No. _____

In the Supreme Court of the United States

GOVERNMENT OF GUAM,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LEEVIN T. CAMACHO
Attorney General
JAMES L. CANTO II
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
590 S. Marine Corps Drive
Suite 901
Tamuning, Guam 96913

JOHN D.S. GILMOUR
WILLIAM J. JACKSON
FABIO C. DWORSCHAK
KELLEY DRYE & WARREN LLP
515 Post Oak Boulevard
Suite 900
Houston, TX 77027

GREGORY G. GARRE
Counsel of Record
ROMAN MARTINEZ
BLAKE E. STAFFORD
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

BEZALEL STERN
KELLEY DRYE & WARREN LLP
3050 K Street, NW
Suite 400
Washington, DC 20007

Counsel for Petitioner

QUESTIONS PRESENTED

For nearly half a century, the United States Navy discarded toxic waste at a dump that the Navy created in the 1940s on the Island of Guam, an unincorporated territory of the United States, without any environmental safeguards. The Navy then left Guam to clean up the site—a project that is likely to cost more than $160 million. Guam brought this suit to recover cleanup costs from the United States under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a), which allows parties to recover remediation costs from other responsible parties within six years of the initiation of a remedial action. The district court concluded that Guam's claim could proceed.

The D.C. Circuit, however, held that Guam's claim was precluded by CERCLA Section 113(f)(3)(B), in a decision that deepens two acknowledged circuit conflicts. Section 113(f)(3)(B) establishes a contribution remedy for any party that "has resolved its liability to the United States or a State for some or all of a response action" in a "judicially approved settlement," subject to a three-year statute of limitations. *Id.* § 9613(f)(3)(B). Here, the D.C. Circuit held that Section 113(f)(3)(B) was triggered by a decade-old consent decree settling claims under the Clean Water Act (CWA)—even though that decree did not mention CERCLA, explicitly disclaimed any finding of liability, and left Guam exposed to future liability. And given that Guam filed suit more than three years after the consent decree was entered, the court held that Guam's action is barred.

The questions presented are:

1. Whether a non-CERCLA settlement can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

2. Whether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Guam v. United States, No. 19-5131 (Feb. 14, 2020), *reh'g denied* (May 13, 2020)

United States District Court (D.D.C.):

Guam v. United States, No. 17-cv-2487 (Oct. 5, 2018), *appeal certified* (Feb. 28, 2019)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

APPENDIX

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

The Government of Guam (Guam) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 950 F.3d 104. The opinion of the district court certifying the case for interlocutory appeal (App. 27a-50a) is available at 2019 WL 1003606. The opinion of the district court denying the United States' motion to dismiss (App. 51a-97a) is reported at 341 F. Supp. 3d 74.

JURISDICTION

The court of appeals entered its judgment on February 14, 2020 (App. 1a) and denied rehearing on May 13, 2020 (App. 98a-99a). Pursuant to this Court's Order of March 19, 2020, a petition for a writ of certiorari is timely if filed within 150 days of an order denying a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, and the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, are reproduced at App. 100a-29a.

STATEMENT OF THE CASE

Just last Term, this Court observed that "[s]ettlements are the heart of the Superfund statute." *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020). This case presents two

acknowledged and longstanding circuit splits that strike at the core of CERCLA's settlement provisions and their impact on a settling party's ability to share cleanup costs with other responsible parties. The court of appeals, district court, and United States all recognized not only the existence of these circuit conflicts but also that each is dispositive here.

The conflicts arise out of the interaction between two CERCLA provisions authorizing the recoupment of cleanup costs from another responsible party. Section 107(a) allows a responsible party to recover cleanup costs from other responsible parties. 42 U.S.C. § 9607(a). Section 113(f)(3)(B) allows a responsible party that "has resolved its liability to the United States or a State for some or all of a response action" in a settlement to "seek contribution" from other responsible parties. *Id.* § 9613(f)(3)(B). Because Section 113(f)(3)(B) has a shorter limitations period (three years, instead of six), lower courts have held that it is exclusive—once a settlement triggers Section 113(f)(3)(B), it bars an otherwise available claim under Section 107(a). The scope and "intersection of [these] provisions" is thus a critical issue that courts "frequently grapple[] with," with this Court intervening when they split. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 131 (2007).

The D.C. Circuit's decision in this case deepens two splits over when a settlement triggers Section 113(f)(3)(B). *First*, the circuits are divided over whether a non-CERCLA settlement can trigger a CERCLA contribution claim under Section 113(f)(3)(B). The Second Circuit has held that the answer to that question is no, while the Third, Seventh, Ninth, and now D.C. Circuits have held that the answer is yes. *Second*, the circuits are divided

over whether a settlement that explicitly disclaims a determination of liability and leaves the settling party exposed to future liability can trigger Section 113(f)(3)(B). The Sixth and Seventh Circuits have held that the answer is no, the D.C. Circuit has now held that the answer is yes, and the Ninth Circuit has staked out a middle ground position.

Two acknowledged splits on recurring issues of unquestionable importance provide a compelling reason to grant review. But the need for certiorari is heightened by the undeniably "harsh" (App. 26a) consequences of the D.C. Circuit's decision: Guam is left on the hook for all of the costs—more than $160 million—of cleaning up a waste site that the United States Navy itself created and then used to dump toxic wastes for decades going back to World War II. That figure is a staggering sum for the people of Guam, alone comprising nearly a fifth of its total annual budget. Meanwhile, the United States, which indisputably is a responsible party, gets off scot-free. That result strikes at the heart of CERCLA's central aims, is the product of an untenable reading of the relevant statutory provisions, and unjustly penalizes the people of Guam. Certiorari is warranted.

A. Statutory Background

1. Enacted in 1980, CERCLA "seeks 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination.'" *Atlantic Richfield*, 140 S. Ct. at 1345 (alteration in original) (citation omitted). Under CERCLA, once the Environmental Protection Agency (EPA) has designated a contaminated site for cleanup, EPA can either (1) undertake an appropriate "response" action

itself using the "Superfund" to pay for it, 42 U.S.C. § 9604; or (2) compel responsible parties to undertake a "response action," which EPA then monitors, *id.* § 9606. EPA is also authorized to "enter into an agreement" with a responsible party "to perform any response action" if EPA "determines that such action will be done properly." *Id.* § 9622(a).

CERCLA defines the term "response" to mean a "removal" action and "remedial" action. 42 U.S.C. § 9601(25). A "removal" action is defined as the "cleanup or removal of hazardous substances from the environment" as well as any of several actions "taken in the event of . . . the release or threat of release of hazardous substances." *Id.* § 9601(23). A "remedial" action is an action "consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 9601(24).

2. The costs of cleaning up a so-called "Superfund" site can be staggering, often exceeding hundreds of millions of dollars. *See, e.g.*, Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 Stan. L. Rev. 191, 200 & n.40 (2018). CERCLA is accordingly designed to ensure that the liability for such costs is fairly allocated among all responsible parties.

Section 107(a) of CERCLA provides that potentially responsible parties (PRPs) "shall be liable" for, among other things, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe," 42 U.S.C.

§ 9607(a)(4)(A), as well as "any other necessary costs of response incurred by any other person," *id.* § 9607(a)(4)(B), including another PRP. *See Atlantic Research*, 551 U.S. at 135-36. Claims to recover remediation costs under Section 107(a) are subject to a six-year limitations period triggered by the "initiation" of a "remedial action." 42 U.S.C. § 9613(g)(2)(B).

In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, Congress clarified that parties "liable under CERCLA [can] seek contribution from other potentially liable parties," H.R. Rep. No. 99-253, pt. 1, at 79 (1985), by adding an express cause of action for contribution in CERCLA Section 113(f), 42 U.S.C. § 9613(f). Under Section 113(f)(1), "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or [Section 107(a)]." *Id.* § 9613(f)(1).

In order to encourage "[s]ettlement with the government under CERCLA," H.R. Rep. No. 99-253, pt. 3, at 19 (1985), SARA also clarified that the right to seek contribution extends to settling parties by adding Section 113(f)(3)(B). It states:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

42 U.S.C. § 9613(f)(3)(B). Claims brought under Section 113(f) are subject to a three-year limitations period that commences upon either "the date of judgment," *id.* § 9613(g)(3)(A), or the "date of an administrative order" or "entry of a judicially approved settlement," *id.* § 9613(g)(3)(B).

B. Factual Background

1. Guam is an island of just over 200 square miles located in the west central Pacific, about a quarter of the way from the Philippines to Hawaii—and 6000 miles from the shores of California. The United States captured the Island in 1898 during the Spanish-American War. The United States then placed Guam under the control of the Navy, which treated it as a Naval ship—the "USS Guam"—and subjected it to military rule. App. 5a. Aside from the period between December 1941 and July 1944, when the Japanese military invaded and brutally occupied the Island, the Navy exercised exclusive control over Guam from 1898 until Congress passed the Guam Organic Act in 1950, which purported to transfer power from the military to a civilian government. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 186 (1990).

Even then, however, the Federal Government retained a tight grip on the Island. For example, visitors could not access the Island without a security clearance until the 1960s, and the Governor of Guam was handpicked by the Federal Government until 1970. App. 5a; C.A.J.A. 23-24. Despite its residents being granted U.S. citizenship in 1950, Guam's first publicly elected governor did not take office until decades later in 1971. C.A.J.A. 24. And the Navy continued to use the Island for military purposes

during the Korean and Vietnam Wars, taking advantage of its vital strategic location.

Today, Guam remains an unincorporated territory of the United States, *see* 48 U.S.C. § 1421a, with nearly 170,000 residents. The United States military maintains a heavy presence on the Island, occupying approximately 25% of the Island's land mass and operating two separate bases (Naval Base Guam and Andersen Air Force Base), with a third (Marine Corps Base Camp Blaz) currently under construction.

2. a. In the 1940s, while the Navy had exclusive control over the Island, the Navy created a waste site—the Ordot Dump—for the disposal of municipal and military waste, in a ravine that slopes into the Lonfit River. App. 5a-6a. Unlined at the bottom and uncapped at the top, the Ordot Dump absorbed rain and surface water, which percolated through the site and mixed with waste. *Id.* at 6a. This toxic mixture would then flow into the Lonfit River and ultimately make its way into the Pacific Ocean. *Id.*

Although the United States unilaterally transferred ownership of the contaminated land to Guam as part of the 1950 Act, the Navy continued to use the site as its own. Throughout the Korean and Vietnam Wars, the Navy used the Ordot Dump to dispose of munitions and toxic chemicals, including DDT and Agent Orange. *Id.* at 5a-6a. "And as the Navy continued to use the Ordot Dump, it continued growing"—turning "'[w]hat was once a valley'" into "'a 280-foot mountain'" of waste. *Id.* at 6a (alteration in original) (citation omitted). The Ordot Dump remained the only landfill on the Island—and also was used by Guam itself for civilian purposes, including everyday garbage—until the 1970s and the only public landfill until its closure in 2011. *Id.*

b. Shortly after CERCLA's enactment in 1980, Guam requested that the Ordot Dump be remediated with federal funds drawn from the new Superfund. EPA opened a CERCLA investigation in 1982 and added the Ordot Dump to the Superfund list—at Guam's request—in 1983. *Id.*; C.A.J.A. 188. In 1988, however, EPA determined "that remedial action at the Ordot Landfill site under [CERCLA]" was "inappropriate" and "unnecessary," and that the problems at the Ordot Dump would be better addressed "through enforcement of the Clean Water Act [(CWA)]." EPA, *Superfund Record of Decision: Ordot Landfill* 12-14 (Sept. 1988).[1] EPA thus declined CERCLA remediation, "choosing no action as the preferred alternative." *Id.* at 14.

Given the Navy's direct role in creating and contaminating the Ordot Dump, EPA unsurprisingly identified the Navy as a "potentially responsible party." *Id.* at 2. But EPA's decision to proceed under the CWA—instead of CERCLA—had a crucial impact on the United States' own liability for cleanup costs. While the United States is subject to liability under CERCLA (*see* 42 U.S.C. § 9620), it is not subject to liability under the applicable CWA provision, 33 U.S.C. § 1319. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 624 (1992). Declining CERCLA remediation and proceeding instead under the CWA therefore allowed the United States to insulate itself from its own cleanup responsibilities.

Over the next decade, EPA then filed several administrative complaints against Guam—solely under the CWA—demanding that Guam take certain

---

[1] https://nepis.epa.gov/Exe/ZyPDF.cgi/9100OBTC.PDF?Dockey=9100OBTC.PDF.

actions with respect to the Ordot Dump. *See* C.A.J.A. 188-89. Guam struggled to comply in large part due to a lack of funding. *Id.* at 189. Unmoved by Guam's fiscal constraints, EPA continued to pile on penalties under the CWA. *See id.* at 188-89. All the while, EPA continued to maintain that "CERCLA remedial action [was] unnecessary" at the site. EPA, *Five Year Review of the No Action Decision at the Ordot Landfill Superfund Site in Guam* 3-5 (Sept. 1993).[2]

3. In 2002, the United States filed a complaint against Guam in the District of Guam exclusively under the CWA, alleging that Guam violated 33 U.S.C. § 1319 by discharging pollutants into the waters of the United States without a permit. App. 130a-37a. A few months later, EPA again concluded that "CERCLA remedial actions" were not "necessary." C.A.J.A. 305; *see* EPA, *Second Five-Year Review: Ordot Landfill Site* 19, 26 (Sept. 2002).[3]

To "avoid protracted litigation" over the CWA claims, Guam and the United States entered into a consent decree that the district court approved in 2004. App. 138a-73a. Pursuant to the express terms of the decree, the parties agreed to "settle[]" only "the civil judicial claims as alleged in the Complaint"—i.e., the CWA permitting claims under 33 U.S.C. § 1319. App. 139a, 166a; *see id.* at 134a-36a. The decree required Guam to pay a penalty, design and install a cover, and close the Ordot Dump. *Id.* at 141a-51a. But it never once mentioned CERCLA, "response action," or, for that matter, a "hazardous substance" that would trigger CERCLA. *See supra* at 4.

---

[2] https://semspub.epa.gov/work/09/100002992.pdf.

[3] https://semspub.epa.gov/work/09/123074.pdf.

The 2004 CWA decree also reserved the United States' right to bring suit for any claims not in the complaint, leaving Guam exposed to future liability for any claims, under any statute, with respect to the Ordot Dump. App. 166a. Even for the CWA claims alleged in the complaint, the decree avoided resolving liability: it expressly disclaimed "any finding or admission of liability against or by the Government of Guam," *id.* at 140a, and, at the same time, expressly conditioned the release of those claims on not only "[e]ntry of th[e] consent decree" but also "compliance with the requirements [t]herein," *id.* at 166a.

Despite acknowledging that Guam lacked the financial means to complete the work, *id.* at 150a-51a, the decree adopted an aggressive schedule for the closure of the Ordot Dump—a massive undertaking given that it was the only municipal landfill on the entire island. Unsurprisingly, Guam's financial constraints hampered its ability to meet the schedule, which eventually prompted the appointment of a receiver that ordered Guam to take out $202 million in bonds to pay for the projects. C.A.J.A. 141. Meantime, EPA reiterated that "no remedial action" was being take at the site "under CERCLA," and, instead, the project was solely "[u]nder Clean Water Act authority," as described in the consent decree. EPA, *Third Five-Year Review Report for Ordot Landfill Superfund Site* 7-1 (Sept. 2007).[4]

Guam finally closed the Ordot Dump and opened a new landfill in 2011. App. 6a. But the extensive remediation of the Ordot Dump, which began in

---

[4] https://semspub.epa.gov/work/09/100002994.pdf.

December 2013, remains ongoing. C.A.J.A. 26. Total costs are expected to exceed $160 million. App. 8a.

C. Proceedings Below

1. In light of the Navy's undeniable responsibility in creating and contaminating the Ordot Dump over the course of many decades, Guam sued the United States in 2017 for cost recovery under CERCLA Section 107(a) and, alternatively, for contribution under CERCLA Section 113(f)(3)(B). App. 7a-8a.

The United States moved to dismiss, asserting that the 2004 CWA consent decree triggered a contribution claim under Section 113(f)(3)(B) that was now time-barred, because Guam's suit was filed more than three years after entry of the consent decree. *Id.* at 8a. And because Sections 107(a) and 113(f) are mutually exclusive, the United States argued, the existence of this time-barred contribution claim required dismissal of Guam's Section 107(a) claim, even though that claim was timely under Section 107(a)'s six-year limitations period. *Id.*

2. The district court rejected the motion to dismiss. *Id.* at 51a-97a. Analyzing the "broad, open-ended reservation of rights, the plain non-admissions of liability, and the conditional resolution of liability that the agreement contains," the court concluded that the 2004 CWA decree did not "resolve liability within the meaning of CERCLA section 113(f)(3)(B)," and thus did not trigger that provision. *Id.* at 69a, 85a-96a. As a result, Guam could pursue its timely Section 107(a) claim against the United States.

In reaching that conclusion, the district court observed that "the courts of appeals diverge" over "whether agreements that contain such clauses should be deemed to have 'resolved' liability." *Id.* at

73a. And, after detailing the circuit conflict, the court agreed with Guam that "the Sixth and Seventh Circuits have the better approach," and that the Ninth Circuit's contrary approach—advanced by the United States in seeking dismissal—"warps the underlying text of CERCLA and/or the 2004 Consent Decree beyond recognition." *Id.* at 73a-90a.

The United States moved for an interlocutory appeal under 28 U.S.C. § 1292(b), asserting that "circuit and district courts" had issued "[c]onflicting decisions" concerning "the correct interpretation of CERCLA [Section 113(f)(3)(B)]" and that these "conflicting statutory interpretations" implicated "the dispositive legal questions" presented here. D. Ct. Doc. 49-1, at 9-10 (Dec. 6, 2018); *see* D. Ct. Doc. 53, at 2 (Dec. 27, 2018) (stressing the "clear differences" and "sharp split of legal authority on the controlling questions of law" among the circuits). The district court granted the motion, App. 27a-50a, agreeing that "there is a circuit split" and that interlocutory review was appropriate, *id.* at 38a-40a, 47a-48a.

3. The D.C. Circuit granted interlocutory review and reversed. App. 1a-26a. Because Sections 107(a) and 113(f) are "mutually exclusive," the court explained, "'a party who *may* bring a contribution action . . . *must* use the contribution action, even if a cost recovery action would otherwise be available.'" *Id.* at 10a-11a (citation omitted). All agree Guam's Section 107(a) claim was timely. *Id.* at 2a. But the court held that Guam's Section 107(a) claim is barred because the 2004 CWA decree triggered Section 113(f)(3)(B), and Guam's claim was not filed within three years of that decree. *Id.* at 16a-26a.

In reaching this "harsh" result, *id.* at 26a, the court first addressed the fact that the 2004 decree—

which was limited to CWA claims—did not purport to resolve Guam's CERCLA liability or, for that matter, even mention CERCLA, *id.* at 16a-18a. After observing that the "'circuits'" are "'split'" on the question whether a non-CERCLA settlement can trigger Section 113(f)(3)(B), the court rejected the Second Circuit's position and joined the Third, Seventh, and Ninth Circuits in holding that Section 113(f)(3)(B) "does not require a CERCLA-specific settlement." *Id.* at 16a-17a (citation omitted). To support that conclusion, the court drew a negative inference from the presence of "CERCLA-specific" language in Section 113(f)(1). *Id.* at 17a-18a.

The court next determined that the terms of the 2004 decree "'resolve[d]' Guam's liability" for a response action because it required Guam to "design and install a 'dump cover system.'" *Id.* at 21a (alterations in original) (citations omitted). The court rejected the district court's "thorough[ly]" reasoned conclusion that the decree's express disclaimer of liability, conditional release of claims, and reservation-of-rights clauses precluded a finding that it "resolve[d]" liability. *Id.* at 9a, 22a-25a. Although the court agreed that these provisions may have precluded a Section 113(f)(3)(B) claim in "other circuits," the court held that these provisions could not "overcome" Guam's agreement to construct a cover. *Id.* at 22a-25a.

The D.C. Circuit denied rehearing. App. 98a-99a.

REASONS FOR GRANTING THE PETITION

This case readily satisfies the Court's criteria for certiorari. The D.C. Circuit's decision below exacerbates two acknowledged circuit splits concerning the meaning of Section 113(f)(3)(B)—one

of the most consequential and frequently litigated provisions of CERCLA. The questions presented are unquestionably important—impacting the operation of a critical feature of CERCLA. And, in reversing the district court, the D.C. Circuit adopted a deeply flawed reading of the relevant statutory provisions, which leaves "Guam to foot the bill" for the costs of cleaning up a dump built and used by the Navy. App. 26a. The petition should be granted.

I. THE DECISION BELOW DEEPENS TWO CIRCUIT SPLITS OVER THE MEANING OF CERCLA SECTION 113(f)(3)(B)

As the court of appeals, district court, and United States all expressly acknowledged below, this case implicates two direct circuit conflicts over the scope of Section 113(f)(3)(B). The D.C. Circuit's decision deepens each of those direct conflicts.

A. The Lower Courts Are Expressly Divided About Whether Non-CERCLA Settlements Trigger Section 113(f)(3)(B)

As the D.C. Circuit stated, the "circuits" are "split" on the question "[w]hether a non-CERCLA settlement agreement may give rise to a contribution action" under Section 113(f)(3)(B). App. 16a (citation and internal alteration omitted); *see also* Gov't C.A. Br. 19-20 & n.5 (discussing split); Gov't C.A. Reply Br. 8-10 (same); C.A.J.A. 224-27 (same).

1. On one side of the split, the Second Circuit has repeatedly held that Section 113(f)(3)(B) authorizes a contribution claim "only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved" in the settlement. *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009) (quoting *Consolidated Edison Co. of N.Y., Inc.*

v. UGI Utils., Inc., 423 F.3d 90, 95 (2d Cir. 2005), *cert. denied*, 551 U.S. 1130 (2007)).

In *Consolidated Edison*, the Second Circuit found it "clear" that only the settlement of "CERCLA claims" will trigger Section 113(f)(3)(B), because the statute requires the "resolution of liability for 'response action[s],'" and "a 'response action' is a *CERCLA*-specific term." 423 F.3d at 95-96 (alteration in original). That reading, the court explained, also harmonizes Section 113(f)(3)(B) with Section 113(f)(1)—"[j]ust as a party must be sued under CERCLA before it can maintain a section 113(f)(1) contribution claim, it must settle CERCLA liability before it can maintain a claim under section 113(f)(3)." *Id.* at 96 (citation omitted). The "operative question" for purposes of Section 113(f)(3)(B), the court held, is whether the settling party "resolved its CERCLA liability" in the settlement. *Id.*

The Second Circuit reaffirmed this holding in *W.R. Grace*, explaining that Section 113(f)(3)(B) applies "only when liability for CERCLA claims . . . is resolved." 559 F.3d at 90-91 (quoting *Consolidated Edison*, 423 F.3d at 95). By "mak[ing] no reference to CERCLA," the agreement in *W.R. Grace* "le[ft] open the possibility that . . . the EPA could, at some future point, assert CERCLA or other claims." *Id.* at 91. Because the settlement did "not resolve CERCLA claims," it did not trigger Section 113(f)(3)(B). *Id.*[5]

---

[5] The United States expressed its disagreement with *Consolidated Edison* more than a decade ago. *See Niagara Mohawk Power Corp. v. Chevron USA, Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010). But the Second Circuit has not changed its position, and district courts within the Second Circuit thus continue to follow *Consolidated Edison*. *See, e.g.*, *DMJ Assocs., L.L.C. v. Capasso*, 181 F. Supp. 3d 162, 166-67 (E.D.N.Y. 2016);

Numerous district courts across the country have followed the Second Circuit in concluding that non-CERCLA settlements do not support contribution claims under Section 113(f)(3)(B). *See, e.g.*, *Differential Dev.-1994, Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 739-40 & n.13 (S.D. Tex. 2007) (collecting a dozen cases from different courts).

2. In the decision below, the D.C. Circuit expressly rejected the Second Circuit's position, holding instead that "a settlement agreement can trigger section 113(f)(3)(B) even if it never mentions CERCLA." App. 17a-18a. In so holding, the court joined three other circuits that have adopted this rule.

The Third Circuit was the first to hold that Section 113(f)(3)(B) "does not require resolution of CERCLA liability in particular." *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013). Rejecting the Second Circuit's position, the court reasoned that "Section 113(f)(3)(B) does not state that the 'response action' in question must have been initiated pursuant to CERCLA—a requirement that might easily have been written into the provision." *Id.* Relying on the absence of such an express requirement, the court held that the non-CERCLA settlement at issue in that case, arising under state law, triggered Section 113(f)(3)(B). *Id.*

The Ninth Circuit likewise has held that "a non-CERCLA settlement agreement may form the necessary predicate for a § 113(f)(3)(B) contribution action." *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1118-21 (9th Cir. 2017). *Asarco* involved

---

New York v. Town of Clarkstown, 95 F. Supp. 3d 660, 675-76 (S.D.N.Y. 2015); *MPM Silicones, LLC v. Union Carbide Corp.*, 931 F. Supp. 2d 387, 394-96 (N.D.N.Y. 2013).

settlements under the Resource Conservation and Recovery Act (RCRA). *Id.* at 1114. After noting the circuit "split" over the effect of "non-CERCLA settlement agreement[s]" under Section 113(f)(3)(B), the Ninth Circuit rejected the Second Circuit's position and held that "Congress did not intend to limit § 113(f)(3)(B) to response actions and costs incurred under CERCLA settlements." *Id.* at 1119-20. Finding the statute's text "unilluminating," the court rested its holding on "CERCLA's broad remedial purpose" and the same negative inference used by the D.C. Circuit below. *Id.* at 1118-19.

The Seventh Circuit has also held that "a settlement need not resolve CERCLA-specific liability in order to start the clock on a contribution action" under Section 113(f)(3)(B). *Refined Metals Corp. v. NL Indus. Inc.*, 937 F.3d 928, 932 (7th Cir. 2019). *Refined Metals*, like *Asarco*, involved RCRA claims. In concluding that this settlement nevertheless satisfied "Congress's intention" underlying Section 113(f)(3)(B), the Seventh Circuit noted the circuit split but was "persuaded by the view adopted by the Third and Ninth Circuits." *Id.* at 932-34.

B. The Lower Courts Are Expressly Divided About Whether Settlements With Liability Disclaimers And Reservation-Of-Rights Clauses Trigger Section 113(f)(3)(B)

There is also an acknowledged "circuit split" on whether settlements—involving CERCLA claims or not—"containing non-admissions of liability, broad reservations of rights, and conditional covenants not to sue" can "'resolve' liability for the purpose of [Section 113(f)(3)(B)]." App. 39a-40a (citations

omitted); *see also id.* at 73a-85a (discussing split); Gov't C.A. Br. 25-27, 32-33, 37-39 (same).

1. The Seventh Circuit has repeatedly held that a settlement does not resolve liability for purposes of Section 113(f)(3)(B) "when (1) the settlement expressly state[s] that the defendant companies did not admit any liability or the validity of the EPA's findings; *and* (2) the covenants not to sue [a]re not immediately effective, but instead [a]re conditional on complete performance of the terms of the settlement." *Refined Metals*, 937 F.3d at 931; *see NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 692 (7th Cir. 2014); *Bernstein v. Bankert*, 733 F.3d 190, 212-13 (7th Cir. 2012), *cert. denied*, 571 U.S. 1175 (2014).

In the Seventh Circuit, the presence of such settlement terms is "dispositive"—and precludes the operation of Section 113(f)(3)(B). *Refined Metals*, 937 F.3d at 931; *see Bernstein*, 733 F.3d at 212-14 (holding that a settlement did not trigger Section 113(f)(3)(B) because it contained an "express disclaimer[] of liability" and "condition[ed]" the release of the settled claims on "complete performance").

The Sixth Circuit has likewise held that a party does not "resolve[] its liability" for purposes of Section 113(f)(3)(B) when the settlement disclaims "'an admission of liability'" and contains a covenant not to sue that is "conditioned on [the settling party's] performance." *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1003-04 (6th Cir. 2015) (quoting *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 460 (6th Cir. 2007)); *see also Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 770-71 (6th Cir. 2014), *cert. denied*, 574 U.S. 1122 (2015).

In *ITT*, for example, the Sixth Circuit held that a settlement did not trigger Section 113(f)(3)(B) because it "expressly reserve[d] [EPA's] rights to legal action" in the future and did not "constitute an admission of liability" on the part of the settling party. 506 F.3d at 459-60. The Sixth Circuit reached the same conclusion in *Florida Power*, where the settlements lacked any "admission of liability," and "explicitly condition[ed] the resolution of liability on performance" in the future. 810 F.3d at 1003-04.

2. The Ninth Circuit has explicitly "disagree[d] with the Sixth and Seventh Circuits[]" and held that a settlement can resolve liability despite the inclusion of a liability disclaimer and a "covenant not to sue conditioned on completed performance." *Asarco*, 866 F.3d at 1123-25; *see id.* at 1125 ("[U]nlike the court in *Florida Power*, we conclude that it matters not that a PRP refuses to concede liability in a settlement agreement."). The court justified its departure from the Sixth and Seventh Circuits based on its view of "Congress' intent in enacting § 113(f)(3)(B)" and its desire to avoid a result that might "discourage PRPs from entering into settlements." *Id.* at 1125. Thus, in the Ninth Circuit, a settling party is deemed to have "resolved its liability" for purposes of Section 113(f)(3)(B) as long as the settlement specifies "compliance obligations" for "at least some of its response actions or costs." *Id.* at 1124-25.

The Ninth Circuit has qualified this rule in one respect. It has held that a settlement that "references [the settling party's] continued legal exposure" in a reservation-of-rights clause can demonstrate that the agreement "fails to resolve . . . liability." *Id.* at 1125-26. Thus, in *Asarco,* which involved two settlement agreements, the court held that a settlement that did

"not restrict the United States' authority to bring an action under CERCLA" and compelled "additional response obligations" did not resolve liability for purposes of Section 113(f)(3)(B). *Id.* at 1126.

The district court in this case concluded that "the Sixth and Seventh Circuits have the better approach." App. 73a. The D.C. Circuit, however, sided with the Ninth Circuit in holding that a settlement can trigger Section 113(f)(3)(B) even if it includes an express "disclaimer of liability" and a "'covenant not to sue'" conditioned on "'full implementation of the settlement's requirements.'" *Id.* at 23a-24a (citations omitted).[6] But when it came to the reservation-of-rights provisions, the court embraced the United States' "disagreement with [that] part of *Asarco*'s holding." Gov't C.A. Reply Br. 18. The court held that, despite Guam's continued legal exposure, all that matters is whether the settling party agreed to perform "'some' of a response action." App. 22a-23a.

The D.C. Circuit's decision in this case thus stakes a claim at the far end of this split.

* * * * *

The longstanding circuit splits deepened by the decision below thwart the uniform, nationwide application of CERCLA. Indeed, had this case arisen in the Second, Sixth, or Seventh Circuits, the outcome would have been different as a matter of law—and Guam's action would have been allowed to proceed.

---

[6] The court also relied on a quote from the Seventh Circuit's decision in *Refined Metals*, *see* App. 24a, yet failed to acknowledge the actual holding of *Refined Metals*—that these provisions together are "dispositive" to "exempt [a decree] from the reach of section 113(f)(3)(B)." 937 F.3d at 931.

This disparity, untenably based on the happenstance of geography, warrants this Court's review.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The case for certiorari is strengthened by the fact that the questions presented are frequently recurring and tremendously important—to both the operation of CERCLA and the legitimacy of dealing with the United States. Moreover, the questions are of vital importance to Guam, which, as the D.C. Circuit recognized, is now "left . . . to foot the bill" for cleaning up the toxic mess that the Navy created and left behind. App. 26a. This case also cleanly presents both questions, providing the Court with a uniquely optimal vehicle for resolving them.

A. 1. As this Court has recognized, lower courts "frequently grapple[] with whether and how PRPs may recoup CERCLA-related costs from other PRPs," "questions [that] lie at the intersection of" Sections "107(a) and 113(f)." *United States v. Atlantic Research Corp.*, 551 U.S. 128, 131 (2007). The answers to these questions are undoubtedly important, particularly given that hundreds of millions of dollars—as well as the fair allocation of responsibility—often hang in the balance.

Given the significance of Sections 107 and 113 to the Superfund program, this Court has repeatedly granted review to resolve disagreements over their meaning. *See, e.g.*, *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1352-53 (2020); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009); *Atlantic Research*, 551 U.S. at 131; *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160-61 (2004); *United States v. Bestfoods*, 524 U.S. 51, 59-60

(1998); *Key Tronic Corp. v. United States*, 511 U.S. 809, 811 (1994). Indeed, in *Cooper*, the Court granted certiorari to interpret Section 113(f) even before a circuit conflict had developed. This case presents two concrete circuit splits over the same subsection.

What is more, these circuit conflicts concern the *settlement* provisions of that subsection. As this Court observed last Term, "[s]ettlements are the heart of the Superfund statute." *Atlantic Richfield*, 140 S. Ct. at 1355. EPA is in fact under statutory orders to "proceed by settlement '[w]henever practicable,'" which has led EPA to seek settlements in the majority of cases involving cleanup work. *Id.* (quoting 42 U.S.C. § 9622(a)). Allowing these circuit splits to persist will frustrate that objective by exacerbating confusion over what kinds of settlements trigger Section 113(f)(3)(B)—producing significant uncertainty for parties who settle with EPA, consuming considerable time and resources in CERCLA litigation, and ultimately upsetting a core feature of the Superfund program.

2. The unsettled meaning of Section 113(f)(3)(B) has a particularly pernicious effect when, as here, the United States is itself a responsible party—a situation that is by no means rare. *See* Gov't Accountability Office, GAO-19-157SP, *High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas* 138-42 (2019).

When negotiating the 2004 CWA decree, the United States thus had every incentive *not* to inform Guam of its view that the decree started the shorter, three-year clock on seeking contribution under CERCLA Section 113(f)(3)(B). Indeed, the United States consistently said—in 1988, 1993, 2002, and 2007, when it faced exposure for the cleanup costs—

that CERCLA remediation was not warranted at the Ordot Dump. *See supra* at 8-10. The United States chose instead to sue Guam under the CWA's permitting provision—pursuant to which the United States enjoys immunity from suit, *see supra* at 8—while reserving the right to bring claims, under any statute, against Guam in the future.

Guam had no reason to think that, in negotiating the CWA decree, it was triggering its *CERCLA* contribution rights. And, instead of informing Guam of its view that this deliberately *non*-CERCLA settlement would trigger a CERCLA-specific contribution claim under Section 113(f)(3)(B), the United States remained silent. This settlement would not have triggered a contribution claim in the Second, Sixth, or Seventh Circuits—yet, under the decision below, Guam is left on the hook for the entire $160 million in cleanup costs. That result is fundamentally at odds with CERCLA's aim of "ensur[ing]" that cleanup costs are "borne by those responsible for the contamination." *Atlantic Richfield*, 140 S. Ct. at 1345 (citation omitted).

This is not the first time the United States has tried to "insulate itself from responsibility for its own pollution" by exploiting its "dual role" as both "CERCLA's primary enforcer" and "a liable party." *Atlantic Research Corp. v. United States*, 459 F.3d 827, 837 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007). Nor will it be the last. The United States has an incentive to avoid liability for cleanup costs. And, regardless of the tactics it pursues, the conflict and confusion over the scope of Section 113(f)(3)(B) only increases the risk that the United States will seek to evade responsibility for its actions, and that those dealing with the United States (like Guam here) will

fall prey to this trap for the unwary. This Court's review is warranted. *Cf. Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319 (2020) (granting review to correct a "decision [that] would 'undermin[e] the reliability of dealings with the government'" (alteration in original) (citation omitted)).

3. This Court's review is also extraordinarily important to the people of Guam. As the United States well knows, Guam's fiscal position is fragile. The lack of funding delayed Guam's ability to construct a new landfill for decades and thereby delayed Guam's ability to clean up the Ordot Dump. *See supra* at 9-10. Saddling Guam with the entirety of the $160 million cleanup bill will dramatically impact Guam's budget—and people. That bill alone amounts to nearly 20% of Guam's entire budget for 2020. *See* Guam Pub. L. No. 35-36 (Sept. 4, 2019). That is a crippling figure; an equivalent bill for the Federal Government would be nearly $1 trillion. *See* Office of Mgmt. & Budget, *A Budget for America's Future: Analytical Perspectives* 85 tbl.8-1 (Feb. 10, 2020).[7]

The result in this case is also particularly "harsh" (App. 26a), given the United States' undeniable responsibility. The Navy created the Ordot Dump and used it—including to dump DDT and Agent Orange—for decades. Yet, under the decision below, the United States will escape *any* liability for its role under CERCLA, with Guam and its residents forced to subsidize the cleanup of the Navy's waste, based on a consent decree that had nothing to do with

---

[7] https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER.pdf.

CERCLA—and expressly disclaimed liability on the claims it did settle. The grossly unfair consequences of the D.C. Circuit's decision for Guam underscore the need for this Court's intervention.

B. This case is also an ideal vehicle for resolving the questions presented. As the United States itself argued in seeking permission for an interlocutory appeal, the questions presented are "dispositive legal questions" about "how to properly interpret CERCLA § 9613(f)(3)(B)." D. Ct. Doc. 49-1, at 6-10 (Dec. 6, 2018). Both the court of appeals and district court issued lengthy, thoughtful opinions addressing these questions, and there are no antecedent barriers that might prevent this Court from reaching them.

III. THE DECISION BELOW IS WRONG

Certiorari is also warranted because the decision below is deeply flawed. Viewed through the lens of either question presented, the 2004 CWA consent decree does not trigger Section 113(f)(3)(B).

A. Section 113(f)(3)(B) Requires The Resolution Of CERCLA Liability

The D.C. Circuit erred by holding that a non-CERCLA settlement can trigger Section 113(f)(3)(B).

1. Section 113(f)(3)(B) authorizes contribution claims by "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). A "response" action is a CERCLA-defined term that means a "removal" or "remedial" action, *id.* § 9601(25), both of which are actions taken "in the event of a release or threatened release of a hazardous substance," *id.* § 9601(24); *see id.* § 9601(23). And the liability for

response actions and associated costs comes from CERCLA itself—specifically, in Sections 106 and 107(a). *See id.* §§ 9606(a), 9607(a). Read in context, therefore, resolving "liability" for a "response action" or associated "costs" in Section 113(f)(3)(B) naturally means resolving the liability for response actions required or costs imposed *under CERCLA*.

Such a reading also makes sense in light of Section 113(f)(1), which authorizes contribution claims "during or following any civil action under [Section 106] or [Section 107(a)]," *id.* § 9613(f)(1). As the United States told this Court in *Cooper*, Sections 113(f)(3)(B) and 113(f)(1)—both enacted as part of SARA—together provide for contribution when a party "satisfies its *CERCLA liability* to the government, through settlement or judgment": Section 113(f)(1) applies "during or following a Section 106 or 107(a) action," while Section 113(f)(3)(B) applies "after a *CERCLA-based* settlement." U.S. Amicus Br. 23, 26, *Cooper*, 543 U.S. 157 (No. 02-1192), 2004 WL 354181 (*Cooper* U.S. Br.) (emphasis added); *see id.* at 11-12 (same).

That conclusion is confirmed by the type of remedy involved—contribution. As this Court has explained, "Congress used the term 'contribution'" in its "traditional sense," which means that the remedy "is contingent upon an inequitable distribution of *common* liability among liable parties." *Atlantic Research*, 551 U.S. at 138-39 (emphasis added). So "a person seeking contribution [under Section 113(f)] must extinguish—through a pending or completed lawsuit or through settlement—the *joint* liability that provides the basis for the contribution claim." *Cooper* U.S. Br. 11 (emphasis added). To obtain contribution after a settlement, the settlement must extinguish

both the liability of the person seeking contribution as well as "'the liability of the person against whom contribution is sought.'" *Id.* at 18-19 (quoting Restatement (Third) of Torts § 23 cmt. b (2000)); *see* Restatement (Second) of Torts § 886A(2) (1979).

Non-CERCLA settlements are incompatible with this remedy. As the United States correctly asserted below, a non-settling party is subject to contribution under Section 113(f)(3)(B) "only" when the non-settling party would otherwise be "liable for clean-up costs *under Section 107*" of CERCLA. Gov't C.A. Suppl. Br. 10 (emphasis added); *see, e.g.*, *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 352 (3d Cir. 2018). Thus, to obtain contribution from a non-settling party, the settling party must extinguish the non-settling party's CERCLA liability. The extinguished liability will be "common," however, only if the settlement extinguishes the settling party's CERCLA liability as well. A settlement that does not resolve CERCLA liability does not resolve the *common* liability supporting the contribution remedy.

This case sharply illustrates the point. The 2004 CWA decree settled claims brought under the permitting provision of the CWA, which "does not authorize liability against the United States," *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 624 (1992). Guam could not possibly have resolved liability it *shared in common with* the United States—and therefore could not have triggered a contribution right—by settling claims under a statutory provision that does not even authorize liability against the

United States. Yet that is the perverse conclusion that the D.C. Circuit reached in this case.[8]

The statutory history further confirms that Section 113(f)(3)(B) is limited to settlements resolving CERCLA liability. Section 113(f)(3)(B) is among the provisions that Congress included within Section 113(f) to "encourage" parties to enter into "[s]ettlement[s] with the government *under CERCLA*," including "consent decree[s] *under CERCLA*" that are judicially approved as "consistent with the purposes that *CERCLA* is intended to serve." H.R. Rep. No. 99-253, pt. 3, at 19-20 (1985) (emphasis added). The history "leaves no doubt that Congress's object" in enacting Section 113(f)(3)(B) was to authorize contribution "after a *CERCLA-based* settlement." *Cooper* U.S. Br. 12 (emphasis added).

2. The D.C. Circuit based its contrary conclusion solely on a negative inference drawn from the fact that Section 113(f)(1) "expressly requires that a party first be sued under CERCLA," while Section 113(f)(3)(B) "contains no such CERCLA-specific language." App. 17a-18a (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). But that argument fails. To begin with, the very premise for a negative inference is absent: Section 113(f)(3)(B) *does* contain

---

[8] Further demonstrating the mismatch, the 2004 CWA decree makes no mention of any "hazardous substances," the touchstone of CERCLA "response" actions. *See* 42 U.S.C. § 9601(23)-(25). Nor does the applicable CWA provision, 33 U.S.C. § 1319. To the contrary, a *different* CWA provision deals with "hazardous substances," *id.* § 1321, and the United States chose *not* to bring claims under that provision. Thus, under the D.C. Circuit's reasoning, a settlement, like the one here, that does not even identify a "hazardous substance" covered by CERCLA can nevertheless trigger Section 113(f)(3)(B).

"CERCLA-specific language"—the reference to "response action," a defined CERCLA term.

In any event, as this Court has cautioned, the "*Russello* presumption" generally applies when "the omission [is] the sole difference" between the provisions, and it "grows weaker with each difference in the formulation of the provisions under inspection." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002). Thus, the Court has repeatedly refused to draw such an inference when, given many differences in formulation, the inference "proves too much." *Field v. Mans*, 516 U.S. 59, 67-68 (1995); *see, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009).

That is the case here. Indeed, not even the United States embraces the consequences of its negative inference when it comes to the contribution defendant (i.e., the non-settling party) rather than the contribution plaintiff. As noted, the United States contends that, to be subject to a contribution claim under Section 113(f)(3)(B), the *non-settling* party must be "liable for clean-up costs under Section 107." Gov't C.A. Suppl. Br. 10. Section 113(f)(3)(B), however, does not mention Section 107; it simply permits contribution against "any person who is not a party to a settlement referred to in paragraph (2)." 42 U.S.C. § 9613(f)(3)(B). Section 113(f)(1), by contrast, *does* reference Section 107—it permits contribution against any person "liable or potentially liable under [Section 107(a)]." *Id.* § 9613(f)(1). Applying the same negative inference adopted by the D.C. Circuit below therefore would mean that a non-settling party need *not* be liable under Section 107. The United States itself agrees that this cannot be right.

Ultimately, "[t]he force of any negative implication . . . depends on context," *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (citation omitted), and here context makes plain that Section 113(f)(3)(B) is not some isolated, self-contained provision to be contrasted with Section 113(f)(1). It is far more natural to read the provisions together, so that they provide a CERCLA-based contribution remedy during or following a CERCLA-based action or "after a CERCLA-based settlement." *Cooper* U.S. Br. 23.

B. Section 113(f)(3)(B) Requires A Final, Conclusive Liability Determination

The decision below is wrong for another, equally glaring, reason: the consent decree did not "resolve[] . . . liability" at all. 42 U.S.C. § 9613(f)(3)(B).

1. The term "resolved," which is not defined in CERCLA, means "decided, determined, or settled—finished, with no need to revisit." *Bernstein*, 733 F.3d at 211. Thus, in plain English, for a settlement to resolve liability, the settlement must reach a "'firm decision about' liability," such that "the question of liability is not susceptible to further dispute or negotiation." *Asarco*, 866 F.3d at 1122. And to determine whether a settlement satisfies that test, "the [settlement] must be construed as it is written," "not by reference to what might satisfy the purposes of one of the parties to it," and "not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

2. The 2004 CWA decree makes explicit, in several different provisions, that the parties did *not* resolve Guam's liability for any claim. The D.C. Circuit disregarded the ordinary meaning of these

provisions—viewed against the plain meaning of the statute—based on its own, arm-chair observations about the practical operation or effect of such provisions. That analysis cannot withstand scrutiny.

a. To begin with, the decree explicitly disclaims "*any finding* or admission *of liability* against or by the Government of Guam." App. 140a (emphasis added). As the district court explained, it is difficult to imagine language that could more "plainly reflect[] the parties' intention *to leave the question of liability unresolved*." *Id.* at 86a; *accord Bernstein*, 733 F.3d at 212. Yet, instead of "tak[ing] th[is] disclaimer at its word," the D.C. Circuit observed that "'parties often expressly refuse to concede liability under a settlement agreement, even while assuming obligations consistent with a finding of liability.'" App. 24a (citation omitted). That was error.

By using "resolved," Congress required a final determination of liability, and the 2004 consent decree says in clear terms that there was no such final determination. The D.C. Circuit's reasoning defeats the plain text of both the statute and the decree, and renders this provision entirely pointless. Congress's use of "resolved" was intentional, and Guam obviously thought that disclaiming a "finding . . . of liability" meant *something*, such that it was worth bargaining for and including in the decree. Yet the D.C. Circuit read that provision out of the agreement.

b. The consent decree also expressly conditioned the release of the CWA claims in the complaint on "[e]ntry of th[e] Consent Decree *and compliance with the requirements [t]herein*." *Id.* at 166a (emphasis added). As the district court explained, that provision "could not be clearer that . . . the resolution of Guam's liability for the specified claims" was not resolved but

instead "condition[ed]" on future events—namely, Guam's actual compliance with all of the decree's requirements. *Id.* at 89a; *accord Florida Power*, 810 F.3d at 1003-04 (concluding that similar provision precluded the resolution of liability).

The D.C. Circuit disagreed, claiming that this interpretation would "nullify section 113(f)(3)(B)" given the applicable three-year limitations period in 42 U.S.C. § 9613(g)(3)(B), which begins to run upon "entry of the settlement, not when liability is 'resolved.'" App. 23a. If claims addressed in the settlement are not released until years after the settlement's entry, the court reasoned, "Guam's cause of action under section 113 would not accrue until *after* the statute of limitations runs," a result "Congress could not have intended." *Id.*

The D.C. Circuit's reasoning wrongly backs into its own conclusion by starting with the premise that "Guam[]" *had* a "cause of action under section 113" and then reading the terms of the consent decree to fit the accompanying limitations period. Moreover, the court's timing concerns rest on a misreading of the statutes. Section 113(f)(3)(B) applies only when the settling party "has resolved its liability" in the settlement itself, not sometime later. *See Carr v. United States*, 560 U.S. 438, 448 (2010) ("present perfect tense" "'denot[es] an act that has been completed'" (citation omitted)). If liability remains unresolved at the "entry of the settlement," then Section 113(f)(3)(B) is not triggered, regardless of what may (or does) happen in the future.[9]

---

[9] This does not create any practical anomaly, as the D.C. Circuit believed. App. 23a. In this instance, the PRP should

There is thus no world in which a Section 113(f) claim could accrue "*after* the statute of limitations runs." App. 23a. That the limitations period is keyed to the "entry of the settlement" simply reinforces the point that a settlement that expressly conditions the release of claims on *future* events, as the 2004 decree explicitly did here, is not supposed to trigger Section 113(f)(3)(B). Only by misreading Section 113(f)(3)(B) to permit a gap between the "entry of the settlement" and the time "when liability is 'resolved,'" App. 23a, did the court below arrive at its supposed anomaly between Sections 113(f)(3)(B) and 113(g)(3)(B).

c. The consent decree also reserved the rights of the United States to pursue additional claims against Guam, leaving Guam "fully exposed" to future liability, including liability "under CERCLA." *Id.* at 87a-89a. The decree makes explicit that, "[e]xcept as specifically provided herein, the United States does *not* waive any rights or remedies available to it for any violation by the Government of Guam of federal and territorial laws and regulations," and that "[n]othing in this Consent Decree shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations unrelated to the claims in the Complaint." *Id.* at 166a (emphasis added). And, as noted, the only "claims in the Complaint" were claims under the CWA. *See id.* at 134a-36a.

The D.C. Circuit reasoned that Section 113(f)(3)(B) "requires merely the resolution of liability for 'some' of a response action," such that the only question that "matters is whether what [the decree] *does* require

---

bring a cost recovery action under Section 107(a), as Guam tried to do here. *See Asarco*, 866 F.3d at 1126 n.9.

qualifies as 'some' of a 'response action.'" *Id.* at 22a. Guam did not undertake any CERCLA-based response action in carrying out the CWA-based settlement. But the more pertinent point is that Guam did not resolve any liability as to any response action, in part or whole. The D.C. Circuit's analysis confuses "perform[ing] certain actions . . . to remedy an instance of environmental contamination" with "settl[ing] the issue of *liability* for that contamination." *Bernstein*, 733 F.3d at 212. The text of Section 113(f)(3)(B) makes the *resolution of liability* the touchstone. Regardless of what actions Guam agreed to perform in the decree under the CWA, the decree explicitly left Guam's liability *unresolved*.

All told, the D.C. Circuit's decision strips Congress's use of "resolve liability" in Section 113(f)(3)(B) of all ordinary meaning, creates the perverse result that settlements that expressly *disclaim* liability nevertheless resolve it, and sets an unintended trap for the unwary that defeats Congress's goal of sharing remediation costs.

* * * * *

The grave flaws in the D.C. Circuit's analysis of the questions presented underscore the need for this Court's review of the unjust result reached below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEEVIN T. CAMACHO
Attorney General
JAMES L. CANTO II
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
590 S. Marine Corps Drive
Suite 901
Tamuning, Guam 96913

JOHN D.S. GILMOUR
WILLIAM J. JACKSON
FABIO C. DWORSCHAK
KELLEY DRYE & WARREN LLP
515 Post Oak Boulevard
Suite 900
Houston, TX 77027

GREGORY G. GARRE
Counsel of Record
ROMAN MARTINEZ
BLAKE E. STAFFORD
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

BEZALEL STERN
KELLEY DRYE & WARREN LLP
3050 K Street, NW
Suite 400
Washington, DC 20007

Counsel for Petitioner

September 16, 2020

APPENDIX

TABLE OF CONTENTS

Page

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOVERNMENT OF GUAM, Appellee

v.

UNITED STATES of America, Appellant

No. 19-5131

Argued November 12, 2019
Decided February 14, 2020

Appeal from the United States District Court for the District of Columbia (No. 1:17-cv-02487)

950 F.3d 104

Before: HENDERSON and TATEL, Circuit Judges, and GINSBURG, Senior Circuit Judge.

TATEL, Circuit Judge:

For nearly half a century, the United States Navy operated a landfill on the island of Guam. Home to discarded munitions, chemicals, and everyday garbage, the so-called Ordot Dump lacked any sort of environmental safeguards. At bottom, this case concerns whether Guam or the Navy is financially responsible for the environmental hazards arising from the Ordot Dump. The answer to that question turns on the interaction between two provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): section 107, the act's "cost-recovery" provision, and section 113, its "contribution" provision. *See* 42 U.S.C. §§ 9607, 9613(f). If Guam must proceed under section 113, then its suit against the Navy for costs related to

the dump is now time-barred. But if it may utilize section 107, then its suit remains timely. As explained below, we conclude that a 2004 consent decree with EPA triggered Guam's right to pursue a contribution claim under section 113, precluding it from now pursuing a claim under section 107. We therefore reverse the district court's contrary conclusion and remand with instructions to dismiss.

I.

Congress enacted CERCLA, 42 U.S.C. §§ 9601 et seq., "in response to the serious environmental and health risks posed by industrial pollution," *United States v. Bestfoods*, 524 U.S. 51, 55, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). Seeking to enable the "prompt cleanup of hazardous waste sites and to ensure that responsible parties foot the bill," *General Electric Co. v. Jackson*, 610 F.3d 110, 114 (D.C. Cir. 2010), CERCLA directs that any potentially responsible party—"PRP" for short—"shall be liable" for the costs associated with the release of hazardous substances and subsequent cleanup of polluted sites, CERCLA § 107(a).

Remediation at Superfund sites is, unsurprisingly, expensive. Central to CERCLA's operation is a mechanism for entities to seek recoupment of any cleanup costs incurred from other responsible parties. As originally drafted, CERCLA provided that "any person" potentially responsible for hazardous waste "shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe," CERCLA § 107(a)(4)(A), as well as "any other *necessary costs of response incurred* by any other person," *id.* § 107(a)(4)(B) (emphasis added). While CERCLA "did not mandate

'joint and several' liability in every case," *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599, 613, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009), "[t]he practical effect of placing the burden on defendants has been that responsible parties rarely escape joint and several liability," *O'Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir. 1989), meaning that any one PRP may be held responsible for the entire cost of a cleanup.

Although multiple entities may be responsible for a superfund site, only one may have actually "incurred" "costs of response"—a necessary predicate to bringing a section 107 claim. CERCLA § 107(a)(4)(A), (B). Following CERCLA's passage in 1980, "litigation arose over whether § 107, in addition to allowing the Government and certain private parties to recover costs from PRPs, also allowed a PRP that had incurred response costs"—that is, a PRP that had paid out but not actually done a cleanup itself—"to recover costs from other PRPs." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 161, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004). At common law, tortfeasors like PRPs were typically entitled to "contribution"—a "right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her proportionate share to the injured party, the shares being determined as percentages of causal fault." *Contribution*, Black's Law Dictionary (11th ed. 2019). But as originally passed, "CERCLA contained no provision expressly providing for a right of action for contribution;" in fact, it made no mention of "contribution" at all. *Cooper*, 543 U.S. at 162, 125 S.Ct. 577.

Congress addressed this gap in the statutory scheme when it amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99–499, 100 Stat. 1613. Specifically, it added a new section to the Act—section 113—which "provide[d] two express avenues for contribution." *Cooper*, 543 U.S. at 167, 125 S.Ct. 577. The first, section 113(f)(1), provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action . . . under section [107(a)] of this title." CERCLA § 113(f)(1). The second new avenue, section 113(f)(3)(B), provides that a party that "has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement." Section 113 also creates special incentives for PRPs to settle with enforcement authorities. Although that section broadly allows PRPs to seek contribution from other PRPs, "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *Id.* § 113(f)(2). Settlement with EPA or state authorities therefore inoculates a party from further contribution liability.

The upshot is that CERCLA now offers two potential causes of action for an entity seeking recovery from a PRP: a section 107 "cost-recovery" action, available for recoupment of cleanup costs, and a section 113(f) "contribution" action, available for recoupment of funds paid out pursuant to a section

107 action, a settlement, or another contribution action. Central to this case, the statute of limitations for a contribution action is three years, *see* CERCLA § 113(g)(3); the statute of limitations for a remedial section 107 action is six, *id.* § 113(g)(2)(B).

II.

Nearly a century before CERCLA's passage, the United States captured the island of Guam following the Spanish-American War. *See* Paul Carano & Pedro C. Sanchez, *A Complete History of Guam* 169–83 (1964) (describing how Guam became an American possession). From 1903 until World War II, the United States treated Guam as a US Naval ship—the "USS Guam"—and maintained military rule until the passage of the Guam Organic Act in 1950. Robert F. Rogers, *Destiny's Landfall : A History of Guam* 126, 226 (1995). That act marked the formal transfer of power from the United States to Guam's newly formed civilian government, *id.* at 226, but until the 1960s, visiting Guam required a military security clearance, *see* Exec. Order No. 11045, 3 C.F.R. 238, 238–39 (1962) (discontinuing the Guam Island Naval Defensive Sea Area and Guam Island Naval Airspace Reservation). Guam remained, as it had been since the Treaty of Paris in 1898, an "unincorporated territory of the United States." 48 U.S.C. § 1421a.

Against this colonial backdrop, the Navy constructed and operated the Ordot Dump for the disposal of municipal and military waste sometime in the 1940s. Even after relinquishing sovereignty over the island, however, the Navy continued to take advantage of the dump. Throughout the Korean and Vietnam Wars, the Navy used the Ordot Dump for the disposal of munitions and chemicals, allegedly

including Dichlorodiphenyltrichloroethane—DDT—and Agent Orange, Am. Compl. ¶ 11. It was "the only sited and operational dump on Guam" until the 1970s, and the only public landfill on the island until its closure in 2011. *Id.* And as the Navy continued to use the Ordot Dump, it continued growing; "[w]hat was once a valley," the District Court of Guam explained, "is now at least a 280-foot mountain of trash." *United States v. Guam,* No.02-00022, slip op. at 1 (D. Guam Jan. 24, 2008).

Despite its extensive use, the Ordot Dump lacked basic environmental safeguards. "[U]nlined on its bottom and uncapped at its top," the landfill absorbed rain and surface water, which percolated through the landfill and mixed with contaminants. Am. Compl. ¶ 12. These contaminants released into the nearby Lonfit River, which flows into the Pago River, and ultimately into the Pacific Ocean at Pago Bay. *Id.*

The Ordot Dump has long attracted the attention of the United States as regulator. EPA added the Ordot Dump to its National Priorities List in 1983, and, in 1988, issued a Record of Decision designating the Navy as a potentially responsible party for the site. *Id.* ¶ 13. But having relinquished sovereignty over the island, the Navy no longer owned and operated the Ordot Dump—Guam did. And, beginning in 1986, EPA repeatedly ordered Guam to devise plans for containing and disposing of waste at the landfill.

Unsatisfied with Guam's remediation attempts, EPA sued Guam in 2002 under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., asserting that Guam violated that act by "discharging pollutants . . . into waters of the United States without obtaining a permit." Complaint for Injunctive Relief, *United*

States v. Guam, No. 02-00022, at ¶ 26 (D. Guam) (CWA Compl.), Joint Appendix (J.A.) 86. As EPA explained in its complaint, the Clean Water Act defines "waters of the United States" as "including the territorial seas," *id.* at ¶ 14, J.A. 85 (quoting 33 U.S.C. § 1362(7), and it alleged that Guam "has routinely discharged untreated leachate from the Ordot [Dump] into the Lonfit River and two of its tributaries," *id.* at ¶ 21, J.A. 85. EPA sought an injunction ordering Guam to comply with the Clean Water Act, by, among other things, "submit[ting] plans and a compliance schedule for a cover system for the Ordot Landfill" and "complet[ing] construction of the cover system to eliminate discharges of untreated leachate." *Id.* ¶ 29, J.A. 86.

Rather than litigate these claims, Guam and EPA entered into a consent decree in 2004, which the District Court of Guam approved. *See* Consent Decree, *United States v. Guam,* No. 02-00022 (D. Guam) (Consent Decree), J.A. 90. That Decree required Guam, among other things, to pay a civil penalty, close the Ordot Dump, and design and install a "dump cover system." *Id.* at 5–12, J.A. 94–101. The Decree expressly states that it "shall apply and be binding upon the Government of Guam . . . and on the United States on behalf of U.S. EPA," and was "based on the pleadings, before taking testimony or adjudicating any issue of fact or law, and without any finding or admission of liability against or by the Government of Guam," *id.* at 3, J.A. 92. Although cleanup continues, Guam officially closed the Ordot Dump in 2011 pursuant to the Decree.

Guam initiated this action against the United States in 2017, arguing that the Navy was responsible for the Ordot Dump's contamination and seeking to

recoup its landfill-closure and remediation costs. Alleging that the costs of the Ordot Dump's required remediation would "exceed approximately $160,000,000," Am. Compl. ¶ 15, Guam brought two causes of action relevant here: a CERCLA section 107(a) claim seeking "removal and remediation costs" related to the landfill, *id.* ¶ 25, and, "[i]n the alternative," a section 113(f) contribution action, *id.* ¶ 31.

The United States moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Guam could not avail itself of CERCLA section 107(a) because section 113(f)(3)(B) is "the exclusive CERCLA remedy for the costs a liable party is compelled to incur pursuant to a judicially-approved settlement with the United States." Mot. to Dismiss 18. Pointing to the 2004 Consent Decree, the United States argued that Guam had resolved its liability for a response action, and so had to proceed under section 113 rather than 107. And, because CERCLA section 113 "imposes a three-year statute of limitations on contribution claims" that runs from a consent decree's entry, the United States argued that Guam was time-barred from pursuing that claim. *Id.* at 17, J.A. 61.

The district court, accepting the premise that "Guam is permitted to proceed against the United States for full cost recovery under section 107(a) only if Guam's right to contribution under section 113(f)(3)(B) has not been triggered," explained that "the key question[] that the pending motion to dismiss presents is whether the 2004 Consent Decree 'resolve[d] [Guam's] liability' for the response action or response costs that Guam undertook with respect to the Ordot Landfill and also qualifies as a 'settlement' within the meaning of" CERCLA's

contribution provision. *Guam v. United States*, 341 F. Supp. 3d 74, 84 (D.D.C. 2018) (quoting CERCLA § 113(f)(3)(B)) (alterations in original). In a thorough opinion, the district court explained that "whether or not an agreement for the removal or remediation of hazardous waste 'resolves' liability for section 113(f)(3)(B) purposes turns on the terms of the agreement," and concluded that "the 2004 Consent Decree did not resolve Guam's liability for the Ordot Landfill cleanup." *Id.* Because the Decree failed to meet the "statutorily prescribed conditions for bringing a contribution claim under section 113(f)(3)(B)," the court ruled that Guam could maintain its section 107(a) claim against the United States and denied the United States' motion to dismiss. *Id.*

The United States sought interlocutory appeal of the district court's order pursuant to 28 U.S.C. § 1292(b). The district court, noting that "the courts of appeals diverge . . . with respect to how one best interprets agreement language" of the kind presented here, concluded that "there is substantial ground for difference of opinion regarding at least one controlling issue of law . . . , and that allowing the United States to appeal . . . could materially advance this litigation," and certified the interlocutory appeal of the order. *Guam v. United States*, No. 1:17-CV-2487, 2019 WL 1003606, at *1 (D.D.C. Feb. 28, 2019) (internal quotation marks omitted). We granted the request for interlocutory review. "We review *de novo* the District Court's legal conclusions denying a motion to dismiss." *Liff v. Office of Inspector General for U.S. Department of Labor*, 881 F.3d 912, 918 (D.C. Cir. 2018).

III.

The first question we must decide, as it underlies this dispute, is whether CERCLA sections 107 and 113 are mutually exclusive. That is, if a party incurs costs pursuant to a settlement and therefore has a cause of action under section 113, is it precluded from seeking cost-recovery under section 107?

While the differences between CERCLA sections 107 and 113 seem clear in theory, the supposedly sharp distinction between cost-recovery and contribution does not always play out in practice. Although the two actions are separate, some situations ostensibly fall under both CERCLA provisions. As the Supreme Court explained in *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007), "a PRP may sustain expenses pursuant to a consent decree" that involve cleanup costs. *Id.* at 139 n.6, 127 S.Ct. 2331. "In such a case, the PRP does not incur costs voluntarily," as one would while undertaking a cleanup, "but [also] does not reimburse the costs of another party," as one would in a traditional contribution action. *Id.* Having settled with the Government, the PRP is authorized to pursue a section 113(f)(3)(B) contribution action, but because it has incurred cleanup costs, the recoupment of those funds would arguably also fall within section 107. In other words, given that "neither remedy swallows the other," *id.*, both cost-recovery and contribution actions appear available.

In *Atlantic Research*, the Supreme Court "d[id] not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both." *Id.* To date, neither have we. But "every federal court of

appeals to have considered the question since *Atlantic Research* . . . has said that a party who *may* bring a contribution action for certain expenses *must* use the contribution action, even if a cost recovery action would otherwise be available." *Whittaker Corp. v. United States*, 825 F.3d 1002, 1007 (9th Cir. 2016); *see id.* at 1007 n.5 (collecting cases).

Today we join our sister circuits. The entire purpose of section 113(f)(3)(B) is to "permit[] private parties to seek contribution after they have settled their liability with the Government." *Atlantic Research Corp.*, 551 U.S. at 132 n.1, 127 S.Ct. 2331. Allowing a PRP that has settled with the government to instead seek recoupment through a section 107 cost-recovery claim would render section 113(f)(3)(B) superfluous; if a PRP could choose whether to sue under section 107 or section 113, "a rational PRP would prefer to file an action under § 107(a)[] in every case." *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014). Like any statute, CERCLA must be "read as a whole," *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991), and we decline to interpret section 113(f)(3)(B) as providing superfluous relief to a party that has settled with the United States or a State.

Having concluded that section 113(f)(3)(B) and section 107 are mutually exclusive, we must address one more threshold issue. Section 113(f)(3)(B) reads: "A person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in a[] . . . judicially approved settlement may seek contribution from *any person who is not party to a settlement* referred to in paragraph (2)." CERCLA § 113(f)(3)(B)

(emphasis added). Paragraph (2), in turn, provides that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *Id.* § 113(f)(2). Here, we face an unusual situation: the United States, through the Navy, is a potentially responsible party, but the United States, through EPA, is also the regulator that has brought the enforcement action. At first blush, the "not party to a settlement" language would seem to preclude a contribution suit by Guam against the United States regardless of whether the settlement otherwise triggers section 113(f)(3)(B); after all, the United States is a "party to a settlement" with Guam.

CERCLA "is not a model of legislative draftsmanship," *Exxon Corp. v. Hunt*, 475 U.S. 355, 363, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986), and, read literally, section 113(f)(3)(B)'s "not party to *a* settlement" language could create non-sensical results. For example, imagine hypothetical Company X settles with EPA for the costs of response actions for a contaminated site in California in 1990. By virtue of becoming "party to *a* settlement," Company X would gain immunity from *any* future section 113(f)(3)(B) action, even if that action were to arise decades later for an entirely unrelated site in Massachusetts. The very first time an agency of the United States settled with a potentially responsible party at *any* site, moreover, that agency would become wholly immune to section 113(f)(3)(B) claims at *every* site where it may be a responsible party. "A fair reading of legislation demands a fair understanding of the legislative plan," *King v. Burwell*, —— U.S. ——, 135 S. Ct. 2480, 2496, 192

L.Ed.2d 483 (2015), and given that section 113 clearly seeks to incentivize private parties to settle with the United States, we decline to read the "not party to a settlement" language as forever foreclosing contribution actions against *any* party that has ever settled *any* qualifying claim.

The United States offers two alternative interpretations. First, it argues that reading sections 113(f)(2) and 113(f)(3)(B) together demonstrates that the phrase "any person who is not party to a settlement referred to in paragraph (2)" simply means any person not insulated from such a contribution claim by a section 113(f)(2) settlement. Appellant's Suppl. Br. 7. Alternatively, it argues that, even if the phrase means that a contribution action could not be brought against any party to any settlement whatsoever, it does not matter here because the Consent Decree was a settlement between Guam and the EPA and Guam's contribution action is against the Navy—a different federal agency. *Id.* at 7-9. Because we agree with the first alternative, we need not address the second.

Congress enacted Section 113(f) to bring PRPs "to the bargaining table at an early date." *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1117 (9th Cir. 2017) (quoting *Whittaker Corp.*, 825 F.3d at 1013 (Owens, J., concurring)). Section 113(f) accomplishes this goal by providing two benefits to such PRPs: a "defensive benefit" to PRPs who decide to resolve their liability by entering a settlement with the United States or with a State and are thereby protected against contribution actions brought by other PRPs regarding matters included in the settlement, *see* CERCLA § 113(f)(2); and an "offensive benefit" to those same PRPs who, again, in exchange for resolving their

liability, can pursue other PRPs for contribution, *see id.* § 113(f)(3)(B).

Reading these two sections *in pari materia*, we interpret the phrase "any person who is not party to a settlement referred to in paragraph (2)" in section 113(f)(3)(B) to mean that one benefit does not cancel out the other. *See Motion Picture Association of America, Inc. v. F.C.C.*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning."). Section 113(f)(3)(B) provides that a person who has resolved its liability with the United States or a State can pursue a contribution action against any person but it notes that the right to seek contribution does not erase the protection provided under section 113(f)(2). For example, if Company A resolves its liability for a response action with the United States, it is protected under section 113(f)(2) from future contribution actions related to its settlement with the United States. The fact that Company B subsequently also resolves its liability to the United States in a related action—and can thereby initiate a contribution action against "any person" under section 113(f)(3)(B)—cannot mean that Company A's protection under section 113(f)(2) is forfeited, leaving it vulnerable to a contribution suit by Company B. This is what the phrase "any person who is not party to a settlement referred to in paragraph (2)" clarifies. Another way to view the two provisions working in tandem is to think of the above hypothetical in reverse. As the Third Circuit has explained, "[i]t appears that the statute allows the government to immunize a late settlor from an early settlor's contribution suit by settling with the government." *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174,

1186 (3d Cir. 1994); *see also* J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlors*, 58 La. L. Rev. 167, 231 (1997) ("[Section 113(f)(2)] provides, in no uncertain terms, that parties who have resolved their liability to the government in a judicially approved settlement, such as the parties to the second settlement, shall not be liable for claims for contribution regarding matters addressed in the settlement.").

This interpretation is supported by the fact that Congress chose to reference "paragraph (2)" within section 113(f)(3)(B). "[W]e are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). In section 113(f)(3)(B), Congress did not state "any person who is not party to a settlement" alone; instead, it specifically stated "any person who is not a party to a settlement *referred to in paragraph (2).*" CERCLA § 113(f)(3)(B) (emphasis added). A settlement included in "paragraph (2)" means a settlement entered into by a person to resolve its liability to the United States or a State in order to secure protection from a contribution action. Therefore, giving effect to section 113(f)(3)(B)'s express reference to section 113(f)(2) and reading that section in harmony with section 113(f)(3)(B), we think it quite clear that section 113(f)(3)(B) allows a person to seek contribution from any person other than those persons protected by their own settlement under section 113(f)(2). Put differently, a person may not use section 113(f)(3)(B) to seek contribution against a person who has resolved its liability through a settlement agreement under section 113(f)(2) to the

extent the contribution action involves matters addressed in that settlement.

Here, the "any person who is not a party" language in section 113(f)(3)(B) does nothing to prohibit Guam's contribution action. Guam is not attempting to pursue a contribution action against a PRP that has already resolved its liability to the United States or a State and is thus protected by section 113(f)(2). The key inquiry, then, is this: did the 2004 Consent Decree "resolve [Guam's] liability" for a response action within the meaning of section 113(f)(3)(b), thus triggering Guam's right to seek contribution and precluding it from seeking cost-recovery under section 107? It is to that question we now turn.

A.

In order to trigger CERCLA section 113(f)(3)(B), a party must have "resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in a[] . . . judicially approved settlement." CERCLA § 113(f)(3)(B). Guam contends that the 2004 Consent Decree cannot qualify as a settlement under CERCLA because it settled an action brought by EPA under the Clean Water Act, not CERCLA. In Guam's view, the Consent Decree "requires reference to CERCLA to trigger a Section 113(f)(3)(B) claim." Appellee's Br. 26 n.11.

"Whether a non-[CERCLA] settlement agreement may give rise to a contribution action has split the circuits," three to one. *Asarco*, 866 F.3d at 1119. As the Ninth Circuit recently explained, both it and the Third Circuit have concluded that "Congress did not intend to limit § 113(f)(3)(B) to response actions and costs incurred under CERCLA settlements," and that

"a non-[CERCLA] settlement agreement may form the necessary predicate for a § 113(f)(3)(B) contribution action." *Id.* at 1120–21; *see also Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (same). The Seventh Circuit has recently concluded the same. *See Refined Metals Corp. v. NL Industries Inc.*, 937 F.3d 928, 932 (7th Cir. 2019) ("[Section] 113(f)(3)(B) . . . does not limit covered settlements to those that specifically mention CERCLA."). The Second Circuit has gone the other way, holding that section 113(f)(3)(B) creates a "contribution right only when liability for CERCLA claims . . . is resolved." *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 95 (2d Cir. 2005). More recently, however, the Second Circuit cast doubt on that holding, noting that EPA "understandably takes issue" with that case and that "there is a great deal of force to [its] argument." *Niagara Mohawk Power Corp. v. Chevron USA, Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010).

We agree with the Third, Seventh, and Ninth Circuits that section 113(f)(3)(B) does not require a CERCLA-specific settlement. As the Seventh and Ninth have pointed out, another provision of section 113—paragraph (f)(1)—expressly requires that a party first be sued under CERCLA section 106 or 107 before pursuing contribution. *See* CERCLA § 113(f)(1) ("Any person may seek contribution from any other person who is liable or potentially liable under section [1]07(a) of this title, *during or following any civil action under section [1]06 of this title or under section [1]07(a) of this title*.") (emphasis added). But section 113(f)(3)(B) contains no such CERCLA-specific language, and "where Congress includes particular language in one section of a statute but

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (internal citation, alterations and quotation marks omitted). We therefore conclude that a settlement agreement can trigger section 113(f)(3)(B) even if it never mentions CERCLA.

B.

But that conclusion gets us only so far. The fact that a non-CERCLA settlement *can* trigger section 113(f)(3)(B) tells us little about whether the 2004 Consent Decree, in fact, "resolve[d] [Guam's] liability" for some or all of the response action or response costs that Guam undertook with respect to the Ordot Dump. "Whether or not liability is resolved through a settlement" is unanswerable by a "universal rule;" it instead requires examination of "the terms of the settlement on a case-by-case basis." *Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013). Because "a consent decree . . . is essentially a contract," a court's "construction of a consent decree is essentially a matter of contract law," *Segar v. Mukasey*, 508 F.3d 16, 21 (D.C. Cir. 2007) (internal quotation marks omitted), and where, as here, that consent decree binds the United States, that contract is "governed exclusively by federal law," *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

We begin with CERCLA's text. The phrase "resolved its liability" is nowhere defined in the statute, meaning our interpretation of these words should start "with their ordinary meaning." *BP*

American Production Co. v. Burton, 549 U.S. 84, 91, 127 S.Ct. 638, 166 L.Ed.2d 494 (2006). The word "resolve" usually means "to deal with successfully," "reach a firm decision about," or "work out the resolution" of something. *Resolve*, *Merriam-Webster's Collegiate Dictionary* 997 (10th ed. 1997). Our sister circuits have likewise concluded that in the context of section 113(f)(3)(B), "resolved" means "decided, determined, or settled—finished, with no need to revisit," *Bernstein*, 733 F.3d at 211, that is, a "firm decision" that is no longer "susceptible to further dispute or negotiation," *Asarco*, 866 F.3d at 1122 (internal quotation marks omitted). The word "[l]iability," in turn, means an "obligat[ion] according to law or equity." *Liability*, *Merriam-Webster's Collegiate Dictionary* 670 (10th ed. 1997); *see also Liability*, Black's Law Dictionary (11th ed. 2019) ("the quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment."); *Asarco*, 866 F.3d at 1124 ("a settlement agreement must determine a PRP's compliance *obligations*") (emphasis added). Taking the phrase "resolved its liability" as a whole, we think it clear that "a PRP's liability must be decided, determined, or settled, at least in part, by way of agreement with the EPA." *Bernstein*, 733 F.3d at 212 (emphasis in original removed).

So far, so good—but liability for what? Recall that section 113(f)(3)(B) kicks in where a party has resolved its liability for "some or all of a *response action*" or for some or all "of the costs of such action." CERCLA § 113(f)(3)(B) (emphasis added). As Guam readily admits, "'[r]esponse' is a term of art in CERCLA," Appellee's Br. 9, and it entails a wide

range of actions. Specifically, "response" is defined as any "removal . . . and remedial action; [and] all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." CERCLA § 101(25). "Removal," in turn, is defined as "the cleanup or removal of released hazardous substances from the environment," "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," "the disposal of removed material," or "other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." *Id.* § 101(23). And "remedy" or "remedial action" means "actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment," or actions "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 101(24). And there is more: remedial action includes "storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations," as well as the "repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." *Id.* Section

113(f)(3)(B) comes into play, therefore, when a party has resolved its liability for "some or all" of any of the above actions.

By its plain terms, the 2004 Consent Decree "resolve[d]" Guam's liability for "some . . . of a response action." The Consent Decree provides that it "shall be in full settlement and satisfaction of the civil judicial claims of the United States against the Government of Guam as alleged in the Complaint filed in this action." Consent Decree ¶ 45, J.A. 112. EPA's Complaint, in turn, sought an injunction requiring Guam to comply with the Clean Water Act, by, among other things, "submit[ting] plans and a compliance schedule for a cover system for the Ordot Landfill" and for "complet[ing] construction of the cover system to eliminate discharges of untreated leachate." CWA Complaint ¶ 29, J.A. 86. The Consent Decree further obligates Guam to design and install a "dump cover system." Consent Decree ¶ 8, J.A. 94. Construction and installation of a cover falls squarely within the definition of a "remedial action," which includes the "confinement" of substances and the "repair or replacement of leaking containers." CERCLA § 101(24). EPA's Clean Water Act lawsuit, in other words, sought injunctive relief for Guam to take action that qualified as a "response action," and the 2004 Consent Decree released Guam from legal exposure for that claim in exchange for Guam's commitment to perform work that qualified as a "response action."

That "construction of the cover system to eliminate discharges of untreated leachate" "resolv[ed] [Guam's] liability . . . for some or all of a response action" within the meaning of CERCLA section

113(f)(3)(B), triggering that section and precluding Guam from seeking cost-recovery under section 107.

C.

Despite the clarity of the Consent Decree, Guam insists that, for several reasons, the Decree did not "resolve" Guam's liability to the United States. We are unpersuaded.

Guam first argues that because "the US broadly and unconditionally reserved all of its rights, including its rights to pursue CERCLA claims," the Consent Decree is "replete with ongoing legal exposure for Guam" and therefore "did not resolve liability with the requisite finality to trigger a Section 113(f)(3)(B) contribution claim." Appellee's Br. 25; 28–29. True, the Consent Decree provides that "[n]othing . . . shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations." Consent Decree ¶ 46, J.A. 112. But that provision applies only to "violations *unrelated to the claims in the Complaint*." *Id.* (emphasis added). This reservation of rights tells us nothing about what the complaint and the consent decree do or do not resolve under CERCLA. Section 113(f)(3)(B) is clear, moreover, that it requires merely the resolution of liability for "some" of a response action. In order to trigger section 113(f)(3)(B), a decree need not decisively determine every action that a party may one day be required to perform at the relevant site. What matters is whether what it *does* require qualifies as "some" of a "response action." And as explained above, *supra* at 114–16, Guam's construction obligations for the Ordot Dump—agreed to under the threat of injunctive relief—qualified as "some of" a "response action" under CERCLA. The

consent decree's reservation of rights for unrelated claims does nothing to alter that analysis.

Guam next contends that the Consent Decree cannot have triggered section 113(f)(3)(B) because "it only releases Guam from . . . liability upon full implementation of the settlement's requirements, and performance is ongoing." Appellee's Br. 19. Such a reading, however, would nullify section 113(f)(3)(B) in a host of cases. According to section 113's statute of limitations, a party must bring a contribution action "no more than 3 years after . . . *entry of a judicially approved settlement*." CERCLA § 113(g)(3)(B) (emphasis added). The clock starts to run, in other words, on entry of the settlement, not when liability is "resolved." But under Guam's theory, liability may not be "resolved" for quite some time. For example, the Decree requires Guam to perform within "44 months"—nearly four years. Consent Decree ¶ 9, J.A. 100. Guam's view—that liability is not "resolved" until that performance is complete—would produce an absurd result: Guam's cause of action under section 113 would not accrue until *after* the statute of limitations runs. *See Asarco*, 866 F.3d at 1124 n.8 (rejecting such a reading of CERCLA). And Guam would hardly be alone. A different CERCLA provision, section 122, provides that "[a] covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed." CERCLA § 122(f)(3). If parties "resolve" their liability only following full performance and Presidential certification, most PRPs would find themselves barred by the statute of limitations by the time they gained the ability to sue under section 113(f)(3)(B). Congress could not have intended such a result.

Next, Guam directs us to the Consent Decree's disclaimer of liability, which provides that the parties' agreement is "based on the pleadings, before taking testimony or adjudicating any issue of fact or law, and without any finding or admission of liability against or by the Government of Guam." Consent Decree 3, J.A. 92. Pointing to what it calls this "clear and unambiguous" language, Guam urges us to take the disclaimer at its word. Appellee's Br. 16–17. To be sure, a disclaimer of liability may weigh against the conclusion that the parties intended to resolve liability within the meaning of section 113(f)(3)(B). *See, e.g.*, *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1002 (6th Cir. 2015) (finding that consent decree did not resolve the plaintiff's liability, in part because "the plaintiff had not conceded the question of its liability"). As other circuits faced with similar language have observed, however, "parties often expressly refuse to concede liability under a settlement agreement, even while assuming obligations consistent with a finding of liability." *Asarco*, 866 F.3d at 1123. Accordingly, "the mere fact that [a party] refused to admit liability is not enough to exempt [a consent] [d]ecree from the reach of section 113(f)(3)(B)." *Refined Metals Corp.*, 937 F.3d at 931. Here, the disclaimer of liability, standing alone, cannot overcome the Consent Decree's substantive provisions. And because we have concluded that those substantive terms do, in fact, "resolve" Guam's "liability" to the United States "for some . . . of a response action," *supra* at 114–16, the Consent Decree triggers section 113(f)(3)(B) despite the disclaimer.

Guam nonetheless asserts that the consent decree falls outside CERCLA's provisions because the

statute covers "[c]ontamination involving 'hazardous substances'" and the Clean Water Act violations alleged in EPA's Complaint concerned "non-CERCLA pollutant discharges only." Appellee's Br. 42. But the Complaint demanded that Guam "complete construction of [a] cover system to eliminate discharges of untreated leachate," CWA Compl. ¶ 29, and CERCLA expressly identifies the "collection of leachate and runoff" as a "remedial action," CERCLA § 101(24).

And finally, Guam argues that denying it the right to seek recovery under section 107 presents constitutional concerns. "[A]s to non-settling PRPs," Guam insists, "the right to contribution is a property interest, which cannot be extinguished without due process of law." Appellee's Br. 49 (internal quotations omitted). Because a qualifying section 113(f)(3)(B) settlement insulates *Guam* from further contribution suits, Guam argues that other PRPs lack notice, and "[a]llowing the [Clean Water Act] and [Consent Decree] at issue here to trigger contribution rights equates to silently extinguishing the property interest of anyone who might have a potential claim against a settling party without due process of law." *Id.* Although it is far from clear whether Guam could assert this claim on behalf of absent third parties, because Guam failed to raise it in the district court, "it is forfeited." *Keepseagle v. Vilsack*, 815 F.3d 28, 36 (D.C. Cir. 2016). And as to Guam's own rights, Guam lost the ability to bring a contribution claim not because it was deprived of due process, but because the statute of limitations ran.

IV.

From Guam's perspective, the result we reach today is harsh. "[A]ccept[ing] as true," as we must at this stage, "all material allegations of the complaint," *Barker v. Conroy*, 921 F.3d 1118, 1121 (D.C. Cir. 2019) (internal quotations omitted), the United States deposited dangerous munitions and chemicals at the Ordot Dump for decades and left Guam to foot the bill. The practical effect of our decision is that Guam cannot now seek recoupment from the United States for that contamination because its cause of action for contribution expired in 2007. Unfortunately for Guam, however, "where a statute is clear, the courts are not at liberty to construe the statute other than according to its terms, or to depart from its clear requirements." *Hirshfeld v. District of Columbia*, 254 F.2d 774, 775 (D.C. Cir. 1958) (internal citations omitted). And while offering little consolation to Guam, EPA has reduced the likelihood that these circumstances will reoccur by since revising its model settlement language to include an express statement that the parties "agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA." *Florida Power Corp.*, 810 F.3d at 1009.

For the foregoing reasons, we reverse the district court's denial of the United States' motion to dismiss and remand with instructions to dismiss the complaint.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT OF GUAM, Plaintiff,

v.

UNITED STATES of America,
Defendant.

No. 1:17-cv-2487 (KBJ)

Signed February 28, 2019

2019 WL 1003606

MEMORANDUM OPINION

KETANJI BROWN JACKSON, United States District Judge

On September 30, 2018, this Court issued an Order denying a motion to dismiss that the United States had filed in the instant matter, which is a case that involves cost-recovery and contribution claims that the government of Guam has brought against the United States. *See Gov't of Guam v. United States*, 341 F. Supp. 3d 74 (D.D.C. 2018). (*See also* Order, ECF No. 37.) Guam's complaint maintains that, "because the United States substantially contributed to the environmental contamination at [Guam's] Ordot Landfill, the United States should pay the full $160,000,000 cost of cleaning up the dump under [the Comprehensive Environmental Response, Compensation, and Liability Act's ('CERCLA's')] section 107(a)'s cost-recovery mechanism, or should at least pay its fair share of the cleanup costs under CERCLA's section 113(f)(3)(B)'s contribution mechanism[.]" *Id.* at 76–77 (internal citations

omitted).[1] In its motion to dismiss, the United States argued that (1) Guam cannot proceed on its section 107(a) cost-recovery claim, because Guam "resolved its liability for th[e] cleanup" as part of a past settlement agreement with the United States and, as a result, a section 113(f)(3)(B) contribution claim is the exclusive CERCLA remedy available to Guam at present, *id.* at 80; and (2) Guam cannot proceed on any section 113(f)(3)(B) contribution claim against the United States because such a claim is now time-barred, *see id.* This Court disagreed with the proposition that Guam is precluded from bringing a section 107(a) cost-recovery claim, based on the plain language of the settlement agreement and the Court's interpretation of section 113(f)(B)(3), and thus, the Court denied the United States' Rule 12(b)(6) motion. *See id.* at 97 (concluding that "Guam's right to contribution under section 113(f)(3)(B) has not yet been triggered, which means that it is not precluded from proceeding via a cost-recovery action under section 107(a)").

Before this Court at present is another motion that the United States has presented for this Court's consideration: a motion to certify for interlocutory appeal this Court's Order denying the motion to dismiss, in accordance with section 1292(b) of Title 28 of the United States Code, and to stay all district court proceedings pending a decision by the D.C.

---

[1] In the context of CERCLA, courts commonly refer to the cost-recovery authority in section 9607(a) of Title 42 of the United States Code as a "section 107(a)" action, and they have dubbed the right to seek contribution under section 9613(f)(3)(B) of Title 42 a "section 113(f)(3)(B)" action. This Memorandum Opinion generally employs that same nomenclature.

Circuit on appeal. (*See* Mem. in Supp. of Def.'s Mot. to Certify Dismissal Orders for Interlocutory Appeal ("Def.'s Mem."), ECF No. 49-1, at 6.)[2] Because this Court finds that there is a substantial ground for difference of opinion regarding at least one controlling issue of law that the United States has identified, and that allowing the United States to appeal at this stage in the litigation could materially advance the litigation, *see* 28 U.S.C. § 1292(b), it concludes that the legal standard for certifying the prior Order for interlocutory appeal has been met. The Court further finds that a stay of the district court proceedings would benefit judicial economy and would not subject the parties to hardship during the pendency of the requested appeal. Therefore, the United States' motion for certification will be **GRANTED,** and all district court proceedings will be **STAYED** pending the D.C. Circuit's resolution of the United States' appeal. A separate Order consistent with this Memorandum Opinion will follow.

I.

The facts and procedural history of this case are recited in full in the Memorandum Opinion that this Court issued in conjunction with its Order denying the United States' motion to dismiss. *See Gov't of Guam*, 341 F. Supp. 3d at 78–81. As relevant to the instant motion, that Opinion notes that "Guam served as a central base of operations for the United States Navy in the South Pacific" for the better part of 50 years, beginning in 1898, *id.* at 76 (citation omitted), and that during this period of use, the Navy

[2] Page-number citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system automatically assigns.

"established the Ordot Landfill to dispose of the waste being generated on the island[,]" *id.* at 78 (citation omitted). When the United States transferred ownership of the landfill to the newly-formed civilian government of Guam in 1950, Guam "continued to operate the Ordot Landfill as a dump until the facility was officially closed in 2011." *Id.* (citation omitted). Notably, even while it was in operation, the Ordot Landfill had more than its share of maintenance issues; indeed, "[t]he [Environmental Protection Agency ('EPA')] ha[d] been aware of . . . environmental problems with the Ordot Landfill for many decades[,]" and the EPA "regularly ordered Guam to devise a feasible plan for containing and disposing of the waste at the landfill[.]" *Id.* at 78–79.

In 2002, "[t]he EPA finally filed a lawsuit against Guam"; the agency specifically claimed that "leachate was discharging from the Ordot Landfill into the Lonfit River and two of its tributaries in violation of the [Clean Water Act]." *Id.* at 79 (internal quotation marks and citation omitted). To resolve this legal action, in 2004, Guam and the EPA "entered into a consent decree" that "required Guam to pay a relatively modest civil penalty; mandated that Guam close the Ordot Landfill and cease the discharge of pollutants into the Lonfit River; and required Guam to construct a new municipal landfill to replace the Ordot Landfill." *Id.* (internal citations omitted). "[T]he Consent Decree [also] specifically provided that the agreement was based on the pleadings, before taking testimony or adjudicating any issue of fact or law, and without any finding or admission of liability against or by the Government of Guam." *Id.* (alteration, internal quotation marks, and citation omitted). Furthermore, the written agreement

expressly stated that "nothing in this Consent Decree shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations unrelated to the claims in the [EPA's] Complaint or for any future events that occur[.]" *Id.* (alteration and citation omitted).

Following entry of the 2004 Consent Decree, "remediation and closure work began[,]" at Guam's expense. *Id.* at 80 (alteration, internal quotation marks, and citation omitted). At present, "Guam expects costs of remediation to exceed approximately $160,000,000." *Id.* (internal quotation marks, ellipsis, and citation omitted). "Guam filed the instant CERCLA action against the United States [in 2017] to recoup its landfill-closure and remediation costs." *Id.* (*See also* Am. Compl., ECF No. 7.)[3]

---

[3] The first count of Guam's three-count operative amended complaint, which was filed May 19, 2017, alleges that

> because the United States Navy contributed hazardous waste to the Ordot Landfill and managed that landfill for many decades, Guam is entitled to recover all of the 'removal and remediation costs' it incurred at or 'related to the Ordot Landfill, plus interest' from the United States pursuant to section 107(a) of the CERCLA.

Gov't of Guam, 341 F. Supp. 3d at 80 (internal citations omitted). "The second count seeks 'a declaratory judgment of liability' to the effect that the United States will pay for Guam's future expenses relating to the remediation of the Ordot Landfill under CERCLA's section 113(g)(2)." *Id.* (citation omitted). In the alternative to the full cost-recovery counts, the complaint's third count seeks "contribution under section 113(f)(3)(B) of CERCLA[,]" on the grounds that, "even if it is not entitled to recover the full costs of remediation and closure of the Ordot Landfill, the United States must nevertheless pay 'for all such costs in excess of Plaintiff's fair and equitable share of costs.'" *Id.* (alteration and citation omitted).

A.

The United States filed a motion to dismiss Guam's complaint under Federal Rule of Civil Procedure 12(b)(6) on November 27, 2017. (*See* Def.'s Mot. to Dismiss, ECF No. 27.) In that motion, the United States maintained that Guam cannot state a claim for either cost recovery or contribution under the CERCLA as a matter of law. (*See id.* at 2–3.) The United States reasoned, first, that because "Guam resolved its liability for that cleanup in the 2004 Consent Decree," it "cannot recover its costs for remediating the Ordot Landfill under section 107(a)[.]" *Gov't of Guam*, 341 F. Supp. 3d at 80 (citation omitted); *see also id.* (quoting the United States as arguing that "the exclusive CERCLA remedy for the costs a liable party is compelled to incur pursuant to a judicially-approved settlement with the United States" is a contribution claim under section 113(f)(3)(B)). The United States then asserted that Guam cannot maintain a contribution claim under section 113(f)(3)(B) either, because the statute of limitations has long run on any such claim. *See id.* (explaining the United States' view that "Guam [has] waited far too long after settling its liability in 2004 to bring its alternative claim for contribution").

In response, Guam argued that it was legally entitled to maintain a full cost-recovery action under CERCLA section 107(a) because

> its right to maintain a contribution action under section 113(f)(3)(B) was never triggered [given that] Guam had not 'resolved its liability for a response action or for some or all of the costs of such action in the context of 'an administrative or judicially approved

> settlement' as the text of section 113(f)(3)(B) requires.

Id. (citation, ellipsis, and alterations omitted). To be specific, "Guam insist[ed] that the parties 'did not resolve response cost liability' in the 2004 Consent Decree," given that "the provisions of that agreement left Guam fully exposed to future liability under CERCLA." *Id.* (citation omitted). Guam also asserted that "because the 2004 Consent Decree was 'expressly limited to the [Clean Water Act],' . . . it does not qualify as a 'settlement agreement' giving rise to a cause of action for contribution under CERCLA's section 113(f)(3)(B)." *Id.* at 81 (citations omitted).

B.

In ruling on the United States' motion to dismiss, this Court acknowledged that "cost-recovery claims under CERCLA section 107(a) and contribution claims under CERCLA section 113(f)(3)(B) are exclusive of one another, such that Guam is permitted to proceed against the United States for full cost recovery under section 107(a) only if Guam's right to contribution under section 113(f)(3)(B) has not been triggered." *Id.* at 84 (footnote omitted). The Court therefore assessed "whether the 2004 Consent Decree resolved Guam's liability for the response action or response costs that Guam undertook with respect to the Ordot Landfill and also qualifies as a 'settlement' within the meaning of section 113(f)(B)(3) [of CERCLA]." *Id.* (internal quotation marks, citation, and alterations omitted).

The Court's resolution of this issue rested on several significant legal determinations. First, the Court concluded that liability "is not 'resolved' simply and solely because interested parties have 'signed a

settlement agreement' concerning the response actions that will be taken at the site, or because one or more [potentially responsibly parties ('PRPs')] have 'cut a check' made payable to the United States." *Id.* at 85 (alteration and citations omitted). Rather, "'the nature, extent, or amount of a PRP's *liability* must be decided, determined, or settled, at least in part, by way of agreement with the EPA.'" *Id.* (quoting *Bernstein v. Bankert*, 733 F.3d 190, 212 (7th Cir. 2013)) (emphasis in original). The Court then explained that in order to determine whether an agreement has "decided, determined, or settled the nature, extent, or amount" of a party's liability, *id.* (internal quotation marks and citation omitted), "a court must 'look to the specific terms of the agreement' and ascertain whether, based on the provisions in the settlement agreement, the parties intended to resolve the plaintiff's liability within the meaning of section 113(f)(3)(B)[,]" *id.* (quoting *Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1001 (6th Cir. 2015)).

Significantly for present purposes, the Court also specifically noted that "the courts of appeals diverge . . . with respect to *how* one best interprets agreement language that expressly eschews liability and reserves the right to sue," *id.* at 86 (emphasis in original), and it joined the Sixth and Seventh Circuits in concluding that "contracts containing non-admissions of liability, broad reservations of rights, and conditional covenants not to sue do not resolve liability[,]" *id.* (capitalization altered). Turning to the settlement agreement at issue in this case—which contained a "clear disclaimer of liability, [a] conditional release of liability for the claims the United States had brought against Guam in a [Clean

Water Act] complaint, and two complementary reservation-of-rights clauses[,]" *id.* at 92—this Court ultimately "conclude[d] that the 2004 Consent Decree did not trigger Guam's contribution rights under section 113(f)(3)(B) . . . which means that Guam is not precluded from maintaining its section 107(a) claim against the United States[,]" *id.* at 84.

Thus, in ruling on the United States' motion to dismiss, the Court expressly found

> that whether or not an agreement for the removal or remediation of hazardous waste 'resolves' liability for section 113(f)(3)(B) purposes turns on the terms of the agreement, and that, here, the 2004 Consent Decree did not resolve Guam's liability for the Ordot Landfill cleanup given the broad, open-ended reservation of rights, the plain non-admission of liability, and the conditional resolution of liability that the agreement contains.

Gov't of Guam, 341 F. Supp. 3d at 84. And it was for those reasons that the Court denied the United States' motion to dismiss. *See id.* at 97.

II.

Section 1292(b) of Title 28 of the United States Code provides that a district court may, in its discretion, certify an order for interlocutory appeal if "(1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation." *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003); *see also* 28 U.S.C. § 1292(b). "A mere claim that the district court's ruling was incorrect" will not suffice to establish that

"a substantial ground for difference of opinion" exists. *Singh v. George Wash. Univ.*, 383 F. Supp. 2d 99, 104 (D.D.C. 2005) (internal quotation marks and citation omitted). Rather, the requisite grounds for difference of opinion are "often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits[,] [or] where a court's challenged decision conflicts with decisions of several other courts." *APCC Servs.*, 297 F. Supp. 2d at 97–98. "[A] court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute." *Id.* at 98. And in order to show that an interlocutory appeal would "materially advance the ultimate termination of the litigation[,]" 28 U.S.C. § 1292(b), a movant must show that "reversal [of the court's order on appeal] would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018) (internal quotation marks and citation omitted).

In addition to satisfying the elements of section 1292(b) in a technical sense, the party who seeks an interlocutory appeal also "has the burden of persuading the Court that the circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *APCC Servs.*, 297 F. Supp. 2d at 95 (internal quotation marks and citation omitted). Because interlocutory appeals are generally disfavored, given the "strong congressional policy

against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals," *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F.Supp.2d 16, 20 (D.D.C. 2002) (internal quotation marks and citation omitted), when deciding whether to grant a request for certification of an order for interlocutory appeal under section 1292(b), a court must conclude not only that the moving party has satisfied all of the elements of section 1292(b), but also that certification is appropriate as a discretionary matter. *See Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 4 (D.D.C. 2018).

There is no dispute in the instant case that the United States has satisfied the first element of the section 1292(b) standard. (*See* Def.'s Mem. at 11, 12 (identifying "several controlling questions of law" that this Court's prior Order encompasses, including "how to properly interpret CERCLA [section 113(f)(3)(B)]"; "[w]hether the 2004 judicial settlement with the United States allowed Guam to pursue a CERCLA contribution claim under CERCLA [section 113(f)(3)(B)]"; and the proper "legal interpretation of the 2004 consent decree's terms"); *see also* Pl.'s Opp'n at 8 (conceding that "the first prong of the discretionary § 1292(b) test is admittedly satisfied").) For the reasons explained below, this Court further finds (A) that there is a substantial ground for difference of opinion concerning at least one such question, (B) that the immediate resolution of that question on appeal would materially advance the ultimate disposition of the litigation, and (C) that certification of the Court's prior Order is appropriate under the circumstances presented here. (*See* Def.'s Mem. at 10–11 (*citing Howard v. Office of the Chief*

Admin. Officer of the U.S. House of Reps., 840 F. Supp. 2d 52, 55 (D.D.C. 2012); *GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F. Supp. 2d 313, 316 (D.D.C. 1999)).)

A.

Given this Court's prior ruling, a "substantial ground for difference of opinion," 28 U.S.C. § 1292(b), plainly exists as to the question of "how one best interprets agreement language that expressly eschews liability and reserves the right to sue, when the court undertakes to evaluate whether a particular agreement resolved the liability of a CERCLA plaintiff for section 113(f)(3)(B) purposes[,]" *Gov't of Guam*, 341 F. Supp. 3d at 86 (internal quotation marks, alterations, and emphasis omitted). As explained in Section II above, a substantial ground for difference of opinion can be "established by a dearth of precedent within the controlling jurisdiction" or by "conflicting decisions in other circuits." *APCC Servs.*, 297 F. Supp. 2d at 97. It is clear to this Court that *both* of these circumstances exist here.

For one thing, there is no controlling precedent from the D.C. Circuit with respect to how to interpret section 113(f)(3)(B) in this context, because the D.C. Circuit has not yet addressed this question. In fact, this Court appears to be the only district court within this jurisdiction to have considered the matter. And, indeed, whether or not a particular consent decree or other agreement "resolves" liability for the purpose of this CERCLA section appears to be a mixed question of law and fact that plainly warrants guidance from the courts of appeals.

Furthermore, as mentioned above and explained fully in this Court's prior opinion, the other courts of

appeals that have analyzed this issue are *split*—with the Sixth and Seventh Circuits on one side, and the Ninth Circuit on the other. *See Gov't of Guam*, 341 F. Supp. 3d at 86; *see also Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1124–25 (9th Cir. 2017); *Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1004–05 (6th Cir. 2015); *Bernstein v. Bankert*, 733 F.3d 190, 212–14 (7th Cir. 2013). This Court devoted five pages of its prior opinion to a robust analysis of the divergent circuit court views, *see Gov't of Guam*, 341 F. Supp. 3d at 86–90; *see also APCC Servs.*, 297 F. Supp. 2d at 98 (directing courts to "analyze the strength of the arguments in opposition to the challenged ruling" when evaluating a section 1292(b) certification motion), and the schism need not be recounted fully here. It suffices to reiterate that this Court agreed—and continues to agree—with the Sixth and Seventh Circuits' holding that "contracts containing non-admissions of liability, broad reservations of rights, and conditional covenants not to sue do *not* resolve liability[,]" *Gov't of Guam*, 341 F. Supp. 3d at 86 (capitalization altered and emphasis added). And this conclusion stands in clear contrast to the Ninth Circuit's stated position that such agreements *can* "'resolve' liability for the purpose of CERCLA section 113(f)(3)(B)[.]" *Id.* at 88. This Court has not faltered in its abiding belief in its own interpretation of section 113(f)(3)(B), which the Sixth and Seventh Circuits share; however, given the Ninth Circuit's opposing view, there unquestionably exists substantial ground for different interpretations. *See, e.g., In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781, 2007 WL 1302396, at *2 (N.D. Cal. May 2, 2007) (finding that "[s]ubstantial ground for difference of opinion" existed because

"there is a substantial circuit split" on the pertinent issue).

The Government of Guam attempts to counter this conclusion by pointing out that, "while the issue of law decided in the Court's Opinion and Order may have been of first impression in this Circuit, that fact alone is not dispositive of whether there are 'substantial grounds for differences of opinion' as to that issue." (Pl.'s Opp'n at 9–10.) This may be so, but, again, the fact that the D.C. Circuit has not yet decided the pertinent legal issue is only *one* component of this Court's conclusion that there exists substantial ground for difference of opinion for the purpose of the pending section 1292(b) certification motion. And Guam does little to diminish the import of the most significant aspect of this Court's certification reasoning: the fact that there is a circuit split on the precise legal issue that precipitated this Court's ruling regarding the United States' motion to dismiss.

Boiled to bare essence, Guam's primary argument in opposition to certification is that the Ninth Circuit got it wrong, and that, to the extent that "[t]he Court's Opinion and Order comports with the majority of Circuit Courts that have addressed the issue[,]" this Court has "provided a 'better approach' than the Ninth Circuit to the question of law at issue." (*Id.* at 10.) But a district court's agreement with the weight of authority regarding a particular issue does not mean that there is no "substantial ground for difference of opinion[,]" 28 U.S.C. § 1292(b), as evidenced by the reasoning and opposing conclusion of another court of appeals, *cf. APCC Servs.*, 297 F. Supp. 2d at 98 ("The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to

show that there is no ground for difference of opinion." (internal quotation marks and citation omitted)). And while Guam correctly observes that the Ninth Circuit disagrees with this Court on only "one limited issue" (Pl.'s Opp'n at 10), it does not dispute that this relatively narrow disagreement centers on what has turned out to be the controlling legal issue with respect to the disputed motion in the instant case. (*See* Def.'s Mem. at 11.)

Finally, even when the majority of the circuit courts that have addressed a particular issue supports the district-court ruling that a proposed interlocutory appeal seeks to address, there may still be a sufficiently "substantial" ground for disagreement warranting interlocutory review, based on the nature of the case and the threshold status of the disputed district court determination. Specifically, "[w]here proceedings that threaten to endure for several years depend on an initial question of jurisdiction or the like, certification may be justified even if there is a relatively low level of uncertainty." *APCC Servs.*, 297 F. Supp. 2d at 98 (internal quotation marks, citation, and ellipsis omitted).

So it is here. The proceedings in this case "threaten to endure for several years[,]" *id.*, as discussed below, and the issue to be presented on appeal is a significant threshold question that, if reversed by the D.C. Circuit, would likely result in dismissal of Guam's entire case. Therefore, given that at least one court of appeals has disagreed with this Court's conclusion regarding "how one best interprets [settlement] agreement language . . . when the court undertakes to evaluate whether a particular agreement resolved the liability of a CERCLA

plaintiff for section 113(f)(3)(B) purposes[,]" *Gov't of Guam*, 341 F. Supp. 3d at 86 (internal quotation marks, alterations, and emphasis omitted)—a legal issue that arises at the outset of this potentially lengthy legal dispute and that might well resolve the entire case—this Court finds that the requisite "substantial ground for difference of opinion" exists to support the United States' call for interlocutory review.

B.

Allowing the United States to appeal this Court's Order denying its motion to dismiss *now*, rather than after the Court issues a final judgment, would also materially advance this litigation. *See* 28 U.S.C. § 1292(b); *see also Nat'l Veterans Legal Servs. Program*, 321 F. Supp. 3d at 155 ("[T]he relevant inquiry is whether reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." (internal quotation marks and citation omitted)). "[A] movant need not show that a reversal on appeal would actually end the litigation." *Id.* (internal quotation marks and citation omitted). But adding a belt to suspenders, the United States has done so here.

That is, if the D.C. Circuit were to reverse this Court's ruling and find that the 2004 Consent Decree did, in fact, "resolve[] [Guam's] liability to the United States for the cleanup and closure of the Ordot Landfill" and was "a cognizable 'settlement' for [CERCLA] section 113(f)(3)(B) purposes[,]" and thus that the past settlement triggered Guam's right to contribution under section 113(f)(3)(B), then Guam's

"contribution action must be dismissed as untimely, per the applicable three-year statute of limitations." *Gov't of Guam*, 341 F. Supp. 3d at 77 (internal quotation marks and citations omitted); (*see also* Def.'s Mem. at 13). Moreover, Guam's section 107(a) claim would also necessarily fail, because, as noted above, "cost-recovery claims under CERCLA section 107(a) and contribution claims under CERCLA section 113(f)(3)(B) are exclusive of one another," and "Guam is permitted to proceed against the United States for full cost recovery under section 107(a) only if Guam's right to contribution under section 113(f)(3)(B) has not been triggered." *Gov't of Guam*, 341 F. Supp. 3d at 84 (footnote omitted); (*see also* Def.'s Mem. at 13). A reversal of this Court's Order on appeal would therefore bring this litigation to a close, which obviously meets the standard of "materially advanc[ing] the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The potential for conservation of judicial resources and avoidance of "needless expense" to the parties is another factor that weighs in favor of certifying this Court's ruling for interlocutory appeal. *Nat'l Veterans Legal Servs. Program*, 321 F. Supp. 3d at 155 (internal quotation marks and citation omitted). Discovery has not yet begun in this cost-recovery case. And as the United States notes in its motion to certify, discovery is likely to be wide-ranging and extensive, for it "will cover issues ranging from World War II military engagements on the Island to the many decades of Guam's subsequent waste disposal operations at the Ordot Dump." (Def.'s Mem. at 17.) Guam does not contest that "[t]he Parties likely will spend many thousands of hours[,] and the United States will incur hundreds of thousands of dollars in

discovery and expert-related expenses[,] to defend this CERCLA case all the way through trial[.]" (*Id.* at 18.) And joinder of additional parties, *i.e.*, those entities "that arranged for the disposal of hazardous waste at the Ordot Dump or transported such waste to the Dump[,]" may also be necessary. (*Id.* at 17.) Thus, "even under Guam's case management proposal[,]" it seems likely that this case could take several years to litigate. (*Id.* at 18). On the other hand, if the Court's motion-to-dismiss ruling is certified for interlocutory review, and if the D.C. Circuit reverses this Court's Order, none of the anticipated lengthy and costly proceedings would be necessary.

Guam responds that even if this Court were to certify its Order for immediate appeal and the D.C. Circuit were to reverse the Order, litigation would still continue, as "the case would be returned to this Court in order to address Guam's alternative grounds for denial" of the United States' motion to dismiss. (Pl.'s Opp'n at 11); *see also Gov't of Guam*, 341 F. Supp. 3d at 94 n.13 ("Because this Court concludes that the 2004 Consent Decree did not resolve liability within the meaning of section 113(f)(3)(B), it need not consider whether a consent decree that addresses claims under the CWA can qualify as a 'settlement' within the meaning of section 113(f)(3)(B), or any of Guam's myriad other contentions." (internal citations omitted)). This argument appears to proceed from a misunderstanding of the nature of an interlocutory appeal of the denial of a dispositive motion that sought to terminate the case.

First of all, it is clear beyond cavil that "the appellate court may address any issue fairly included within the certified order because it is the *order* that

is appealable, and not the controlling question identified by the district court." *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1194 (D.C. Cir. 2005) (quoting *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 205 (1996)) (emphasis in original) (internal quotation marks omitted). This means that, upon interlocutory appeal, the D.C. Circuit would be reviewing this Court's Order denying the United States' motion to dismiss, "regardless of the grounds [this] Court gave for its decision." *Id.* And because Guam's alternative arguments were put "before the [C]ourt[,]" the circuit court can consider those arguments within the ambit of its interlocutory review. *Id.*

What is more, because the effect of an appellate reversal of a district court's order denying a motion to dismiss is a holding by the court of the appeals that the district court should have granted the motion—*i.e.*, a reversal under these circumstances *ends the case*—the D.C. Circuit would most likely reach and dispose of Guam's alternative arguments for why the case should go forward in the course of conducting its interlocutory review. *Cf. id.* (noting that "granting [the summary judgment] motion would have resulted in *complete dismissal* of the Government's claim" and thus the court of appeals "may review [the District Court's denial] regardless of the grounds the District Court gave for its decision" (emphasis in original)); *id.* at 1196 ("[I]t is difficult to see how we could establish such a policy that would cause us to affirm a decision denying summary judgment when a ground compelling its grant is fairly encompassed within the order."); *see also Lewis v. Pension Benefit Guar. Corp.*, 912 F.3d 605, 609 (D.C. Cir. 2018) (explaining that, in the context of an interlocutory appeal pursuant to

section 1292(b), court of appeals still "review[s] de novo the district court's decision on the motion to dismiss"). Consequently, far from Guam's suggestion that an appeal to the D.C. Circuit would encompass only the one anti-dismissal argument that this Court found persuasive, the D.C. Circuit would be called upon to determine the propriety of this Court's denial of the United States' motion more generally (based on whatever arguments the circuit court deemed necessary to consider), and if it reversed this Court's ruling, it would order that the motion be granted and that Guam's case be dismissed.

Undaunted, Guam further insists that the instant motion for certification is part of an overall "strategy of delay and piecemeal litigation" on the part of the United States that this Court should not countenance. (Pl.'s Opp'n at 12; *see also id.* (asserting that "the U.S. also has raised 18 other defenses in this case for which the same arguments made [in its motion to certify] could be made again following another unfavorable (to the U.S.) result[,]" and that "[t]he Court should not permit the U.S. to continue its strategy of delay and piecemeal litigation where many other dispositive motions and differences of opinion are likely to follow").) These contentions are plainly speculative, and Guam has not pointed to any evidence of bad faith on the part of the United States or its representatives. In the absence of such evidence, Guam's concern about future actions that counsel for the United States may or may not take is manifestly insufficient to rebut an otherwise viable certification request. If litigation continues before this Court and the United States elects to engage in unwarranted delay and "piecemeal" challenges in regard to future matters (*id.*), then Guam might well

be in a position to support its contentions and to argue that certain procedural maneuvers should not be permitted going forward. But for now, Guam has failed to make a sufficient showing that the present motion for certification is indicative of any such bad faith strategy on the part of the United States.

C.

Having concluded that the each of the elements of section 1292(b) have been met, this Court further finds that certifying its Order denying the United States' motion to dismiss for interlocutory appeal is appropriate as a discretionary matter. *See APCC Servs.*, 297 F. Supp. 2d at 95. The Court will exercise its discretion in this regard for largely the same reasons that it has determined that allowing for interlocutory appeal under the circumstances presented here could materially advance the litigation. (*See supra* Sec. II.B.) Well over one-hundred million dollars are at stake in this case, *see Gov't of Guam*, 341 F. Supp. 3d at 76, and discovery regarding the causes of the contamination at issue is likely to be voluminous and costly (*see* Def.'s Mem. at 18.). The parties and this Court would avoid significant costs if the D.C. Circuit decides on appeal that this Court was wrong about the threshold legal question pertaining to Guam's ability to seek cost recovery as a matter of law.

In sum, this Court has concluded that allowing the United States to appeal the Court's ruling denying its motion to dismiss immediately not only satisfies the elements of section 1292(b) of Title 28 of the United States Code, but also is appropriate under the circumstances presented in this case. As such, the

Court will certify its Order of September 30, 2018, for interlocutory appeal.

III.

This Court must next decide whether or not to stay the present proceedings, in light of its decision to certify its Order denying the United States' motion to dismiss for interlocutory appeal. *See* 28 U.S.C. § 1292(b) ("[A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). "District courts have broad discretion to stay all proceedings in an action pending the resolution of independent legal proceedings." *Nat'l Indus. for the Blind v. Dep't of Veterans Affairs*, 296 F. Supp. 3d 131, 137 (D.D.C. 2017). "In considering a stay, courts must 'weigh competing interests and maintain an even balance between the court's interests in judicial economy and any possible hardship to the parties.'" *Id.* (quoting *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012)). Thus, "hardship to the parties and benefits to judicial economy are the key interests to consider in evaluating a motion for a stay." *Id.*

It is clear to this Court that staying the instant district court proceedings would serve judicial economy and would not subject either party to hardship. As discussed above, discovery has not yet begun in this case, and a reversal of this Court's ruling would likely make discovery unnecessary. Moreover, given that the underlying case is itself a cost-recovery action, any clean-up costs that Guam incurs during the pendency of the interlocutory appeal would be subject to recovery (just like the costs

that have already been incurred), plus interest, if the D.C. Circuit affirms this Court's Order on appeal.

Guam argues that, instead of issuing a stay, "the case should be trifurcated," and the Court should allow discovery to proceed. (Pl.'s Opp'n at 13; *see also* Joint Case Mgmt. Report, ECF No. 48, at 12 (proposing that "Phase I would focus solely on issues of liability and associated defenses"; "Phase II would focus solely on damages and associated defenses"; and "Phase III would focus solely upon allocation of responsibility between the liable Defendants").) In this regard, Guam asserts that the district court's rationale behind denying the requested stay in *In re Vitamins Antitrust Litigation* is "equally applicable here[.]" (*Id.*); *see also In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 33142129, at *2 (D.D.C. Nov. 22, 2000) (reasoning that "[a] stay of jurisdictional discovery would certainly thwart the prompt resolution of this matter"). But the order that was certified for interlocutory appeal in the *In re Vitamins* case addressed only which rules would govern jurisdictional discovery, and did not resolve any dispositive legal issues. *See id.* at *1. Thus, that court's "prompt resolution" rationale does not apply here. *Id.* at *2. In other words, in the *In re Vitamins* case, proceedings would continue before the district court no matter what the D.C. Circuit decided, whereas, here, if the D.C. Circuit reverses this Court's decision, the case will be over.

Guam further asserts that it "has already borrowed and spent approximately $160 million on environmental cleanup related to the Ordot Dump and relocation of the facility to a new location[,]" and "[e]very day in which the U.S. delays this case is another day Guam has to pay full freight for the U.S.'

liability." (Pl.'s Opp'n at 14.) This argument is not a persuasive response to the United States' request for a stay, because, as this Court has already noted, if the ruling on the motion to dismiss stands and the case proceeds, and if Guam ultimately wins on the merits, Guam will be able to seek prejudgment interest to compensate for any delay resulting from the interlocutory appeal. *See Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d 43, 54 (D.C. Cir. 1997) ("The purpose of [pre-judgment interest] awards is to compensate the plaintiff for any delay in payment resulting from the litigation.").

Thus, the Court concludes that a stay will not subject the parties to hardship, and that staying the case during the pendency of the D.C. Circuit's interlocutory review will promote the efficient use of judicial resources and prevent potentially unnecessary and burdensome discovery expenses.

IV.

For the foregoing reasons, and as set forth in the accompanying Order, the United States' motion for certification under section 1292(b) of Title 28 of the United States Code will be **GRANTED**. Furthermore, all proceedings before this Court are **STAYED** pending a decision by the D.C. Circuit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT OF GUAM, Plaintiff,

v.

UNITED STATES of America,
Defendant.

No. 1:17-cv-2487 (KBJ)

Signed October 5, 2018

341 F. Supp. 3d 74

MEMORANDUM OPINION

KETANJI BROWN JACKSON, United States District Judge

The island of Guam has been a territory of the United States for more than a century, and for most of the period between 1898 and the mid-1900s, Guam served as a central base of operations for the United States Navy in the South Pacific. (Am. Compl., ECF No. 7, ¶ 6.) Early on, the Navy created a major landfill on the island—the Ordot Landfill—to support its mission, and this dump was used to dispose of munitions and chemicals, as well as military and civilian waste, for decades. (*Id.* ¶¶ 7, 11.) As relevant here, by the time the United States government relinquished control of Guam to civilian authorities in the year 1950, the Ordot Landfill contained, and would continue to receive, significant quantities of trash and hazardous waste that posed a serious risk to the surrounding environment. As a protectorate of the United States, Guam is subject to U.S. environmental laws, and pursuant to an agreement

with the U.S. Environmental Protection Agency ("the EPA") that arose under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1387, the local Guamanian authorities shut down the Ordot Landfill in 2011, and commenced the arduous (and quite expensive) task of cleaning up the landfill and permanently containing its contents so as to prevent hazardous waste leaks that threatened rivers, waterways, and the Pacific Ocean. (*See id.* ¶¶ 12, 14.) The Government of Guam ("Guam" or "Plaintiff") has now brought the instant three-count complaint against the United States ("United States" or "Defendant") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601–75. Guam alleges that, because the United States substantially contributed to the environmental contamination at the Ordot Landfill, the United States should pay the full $160,000,000 cost of cleaning up the dump under CERCLA's section 107(a)'s cost-recovery mechanism (*see* Am. Compl. ¶¶ 23, 25 (Count I)), or should at least pay its fair share of the cleanup costs under CERCLA's section 113(f)(3)(B)'s contribution mechanism (*see id.* ¶ 31 (Count III)).[1] Guam also seeks a declaratory judgment that establishes the United States's liability for "future removal and remediation costs incurred by Guam[.]" (*Id.* ¶ 29 (Count II).)

---

[1] In the context of CERCLA, courts commonly refer to the cost-recovery claim embodied in section 9607(a) of Title 42 of the United States Code as a "section 107(a)" action and they call the contribution claim embodied in section 9613(f)(3)(B) of Title 42 of the United States Code a "section 113(f)(3)(B)" action. This Memorandum Opinion generally employees that same nomenclature.

Before this Court at present is the United States's motion to dismiss Guam's complaint under Federal Rule of Civil Procedure 12(b)(6). (*See* United States' Mem. in Supp. of Mot. to Dismiss Guam's Am. Compl. ("Def.'s Mem."), ECF No. 27-1.) In its motion to dismiss, the United States argues that Guam cannot compel the United States to pay for the closure and remediation of the Ordot Landfill under CERCLA's section 107(a) because, under the circumstances presented here, CERCLA only provides Guam with a claim for contribution under section 113(f)(3)(B) (*see id.* at 28–29), and, unfortunately for Guam, any such contribution action must be dismissed as untimely, per the applicable three-year statute of limitations (*see id.* at 36–39).[2] The United States's argument hinges on the established view that section 107(a) claims and section 113(f)(3)(B) claims are mutually exclusive, and the contention that Guam's circumstances fit the latter provision, because Guam previously executed a 2004 Consent Decree with the EPA that purportedly "resolve[d] its liability to the United States" for the cleanup and closure of the Ordot Landfill, and the United States considers that agreement to be a cognizable "settlement" for section 113(f)(3)(B) purposes. *See* 42 U.S.C. § 113(f)(3)(B). Guam responds that the 2004 Consent Decree did not "resolve its liability" within the meaning of section 113(f)(3)(B), nor does that agreement qualify as a CERCLA "settlement," and thus, Guam maintains that it is not precluded from bringing a cost-recovery claim under section 107(a). (*See* Government of

[2] Page-number citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system automatically assigns.

Guam's Mem. in Opp'n to the United States of America's Mot. to Dismiss Guam's Am. Compl. ("Pl.'s Opp'n"), ECF No. 30, at 15–18.)

On September 30, 2018, this Court issued an Order that **DENIED** the United States's motion to dismiss. (*See* Order, ECF No. 37.) This Memorandum Opinion explains the reasons for that Order. In short, the Court concludes that a cost-recovery action under section 107(a) remains available to Guam because the 2004 Consent Decree plainly left the issue of liability for the costs associated with the Ordot Landfill cleanup unresolved, and therefore, section 113(f)(3)(B)'s contribution mechanism was not triggered. Consequently, and to that extent, the Court finds that the United States's motion to dismiss Guam's cost-recovery claim under section 107(a) must be denied.[3]

I. BACKGROUND[4]

A. The Ordot Landfill

Over one hundred years ago, the United States captured the island of Guam from Spain and began

---

[3] The Amended Complaint pleads a cost-recovery claim under section 107(a) and a contribution claim under section 113(f)(3)(B) "in the alternative." (Am. Compl. ¶ 31.) Given this Court's conclusion that Guam can maintain its cost-recovery claim against the United States under section 107(a), the alternative cause of action in Plaintiff's amended complaint must be **DISMISSED**.

[4] The following facts are derived from the Government of Guam's amended complaint and certain exhibits that are referenced in the complaint and are necessary to this Court's resolution of the pending motion. *See Azima v. RAK Investment Auth.*, 305 F.Supp.3d 149, 159 (D.D.C. 2018) (noting that, in the Rule 12(b)(6) setting, all reasonable inferences must be viewed "in the light most favorable to the plaintiff" and that this Court

administering the island as a United States territory. (*See* Am. Compl. ¶ 6.) Between 1898 and 1950, the United States Navy "unilaterally governed and operated" Guam (*id.*), and at some point during its administration of the island's operations, the Navy established the Ordot Landfill to dispose of the waste being generated on the island (*see id.* ¶ 7). In 1950, the Navy handed Guam, and the landfill, over to the newly-established civilian government (*see id.* ¶ 10), and the Guamanian authorities continued to operate the Ordot Landfill as a dump until the facility was officially closed in 2011 (*see id.* ¶ 14).

Notably, throughout its lifespan, the Ordot Landfill accepted waste from both military and civilian entities. (*See id.* ¶ 11.) The Government of Guam alleges that the United States military deposited "[s]ignificant quantities of munitions and chemicals" at the dump, including hazardous substances such as DDT and Agent Orange. (*Id.*) At the same time, the Ordot Landfill served as the only public dump site on the island of Guam until 2011 (*see id.*), and it appears that even though the landfill "reached capacity in 1986, it continue[d] to receive virtually all of the industrial and municipal waste from the civilian population of Guam" for a significant period of time thereafter, *United States v. Gov't of Guam*, 02-00022, 2008 WL 216918, at *1 (D. Guam Jan. 24, 2008). Thus, "[w]hat was once a valley

---

may consider "the facts alleged in the complaint . . . and documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss" (internal quotation marks and citation omitted)).

[became] at least a 280-foot mountain of trash." *Id.* (describing the Ordot Landfill back in 2008).

For present purposes, it is important to note that because the Ordot Landfill was built in the pre-World War II era, it was not designed with modern environmental practices in mind, and thus, did not have certain safeguards to shield the surrounding environment from contamination. For example, "[d]uring its years of operation, the Ordot Landfill was . . . uncapped at its top." (Am. Compl. ¶ 12.) Consequently, "[t]he landfill absorbed rain and surface water" from storms and other sources, and this water "percolated through the landfill and picked up contaminants." (*Id.*) In addition, since the landfill was also "unlined on its bottom[,]" the contaminated water—which is known as "leachate"—leaked out of the Ordot Landfill into the nearby Lonfit River, and the river carried hazardous materials from the landfill out into the Pacific Ocean. (*Id.*)

The EPA has been aware of these and other environmental problems with the Ordot Landfill for many decades; indeed, the agency placed this site on the National Priorities List as far back as 1983, which indicated its "priority [status] for the expenditure of funds to respond to the release or threatened release of hazardous substances." (*Id.* ¶ 13.) Moreover, starting in 1986, the EPA began issuing administrative orders under the CWA, directing Guam's civilian government to halt the further discharge of contaminants from the Ordot Landfill into the rivers and oceans of Guam. *See Guam*, 2008 WL 216918, at *1. Over the next fifteen years, the EPA regularly ordered Guam to devise a feasible plan for containing and disposing of the waste at the

landfill, but Guam did not provide a plan that satisfied the agency. *See id.*

B. The EPA's CWA Lawsuit And The Resulting Consent Decree

The EPA finally filed a lawsuit against Guam in 2002, "asserting that leachate was discharging from the Ordot Landfill into the Lonfit River and two of its tributaries" in violation of the CWA. (Am. Compl. ¶ 14.) The EPA's legal action sought (1) "[a]n injunction ordering the Government of Guam to comply with the [CWA]"; (2) civil monetary penalties; (3) and court orders that required Guam to file timely and complete applications for any required discharge permits and forbade Guam from allowing further unpermitted discharges from the landfill. (CWA Compl., Ex. 2 to Decl. of Matthew Woolner in Supp. of Def. United States' Mot. to Dismiss ("Woolner Decl."), ECF No. 27-2, at 13 (Prayer for Relief).) Ultimately, rather than litigating these CWA claims in court, the parties entered into a consent decree in 2004 to resolve the EPA's lawsuit. (*See* 2004 Consent Decree, Ex. 3 to Woolner Decl., ECF No. 27-2, at 16–45.)

The 2004 Consent Decree between Guam and the EPA required Guam to pay a relatively modest civil penalty (*see id.* ¶ 5); mandated that Guam close the Ordot Landfill and cease the discharge of pollutants into the Lonfit River (*see id.* ¶ 8); and required Guam to construct a new municipal landfill to replace the Ordot Landfill (*see id.* ¶ 9). Significantly for present purposes, despite imposing these obligations on Guam, the Consent Decree specifically provided that the agreement was "based on the pleadings, before taking testimony or adjudicating any issue of fact or law, and without any finding or admission of liability

against or by the Government of Guam[.]" (*Id.* at 18 (Therefore Clause).)

The 2004 Consent Decree also contained a number of provisions that specified the claims that the EPA was relinquishing as part of the settlement and the rights the United States retained notwithstanding the parties' agreement. First, the Consent Decree expressly stated that

> [e]ntry of this Consent Decree and compliance with the requirements herein shall be in full settlement and satisfaction of the civil judicial claims of the United States against the Government of Guam as alleged in the Complaint filed in this action through the date of the lodging of the Consent Decree.

(*Id.* ¶ 45.) The Consent Decree also provided that

> [n]othing in this Consent Decree shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations unrelated to the claims in the Complaint or for any future events that occur after the date of lodging of this Consent Decree.

(*Id.* ¶ 46.) The Consent Decree further stated that "[e]xcept as specifically provided herein, the United States does not waive any rights or remedies available to it for any violation by the Government of Guam of federal and territorial laws and regulations." (*Id.* ¶ 48.)

In accordance with the terms of the Consent Decree, which, as noted, required the "complete closure of [the] Ordot Dump" and the "implementation of [a] post-closure plan" (*id.* ¶ 8(h)), Guam began taking steps to close the Ordot Landfill

and to put an end to the leaching of pollutants from that dump. Guamanian officials officially ceased operations at the Ordot Landfill in 2011, and "[r]emediation and closure work" began "in December 2013." (*Id.* ¶ 14.) That remediation work, "which include[s] capping the landfill, installing storm water management ponds, leachate storage tanks and a sewer line, . . . is still ongoing" (*id.*), and "Guam expects costs of remediation . . . to exceed approximately $160,000,000" (*id.* ¶ 15).

C. Procedural History

On March 2, 2017, Guam filed the instant CERCLA action against the United States to recoup its landfill-closure and remediation costs. (*See* Compl., ECF No. 1.) On May 19, 2017, Guam filed the operative amended complaint, which contains three counts that collectively allege that the United States is liable for at least some, if not all, of the costs that Guam has incurred in closing and remediating the Ordot Landfill. (*See* Am. Compl. ¶¶ 32–34.) The first count contends that, because the United States Navy contributed hazardous waste to the Ordot Landfill and managed that landfill for many decades (*see id.* ¶ 19), Guam is entitled to recover all of the "removal and remediation costs" it incurred at or "related to the Ordot Landfill, plus interest" from the United States pursuant to section 107(a) of the CERCLA (*id.* ¶ 25). The second count seeks "a declaratory judgment of liability" to the effect that the United States will pay for Guam's future expenses relating to the remediation of the Ordot Landfill under CERCLA's section 113(g)(2). (*Id.* ¶¶ 29, 33.) The third count is a claim in the alternative for contribution under section 113(f)(3)(B) of CERCLA; Guam maintains that, even

if it is not entitled to recover the full costs of remediation and closure of the Ordot Landfill, the United States must nevertheless pay "for all [such] costs in excess of Plaintiff's fair and equitable share of costs." (*Id.* ¶ 31.)

On November 27, 2017, the United States filed a motion to dismiss Guam's amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (*See* Def.'s Mem.) In its motion, the United States first argues that Guam cannot recover its costs for remediating the Ordot Landfill under section 107(a) because Guam resolved its liability for that cleanup in the 2004 Consent Decree, and a contribution claim under section 113(f)(3)(B) is "the exclusive CERCLA remedy for the costs a liable party is compelled to incur pursuant to a judicially-approved settlement with the United States." (*Id.* at 28.) The United States further asserts that, "because CERCLA imposes a three-year statute of limitations on contribution claims[,]" Guam "waited far too long after settling its liability in 2004" to bring its alternative claim for contribution under section 113(f)(3)(B). (*Id.* at 27.) Thus, from the United States's perspective, Guam has no right to recover under either section 107(a) or section 113(f)(3)(B) at this time, and therefore, the Court should "dismiss Guam's amended complaint with prejudice." (*Id.* at 40.)

Guam's opposition challenges the United States's understanding of the applicable law on several grounds. Most significantly, Guam argues that its right to maintain a contribution action under section 113(f)(3)(B) was never triggered because Guam had not "resolved its liability . . . [for] a response action or

for some or all of the costs of such action" in the context of "an administrative or judicially approved settlement[,]" as the text of section 113(f)(3)(B) requires. (Pl.'s Opp'n at 20.) Guam insists that the parties "did not resolve response cost liability" in the 2004 Consent Decree, because the provisions of that agreement left Guam fully exposed to future liability under CERCLA. (*Id.* at 16; *see also id.* at 26–40.) Moreover, because the 2004 Consent Decree was "expressly limited to the CWA" (*id.* at 16), Guam argues that it does not qualify as a "settlement agreement" giving rise to a cause of action for contribution under CERCLA's section 113(f)(3)(B) (*id.*; *see also id.* at 40–48). Indeed, Guam asserts that it has not heretofore pursued a contribution claim against the United States *precisely because* it is not entitled to do so, given that its liability for the Ordot Landfill cleanup costs remains unresolved. (*See id.* at 20 n.12.) Thus, in Guam's view, a cost-recovery action under section 107(a) is appropriate and legally available, and this Court should not dismiss the instant cost-recovery claim.

The United States's motion to dismiss became ripe for decision on January 8, 2018. (*See* Def.'s Mem.; Pl.'s Opp'n; United States' Reply in Supp. of its Mot. to Dismiss ("Def.'s Reply"), ECF No. 33.) This Court held a hearing on May 15, 2018, and on September 30, 2018, the Court issued an Order denying the United States's motion to dismiss.

II. LEGAL STANDARDS

A. Motions To Dismiss Under Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint on the grounds that it "fail[s] to state a claim upon which

relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a complaint must comply with Rule 8, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief[,]" Fed. R. Civ. P. 8(a)(2), and it must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation omitted). A claim is plausible on its face when it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Therefore, even though a complaint "'does not need detailed factual allegations,' the factual allegations 'must be enough to raise a right to relief above the speculative level.'" *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 343 (D.C. Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

In evaluating whether a complaint has managed to set forth sufficient factual allegations, a court must "accept the plaintiff's factual allegations as true and construe the complaint liberally, granting plaintiff the benefit of all inferences that can reasonably be derived from the facts alleged." *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 345 (D.C. Cir. 2018) (internal quotation marks, alterations, and citation omitted). The court generally may not consider matters beyond the pleadings, *see Patterson v. United States*, 999 F.Supp.2d 300, 306 (D.D.C. 2013), but a limited exception to this rule does allow a court to consider "any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice[,]" *Equal Emp.*

Opportunity Comm'n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). A court may also review "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Mills v. Hayden*, 284 F.Supp.3d 14, 17 (D.D.C. 2018).

Finally, to the extent that a defendant's 12(b)(6) motion rests on the argument that a plaintiff's claim falls outside the applicable statute of limitations, "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint." *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017) (internal quotation marks and citation omitted). "A complaint will be dismissed under Rule 12(b)(6) as 'conclusively time-barred' if 'a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *Id.* (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). Put another way, only "[i]f no reasonable person could disagree on the date on which the cause of action accrued [may] the court [] dismiss a claim on statute of limitations grounds." *Wash. Metro. Area Transit Auth. v. Ark Union Station, Inc.*, 268 F.Supp.3d 196, 204 (D.D.C. 2017) (internal quotation marks and citation omitted).

B. Legal Actions Brought Under CERCLA

Congress enacted CERCLA in 1980 "in response to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The statute is designed to "promote the timely cleanup of hazardous waste sites and to ensure that

the costs of such cleanup efforts [a]re born by those responsible for the contamination[,]" *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009) (internal quotation marks and citation omitted), and to achieve these goals, Congress "impose[d] strict liability for environmental remediation" of any hazardous waste, including waste that was initially "disposed of according to then-acceptable practices before [it was] known to be hazardous[,]" *Lockheed Martin Corp. v. United States*, 833 F.3d 225, 227 (D.C. Cir. 2016). Thus, CERCLA "reach[es] back indefinitely into the past to make a[n] [entity] liable for the cleanup of hazardous materials it may have [properly] disposed of decades ago." John L. Ropiequet, *Environmental Law Litigation Under CERCLA*, 47 Am. Jur. Trials § 1 (April 2018 Update).

The instant case centers on the text of two of CERCLA's remedial provisions: (1) section 107(a)'s cost-recovery mechanism, which is codified at section 9607(a) of Title 42 of the United States Code, and (2) section 113(f)(3)(B)'s contribution mechanism, which is codified at section 9613(f)(3)(B) of Title 42 of the United States Code. These two provisions work in harmony to encourage response actions such as "removal[s]" (*i.e.*, carting away hazardous waste from a given waste site) or "remediation[s]" (*i.e.*, taking action that ensures that hazardous waste will never escape from its current waste site), 42 U.S.C. § 9601(23)–(25); *see also Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1117 (9th Cir. 2017), and they provide the actor with the means to ensure that the costs of such response activities are covered, while assuring any payor that such costs will ultimately be allocated properly among all "potentially responsible

parties" (hereinafter referred to as "PRPs"), *see United States v. Atl. Research Corp.*, 551 U.S. 128, 139, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007).

Specifically, section 107(a) "creates a cause of action through which entities that have incurred costs cleaning up contaminated sites may sue to recover cleanup costs from" four categories of PRPs, *Lockheed Martin*, 833 F.3d at 227—the present owners of the facility; the past owners of the facility; individuals who disposed of hazardous waste at that site; and individuals who transported hazardous waste to these facilities, *see* 42 U.S.C. § 9607(a)(1)–(4). When sued, such PRPs are usually subject to joint-and-several liability for the entire cost of cleaning up the hazardous waste site, meaning that a single defendant sued under section 107(a) can be held legally responsible for all of the cleanup costs even if other PRPs also disposed of hazardous pollutants at that site. *See, e.g.*, *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 259 (D.C. Cir. 2002). *But see Bernstein v. Bankert*, 733 F.3d 190, 201 (7th Cir. 2013) (explaining that, while joint-and-several liability is the default presumption, if "the defendant can demonstrate that there is a reasonable basis for determining the contribution of each cause to a single harm[,]" then a court considering a section 107(a) claim may apportion the costs of the cleanup in proportion to the responsibility of the PRPs for those costs).

Through section 113(f), Congress has provided a mechanism for PRPs who have been held liable for cleanup costs to seek contribution from other responsible parties, thereby ensuring that the costs of cleaning up hazardous waste sites are divided fairly among all PRPs. *See Cooper Indus., Inc. v. Aviall*

Servs., Inc., 543 U.S. 157, 162–63, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004). As relevant here, a PRP may bring an action for contribution under section 113(f)(3)(B) if that PRP

> has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement[.]

42 U.S.C. § 9613(f)(3)(B); *see also Atl. Research Corp.*, 551 U.S. at 132 n.1, 127 S.Ct. 2331 ("Section 113(f)(3)(B) permits private parties to seek contribution after they have settled their liability with the Government.").[5]

Thus, when coupled together, the remedies available under sections 107(a) and 113(f) serve to ensure that PRPs pick up the tab for the cleanup costs that occur with respect to hazardous waste sites and that PRPs share the costs in an equitable manner. In this way, sections 107(a) and 113(f) provide "complementary yet distinct" causes of action. *Id.* at 138, 127 S.Ct. 2331. And because these statutory provisions establish "distinct remed[ies] available to persons in different procedural circumstances[,]" *Bernstein*, 733 F.3d at 202, every circuit to have addressed the issue has held that claims for cost-recovery under section 107(a) and claims for contribution under section 113(f) (3)(B) are exclusive, in the sense that a CERCLA plaintiff cannot seek to advance both claims against the same defendant at

---

[5] Section 113(f)(1) parallels section 113(f)(3)(B), insofar as it bestows upon PRPs a cause of action for contribution, but only once they have been found liable in the context of a fully litigated section 106(a) or section 107(a) action. *See* 42 U.S.C. § 9613(f)(1).

the same time, *see* Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 Stan. L. Rev. 191, 226–27 (2018).[6] What is more, courts routinely evaluate the availability of a cost-recovery claim under section 107(a) by determining whether the circumstances that give rise to a contribution claim under section 113(f) have occurred. *See, e.g.*, *Asarco*, 866 F.3d at 1127 (examining whether a settlement agreement has "resolved liability" in order to assess the availability of a section 107(a) claim); *Bernstein*, 733 F.3d at 207–08 (same). The instant dispute concerns whether, and to what extent, Guam can pursue either of these remedies in this case.[7]

III. ANALYSIS

In its motion to dismiss, the United States maintains that Guam is precluded from seeking cost-

---

[6] *See also Asarco*, 866 F.3d at 1117; *Bernstein*, 733 F.3d at 206; *Solutia, Inc., v. McWane, Inc*, 672 F.3d 1230, 1236–37 (11th Cir. 2012); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603–04 (8th Cir. 2011); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010); *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007).

[7] Although not pivotal to the outcome of this case, it is noteworthy that the two causes of action at the center of this dispute have different statutes-of-limitations periods. *See Asarco*, 866 F.3d at 1117. The CERCLA plaintiff who intends to file a lawsuit under section 107(a) must do so within six years of the "initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B). Meanwhile, an action under section 113(f) must commence no later than three years after "the date of judgment in any [CERCLA action]" or within three years of the entry of "a judicially approved settlement with respect to such costs or damages." *Id.* § 9613(g)(3)(B).

recovery under CERCLA's section 107(a) because the prescriptions of section 113(f)(3)(B) apply to the circumstances presented here. As noted, and as the amended complaint itself suggests, cost-recovery claims under CERCLA section 107(a) and contribution claims under CERCLA section 113(f)(3)(B) are exclusive of one another, such that Guam is permitted to proceed against the United States for full cost recovery under section 107(a) only if Guam's right to contribution under section 113(f)(3)(B) has not been triggered.[8] Thus, the key questions that the pending motion to dismiss presents is whether the 2004 Consent Decree "resolve[d] [Guam's] liability" for the response action or response costs that Guam undertook with respect to the Ordot Landfill and also qualifies as a "settlement" within the meaning of section 113(f)(B)(3). (*Compare* Def.'s Mem. at 28–31 (discussing the resolution of liability issue) *and id.* at 31–34 (arguing that a settlement under the CWA can trigger a section 113(f)(3)(B) action) *with* Pl.'s Opp'n at 22–40 (contending that Guam's liability for the Ordot Landfill cleanup costs was not resolved in the 2004 Consent Decree) *and id.* at 40–47 (contending that a CWA consent decree

[8] Although the D.C. Circuit has not yet made this particular pronouncement and Guam's counsel refused to concede at the motion hearing that Guam cannot maintain *both* a section 107(a) cost-recovery claim *and* a section 113(f) contribution claim simultaneously (*see* Hr'g Tr. at 16:4–13), the amended complaint quite clearly seeks full cost recovery under section 107(a) and pleads contribution under section 113(f) "in the alternative" (Am. Compl. ¶¶ 31, 34), and a party cannot amend its complaint through subsequent argument, *see Hudson v. Am. Fed'n of Gov't Emps.*, 308 F.Supp.3d 388, 396 (D.D.C. 2018).

cannot qualify as a "settlement" under section 113(f)(3)(B)).)

For the reasons explained below, this Court concludes that the 2004 Consent Decree did not trigger Guam's contribution rights under section 113(f)(3)(B). In accordance with the persuasive reasoning of the Sixth and Seventh Circuits in CERCLA cases that are substantially similar to this one, this Court finds that whether or not an agreement for the removal or remediation of hazardous waste "resolves" liability for section 113(f)(3)(B) purposes turns on the terms of the agreement, and that, here, the 2004 Consent Decree did not resolve Guam's liability for the Ordot Landfill cleanup given the broad, open-ended reservation of rights, the plain non-admissions of liability, and the conditional resolution of liability that that agreement contains. Thus, the statutorily prescribed conditions for bringing a contribution claim under section 113(f)(3)(B) have not been satisfied, which means that Guam is not precluded from maintaining its section 107(a) claim against the United States.

A. To "Resolve" Liability Within The Meaning Of Section 113(f)(3)(B), The Agreement At Issue Must Decide Or Determine That The Claimant PRP Is Liable For The Costs Of A Response Action

CERCLA nowhere defines the phrase "resolved its liability," which, as noted, is one of the veritable linchpins of section 113(f)(3)(B). *See* 42 U.S.C. § 9613(f)(3)(B) (providing an action for contribution to "[a] person who has *resolved its liability* to the United States or a State for some or all of a response action"

(emphasis added)). Therefore, consistent with ordinary principles of statutory construction, this Court must interpret that phrase in accordance with its plain meaning. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376–77, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006) (citation omitted). The ordinary meaning of the verb "resolve" is "[t]o find an acceptable or even satisfactory way of dealing with []a problem or difficulty[.]" *Black's Law Dictionary* 1504 (10th ed. 2014); *see also* Merriam-Webster Dictionary Online (defining "resolve" to mean "to deal with successfully," "reach a firm decision about," or "work out the resolution" of something).[9] Thus, Congress's invocation of the word "resolved" suggests an "element of finality[,]" *Asarco*, 866 F.3d at 1122, meaning that the issue has been "decided, determined, or settled—finished, with no need to revisit[,]" *Bernstein*, 733 F.3d at 211. One reasonably concludes, then, that "resolving" liability requires the parties to have reached a "firm decision about liability" such that the "the question of liability" is no longer "susceptible to further dispute or negotiation." *Asarco*, 866 F.3d at 1122.

Given this understanding, it is clear to this Court—as it was to the Sixth, Seventh, and Ninth Circuits—that liability with respect to cleaning up a hazardous waste site is not "resolved" simply and solely because interested parties have "sign[ed] a settlement agreement" concerning the response actions that will be taken at the site, *Bernstein*, 733 F.3d at 213, or because one or more PRPs have "cut a check" made payable to the United States, *Fla. Power*

---

[9] *See* https://www.merriam-webster.com/dictionary/resolve (last visited June 27, 2018).

Corp. v. FirstEnergy Corp., 810 F.3d 996, 1006 (6th Cir. 2015). Instead, "[t]o meet the statutory trigger for a contribution action under [section 113(f)(3)(B)], the nature, extent, or amount of a PRP's *liability* must be decided, determined, or settled, at least in part, by way of agreement with the EPA." *Bernstein*, 733 F.3d at 212 (emphasis in original); *see also Asarco*, 866 F.3d at 1122 (endorsing and adopting that definition); *Fla. Power*, 810 F.3d at 1003 (same).

Of course, there exists no formulaic means of determining when a particular settlement agreement has "decided, determined, or settled" the "nature, extent, or amount" of an entity's liability, *Bernstein*, 733 F.3d at 212, and, for present purposes, therein lies the rub. Each superfund dispute is unique, and every settlement agreement comes about through individualized negotiations between parties who have idiosyncratic concerns that inform the final contents of the contract they create. The circuits appear unanimous in their conclusion that, to best evaluate the parties' intent given this conglomeration of circumstances, a court must "look to the specific terms of the agreement" and ascertain whether, based on the provisions in the settlement agreement, the parties intended to resolve the plaintiff's liability within the meaning of section 113(f)(3)(B). *Fla. Power*, 810 F.3d at 1001; *see also Asarco*, 866 F.3d at 1125 ("Whether this test is met depends on a case-by-case analysis of a particular agreement's terms."); *Bernstein*, 733 F.3d at 213 ("Whether or not liability is resolved through a settlement simply is not the sort of question which can or should be decided by universal rule. Instead, it requires a look at the terms of the settlement on a case-by-case basis.").

In this regard, when the agreement that is subject to interpretation is a federal consent decree, its "construction . . . is essentially a matter of contract law." *Segar v. Mukasey*, 508 F.3d 16, 21 (D.C. Cir. 2007) (internal citation and quotation marks omitted). Moreover, contracts to which the United States is a party must be interpreted according to the precepts of federal common law. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) ("We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law."). Therefore, a consent decree between the federal government and another party must also be interpreted in light of the federal common law of contracts. *See United States v. Volvo Powertrain Corp.*, 854 F.Supp.2d 60, 64 n.1 (D.D.C. 2012); *see also Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (explaining that this circuit typically derives the rules governing the federal common law of contracts from the Second Restatement of Contracts since "those principles represent the 'prevailing view' among the states").[10]

---

[10] Guam's suggestion that the 2004 Consent Decree must be interpreted according to the precepts of state contract law—in this case, the law of Guam—ignores the different practices of this Circuit with respect to this issue. (*See* Pl.'s Opp'n at 20–22.) The Sixth Circuit appears to have taken the approach that state common law governs with respect to its interpretation of administrative orders by consent and consent decrees. *See Fla. Power*, 810 F.3d at 1001 (applying Ohio law to an administrative order by consent); *John B. v. Emkes*, 710 F.3d 394, 407 (6th Cir. 2013) (applying Tennessee law in interpreting a consent decree). But, that view is flatly inconsistent with the D.C. Circuit's precedent; therefore, this Court will look to federal common law here.

Where the courts of appeals diverge is with respect to *how* one best interprets agreement language that expressly eschews liability and reserves the right to sue, when the court undertakes to evaluate whether a particular agreement "resolve[d] [the] liability" of a CERCLA plaintiff for section 113(f)(3)(B) purposes. *Compare, e.g.*, *Asarco*, 866 F.3d at 1124–25 *and Chitayat v. Vanderbilt Assoc.*, 702 F.Supp.2d 69, 81 (E.D.N.Y. 2010) *with Fla. Power*, 810 F.3d at 1004–05; *Bernstein*, 733 F.3d at 212–14; *and DMJ Assocs., LLC v. Capasso*, 181 F.Supp.3d 162, 168 (E.D.N.Y 2016). The Sixth, Seventh, and Ninth Circuits have considered settlement agreements that contain non-admissions with respect to liability, conditional releases of liability for the claims addressed therein, and unambiguous reservation-of-rights clauses—agreements much like the 2004 Consent Decree at issue here (*see, e.g.*, 2004 Consent Decree ¶¶ 45–46, 48)—and have reached different conclusions regarding whether agreements that contain such clauses should be deemed to have "resolved" liability such that they trigger a claimant's right to bring a contribution action under section 113(f)(3)(B). As explained below, this Court believes that the Sixth and Seventh Circuits have the better approach.

1. <u>The Sixth And Seventh Circuits Correctly Concluded That Contracts Containing Non-Admissions Of Liability, Broad Reservations Of Rights, And Conditional Covenants Not To Sue Do Not Resolve Liability</u>

At issue in the Seventh Circuit's *Bernstein* decision was whether two written agreements between the EPA and several different PRPs

(agreements that were denominated "Administrative Orders by Consent" ("AOCs")) had resolved those PRPs' liability for the purpose of section 113(f)(3)(B). *See* 733 F.3d at 212–16. In the latter of the two agreements, the EPA had "select[ed] a removal action and cleanup objective[]" for the PRPs to perform. *Id.* at 207. Yet, the written agreement also specifically stated that "[e]xcept as expressly provided in" the covenants not to sue, "nothing in this [o]rder constitutes a satisfaction of or release from any claim or cause of action . . . under CERCLA, other statutes, or the common law." *Id.* at 203. Furthermore, while the covenants not to sue warranted that the EPA would not proceed to sue the PRPs under section 107(a), the agreement "conditioned" that promise "upon the complete and satisfactory performance" of the terms of the AOC. *Id.* That AOC also stated that the agreement would not "constitute any admission of liability by any (or all) of the Respondents nor any admission . . . of the basis or validity of U.S. EPA's findings, conclusions or determinations[.]" *Id.* at 204. Thus, the Seventh Circuit panel astutely observed that the agreement contained "reservations of rights, conditional covenants, and express disclaimers of liability." *Id.* at 214.

In analyzing the agreement for section 113(f)(3)(B) purposes, the Seventh Circuit panel took particular stock in the fact that the parties had expressly disclaimed any resolution of liability; given that fact alone, the panel noted that it was "very difficult to say . . . that the agreement between the parties constituted a resolution of liability." *Id.* at 212. And in light of this express disclaimer of liability and other indicia within the terms of the contract, the court concluded that, while the PRPs had "'settled' with the

EPA[]" insofar as the PRPs had "agreed to perform certain actions in order to remedy an instance of environmental contamination[,]" the parties had not "settl[ed] the issue of *liability* for that contamination—which is what the statute requires[.]" *Id.* (emphasis in original).

The panel further addressed—and rejected—the EPA's argument that the covenants not to sue within the AOC demonstrated that the parties had intended to resolve their liability. *See id.* The Seventh Circuit noted that, while the AOC included promises by the agency not to sue the PRPs concerning the response actions the agreement covered, within the AOC, the parties had expressly *conditioned* those covenants not to sue upon the PRPs' "complete performance" of the removal and cleanup actions, *see id.* at 212–13, and in the Seventh Circuit's view, such conditional clauses did not demonstrate that the parties had intended to resolve liability, because those clauses' terms made it emphatically clear that "the resolution of liability would not occur until performance was complete," as that would be "the first time at which the covenant would have any effect[,]" *id.*

Ultimately, the Seventh Circuit explained its conclusion with respect to the resolution of liability this way: "[t]he parties to a settlement may choose to structure their contract so that liability is resolved immediately upon execution of the contract. Or, the parties may choose to leave the question of liability open through the inclusion of reservations of rights, conditional covenants, and express disclaimers of liability." *Id.* at 213–14 (citation omitted). The panel concluded that the terms and circumstances of the settlement agreement in *Bernstein* indicated that the parties had opted to do the latter, and it therefore

held that the settlement agreement between the EPA and the pertinent PRPs had not resolved liability within the meaning of section 113(f)(3)(B). *See id.* at 214; *see also, e.g.*, *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 691–92 (7th Cir. 2014) (applying these same principles in determining whether a PRP has resolved its liability within the meaning of section 113(f)(3)(B)).

The Sixth Circuit has recently employed similar reasoning to reach similar results. *See, e.g.*, *Fla. Power*, 810 F.3d at 1003–04. Thus, that court has plainly stated that broad reservations of rights, conditional covenants not to sue, and/or language that "explicitly condition[s] the resolution of liability on performance" can prevent a settlement agreement from being interpreted as one that resolves liability under CERCLA. *Id.* at 1003–04; *see also ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 459 (6th Cir. 2007) (holding that the EPA's reservation of rights "to adjudicate Plaintiff's liability for failure to comply with the AOC, for costs of response . . . costs of injunctive relief" and so on demonstrates no intent to resolve liability). Moreover, like the *Bernstein* court, the Sixth Circuit appears to find that disclaimers of liability weigh against the conclusion that the parties intended to resolve liability within the meaning of section 113(f)(3)(B). *See Fla. Power*, 810 F.3d at 1004 ("This provision parallels the non-admission of liability provisions in the *ITT Industries* and *Bernstein* AOCs." (citations omitted)); *ITT Indus.*, 506 F.3d at 460 ("[P]articipation in this Consent Order does not constitute an admission of liability[.]").

This reasoning was on full display in the Sixth Circuit's *Florida Power* case. In that case, the court examined whether two Administrative Orders of

Consent resolved liability within the meaning of section 113(f)(3)(B)—AOCs that expressly provided that "[f]ollowing satisfaction of the requirements of this Consent Order, plaintiff shall have resolved its liability to EPA[.]" 810 F.3d at 1004 (alterations omitted). In both AOCs, the EPA also "broadly reserved its 'right to take any enforcement action pursuant to CERCLA or any other available legal authority . . . for any violation of law or this Consent Order[,]'" *id.* at 1003 (alteration omitted), and while one of the AOCs also contained an express disclaimer of liability, the other AOC contained no statement on liability either way, *see id.* at 1004. Taking all of these provisions into consideration, the Sixth Circuit held that these agreements did not resolve liability within the meaning of section 113(f)(3)(B), because the AOCs "expressly condition[ed] the resolution of liability on performance of the contract, as opposed to resolving liability on the contract's effective date[,]" and also "broadly reserve[d] the EPA's rights." *Id.* at 1005. In this regard, courts concluded that there were "no material differences between the AOCs in [the Sixth Circuit's *ITT* case] and *Bernstein* that warrant[ed] a different outcome[.]" *Id.* at 1004.[11]

---

[11] In *ITT*, the Sixth Circuit held that an Administrative Order by Consent "did not resolve any of the plaintiff's liability for at least two reasons." *Fla. Power*, 810 F.3d at 1002. "First, the EPA broadly reserved its rights to take legal action to adjudicate the plaintiff's liability for failure to comply with the AOC, for costs of response (past, present, or future), for costs of injunctive relief or enforcement, criminal liability, and other damages. And, "[s]econd, the plaintiff had not conceded the question of its liability, and the AOC expressly stated that the plaintiff's 'participation in this Consent Order does not constitute an admission of liability.'" *Id.* (quoting *ITT*, 506 F.3d at 460).

2. The Ninth Circuit Mistakenly Characterizes Settlements That Contain Conditional Releases, Non-Admissions, And Broad Reservations Of Rights As Agreements That "Resolve" Liability For The Purpose Of CERCLA Section 113(f)(3)(B)

By contrast, the Ninth Circuit considered whether a settlement agreement "resolved [the] liability" of a PRP within the meaning of section 113(f)(3)(B) just last year, and it appears to have charted its own course in analyzing the effect of disclaimers of liability, conditional releases, broad reservations of rights, and the like. *See Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017). The panel in *Asarco* determined (unpersuasively, in this Court's view) that the Sixth and Seventh Circuits had misunderstood Congress's intent with respect to section 113(f)(3)(B), *see id.* at 1124–25, and it concluded that conditional covenants and disclaimers of liability in a settlement agreement are essentially irrelevant to the determination of whether a PRP had resolved its liability, *see id.* at 1125.

The *Asarco* court began the relevant analysis by accepting the premise that, in order to qualify as having resolved liability for the purpose of section 113(f)(3)(B), "a settlement agreement must determine a PRP's compliance obligations with certainty and finality." *Id.* at 1124 (citations omitted). But the panel then proceeded to disclaim the significance of certain terms of an agreement that ordinarily indicate the parties' intention to leave the matter of liability for the compliance obligations that the PRP agrees to undertake open and unresolved. For example, the circuit stated that it "disagree[d] with the Sixth and

Seventh Circuits' holdings in *Florida Power* and *Bernstein*" concerning conditional covenants not to sue, *id.*, *not* because those circuits were wrong to reason that such language means that liability is not resolved until the competition of performance, as a matter of fact, but because, as a matter of policy, settlement agreements of this nature ordinarily and necessarily contain such conditional language, and thus, none would ever count as resolutions of liability for section 113(f)(3)(B) purposes if interpreted in this fashion, *see id.* (explaining that "CERCLA prevents a covenant not to sue from taking effect until the President certifies that remedial action has been completed"; therefore, if such a condition served as a barrier to resolution of liability under section 113(f)(3)(B), "it is unlikely that a settlement agreement could ever resolve a party's liability" (alterations, internal quotation marks, and citation omitted)). Put another way, the *Asarco* court appears to have viewed a covenant not to sue that is conditioned on completed performance as merely a mechanism for enforcement of the agreement's terms, rather than a statement regarding the status of liability for the claims addressed in the agreement, and thereby flatly rejected the Seventh Circuit's conclusions regarding the significance such language. *See id.* ("An agreement may 'resolve' a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges." (alteration omitted)).

The *Asarco* court used similar logic when it concluded, contrary to the Sixth Circuit in *Florida Power*, that "it matters not that a PRP refuses to concede liability in a settlement agreement." *Id.* at 1125. The reasoning that the circuit offers to justify

this view is rooted in policy—*i.e.*, its belief that "Congress' intent in enacting section 113(f)(3)(B) was to encourage prompt settlements that establish PRP's cleanup obligations with certainty and finality[,]" and its concern that "requiring a PRP to concede liability may discourage PRPs from entering into settlements because doing so could open the PRP to additional legal exposure." *Id.* And it sidestepped consideration of what the parties' themselves intended with respect to liability when they inserted a non-admissions clause into the agreements at issue. Thus, notwithstanding the clear congressional mandate that "liability" for response actions actually be "resolved" by the settlement, 42 U.S.C. § 9613(f)(3)(B), the *Asarco* court held that "a covenant not to sue or release from liability conditioned on completed performance does not undermine such a resolution, nor does a settling party's refusal to concede liability." *Asarco*, 866 F.3d at 1125.

The primary concern that this Court has with the Ninth Circuit's reasoning concerning disclaimers of liability in a settlement agreement in particular is that the Ninth Circuit's position results in a situation in which parties who have clearly opted to set aside the resolution of the PRP's "liability"—*i.e.*, its legal responsibility—in the context of an agreement to undertake (or pay for) response actions are nevertheless deemed to have "resolved its liability" for the purpose of section 113(f)(3)(B). As the Seventh Circuit astutely exclaimed, in the face of an explicit disclaimer of liability in a written settlement agreement, "[i]t is very difficult to say . . . that the agreement between the parties constituted a resolution of liability." *Bernstein,* 733 F.3d at 212. And nothing in the statute suggests that Congress

intended section 113(f)(3)(B) to be read to trigger contribution rights based merely on the fact that a settlement agreement contains terms that *specify* "a PRP's *obligations* for a least some of its response actions[,]" *Asarco*, 866 F.3d at 1125 (emphasis added); indeed, the statute Congress penned plainly requires that any such agreement "*resolve*[] [the PRP's] *liability*[,]" 42 U.S.C. § 9613(f)(3)(B) (emphasis added), and an agreement that delineates "a PRP's compliance obligations"—even "with certainty and finality"—*Asarco*, 866 F.3d at 1124, does not thereby "resolve[] [the PRP's] *liability*" within the plain meaning of that statutory phrase, 42 U.S.C. § 9613(f)(3)(B) (emphasis added); *see also* 42 U.S.C. § 9607(a) (holding certain listed persons strictly "liable" for specified cleanup costs). In other words, if Congress had intended to provide contribution rights for any person who has merely entered into a settlement agreement with the United States or a State concerning a CERCLA response action or its costs, it certainly could have said so. Instead, Congress mandated that, in order to give rise to the right to bring a contribution action, the agreement must "resolve [the contribution claimant's] liability to the United States or a State for some or all of a response action or for some or all of the costs of such action[,]" *id.* § 9613(f)(3)(B), which, in this Court's view, necessarily means that a settlement that expressly disclaims liability does not count.

Nor is the Ninth Circuit's analysis persuasive with respect to the appropriate evaluation of conditional covenants not to sue. In *Bernstein*, the Seventh Circuit made clear that the existence of a covenant not to sue in a settlement agreement was a contract term that *the agency* had pointed to in order to

support its own section 113(f)(3)(B) contention. Specifically, because the parties in *Bernstein* had included such a release in the agreements at issue, the agency argued that the agreements did, in fact, resolve the liability of the PRPs concerning the cleanup costs and remediation that the agreements addressed. *See Bernstein*, 733 F.3d at 212 (noting the EPA had argued that the AOCs resolved the PRPs liability because "[i]n the AOCs, the settling PRPs promised to perform certain removal actions and EPA promised not to sue concerning those actions"). The Seventh Circuit's response was the imminently reasonable assertion that "[i]f the EPA's covenant not to sue is the contemplated 'resolution of liability' in this case . . . then, by the terms of the AOC itself, the resolution of liability would not occur until performance was complete, which is the first time at which the covenant could have any effect." *Id.* In rejecting this contention, it appears that the Ninth Circuit misread *Bernstein* to hold that an agreement that contains such a conditional covenant cannot by any means be construed as resolving liability for the purpose of section 113(f)(3)(B), *see Asarco*, 866 F.3d at 1124 (retorting that "[a]n agreement may 'resolve' a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges" (alteration omitted)), when *Bernstein* actually stands for the far more modest proposition that the reasonable reservation of an agency's right to enforce the terms of the agreement through a conditional release or conditional covenant not to sue is not *itself* indicative of the parties' intent to resolve all liability by virtue of the agreement, particularly when the specified conditions for such resolution have not been satisfied.

For what it's worth, this Court also questions the Ninth Circuit's view of the requirements for "resolv[ing] [] liability" under section 113(f)(3)(B) from a practical perspective. First of all, it is difficult to see how a settlement agreement can meaningfully "decide[], determine[], or settle[]" the "nature, extent, or amount" of a PRP's liability if that agreement has not established that the PRP is in fact liable. *Cf. Queen v. Schultz*, 747 F.3d 879, 889 (D.C. Cir. 2014) (suggesting that whether a defendant is liable must be established before determining the scope of that liability). Thus, it is hard to know what to do when a settlement agreement expressly disclaims any finding or admission of liability; apparently, under the Ninth Circuit's interpretation, such language must simply be ignored. *But see* Restatement (Second) of Contracts § 202(2) ("A writing is interpreted as a whole[.]"); *id.* § 202(3) ("Unless a different intention is manifested, where language has a generally prevailing meaning, it is interpreted in accordance with that meaning[.]"). And this is no rare happenstance, even the Ninth Circuit acknowledges that parties to a CERCLA settlement may "often expressly refuse to concede liability under a settlement agreement," *Asarco*, 866 F.3d at 1123, and it is certainly odd to give non-admissions of liability that clearly mattered to the parties when they struck their bargain no effect in the context of a statute that turns on whether a settlement has resolved the liability of a party, *see Collins v. Pension Benefit Guar. Corp.*, 881 F.3d 69, 72 (D.C. Cir. 2018) ("It is a commonplace of contract law that we will give the parties' agreement the meaning they have given it themselves.").

The concern that giving effect to the parties' disclaimer of liability will discourage PRPs from entering into "prompt settlements that establish PRPs' cleanup obligations with certainty and finality[,]" *Asarco*, 866 F.3d at 1125, might well be justified (*see* Def.'s Reply at 22–23), but it should not compel a different outcome, for that result was manifestly insufficient to deter Congress from setting the "resolved its liability" bar for the triggering of the contribution rights that the statute plainly confers. Moreover, it is entirely possible that, from a PRP's perspective, the benefit derived from entering into a timely settlement agreement that disclaims any finding of liability outweighs the cost of obtaining the right to contribution under section 113(f)(3)(B), such that "the timely cleanup of hazardous waste sites" that Congress plainly sought to promote, *Burlington N.*, 556 U.S. at 602, 129 S.Ct. 1870, will occur nonetheless. Thus, even if a PRP that is considering a disclaimer of liability faces a Sophie's choice in the context of section 113(f)(3)(B)—*i.e.*, either settle with a disclaimer and not receive contribution rights or go to trial on the question of CERCLA liability—it is not necessarily the case that the PRP would decline to settle, and would opt instead to engage in protracted and potentially lengthy litigation, with the concomitant risk of being found liable for a strict liability CERCLA offense, all to the continued detriment of the "air, earth, rivers, and sea[,]" Rachel Carson, *Silent Spring* (1962). In any event, *resolution* of liability in the context of a settlement is plainly what the pertinent statutory provision demands in order for the right to contribution to be triggered, and instead of rewriting contractual agreements, courts should have faith that the relevant stakeholders can

effect a prompt cleanup (as Congress prefers), in a manner that disclaims the PRP's liability for the response action (as the PRP desires) while also releasing any other claims (as the agency is willing to do), within the parameters of the law as written.

B. The 2004 Consent Decree Did Not "Resolve" Guam's Liability For The Ordot Landfill Hazardous Waste Response Actions It Has Undertaken

Of course, as noted earlier, whether or not contractual terms such as a disclaimer of liability or a covenant not to sue in a settlement agreement with the United States "resolve[s]" a party's liability, and thereby gives rise to a right to seek contribution under section 113(f)(3)(B), must be determined through "a case-by-case analysis of a particular agreement's terms." *Asarco*, 866 F.3d at 1125. This Court now turns its attention to various pertinent provisions of the 2004 Consent Decree—namely, its clear disclaimer of liability, its conditional release of liability for the claims the United States had brought against Guam in a CWA complaint, and two complementary reservation-of-rights clauses—and addresses whether, in light of these provisions, the parties to the 2004 Consent Decree can be said to have "decided, determined, or settled" the "nature, extent, or amount" of Guam's liability for the response actions or costs relating to the Ordot Landfill. *Bernstein*, 733 F.3d at 212.

1. The 2004 Consent Decree's Disclaimer Of Liability, Broad Reservation-Of-Rights Clause, And Conditional Resolution Of Liability Are Not Indicative Of An Intent To Resolve Guam's Liability

The very first affirmative representation Guam and the EPA make in the 2004 Consent Decree (following an unremarkable series of "Whereas" clauses) is that the agreement itself is "based on the pleadings, before taking testimony or adjudicating any issue of fact or law, *and without any finding or admission of liability against or by the Government of Guam*." (2004 Consent Decree 18, lines 7–9 (emphasis added).) This "therefore" provision leaves no room for ambiguity; it specifies exactly what materials the parties had access to at the time they signed the Consent Decree (few); which legal and factual issues remained unexamined (all of them); and what liability Guam is accepting by virtue of consenting to settlement (none). Thus, this contract language plainly reflects the parties' intention *to leave the question of liability unresolved*, despite the fact that Guam was proceeding to consent to engage in the immediate cleanup of the Ordot Landfill by virtue of entering into the agreement. (*Id.* ¶ 9(a) (requiring Guam to start taking steps within thirty days of the entry of the consent decree).) *Cf. Bernstein*, 733 F.3d at 212 ("They agreed to perform certain actions in order to remedy an instance of environmental contamination. But they did not settle the issue of *liability* for that contamination[.]" (emphasis in original)).

The argument that Guam "resolved its liability" to the United States by executing the 2004 Consent Decree is thus facially untenable. But that conclusion

becomes even more far-fetched when one considers the broad reservation of rights that the EPA inserted into this contract. The 2004 Consent Decree agreement specifically provides that

> [n]othing in this Consent Decree shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations *unrelated to the claims in the Complaint* or *for any future events that occur after the date of lodging of this Consent Decree*.

(2004 Consent Decree ¶ 46 (emphasis added).) And presumably to reinforce the point that Guam could still be held potentially liable notwithstanding the settlement, the Consent Decree also states that "[e]xcept as specifically provided herein, the United States *does not waive any rights or remedies available to it for any violation by the Government of Guam of federal and territorial laws and regulations*." (*Id.* ¶ 48 (emphasis added).)

Much like the disclaimer of liability clause, the takeaway from these two provisions in the 2004 Consent Decree is that the United States was reserving its right to pursue *any* violation of law that Guam may have committed other than those articulated in the 2002 CWA complaint to which the settlement agreement was addressed, and the scope of the 2002 CWA complaint was similarly clear: it asserted that Guam was liable under the CWA and should be ordered to pay monetary penalties and to cease the discharge of hazardous chemicals into the Lonfit River. (*See* CWA Compl. ¶¶ 25–27, 34–35, Prayer for Relief.) Thus, the careful wording of the 2004 Consent Decree's reservation-of-rights clause makes clear that the United States retained its rights

to sue Guam under countless other environmental statutes for the response actions and costs relating to any cleanup at the Ordot Landfill, and it can hardly be viewed as evidencing the parties' intention that *this* settlement agreement resolved Guam's liability for any response costs or response actions that those other statutes might demand. *See Fla. Power*, 810 F.3d at 1006; *Bernstein*, 733 F.3d at 212–13; *ITT Indus.*, 506 F.3d at 459–60.

If any more proof that the 2004 Consent Decree did not resolve Guam's liability is needed, one need look no further than paragraph forty-five of the 2004 Consent Decree, which unequivocally establishes the agreement's scope, by stating that

> [e]ntry of this Consent Decree and compliance with the requirements herein shall be in full settlement and satisfaction *of the civil judicial claims of the United States against the Government of Guam as alleged in the Complaint filed in this action* through the date of the lodging of this Consent Decree.

(2004 Consent Decree ¶ 45 (emphasis added).) Again, the parties clearly contemplated Guam's compliance with the 2004 Consent Decree as settling and satisfying *only* the CWA claims that the EPA had brought against Guam. And because Guam was plainly left fully exposed to other environmental suits and allegations—say, a subsequent suit brought by the United States to recover costs under CERCLA section 107(a)—the language above cannot be reasonably interpreted to evince the parties' intent that the 2004 Consent Decree resolved Guam's liability for the response costs or actions associated with the cleanup of the Ordot Landfill under section 107(a) or any other statute.

Also noteworthy is the fact that paragraph 45 of the 2004 Consent Decree explicitly conditions the resolution of whatever CWA liability that the 2004 Consent Decree addresses on both the "[e]ntry of this Consent Decree *and compliance with the requirements herein*." (*Id.* (emphasis added).) Thus, the agreement could not be clearer that the "entry of this Consent Decree" *alone* does not settle or resolve any of the claims against Guam—that is, whatever circumstances might be inferred from a general conditional covenant not to sue, *this* agreement states that the resolution of Guam's liability for the specified claims does not occur until Guam has actually complied with all of the Consent Decree's requirements.[12]

In short, it is clear to this Court that, taken together, the terms of the 2004 Consent Decree do not support the conclusion that Guam and the EPA intended to resolve Guam's liability for any response actions or costs relating to the Ordot Landfill. (*Id.* at 18 (Therefore Clause), ¶¶ 45–46, 48.) Under the terms of that settlement, Guam and the United States unquestionably reached a consensus that Guam would engage in certain response actions to clean up and remediate the dump, but the 2004 Consent Decree does not decide—much less determine with finality and certainty—who bears the ultimate

---

[12] Indeed, because the Ordot Landfill cleanup is still ongoing (*see* Am. Compl. ¶ 14), it remains to be seen whether Guam will actually be released from the specter of liability per this agreement in the future. *See Fla. Power*, 810 F.3d at 1004 (explaining that "language" that "explicitly condition[s] the resolution of liability on performance" goes "a step beyond [] conditional covenants not to sue and reservations of rights" in preventing the resolution of liability).

responsibility for the costs of that cleanup. *Cf. Bernstein*, 733 F.3d at 212. Consequently, the 2004 Consent Decree did not "resolve[]" Guam's "liability" within the meaning of section 113(f)(3)(B), and absent such a resolution, Guam can maintain its cost-recovery claim under section 107(a), given that the six-year statute of limitations for the remediation and recovery actions that Guam has and is taking has not even begun to run. *See* 42 U.S.C. § 9613(g)(2)(B).[13]

2. The United States's Argument That The 2004 Consent Decree Resolved Guam's Liability Distorts Both The Provisions Of That Contract And Relevant Case Law

To resist the above conclusion, the United States makes several pointed arguments that are largely aimed at the just-discussed provisions of the 2004 Consent Decree. In this Court's view, each of Defendant's arguments either warps the underlying text of CERCLA and/or the 2004 Consent Decree beyond recognition, or advances a dubious reading of case law from the courts of appeals.

For example, the United States maintains that, because the 2004 Consent Decree "resolved Guam's liability for the civil penalties paid and the injunctive relief performed under the decree," it should be construed as having resolved Guam's liability for the purpose of CERCLA's section 113(f)(3)(B). (Def.'s

---

[13] Because this Court concludes that the 2004 Consent Decree did not resolve liability within the meaning of section 113(f)(3)(B), it need not consider whether a consent decree that addresses claims under the CWA can qualify as a "settlement" within the meaning of section 113(f)(3)(B) (*see* Pl.'s Opp'n at 22–26; 40–45), or any of Guam's myriad other contentions (*see* Pl.'s Opp'n at 46–51).

Reply at 19.) But as has already been explained, CERCLA has its own (strict) liability provision, *see* 42 U.S.C. § 9607, and the complaint that the 2004 Consent Decree settles requested only civil monetary penalties and an injunction requiring Guam to bring the Ordot Landfill *into compliance with the CWA*. (*See* CWA Compl. ¶¶ 25–27, 34–35, Prayer for Relief.) Consequently, under the terms of the agreement, once Guam completes the response activities laid out in the 2004 Consent Decree, it will have resolved its liability *only* with respect to the prescribed fines and any outstanding obligation to bring the landfill into compliance with the CWA. (*See* 2004 Consent Decree ¶ 7 (stating that "[t]he Government of Guam shall correct all compliance problems that form the basis for the Complaint filed in this action by undertaking the action identified below within the specified times").) The allocation of costs for CERCLA purposes is not covered, and thus would remain unresolved.

In a similarly bewildering reading of the agreement between Guam and the EPA, the United States argues that the 2004 Consent Decree contains no "specific covenant not to sue, let alone one" that resolves liability "in a conditional manner." (Def.'s Reply at 24.) Yet, as the United States readily admits (*see id.*), the consent decree explicitly states that "entry of this consent decree *and compliance with the requirements herein* shall be in full settlement and satisfaction of" the complaint's claims (2004 Consent Decree ¶ 45 (emphasis added)). This language establishes duties that are inherently conditional—*i.e.*, no release of liability will actually occur until (1) the Consent Decree has been entered, and (2) Guam has fully complied with the terms of the Consent

Decree. And because the removal and remediation work required in the 2004 Consent Decree is still ongoing (*see* Am. Compl. ¶ 14), it is still possible for Guam to fall out of compliance with the 2004 Consent Decree—a circumstance that would seemingly resuscitate the United States's CWA claims. *See Fla. Power*, 810 F.3d at 1004 (concluding that language that stated that "[f]ollowing satisfaction of the requirements of this Consent Order, [plaintiff] shall have resolved [its] liability to EPA" amounted to a conditional resolution of liability (alteration in original)). It is thus difficult to accept the United States's suggestion that the 2004 Consent Decree's release language is unconditional.

The Eighth Circuit's decision in *Dravo Corporation v. Zuber*, 13 F.3d 1222 (8th Cir. 1994), is not to the contrary. (*See* Def.'s Reply at 23 (citing *Dravo Corp.*, 13 F.3d at 1225–26).) There, the Eighth Circuit examined whether the parties had resolved liability for section 113(f)(2) purposes within the context of a *de minimis* settlement that had provided that the defendants "will have resolved" their liability "by entering into and carrying out" the terms of that settlement. 13 F.3d at 1226 (internal quotation marks omitted). *De minimis* settlements constitute a unique type of settlement within CERCLA's statutory scheme, and are only available when a particular PRP has minimal responsibility for the contamination of a hazardous waste site. *See* 42 U.S.C. § 9622(g)(1). Congress has repeatedly emphasized that the President shall enter into and encourage *de minimis* settlements "as promptly as possible[,]" *id.*, "as soon as possible[,]" *id.* § 9622(g)(3), and "as soon as practicable[,]" *id.* § 9622(g)(10). And in the context of a *de minimis* settlement that expressly incorporated

such statutory language, the Eighth Circuit concluded that the parties had not intended to leave the issue of the defendants' liability unresolved. *See* 13 F.3d at 1226; *see also id.* (reasoning that, in the *de minimis* settlement context, a statement of resolution "subject to a condition subsequent" qualifies as a resolution of liability).

Thus, the nature of the settlement (*de minimis* versus substantive) is an important distinction that differentiates the instant case from the facts of *Dravo Corporation*. As the D.C. Circuit and the Supreme Court have both explained, "[i]dentical words [within a statute] may have different meanings where 'the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another.'" *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1932)). This cautionary sentiment is especially apt in the instant case, given that "the language of CERCLA is not a model of precise crafting[.]" *Pakootas v. Teck Cominco Metals, LTD.*, 830 F.3d 975, 985 (9th Cir. 2016). As relevant here, Congress has explicitly and repeatedly authorized the prompt, immediate, and final resolution of liability in the context of *de minimis* settlements, but *not* for other types of settlements of CERCLA claims. This means that Congress has provided contextual clues that attach different meanings to the phrase "resolved its liability" as that phrase appears in sections 113(f)(3)(B) and 122(g)(5), and this difference in context suffices to warrant different interpretations. Therefore, even if being

"subject to condition subsequent" does not interfere with resolving liability under section 122(g)(5), *Dravo Corp.*, 13 F.3d at 1226, that holding does not necessarily suggest that, in a context in which liability must actually be negotiated and established, the parties intended to resolve liability despite including a condition subsequent for the purpose of section 113(f)(3)(B), *see Fla. Power*, 810 F.3d at 1004.

The United States also appears to attach significance to the fact that the instant case involves a "judicially-approved consent decree that also constituted a final judgment[,]" rather than an "administrative settlement[.]" (Def.'s Reply at 20.) But it fails to explain why this distinction makes a difference with respect to an evaluation of its terms, and it does not cite a single case that supports the suggestion that this distinction matters when it comes to determining whether a settlement agreement resolves liability under section 113(f)(3)(B). *Compare Asarco*, 866 F.3d at 1122 (examining whether a consent decree had "determined, decided, or settled" the "nature, extent, or amount of a PRP's *liability*") *with Bernstein*, 733 F.3d at 212 (applying the same inquiry to administrative settlements).

Finally, the United States seeks to distinguish this case from the Sixth Circuit's reasoning in *ITT Industries* and *Florida Power* by maintaining that the reservation-of-rights clauses in those cases were "substantially broader" than the reservation of rights in the 2004 Consent Decree. (Def.'s Reply at 20; *see also id.* at 20–22.) This Court has dutifully compared the clauses in each of those cases with the reservation-of-rights clause at issue here, and it cannot agree with the United States's

characterization. In *ITT Industries*, "the EPA expressly reserve[d] its rights to legal action to adjudicate Plaintiff's liability for failure to comply with the AOC, for costs of response (past, present or future), for costs of injunctive relief of enforcement, criminal liability, and other damages." 506 F.3d at 459; *see id.* ("U.S. EPA retains all of its rights under this Consent Order and CERCLA[.]" (internal quotation marks omitted)). The reservation of rights in *Florida Power* was similar; it "broadly reserved [the EPA's] right to take any enforcement action pursuant to CERCLA or any other available legal authority . . . for any violation of law or this Consent Order." 810 F.3d at 1003 (internal quotation marks omitted).

Neither of these reservation-of-rights clauses is any broader than the one at issue in this case. Although no mention of CERCLA is made in the relevant portions of the 2004 Consent Decree, the EPA expressly reserved its rights "to enforce any and all provisions of applicable federal laws and regulations for *any violations unrelated to the claims in the Complaint*" (2004 Consent Decree ¶ 46 (emphasis added)), which patently includes any violations under CERCLA, and to be doubly clear, the agreement also stated that "except as specifically provided herein, the United States *does not waive any rights or remedies* available to it for *any* violation . . . of federal and territorial laws and regulations" (*id.* ¶ 48 (emphasis added)). Therefore, it appears that the United States has discerned a material difference where there is none: *all* of these provisions plainly reserve the right of the United States to take any other action against the signatory of the agreement for any violation of law, and if the 2004 Consent

Decree is narrower, it is only marginally so, given that the United States only expressly waived its ability to seek the monetary penalties and compliance actions that it requested for the CWA violations that were specified in the underlying complaint.

In the final analysis, then, the 2004 Consent Decree between Guam and the EPA did not "resolve[]" Guam's "liability" within the meaning of section 113(f)(3)(B), as evidenced principally by the following provisions: (1) the statement disclaiming any admission of liability on Guam's part (*see id.* at 18 (Therefore Clause)); (2) the broad reservation-of-rights clauses that benefited the United States (*see id.* ¶¶ 46, 48); and (3) the omission of any language that immediately and effectively insulated Guam from future lawsuits by the EPA under CERCLA sections 106(a) and 107(a).

IV. CONCLUSION

For the reasons explained above, this Court has concluded that, in order to resolve liability within the meaning of CERCLA section 113(f)(3)(B), a settlement agreement must "decide[], determine[], or settle[]" the "nature, extent, or amount of a PRP's liability," *Bernstein*, 733 F.3d at 212, and that the 2004 Consent Decree between Guam and the EPA failed to do so because the provisions within that agreement—from a conditional release of liability to an overly broad reservation of rights to a clear non-admission of liability—demonstrate that the parties did not reach an agreement as to *whether* Guam was liable for the cost of the Ordot Landfill cleanup, much less determine the scope of its liability. Consequently, Guam's right to contribution under section 113(f)(3)(B) has not yet been triggered, which means

that it is not precluded from proceeding via a cost-recovery action under section 107(a). As a result, this Court determined, on September 30, 2018, that the United States's motion to dismiss under 12(b)(6) must be **DENIED.**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5131 **September Term, 2019**
1:17-cv-02487-KBJ

Filed On: May 13, 2020

Government of Guam,
Appellee

v.

United States of America,
Appellant

BEFORE: Henderson and Tatel; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of appellee's petition for panel rehearing filed on April 29, 2020, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5131 **September Term, 2019**
1:17-cv-02487-KBJ

Filed On: May 13, 2020

Government of Guam,
Appellee

v.

United States of America,
Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

33 U.S.C. § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1319

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally

assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the

requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * *

33 U.S.C. § 1321

§ 1321. Oil and hazardous substance liability

(a) Definitions

For the purpose of this section, the term—

* * *

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

* * *

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs, alternative remedies, and withholding clearance of vessels

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens

Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.]).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.]), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

* * *

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.]), in such

quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. The Federal agency shall immediately notify the appropriate State agency of any State which is, or

may reasonably be expected to be, affected by the discharge of oil or a hazardous substance. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined in accordance with title 18, or imprisoned for not more than 5 years, or both. Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement.

* * *

(7) CIVIL PENALTY ACTION.—

(A) DISCHARGE, GENERALLY.—Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3), shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.

* * *

(11) LIMITATION.—Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

* * *

33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter

* * *

33 U.S.C. § 1362

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

42 U.S.C. § 9601

§ 9601. Definitions

For purposes of this subchapter—

* * *

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.]has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural

gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

* * *

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing

site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

(23) The terms "remove" or "removal" means[2] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means[2] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future

---

[2] So in original. Probably should be "mean".

public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means[2] remove, removal, remedy, and remedial action;,[3] all such terms (including the terms "removal" and

---

[2] So in original. Probably should be "mean".

[3] So in original.

"remedial action") include enforcement activities related thereto.

* * *

(27) The terms "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

* * *

42 U.S.C. § 9606

§ 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus

interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate

costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

* * *

42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a

State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

* * *

42 U.S.C. § 9613

§ 9613. Civil proceedings

* * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

* * *

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry

of a judicially approved settlement with respect to such costs or damages.

* * *

42 U.S.C. § 9620

§ 9620. Federal facilities

(a) Application of chapter to Federal Government

(1) In general

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

* * *

42 U.S.C. § 9622

§ 9622. Settlements

(a) Authority to enter into agreements

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

* * *

(c) Effect of agreement

(1) Liability

Whenever the President has entered into an agreement under this section, the liability to the United States under this chapter of each party to the agreement, including any future liability to the United States, arising from the release or

threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f) of this section. A covenant not to sue may provide that future liability to the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) of this section any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties.

(2) Actions against other persons

If an agreement has been entered into under this section, the President may take any action under section 9606 of this title against any person who is not a party to the agreement, once the period for submitting a proposal under subsection (e)(2)(B) has expired. Nothing in this section shall be construed to affect either of the following:

(A) The liability of any person under section 9606 or 9607 of this title with respect to any costs or damages which are not included in the agreement.

(B) The authority of the President to maintain an action under this chapter against any person who is not a party to the agreement.

* * *

[Counsel information omitted]

FILED
DISTRICT COURT OF GUAM
AUG 07 2002
MARY L. M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA, Plaintiff, vs. GOVERNMENT OF GUAM, Defendant.	CIVIL CASE NO. 02-00022 **COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES UNDER THE CLEAN WATER ACT**

The United States of America ("United States"), through its undersigned attorneys, by authority of the Attorney General and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges:

INTRODUCTION

This complaint seeks civil penalties under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319, and seeks the closure of the Ordot Landfill on Guam.

This facility has exceeded its appropriate closure date by over five years. The landfill has produced leachate which has been discharged into the Lonfit River throughout that time period. As early as March 1986, leachate discharge from the landfill to the Lonfit River was documented through Guam Environmental Protection Agency ("GEPA") inspections. In 1986, the landfill was, by administrative order of the U.S. EPA, ordered to cease discharge into the Lonfit River. To date, the leachate discharges have not ceased.

PARTIES

1. The plaintiff is the United States of America ("United States").

2. The defendant is the Government of Guam ("Guam").

3. Guam is an unincorporated territory of the United States created by statute and has the power to sue and be sued. 48 U.S.C. § 1421a; 33 U.S.C. §§ 1311(a) and 1365(3), (5).

JURISDICTION AND VENUE

4. This Court has jurisdiction over the parties to and the subject matter of this action pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

5. Venue is proper in this judicial district pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395, because the defendant is located in this district and the events or omissions giving rise to this claim occurred in this district.

6. EPA has notified Guam of this action under CWA Section 309(b), 33 U.S.C. § 1319(b).

STATUTORY BACKGROUND

7. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters by any person except as authorized by, and in compliance with, certain other sections of the Act, including CWA Section 402, 33 U.S.C. § 1342.

8. Under CWA Section 402(a), 33 U.S.C. § 1342(a), the Administrator of EPA may issue National Pollutant Discharge Elimination System ("NPDES") permits which authorize the discharge of pollutants into waters of the United States, subject to the conditions and limitations set forth in such permits.

9. Under CWA Section 402(b), 33 U.S.C. § 1342(b), the EPA Administrator may approve a state's administration of the NPDES program in that state. The EPA Administrator has not approved Guam to administer the NPDES permit program in Guam.

10. CWA Section 502(5) defines "person" to include a "state." 33 U.S.C. § 1362(5).

11. CWA Section 502(3) defines "state" to include Guam. 33 U.S.C. § 1362(3).

12. CWA Section 502(6) defines "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

13. CWA Section 502(12) defines "discharge of a pollutant" to include "any addition of any pollutant to

navigable waters from any point source." 33 U.S.C. § 1362(12).

14. CWA Section 502(7) defines "navigable waters" to be "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

15. CWA Section 502(14) defines "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel conduit, well [or] container from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

16. CWA Section 309(a)(3), 33 U.S.C. § 1319(a)(3), among other things, authorizes EPA to order any violator of CWA Section 301(a) to comply with CWA Section 301(a).

17. CWA Section 309(b), 33 U.S.C. § 1319(b), authorizes EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA Section 301 or commits any violation against which EPA may issue a compliance order pursuant to 33 U.S.C. § 1319(a).

18. CWA Section 309(d), 33 U.S.C. § 1319(d), provides that any person who violates CWA Section 301(a), 33 U.S.C. § 1311(a), or an order issued pursuant to CWA Section 309(a), 33 U.S.C. § 1319(a), shall be subject to civil penalties not to exceed $25,000 per day for each violation which occurred on or before January 30, 1997. The maximum civil penalty has been increased to $27,500 per day per violation, after January 30, 1997, 40 C.F.R. § 19.4.

GENERAL ALLEGATIONS

19. Defendant owns and operates the Ordot Landfill which is located in the village of Ordot and is

the municipal landfill for the Island of Guam. It has been in operation since the early 1950s.

20. Guam does not have any NPDES permit from the EPA authorizing the discharge of any pollutant from the Ordot Landfill to waters of the United States.

21. From at least 1988 through the present, Guam has routinely discharged untreated leachate from the Ordot Landfill into the Lonfit River and two of its tributaries.

22. Leachate is a "pollutant" under CWA Section 502(6), 33 U.S.C. § 1362(6).

23. The Ordot Landfill, together with earthen channels, gullies, trenches, and ditches which carry leachate to the Lonfit River's tributaries, are "point sources" under CWA Section 502(14), 33 U.S.C. § 1362(14).

24. The Lonfit River and its tributaries drain into the Pacific Ocean at Pago Bay. The Lonfit River and its tributaries are "waters of the United States" and "navigable waters" under CWA Section 502(7), 33 U.S.C. 1362(7).

FIRST CLAIM FOR RELIEF

25. The United States fully incorporates by reference the allegations in paragraphs 1 through 24.

26. By reason of the foregoing, Guam has repeatedly violated CWA Section 301 (a), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into waters of the United States without obtaining a permit in accordance with CWA Section 402, 33 U.S.C. § 1342.

27. Pursuant to CWA Section 309, 33 U.S.C. § 1319, Guam is liable, for civil penalties of up to

$25,000 per day per violation on or before January 30, 1997, and after January 30, 1997 for civil penalties of up to $27,500 per day per violation. Unless enjoined, Guam will continue to violate the CWA.

SECOND CLAIM FOR RELIEF

28. The United States fully incorporates by reference the allegations in paragraphs 1 through 24.

29. On July 19, 1990, in EPA Docket No. IX-FY90-28, the EPA issued an administrative order to Guam under CWA Section 309(a), 33 U.S.C. § 1319(a), requiring, among other things, that Guam submit plans and a compliance schedule for a cover system for the Ordot Landfill and complete construction of the cover system to eliminate discharges of untreated leachate to the waters of the United States by June 30, 1992.

30. On October 9, 1990, EPA extended the deadline for demonstration of compliance under the administrative order, that is elimination of the discharge, to August 15, 1992.

31. On April 10, 1997, EPA extended the deadline under the administrative order to July 9, 1997, for submission of a schedule for design and construction of a cover system to eliminate untreated leachate discharges.

32. Guam submitted a proposed schedule for design and construction on July 9, 1997.

33. On September 19, 1997, EPA disapproved the proposed schedule. Specifically, EPA found that the submittal was not a credible schedule, as performance of many of the important items were conditioned on the availability of funds. The submittal did not identify an assured source of funding.

34. To date, Guam has failed to submit a schedule that incorporates an unconditional source of funding and has failed to construct a closure system.

35. Each day that Guam fails to comply with the deadline for submittal of an acceptable schedule is a separate violation of the administrative order and the CWA. Each day that Guam fails to complete construction of a cover system is a separate violation of the administrative order and the CWA. Pursuant to CWA Section 309, 33 U.S.C. § 1319, Guam is liable for civil penalties of up to $27,500 per day for each violation of the administrative order and the CWA. Unless enjoined, Guam will continue to violate the administrative order and the CWA.

PRAYER FOR RELIEF

WHEREFORE, the United States of America prays that the Court provide the following relief:

1. An injunction ordering the Government of Guam to comply with the Clean Water Act;

2. A judgment for the United States of America imposing civil penalties on the Government of Guam not to exceed $25,000 per day for each day of each violation of the Clean Water Act, including violations of the 1990 EPA Administrative Order, up to January 30, 1997, and $27,500 for each day of each violation thereafter;

3. An order that Guam file timely and complete applications for all required permits;

4. An order that Guam cease all further unpermitted discharges;

5. An award to the United States of America of its costs and disbursements in this action; and

6. Such other relief as this Court deems appropriate.

DATED this 14 day of [May,] 2002.

/s/ *Tom Sansonetti*
THOMAS L. SANSONETTI
Assistant Attorney General
Environmental & Natural
Resources Division

CYNTHIA S. HUBER
Senior Attorney
Environmental Enforcement
Section
P.O. Box 7611
Washington, D.C. 20044-7611

FREDERICK A. BLACK
United States Attorney
Districts of Guam and NMI

By: /s/ *Mikel W. Schwab*
MIKEL W. SCHWAB
Assistant U.S. Attorney

Of Counsel: JULIA JACKSON
U.S. Environmental Protection Agency
Office of Regional Counsel, Region IX
75 Hawthorne Street
San Francisco, CA 94105

[Counsel information omitted]

FILED
DISTRICT COURT OF GUAM
FEB 11 2004
MARY L. M. MORAN
CLERK OF COURT

UNITED STATES DISTRICT COURT
TERRITORY OF GUAM

UNITED STATES OF AMERICA, Plaintiff, v. GOVERNMENT OF GUAM, Defendant.	CIVIL CASE NO. 02-00022 CONSENT DECREE

WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), filed a civil lawsuit against the Government of Guam;

WHEREAS, the Government of Guam owns and operates a solid waste disposal facility in the Village of Ordot, hereinafter referred to as the "Ordot Dump;"

WHEREAS, the operation of the Ordot Dump is subject to, among other things, the provisions of the Clean Water Act, 33 U.S.C. §§ 1251-1387;

WHEREAS, 33 U.S.C. § 1311(a) makes it unlawful to discharge pollutants from a point source to waters

of the United States, except as authorized by a permit issued pursuant to 33 U.S.C. § 1342;

WHEREAS, in the Complaint, the United States alleges that discharges from the Ordot Dump into the Lonfit River constitute discharges of pollutants into a water of the United States and that such discharges are not authorized by a permit issued pursuant to 33 U.S.C. § 1342;

WHEREAS, pursuant to the authority in 33 U.S.C. § 1319, on July 24, 1990, U.S. EPA issued an administrative order to the Government of Guam Department of Public Works ("DPW") requiring the cessation of discharges in accordance with a plan and schedule to be submitted to and approved by U.S. EPA;

WHEREAS, pursuant to the authority in 33 U.S.C. § 1318(a), on September 19, 1997, U.S. EPA requested DPW to obtain and submit to U.S. EPA certain data and information on the discharges from the Ordot Dump and the receiving water in accordance with specified deadlines;

WHEREAS, in the Complaint, the United States alleges that the Government of Guam did not comply with the terms and conditions of the administrative order and the request for information;

WHEREAS, Guam law, at 10 G.C.A. § 51118, provides for a financing source from tipping and user fees for the Government of Guam costs and expenses directly related to the closure of Ordot Dump and the development, design, construction, and operation of a new sanitary landfill;

WHEREAS, the parties agree that settlement of the civil judicial claims as alleged in the Complaint is in the public interest and that entry of this Consent

Decree without further litigation is the most appropriate way to resolve this action and avoid protracted litigation;

THEREFORE, based on the pleadings, before taking testimony or adjudicating any issue of fact or law, and without any finding or admission of liability against or by the Government of Guam;

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 33 U.S.C. § 1319(b) and (d) and 28 U.S.C. §§ 1331, 1345, and 1355. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and 1395(a) and 33 U.S.C. § 1319(b).

II. PARTIES BOUND

2. This Consent Decree shall apply and be binding upon the Government of Guam and its boards, directors, agencies, authorities, departments (including and not limited to DPW and the Guam Environmental Protection Agency ("GEPA")), and their successors and assigns, and on the United States on behalf of U.S. EPA.

3. The Government of Guam shall give written notice of this Consent Decree to any successor in interest prior to the transfer of any ownership interest or right to operate the Ordot Dump. The Government of Guam shall send a copy of such notification to U.S. EPA prior to such sale or transfer. Upon sale or transfer of the Ordot Dump, the Government of Guam shall attach a copy of this Consent Decree to the agreement which effects the

sale or transfer and shall make performance of the obligations of the Government of Guam under this Consent Decree an obligation of the purchaser or transferee. Transfer of ownership of the Ordot Dump will not relieve the Government of Guam from the obligations of this Consent Decree.

4. Within TEN (10) days from the entry of this Consent Decree and as appropriate thereafter, the Government of Guam shall provide copies of this Consent Decree, accompanied by a summary explanation of its terms, to all persons who are bound by this Consent Decree as specified in Paragraph 2 or who are in a position to ensure or affect compliance with this Consent Decree, including notice to any successors in interest to property governed by this Consent Decree prior to the transfer of said property. The Government of Guam shall provide a copy of this Consent Decree to any contractor or consultant retained to perform any activity required by this Consent Decree. No later than TEN (10) days after any such notice, the Government of Guam shall provide U.S. EPA with a copy of its summary explanation and a list of the names, titles, and addresses of all recipients.

III. CIVIL PENALTY

5. The Government of Guam shall pay a civil penalty of $200,000 to the United States in accordance with Paragraph 6 below.

6. Payments shall be made by wire transfers payable to the United States Department of Justice in accordance with the FEDWIRE Electronic Funds Transfer instructions (forms attached as Appendix A) at the following times:

a. Thirty days after the effective date in the amount of $25,000;

b. One (1) year after the effective date in the amount of $50,000;

c. Two (2) years after the effective date in the amount of $50,000; and

d. Three (3) years after the effective date in the amount of $75,000.

IV. COMPLIANCE

7. The Government of Guam shall correct all compliance problems that form the basis for the Complaint filed in this action by undertaking the actions identified below within the specified times. Unless otherwise specified, the times given in days refer to calendar days from the date of entry of this Consent Decree. U.S. EPA may, at its discretion, review documents submitted by the Government of Guam concerning operation and closure of Ordot Dump and the construction or operation of the new Municipal Solid Waste Landfill ("MSWLF"). In the event that U.S. EPA provides written comments, the Government of Guam must respond in writing within 30 days and incorporate such comments into the document. Representatives of the Parties shall make themselves readily available during and after the comment period to informally discuss questions and comments on any documents.

a. For purposes of this Consent Decree, (i) "Ordot Dump" shall refer to Ordot Dump in its current configuration and current boundaries as depicted in Appendix B; and (ii) the new Municipal Solid Waste Landfill or "MSWLF" shall include the option of constructing and operating new cells at a location adjacent to the Ordot Dump location.

8. Closure of Ordot Dump and Cessation of Discharge of Pollutants from Ordot Dump into Waters of the United States.

a. Within 300 days (approximately 10 months), DPW shall:

i. Submit a Draft Closure Plan to U.S. EPA that shall include, but not be limited to:

- Site investigation, survey & mapping.
- Environmental baseline survey.
- 40% (conceptual) design of the dump cover system including methods and procedures to be used to install the cover system and operational plans to implement measures to cease discharge of pollutants into waters of the United States.
- 40% (conceptual) design of perimeter surface water diversion system.
- Other measures necessary to comply with Government of Guam regulations regarding closure of municipal solid waste landfills (22 G.A.R. § 23601).

ii. Submit a permit application to GEPA pursuant to Government of Guam regulations (22 G.A.R. § 23104) for the disposal of municipal solid waste at Ordot Dump until such time as the facility is closed and no longer accepts municipal solid waste for disposal. DPW shall provide a copy of this permit application to U.S. EPA at the time of submission.

b. Within 450 days (approximately 15 months), DPW shall:

i. Submit to U.S. EPA a 90% Draft Final Closure Plan that shall include, but not be limited to:

- 100% design of the dump cover system including methods and procedures to be used to install the cover system and operational plans to implement measures to cease discharge of pollutants into water of the United States.
- 100% design of the perimeter surface water diversion system.
- 100% post-closure care and monitoring plan.
- 40% Draft Specifications (including a Construction Management Plan) that describes the quality assurance measures necessary to ensure that the final dump closure system meets the design specifications.
- Other measures necessary to comply with Government of Guam regulations regarding closure of municipal solid waste landfills (22 G.A.R. § 23601).

ii. Submit to U.S. EPA and GEPA a draft final plan and a schedule to implement post-closure requirements.

iii. Submit to U.S. EPA a supplement to its original permit application to GEPA that includes complete information about closure plans, in compliance with Government of Guam Regulations (22 G.A.R. § 23104).

c. Within 570 days (approximately 19 months), DPW shall:

i. Submit to U.S. EPA a Final Closure Plan that shall include, but not be limited to:

- 100% design of the dump cover system including methods and procedures to be used to install the cover system and operational plans to implement measures to cease discharge of pollutants into waters of the United States.
- 100% design of the perimeter surface water diversion system.
- Final Specifications (including a Construction Management Plan) that describes the quality assurance measures necessary to ensure that the final dump closure system meets the design specifications.
- Other measures necessary to comply with Government of Guam regulations regarding closure of municipal solid waste landfills (22 G.A.R. § 23601).

ii. Submit to GEPA a final plan and schedule to implement post-closure requirements, in accordance with Government of Guam requirements. A copy shall be provided to U.S. EPA at the same time.

iii. Submit to GEPA, U.S. EPA, and U.S. Army Corps of Engineers a 90% Draft Wetland Mitigation Plan for closure of Ordot Dump. An approved Wetland Mitigation Plan, including a viable financial plan, shall be required before the issuance of any closure construction permits.

d. Within 570 days (approximately 19 months), GEPA shall notify DPW and U.S. EPA of the

adequacy of the solid waste permit application filed pursuant to Paragraph 8(a)(ii) and 8(b)(iii) above in accordance with Government of Guam regulations (22 G.A.R. § 23104(c)(2)).

e. Within 660 days (approximately 22 months), GEPA shall issue or deny a solid waste permit for the continued operation of Ordot Dump for a period not to extend beyond 1,350 days (approximately 45 months) after the entry of this Consent Decree and for the closure of Ordot Dump and provide a copy of the permit, including any conditions, or the denial to U.S. EPA.

f. Within 700 days (approximately 23 months), DPW shall advertise for bids to construct Ordot closure plans and specifications.

g. Within 800 days (approximately 27 months), DPW shall award a construction contract for Ordot Dump closure and provide a notice to proceed to the selected contractor and submit evidence of such award and notice to U.S. EPA.

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

i. Within 1,350 days (approximately 45 months), DPW 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.

9. Construction and Operation of New Municipal Solid Waste Landfill ("MSWLF").

a. Within 30 days, DPW shall submit a list of at least three potential landfill sites to U.S. EPA and GEPA. Within 300 days (approximately 10 months), DPW shall complete an Environmental Impact Statement ("EIS") that includes a detailed analysis and comparison of at least three potential landfill sites for the MSWLF and identifies DPW's preferred alternative for the MSWLF. DPW shall provide U.S. EPA and GEPA with a copy of the draft and final EIS within 10 days after completion of the draft and final EIS.

b. If U.S. EPA does not agree with DPW's preferred alternative, the parties shall use their best efforts to come to an agreement regarding the location of the new MSWLF within 90 days after completion of the final EIS. If the parties are unable to agree on a location, the Government of Guam shall file a motion within 110 days after completion of the final EIS, submitting the disputed matter to the Court for resolution. The Government of Guam's motion shall request oral argument and shall be set for hearing not less than 45 after service of the moving papers. The United States shall have 30 days to respond to the Government of Guam's motion. The Court shall render a decision on the location of the new MSWLF based on the written materials on file and any oral argument.

c. Within 540 days (approximately 18 months), DPW shall submit a Draft Plan for the design, construction, and operation for the new MSWLF to U.S. EPA. The Draft Plan shall include but not be limited to:

- Site investigation, survey, and mapping.
- Hydrogeologic/subsurface investigation.
- 40% design and specifications for construction and operation of the new MSWLF system.
- Other measures necessary to comply with Government of Guam regulations regarding siting, design, and operational criteria for Municipal Solid Waste Landfills (22 G.A.R. § 23601).

d. Within 725 days (approximately 24 months), DPW shall:

i. Submit a 90% Draft Final Plan for the design, construction, and operation for the new MSWLF to U.S. EPA. The Draft Final Plan shall include but not be limited to:

- 100% design for construction and operation of the new MSWLF system.
- Draft Specifications (including a Construction Management Plan) that describes the quality assurance measures necessary to ensure that the final new municipal solid waste landfill system meets the design specifications.
- Other measures necessary to comply with Government of Guam regulations regarding siting, design, financial and operational criteria for Municipal Solid Waste Landfills (22 G.A.R. § 23401).

ii. Submit a permit application to GEPA in accordance with Government of Guam Regulations (22 G.A.R. § 23104) to site, construct, and operate a new municipal solid waste disposal landfill in accordance

with applicable Guam and Federal regulations. A copy of the application shall also be submitted to U.S. EPA at the same time.

iii. Submit to GEPA, U.S. EPA, and U.S. Army Corps of Engineers a 90% Draft Wetland Mitigation Plan and submit a Wetland Development Permit application to the Guam Land Use Commission. Approval of the 100% Final Wetland Mitigation Plan, including a viable financial plan, and a Wetland Development Permit shall be required before the issuance of any landfill construction permits.

e. Within 845 days (approximately 28 months, which is 120 days after DPW's application is submitted), GEPA shall notify DPW and U.S. EPA of the adequacy of the permit application filed pursuant to Paragraph 9(d)(ii) above and in accordance with Government of Guam Regulations (22 G.A.R. § 23104(c)(2)).

f. Within 845 days (approximately 28 months), DPW shall:

i. Submit 100% Final Plan for the design, construction, and operation for the new MSWLF to U.S. EPA. The Final Plan shall include but not be limited to:

– 100% design for construction and operation of the new MSWLF system.

– Other measures necessary to comply with Government of Guam regulations regarding the design criteria for Municipal Solid Waste Landfill (22 G.A.R. § 23401).

– Final Specifications (including a Construction Management Plan) that describes the quality assurance measures necessary to ensure that the final new municipal solid waste landfill system meets the design specifications.

ii. Advertise for bids to construct the new MSWLF.

g. Within 935 days (approximately 31 months), GEPA shall issue or deny a permit for the new MSWLF and provide a copy of the permit, including any conditions, or the denial to U.S. EPA.

h. Within 975 days (approximately 32 months), DPW shall award a construction contract for the new MSWLF in accordance with applicable procurement rules and policies of the Government of Guam and provide a notice to proceed to the selected contractor and submit evidence of such award and notice to U.S. EPA.

i. Within 1,320 days (approximately 44 months), DPW shall begin operations of the new MSWLF and so certify to U.S. EPA within 7 days of commencement of operation.

10. Financing Closure of Ordot Dump and Construction and Operation of New Municipal Solid Waste Landfill.

a. Within 120 days, the Government of Guam shall submit to U.S. EPA a financial plan for funding those actions identified in Paragraphs 8 and 9, over time, including the funding source or sources and a schedule to secure funds for the capital and operating costs necessary to fully implement those actions identified in Paragraphs 8 and 9 above. The parties acknowledge and agree

that the total amount of funding needed to complete the projects required under this Consent Decree is not currently available. The parties agree that the projects shall be funded by the Solid Waste Operations Fund, established by 10 G.C.A. § 51118, including the costs and expenses directly related to the closure of the Ordot Dump and the development, design, construction, and operation of a new sanitary landfill. The parties also agree that the Solid Waste Operations Fund shall not be regarded as the exclusive source of funding for the projects; and that the Government of Guam may obtain funding from other sources. The Government of Guam shall use its best efforts to obtain sufficient funding to fully implement the projects required by this Consent Decree. If funding from the Solid Waste Operations Fund is not sufficient to fully implement the projects, the Government of Guam shall seek funding through legislative appropriation, loans, grants, and rates charged for consumer services such as tipping or user fees.

b. Notwithstanding any of the time frames set forth in Paragraph 8 or 9 above, upon the opening of a properly licensed and permitted municipal solid waste landfill prior to the times set forth in Paragraphs 8 and 9 above, no further dumping of any kind will be permitted at the Ordot Dump.

V. REPORTING REQUIREMENTS

11. Beginning with the first quarter following the quarter in which this Consent Decree is entered and continuing until termination of this Consent Decree, the Government of Guam shall submit to U.S. EPA written quarterly reports of its progress in

implementing the provisions of this Consent Decree. Quarterly reports shall be submitted within twenty-one (21) days after the last day of each quarter. At a minimum, these Progress Reports shall include:

a. All tasks required under the Consent Decree and performed during the reporting period;

b. All deadlines in this Consent Decree that the Government of Guam was required to meet during the reporting period;

c. A report whether the Government of Guam met these deadlines;

d. The reasons for any failure to meet these deadlines and all steps taken to remedy such failure; and

e. A projection of the tasks to be performed pursuant to this Consent Decree during the next reporting period.

VI. STIPULATED PENALTIES

12. Stipulated Penalties.

a. The Government of Guam shall pay stipulated penalties for failure to meet deadlines specified in Section IV (Compliance) as follows:

i. For failure to meet any of the deadlines specified in Paragraphs 8(a) - 8(f) and 9(a) - 9(g):

– $250 per day per violation for the first 30 days, $500 per day per violation for the following 30 days, and $1,000 per day per violation for each day thereafter.

ii. For failure to meet any of the deadlines specified in Paragraphs 8(g), 9(h), and 10:

– $500 per day per violation for the first 30 days, $1,000 per day per violation for the

following 30 days, and $2,000 per day per violation for each day thereafter.

iii. For failure to meet any of the deadlines specified in Paragraphs 8(h), 8(i), and 9(i):

– $1,000 per day per violation for the first 30 days, $2,000 per day per violation for the following 30 days, and $5,000 per day per violation for each day thereafter.

b. The Government of Guam shall pay stipulated penalties in the amount of $500 per day for failure to timely pay the civil penalty required by Section III.

c. The Government of Guam shall pay stipulated penalties for failure to meet any other requirements of this Consent Decree (with the exception of the failure to complete the Supplemental Environmental Project as set forth in Appendix C that is subject to penalties pursuant to Paragraph 18) as follows:

– $250 per day per violation for the first 30 days, $500 per day per violation for the following 30 days, and $1,000 per day per violation for each day thereafter.

13. Stipulated penalties shall begin to accrue on the day after performance is due and shall continue to accrue through the final date of completion even if no notice of the violation is sent to the Government of Guam. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of the Consent Decree.

14. Any stipulated penalty accruing pursuant to this Consent Decree shall be payable upon demand and due not later than THIRTY (30) days after the Government of Guam's receipt of U.S. EPA's written

demand. Stipulated penalties shall be paid by certified or cashier's check in the amount due, shall be made payable to the "U.S. Department of Justice," referencing DOJ #90-5-1-1-06658 and USAO File Number 1998V00094, and shall be delivered by certified mail with return receipt requested to:

United States Attorney, District of Guam
Attention: Financial Litigation Unit
Suite 500, Sirena Plaza
108 Hernan Cortez
Hagatna, Guam 96910

Concurrently with making the payment, Defendant shall send notice of payment to U.S. EPA and DOJ, directed to the addresses provided in Section XI (Notification). The notice of payment shall also identify: (i) the specific provision of this Section VI (Stipulated Penalties) related to such payment, and (ii) a description of the violation(s) of this Consent Decree for which the stipulated penalties or interest are being tendered.

15. If the Government of Guam fails to pay stipulated penalties owed pursuant to this Consent Decree within THIRTY (30) days of receipt of U.S. EPA's written demand, the Government of Guam shall pay interest on the late payment for each day after the initial thirty day due date. The rate of interest shall be the most recent interest rate determined pursuant to 28 U.S.C. § 1961.

16. Stipulated penalties are not the Plaintiff's exclusive remedy for violations of this Consent Decree. The United States expressly reserves the right to seek any other relief it deems appropriate, including, but not limited to, action for statutory

penalties, contempt, or injunctive relief against the defendant.

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

17. In partial satisfaction of Plaintiff's claims, the Government of Guam shall perform and complete the Supplemental Environmental Project ("SEP") set forth in Appendix C, which has the objective of securing significant environmental or public health protection and improvements. The Government of Guam shall complete the SEP in accordance with the schedule and requirements set forth in Appendix C. The SEP shall be completed by March 2007. The SEP shall develop and implement a comprehensive waste diversion strategy for household hazardous waste on Guam.

18. The total expenditure for the SEP shall be not less than the present value of $1,000,000. The Government of Guam shall include documentation of the expenditures made in connection with the SEP as part of the SEP Completion Report described in Paragraph 21 below. In the event that the Government of Guam fails to perform and complete the SEP as set forth in Appendix C, it shall, in the same manner as set forth in Paragraph 14, pay a civil penalty to the United States equal to the difference between the sum of $1,000,000 and the total SEP costs that the Government of Guam has incurred and itemized according to the requirements set forth in Paragraph 21.

19. The Government of Guam is responsible for the satisfactory completion of the SEP in accordance with the requirements of this Decree. The Government of

Guam may use contractors and/or consultants in planning and implementing the SEP.

20. The Government of Guam hereby certifies that, as of the date of this Consent Decree, it is not required by any federal, state or local law or regulation to perform or develop the SEP; nor is the Government of Guam required by agreement, grant or as injunctive relief in this or any other case to perform or develop the SEP. The Government of Guam further certifies that is has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP; nor will the Government of Guam realize any profit attributable to or associated with the SEP, or receive any reimbursement for any portion of the SEP from any other person.

21. SEP Completion Report. The Government of Guam shall complete the SEP by March 2007. The Government of Guam shall submit a SEP Completion Report to the United States within thirty (30) days after completion of the SEP. The SEP Completion Report shall contain the following information:

a. A detailed description of the SEP as implemented;

b. A description of any implementation problems and the solutions thereto;

c. An itemization of all SEP costs and acceptable evidence of such costs;

d. Certification that the SEP has been completed pursuant to the provisions of this Consent Decree, including Appendix C;

e. A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reduction to the extent feasible); and

f. Copies of any training materials, brochures, databases, or software relating to the SEP.

22. Periodic Reports. While the SEP is being planned and implemented, the Government of Guam shall submit quarterly reports to U.S. EPA describing the progress of the SEP within twenty-one (21) days after the end of each Calendar Quarter.

23. Following receipt of the SEP Completion Report described in Paragraph 21 above, U.S. EPA will do one of the following in writing:

a. Accept the SEP Completion Report; or

b. Reject the SEP Completion Report, notifying Government of Guam in writing of deficiencies in the SEP Completion Report. If U.S. EPA rejects SEP Completion Report, the Government of Guam shall have thirty (30) days from the date of receipt of U.S. EPA's notice in which to correct any deficiencies and submit a revised SEP Completion Report. If U.S. EPA rejects a revised SEP Completion Report, it shall notify the Government of Guam about the rejection. The Government of Guam shall be subject to stipulated penalties in accordance with Paragraph 12(c) herein for each day after receipt of U.S. EPA's notice of rejection of the revised SEP Completion Report until an acceptable SEP Completion Report is submitted to U.S. EPA.

24. If U.S. EPA rejects the SEP Completion Report pursuant to Paragraph 23(b), U.S. EPA shall permit the Government of Guam the opportunity to object in writing to the notification of deficiency within ten (10) days of receipt of such notification. U.S. EPA and the Government of Guam shall have an additional thirty (30) days from the receipt by U.S. EPA of the

notification of objection to reach agreement relating to U.S. EPA's notice of deficiency. If agreement cannot be reached on any issue in the notice of deficiency within this thirty (30) day period, U.S. EPA shall thereafter provide a written statement of its decision to the Government of Guam, which decision shall be final and binding. Any such decision shall not be subject to Dispute Resolution. The Government of Guam agrees to comply with any SEP-related requirements imposed by U.S. EPA's written decision.

25. If upon receipt of the SEP Completion Report, U.S. EPA determines in its sole discretion that part or all of the SEP has not been implemented in accordance with this Consent Decree, including Appendix C, and any statements of work, U.S. EPA may require the Government of Guam: (1) to repeat any deficient tasks; or (2) if specific tasks set forth in Appendix C were not performed at all, to perform such tasks. U.S. EPA shall provide any such requirement to the Government of Guam in writing.

26. The Government of Guam bears the burden of segregating eligible SEP costs from costs not eligible for SEP credit. Any non-segregable cost evidence (i.e., containing both eligible SEP costs and costs not eligible for SEP credit) shall be disallowed in its entirety. "Acceptable evidence" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods or services for which payment is made. Cancelled drafts are not acceptable evidence unless such drafts specifically identify and itemize the individual costs of the goods or services for which payment is made. Each submission required under this Section shall be signed by an official with

knowledge of the SEP and shall bear the certification language set forth in Paragraph 42 below.

27. The Government of Guam hereby agrees that if, in estimating the cost of the SEP, it did not subtract the estimated savings achieved from deducting the cost of each SEP in calculating state and federal taxes, any funds expended by the Government of Guam in the performance of each SEP shall not be deductible for purposes of such taxes. The Government of Guam, at the time of completion of the SEP, shall submit to the United States written certification than any funds expended in the performance of each SEP have not been and will not be deducted for purposes of such taxes.

28. In the event the Government of Guam does not spend the present value attributed to a SEP pursuant to Paragraph 18 above, the Government of Guam shall perform additional work on the SEP, as set forth in Appendix C, such that the total expenditures on the SEP equals or exceeds the required present value of the SEP. If the Government of Guam performs the additional work as required by this Paragraph, it shall not be subject to the civil penalty set out in Paragraph 18.

29. Any public statement, oral or written, in print, film, or other media made by the Government of Guam making reference to the SEP shall include the following language, "This project was undertaken in connection with the settlement of a civil enforcement action taken by the United States for violations of the Clean Water Act."

VIII. RIGHT OF ENTRY

30. U.S. EPA and its contractors and consultants shall have the authority to enter Ordot Dump and any

facility related to the SEP at all reasonable times, upon proper presentation of credentials. This provision in no way limits or otherwise affects any right of entry held by U.S. EPA pursuant to applicable federal or territorial laws, regulations, or permits.

IX. FORCE MAJEURE

31. The Government of Guam shall perform all requirements of this Consent Decree in accordance with the time schedules set forth except to the extent, and for the period of time, that such performance is prevented or delayed by events which constitute a force majeure. The schedule set forth in Paragraph 9 above for the construction of a new municipal solid waste landfill is not based on, or dependent upon, the existence of any contractual arrangements the Government of Guam may or may not have, now or in the future, for the construction and operation of a new landfill or incinerator.

32. For the purposes of this Consent Decree, a force majeure is defined as any event arising from causes beyond the control of the Government of Guam and that cannot be overcome by diligent and timely efforts of the Government of Guam, including its contractors. Economic hardship, normal inclement weather, and increased costs of performance shall not be considered events beyond the reasonable control of the Government of Guam for purposes of determining whether an event is force majeure. The requirement that the Government of Guam exercise diligent and timely efforts to fulfill its obligations includes using best efforts to anticipate any force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following

the potential force majeure events, such that delay is minimized to the greatest extent possible.

33. In the event of a force majeure, the time of performance of the activity delayed by the force majeure shall be extended by U.S. EPA for the time period of the delay attributable to the force majeure. An extension of one compliance date based on a particular incident does not necessarily result in an extension of a subsequent compliance date or dates. The Government of Guam must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought. The Government of Guam shall adopt all reasonable measures to avoid or minimize any delay caused by a force majeure.

34. When an event occurs or has occurred that may delay or prevent the performance of any obligation under this Consent Decree, the Government of Guam shall notify by telephone the Manager, Pacific Islands Office, Region 9, (415) 972-3774, or the Guam Program Manager, Pacific Islands Office, Region 9, (415) 972-3770, within 72 hours of Government of Guam's knowledge of such event. Telephone notification shall be followed by written notification made within SEVEN (7) days of Government of Guam's knowledge of the event. The written notification shall fully describe: the event that may delay or prevent performance; reasons for the delay; the reason the delay is beyond the reasonable control of the Government of Guam if Guam believes the event constitutes a force majeure; the anticipated duration of the delay; actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to mitigate the effect of the delay; and the time needed

to implement any dependent activities. For purposes of this Section, the Government of Guam shall be deemed to have knowledge of anything it or its contractors knew or should have known.

35. Failure of the Government of Guam to comply with the force majeure notice requirements provided in Paragraph 34 for any delay in performance will be deemed an automatic forfeiture of its right to assert that the delay was caused by a force majeure.

36. After receiving written notification from the Government of Guam of a force majeure, U.S. EPA shall determine whether the Government of Guam's request for delay is justified and U.S. EPA shall notify the Government of Guam of its determination in writing. U.S. EPA's failure to respond within THIRTY (30) days to a request for delay by the Government of Guam shall be deemed a denial of that request. If the Government of Guam disagrees with U.S. EPA's determination, the Government of Guam may initiate dispute resolution procedures pursuant to Section X (Dispute Resolution).

37. The Government of Guam shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused by circumstances beyond its control, or any entity under its control, including consultants and contractors, and that the Government of Guam could not have reasonably foreseen and prevented such violation. The Government of Guam shall also bear the burden of proving the duration and extent of any delay or violation attributable to such circumstances.

X. DISPUTE RESOLUTION

38. The Dispute Resolution procedures of this Section shall be the exclusive mechanism to resolve

disputes arising under or with respect to the Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations by the Government of Guam under this Consent Decree that have not been disputed in accordance with this Section.

39. If the Government of Guam disputes any determination made by U.S. EPA under this Consent Decree, the Government of Guam shall send a written notice to U.S. EPA and DOJ outlining the nature of the dispute, submitting all supporting information and document relating to the dispute, describing its proposed resolution, and requesting informal negotiations to resolve the dispute. Such period of informal negotiations shall not extend beyond FIFTEEN (15) days from the date when notice was received by U.S. EPA and DOJ unless the parties agree otherwise in writing.

40. If the informal negotiations are unsuccessful, the disputed determination by U.S. EPA shall control, unless the Government of Guam files a motion with this Court for dispute resolution. Any such motion must be filed within TWENTY (20) days after termination of informal negotiations and must be concurrently sent to U.S. EPA and DOJ. The United States shall then have THIRTY (30) days to respond to the Government of Guam's motion. In any such dispute resolution proceeding, the Government of Guam bears the burden of proving that U.S. EPA was arbitrary and capricious.

XI. NOTIFICATION

41. Except as otherwise specifically stated, all notices and submissions from the Government of Guam to U.S. EPA required by this Consent Decree

shall be sent via express mail or similar service with a return receipt requested, or, in the alternative, by both fax and e-mail, and addressed to:

Manager, Pacific Islands Office (CMD-6)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105
Fax: (415) 947-3560
e-mail: machol.ben@epa.gov

42. All notices and submissions to U.S. EPA shall be signed and affirmed by a responsible official of the Government of Guam using the following certification statement:

> I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement.

43. All notices and submissions to the Government of Guam required by this Consent Decree shall be sent to:

Attorney General of Guam
Guam Judicial Center, Suite 2-200E
120 West O'Brien Drive
Hagatna, Guam 96910
Fax: (671) 472-2493
e-mail: law@mail.justice.gov.gu

Director, Department of Public Works
542 North Marine Drive
Tamuning, Guam 96911
Fax: (617) 649-6178
e-mail: dpwdir@mail.gov.gu

Administrator, Guam Environmental Protection Agency
15-6101 Mariner Avenue
Tiyan, Guam 96913
Fax: (671) 477-9402
e-mail: fcastro@guamepa.govguam.net

44. All notices and submissions to DOJ required by this Consent Decree shall be sent to:

United States Attorney
District of Guam
Sirena Plaza
108 Hernan Cortez Ave., Suite 500
Hagatna, Guam 96910
Fax: (671) 472-7215
e-mail: mikel.schwab@usdoj.gov

Section Chief, Environmental Enforcement Section
D.J. Ref. 90-5-1-1-06658 (Mullaney)
U.S. Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Fax: (415) 744-6476
e-mail: robert.mullaney@usdoj.gov

XII. MISCELLANEOUS

45. Entry of this Consent Decree and compliance with the requirements herein shall be in full settlement and satisfaction of the civil judicial claims of the United States against the Government of Guam as alleged in the Complaint filed in this action through the date of the lodging of this Consent Decree. This Consent Decree in no way relieves the Government of Guam of any criminal liability.

46. Nothing in this Consent Decree shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations unrelated to the claims in the Complaint or for any future events that occur after the date of lodging of this Consent Decree.

47. The United States does not guarantee that implementing the relief described in this Consent Decree will ensure compliance with the Clean Water Act. This Consent Decree in no way affects the Government of Guam's responsibilities to comply with all applicable federal and territorial laws and regulations.

48. Except as specifically provided herein, the United States does not waive any rights or remedies available to it for any violation by the Government of Guam of federal and territorial laws and regulations.

49. Except as provided herein, each party shall bear its own costs and attorney's fees in this action. Should the Government of Guam subsequently be determined to have violated the terms and conditions of this Consent Decree, then the Government of Guam shall be liable to the United States for any costs and attorney's fees incurred by the United States in any

actions against it for noncompliance with this Consent Decree.

50. This Consent Decree contains the entire agreement between the parties and no statement, promise, or inducement made by any of the parties or agent of the parties that is not contained in this written Consent Decree shall be valid or binding, and this Consent Decree may not be enlarged, modified, or altered except by using procedures described in this Consent Decree.

51. The Attorney General of the Government of Guam and the Assistant Attorney General for Environmental and Natural Resources Division of the Department of Justice each certify that he is fully authorized to enter into the terms and conditions of this Consent Decree, to execute the document, and to legally bind the party he represents to this document.

52. The Government of Guam shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. The Government of Guam hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of summons.

XIII. RECORD RETENTION

53. In addition to any state or federal requirements relating to record retention, the Government of Guam shall retain at least one legible copy of all records, documents, reports or plans required by its permit or which relate to its performance under any provision

of this Consent Decree and any documentation which the Government of Guam relied on in preparing such records, documents, reports or plans, for a period of five (5) years from the date of such record, document, report, or plan, or underlying documentation, or until two (2) years after termination of this Consent Decree, whichever is later.

54. Not less than sixty (60) days prior to destruction of any reports or documents created pursuant to the requirements of this Consent Decree and any documents used to create such submittals, the Government of Guam shall notify the U.S. EPA and DOJ in writing, as provided in Section XI, that destruction of documents is planned and make such records available to the United States for inspection, copying or retention. This notification will identify the nature of the documents and their storage location or locations. The Government of Guam shall not claim that any such reports or documents are confidential or privileged.

55. Within fifteen (15) days of a written request from the United States, the Government of Guam shall provide the United States with copies of the documentation underlying any document, report or plan submitted pursuant to this Consent Decree, or any documents, reports or plans retained pursuant to Paragraph 53.

XIV. TERMINATION

56. This Consent Decree shall remain in effect until the later of: (1) one year after the Government of Guam completes all activities contained in Sections III, IV, and VII; or (2) the resolution of any matters pending in this Court regarding this Consent Decree.

57. If the Government of Guam believes that the requirements of Paragraph 56 have been met, the Government of Guam may request that the United States make a determination that this Consent Decree may be terminated. Any such request shall be in writing and include a certification that the applicable requirements have been met.

58. If the United States agrees that the requirements of Paragraph 56 have been met, the United States will notify the Government of Guam and the Court that the Consent Decree has terminated.

59. Until termination of this Consent Decree, the Court shall retain jurisdiction to handle any disputes that arise under this Consent Decree.

60. The parties agree to the foregoing Consent Decree and agree that the Consent Decree may be entered upon compliance with the public notice procedures set forth at 28 C.F.R. § 50.7, which states that the public shall have THIRTY (30) days to comment on this Consent Decree, and upon notice to this Court from DOJ requesting entry of this Consent Decree. The United States reserves its right to withdraw consent to this Consent Decree based upon comments received during the public notice period. The Government of Guam consents to entry of this Consent Decree without further notice to the Court.

XV. MODIFICATION

61. There shall be no material modifications of this Consent Decree without the written approval of the parties to this Consent Decree and the approval of the Court. All non-material modifications, which may include extensions of the time frames and schedules for performance of the terms and conditions of this

Consent Decree and certain modifications to the attachments, may be made by agreement of the parties and shall be effective upon filing by the United States of such modifications with the Court.

XVI. FINAL JUDGMENT

62. Upon approval and entry of this Consent Decree by the Court, the Consent Decree shall constitute a final judgment pursuant to Federal Rules of Civil Procedure 54 and 58.

ORDER

IT IS SO ORDERED this 11th day of February, 2003.

/s/ *[illegible]*
United States District Judge

Notice is hereby given that this document was entered on the docket on 02/12/04. No separate notice of entry on the docket will be issued by the Court.

Mary L.M. Moran
Clerk, District Court of Guam

By: /s/ *[illegible]* 02/12/04
Deputy Clerk Date

For the United States of America, Plaintiff:

Dated: 11/7/03 /s/ *Kelly A. Johnson*
~~THOMAS L. SANSONETTI~~
[Acting] Assistant Attorney General
Environmental & Natural Resources Division
ROBERT D. MULLANEY
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice

LEONARDO M. RAPADAS
United States Attorney
Districts of Guam and NMI
(671) 472-7332

Dated: 11/26/03 /s/ *Mikel W. Schwab*
MIKEL W. SCHWAB
Assistant U.S. Attorney

Dated: 11/20/03 /s/ *John Peter Suarez*
JOHN PETER SUAREZ
Assistant Administrator for Enforcement
U.S. Environmental Protection Agency

Dated: 11/05/03 /s/ *[illegible]*
WAYNE NASTRI
[initials] Regional Administrator
U.S. Environmental Protection Agency, Region 9

OF COUNSEL:

JULIA JACKSON
Assistant Regional Counsel
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

For the Government of Guam, Defendant:

Dated: 10/20/03 /s/ *Douglas B. Moylan*
DOUGLAS B. MOYLAN
Attorney General of Guam
Guam Judicial Center, Suite 2-200E
120 West O'Brien Drive
Hagatna, Guam 96910
(671) 475-3324

Dated: 10/21/03 /s/ *Felix P. Camacho*
FELIX P. CAMACHO
Governor of Guam

Dated: 10/20/03 /s/ *Jose Morcilla, Jr.*
JOSE MORCILLA, JR.
Interim Director, Department of Public Works

Dated: 10/20/03 /s/ *Fred Castro*
FRED CASTRO
Administrator
Guam Environmental Protection Agency

Agent for service of process:

Douglas B. Moylan
Attorney General of Guam
Guam Judicial Center, Suite 2-200E
120 West O'Brien Drive
Hagatna, Guam 96910
(671) 475-3324