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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOVERNMENT OF GUAM,

Defendant.

CIVIL CASE NO. 02-00022

ORDER
re Revised Transition Timeline for the
Termination of the Federal Receivership
and Financing Plan for the
Post-Closure Care of Ordot Dump

This matter came before the court on March 29, 2016, for a hearing on the proposals submitted by the Receiver and the Government of Guam with regard to a revised transition timeline and a funding plan for the post-closure care of the Ordot Dump. Having considered the proposals and pertinent pleadings¹ and having heard argument from the parties, the court issues the following Order.

¹ The pertinent pleadings comprise of the following:

- Receiver’s October 21, 2015 Quarterly Report, ECF No. 1634-1,
- Government of Guam and the Guam Solid Waste Authority Board’s Response to Receiver’s Oct. 21, 2015 Report (the “Government of Guam Alternative Plan”) and attachments, ECF No. 1648,
- United States’ Response to Government of Guam’s Proposed Timeline and Financial Plan and attachment, ECF No. 1651,
- Receiver’s Response to Government of Guam’s Response to Receiver’s Oct. 21, 2015 Report, ECF No. 1652,
- Government of Guam’s Reply to Receiver’s Response, ECF No. 1654,
- Declaration of Simon Sanchez II, ECF No. 1655,
- United States’ Sur-Reply to Government of Guam’s Reply, ECF No. 1661, and
- Receiver’s Sur-Reply to Government of Guam’s Reply, ECF No. 1662.

BACKGROUND²

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2 On February 11, 2004, the court approved the Consent Decree entered into by the parties.
3 *See* Consent Decree, ECF No. 55. Among other things, the Consent Decree established a schedule
4 for the closure of the Ordot Dump and the construction and operation of a new conforming
5 municipal solid waste landfill. *Id.* at ¶¶8-9. The Consent Decree mandated operations at the new
6 landfill to begin by September 23, 2007, with operations at the Ordot Dump to cease by October 23,
7 2007. *Id.* at ¶¶8(i) and 9(i).³ Additionally, as part of the closure of the Ordot Dump, the Consent
8 Decree required the Government of Guam to submit a post-closure care and monitoring plan. *Id.*
9 at ¶8(b)(i).

10 The Government of Guam acknowledged in the Consent Decree that “the total amount of
11 funding needed to complete the projects required under [the] Consent Decree [was] not currently
12 available.” *Id.* at ¶10(a). The Consent Decree thus required the Government of Guam, within 120
13 days after its entry, to submit a financial plan which identified “the funding source or sources and
14 a schedule to secure funds for the capital and operating costs necessary” to pay for the various
15 compliance measures required under the Consent Decree.⁴ *Id.* The Government of Guam agreed
16 to “use its best efforts to obtain sufficient funding to fully implement the projects required by [the]
17 Consent Decree.” *Id.*

18 The Government of Guam failed to meet critical Consent Decree deadlines and failed to
19 raise the financial resources necessary to complete the Consent Decree projects. Thus, on
20 January 31, 2007, the United States moved to enforce the Consent Decree. *See* ECF Nos. 68-69.
21 After conducting numerous monthly status hearings and site visits and based on the lack of progress
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23 ² Because the parties are familiar with the facts and procedural history of this action, the
24 court will not recite them here in great detail except as necessary to explain its decision.

25 ³ The Government of Guam did not meet these deadlines. Instead, under the Receivership,
26 the Ordot Dump stopped receiving trash for disposal on August 31, 2011, and the new landfill in
Layon was promptly opened the next day. *See* Minutes (Sept. 1, 2011), ECF Nos. 795-96.

27 ⁴ The Government of Guam submitted its financial plan in June 2004 as required, and, after
28 receiving the U.S. EPA’s comments, revised its financial plan and resubmitted it in October 2004.
See Machol Decl. at ¶3, ECF No. 74.

1 by the Government of Guam, the court appointed a Receiver⁵ with “full power and authority to
2 enforce the terms of the Consent Decree, and assume all of the responsibilities, functions, duties,
3 powers and authority of the Solid Waste Management Division of the Department of Public Works,
4 and any and all departments, or other divisions of the Department of Public Works⁶ insofar as they
5 affect the Government of Guam’s compliance with the Consent Decree.” Order Re: Appointment
6 of Receiver (Mar. 17, 2008) at 15-16, ECF No. 239.

7 The Receiver initially estimated the capital needed to achieve compliance with the Consent
8 Decree would be approximately \$159.7 million, of which approximately \$40 million would be
9 required for the closure of the Ordot Dump. See Quarterly Report (Oct. 22, 2008) at 13, ECF
10 No. 269-1. The Quarterly Report cautioned that the estimates were “subject to change as the
11 competitive bidding process provide[d] the final measure of the cost for [the Consent Decree]
12 projects.” ECF No. 269-1 at 13. The Receiver further stated that the “estimates related to the Ordot
13 Dump’s closure” would “require a full reexamination” as the time for the project to actually begin
14 drew near because there was “a significant amount of remedial investigation that remain[ed] to be
15 accomplished . . . to determine the extent of environmental damage that ha[d] occurred [at the Ordot
16 Dump] and devise acceptable plans to mitigate the damage identified.” *Id.* at 14.

17 The Receiver also identified various financing options for the Government of Guam’s
18 consideration for funding the Consent Decree projects. *Id.* at 15-20. The Receiver recommended
19 to the Government of Guam that the Consent Decree projects be funded through a revenue bond
20 guaranteed by Section 30 funds received by the Government of Guam. *Id.* at 21. The Government

22 ⁵ For a more thorough recitation of the background of this case, including the events that led
23 to the appointment of a Receiver, the court incorporates by reference the following prior decisions:
24 Order re Appointment of Receiver, ECF No. 239; Order re Motion for Reconsideration, ECF
25 No. 1157; Order re Motion to Intervene, ECF No. 1164; Order re Emergency Motion for a Stay
Pending Appellate Review, ECF No. 1230; and Order re Motion to Stay and for Further Relief, ECF
No. 1243.

26 ⁶ Upon enactment of Guam Public Law 31-020, the Solid Waste Management Division
27 (“SWMD”) became the Guam Solid Waste Authority (“GSWA”), an autonomous, public corporation
28 of the Government of Guam. 10 GUAM CODE ANN. § 51A103. The court thereafter vested the
Receiver with “full power and authority over GSWA, to the full extent of its previously granted
authority over SWMD.” Order (Sept. 2, 2011) at 9, ECF No. 798.

1 of Guam, however, opted to finance the Consent Decree projects through the sale of approximately
2 \$202.4 million in Limited Obligation Bonds, which pledged Section 30 funds as the source of
3 repayment. *See* ECF No. 455 at 3. Of this amount, approximately \$139.7 million⁷ was allocated for
4 deposit to the Project Construction Fund. *See* ECF No. 455-1 at 16.

5 The cost for the Ordot Dump closure increased from the Receiver’s original 2008 estimates,
6 and on May 21, 2013, the Receiver informed the court and the parties that “it is likely that there will
7 not be enough money from the [Limited Obligation] Bonds to cover all of the projects” related to
8 the Consent Decree. *See* Quarterly Report (May 21, 2013) at 33, ECF No. 1067-1. These unfunded
9 projects included: (1) upgrades to the residential transfer stations,⁸ (2) Route 4 safety enhancements,
10 (3) upgrades to Dero Road and (4) post-closure care for the Ordot Dump. The court directed the
11 Receiver and the Government of Guam to meet and discuss the development of a plan for additional
12 financing or funding to pay for the unfunded projects. The Receiver and the Government of Guam
13 could not agree on whether all the additional projects were required under the Consent Decree, and
14 if required, how to finance these projects.

15 Ultimately, after briefing and hearings, the court issued separate orders as to each of the
16 unfunded projects. With regard to the upgrades to the residential transfer stations, the court found
17 that although the upgrades to the residential transfer stations were not specifically required in the
18 Consent Decree, the project became a mandatory requirement of the Consent Decree once GEPA
19 required that the facilities be permitted as a condition of the Solid Waste Facility Permit for the
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22 ⁷ The Government of Guam deposited an initial amount of \$20 million – obtained through
23 a loan with the Bank of Guam – with a trustee designated by the Receiver and approved by the court.

24 ⁸ When the Layon Landfill began operating as Guam's new conforming municipal solid
25 waste landfill, the Guam Environmental Protection Agency (“GEPA”) required, as a condition to the
26 permitting of the Layon Landfill, that the Receiver permit the residential transfer stations. The
27 upgrades to these facilities were not included in the Receiver’s initial estimates in 2008 since
28 GEPA’s requirement to permit each transfer station only materialized in 2011. Additionally, when
GEPA renewed the Layon Landfill’s permit on January 28, 2015, Special Condition II required
GSWA to “obtain a permit to operate transfer stations that meets Guam’s regulatory agencies
requirements.”

1 Layon Landfill.⁹ *See* Order (Apr. 20, 2015), ECF No. 1571. While the court found the Route 4
2 safety enhancement project to be beyond the scope of the Consent Decree, *see* Order (June 29, 2015),
3 ECF No. 1592, the court ordered the Receiver to complete the upgrades to Dero Road.¹⁰ Order (May
4 1, 2015), ECF No. 1574. The court ordered the Government of Guam to fund the residential transfer
5 station and Dero Road projects, which the Receiver would implement. *See* Order (Apr. 20, 2015)
6 at 6, ECF No. 1571 and Order (May 1, 2015) at 9-10, ECF No. 1574. However, because the
7 Government of Guam stated that it did not have the funds needed to pay for these projects, the court
8 ordered the Receiver to utilize the monies the Receiver was holding in the special account¹¹ to fund
9 the projects. Additionally, the court ordered the Receiver to include in its next quarterly report a
10 revised transition timeline to take into account the time needed to permit the Agat and Malojloj
11 facilities and complete the environmental closure of the Dededo transfer station. Order (Apr. 20,
12 2015) at 7, ECF No. 1571.

13 As for the post-closure care of the Ordot Dump, the court ordered the Receiver to fund these
14 costs on an ongoing basis from the debt service reimbursements accumulating in the special account.
15 *See* Order (May 27, 2015), ECF No. 1582. If, however, these funds were insufficient to meet the
16 post-closure care funding obligations before the end of the Receivership, then the court ordered the
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18 ⁹ GSWA then had three residential transfer stations located in the villages of Dededo,
19 Malojloj and Agat. The court accepted the Government of Guam's decision to close the Dededo
20 Residential Transfer Station. The court thus ordered the Receiver to close the Dededo facility and
21 to develop a plan for the proper environmental closure of the Dededo Residential Transfer Station.
Order (Apr. 20, 2015) at 6, ECF No. 1571.

22 ¹⁰ These upgrades include stormwater mitigation and shoulder-to-shoulder paving along
23 Dero Road beginning just before the new pump station to the westernmost boundary of the Ordot
Dump property.

24 ¹¹ The court approved the establishment of a separate account under the Trust Agreement
25 with the Bank of Guam. *See* Order (Sept. 12, 2014) at 2, ECF No. 1405. The Receiver was
26 authorized to deposit the debt service reimbursements it had been withholding (approximately \$4.5
27 million annually) into this special account for purposes of paying legal expenses, future capital
28 requirements and the post-closure care of the Ordot Dump. *Id.* This special account created is the
Reserve for Unfunded Expense. *See* Receiver's Response to Government of Guam's Alternative
Plan at 6, n.6, ECF No. 1652. At the end of Fiscal Year 2015, the funds available in this special
account was \$6,298,491.53. *Id.*

1 Receiver to develop a financing plan that included a dedicated funding mechanism which secured
2 the funds necessary to fully implement all post-closure care and monitoring actions. *Id.* at 10.

3 In compliance with the court's orders, the Receiver's most recent Quarterly Report included
4 a revised transition timeline and a plan for financing the post-closure care of the Ordot Dump that
5 included a dedicated funding mechanism. *See* Quarterly Report (Oct. 21, 2015) at 49, ECF
6 No. 1634-1. The court allowed the Government of Guam to submit its own proposed alternative
7 financial plan and transition timeline and also gave the parties an opportunity to comment on each
8 of the proposals. *See* Order (Oct. 26, 2015) at 7-8, ECF No. 1635.

9 DISCUSSION

10 Transition Timeline

11 On July 1, 2013, the court formally adopted the Receiver's proposed timeline for GSWA's
12 transition from Receivership to GSWA Board control.¹² *See* Order re Transition from Court-
13 Appointed Receiver to the GSWA Board at 1, ECF No. 1132. Under said Transition Timeline, the
14 Receivership was expected to end five months ago in December 2015, with the environmental
15 closure of the Ordot Dump.¹³ However, the Transition Timeline had to be amended because the
16 court ordered the Receiver to complete the upgrades and permitting of the residential transfer stations
17 and the Dero Road project.

18 The Receiver estimates it will need approximately \$9,442,900 for the additional projects,
19 and, taking into account various factors, the Receiver anticipates two dry seasons will be needed to

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21 ¹² This timeline shall hereinafter be referred to as the "Transition Timeline."

22 ¹³ The law that established the GSWA as an autonomous public corporation also created a
23 Board of Directors for GSWA (the "GSWA Board"). Although the GSWA Board sought an earlier
24 transition, the court has stressed that the Receiver will "retain full administrative and operational
25 control over GSWA to assure that the resources needed to achieve full compliance with the Consent
26 Decree are provided." Order (July 3, 2014) at 5, ECF No. 1378. *See also* Order (July 1, 2013) at 2,
27 ECF No. 1132 ("While the court is encouraged that the Board wishes to be actively involved in
28 discussions and decisions concerning Ordot Dump and the Layon Landfill, the fact remains that
matters concerning both the Dump and Landfill remain Consent Decree project matters, under the
purview of the Receiver, by order this court. . . . [T]he Receiver has, and will retain, the same
authority and control over such areas until such time as the court orders otherwise. In other words,
complete turnover of control and authority of [GSWA], when the time is right, will occur at a date
ordered by this court.")

1 complete this work.¹⁴ *See* Quarterly Report (Oct. 21, 2015) at 53-54, ECF No. 1634-1. Given the
2 remaining work it must accomplish, the Receiver’s revised transition timeline anticipates an end to
3 the receivership in December 2017, with the hiring process for a general manager and comptroller
4 to begin in January 2017. *Id.* at 54, Fig. 42. With regard to transitioning the temporary contract
5 employees to permanent positions, the Receiver states this conversion “will cause a significant
6 increase in GSWA’s cost,¹⁵ [thus] it should be carefully planned out but not actually executed until
7 near the end of the transition period.” *Id.* at 54.

8 Not surprisingly, the Government of Guam envisions an earlier transition period. The
9 Government of Guam proposes “that a Management Team consisting of a [General Manager] and
10 Comptroller be hired and commence working with the Receiver as early as October 2016.”
11 Government of Guam Alternative Plan at 3, ECF No. 1648. The Government of Guam believes that
12 a full transition from Receivership to GSWA Board control could occur as early as March 2017,
13 which is only about ten months from now.¹⁶

14 Regarding the conversion of temporary positions at GSWA to permanent positions, the
15 Government of Guam states that the “GSWA Board has not yet determined whether any or all [of
16 the] unclassified/contract GSWA employees will be transitioned into government of Guam’s merit
17 system.” *Id.* at 5. With the assistance of the Department of Administration, the Government of
18 Guam anticipates “it would take approximately six (6) months to identify critically needed positions,
19 advertise, have contract employees compete and to select qualified applicants.” *Id.* at 6. The

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21 ¹⁴ The Receiver states the additional projects will be completed over calendar years 2016 and
2017.

22 ¹⁵ The Receiver estimates the cost of converting the contract employees to permanent
23 employees will result in a 35.5% increase to GSWA. *See* Receiver’s Sur-Reply at 7, ECF No. 1662.

24 ¹⁶ In their alternative proposal, the Government of Guam states it
25 agree[s] with the Receiver’s original proposal pursuant to the . . . Transition Timeline
26 that there should be at least a six (6) month transition overlap. Assuming the [c]ourt
27 permits the GSWA Board to hire a Management Team, the GSWA Board would like
to complete the transition within six (6) months after new management is hired.

28 *Id.*

1 Government of Guam estimates the conversion “will add roughly thirty percent (30%) more to
2 personnel costs.” *Id.*

3 After careful consideration of the two proposals, the court hereby adopts the Receiver’s
4 revised transition timeline and finds that it is reasonable and no longer than necessary to accomplish
5 the goals of the Consent Decree. First, the court notes that the Government of Guam “agrees with
6 the Receiver that the final work on pending projects could run at least another two (2) years. *Id.* at 2.
7 The upgrading of the Agat and Malojloj transfer stations and the environmental clean up of the
8 Dededo transfer station involve technical work, and the Receiver has the specialized skill and
9 knowledge to accomplish these projects. It is imperative that the Receiver has complete and
10 uninterrupted control over all aspects of the projects to ensure their timely completion.

11 Second, the Government of Guam had stated that it did not have the funds needed to pay for
12 these projects and the post-closure care costs, and so the Receiver must finance these projects using
13 the \$4.5 million in annual revenue that was previously used to reimburse the Government of Guam
14 for debt service. The Government of Guam was put on notice over two years ago that funding this
15 project through debt service reimbursement – the only source of funds available to the Receiver –
16 would likely extend the Transition Timeline. *See* Order (Mar. 17, 2014) at 20 and 25, ECF
17 No. 1319. *See also* Quarterly Report (Mar. 5, 2015) at 11, ECF No. 1531-1 (“It should be noted .
18 . . . that given the delay in [the] . . . decisions [of how to fund the additional projects], these projects
19 cannot be completed within the transition timeline previously approved by the [c]ourt.”). The
20 Receiver’s revised transition timeline will allow the Receiver to better manage GSWA’s operating
21 revenues and control GSWA’s expenses by delaying the hiring process for a general manager and
22 comptroller until 2017 and by postponing the conversion of the contract employees to permanent
23 positions until near the end of the transition period. While the Government of Guam maintains that
24 GSWA’s operating costs would be significantly reduced at the end of the Receivership,¹⁷ the actual

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26 ¹⁷ The Government of Guam failed to provide any detailed financial analysis to support this
27 claim. The only number cited by the Government of Guam is a statement unsupported by financial
28 data that “the cost to transition the unclassified/contract positions to classified [positions] . . . will
add roughly thirty percent (30%) more to personnel costs.” Government of Guam Alternative Plan
at 6, ECF No. 1648.

1 calculations presented to the court reveal otherwise. As noted by the Receiver, operating expenses
2 for GSWA will actually increase after the Receivership ends. *See* Ex. 1 and 2 to Receiver's Sur-
3 Reply at 16-17, ECF No. 1662. The Receiver estimates that the new management positions and the
4 conversion of the contract employees to permanent positions under the merit system will result in
5 an increase of over \$122,248 to GSWA's operating cost. *See* Table 2 to Receiver's Sur-Reply at
6 8, ECF No. 1662. Thus, the Receiver's proposal will conserve necessary funds by deferring these
7 transition-related expenditures.

8 Financing Plan

9 The Ordot Dump has been environmentally closed. *See* Minutes (Mar. 28, 2016), ECF
10 No. 1665. Nevertheless, pursuant to U.S. EPA regulations,¹⁸ GSWA is required to continue
11 monitoring and maintaining the landfill for a 30-year period to protect against the release of
12 hazardous constituents to the environment. Specific post-closure care requirements consist of
13 maintaining the integrity and effectiveness of the final cover system, the leachate collection system,
14 the groundwater monitoring system, and the methane gas monitoring system. 40 C.F.R. § 258.61(a).

15 Landfill closures are complex, costly, and unique civil engineering projects that leave
16 waste in place and that necessitate post-closure monitoring and maintenance well into
17 the future to ensure the continued protection of public health and the environment.
18 Solid waste takes decades to centuries to decompose, and the resulting settlement
19 from decomposing waste affects cover and drainage systems, and the generation of
20 landfill gas and leachate. . . . Old dumpsites with historic non-compliant operations,
21 such as the Ordot Dump, are more technically challenging during post-closure care
22 because they lacked proper environmental monitoring and controls during operations.
23 Later problems can occur with extreme events, such as typhoons or earthquakes.
24 Ordot's unique design of vegetated exposed geomembrane on side slopes and
25 impacts from the tropical environment will be especially crucial to evaluate and
26 monitor during the post-closure period.

27 Walker Decl. at ¶4, ECF No. 1651-1.

28 The Receiver estimates that the net present value of the total 30-year cost is \$15,670,893.97.¹⁹

25 ¹⁸ *See* Title 40, Code of Federal Regulations, Part 258, Subpart F - Closure and Post-Closure
26 Care.

27 ¹⁹ This estimate does not include the compensation of the trustee the Receiver proposes the
28 court appoint when the Receivership ends to manage the funds in the Ordot Dump Post-Closure Care
Reserve. Additionally, the estimate does not include the compensation for the independent engineer
the trustee will have to retain to inspect and certify that the post-closure care operator is performing

1 See Quarterly Report (Oct. 21, 2015) at 48, ECF No. 1634-1. Because the balance in the special
2 account was insufficient to fund the additional Consent Decree-related projects and the post-closure
3 care costs, the court ordered the Receiver to prepare a financial plan that includes a dedicated
4 funding mechanism to secure funds necessary to fully implement all post-closure care and
5 monitoring actions.

6 Under the Receiver's financial plan, beginning in fiscal year ("FY") 2016 through
7 approximately FY2023, the Receiver recommends setting aside \$2 million annually and depositing
8 said funds into the Ordot Dump Post-Closure Reserve. These funds would come from the
9 approximately \$4.5 million in annual revenue that was previously used to reimburse the Government
10 of Guam for debt service. In FY2016 and 2017, the Receiver would be responsible for depositing
11 said funds into the Ordot Dump Post-Closure Reserve, for a total of \$4 million during the remaining
12 Receivership period. See Quarterly Report (Oct. 21, 2015) at 49-50, ECF No. 1634-1. To assure
13 the needed funds are set aside and remain available post-Receivership, the Receiver recommends
14 that the court appoint a trustee when the Receivership ends to manage the funds in the Ordot Dump
15 Post-Closure Reserve. *Id.* at 50. The Receiver also proposes that the court order all commercial
16 haulers on Guam to make their payments through the trustee, and, upon receipt of said funds, the
17 trustee will deduct what is needed to fully fund the Ordot Dump Post-Closure Reserve²⁰ and pass
18 the balance through to GSWA for operations. The trustee will continue these monthly set asides into
19 the Ordot Dump Post-Closure Reserve until the reserve is fully funded, which is anticipated to occur
20 in FY2023. *Id.* at Table 17.

21 The Receiver's proposed financing plan takes into account other capital needs of GSWA.
22 These include equipment needs and other projects, such as the closure of Cells 1 and 2 at Layon and
23 the opening of a new cell. *Id.* at 48.²¹ The Receiver asserts that although "[t]hese projects may occur

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25 all of the work necessary for the proper care of the environmental closure of the Ordot Dump.

26 ²⁰ The Receiver recommends this amount not exceed \$374,758.08 per month. See Quarterly
27 Report (Oct. 21, 2015) at 51, Fig. 41, ECF No. 1634-1.

28 ²¹ The Receiver estimates that the construction of a new cell at the Layon Landfill will cost
\$10,590,642.09 and the closure cost for Cells 1 and 2 are estimated to be \$5,273,975.41, for a

1 after the Receivership ends, . . . they must be completed and they must be fully funded; therefore,
2 a responsible financial plan must include funding them.” *Id.* at 48-49.

3 The Government of Guam’s Alternative Plan does not dispute the amount of the Receiver’s
4 cost estimates and it proposes to only include funding for the Dero Road project, the transfer station
5 upgrades and the post-closure care of the Ordot Dump.²² The Government of Guam urges the court
6 exclude from any court-approved financial plan the cost of funding the opening of a new cell at the
7 Layon Landfill and the closure of Cells 1 and 2 because the Government contends that these projects
8 “may arise sometime within the next 8-15 years depending on Layon’s capacity and recycling
9 efforts” and thus “[i]t is neither ripe nor financially prudent to incorporate [these costs] into the
10 litigation as it presently stands.” Government of Guam Alternative Plan at 9, ECF No. 1648. The
11 Government of Guam objects to funding the Ordot Dump post-closure care costs over an eight-year
12 span as recommended by the Receiver, and its Alternative Plan instead proposes to pay for these
13 post-closure care costs over a 30-year period. *Id.* at 11-12. The Government of Guam recommends
14 the creation of a separate account for this purpose, which would be funded with an initial deposit \$1
15 million in FY2016²³ and thereafter funded for the next five years with a monthly deposit of \$62,500
16 (or \$750,000 annually) to be collected from GSWA’s commercial tipping fees. *Id.* at 12. Thereafter,
17 beginning in FY2022, the Government of Guam proposes that deposits to the special account be
18 reduced to \$41,667 monthly (or \$500,000 annually), until the entire cost of post-closure is

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20 combined total of \$15,864,617.50. *Id.* at 49, Table 16.

21 ²² The Government of Guam’s Alternative Plan never discusses the possibility of closing one
22 of the remaining transfer stations, however, in the Declaration of Eric Palacios that was submitted
23 in support of the Government of Guam’s proposal, the former GEPA Administrator states that the
24 Government of Guam “has decided to close the Malojloj transfer station” but keep the Agat Transfer
25 station open. Palacios Decl. at ¶3, ECF No. 1648-6. He further states that GEPA “believes it would
26 be more advantageous to close the Maloloj facility and concentrate on getting the Agat facility
27 permitted” especially because “the Malojloj transfer station is use less frequently than the Agat
28 facility[.]” *Id.* at ¶¶3-4. If the Malojloj transfer station is closed as Mr. Palacios proposes, then this
would reduce the estimated cost of the upgrades needed for the transfer stations, however, such a
reduction was not reflected in the Government of Guam’s Alternative Plan.

²³ The Government of Guam’s Alternative Plan does not discuss the source of this \$1 million
deposit.

1 accumulated.²⁴ *Id.* at 13.

2 The Government of Guam claims its Alternative Plan is funded by multiple sources: (1) the
3 monies held by the Receiver in the special account (the Reserve for Unfunded Expense),
4 (2) GSWA’s commercial revenues and (3) proceeds resulting from the refinancing of the 2009
5 Section 30 bonds. *Id.* at 14-16. The Government of Guam anticipates the refinancing and extension
6 of the bonds by two years would result in proceeds of \$42.7 million, of which it intends to commit
7 setting aside up to \$16,573,351.67 to fund the other landfill capital expenditures. *Id.* at 16. The
8 Government of Guam’s Alternative Plan assumes that the debt refinancing would occur as early as
9 next month or as late as December 2016, eight months from now. *See* Miller Decl. at Ex. 2 (Dec.
10 7, 2015 Mem. from Tim Rattigan and Stephen Field at Citigroup to Mana Silva Taijeron, then acting
11 Administrator of the Guam Economic Development Authority (“GEDA”)), ECF No. 1648-4. The
12 Government of Guam also states that “refinancing and refunding the bonds as proposed by the
13 Government’s plan . . . presents a unique opportunity to incorporate solid waste revenues into the
14 bond security structure (in addition to the Section 30 revenues). Incorporating revenues allows for
15 a transition from the current Section 30-backed bonds into a more formal revenue bond.”²⁵

17 ²⁴ The Government of Guam’s apparent rationale for decreasing the deposits into the special
18 account for post-closure care costs is based on its belief that “the cost to monitor Ordot Dump will
19 decrease as the years go by due to the reduction of methane gas product and the inevitable and
20 increasing growth of stormwater-reducing vegetation.” *Id.* at 14. This rationale is called into
21 question by the Declaration of Scott Walker. *See* Walker Decl. at ¶4, ECF No. 1651-1.

22 ²⁵ The Government of Guam’s written description of its plans to refinance the bonds *differs*
23 *significantly* from the oral testimony provided by Lester Carlson, Jr., the Deputy Director of the
24 Guam Bureau of Budget and Management Research and the former Public Finance Manager with
25 GEDA. The Government of Guam’s Alternative Plan proposed that the current 2009 Section 30
26 bonds be restructured to be more akin to the revenue bond that it claims the Receiver originally
27 proposed in 2008. *See* Government of Guam Alternative Plan at 16, ECF No. 1648 (“Incorporating
28 revenues allows for a transition from the current Section 30-backed bonds into a more formal
revenue bond.”) and Government of Guam Reply at 5, ECF No. 1654 (“The Receiver’s opposition
to refinancing the bonds as recommended by bond counsel and Citigroup is surprising given . . . the
Receiver’s previous recommendation and support of revenue bonds as a financing vehicle[.]”).
However, Mr. Carlson contradicted this and stated that the Government of Guam’s proposed plan
does not contemplate using GSWA revenues since GSWA is currently not capable of putting
together a revenue generating bond. Instead, he testified that the Government of Guam’s plan
contemplates refunding the Section 30 bonds and extending the amortization by two years but

1 Government of Guam Alternative Plan at 16, ECF No. 1648.

2 Between the two proposed financing plans, the United States supports the Receiver's
3 proposal, and the court concurs for several reasons. First, the court continues to believe it is
4 imperative that sufficient funds be set aside to monitor and maintain all of the infrastructure (*i.e.*, the
5 final cover system, the landfill gas collection system, the groundwater monitoring system, and the
6 leachate collection system) over the 30-year post-closure period. The Receiver's plan will fully fund
7 the post-closure care costs, but the Government of Guam's plan does not provide sufficient funds
8 to cover the post-closure care costs of the Ordot Dump. Under the Government of Guam pay-as-
9 you-go proposal, at the end of 30 years GSWA's revenues would have provided a total of
10 \$15,670,900 towards post-closure care costs, but this is only equivalent to what the Receiver
11 estimates is the net present value required. Under a pay-as-you-go scenario, the Receiver estimates
12 that \$20,367,699 will be needed for post-closure care costs, which means that the Government of
13 Guam Alternative Plan is short by about \$4.7 million.

14 Second, under the Receiver's proposal, the post-closure care costs for the Ordot Dump would
15 be fully funded within eight years, but the Government of Guam's plan contemplates a 30-year
16 payment period. According to the Declaration of Scott Walker,²⁶

17 under the federal regulations, the pay-in period for trust funds should be completed
18 during the operating life of the facility, not during the post-closure period. Based on
19 my experience, to the extent that unique circumstances require a pay-in period, *only*
20 *the shortest pay-in period of a dedicated funding source should be allowed in order*
21 *to protect public health and the environment*, and to reduce the risk that the federal
or state government will ultimately bear the cost of post-closure care. The funding
source to fund post-closure care must be dedicated for that purpose and cannot be
subject to discretionary use by another government entity.

22 Walker Decl. at ¶8, ECF No. 1651-1 (emphasis added). The Government of Guam acknowledges
23 that it had not been setting aside funds for Ordot Dump's post-closure care even though the law

24
25 _____
26 Section 30 funds will remain the source of repayment, not the GSWA revenues.

27 ²⁶ Mr. Walker is a Licensed Professional Engineer with over 29 years of civil engineering
28 and management experience on diverse solid waste projects. Walker Decl. at ¶1, ECF No. 1651-1.
In addition to his employment with CH2M HILL, he is "an independent consultant specializing in
solid waste landfills, in particular post-closure at landfills." *Id.*

1 mandating the 30-year monitoring period was effective in 1993 – 11 years before the parties entered
2 into the Consent Decree and 15 years before the appointment of the Receiver. *See* Government of
3 Guam Alternative Plan at 13, ECF No. 1648. Consistent with Mr. Walker’s expertise, the court
4 strongly agrees that the shortest pay-in period of a dedicated funding source is preferred in order to
5 protect public health and the environment.

6 Third, the Receiver’s financing plan is reasonable and financially prudent. Under the
7 Receiver’s proposal, the trustee retains discretion to periodically reassess the financial requirements
8 of the Ordot Dump post-closure reserve and to adjust the amount set aside into the reserve if needed.
9 The Government of Guam plan does not include a provision that allows for such adjustments.
10 Additionally, the Receiver’s proposal takes into consideration GSWA’s other capital needs, most
11 importantly the necessity to secure funding for the closure of Cells 1 and 2 and the opening of a new
12 cell at the Layon Landfill. The Government of Guam, however, asserts that these matters should be
13 excluded from consideration since they may not arise for the next 8-15 years. Mr. Walker disagrees
14 with the Government of Guam’s position and states that

15 [a] financing plan for new cell construction, such as proposed by the Receiver, will
16 help to ensure that a viable solid waste management system will be in place and not
17 be interrupted, which is particularly important given that the Layon Landfill is the
18 only commercial and permitted municipal solid waste landfill in Guam. Additionally, *the design development, including hydrogeologic and geotechnical*
19 *investigations, and other technical studies, must be completed prior to permitting*
20 *and public involvement. Consequently, the timeframe leading up to waste placement*
21 *in the new cell is typically a multi-year process.* The Government of Guam requests
22 deferral of the issue to allow the GSWA Board to determine resolution, but does not
23 offer any specific alternative financing plan. Such an approach is not consistent with
24 prudent and proper landfill operations.

25 Walker Decl. at ¶10, ECF No. 1651-1 (emphasis added).

26 It is anticipated that Cells 1 and 2 at the Layon Landfill will be filled by approximately the
27 year 2020. *See* Quarterly Report (Nov. 20, 2013) at 32, ECF No. 1267-1. While complete closure
28 of these cells would occur after the Receivership ends, initial work for the eventual closure of said
cells and the opening of a new cell will begin this year. *See* Quarterly Report (Oct. 21, 2015) at
Tab 24, ECF No. 1634-27. As explained by Mr. Walker, this is a multi-year process. Field studies
must be performed, plans need to be designed, permits applied for, and gas collection lines must be
installed. *Id.* It would not be responsible for the Receiver to simply exclude from the scope of a

1 financial plan the future needs of GSWA in funding these projects at the Layon Landfill.

2 Fourth, the Receiver's financing plan includes a dedicated funding mechanism that ensures
3 payments into a trust fund. In comparison, the Government of Guam's Alternative Plan does not
4 contemplate the use of a trust fund managed by an independent trustee dedicated to post-closure care.
5 Rather, the Government of Guam proposes establishing a "special account" to accumulate funds over
6 the next 30 years, but there are no controls in place to control how the funds in the "special account
7 will be used. As noted by Mr. Walker,

8 [the] *use of a trust fund for financing the post-closure period* is an acceptable, and
9 often *preferred, financial assurance mechanism*. It is critically important that the
10 monies in the trust fund are dedicated to post-closure care and managed by a third
11 party trustee under strict guidelines for ensuring both adequate funding and proper
12 disbursement for authorized postclosure expenses. The role, responsibilities, and
13 authorities of the Trustee must be clear.

14 Walker Decl. at ¶9, ECF No. 1651-1 (emphasis added).

15 Finally, the Receiver's proposal requires no new borrowing while the Government of Guam's
16 Alternative Plan envisions further borrowing by the Government of Guam and GSWA. While the
17 Government of Guam asserts that investors have been very receptive to its past offerings which were
18 considered "attractive," the Government of Guam's plan is speculative because market conditions
19 are simply unknown at this time. If refinancing does not work as contemplated, it would put the
20 post-closure care of the Ordot Dump at risk, which is something the court is not willing to gamble.
21 If, however, the Government of Guam's refinancing plan materializes, it may then use any funds
22 gained through the refinancing as it sees fit, including substituting them for the funds in the
23 Receiver's plan.

24 CONCLUSION

25 The court finds that the shortest pay-in period of a dedicated funding source is preferred in
26 order to protect the public health of our residents and the environmental health of our island. The
27 Government of Guam's pay-as-you-go proposal simply is not sufficient nor responsible. This court
28 agrees with the Receiver and the United States that the Receiver's plan is clearly the more reasonable
and financially prudent plan. The court further finds that the Receiver's plan is consistent with
prudent and proper landfill operations, since the use of a trust fund post-Receivership is a "preferred,

1 financial insurance mechanism.”

2 The court at this time adopts the Receiver’s revised transition timeline and proposed financial
3 plan.²⁷ Barring any unforeseen circumstances, the federal Receivership under the leadership of
4 Gershman, Brickner & Bratton, Inc. will end in 2017. While the GSWA Board is eager to begin
5 overseeing the operations of the Layon Landfill and the post-closure care of the Ordot Dump, much
6 technical work remains and it is essential that the Receiver has uninterrupted control over all aspects
7 of GSWA’s operations and finances to ensure the timely completion of these projects. Accordingly,
8 the parties and their departments and agencies are ordered to continue to cooperate with the
9 Receiver’s efforts to responsibly and expeditiously complete all Consent Decree-related projects.

10 IT IS SO ORDERED.



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: May 02, 2016

27 ²⁷ The adoption of the Receiver’s proposal in no way prevents the Government of Guam
28 from refinancing the 2009 Section 30 bonds if the Government of Guam and its financial advisers
believes it is in the best interest to do so.