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IN THE DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUAM WATERWORKS AUTHORITY
and GOVERNMENT OF GUAM,

Defendant.

CIVIL CASE NO. 02-00035

**ORDER RE: UNITED STATES MAGISTRATE
JUDGE’S REPORT AND RECOMMENDATION**

I. INTRODUCTION

The matter before the court is Plaintiff United States’ Objections (Docket No. 77) to the Magistrate Judge’s Report and Recommendation (Docket No. 76). The Magistrate Judge recommends the undersigned vacate the United State Environment Protection Agency’s findings of violations and order the \$40,000 in stipulated penalties, already paid, be returned to Guam Waterworks Authority.¹

II. RELEVANT PRIOR PROCEEDINGS

On October 29, 2007, the Guam Waterworks Authority (“GWA”) filed a Motion for

¹ The court held a hearing on September 10, 2009. At that time, the court informed the parties that it agreed with the United State Magistrate’s finding that there had been a violation. Before issuing this order, however, the court asked the Plaintiff to research whether the \$40,000 payment in stipulated penalties paid by the Guam Waterworks Authority could be retrieved and put toward the projects under the Stipulated Order. Based on the Plaintiff’s report (*see* Docket No. 88) the court is now satisfied that the \$40,000 which has been deposited in the U.S. Treasury pursuant to the Miscellaneous Receipts Act is not recoverable. 31 U.S.C. § 3302.

1 Dispute Resolution (“Motion”).² See Docket No. 42. On October 31, 2007, this matter was
2 referred to the Magistrate Judge. See Docket No. 48. On November 28, 2007, Plaintiff United
3 States (“United States”) filed its Response. See Docket No. 56. On December 6, 2007, GWA
4 filed a Reply. See Docket No. 60.

5 On February 4, 2009, the Magistrate Judge held a hearing on the Motion. On February
6 26, 2009, the United States filed a Sur-reply. See Docket No. 71. On May 11, 2009, the
7 Magistrate Judge issued the Report and Recommendation. See Docket No. 76. Presently before
8 the court is the United States’ May 26 2009 Objections to the Magistrate Judge’s Report and
9 Recommendation. See Docket No. 77. After reviewing the record and filings, the court sustains
10 in part and overrules in part the United States’ Objections.

11 III. FACTUAL BACKGROUND

12 On December 20, 2002, the United States filed suit against GWA and the Government of
13 Guam (collectively “Defendants”) seeking injunctive relief and civil penalties to redress
14 violations of the Clean Water Act (“CWA”) and Safe Drinking Water Act (“SDWA”).
15 See Docket No. 1. The complaint alleged, *inter alia*, that GWA failed to adequately operate and
16 maintain its sewage collection system, resulting in a substantial number of discharges of
17 untreated and inadequately treated wastewater (*i.e.*, raw sewage). After negotiations, the parties
18 settled the lawsuit with the entry of a Stipulated Order for Preliminary Relief (“Stipulated
19 Order”). The court approved the Stipulated Order on June 5, 2003. See Docket No. 17. The
20 parties agreed that the Stipulated Order was “the most appropriate way to require the immediate
21 implementation of short-term projects and initial planning measures by [the Defendants] to begin
22 to address issues of compliance at GWA’s [Publicly Owned Treatment Works (“POTW”)] and
23 three public water systems.” *Id.* at 3.

24 The Stipulated Order was twice amended to accommodate GWA’s requests for
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26 ² Co-defendant Government of Guam did not participate in the briefings relative to GWA’s
27 motion, although presumably it would have endorsed GWA’s position on the matter. Additionally,
28 the Government of Guam did not appear nor participate at the hearing. Accordingly, only reference
will be made to GWA.

1 modifications to the scheduled deadlines and to correct minor typographical errors in the original
2 Stipulated Order. *See* Docket Nos. 36 and 40. The Stipulated Order (“Second Amended
3 Stipulated Order”) presently before the court was approved on October 25, 2006. *See* Docket
4 No. 41.

5 The Second Amended Stipulated Order provided for stipulated penalties GWA would
6 pay if it failed to meet the deadlines specified therein. *See* Docket No. 40 at ¶¶53-54.
7 Additionally, the parties also agreed that the “United States may, in the unreviewable exercise of
8 its discretion, reduce or waive stipulated penalties otherwise due.” *Id.* at ¶56. With the exception
9 of the penalties that are now subject of this matter, the United States Environmental Protection
10 Agency (“USEPA”) has previously assessed stipulated penalties for twelve separate violations,
11 for a total sum of \$224,750. *See* Docket No. 57, Declaration of Michael J. Lee (“Lee Decl.”), at
12 ¶ 2.

13 As of August 30, 2007, USEPA determined that stipulated penalties of \$298,000 had
14 accrued for GWA’s violations under Paragraphs 39 and 42. *See* Docket No. 43, Exh. B. On
15 September 5, 2007, GWA received a Penalty Demand letter dated September 4, 2007 from
16 USEPA’s Water Division, Region IX, regarding three alleged violations of ¶¶39 and 42 of the
17 Second Amended Stipulated Order. *Id.* Specifically, the alleged violations were as follows:

- 18 1. GWA failed to conduct an operational performance evaluation by May 4, 2007, to
19 determine whether advanced primary treatment is needed at the Northern District
20 Sewage Treatment Plant (“STP”) in order to comply with national effluent
21 limitations. On May 4, 2007, GWA submitted a Northern District Performance
22 Evaluation Report with a schedule to complete the performance evaluation in July
23 2008. Thus, USEPA believed GWA violated ¶39³ and determined that as of

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25 ³ In its entirety, ¶39 provided:

26 39. Northern District STP Renovation: GWA shall implement corrective
27 actions to restore primary treatment operation capacity to the Northern District STP.
28 The corrective actions shall include, but not be limited to, the following: primary
clarifiers, preaeration and aerated grit removal systems, and installation of primary

1 August 30, 2007, total penalties of \$161,000 had accrued for this violation. *See*
2 Docket No. 43, Exh. B.

- 3 2. GWA failed to conduct an operational performance evaluation by April 30, 2007,
4 to determine whether advanced primary treatment is needed at the Hagåtña STP
5 as required by ¶ 42.⁴ On May 4, 2007, GWA submitted an Agana Performance
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7 sludge pumps and solids handling (as necessary). GWA shall complete the
8 corrective actions to restore primary treatment operational capacity by March 2,
9 2007. After completion of the corrective actions to restore primary treatment, GWA
10 shall conduct an operational performance evaluation by May 4, 2007, to determine
11 whether advanced primary treatment is needed to comply with NPDES [National
12 Pollutant Discharge Elimination System] permit effluent limitations. *By May 4,*
13 *2007, GWA shall submit to EPA and Guam EPA for review and comments the*
14 *operational performance evaluation with a determination of the need for advanced*
15 *primary treatment. Within 30 days after receipt of EPA's comments, GWA shall*
16 *respond to EPA's comments in accordance with Paragraph 2. If advanced primary*
17 *treatment is needed, the submitted operational performance evaluation shall include*
18 *a schedule for the design and installation of the advanced primary treatment system.*
19 *GWA shall perform the required tasks in accordance with the schedule set out in the*
20 *operational performance evaluation.*

21 (Emphasis added.)

22 ⁴ In its entirety, ¶42 reads:

23 42. Agana STP Renovation: GWA shall implement corrective actions to
24 restore primary treatment operation capacity to the Agana STP and shall renovate the
25 grit removal/screening system and wet well at the Agana Main Sewer Pump Station
26 ("SPS"). GWA shall complete the corrective actions to restore the primary treatment
27 operational capacity of the Agana STP by March 2, 2007, and shall complete the
28 renovations at the Agana Main SPS by June 1, 2007. After completion of the
corrective actions to restore full primary treatment, GWA shall conduct an
operational performance evaluation by April 30, 2007, to determine whether
advanced primary treatment is needed to comply with NPDES [National Pollutant
Discharge Elimination System] permit effluent limitations. GWA shall submit to
EPA and Guam EPA for review and comments the operational performance
evaluation with a determination of the need for advanced primary treatment. Within
30 days after receipt of EPA's comments, GWA shall respond to EPA's comments
in accordance with Paragraph 2. If advanced primary treatment is needed, the
submitted operational performance evaluation shall include a schedule for the design
and installation of the advanced primary treatment system. GWA shall perform the
required tasks in accordance with the schedule set out in the operational performance
evaluation.

1 Evaluation Report with a schedule to complete the performance evaluation in
2 February 2008. For this alleged violation, USEPA computed stipulated penalties
3 of \$84,500. *See* Docket No. 43, Exh. B.

- 4 3. Paragraph 42 also required GWA to complete renovations at the Hagåtña Main
5 Sewer Pump Station (“SPS”) by June 1, 2007. On May 30, 2007, GWA
6 submitted a “notice of expected non-compliance or delay of work” and another
7 such notice on July 24, 2007, which indicated that the scheduled completion date
8 would be in September 2008. For this alleged violation, USEPA computed
9 stipulated penalties of \$52,500. *See* Docket No. 43, Exh. B.

10 In its September 4, 2007 letter, USEPA also advised GWA that as provided for in ¶56, it
11 had discretionarily reduced the amount of the stipulated penalties and instead had imposed a
12 \$40,000 penalty for the above violations.

13 In accordance with the dispute resolution procedures set forth in ¶¶66-68⁵ of the Second
14 Amended Stipulated Order, GWA submitted a formal protest to USEPA and DOJ, outlining the
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17 ⁵ The dispute resolution provisions are provided for in part XI of the Second Amended
18 Stipulated Order. The relevant provisions of these paragraphs are as follows:

19 66. The Dispute Resolution procedures of this Section shall be the exclusive mechanism
20 to resolve disputes arising under or with respect to the Stipulated order for Preliminary Relief. . . .

21 67. If Defendants dispute any determination made by EPA under this Stipulated Order
22 for Preliminary Relief, Defendant shall send a written notice to EPA and DOJ
23 outlining the nature of the dispute, submitting all supporting information and
24 document relating to the dispute, describing its proposed resolution, and requesting
25 informal negotiations to resolve the dispute. Such period of informal negotiations
26 shall not extend beyond 15 days from the date when notice was received by EPA and
27 DOJ unless the parties agree otherwise in writing.

28 68. If the informal negotiations are unsuccessful, the disputed determination by EPA
shall control, unless Defendants file a motion with this court for dispute resolution.
Any such motion must be filed within 30 days after termination of informal
negotiations and must be concurrently sent to EPA and DOJ. The United States shall
then have 30 days to respond to Defendants’ motion. In any such dispute resolution
proceeding, Defendants bear the burden of proving that EPA was arbitrary and
capricious.

1 nature of the dispute and requesting informal negotiations. *See* Docket No. 43, Exh. C. GWA
2 argued that the fine was arbitrary in that it contravened the intention of the Second Amended
3 Stipulated Order of coming into compliance with the SDWA and CWA. *Id.* at p. 3.

4 On September 24, 2007 (Pacific Standard Time; September 25 on Guam), the parties
5 participated in a conference call but were unable to reach an agreement with regard to the
6 disputed penalty. The United States then sent a letter dated September 26, 2007 notifying the
7 Defendants that the informal negotiations had concluded and advising the Defendants that it had
8 30 days to file a motion for dispute resolution with the court. *See* Docket No. 43, Exh. D. The
9 Defendants paid the \$40,000 penalty on or about October 1, 2007 and then filed the instant
10 motion for dispute resolution. *See* Docket No. 43.

11 As noted the Magistrate Judge heard the matter and recommended that the violations
12 found by USEPA be vacated and the \$40,000 in penalties paid be returned to GWA. *See* Docket
13 No. 76. The United State's objections to that recommendation are presently before this court.
14 *See* Docket No. 77.

15 IV. STANDARD OF REVIEW

16 When a party files a timely objection to a magistrate judge's report and recommendation,
17 "[a] judge of the court shall make a *de novo* determination of those portions of the report or
18 specified proposed findings or recommendations to which objection is made." 28 U.S.C. §
19 636(b)(1) (2005); *see Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *see also*
20 Fed.R.Civ.P. 72(b)(3) (stating "[t]he district judge must determine *de novo* any part of the
21 magistrate judge's disposition that has been properly objected to"). "A judge of the court may
22 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
23 magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed.R.Civ.P. 72(b)(3) (stating a judge "may
24 accept, reject, or modify the recommended disposition; receive further evidence; or return the
25 matter to the magistrate judge with instructions"). The Eighth Circuit Court of Appeals has held
26 it is reversible error for the district court to fail to engage in a *de novo* review of a magistrate
27 judge's report when such review is required. *United States v. Lothridge*, 324 F.3d 599, 600 (8th
28 Cir. 2003); *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996); *Grinder v. Gammon*, 73 F.3d

1 793, 795 (8th Cir. 1996). Accordingly, the court reviews the Report and Recommendation de
2 novo.⁶

3 V. ANALYSIS

4 At the outset, the United States raises a procedural argument that this court will consider
5 before addressing the merits of the underlying dispute over the alleged violations of §§39 and 42.
6 According to the United States, the parties' dispute about the stipulated penalty became moot
7 once the Defendants paid the \$40,000 penalty without a reservation of its rights. The Magistrate
8 Judge considered this argument and found otherwise.

9 The Magistrate Judge noted that the Second Amended Stipulated Order provides time
10 frames and deadlines for: (1) the payment of fines and (2) when a motion for dispute resolution
11 is to be filed. The Magistrate Judge found that the Second Amended Stipulated Order explicitly
12 provides for GWA to pay the fine to avoid interest charges while providing time for GWA to
13 consider the filing of a motion for dispute resolution. In this instance, the Magistrate Judge
14 found that GWA paid the penalty to stave off the payment of interest charges in the event it did
15 not prevail on its motion for dispute resolution before the court.⁷ The Magistrate Judge further
16 found "that payment of the fine in order to avoid future interest is envisioned and required under
17 the Order and operates without a bar to the Defendant's subsequent right to file a dispute
18 resolution motion." Docket No. 76 at p. 12.

19 This court agrees with the Magistrate Judge's assessment in this regard. It is not clear
20 from the Second Amended Stipulated Order that interest would be tolled in the event GWA
21 wanted to pursue a dispute resolution motion. Accordingly, GWA should not be penalized for
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24 ⁶ The court conducted a review of the record before it, including listening to the recording
25 of the evidentiary hearing, the moving papers, the Magistrate Judge's Report and Recommendation,
and each of the Plaintiff's Objections.

26 ⁷ Paragraph 57 of the Second Amended Stipulated Order provides that if the Defendants fail
27 to pay stipulated penalties owed within 30 days of receipt of EPA's written demand, the Defendant
28 are required to pay interest on the late payment for each day after the initial 30 day due date.

1 trying to mitigate its losses.⁸

2 B. Whether the Defendants violated ¶¶39 and 42 of the Second Amended Stipulated
3 Order

4 USEPA bases the \$40,000 penalty in part on its allegation that GWA failed to conduct
5 operational performance evaluations at the Northern District STP and the Hagåtña STP within
6 the schedule established in ¶¶39 and 42.

7 1. Violation of ¶ 39 - Operational Performance Evaluation

8 On March 2, 2007, GWA submitted a certification statement and a letter reporting that
9 GWA had successfully completed its renovation work as required by ¶39:

10 GWA herewith reports that the work called for in Paragraph 39, the Northern
11 District Wastewater Treatment Facility Renovation has been successfully
completed. . . .

12 GWA is now monitoring the performance of the restored facility and will evaluate
13 it to determine if any process adjustments may be needed in order to meet the
NPDES permit. GWA is on schedule to complete this evaluation by the May 4,
14 2007 compliance date.

15 *See Lee Decl., Docket No. 57, Exh. 1.*

16 On May 4, 2007, GWA submitted a second certification to USEPA regarding its
17 obligations under ¶39 of the Second Amended Stipulated Order. *See Lee Decl., Docket No. 57,*
18 *Exh. 3.* The performance evaluation attached to the certification statement noted that although
19 GWA was required to have completed all renovations by March 2, 2007, all work was complete
20 “with the exception of five of the six sludge pumps and half of the aerated grit removal system.”
21 *Id.* The sludge pumps were now listed as a “planned action.” *Id.* The Performance Evaluation
22 went on to say “[s]ince GWA is still working to complete mechanical repairs, GWA does not
23 believe that the requirements for additional treatment can be properly assessed until additional

24 ⁸ The United States also objected to the Magistrate Judge’s finding as to the violation of ¶
25 68. *See Docket No. 77.* Paragraph 68 required that GWA provide USEPA concurrent notice of the
26 motion for dispute resolution. However, USEPA did not receive notice until October 30, one day
27 after the United States was notified. The Magistrate Judge found that GWA did violate the Second
28 Amended Stipulated Order in this regard, however, did not find it egregious enough to merit
dismissal of the motion. This court concurs with the Magistrate Judge’s rationale.

1 sludge pumps have been procured and plant operations have been successfully optimized and
2 assessed.” *Id.* This statement contradicts its representations in the March 2, 2007 certification
3 letter that the corrective actions to the Northern District STP were “successfully completed,” and
4 GWA was on schedule to complete the operational performance evaluations by May 4, 2007.
5 *See* Lee Decl., Docket No. 57, Exh. 1.

6 2. Violation of ¶ 42 - Operational Performance Evaluation

7 In its March 2, 2007 letter GWA also reported that it had successfully completed its
8 renovation work as required by ¶42.

9 Further, GWA herewith reports that the work called for in Paragraph 42, the
10 Hagåtña (Agana) Wastewater Treatment Facility Renovation has been completed
and successfully tested.

11 *See* Lee Decl., Docket No. 57, at Exh. 1.

12 On April 30, 2007, GWA submitted a certification statement to EPA regarding its
13 obligations under ¶42 of the Second Amended Stipulated Order. *See* Lee Decl., Docket No. 57,
14 at Exh.2. However, rather than certifying that it had conducted and submitted an operational
15 performance evaluation for the Agana STP, the performance evaluation by GWA stated:

16 GWA does not believe that two months of operation are adequate to fully
17 optimize and assess the treatment capabilities of the newly rehabilitated plant.
GWA is providing a detailed plan and schedule for needed optimization and
18 realistic assessment.

19 *Id.*, at Exh. 2.

20 The United States argues that it is clear from the submissions that GWA did not meet the
21 deadlines. GWA seemingly concedes as much, but argues that it should be excused from
22 complying with the missed deadlines. It points out that USEPA, itself, did not comply with the
23 Second Amended Stipulated Order. Specifically, GWA argues, USEPA did not provide
24 comments on the material that GWA submitted to it on April 30 and May 4, 2007.

25 According to GWA, ¶2 of the Second Amended Stipulated Order required USEPA to
26 provide comments to GWA’s submissions – either approving or providing an explanation why it
27 did not approve said plans or reports. GWA further notes that ¶42 of the Second Amended
28 Stipulated Order provides that “GWA shall submit to EPA and Guam EPA for review and

1 comments the operational performance evaluation Within 30 days after receipt of EPA’s
2 comments, GWA shall respond to EPA’s comments in accordance with Paragraph 2.” *See*
3 Docket No. 40. A similar provision is also found in ¶39. *Id.* Because USEPA failed to approve
4 or disapprove GWA’s submissions or provide any comment thereto, GWA asserts that USEPA
5 itself was in violation of the court order. GWA contends that without these comments, it did not
6 realize its April 30 and May 4, 2007 reports were deficient until it received USEPA’s demand
7 letter in September.

8 Paragraphs 39 and 42 require USEPA to comment on the *operational performance*
9 *evaluations* submitted by GWA. Here, GWA never performed the operational performance
10 evaluations, and thus GWA never submitted said evaluations to USEPA, and in turn, USEPA
11 had nothing on which to comment. USEPA is not required to review and comment on a non-
12 submittal. Second, even if a liberal reading of ¶¶39 and 42 included a requirement that USEPA
13 comment on GWA’s reports, it is disingenuous to assert that GWA did not realize that its
14 submissions were deficient because of USEPA’s failure to provide comments. GWA did not
15 conduct the operational performance evaluations, and its April 30 and May 4 2007 reports
16 provided excuses as to why it did not perform the required tasks.

17 These failures then triggered the stipulated penalties under the Second Amended
18 Stipulated Order. As the Second Amended Stipulated Order specifically states, “[s]tipulated
19 penalties shall begin to accrue on the day after performance is due and shall continue to accrue
20 through the final date of completion *even if no notice of the violation is sent to Defendants.*” *See*
21 Docket No. 40 at ¶54 (emphasis added).⁹

22 GWA also argues that it should not be penalized because it did not understand what an
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24 ⁹ The court notes that GWA did not meet the original compliance deadlines in ¶¶39 and 42
25 of the June 2003 Stipulated Order for the renovation of the Northern District and Agana STPs. *See*
26 Lee Decl., Docket No. 57, at ¶ 3. However, USEPA did not impose stipulated penalties for these
27 violations. *Id.* Instead, it extended the deadlines. For example, the deadline for renovation of the
28 Northern District STP, originally scheduled to be completed by November 26, 2004, was extended
by more than 27 months to March 2, 2007. Similarly, the Agana STP’s renovations were to be
completed by June 5, 2005 but that deadline was extended to March 2, 2007.

1 *operational performance evaluation* was. As noted ¶¶ 39 and 42 of the Second Amended
2 Stipulated Order required GWA to conduct evaluations to determine whether advanced primary
3 treatment was required to comply with permit limits, by the compliance deadlines of April 30
4 and May 4, 2007; however, GWA submitted documents labeled “Performance Evaluation”
5 which consisted of proposed plans in meeting the requirements of ¶¶ 39 and 42, several months
6 after the deadlines. *See* Lee Decl., Docket No. 57, at Exhs. 2 and 3. The Magistrate Judge
7 agreed with GWA’s argument and found that GWA should not be penalized for its
8 misunderstanding. However, this court does not agree. If GWA did not understand what was
9 required, the more appropriate response would have been for GWA to seek clarity from USEPA,
10 or guidance from the court. Moreover, the court notes that GWA did not raise this issue during
11 its discussion with USEPA at the time of the dispute resolution. *See* Docket No. 78 at ¶ 27.
12 Accordingly, the court finds that GWA violated ¶¶ 39 and 42 of the Second Amended Stipulated
13 Order which triggered USEPA’s right to impose stipulated penalties.

14 3. Violation of ¶ 42 - Renovation of Hagåtña Station

15 GWA does not dispute that it did not meet the deadline to renovate the Hagåtña (Agana)
16 Main Sewage Pump Station by June 1, 2007 as required by ¶42 of the Second Amended
17 Stipulated Order. GWA was to complete work to the Sewer Pump Station while the Hagåtña
18 (Agana) Main Sewage Pump Station was being bypassed for the treatment plant renovations.
19 However, GWA was unable to complete the two tasks simultaneously. Therefore, on May 30,
20 2007, GWA sent USEPA a certification statement and letter that it had experienced delays in
21 completing the required renovations. *See* Lee Decl., Docket No. 78, Exh. 3. GWA indicated
22 that it was having difficulty obtaining funding to implement the contract to renovate the station.
23 *See* Lee Decl., Docket No. 57, Exhs. 6 and 7.

24 The Magistrate Judge also found that GWA had violated the deadline of ¶ 42 in this
25 regard. However, rather than affirming USEPA’s penalty assessment, the Magistrate Judge
26 found that there were extenuating circumstances for GWA’s delays. Additionally, he found that
27 because the fines were all lumped together, it would be difficult and inappropriate for the court
28 to apportion the fine amount for this one violation.

1 The court disagrees with the Magistrate Judge’s position. GWA was required to perform
2 all requirements within the time lines agreed to “except to the extent, and for the period of time,
3 that such performance is prevented or delayed by events which constitute a force majeure.” *See*
4 Docket No. 40, at ¶59. GWA does not argue that it could not meet its obligations under ¶¶39
5 and 42 because of a force majeure. While there may be some legitimate excuses why GWA
6 could not meet these deadlines, said reasons did not amount to a force majeure. Nor was there
7 any agreed upon modifications to the time lines.

8 As noted above, USEPA found stipulated penalties of \$298,000 had accrued for ¶39 and
9 ¶42 violations. Pursuant to ¶ 56, USEPA reduced that amount to \$40,000, a substantial
10 reduction. The accrued stipulated penalties for each separate violation exceeded the full amount
11 of the lumped assessed penalty amount. For example, the stipulated penalties of \$52,500 had
12 accrued for the violation of ¶42 concerning the renovation of Hagåtña (Agana) Main Sewage
13 Pump Station. *See* Docket No. 43, Exh. B. *See In re Transcon Lines*, 89 F.3d 559, 569 (9th Cir.
14 1996)(holding that court may sustain an agency's decision as long as at least one of the grounds
15 upon which the agency relies is valid). Accordingly, the court finds that GWA violated ¶ 42
16 which triggered USEPA’s right to impose stipulated penalties.

17 C. Review of Agency’s Penalty Assessment is Limited.

18 Pursuant to the Second Amended Stipulated Order, GWA bears the burden of proving in
19 this dispute resolution proceeding that USEPA was “arbitrary and capricious” in imposing
20 stipulated penalties. *See* Docket No. 40-2, at ¶ 68. This narrow scope of review is similar to that
21 applicable to the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.*, in which the court
22 should not substitute its judgment for that of the agency. *Arizona Cattle Grower’s Ass’n. v. U.S.*
23 *Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (“To determine whether an agency
24 violated the arbitrary and capricious standard, this court must determine whether the agency
25 articulated a rational connection between the facts found and the choice made.”).

26 The scope of review over an agency’s penalty assessment is limited. “Congress has
27 entrusted an administrative agency with the responsibility of selecting the means of achieving
28 the statutory policy”; therefore, the reviewing court should not overturn the choice of sanction

1 unless the Court finds it is “unwarranted in law or . . . without justification in fact.” *Butz v.*
2 *Glover Livestock Comm’n Co., Inc.*, 411 U.S. 182, 185-186 (1973)(quoting *American Power Co.*
3 *v. SEC*, 329 U.S. 90, 112 (1946)).

4 After USEPA applied its technical expertise and evaluated GWA’s April and May 2007
5 submittals, it determined GWA had violated the provisions of ¶¶39 and 42 and required GWA to
6 pay the stipulated penalties as provided for in the Second Amended Stipulated Order. USEPA
7 substantially reduced the penalties assessed to \$40,000, a decision solely within its discretion.
8 As the Magistrate Judge found, “[w]hen compared to the total amount which could have been
9 levied versus the actual fine imposed, the amount of the fine does not appear to be excessive and
10 the court commends Plaintiff for the exercise of its discretion in this regard.” Docket No. 76 at
11 pp. 19-20. This court agrees and finds that USEPA’s action in imposing the reduced penalty is
12 consistent with the terms of the Second Amended Stipulated Order and is a reasonable response
13 to the violations. More importantly, USEPA’s assessment of penalties cannot be said to be
14 arbitrary and capricious. *See* Docket No. 40 at ¶ 68. Accordingly, the imposition of penalties is
15 affirmed.

16 VI. CONCLUSION

17 For the foregoing reasons, the United States’ Objections concerning the assessment of the
18 penalties are **SUSTAINED**. In all other respects (*e.g.*, procedural objections) the Objections are
19 overruled. USEPA’s assessment of \$40,000 in stipulated penalties and the payment of them by
20 GWA is affirmed. Again, the court finds that USEPA could have assessed \$298,000 in penalties.
21 In imposing only \$40,000– USEPA’s reduction of \$258,000 is more than generous.

22 As noted, GWA has already been assessed penalties in the sum of \$224,750. While the
23 court is cognizant that under the Consolidated Commission of Utilities, GWA has shown great
24 strides, it is unfortunate that almost a quarter of a million dollars has been spent in penalties
25 rather than for much needed improvements of the water systems. Now that this matter is before

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1 this court, it has begun to schedule quarterly status hearings to ensure that there is continued
2 progress. Accordingly, the first of such hearings is scheduled for December 10, 2009 at 9:00
3 a.m.

4 **SO ORDERED.**



5 /s/ Frances M. Tydingco-Gatewood
6 Chief Judge
7 Dated: Sep 21, 2009

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