

No. 20-382

In the
Supreme Court of the United States

GOVERNMENT OF GUAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

JOINT APPENDIX

Counsel for Respondent

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs
@usdoj.gov

Counsel for Petitioner

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

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 2020
CERTIORARI GRANTED JANUARY 8, 2021

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In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (September 16, 2020):

| | |
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RELEVANT DOCKET ENTRIES

**U.S. Court of Appeals for the District of
Columbia Circuit
Case No. 19-5131**

| Date Filed | Docket Text |
|-------------------|---|
| 05/08/2019 | US CIVIL CASE docketed. [19-5131] [Entered: 05/08/2019 01:27 PM] |
| 05/08/2019 | NOTICE OF APPEAL [1786855] seeking review of a decision by the U.S. District Court in 1:17-cv-02487-KBJ filed by USA. Appeal assigned USCA Case Number: 19-5131. [19-5131] [Entered: 05/08/2019 01:28PM] |
| | * * * |
| 06/25/2019 | APPELLANT BRIEF [1794484] filed by USA [Service Date: 06/25/2019] Length of Brief: 10,703 words. [19-5131] (Heron, Rachel) [Entered: 06/25/2019 04:34 PM] |
| 06/25/2019 | <i>JOINT</i> APPENDIX [1794487] filed by USA. [Volumes: 1] [Service Date: 06/25/2019] [19-5131] (Heron, Rachel) [Entered: 06/25/2019 04:37 PM] |
| 07/25/2019 | APPELLEE BRIEF [1799181] filed by Government of Guam [Service Date: 07/25/2019] Length of Brief: 12,851 words. [19-5131] (Gilmour, John) [Entered: 07/25/2019 08:44 PM] |

| Date Filed | Docket Text |
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| 07/29/2019 | LETTER [1799365] sent to counsel concerning the use of uncommon acronyms and abbreviations in briefs. [19-5131] [Entered: 07/29/2019 07:41 AM] |
| 08/05/2019 | <i>CORRECTED</i> APPELLEE BRIEF [1800768] filed by Government of Guam [Service Date: 08/05/2019] Length of Brief: 12861. [19-5131] (Gilmour, John) [Entered: 08/05/2019 05:29 PM] |
| 08/15/2019 | APPELLANT REPLY BRIEF [1802438] filed by USA [Service Date: 08/15/2019] Length of Brief: 6,494 words. [19-5131] (Heron, Rachel) [Entered: 08/15/2019 04:47 PM] |
| | * * * |
| 11/04/2019 | LETTER [1814079] pursuant to FRAP 28j advising of additional authorities filed by USA [Service Date: 11/04/2019] [19-5131] (Heron, Rachel) [Entered: 11/04/2019 01:24 PM] |
| 11/05/2019 | RESPONSE [1814488] to letter [1814079-2], letter [1814079-3] filed by Government of Guam [Service Date: 11/05/2019 by CM/ECF NDA] Length Certification: 349 words. [19-5131] (Stern, Bezalel) [Entered: 11/05/2019 05:38 PM] |

| Date Filed | Docket Text |
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| 11/12/2019 | ORAL ARGUMENT HELD before Judges Henderson, Tatel and Ginsburg. [19-5131] [Entered: 11/12/2019 10:22 AM] |
| 11/12/2019 | PER CURIAM ORDER [1815327] filed, on the court's own motion, that the parties file supplemental briefs addressing two issues (SEE ORDER FOR ISSUES). Appellant's and appellee's supplemental briefs may not exceed 2,600 words. Appellant's reply brief may not exceed 1,300 words. Appellant's supplemental brief is due no later than 4:00 p.m. on November 19, 2019; appellee's supplemental brief is due no later than 4:00 p.m. on November 25, 2019; appellant's supplemental reply brief is due no later than 4:00 p.m. on November 27, 2019. In addition to electronic filing, paper copies of the submissions are to be hand-delivered to the court by the time and date due. Before Judges: Henderson, Tatel and Ginsburg. [19-5131] [Entered: 11/12/2019 03:46 PM] |
| 11/19/2019 | APPELLANT SUPPLEMENTAL BRIEF [1816444] filed by USA [Service Date: 11/19/2019] Length of Brief: 2,587 words. [19-5131] (Heron, Rachel) [Entered: 11/19/2019 11:52 AM] |

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|-------------------|---|
| 11/25/2019 | APPELLEE SUPPLEMENTAL BRIEF [1817476] filed by Government of Guam [Service Date: 11/25/2019] Length of Brief: 2461. [19-5131] (Stern, Bezalel) [Entered: 11/25/2019 02:27 PM] |
| 11/27/2019 | APPELLANT SUPPLEMENTAL REPLY BRIEF [1817859] filed by USA [Service Date: 11/27/2019] Length of Brief: 1,299 words. [19-5131] (Heron, Rachel) [Entered: 11/27/2019 10:31 AM] |
| 02/14/2020 | PER CURIAM JUDGMENT [1828592] filed that the District Court's denial of the United States' motion to dismiss be reversed, and the case be remanded to the District Court with instructions to dismiss the complaint, for the reasons in the accompanying opinion . Before Judges: Henderson, Tatel and Ginsburg. [19-5131] [Entered: 02/14/2020 10:28 AM] |
| 02/14/2020 | OPINION [1828593] filed (Pages: 24) for the Court by Judge Tatel. [19-5131] [Entered: 02/14/2020 10:30 AM] |
| 02/14/2020 | CLERK'S ORDER [1828594] filed withholding issuance of the mandate. [19-5131] [Entered: 02/14/2020 10:31 AM] |
| | * * * |
| 04/29/2020 | PETITION [1840606] for rehearing, for rehearing en banc filed by Appellee Government of Guam [Service Date: |

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| | 04/29/2020 by CM/ECF NDA] Length Certification: 3,349 words. [19-5131] (Gilmour, John) [Entered: 04/29/2020 09:10 PM] |
| 05/13/2020 | PER CURIAM ORDER, En Banc, [1842653] filed denying appellee's petition for rehearing en banc [1840606-3] Before Judges: Srinivasan, Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, Rao and Ginsburg. [19-5131] [Entered: 05/13/2020 02:40 PM] |
| 05/13/2020 | PER CURIAM ORDER [1842655] filed denying appellee's petition for rehearing [1840606-2] Before Judges: Henderson, Tatel and Ginsburg. [19-5131] [Entered: 05/13/2020 02:42 PM] |
| 05/21/2020 | MANDATE ISSUED to Clerk, U.S. District Court. [19-5131] [Entered: 05/21/2020 12:19 PM] |
| 09/24/2020 | LETTER [1863490] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 09/24/2020 as No. 20-382. [19-5131] [Entered: 09/25/2020 04:28 PM] |
| 12/21/2020 | TRANSCRIPT [1877124] of oral argument [19-5131] [Entered: 12/23/2020 01:31 PM] |

RELEVANT DOCKET ENTRIES

**U.S. District Court for the
District of Columbia (Washington, DC)
Case No. 1:17-cv-0248 7-KBJ**

| Date Filed | # | Docket Text |
|-------------------|----------|--|
| 03/02/2017 | 1 | COMPLAINT against United States Department of Navy (Filing fee \$400 receipt number 0205-4317208.), filed by Territory of Guam. (Attachments: # 1 Civil Cover Sheet) (Lorenzo, Marisa) [Transferred from Connecticut on 11/20/2017.] (Entered: 03/02/2017) * * * |
| 03/02/2017 | 4 | STANDING PROTECTIVE ORDER. Signed by Judge Vanessa L. Bryant on 03/02/2017. (Shafer, J.) [Transferred from Connecticut on 11/20/2017.] (Entered: 03/03/2017) * * * |
| 05/19/2017 | 7 | AMENDED COMPLAINT against United States Department of Navy, filed by Territory of Guam.(Lorenzo, Marisa) [Transferred from Connecticut on 11/20/2017.] (Entered: 05/19/2017) * * * |

| Date Filed | # | Docket Text |
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| 07/10/2017 | 11 | MOTION to Stay <i>and Request for Expedited Consideration</i> by USA. Responses due by 7/31/2017 (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order) (Augustini, Michael) [Transferred from Connecticut on 11/20/2017.] (Entered: 07/10/2017) |
| 07/10/2017 | 12 | MOTION to Transfer to Another District by USA. (Attachments: # 1 Memorandum in Support, # 2 Affidavit Declaration of Jamie Blow, # 3 Affidavit Declaration of Dale J. Gordon, # 4 Affidavit Declaration of Joseph Ludovici, # 5 Affidavit Declaration of Rochelle L. Russell)(Augustini, Michael) [Transferred from Connecticut on 11/20/2017.] (Entered: 07/10/2017) |
| * * * | | |
| 07/12/2017 | 14 | ORDER granting 11 Motion to Stay for 90 days. Signed by Judge Vanessa L. Bryant on 07/12/2017. (Lee, E.) [Transferred from Connecticut on 11/20/2017.] (Entered: 07/12/2017) |
| 07/12/2017 | | Answer deadline updated for USA to 10/22/2017. (Lee, E.) [Transferred from Connecticut on 11/20/2017.] (Entered: 07/12/2017) |

| Date Filed | # | Docket Text |
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| 07/31/2017 | 15 | Memorandum in Opposition re 12 MOTION to Transfer to Another District filed by Territory of Guam. (Attachments: # 1 Declaration of John D.S. Gilmour in Support of Government of Guam's Memorandum in Opposition to Defendant United States of America's Motion to Transfer Venue)(Lorenzo, Marisa) [Transferred from Connecticut on 11/20/2017.] (Entered: 07/31/2017) |
| 08/01/2017 | 16 | ORDER. The 15 Memorandum in Opposition and declaration shall be refiled in accordance with the first paragraph of 5 Chambers Practices. Signed by Judge Vanessa L. Bryant on 08/01/2017. (Shafer, J.) [Transferred from Connecticut on 11/20/2017.] (Entered: 08/01/2017) |
| 08/01/2017 | 17 | Memorandum in Opposition (<i>refiled per Court's Order 16</i>) re 12 MOTION to Transfer to Another District filed by Territory of Guam. (Attachments: # 1 refiled Declaration of John D.S.Gilmour)(Lorenzo, Marisa) [Transferred from Connecticut on 11/20/2017.] (Entered: 08/01/2017) |

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| Date Filed | # | Docket Text |
|-------------------|----------|---|
| 08/11/2017 | 18 | REPLY to Response to 12 MOTION to Transfer to Another District filed by USA. (Attachments: # 1 Affidavit Matthew Woolner)(Augustini, Michael) [Transferred from Connecticut on 11/20/2017.] (Entered: 08/11/2017) |
| 10/05/2017 | 19 | Consent MOTION to Stay <i>and Request For Expedited Consideration</i> by USA.Responses due by 10/26/2017 (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Augustini, Michael) [Transferred from Connecticut on 11/20/2017.] (Entered: 10/05/2017) |
| 10/05/2017 | 20 | ORDER granting 19 Consent Motion to Stay <i>and Request for Expedited Consideration</i> . The stay shall be lifted upon the Court's ruling on the 12 Motion to Transfer to Another District. Signed by Judge Vanessa L. Bryant on 10/05/2017. (Lee, E.) [Transferred from Connecticut on 11/20/2017.] (Entered: 10/05/2017) |
| 10/11/2017 | 21 | ORDER: The Clerk is directed to amend the case caption and the name of the parties to conform with the Amended Complaint. See Dkt. 7 . Signed by Judge Vanessa |

| Date Filed | # | Docket Text |
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| | | L. Bryant on 10/11/2017. (Lee, E.) [Transferred from Connecticut on 11/20/2017.] (Entered: 10/11/2017) |
| 10/27/2017 | 22 | ORDER granting 12 Motion to Transfer to Another District. This case is hereby transferred to the District Court for the District of Columbia. The Clerk is directed to close this case. Signed by Judge Vanessa L. Bryant on 10/27/2017. (Lee, E.) [Transferred from Connecticut on 11/20/2017.] (Entered: 10/27/2017) |
| | | * * * |
| 11/01/2017 | 23 | Consent MOTION Establish Date Certain For Response To Complaint by USA.Responses due by 11/22/2017 (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Augustini, Michael) [Transferred from Connecticut on 11/20/2017.] (Entered: 11/01/2017) |
| 11/02/2017 | 24 | ORDER granting 23 Consent Motion Establish Date Certain For Response To Complaint. The Government is ordered to file a response to Guam's amended complaint within 10 days after the Clerk transfers the action unless otherwise instructed by this Court or the District Court for the |

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| Date Filed | # | Docket Text |
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| | | District of Columbia. Signed by Judge Vanessa L. Bryant on 11/02/2017. (Lee, E.) [Transferred from Connecticut on 11/20/2017.] (Entered: 11/02/2017) |
| 11/15/2017 | 25 | Case transferred in from District of Connecticut; Case Number 3:17-cv-00371. Original file certified copy of transfer order and docket sheet received. Modified on 11/20/2017 (zrdj). (Entered: 11/20/2017) * * * |
| 11/27/2017 | 27 | MOTION to Dismiss <i>Guam's Amended Complaint</i> by USA (Attachments: # 1 Memorandum in Support, # 2 Declaration Matthew Woolner, # 3 Text of Proposed Order) (Augustini, Michael) (Entered: 11/27/2017) * * * |
| 12/11/2017 | 30 | Memorandum in opposition to re 27 MOTION to Dismiss <i>Guam's Amended Complaint</i> filed by GOVERNMENT OF GUAM. (Attachments: # 1 Declaration Declaration of Mark V. Donatiello, # 2 Text of Proposed Order Text of Proposed Order)(Cushman, Travis) (Entered: 12/11/2017) * * * |

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| 01/08/2018 | 33 | REPLY to opposition to motion re 27 MOTION to Dismiss <i>Guam's Amended Complaint</i> filed by UNITED STATES DEPARTMENT OF NAVY, USA. (Alford, Thomas) (Entered: 01/08/2018) |
| | | * * * |
| 05/15/2018 | | Minute Entry for the Motion Hearing proceedings held on 5/15/2018, before Judge Ketanji Brown Jackson: Oral argument heard re 27 MOTION to Dismiss and taken under advisement. (Court Reporter: Sara Wick) (gdf) (Entered: 05/15/2018) |
| 09/30/2018 | 37 | ORDER, that Defendants motion to dismiss (ECF No.27) is DENIED. Signed by Judge Ketanji Brown Jackson on 9/30/2018. (lckbj2) (Entered: 09/30/2018) |
| 10/05/2018 | 38 | MEMORANDUM OPINION. Signed by Judge Ketanji Brown Jackson on 10/5/2018. (lckbj2) (Entered: 10/05/2018) |
| 10/05/2018 | | MINUTE ORDER. Consistent with this Court's Memorandum Opinion, it is ORDERED that Count III of Plaintiff's Amended Complaint under section 9613(f)(3)(B) of Title 42 of the |

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| | | United States Code is DISMISSED, given that such contribution actions may not be maintained when a viable cost-recovery action under section 9607(a) of Title 42 of the United States Code is available. Signed by Judge Ketanji Brown Jackson on 10/5/2018. (lckbj2) (Entered: 10/05/2018) |
| 10/05/2018 | | MINUTE ORDER. It is hereby ORDERED that the parties in this case shall file a joint status report, on or before October 19, 2018, advising this Court of how they wish to proceed in the instant matter. Signed by Judge Ketanji Brown Jackson on 10/5/2018. (lckbj2) (Entered: 10/05/2018) |
| 10/15/2018 | 39 | <i>United States of America's</i> ANSWER to 7 Amended Complaint , COUNTERCLAIM against GOVERNMENT OF GUAM by USA.(Augustini, Michael) (Entered: 10/15/2018) |
| 10/19/2018 | 40 | Joint STATUS REPORT by GOVERNMENT OF GUAM. (Cushman, Travis) (Entered: 10/19/2018) |

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| 11/05/2018 | 43 | Guam's ANSWER to Counterclaim 39 , COUNTERCLAIM against USA by GOVERNMENT OF GUAM.(Cushman, Travis) (Entered: 11/05/2018) * * * |
| 11/06/2018 | 45 | TRANSCRIPT OF MOTION HEARING before Judge Ketanji Brown Jackson, held on 05/15/2018. Page Numbers: 1-73. Date of Issuance: 11/6/2018. Court Reporter: Sara A. Wick, Telephone number 202-354-3284. Transcripts may be ordered by submitting the Transcript Order Form * * * |
| 11/28/2018 | 46 | ANSWER to Counterclaim 43 by USA.(Augustini, Michael) (Entered: 11/28/2018) * * * |
| 12/06/2018 | 49 | MOTION for Leave to Appeal , MOTION to Stay by USA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Augustini, Michael) (Entered: 12/06/2018) |
| 12/06/2018 | | MINUTE ORDER. In light of Defendant's 49 Motion to Certify the Dismissal Orders for Interlocutory Appeal, it is hereby ORDERED that the initial |

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| | | scheduling conference currently set for 12/13/2018 is VACATED and will be reset by the Court at a later date, if necessary. Signed by Judge Ketanji Brown Jackson on 12/6/2018. (lckbj1) (Entered: 12/06/2018) |
| 12/07/2018 | 50 | Emergency MOTION for Order <i>for Reinstatement of the Rule 26 Scheduling Conference</i> by GOVERNMENT OF GUAM (Attachments: # 1 Text of Proposed Order Reinstating Scheduling Conference)(Stern, Bezalel) (Entered: 12/07/2018) |
| 12/10/2018 | 51 | Memorandum in opposition to re 50 Emergency MOTION for Order <i>for Reinstatement of the Rule 26 Scheduling Conference</i> filed by USA. (Augustini, Michael) (Entered: 12/10/2018) |
| 12/10/2018 | | MINUTE ORDER. On December 6, 2018, the United States filed a motion seeking certification for interlocutory appeal of this Court's denial of the United States' motion to dismiss Guam's amended complaint. (See ECF No. 49 .) In light of this motion, and in the interest of judicial efficiency, this Court vacated the initial scheduling conference that had |

Date Filed # Docket Text

been set for December 13, 2018. (See Minute Order of Dec. 6, 2018). Guam has now filed a motion seeking reinstatement of the initial scheduling conference, arguing that the United States is still awaiting final authorization of from the Solicitor General to proceed with an interlocutory appeal, and that “an interlocutory appeal should be discussed as part of case management.” (ECF No. 50 , at 2.) When there is a pending motion that may obviate the need for any discovery in a matter, it is this Court’s typical practice to resolve that motion before proceeding with an initial scheduling conference. Accordingly, this Court will DENY Guam’s request for reinstatement of the initial scheduling conference at this point in time. However, this Court expects the United States to determine promptly whether it will pursue an interlocutory appeal, and to that end, it is hereby ORDERED that the United States shall inform this Court in its reply brief on the motion for certification whether the Solicitor General has provided the requisite authorization to proceed with the appeal. If the Solicitor General has

| Date Filed | # | Docket Text |
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| | | not determined whether to authorize an appeal by the due date for the reply brief, this Court will enter an Order resetting the initial scheduling conference for Tuesday, January 15, 2019, at 2:45 PM. Signed by Judge Ketanji Brown Jackson on 12/10/2018. (lckbj1) (Entered: 12/10/2018) |
| 12/20/2018 | 52 | Memorandum in opposition to re 49 MOTION for Leave to Appeal MOTION to Stay filed by GOVERNMENT OF GUAM. (Attachments: # 1 Text of Proposed Order)(Stern, Bezalel) (Entered: 12/20/2018) |
| 12/27/2018 | 53 | REPLY to opposition to motion re 49 MOTION for Leave to Appeal MOTION to Stay filed by USA. (Augustini, Michael) (Entered: 12/27/2018) |
| | | * * * |
| 02/28/2019 | 55 | MEMORANDUM OPINION. GRANTING Defendant's 49 Motion for Leave to Appeal and STAYING case pending decision by D.C. Circuit. Signed by Judge Ketanji Brown Jackson on 2/28/2019. (lckbj2) (Entered: 02/28/2019) |

| Date Filed | # | Docket Text |
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| 02/28/2019 | 56 | ORDER. GRANTING Defendant's 49 Motion for Leave to Appeal and STAYING case pending decision by D.C. Circuit. Signed by Judge Ketanji Brown Jackson on 2/28/2019. (lckbj2) (Entered: 02/28/2019) |
| 05/02/2019 | 57 | ORDER of USCA, ORDERED that the petition for permission to appeal be granted USCA Case Number 19-8001. (zrdj) (Entered: 05/07/2019) |
| 05/02/2019 | 58 | NOTICE OF INTERLOCUTORY APPEAL as to 37 Order on Motion to Dismiss, 38 Memorandum & Opinion by USA. Fee Status: No Fee Paid. Parties have been notified. (zrdj) (Entered: 05/07/2019) |
| 05/02/2019 | 59 | Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was filed by the government re 58 Notice of Interlocutory Appeal. (zrdj) (Entered: 05/07/2019) |

JA-19

| Date Filed | # | Docket Text |
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| 05/08/2019 | | USCA Case Number 19-5131 for 58 Notice of Interlocutory Appeal filed by USA. (ztd) (Entered: 05/08/2019) * * * |
| 05/21/2020 | 61 | MANDATE of USCA as to 58 Notice of Interlocutory Appeal filed by USA ; USCA Case Number 19-5131. (Attachment: # 1 USCA Judgment)(zsb) (Entered: 05/21/2020) |
| 05/27/2020 | 62 | ORDER TO SHOW CAUSE why complaint should not be dismissed. Show Cause Response due by 6/22/2020. Signed by Judge Ketanji Brown Jackson on 05/27/2020. (jag) (Entered: 05/27/2020) |
| 06/19/2020 | 63 | RESPONSE TO ORDER TO SHOW CAUSE by GOVERNMENT OF GUAM re 62 Order to Show Cause filed by GOVERNMENT OF GUAM. (Attachments: # 1 Exhibit 1 - Petition for Rehearing En Banc)(Stern, Bezalel) (Entered: 06/19/2020) |
| 06/19/2020 | 64 | RESPONSE re 63 to <i>Guam's show cause filing</i> filed by USA. (Augustini, Michael) . (Entered: 06/19/2020) |

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| Date Filed | # | Docket Text |
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| 06/19/2020 | 65 | MOTION to Stay by GOVERNMENT OF GUAM. (See Docket Entry 63 to view document). (znmw) (Entered: 06/23/2020) |
| 06/22/2020 | | MINUTE ORDER. In light of the representations in the parties' responses to this Court's Order to Show Cause, it is hereby ORDERED that this case is STAYED until further Order of this Court. It is FURTHER ORDERED that, notwithstanding this stay, the parties shall file a further status report on or before 10/17/2020, updating this Court on whether any petition for certiorari has been filed. Signed by Judge Ketanji Brown Jackson on 6/22/2020. (jag) (Entered: 06/22/2020) |
| | | * * * |
| 10/09/2020 | 66 | STATUS REPORT by GOVERNMENT OF GUAM. (Attachments: # 1 Exhibit A - Petition for Writ of Certiorari)(Stern, Bezalel) (Entered: 10/09/2020) |
| 10/13/2020 | | MINUTE ORDER. In light of the representations in Plaintiff's 66 Status Report, it is hereby ORDERED that the parties shall |

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Date Filed # Docket Text

file a joint status report within 30 days of the conclusion of proceedings before the United States Supreme Court. Signed by Judge Ketanji Brown Jackson on 10/13/2020. (jag) (Entered: 10/13/2020)

[List of counsel omitted]

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| DISTRICT COURT OF |
| GUAM |
| FEB 02 2004 |
| MARY L. M. MORAN |
| CLERK OF COURT |

IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

| | | |
|---------------|---|-------------------------|
| UNITED STATES |) | CIVIL CASE |
| OF AMERICA, |) | NO. 02-00022 |
| Plaintiff, |) | |
| vs. |) | MEMORANDUM IN |
| |) | SUPPORT OF MOTION |
| GOVERNMENT OF |) | TO ENTER CONSENT |
| GUAM, |) | DECREE |
| Defendant. |) | Date: February 11, 2004 |
| |) | Time: 9:00 a.m. |
| |) | |
| |) | |

* * *

On August 7, 2002, the United States filed a Complaint in this case under Section 309 of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1319, alleging that the Government of Guam ("GovGuam") violated the Act by: (1) discharging pollutants from the Ordot Dump to waters of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit; and (2) violating the terms

of an Order from the U.S. Environmental Protection Agency (“EPA”), requiring GovGuam to eliminate the unpermitted discharges. The United States sought both injunctive relief and civil penalties to address the violations of the Act.

The United States lodged a proposed Consent Decree, which had been fully signed by the parties, with the Court on December 3, 2003. After lodging the Consent Decree, the United States published notice of the Consent Decree in the Federal Register and requested public comment on the proposed Decree for a period of thirty days. See 68 Fed. Reg. 70,533 (Dec. 18, 2003).¹ During the 30-day public comment period, the United States received a comment letter from the law firm of Calvo and Clark, LLP, counsel to Guam Resource Recovery Partners, and a comment letter from a citizens’ group called “Concerned Citizens to Close Ordot,” expressing objections to the proposed Decree.²

The United States has carefully considered these comment letters. After this review, the United States has concluded that none of the comments raised issues that would cause the United States to withdraw its consent to the Consent Decree. The United States continues to regard the Consent Decree as fair, reasonable, and consistent with the purposes of the Clean Water Act. Therefore, the United States respectfully moves this Court to approve, sign, and

¹ A copy of the Federal Register notice is included as Exhibit 1 to this Memorandum.

² The comment letters are included as Exhibit 2 to this Memorandum.

enter the Consent Decree that was lodged with the Court on December 3, 2003.

I. BACKGROUND

A. Clean Water Act

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). In order to achieve this objective, CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any persons except as authorized by, and in compliance with, specific sections of the Act. Pursuant to CWA Section 402, 33 U.S.C. § 1342, EPA may issue an NPDES permit to authorize discharges of pollutants into waters of the United States. Such discharges are subject to the conditions and limitations set forth in the NPDES permit.

EPA has broad authority under CWA Section 309(a), 33 U.S.C. § 1319(a), to issue compliance orders to persons whenever EPA finds that a person has violated Section 301 of the Act. In addition, Section 309(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 and for any violation for which EPA is authorized to issue a compliance order. Pursuant to CWA Section 309(d), 33 U.S.C. § 1319(d), any person who violates CWA Section 301 or an order issued by EPA under Section 309(a) is subject to civil penalties not to exceed \$25,000 per day for each violation that occurred on or before January 30, 1997. The maximum civil penalty has been increased to \$27,500 per day per violation for violations after January 30, 1997. 40 C.F.R. §§ 19.2, 19.4.

B. The Ordot Dump

GovGuam owns and operates the Ordot Dump, which is located on high ground north of the Lonfit River.³ Because the Dump is unlined on its bottom and uncapped at its top, it acts like a sponge, retaining rain water and releasing it after it has percolated through the landfill and absorbed contaminants. As a direct result of these conditions, the Ordot Dump has discharged, and continues to discharge, leachate into the Lonfit River along the surface of the ground via two streams.

In addition, there have been a series of major fires at the Ordot Dump in 1998, 2000, 2002, and 2003. Smoke from Dump fires has caused the temporary evacuation of residents in the nearby village of Ordot. Odors and vectors (rats, flies, and mosquitoes) have also been serious and constant problems. Both the residents of Guam and individual agencies of GovGuam have expressed their frustration and lack of ability to get the Ordot Dump closed and a new sanitary landfill opened.

The Ordot Dump serves Guam's civilian population of about 115,000 and currently receives about 255 tons of municipal solid waste per day. It is the only municipal landfill on the Island of Guam and is already filled beyond capacity. The Guam Legislature has attempted to address the landfill issue, including setting deadlines for closure of the Ordot Dump. However, GovGuam has not been able to come up with a political consensus or the funding required for closure. Thus, the Dump remains open,

³ The Lonfit River merges with the Sigua River to form the Pago River and then drains into Pago Bay and the Pacific Ocean.

leachate discharges continue, and the Dump remains a public nuisance.

C. EPA's Administrative Actions Involving the Ordot Dump

1. EPA's CERCLA Investigation

On June 1, 1982, EPA Region 9 approved a "formal investigation" of the Ordot Dump under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Ordot Dump was included on the original National Priorities List. In a 1988 Record of Decision, EPA decided to take no further action under CERCLA to address the Dump. EPA concluded that "applying standard operation practices to control landfill leachate to receiving waters" and "improved leachate control measures consisting of capping and surface water control" could be implemented through enforcement of EPA's 1986 Order under the CWA. (See Section C.2. below.)

2. EPA's Clean Water Act Actions

EPA issued administrative Orders under the CWA against GovGuam in both 1986 and 1990. The 1986 EPA Order required GovGuam to submit a detailed compliance plan by May 1, 1986, assess landfill operations by June 15, 1986, assess past discharges by May 1, 1986, and cease the discharges by May 1, 1987.

Despite the administrative Order, GovGuam continued to discharge and violated other provisions of the 1986 Order. EPA filed an administrative complaint against GovGuam in 1989 for the discharge of untreated leachate from the Dump and settled the case in May 1990. GovGuam paid a civil penalty of

\$15,000 and performed a \$40,000 Supplemental Environmental Project (“SEP”).⁴

EPA issued another administrative Order pursuant to the CWA in July 1990, requiring GovGuam to cover the Ordot Dump to prevent discharges by June 30, 1992, and to submit plans for capping and for the continued operations for the remaining life of the landfill. The 1990 Order did not explicitly require closure. In February 1991, EPA approved an extension of the cover deadline to August 15, 1992. That deadline was missed and the capping was never done.

In April 1997, EPA amended the 1990 Order to require, by July 9, 1997, a schedule for the design of a cover system to eliminate the untreated leachate discharges. GovGuam submitted a proposed schedule. In September 1997, EPA rejected the schedule because it lacked funding commitments to make the plan credible. GovGuam has continued to fail to comply with the amended 1990 Order.

II. THE COMPLAINT AND CONSENT DECREE

A. Complaint

On August 7, 2002, the United States filed a Complaint against GovGuam under the Act. The Complaint alleged that: (1) GovGuam does not have a

⁴ EPA’s policy defines a Supplemental Environmental Project (“SEP”) as an environmentally beneficial project that a defendant undertakes in settlement of an enforcement action. In order to qualify under EPA’s policy, the project must be one that the defendant is not otherwise legally obligated to perform. The costs incurred by the defendant in performing the SEP may be considered by EPA as one factor in determining an appropriate penalty amount.

permit from EPA authorizing the discharge of any pollutant from the Ordot Dump to waters of the United States; (2) from at least 1988 to the present, GovGuam has routinely discharged untreated leachate from the Ordot Dump into the Lonfit River and two of its tributaries; (3) leachate is a pollutant under the Act; (4) the Lonfit River and its tributaries are waters of the United States; and (5) the Ordot Dump and the earthen channels, gullies, trenches, and ditches that carry leachate to the Lonfit River's tributaries are point sources under the Act. The United States also alleged that, in response to EPA's administrative Order, GovGuam failed to submit a compliance schedule that contained an unconditional source of funding and failed to construct a closure system at the Ordot Dump. The United States sought civil penalties and injunctive relief for violations of the Act.

B. Consent Decree

The United States had negotiated with GovGuam for over a year before filing the Complaint in this case. After the Complaint was filed, the parties participated in a number of Court-supervised negotiations beginning in November 2002, and were able to reach agreement on the terms of the Consent Decree that the United States lodged with the Court on December 3, 2003.

The Consent Decree sets out a schedule for the closure of the Ordot Dump and the opening of a new sanitary landfill. Pursuant to the Decree, Guam Department of Public Works ("Guam DPW") is required to submit a closure plan that includes a site investigation, a baseline survey, and the design of a landfill cover system and a perimeter surface water

diversion system. Guam DPW is also required to submit a permit application to Guam EPA to comply with requirements for the disposal of municipal solid waste at Ordot Dump for the interim period until the Dump is closed. Guam DPW will also need to obtain the Army Corps of Engineers' approval of a Wetland Mitigation Plan for the closure. After its closure plan is approved, Guam DPW is required to award a construction contract for closure, complete closure, begin implementing a post-closure plan, and certify that it no longer accepts municipal waste at Ordot Dump.

The Ordot Dump is presently the sole municipal landfill on Guam. Thus, in addition to requiring the closure of the Ordot Dump, the Consent Decree also directs Guam DPW to construct and operate a new sanitary landfill. The Decree requires Guam DPW to complete an Environmental Impact Statement regarding at least 3 alternative sites for the new landfill, choose a site, and submit design and construction plans to EPA. Thereafter, Guam DPW must submit a permit application and obtain a permit from Guam EPA, submit a permit application and obtain a Wetland Development Permit from the Army Corps of Engineers, award a construction contract, and construct and operate a new sanitary landfill.

The Consent Decree requires GovGuam to spend \$1 million for a SEP to develop and implement a comprehensive waste diversion strategy for household hazardous waste on Guam. Currently, Guam has no system in place to regulate the disposal of household hazardous waste. Pursuant to the Consent Decree, GovGuam will: (1) develop a service for residents to properly dispose of such wastes; (2) produce a guide and public education program to

inform the public about the type of wastes, alternative products, and disposal options; and (3) construct and operate a hazardous waste holding facility to allow recycling, reuse, or disposal of hazardous wastes at an EPA-approved facility. Finally, the Consent Decree requires GovGuam to pay a civil penalty of \$200,000 in a series of installments.

III. STANDARD OF REVIEW FOR ENTRY OF A PROPOSED CONSENT DECREE

Approval of a proposed consent decree is committed to the informed discretion of the district court. United States v. State of Oregon, 913 F.2d 576, 580 (9th Cir. 1990). The court's discretion should be exercised in favor of the strong policy favoring voluntary settlement of litigation. Ahern v. Central Pacific Freight Lines, 846 F.2d 47, 48 (9th Cir. 1988); accord SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) (“[t]he use of consent decrees encourages informal resolution of disputes, thereby lessening the risks and costs of litigation”). Judicial deference to negotiated settlements is particularly appropriate when a government agency charged with protecting the public interest ‘has pulled the laboring oar in constructing the proposed settlement.’ United States v. Montrose Chemical Corp. of California, 50 F.3d 741, 746 (9th Cir. 1995); see also United States v. Akzo Coatings of Am. Inc., 949 F.2d 1409, 1436 (6th Cir. 1991) (judicial deference to a government settlement is “particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field”). Accordingly, “a district court reviewing a proposed consent decree ‘must refrain

from second-guessing the Executive Branch.” Montrose Chemical Corp., 50 F.3d at 746 (quoting United States v. Cannons Eng’g Corp., 899 F.2d 79, 84 (1st Cir. 1990)); see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (the balancing of interests “must be left, in the first instance, to the discretion of the Attorney General”).

The trial court should enter the consent decree if it is fair, reasonable, and consistent with the purposes that the statute is intended to serve. Montrose Chemical Corp., 50 F.3d at 747; see Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990) (in a CWA case, Ninth Circuit concluded that the court may enter the consent decree as long as the decree comes within the general scope of the case made by the pleadings, furthers the statute’s objectives, and does not violate the statute). In undertaking its review, a court is not required to make the same in-depth analysis of a proposed settlement that it would be required to make in order to enter a judgment on the merits after trial: “[t]he trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.” Citizens for a Better Env’t v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983); accord United States v. State of Oregon, 913 F.2d at 582.

A court does not have the authority to modify the decree. Instead, it must either accept or reject the decree as submitted. See Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615, 630 (9th Cir. 1982). The

relevant standard is “not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.” Cannons, 899 F.2d at 84.

In sum, the Court’s role in reviewing this Consent Decree is limited. Broad deference should be afforded to EPA’s expertise in determining an appropriate settlement and to the voluntary agreement of the parties in proposing the settlement. If the Consent Decree is fair, reasonable, and consistent with applicable law, it ought to be approved. Since this Consent Decree meets the standards for entry, the United States requests the Court to approve and enter it.

IV. THE CONSENT DECREE IS FAIR, REASONABLE, AND CONSISTENT WITH THE PURPOSES OF THE CLEAN WATER ACT

A. The Consent Decree is Procedurally and Substantively Fair

Courts evaluate both the procedural and substantive fairness of settlements. Cannons, 899 F.2d at 86. Procedural fairness concerns the negotiation process; courts assess whether the process was open and at arm’s length. United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1051 (N.D. Ind. 2001). A consent decree’s substantive fairness “incorporates ‘concepts of corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible.’” United States v. Telluride Co., 849 F. Supp. 1400, 1402 (D. Colo. 1994).

In this instance, the United States negotiated with GovGuam representatives for over one year before the Complaint was filed. The parties also participated in Court-supervised negotiations since November 2002. Both parties were represented by counsel and engineers and closely negotiated the terms of the settlement that was presented to the Court in December 2003. It is undisputed that this Consent Decree is the product of arm's length negotiations.

In addition, the Consent Decree is substantively fair. In its administrative actions before the Complaint was filed in this case, EPA sought to require GovGuam to cap the Ordot Dump and to stop leachate discharges from the Dump. Under the Consent Decree, GovGuam bears the cost of harm for which it is responsible. Not only does the Decree require the cessation of leachate discharges from Ordot Dump, it also mandates that GovGuam close the Dump permanently and construct a new sanitary landfill. Moreover, GovGuam will pay \$1 million for an SEP to develop and implement a comprehensive waste diversion strategy for household hazardous waste on Guam, which will prevent some hazardous waste from ever being disposed in a landfill and will protect the Nation's waters from hazardous waste discharges. The Consent Decree is therefore fair to Guam residents, who have the right to expect that they and the Island's fragile environment will be adequately protected, because it provides an environmentally sound approach to Guam's landfill problem. Furthermore, steps toward compliance will begin immediately and will not be delayed by additional litigation.

B. The Consent Decree is Reasonable

In discerning whether a consent decree is reasonable, a court may consider whether the decree is technically adequate, fully compensates the public for the alleged violations, and takes into consideration the risks of litigation. Telluride Co., 849 F. Supp. at 1403. Applying that standard here, the Court should find that this Decree represents a reasonable settlement of the CWA violations. As discussed above, the Decree is technically adequate because it contains specific, tailored relief that addresses the violations alleged in the United States' Complaint. Moreover, it obtains this compliance without requiring the parties to spend scarce resources to litigate the case and without the attendant delay of such litigation. The Decree requires payment of a civil penalty that is appropriate under the circumstances because it provides a deterrent effect while taking into account GovGuam's current fiscal straits. The Decree also provides for an SEP that will improve Guam's management of solid waste and prevent future harm to waters of the United States. If the United States had litigated this case to judgment, this SEP would not have been obtained as injunctive relief because it is, by definition, a project that is not required by law.

C. The Consent Decree is in the Public Interest and Consistent with the Purpose of the Clean Water Act

The role of the Court in reviewing an environmental settlement is to determine "whether the decree comports with the goals of Congress." Sierra Club v. Coca-Cola Corp., 673 F. Supp. 1555, 1556 (M.D. Fla. 1987). Thus, this Court should

determine whether the Consent Decree “is in the public interest and upholds the objectives of the Clean Water Act, the primary of which is ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” Telluride Co., 849 F. Supp. at 1402-03. In making this determination, “[t]he court should also bear in mind the flexibility of the public interest inquiry: the court’s function is not to determine whether the resulting array of rights and liabilities ‘is the one that will best serve society,’ but only to confirm that the resulting settlement is ‘within the reaches of the public interest.’” United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (citations omitted).

As described above, the settlement achieves, without further litigation delays or costs, environmental benefits by requiring GovGuam to comply with a schedule for the closure of the Ordot Dump and the opening of a new sanitary landfill. In the closure plan, GovGuam will design a landfill cover system and a perimeter surface water diversion system to stop the discharge of leachate from the Dump. The construction and operation of a new sanitary landfill will end Guam’s dependence on the Ordot Dump, thereby eliminating a long-standing nuisance and bringing GovGuam into compliance with the CWA. GovGuam’s development of a new household hazardous waste diversion plan through implementation of the SEP will also protect against the future discharge of hazardous wastes to the Nation’s waters. Thus, this Consent Decree furthers the statutory goals of the Clean Water Act and serves the public interest.

**V. THE COMMENTS ABOUT THE PROPOSED
CONSENT DECREE DO NOT PROVIDE A
BASIS FOR REJECTING THE
SETTLEMENT**

As noted above, the United States published notice of the proposed Consent Decree for public comment and received a comment letter from Calvo and Clark, LLP, on behalf of Guam Resource Recovery Partners (“GRRP”). According to GRRP, GovGuam and GRRP executed a Solid Waste Construction and Services Agreement (the “SWCS Agreement”) in 1996 that was intended to finance the generation of electricity from waste. GRRP notes that the validity of the SWCS Agreement is currently being challenged in a case that is pending in Guam’s Supreme Court. GRRP’s letter contained four comments that are summarized below.

The United States also received a comment letter from a citizens’ group called “Concerned Citizens to Close Ordot” (“CCCO”), enclosing a petition that CCCO had previously presented to the Court in 2003.⁵ CCCO’s comment letter and petition contain four comments that are summarized below.

Comment 1: Expansion of the Ordot Dump

GRRP - Expansion of the Ordot Dump should not be permitted because it will complicate existing environmental problems in the area, violate Guam law, and breach the SWCS Agreement, which granted

⁵ The United States has included a copy of one page of the petition in Exhibit 2 to this Memorandum. As the Court is aware, the petition was signed by over 3,600 Guam residents.

GRRP the option to design, construct, and operate a new landfill.

CCCO - The Ordot Dump is a public health hazard, has been operating in an unsafe and illegal manner, and should be closed as soon as possible. CCCO opposes any expansion of the Ordot Dump and the acquisition of any private property in Ordot for the purposes of operating a solid waste facility. Ordot has been designated as a Superfund site and needs to be cleaned up without any further pollution pressures placed on it.

The Consent Decree is designed to remedy GovGuam's continuous violation of the federal Clean Water Act. For many years, GovGuam has acknowledged that the Ordot Dump has been filled beyond its capacity. For example, Guam's former Governor sent a letter to the Legislature in February 1998 about Bill No. 495 in which he noted that the Ordot Dump was overflowing and that Guam had considered closing Ordot beginning in 1982. Similarly, the Guam Legislature has made specific findings relating to the Ordot Dump:

(1) *the Ordot Landfill is a threat to the health and safety of the residents of Guam, and specifically for the residents of Ordot-Chalan Pago, Yona and the villages down river and downwind;. . . .*

(4) *the Ordot Landfill reached its capacity in the 1990's, and the closure of the dump is necessary in order to eliminate this existing serious environmental hazard.*

10 G.C.A. § 51101(a) (emphasis added).

Despite repeated acknowledgments by Guam's government of this serious problem and several

legislative acts attempting to address it, the Ordot Dump continues to discharge leachate into the Lonfit River. In addition, conditions at the Dump periodically cause catastrophic fires, necessitating the evacuation of nearby residents. This Consent Decree finally serves to break the legislative logjam that prevented GovGuam from addressing this serious public health and environmental hazard.

Pursuant to Paragraph 9 a. of the Consent Decree, Guam DPW is required to submit a list of at least three potential landfill sites to EPA and Guam EPA within 30 days after entry of the Decree. Contrary to GRRP's assumption, the Decree does not mandate that Guam DPW include an expansion of Ordot as one of its choices on that list. Paragraph 7 a. of the Decree serves only to clarify that Guam DPW may consider the option of constructing and operating new cells at a location adjacent to Ordot Dump when it evaluates potential landfill sites for the new Municipal Solid Waste Landfill ("MSWLF"). Thus, the decision whether to include an Ordot option on its list of potential sites rests with Guam DPW under the Decree.

If Guam DPW does choose to include an Ordot option on its list, the Consent Decree requires DPW to complete an Environmental Impact Statement ("EIS") that includes a detailed analysis and comparison of the landfill sites on the list. ¶ 9 a. The EIS process will allow for public participation so that citizens can express their concerns about each site. In that EIS process, Guam DPW will be able to evaluate the advantages and disadvantages of each site. After completing the EIS, Guam DPW will identify its preferred alternative for a new landfill site. ¶ 9 a.

At this point, it is premature to conclude that an Ordot option is either feasible or infeasible for the following reasons. First, Guam DPW has not yet identified Ordot expansion as an option under Paragraph 9 a. Second, even if an Ordot option is identified, it may not be DPW's preferred alternative after the EIS process is completed. Third, EPA has the prerogative to dispute DPW's preferred alternative pursuant to Paragraph 9 b. If EPA and GovGuam cannot agree on a location for the new landfill site, the matter will be submitted to the Court for resolution, ¶ 9 b. Fourth, Paragraph 8 of the Consent Decree requires GovGuam to design and implement a closure plan for the existing Ordot Dump that will eliminate the source of the discharge of leachate to the Lonfit River. This approach to the problem is consistent with EPA's conclusion in its 1988 Record of Decision when EPA decided to take no further action under CERCLA to address the Ordot Dump. Finally, if any new MSWLF is slated for the vicinity of Ordot, it will be sited, constructed, and operated in accordance with all applicable federal and local laws pursuant to the requirements of the Consent Decree. Therefore, a new MSWLF should not complicate existing environmental problems in the area.

The United States also believes that any perceived conflict with Guam law can be managed by Guam DPW. For example, if Guam DPW identifies an Ordot option as the preferred alternative for a new landfill at the conclusion of the EIS process, DPW can request the Guam Legislature to authorize its decision in new legislation.

Similarly, it is premature to state there will be any conflict with the SWCS Agreement. It is conceivable

that the legal challenge to the validity of the SWCS Agreement will be decided by the Guam Supreme Court by the time Guam DPW needs to state its preferred alternative for a landfill site for the new MSWLF. The Court may determine that the SWCS Agreement is invalid. In addition, GovGuam may interpret the SWCS Agreement differently than GRRP. Even if the SWCS Agreement is determined to be valid, GRRP's interpretation of its substantive provisions is not necessarily controlling.

Comment 2: Construction Contract

GRRP: The Consent Decree's provision requiring GovGuam to award a construction contract for the new MSWLF violates the SWCS Agreement because GovGuam has already exercised an option under the Agreement and designated GRRP to construct a new landfill.

The Consent Decree does require GovGuam to construct a new MSWLF. However, as long as GovGuam follows the requirements of the Consent Decree in making its siting decision regarding a new MSWLF, GovGuam could decide to construct the new MSWLF at the location chosen by GRRP. Moreover, as stated previously, the validity of the SWCS Agreement is currently before the Guam Supreme Court and will likely be decided long before DPW is required to award a construction contract under the Consent Decree, which occurs 32 months after entry. In addition, GovGuam may interpret the SWCS Agreement differently than GRRP. Finally, if the Guam courts determine that the SWCS Agreement is valid and if GRRP were to prevail in its interpretation of the Agreement, GRRP would have a remedy at law.

That would not affect the validity of this Consent Decree.

Comment 3: Location of Potential Landfill Sites

GRRP: The Consent Decree's requirement that Guam DPW identify three potential landfill sites allows GovGuam to identify potential sites outside of those designated by the Guam Legislature, which chose Guatali and Malaa. Consideration of sites other than Guatali and Malaa would violate Guam law and the SWCS Agreement.

CCCO: Allowing GovGuam to locate a new solid waste management facility adjacent to the existing Ordot Dump conflicts with previous Guam legislation prohibiting such an option. Citizens will be required to bring litigation against GovGuam for ignoring Guam law.

The Decree establishes an EIS procedure in Paragraph 9 that requires GovGuam to complete a detailed analysis and comparison of at least three alternative sites for a new MSWLF. An analysis of alternative sites in an EIS process will not necessarily result in any conflict with the Guam Legislature's preferred alternatives. First, Guam DPW could conclude, after completing the EIS, that Guatali or Malaa is its preferred alternative. Alternatively, Guam DPW could decide, after considering its options in the EIS process, that a new site is preferable and ask the Guam Legislature to ratify its decision in new legislation.

Regarding the perceived conflict with the SWCS Agreement, the United States has addressed that concern in its response to comment 2.

Comment 4: Methods of Solid Waste Disposal

GRRP: The Consent Decree contemplates that the primary method of municipal solid waste disposal on Guam shall be a landfill. The SWCS Agreement contemplates that incineration shall be the primary method. GRRP objects to the Consent Decree to the extent that it impacts the SWCS Agreement by calling for an alternate primary method of solid waste disposal other than incineration.

CCCO: The Consent Decree assumes that construction of landfill constitutes compliance with the Court's Order and eliminates any alternative method of solid waste management such as incineration. GovGuam has previously adopted an incinerator-based approach to the problem. GovGuam is attempting to use this Consent Decree to abandon previously approved methods of solid waste management. GovGuam does not have the authority to negotiate the compliance provisions of this Decree because it conflicts with previous governmental acts by GovGuam.

Contrary to assertions by GRRP and CCCO, the Consent Decree does not establish any primary method of municipal solid waste disposal for Guam. As long as it complies with applicable federal and local laws, GovGuam is free to decide whether it will rely on incineration as the primary method of municipal solid waste disposal on Guam. The Consent Decree does require that GovGuam close the Ordot Dump and design, construct, and operate a new MSWLF. While incineration may be used to reduce the total volume of municipal solid waste, it cannot eliminate solid waste entirely. Therefore, even if GovGuam were to decide to construct a waste-to-

energy facility, the Territory of Guam would still require a new MSWLF for disposal of ash

Comment 5: Financial Plan

CCCO: The Consent Decree is unenforceable because GovGuam does not have the money to comply with its provisions. Paragraph 10 of the Consent Decree requires only that GovGuam exercise its best efforts to fund the compliance terms and does not guarantee that the terms of the Decree will ever be brought to fruit. It is ironic that GovGuam is proposing to pay stipulated penalties if it has not secured funding for compliance with the Decree.

Within 120 days after entry of the Consent Decree, Paragraph 10 requires GovGuam to submit to EPA a financial plan for funding the closure of Ordot Dump and the opening of a new sanitary landfill. The financial plan will include both the sources of funds and a schedule to secure funds for both capital costs and operating expenses.

The parties acknowledge in Paragraph 10 that GovGuam does not currently have the total amount of funding necessary to complete these projects. However, the projects will take more than three years to complete and can be funded over time. Moreover, the Guam Legislature has already provided some funding through the Solid Waste Operations Fund, which is specifically designed to finance the closure of Ordot and the opening of a new sanitary landfill, and the U.S. Department of the Interior has provided some additional funding. In addition, collection of tipping fees is an expected source of revenue for these projects. GovGuam presently has sufficient funds to begin the planning process required by the Consent Decree. To the extent that the Solid Waste

Operations Fund is insufficient to complete the projects, GovGuam committed to use its best efforts to secure the necessary funding for these projects.

The stipulated penalties provisions in Paragraph 12 of the Consent Decree provide the United States with an important enforcement tool to ensure that GovGuam follows through on its commitments. The threat of such fines will also serve to motivate GovGuam to focus on compliance with the terms of the Decree, which should prevent any undue delays in the compliance schedule.

In sum, the parties negotiated the terms of the compliance schedule embodied in the Consent Decree over a period of many months. GovGuam is committed now to a reasonable and enforceable compliance schedule to address and resolve the long-standing issue of municipal solid waste disposal for Guam.

VI. CONCLUSION

The Consent Decree now before the Court was reached after the parties' careful and informed assessment of the merits of the case, the costs, risks, and delays that litigation would entail, and the value of an early settlement, including the significant environmental benefits that will accrue from GovGuam commencing many of the comprehensive injunctive measures contained in the proposed Decree immediately. As explained above, the proposed settlement is fair, reasonable, and consistent with the purpose of the Clean Water Act. Because the public comments submitted on the proposed Decree do not provide a basis for the United States to withhold its consent to the settlement, the United States requests

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this Court to approve and enter the proposed Consent Decree.

Respectfully submitted,

LEONARDO M. RAPADAS
United States Attorney
Districts of Guam and NMI

Dated: 2/2/04

s/ Mikel W. Schwab

MIKEL SCHWAB
Assistant U.S. Attorney

OF COUNSEL:

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

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NOTICES

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the
Clean Water Act

Thursday, December 18, 2003

***70533** Under 28 CFR 50.7, notice is hereby given that on December 3, 2003, a proposed consent decree in *United States v. Government of Guam*, Civil Case No. 02-00022, was lodged with the United States District Court for the District of Guam.

In this action, the United States sought injunctive relief and civil penalties under section 309 of the Clean Water Act ("CWA") against the Government of Guam for: (1) Discharges of leachate from the Ordot Landfill without a permit in violation of CWA section 301; and (2) violation of the U.S. Environmental Protection Agency's administrative order to cease the discharges. The consent decree requires the

GOVERNMENT
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Government of Guam to: (1) Close the Ordot Landfill, conduct environmental studies, and develop, design, construct, and operate a new sanitary landfill; (2) as a supplemental environmental project, develop and implement a comprehensive waste diversion strategy for household hazardous waste on Guam; and (3) pay a civil penalty of \$200,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to United States v. Government of Guam, D.J. Ref. #90-5-1-1-06658.

The consent decree may be examined at the Office of the United States Attorney, Suite 500, Sirena Plaza, 108 Hernan Cortez, Hagatna, Guam, and at U.S. EPA Region 9, Office of Regional Counsel, 75 Hawthorne Street, San Francisco, California. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site: <http://www.usdoj.gov/enrd/open.html>. A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount \$20.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

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Ellen M. Mahan,
Assistant Chief, Environmental Enforcement Section,
Environment and Natural Resources Division.

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CALVO AND CLARK, LLP

[letterhead omitted]

January 15, 2004

Assistant Attorney General
Environmental and Natural Resources Division
Post Office Box 7611
U.S. Department of Justice
Washington, DC 20044-7611

RE: United States v. Government of Guam, D.J.
Ref. 90-5-1-1-06658

Dear Assistant Attorney General:

This office is legal counsel for Guam Resource Recovery Partners (“GRRP”). On behalf of GRRP, we wish to submit the following comments to the Consent Decree in the action entitled *United States of America v. Government of Guam*, U.S. District Court of Guam Civil Case No. 02-00022 (the “Ordot Dump Action”), for the U.S. Government’s consideration.

In 1996, the Government of Guam and GRRP executed the Solid Waste Construction and Services Agreement (the “Agreement”). The Agreement has as its general purpose the generation of electricity from waste using a privately financed, constructed and operated facility and the purchase of the power produced by the facility by the Government of Guam.

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In 2000, a local senator filed a complaint seeking declaratory and injunctive relief against the Government of Guam in order to have the Agreement declared invalid and to enjoin the Government from proceeding with the Agreement. See *Pangelinan v. Gutierrez*, Superior Court of Guam Special Proceedings Case No. 212-00. GRRP intervened in that action.

In 2001, the Superior Court of Guam issued a Decision and Order declaring the Agreement valid and finding unconstitutional and inorganic local laws that impaired the Agreement. The judgment of the Superior Court was appealed and the matter is still pending before the Guam Supreme Court after the issuance of an opinion and the granting of a motion to reconsider that opinion. Since the matter is still pending before the Guam Supreme Court the applicable judicial enactment is the decision of the Superior Court of Guam upholding the validity of the Agreement.

GRRP offers the following comments:

1. Paragraph 7.a. provides that “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.”

Comment - Expansion of the Ordot Dump site will only lead to a complication of the existing environmental degradation downstream and adjacent to the dump. For instance, according to the U.S. EPA, leachate of questionable composition has been observed openly entering the Lonfit River from the dump. The Water and Energy Research Institute (University of Guam) characterizes this leachate as

containing certain toxic and harmful substances, which are probably now in situ in the river sediment. Until the source of these substances is identified and specifically isolated and monitored, the whole area can be considered as an environmental hazard and area source for these pollutants. If the MSWLF is located adjacent to or close to the dump, isolation of any additional source will be difficult to accomplish. The Ordot site is listed as a Superfund site, so any work at Ordot should be isolated to the closing of the dump and remediation of the existing violations.

Additionally, constructing the MSWLF at a location adjacent to the Ordot Dump violates existing Guam Law. Guam Public Laws 23-95 (1996) and 24-06 (1997) and the Integrated Solid Waste Management Plan for the Island of Guam provide that the primary site for the MSWLF shall be *Guatali* and the secondary site shall be *Malaa*. Expansion of the Ordot Dump, as contemplated by the Consent Decree, contravenes the express provisions of Guam Public Law 23-95 and 24-06. It is highly likely that if the Ordot Dump is expanded, residents of Ordot-Chalan Pago will protest and bring suit to enforce the provisions of Public Laws 23-95 and 24-06 and prohibit such expansion.

Finally, expansion of the Ordot Dump is a breach of the Agreement. The Agreement grants the Government of Guam the option to cause GRRP to design, construct, and operate a new landfill. The Government of Guam exercised its option in February 1997. In anticipation of satisfying its obligations under the option, GRRP identified a landfill site and is in fact leasing a site from the Chamorro Land Trust Commission for the development and operation of the new landfill. The leased site is Parcel B of the area

commonly known as *Guatali* and this site meets all U.S. EPA and Guam EPA requirements for landfill siting, construction and operation. Should the Government of Guam proceed with expansion of the Ordot Dump, GRRP will seek an injunction from the court and enforcement of the option exercised by the Government of Guam.

2. Paragraph 9.5 provides: “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.”

Comment - Pursuant to the option exercised by the Government of Guam under section 5.09 of the Agreement, the Government of Guam has designated GRRP as the entity responsible for the design, construction and operation of a new landfill. Putting out the design, construction and operation of the MSWLF for bid is a direct violation of the option exercised by the Government of Guam under the Agreement. GRRP intends on fully protecting its rights under the option and the Agreement and will institute legal action to ensure that its rights are adequately protected.

3. Paragraph 9.a provides that “Within 30 days, DPW shall submit a list of at least three potential landfill sites to U.S. EPA and GEPA.”

Comment - This broad language allows the Government of Guam to identify potential landfill sites outside of those mandated by the Guam Legislature. The sites to be considered under the

Consent Decree should be specifically identified as either Parcel A of *Guatali* (designated by Guam P.L. 23-95 and 24-06), Parcel B of *Guatali* (designated by GRRP under the Agreement) or *Malaa* (designated by Guam P.L. 23-95 and 24-06). Consideration of sites other than *Guatali* and *Malaa* would be a violation of local law and a breach of the Agreement.

4. As a general matter the Consent Decree contemplates that the primary method of municipal solid waste disposal on Guam shall be landfilling. This is in direct contravention of the Agreement, which contemplates that incineration should be the primary method of solid waste disposal on Guam. Accordingly, GRRP objects to the Consent Decree to the extent that it impacts the Agreement by calling for an alternate primary method of solid waste disposal other than incineration.

In conclusion, the Agreement is a valid contract between the Government of Guam and GRRP. It appears that the Consent Decree fails to take into consideration the Government of Guam's obligations under the Agreement and the impact the Agreement might have on the Government of Guam's ability to comply with the consent Decree. Inversely, the Consent Decree also fails to consider the impact the Government of Guam's compliance with the Consent Decree might have on the Agreement. To the extent that the Government of Guam's compliance with the Consent Decree works as a material breach of the Agreement, the Government of Guam risks being in default under the Agreement thereby subjecting itself to damages.

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Sincerely,

CALVO AND CLARK, LLP

/s/ Janalynn M. Cruz

Janalynn M. Cruz

JA-55

January 15, 2004

Assistant Attorney General
Environmental and Natural Resources Division
Post Office Box 7611
U.S. Department of Justice
Washington, DC 20044-7611

RE: United States v. Government of Guam, D.J.
Ref. 90-5-1-1-06658

To Whom It May Concern:

As concerned citizens of Guam we are transmitting the enclosed comments on the proposed consent decree in the issue of the United States of America vs. the Government of Guam, Civil Case No. 02-00022.

The enclosure outlines our concerns that the decree and appurtenant conditions do not take into account the fact that the Government of Guam has previously adopted methods of solid waste management, and has previously excluded the existing Ordot Dump location from consideration for expansion of trash disposal facilities on Guam.

We are enclosing for your reference copies of signature sheets previously presented at the District

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| GOVERNMENT EXHIBIT 3 |
|--------------------------------|

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Court of Guam in 2003, voicing citizens' opinions that the Ordot Dump should be closed and no adjacent or nearby expansion considered.

Ordot has been designated a Superfund site. It needs to be closed and cleaned up with no further pollution pressures placed on it.

Sincerely,

s/ [illegible]

Concerned Citizens to Close Ordot

Attachments: Comments to Consent Decree
Signature Sheets

**COMMENTS ON THE PROPOSED CONSENT
DECREE IN CIVIL CASE NO. 02-00022**
*UNITED STATES OF AMERICA V.
GOVERNMENT OF GUAM*

THE UNDERSIGNED are citizens and residents of the Territory of Guam, and are persons directly affected by the current and future waste management policies of the Government of Guam. **THE UNDERSIGNED** submit their comments on the proposed Consent Decree in the above identified suit as follows:

I. SUMMARY OF COMMENTS

The proposed Consent Decree has assumptions built into it that actually constitute a fraud on the United States District Court that will be asked to enter this Consent Decree.

By assuming that a landfill constitutes compliance with a U.S. court order, this proposed Consent Decree eliminates any alternative methods of solid waste management. In fact, the Government of Guam has previously explored and adopted methods of solid waste management different from simple landfill solutions and has entered into contracts, including legislative approvals, for an incinerator based approach to the problem. It appears that GovGuam is attempting to use this proposed Consent Decree to abandon previous approved methods of solid waste management.

The proposed Consent Decree explicitly allows consideration of the existing Ordot location for a new landfill. Again, previous legislation by the Guam legislature has excluded the Ordot area from consideration for new solid waste management

facilities. GovGuam is attempting to use the Consent Decree process and the power of the Court to avoid binding legislation that limits GovGuam's powers in this area.

The proposed Consent Decree is essentially unenforceable. GovGuam does not have the money to comply with the proposed Consent Decree (see Consent Decree, Par. 10). The proposed Consent Decree only requires "best efforts" on the part of GovGuam to comply with the provisions of this proposed Consent Decree. This is a subjective and essentially unenforceable standard of compliance. It is foreseeable that this "best efforts" standard will require re-litigation of each step of compliance with the Consent Decree, with inevitable delays.

II. PRE-EXISTING OBLIGATIONS OF GOVGUAM

The proposed Consent Decree, if entered by the Court, will implicitly adopt two underlying factual assumptions. First, the proposed Decree assumes that GovGuam has no previous governmental restrictions and obligations that limit or define its choices in solid waste management. Second, the proposed Decree assumes in advance that a simple landfill solution is the proper solution to Guam's solid waste management problems.

GovGuam does have prior governmental commitments and obligations concerning solid waste management that are directly inconsistent with the proposed compliance provisions of the proposed Consent Decree. There has been previous legislation, contracts, financing arrangements. There have been prior feasibility studies, site studies, and decisions made from those prior studies. There has been

previous legislation involving these prior obligations and restrictions. GovGuam does not have the authority to negotiate the compliance provisions of the proposed Consent Decree. They conflict with previous governmental acts by GovGuam,

The direct interest of the undersigned persons is that these prior legislative and contractual obligations and restrictions on GovGuam direct placement of new solid waste management facilities at sites other than the Ordod vicinity.

If the proposed Consent Decree is entered, it would constitute the blessings of the United States District Court on GovGuam's disregard of its prior governmental actions and obligations pertaining to future solid waste management on Guam.

III. LOCATION OF NEW LANDFILL IN ORDOD

The proposed Consent Decree, Paragraph 7(a), would allow GovGuam to locate new solid waste management facilities adjacent to the existing Ordod Dump. However, previous Guam legislation prohibits such an option. By placing the signature of the United States District Judge on this Consent Decree, the Court would be authorizing GovGuam's violation of its own governmental acts and limitations.

The citizens who live in the vicinity of the existing Ordod Dump have deferred private litigation pending the negotiation of this Consent Decree. Extensive and expensive litigation under applicable provisions of the United States Constitution and the Guam Organic Act could be avoided if GovGuam would recognize its pre-existing obligations and limiting legislation in proposing compliance terms for the Consent Decree. If, on the other hand, GovGuam persists in ignoring its prior governmental acts, then the same Court that

is being asked to enter this Consent Decree will soon be asked to apply constitutional standards to the states actions of GovGuam.

III. UNENFORCEABLE FUNDING PROVISIONS

Paragraph 10 of the proposed Consent Decree acknowledges that GovGuam does not have the funds to pay for the compliance provisions of the Decree. GovGuam is then obligated to exercise “best efforts” to fund the compliance terms of the Decree.

“Best efforts” is a fluid and subjective measure of GovGuam’s compliance efforts. This offers the citizens of Guam no guarantee of any kind that, in fact, the terms of the Decree will ever be brought to fruit. It does, however, guarantee multiple hearings before the Court over whether or not GovGuam is complying with this amorphous standard of “best efforts.” It is virtually guaranteed that there will be delay upon delay in an already lengthy compliance project while the Court must determine whether GovGuam is doing what it must do to fund this solid waste management project.

The irony of this provision of the proposed Consent Decree is the proposed penalties for non-compliance. Paragraph 12, etc., of the Decree provides for economic civil penalties for non-compliance. GovGuam is proposing to pay economic penalties in response to the accusation that it has not secured funding for compliance with the Decree. This does appear to the average person to make a mockery of the funding provisions of the proposed Consent Decree.

PUBLIC PETITION

Attached is a public petition showing the support for solving the Ordot Dump problem in a rational and effective way. The undersigned ask that the spirit and letter of this petition be considered in this comment process.

CONCLUSION

The undersigned feel very strongly that this proposed Consent Decree only papers over a long-standing problem on Guam. Foreseeably, it resolves nothing. Foreseeably, the terms of this Consent Decree would only offer the authority of the United States District Court to support extensive, and ultimately fruitless, delay.

COMMENTS AS SIGNED BELOW

[Signature list omitted]

**Committee for the
Closure of the Ordot Dump**

We, the people, are opposed to any expansion of the Ordot Dump, or the acquisition of private property in Ordot for the purposes of operating a Solid Waste Facility.

The Ordot Dump is a public health hazard, and has been operating in an unsafe and illegal manner, and should be closed as soon as possible.

[Signature list omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

| | | |
|-------------------|---|--------------------|
| GOVERNMENT OF | § | |
| GUAM, | § | |
| <i>Plaintiff,</i> | § | |
| | § | |
| v. | § | Civ. Action No.: |
| | § | 3:17-CV-00371 |
| UNITED STATES OF | § | Filed May 19, 2017 |
| AMERICA, | § | |
| <i>Defendant.</i> | § | |

AMENDED COMPLAINT

Comes Now, the Government of Guam, as authorized and approved by Governor Eddie Baza Calvo and brought by the Office of Attorney General Elizabeth Barrett-Anderson and outside counsel, and files its Amended Complaint and complains as follows:

INTRODUCTION

1. This is a civil action brought by the Government of Guam pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601-9675, as amended (“CERCLA”), against the United States of America, including but not limited to the Department of Navy, for costs of removal and remedial action arising from or related to the investigation, remediation and closure of the Ordot Landfill and relocation of the community facility and business.

JURISDICTION

2. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (civil action arising under the laws of the United States) and 28 U.S.C. § 2201 (declaratory relief). Jurisdiction is also proper in this Court under 42 U.S.C. §§ 9613(b) and 9613(g)(2).

VENUE

3. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(1), 1391(c)(2) and 1391(e)(1)(A) and 42 U.S.C. § 9613(b).

PARTIES

4. Plaintiff, Government of Guam (“Guam”), is a public entity existing under the Guam Organic Act of 1950 and has the power to sue under 48 U.S.C. § 1421a.

5. Defendant United States of America includes, *inter alia*, the Departments of Interior, Defense, Army, Navy, and Air Force. The Department of Navy (“Navy”)¹ was previously identified by the United States Environmental Protection Agency (“USEPA”) as a potentially responsible party at the Ordot Landfill.² Defendant Navy is an agency within the Executive Branch of the federal government of the United States of America. Defendant Navy is a resident of Connecticut with Naval Submarine Base

¹ Defendant Navy is the successor to the former Department of the Navy, a cabinet-level Executive Branch Department until it was merged into the Department of Defense as a military department pursuant to the National Security Act of 1947, as amended in 1949.

² U.S. EPA Final Record of Decision, Ordot Landfill Superfund Site, September 1988.

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New London located at Groton, Connecticut 06349. Defendant Navy may be served via certified mail return receipt requested at the following three addresses:

United States of America
Department of the Navy
General Litigation Division
Authorized Agent for Service of Legal Documents
875 N Randolph Street
Arlington, VA 22217

United States of America
Department of the Navy
General Litigation Division
Authorized Agent for Service of Legal Documents
720 Kennon Street, SE
Washington, DC 20374

United States of America
Department of the Navy
General Litigation Division
Authorized Agent for Service of Legal Documents
1322 Patterson Ave., Suite 3000
Washington Navy Yard, DC 20374-5066

The United States Attorney for the District of Connecticut may be served via certified mail return receipt requested at:

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United States Department of Justice
United State Attorney
District of Connecticut
Civil Process Clerk
Connecticut Financial Center
157 Church Street, Floor 25
New Haven, CT 06510

The United States Department of Justice may be served via certified mail return receipt requested at:

United States Department of Justice
United States Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530

FACTUAL BACKGROUND

6. On June 21, 1898, the United States captured the island of Guam. By the Treaty of Paris, Spain ceded Guam to the United States, effective April 11, 1899. Defendant Navy unilaterally governed and operated the island as the “USS Guam,” with the Naval Commandant acting as the governor of Guam. Plaintiff Guam was established by the United States Congress through enactment of the Guam Organic Act in 1950. The Guam Organic Act transferred federal jurisdiction over Guam from Defendant Navy to the Department of the Interior. However, Guam continued to be under the control of the federal government and Defendant Navy as an instrumentality and having its governor appointed by the President of the United States. Indeed, due to the extensive military presence and operations throughout Guam, a federal military security clearance was required for anyone to visit Guam until

the 1960s. Guam's first popularly elected governor took office in 1971.

7. Defendant Navy built and began using the Ordot Landfill before World War II for the disposal of municipal and military waste. The Navy operated the landfill until the Japanese military invaded and occupied Guam in December 1941. Japan used the landfill throughout its occupation until United States military forces recaptured Guam in July 1944.

8. In November 1945, Congress passed "The Guam Meritorious Claims Act," authorizing the Secretary of the Navy to adjudicate and settle Guam's reparation claims. On January 8, 1947, the Secretary of the Navy appointed a three-member committee to evaluate Defendant Navy's handling of its reconstruction and rehabilitation responsibilities on Guam. The committee found Defendant Navy's settlement and payment system was ineffective and recommended significant changes to the reparations process.

9. On September 8, 1951, the United States government signed the Treaty of San Francisco with Japan, waiving all of Guam's reparation claims, including those for property damage across the island. The United States therefore is responsible for any removal and remediation costs related to the Ordot Landfill attributable to the Japanese invasion and occupation of Guam.

10. Upon the recapture of the island by the United States in July 1944, Defendant Navy resumed operations at the Ordot Landfill and operated and controlled the site thereafter. Despite the Guam Organic Act, Guam remained an instrumentality of the federal government from 1950 to 1970. During

this time period, the Ordot Landfill was operated by the government of Guam under a governor appointed by the President of the United States and under the oversight of the United States military including Defendant Navy.

11. The United States arranged for, transported and disposed of municipal and military waste at the Ordot Landfill from the time of the dump's opening until the creation of Navy's own disposal area in the 1970s.³ The United States used the Ordot Landfill during significant military campaigns, including but not limited to the Korean War (1949-1953) and the Vietnam Conflict (1965-1973). Significant quantities of munitions and chemicals (e.g., Dichlorodiphenyltrichloroethane – "DDT" – and Agent Orange) were stored on Guam for extensive use during these campaigns, both on foreign soils as well as on Guam itself. Upon information and belief, wastes and unused excess stores of these munitions and chemicals were disposed of on Guam including but not limited to at the Ordot Landfill. Until the 1970s, at the earliest, the Ordot Landfill was the only sited and operational dump on Guam. It continued to be the only public sited dump on the island until its closure in 2011.

12. During its years of operation, the Ordot Landfill was unlined on its bottom and uncapped at its top. The landfill absorbed rain and surface water

³ At some point after its creation in the late 1940s, the United States Air Force began operating on Guam and opened its own base. Upon information and belief, the Air Force arranged for, transported and disposed of municipal and military waste at the Ordot Landfill from the time of the base's opening until the creation of Air Force's own disposal area in the 1970s.

and released it after it percolated through the landfill and picked up contaminants. These contaminants discharged into the nearby Lonfit River. The Lonfit River flows into the Pago River which discharges into the Pacific Ocean at Pago Bay.

13. The Ordot Landfill has a long history of operational and environmental problems dating back to before World War II. USEPA added the Ordot Landfill to the National Priorities List (“NPL”) in 1983. The NPL is USEPA’s list of sites given priority for the expenditure of funds to respond to the release or threatened release of hazardous substances. In 1988, the USEPA issued a Record of Decision which noted that Defendant Navy was a potentially responsible party (“PRP”) for the environmental contamination at and emanating from the Ordot Landfill. Despite such designation, USEPA recommended no action at the Ordot Landfill.

14. In 2002, the United States sued Guam solely under the Clean Water Act, asserting that leachate was discharging from the Ordot Landfill into the Lonfit River and two of its tributaries. In 2004, the United States District Court for the Territory of Guam approved a consent decree under the Clean Water Act requiring Guam to close the Ordot Landfill and stop the discharge of leachate. In 2011, operations at the Ordot Landfill ceased. Remediation and closure work at the Ordot Landfill, which included capping the landfill, installing storm water management ponds, leachate storage tanks and a sewer line, began in December 2013 and is still ongoing.

15. Guam expects costs of remediation at and related to the Ordot Landfill to exceed approximately \$160,000,000.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

**RECOVERY OF REMOVAL AND REMEDIATION
COSTS UNDER SECTION 107(A) OF CERCLA**

16. Guam incorporates the allegations in all preceding paragraphs.

17. The Ordot Landfill is located on Guam. The Ordot Landfill is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

18. The United States is a person within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). The United States, including but not limited to Defendant Navy, is the former owner and operator of the Ordot Landfill, and it also arranged for the disposal or treatment of hazardous substances at the Ordot Landfill and transported hazardous substances for disposal at the Ordot Landfill.

19. During the time the United States owned or operated the Ordot Landfill, and possibly afterwards, the United States, including but not limited to Defendant Navy, disposed of, and arranged for the disposal of, various types of hazardous substances and waste at the Ordot Landfill, including but not limited to municipal waste, military, industrial and commercial chemicals, PCB-contaminated oils from electrical transformers and munitions.

20. There have been releases, within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), and threats of continuing releases, of hazardous substances, within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), into the environment at or from the Ordot Landfill.

21. Guam has incurred and will continue to incur removal and remediation costs related to the releases or threatened releases of hazardous substances at or from the Ordot Landfill.

22. Guam's removal and remediation costs regarding the Site are not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300.

23. Under Section 107(a)(4)(A) of CERCLA, PRPs are liable for all costs of removal and remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). The terms United States and State are defined specifically to include Guam. 42 U.S.C. § 9601(27).

24. Under CERCLA, each department or agency of the United States is subject to liability under Section 107. 42 U.S.C. § 9620(a)(1). The United States, including but not limited to Defendant Navy, is liable under Section 107(a)(2) because it owned or operated the Ordot Landfill when hazardous substances were disposed of there. The United States, including but not limited to Defendant Navy, also is liable because it arranged for the disposal of hazardous substances at the Ordot Landfill and transported hazardous substances for disposal at the Ordot Landfill.

25. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the United States, including but not limited to Defendant Navy, is liable to Guam for removal and remediation costs incurred by Guam related to the Ordot Landfill, plus interest, in an amount to be proven at trial.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT OF LIABILITY FOR
FUTURE RESPONSE COSTS PURSUANT TO
SECTION 113(g)(2) OF CERCLA

26. Guam incorporates the allegations in all preceding paragraphs.

27. Guam will continue to incur removal and remediation costs associated with the Ordot Landfill that are recoverable from the United States, including but not limited to Defendant Navy, under CERCLA.

28. Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), specifies that in any action for recovery of costs under Section 107 of CERCLA, 42 U.S.C. § 9607, “the court shall enter a declaratory judgment on liability for response costs . . . that will be binding on any subsequent action or actions to recover further response costs”

29. Guam is entitled to entry of a declaratory judgment that the United States, including but not limited to Defendant Navy, is liable for future removal and remediation costs incurred by Guam in connection with the Ordot Landfill to the extent that such costs are incurred in a manner not inconsistent with the National Contingency Plan.

THIRD CAUSE OF ACTION
CONTRIBUTION UNDER SECTION 113(f)
OF CERCLA

30. Guam incorporates the allegations in all preceding paragraphs.

31. Pleading in the alternative, the United States, including but not limited to Defendant Navy, is liable to Guam for contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), for all costs in

excess of Plaintiff's fair and equitable share of costs that Plaintiff has incurred and may incur for removal and/or remediation of the release and/or threatened release of hazardous substances at or from the Ordot Landfill.

PRAYER FOR RELIEF

WHEREFORE, Guam prays that this Court:

32. Enter a judgment in favor of Guam and against Defendant United States, including but not limited to Defendant Navy, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for removal and remediation costs incurred by Guam at or related to the Ordot Landfill, plus interest, in an amount to be proven at trial.

33. Enter a declaratory judgment of liability in favor of Guam and against Defendant United States, including but not limited to Defendant Navy, for future removal and remediation costs pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) at or related to the Ordot Landfill.

34. In the alternative, enter a judgment in favor of Guam and against Defendant United States, including but not limited to Defendant Navy, for all costs in excess of Plaintiff's fair and equitable share of removal and remediation costs that Plaintiff has incurred and may incur at or related to the Ordot Landfill.

35. Enter a judgment awarding Guam its costs incurred herein.

36. Enter a judgment for such other and further relief as the Court deems just and equitable.

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Dated: May 19, 2017

Elizabeth Barrett-
Anderson
ATTORNEY GENERAL OF
GUAM
Kenneth D. Orcutt
DEPUTY ATTORNEY
GENERAL
Civil Litigation Division
590 S. Marine Corps
Drive
Suite 706, ITC Building
Tamuning, Guam 96913
Telephone:
(671) 475-3324
Facsimile: (671) 472-2493
korcutt@guamag.org

Respectfully submitted,

/s/ Marisa A. Lorenzo

Marisa A. Lorenzo
(ct30190)
KELLEY DRYE &
WARREN LLP
101 Park Avenue
Telephone:
(212) 808-7800
Facsimile:
(212) 808-7897
New York, NY 10178
mlorenzo@kelleydrye.
com

John D.S. Gilmour
William J. Jackson
Mark Donatiello
KELLEY DRYE / JACKSON
GILMOUR DOBBS
515 Post Oak Blvd.,
Suite 900
Houston, TX 77027
Telephone:
(713) 355-5005
Facsimile:
(713) 355-5001
jgilmour@kelleydrye.
com
bjackson@kelleydrye.
com
mdonatiello@kelleydrye.
com