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IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOVERNMENT OF GUAM,

Defendant.

CIVIL CASE NO. 02-00022

ORDER
Partially Vacating February 3, 2011 Order
and
Denying as Moot *Ex Parte* Application to Shorten
Time and Motion to Intervene and to Stay

This matter is before the court on the Receiver’s Special Report (the “Special Report”), filed on February 3, 2011. *See* Docket No. 663. After reviewing said report, the court issued an Order (the “February 3, 2011 Order”) directing the Government of Guam and the U.S. Government to file responses to the court’s concerns. *See* Docket No. 664. Subsequently, on March 1, 2011, Guam Resource Recovery Partners (“GRRP”) filed a Motion to Intervene and to Stay the Court’s February 3, 2011 Order (the “Motion to Intervene and to Stay”), as well as an *Ex Parte* Application to Shorten Time on GRRP’s Motion to Intervene and to Stay (the “*Ex Parte* Application to Shorten Time”). *See* Docket Nos. 673-74. Based on the discussion below, the court hereby partially vacates the February 3, 2011 Order and denies as moot GRRP’s *Ex Parte* Application to Shorten Time and its Motion to Intervene and to Stay.

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DISCUSSION

The parties are well aware of the historical background of this case leading to the entry of the Consent Decree on February 11, 2004, *see* Docket No. 55, and thus the court need not restate those facts herein. Relevant to this discussion, however, was the requirement in ¶10(a) of the Consent Decree for the Government of Guam to submit a financial plan for funding the various Consent Decree projects, including the funding source or sources and a schedule to secure funds for the capital and operating costs necessary to construct and operate a new municipal solid waste landfill and to close the Ordot Dump.

The Government of Guam did not meet the various deadlines set forth in the Consent Decree. Eventually, the court invoked its equity jurisdiction and Rule 70 of the Federal Rules of Civil Procedure and appointed a Receiver to manage, supervise, and oversee the Solid Waste Management Division (“SWMD”). *See* Docket No. 239. The Receiver thereafter proposed a timetable for completion of the Consent Decree projects, which this court adopted on October 22, 2008. *See* Docket No. 272. After many months of indecision and debate in choosing a viable financing option for the Consent Decree projects, the Government of Guam ultimately decided to finance the closure of the Ordot Dump and the construction of the Layon Landfill through the issuance of Limited Obligation (Section 30) Bonds, Series 2009A (the “Series 2009A Bonds”). *See* Docket Nos. 401 at 4 and 455-56.

In its Special Report, the Receiver was concerned, among other things, that GEPA’s approval of the GRRP Draft Permit and proposed landfill could violate the bond covenants associated with the Series 2009A Bonds, undermine the Government’s of Guam’s ability to repay the bonds, and impair the SWMD’s ability to set aside sufficient operating revenue to pay for long-term maintenance of the equipment and maintenance of the Layon Landfill itself.

The court primarily was concerned with the possibility that GEPA’s actions would affect the Government of Guam’s financial plan, which was an integral part of the Consent Decree. Without a funding mechanism in place, compliance with the Consent Decree would not be possible. With airspace at the Ordot Dump quickly diminishing,¹ the court could not

¹ As of today, the Ordot Dump has only 147 days of airspace remaining.

1 allow the risk that the Government of Guam might violate its bond covenants and jeopardize
2 the Receiver's continued use of bond proceeds to complete all Consent Decree projects.
3 Accordingly, the court issued the February 3, 2011 Order enumerating five specific tasks to be
4 performed by the Government of Guam and the United States. Among these undertakings were
5 the requirements that

6 [t]he Office of the Attorney General and Bond Counsel for the Government of
7 Guam . . . advise the court if the issuance of a permit by GEPA for an additional
8 landfill violates Section 6.07 of the Bond Indenture or any other pledge the
Government made to secure the bonds needed for compliance with the Consent
Decree; [and]

9 . . .

10 [t]he Governor of Guam . . . provide the court with a revised Consent Decree
11 Financial Plan that will provide, in a manner acceptable to the court, additional
12 financial resources to the SWMD to compensate for the financial losses that will
occur should the Government allow an additional landfill to be constructed.

13 *See* Docket No. 664 at 2-3 (enumerated tasks #s 3 and 5).

14 On March 3, 2011, the Government of Guam filed its response and supporting
15 declarations to the court's February 3, 2011 Order. *See* Docket Nos. 680-83. As required by
16 enumerated task #3, attached to the Declaration of Assistant Attorney General Kathy Fokas
17 was a letter from Stanley J. Dirks, Bond Counsel for the Government of Guam. *See* Docket
18 No. 681 and Exhibit A thereto. According to Mr. Dirks, "[t]he Series 2009A Bonds are
19 secured by a pledge of and payable solely from, Section 30 Revenues. *Id.* at 1. Additionally,
20 Mr. Dirks stated that revenues of the Government of Guam's solid waste management system
21 ("System Revenues") "are not pledged to the payment of the Series 2009A Bonds and
22 bondholders are not entitled to rely on System Revenues for that or any other purpose." *Id.* at
23 2. Therefore,

24 an action, such as permitting the operation of a competitive landfill, that might
25 impair the revenue generating ability of the System would not be, in and of
26 itself, an action that would "hinder, delay or imperil either the payment of the
27 indebtedness evidenced by any of the Bonds or the observance of any of the
28 covenants [of the Indenture]." Nor would such an action be, in and of itself, an
"action that would permit any default to occur hereunder, or. . . anything that
might in any way weaken, diminish or impair the security intended to be given
pursuant to [the] Indenture." That is, bondholders would still be entitled (and

1 expected) to be paid from Section 30 Revenues, irrespective of the level of
2 System Revenues. We also do not believe that such an action would, in and of
3 itself, violate any other covenant of which we are aware relating to or affecting
4 the Series 2009A Bonds.

5 *Id.* at 3-4 (brackets and quotes in original).

6 The Government of Guam also submitted a letter from the Governor's Legal Counsel,
7 James L. Canto II. *See id.* and Exhibit B thereto. Mr. Canto indicated that the Governor was
8 not able to produce the revised financial plan requested in task #5, because the Governor did
9 not have relevant financial information or details necessary to accurately determine the
10 financial impact, if any, of another landfill.

11 Having reviewed the Government of Guam's responses, the court is now satisfied that
12 GEPA's contemplated actions have not jeopardized the repayment of the Series 2009A Bonds,
13 and that the Government of Guam has not violated any bond covenants. Thus, the Receiver
14 can continue with its vital mission of completing the construction of the Layon Landfill and
15 closing the Ordot Dump, bringing to an end decades of noncompliance with the Clean Water
16 Act by the Government of Guam. For this reason, the court hereby vacates that portion of the
17 February 3, 2011 Order insofar as it affects GEPA's actions relative to the issuance of a draft
18 permit for the Guatali site.²

19 CONCLUSION

20 The representations by the Government of Guam have sufficiently addressed the court's
21 current concern regarding the effect on the Consent Decree's financial plan. Based on recent
22 information from Bond Counsel Mr. Dirks, the court has been assured that the Government of
23 Guam has not violated any bond covenants, nor has it jeopardized the repayment of the Series
24 2009A Bonds.

25 In light of the court's partial *vacatur* of its February 3, 2011 Order, the court finds it
26 unnecessary to further address the merits of GRRP's *Ex Parte* Application to Shorten Time and

27 ² Furthermore, the court finds, on the basis of the Government of Guam's responses,
28 that it is not necessary for U.S. Environmental Protection Agency to provide the information
requested in task #2 of its February 3, 2011 Order.

1 its Motion to Intervene and to Stay. Therefore, the court denies said pleadings in their entirety³
2 as they have been rendered moot.

3 **IT IS SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Mar 03, 2011

26 _____
27 ³ In the Motion to Intervene and to Stay, GRRP also requested the court recuse itself
28 from the motion and this case. *See* Docket No. 674 at 15-20. This request, although not
included in the caption of its pleading, is also denied as moot.