



GUAM RESOURCE RECOVERY PARTNERS, INC.

2009 NOV 13 PM 5:00

November 4, 2009

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30-09-1355

Office of the Speaker
Judith T. Won Pat, Ed. D.
Date: 2009 11 05
Time: 1:13 PM
Received by:

Re: 1996 Solid Waste Construction and Services Agreement

Dear Sirs:

I am writing to follow-up on my March 13, 2008 letter to you requesting you to comply with your valid and binding agreement with Guam Resource Recovery Partners (GRRP), the 1990 Amended License, and to enter into negotiations for a municipal solid waste agreement ("MSW Agreement") as contemplated by section 6.a. of the License. (See **Attachment 1**). Since the Guam Superior Court in *Pangelinan v. Camacho*, CVA06-017, affirmed that the 1996 Solid Waste Construction and Service Agreement is unenforceable, the License is now the governing agreement between the parties, subject to GRRP's right to appeal the decision to the Guam Supreme Court. No law can impair the Government's obligation to this binding agreement. (See Section 1421b(j) of the Guam Organic Act, Bill of Rights). Moreover, pursuant to the Term Sheet for the MSW Agreement for the Guam Waste-To-Energy (WTE) Facility, dated December 30, 1994, between Charles P. Crisostomo, Administrator of Guam Economic Development Authority (GEDA) and GRRP, the parties agreed to "negotiate in good faith and with due diligence a definitive Service Agreement, which includes a landfill. (See **Attachment 2**, Term Sheet). Due to the impending military build-up, the on-going solid waste disposal crisis, environmental concerns regarding the proposed Layon landfill's potential to pollute a future

water resource, and the legal and financial hindrances in proceeding with a landfill at Layon, it is clearly in the best interest of GRRP and the Government to commence and complete negotiations as soon as possible “in good faith” as agreed.

LEGAL PROBLEMS WITH A LANDFILL AT LAYON

Building a MSWLF at Layon is not only unauthorized, but it is also against the law. (See **Attachment 3** – Comments to Layon Permit and Request for Hearing, dated September 21, 2009, and Statement of Issues, filed October 26, 2009, submitted to GEPA and the GEPA Board.) The Guam Legislature made it a law that the Guam MSWLF will be located at *Guatali* or *Malaa* – not at Layon. Building a MSWLF at Layon violates Guam law, Public Law (P.L.) 24-06, enacted on March 20, 1997, which provides in Section 4(e) that the new landfill “shall be located at either *Guatali* or *Malaa*, or both” P.L. 24-06 makes the use of *Guatali* or *Malaa* or both as the site of the new MSWLF both mandatory and unconditional. P.L. 24-06 has been the law of the land since 1997, predating and thus incorporated into the Consent Decree filed in *United States v. Government of Guam*, District Court of Guam Civil Case No. 02-00022.

Section 4 of Public Law 24-06 additionally requires that “the Department of Public Works shall immediately contract with a single, private entity for the financing, design, development, construction and operation of a new MSWLF facility,” which contract Section 4 further mandates “shall require that the contractor comply with the Environmental Impact Study created by Juan C. Tenorio and Associates dated November 20, 1995 . . .” Guam Pub. Law 24-06:4(b) (March 20, 1997). Since the Environmental Impact Study developed by Juan C. Tenorio and Associates (“Tenorio EIS”) only studies *Guatali*, *Malaa* and the Ordot expansion, it is quite impossible to comply with the Tenorio EIS by building a MSWLF at Layon.

Moreover, 10 Guam Code Annotated, Chapter 51 on “Solid Waste Management” specifically refers to P.L. 24-06 mandating that the new MSWLF be located at *Guatali* or *Malaa*. Section 51101, entitled “Legislative Findings,” provides:

(b) The purposes of this Chapter are to: (3) privatize Guam’s Solid Waste Management System (‘SWMS’) subject to all applicable laws and **Public Law Number 24-06**; (emphasis added).

The Government of Guam cannot ignore its own laws.

Furthermore, the selection of the landfill site at Layon was not authorized by the Guam Legislature. Only the Guam Legislature has the authority to select the next municipal solid waste landfill (MSWLF). This conclusion is bolstered by the enactment of Public Law (P.L.) 23-95. Previously, in P.L. 22-115, the Legislature authorized the Governor of Guam to select the next landfill site, but then expressly repealed this authorization in P.L. 23-95. See P.L. 23-95:2. There can be no doubt about the Legislature’s intent in repealing an earlier grant of authority given to the Executive Branch concomitant with an exercise of that authority by the Legislature itself – the authority to select the next landfill site was reserved to the Legislature. See *University of Guam v. Guam Civil Service Com’n*, 2002 Guam 4 § 13 (“In an express repeal, a legislature expressly declares its intent to abrogate an earlier statute.”).

There is no law approving Layon or any site other than *Guatali* or *Malaa* for Guam's next MSWLF. Further, there is no credence in the position that the Legislature approved their selection of Layon by the Legislature's inaction with regard to the 2006 Integrated Solid Waste Management Plan ("ISWMP"), which identifies the Layon site. The 2006 ISWMP did not comply with Guam law, thus it is invalid. Guam law requires that the Guam Environmental Protection Agency (Guam EPA) adopt and update Guam's ISWMP pursuant to the provisions of the Administrative Adjudication Law ("AAL"). See 10 G.C.A. § 51103(a)(2) (authorizing Guam EPA to prepare and adopt in accordance with the AAL a solid waste management plan). The AAL requires an Economic Impact Statement ("EIS") for any rule promulgated under the AAL that will cost the general public in excess of \$500,000. See 5 Guam Code Annotated (G.C.A.) § 9301.

The 2006 ISWMP was submitted to the Legislature without an EIS, despite the fact that the 2006 ISWMP (see e.g., Sec. 6.5.2) specifically requires the development of the Layon MSWLF, the cost of which has been reported to be in excess of \$110 million. (See Quarterly Reports of the Receiver). Guam EPA never prepared an EIS because the Guam EPA Administrator certified that the cost to the public to implement the 2006 ISWMP would be less than \$500,000. Guam EPA skirted the issue by saying that it only needs to consider those elements that are not existing legal obligations. However, there is no provision whatsoever in the AAL recognizing the purported exemption for existing legal obligations, and it appears that Guam EPA's reliance thereon is an attempt to circumvent the clear mandate of the AAL. Without the EIS, the 2006 ISWMP was never properly promulgated. See 5 G.C.A. § 9301(e) ("No proposed rule or regulation shall be transmitted to I Liheslaturan Guahan for consideration without an economic impact statement, **nor shall any proposed rule or regulation go into effect without a completed economic impact statement.**") (emphasis added). Thus, the Legislature did not approve the selection of Layon by its failure to act on the submitted 2006 ISWMP.

The development of the MSWLF at *Guatali* or *Malaa* is consistent with the Consent Decree, which requires the Government of Guam's compliance with Guam law. Specifically, Section XII.47 states that "[t]his Consent Decree in no way affects the Government of Guam's responsibilities to comply with all applicable federal and territorial laws and regulations." A MSWLF at *Guatali* is also consistent with Section IV.10.b. of the Consent Decree as it allows for a private MSWLF option. The permitting process for the MSWLF at *Guatali* is in its final stage making *Guatali* a viable, cost-effective, and legal alternative to building a MSWLF at Layon.

In addition to the Consent Decree itself mandating compliance with Guam laws (e.g., P.L. 24-06), the United States Department of Agriculture (USDA) requires compliance with Guam law as a condition precedent for approval of a loan and grant for the new MSWLF. Specifically, one of the conditions for the continued processing of the USDA loan and grant is that "[a]ll applicable Guam laws and requirements must be met." See USDA July 20, 2009 letter to you, Condition #22. As such, the Layon landfill cannot meet the conditions for the USDA loan and grant needed to fund the project because a MSWLF at Layon violates Guam law.

The Attorney General of Guam wrote a misleading letter to the Underwriters providing opinions and conclusions "based on an analysis of existing laws, regulations, rulings and court decisions .

...” (See **Attachment 4** – June 18, 2009 Letter from Guam AG to the Underwriters). Paragraph (iii) on page 2 provides:

the enactment or adoption of the Bond Act and the GEDA Resolutions and the execution and delivery of the Indenture, the Continuing Disclosure Agreement and the Bond Purchase Agreement, and the consummation of the transactions contemplated thereby, and the compliance of the provisions thereof, *will not conflict with* or constitute on the part of the Government a breach of or a default under *any existing law, administrative regulation*, court order or consent decree of the Government or any department division, agency or instrumentality of the United States, to which the Government is subject, or *any agreement, resolution or instrument to which the Government is a party or may otherwise be subject*; (emphasis added).

Contrary to this statement, bonds issued to build a MSWLF at Layon *will conflict with*: 1) the License agreement between the Government and GRRP, 2) Guam P.L. 24-06, and 3) 10 GCA 51101(b).

The Attorney General’s letter to the Underwriters also misrepresents the facts in Paragraph (v), which states:

“there is *no litigation* . . . in any way contesting or affecting . . . the pledge of the Section 30 Revenues to the payment of the principal of and interest or premium, if any, on the Bonds...” (emphasis added).

The definition of the Series 2009A bonds per the Supplemental Indenture for the Limited Obligation Bonds specifically appoints Layon as the location for the new MSWLF, which as mentioned here is illegal and has not been authorized by local law. Moreover, contrary to Paragraph (v), there is a current and pending lawsuit challenging the legality of using taxpayers’ money on a project that violates Guam Law – the Layon landfill project. The Attorney General failed to mention the lawsuit, *Rosanna San Miguel, et al., v. Department of Public Works, et al.*, CV0892-04, pending in the Superior Court of Guam. (See **Attachment 5** – Taxpayers’ Motion for Summary Judgment). If this lawsuit is successful, there will be an effect on the ability to pay the principal and interest on the bonds.

Furthermore, pursuant to Section 1511 of the American Recovery and Reinvestment Act of 2009, you are required, as the Governor, to certify that the infrastructure investment for the landfill at Layon has been properly approved as required by law and accept responsibility that the infrastructure investment is an appropriate use of taxpayer dollars. *Id.* at Condition 21.a. The Legislature has not approved the Layon site for the MSWLF as set forth in P.L. 29-116, which states that nothing in the law “shall be construed to be an acquiescence to or the legislative approval of *I Maga’lahi’s* [the Governor’s] or any other entity’s selection of the Layon site as the location for a Municipal Solid Waste Landfill.” **If a landfill at Layon violates Guam law, namely P.L. 24-06, and has not been approved by the Legislature, then you cannot certify**

to the USDA that the investment has been properly approved and that it is an appropriate use of taxpayer dollars, as required.

ENVIRONMENTAL PROBLEMS WITH A LANDFILL AT LAYON

Building a landfill on top of a major future potable water resource is reckless. It would be unconscionable for you, as Governor, to certify that building a landfill at Layon endangering the vital water resources of the Inajaran Watershed is “an appropriate use of taxpayer dollars” pursuant to the American Recovery and Reinvestment Act of 2009. Furthermore, a landfill at Layon would contravene the intent of the July 17, 2009 Letter of Intent between you and the Navy stating that: “It is the intent of the parties that the to be constructed new MSWLF on Guam be operated in an efficient, cost-effective manner employing *best practices to protect the environment* and maximize its useful life.” Not building the landfill at Layon would be the only way to genuinely protect the environment and the valuable potable water resources of the Inajaran Watershed. The Guatali/WTE option is the only cost-effective renewable energy approach that satisfies the Navy’s intention to support best practices to protect the environment.

The importance of the water resources in southern Guam has been studied and well-documented. In 1980, the United States Army Corps of Engineers, Honolulu District, performed an extensive study called the “Ugum River Study” pursuant to the authority of Section 106 of the River and Harbor Act of 1970, which authorizes investigations of water resources on Guam. This study was a part of a series of investigations regarding Guam’s water resources. Local officials facing increasing demand for water and uncertainties about the supply capacity of Guam’s groundwater requested the study, which included a Final Environmental Impact Statement for the development of southern Guam water resources for domestic and agricultural use. The Summary concluded:

[T]he current primary source of potable water supply is the northern groundwater lens. Based on current knowledge of the lens capacity and demand projections, *there is the strong possibility that the full water production potential of the lens will be reached by the end of the century if additional sources are not developed in the near future.* Surface water development in the south is considered a practical and supplemental source to increase the overall water supply of the island.

Various possible solutions to the problems and needs of water use reduction and supply increase were analyzed. ... Environmentally, the most acceptable measure is the conservation approach. Based on the most probable future conditions, however, this measure would only defer the point at which consumptive demand will exceed the groundwater supply. In view of the study results, it is concluded that together with a locally implemented water conservation program, *the most desirable plan for supplementing the water source at this time consists of a surface water storage project in the Ugum River drainage basin.* (emphasis added) (p. 1 of the Ugum River Study – See **Attachment 6**).

The Layon landfill site is part of the Inajaran River Watershed, which has a number of rivers and tributaries flowing through it, including the Ugum River, a major tributary of the Talofoto River. The combined average flow in the major drainage basins of the southern half of Guam totals approximately 60 million gallons per day (mgd) – compared to the 50 mgd that the northern aquifer yields. (pp. 8-9 of the Ugum River Study – See **Attachment 6**). A landfill located in this area clearly will endanger a vital source of fresh water for Guam's future growth and development.

In addition, Guam Waterworks Authority Water Resource Management Plan 2006 ("WRMP")¹, Volume 2 Chapter 3, Water Budget, 3.4 Water Resources Occurrence and Behavior, 3.4.2 Southern Guam has emphasized the importance of the southern Guam's water resources, which states that:

Surface water in the South is *a substantial resource that may have to be exploited more intensively* should population demand in the future exceed the sustainable yield of the northern aquifers. (emphasis added). 3.4.2.2 Surface Water (pp. 3-10).

WRMP also found that:

Both groundwater and surface water are developed in southern Guam, but surface water offers the most voluminous source of supply ... *The importance of the surface water opportunities in southern Guam will increase as island population continues to grow.* (emphasis added). 3.5 Water Development, 3.5.2 Southern Guam (pp. 3-20).

Further, it states:

The surface water resources of southern Guam and proposals for developing them are thoroughly discussed in the surface water development study by the Barrett Consulting Group. The study concluded that although a dam/reservoir on several rivers would provide the greatest reliable yield, the most practical way to capture stream flow for use is by means of diversions. 3.5.2.1 Surface Water

Interestingly, the WRMP refers to the Barrett Consulting Group study, which assumes that one of the dams would be located in the same position on the Inarajan River as that proposed in the U.S. Army Corps of Engineers Ugum River Study and EIS. Why are these professionally prepared comprehensive studies about Guam's future water resources being ignored? Placing a landfill at Layon would be as irrational as placing a landfill over Guam's northern aquifer. How can you jeopardize a critical potable water resource, especially considering the enormous influx of the U.S. military to Guam in the upcoming years?

FINANCIAL PROBLEMS WITH A LANDFILL AT LAYON

¹ See http://www.guamwaterworks.org/wrmp_vol2.html

A landfill at Layon is a heavy financial burden on the Government and the people of Guam. The July 17, 2009 Letter of Intent between you and the Navy states that: "It is the intent of the parties that the to be constructed new MSWLF on Guam be operated in an efficient, *cost-effective manner* employing best practices to protect the environment and *maximize its useful life*." A private landfill at Guatali is the most environmentally sound and cost-effective option to solve the solid waste crisis on Guam for the following reasons:

- Initial development of the Layon landfill will cost the Government of Guam (GovGuam) about \$150 million, while the Guatali MSWLF is being built using private funds that will cost GovGuam nothing.
- The Guatali MSWLF/ WTE option provides the lowest tipping fee per ton and cost per household. (See p. 99, GEDA Public Hearing for Guatali MSWLF, submitted November 5, 2009).
- The Guatali MSWLF/WTE option will not require use of federal highway money – collected from fuel taxes paid by Guam residents – to subsidize non-GovGuam solid waste.
- The contemplated use of federal highway money to be used to upgrade the bridges and routes to the Layon site can be better used for other bridges and highways in Guam.
- The operation of the WTE is expected to handle solid waste disposal for 40 years with the addition of new cells at the Guatali site; in comparison, the current two cells at Layon, costing about \$150 million, will be filled within 5 to 10 years.
- Layon will require the addition of two cells every 5 to 10 years at a cost of approximately \$80 million present worth value, for a total of 11 cells at the cost of an additional \$300 million.
- After paying off the debt service of the WTE facility in 20 years, the tipping fee will drop dramatically and may result in paying for the garbage as a source of fuel; meanwhile, the tipping fee for the Layon approach will keep escalating astronomically.

Furthermore, in applying for the USDA loan and grant, you have misrepresented that due to a depressed economy and the unavailability of conventional financing that you had no other alternative but to turn to the U.S. Government for funding. (See **Attachment 7** – March 19, 2009 letter from Governor Camacho to Secretary Ken Salazar, U.S. DOI, which references another March 19, 2009 letter from Governor Camacho to Secretary Tom Vilsack, USDA). Specifically, you stated in this letter:

the economic forces that have adversely impacted the financial markets nationwide have made conventional municipal financing resources an unrealistic solution for our immediate needs. *This situation has compelled the government of Guam to consider alternative financing solutions to fund essential community facilities and infrastructure projects* over an abbreviated period of time as outlined by the U.S. Department of Defense in their efforts to move the III Marine Expeditionary Force to Guam from Okinawa ... *Among the most important of these facilities is the Layon landfill*, which will serve the entire island community. (emphasis added). See **Attachment 7**.

On the contrary, you have a valid and binding agreement with GRRP to negotiate a contract to build a WTE power plant and landfill that must accompany it. As you have been made aware, GRRP is ready and willing to go forward with these projects. You repeatedly fail to mention to the U.S. Government that, in fact, there is an alternative to building a government-funded landfill.

You also repeatedly fail to mention that there are, in fact, substantial funds in place for financing a MSWLF – albeit a private one – evidenced by the allocation by the Government of Guam under P.L. 30-1 of \$152,198,585 for private activity bonds for Solid Waste Disposal Facility Bonds pursuant to 26 USC Section 142(a)(6), U.S. Internal Revenue Code, along with \$50 million each year thereafter. P.L. 30-1 further provides that Guam Legislature “intends to authorize the use of Private Activity Bonds to achieve the most efficient and lowest cost financing arrangement available in the financial market for the construction, operation and maintenance of a properly permitted solid waste management system *in accordance with federal and local laws.*” (emphasis added). In order to be eligible for these bonds, the project must comply with federal and local laws. A landfill at Layon does not meet that requirement. The GRRP submitted its application to the Guam Economic Development Authority for these bonds and a hearing is scheduled on November 18, 2009. (See **Attachment 8** – GEDA Public Hearing Notice).

Instead of illegally funding Layon, these bonds could be used to assist in financing the *Guatali* MSWLF. The failure to disclose this pertinent information can be seen as an attempt to thwart private enterprise and unnecessarily use U.S. taxpayer money. There are surely other important projects that need USDA funding where there truly is no other alternative. How can you in good faith receive this money, diverting it from worthwhile projects, knowing that a private company is on the cusp of building a MSWLF which would cost the government nothing?

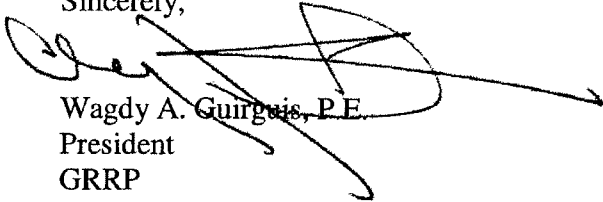
CONCLUSION

We suggest that you comply with the laws of Guam, honor the Amended License, and support the *Guatali* MSWLF/WTE projects – the legal, cost-effective, and environmentally sound alternative to the Layon landfill. A reasonable and prudent course would be to renegotiate the 1996 Agreement as that agreement was already extensively negotiated by the parties, extensively reviewed by the courts, and already independently reviewed by the Government's consultant, The Shaw Group, and found to be consistent with industry standards. The parties can execute an agreement identical to the 1996 Agreement without the offending section 4.04, or the parties can execute an amendment to the 1996 Agreement that removes section 4.04. Proceeding with an agreement that eliminates section 4.04 would allow the parties to proceed consistently with the Supreme Court's decision. Because of the 13 years that have lapsed since the execution of the 1996 Agreement, there may be certain other minor elements of the Agreement that need to be adjusted.

If GovGuam fails to proceed **in good faith** under the 1990 Amended License and to negotiate the MSW agreement within a reasonable period of time, GRRP reserves the right to pursue damages against the Government for breach of the Amended License. We hope GovGuam will act expeditiously and in the best interests of the people and environment of Guam and immediately

begin negotiations with GRRP. I look forward to your response and working with you to provide a legal, cost-effective, environmentally sound solution to Guam's solid waste crisis.

Sincerely,



Wagdy A. Gurguis, P.E.
President
GRRP

cc: Melissa L. Pang Ching, Acting State Director, USDA Rural Development for Hawaii State Office – Western Pacific Region
Ted K. Matsuo, P.E., Community Programs Director, USDA Rural Development for Hawaii State Office – Western Pacific Region
Sandi Boughton, Director, Water & Environment Programs, National Office, USDA
Joe Diego, Director, USDA Rural Development, Guam Area Office
Senator Judith T. Won Pat, Ed.D., Speaker, 30th Guam Legislature
Senator Rory J. Respicio, Chairman of the Committee on Natural Resources
Alicia G. Limtiaco, Esq., Attorney General of Guam
John Jackson, Director, Joint Guam Program Office
Rear Admiral Douglas Biesel, Commander, Joint Region Marianas
Captain Peter S. Lynch, Commander, NAVFAC Marianas
Secretary Tom Vilsack, USDA
Secretary Ken Salazar, DOI
Piper Jaffray & Co., El Segundo, California
Citigroup Global Markets, Inc., Seattle Washington

Attachments:

1. WTE License
2. Term Sheet
3. Comments to Layon Permit and Request for Hearing, dated September 21, 2009, and Statement of Issues, filed October 26, 2009, submitted to GEPA and the GEPA Board
4. June 18, 2009 Letter from Guam AG to the Underwriters
5. Taxpayers' Motion for Summary Judgment
6. Ugum River Study
7. March 19, 2009 letter from Governor Camacho to Secretary Ken Salazar, U.S. DOI and March 19, 2009 letter from Governor Camacho to Secretary Tom Vilsack, USDA
8. GEDA Public Hearing Notice

[254.17]license2

26 September 1990

AMENDED LICENSE AGREEMENT

This Amended License Agreement is made this 15th day of November, 1990, by and between GUAM POWER, INC., hereinafter called "GPI", whose mailing address is 841 Bishop Street, Honolulu, Hawaii 96813, GUAM RESOURCE RECOVERY PARTNERS, hereinafter called "GRRP", whose mailing address is 335 Madison Avenue, New York, New York 10017, the GUAM ECONOMIC DEVELOPMENT AUTHORITY, an autonomous agency of the Government of the Territory of Guam, hereinafter called "GEDA", whose mailing address is GITE Building, Suite 911, 590 South Marine Drive, Tamuning, Guam 96911, and the GOVERNMENT OF GUAM, by and through its Governor, the Honorable Joseph F. Ada, Governor, Territory of Guam.

On March 2, 1992, International Energy Enterprises, Inc., a New York corporation with a principal office at 500 Fifth Avenue, New York, New York (hereinafter referred to as "IEEI") entered into a License Agreement (the "1992 License Agreement") with GEDA and the Government of Guam for the financing, construction, ownership and operation of a facility (the "Facility") to incinerate municipal solid waste collected on Guam and to generate electricity for sale to the Guam Power Authority ("GPA").

IEEI has granted GPI an option to purchase the 1992 License Agreement from IEEI. GPI has exercised its option and has approximately one year to pay the purchase price to IEEI. If the License reverts to IEEI as a result of nonpayment of the purchase price, then this Amendment shall be void and of no force and effect.

In order to exercise its rights and to fulfill its obligations under the License Agreement, GPI and Enprotech Guam, Inc. ("Enprotech Guam"), a wholly owned subsidiary of Enprotech Corp., have formed Guam Resource Recovery Partners, a New York general partnership. The address of Enprotech Guam, Inc., and Guam Resource Recovery Partners is 335 Madison Avenue, New York, New York 10017. GPI and Enprotech Guam are the sole partners of GRRP.

GRRP and the Government of Guam intend to enter into a Municipal Solid Waste Agreement (the "MSW Agreement") setting forth, among other items, the terms and conditions on which GRRP shall finance, construct and operate the facility.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein and for other good and valuable consideration, the parties agree to modify and amend the License Agreement to read as follows:

1. License: The Government of Guam and GEDA grant to GRRP an exclusive right to develop, finance, design, construct and operate a waste reduction facility for the recycling and incineration of the solid waste collected within the Territory of Guam as provided herein.
2. Limited Right of Assignment: GRRP shall have the right, without the approval of GEDA or the Government of Guam, to establish such subsidiaries and affiliates to be owned exclusively by it, Enprotech Guam and/or GPI in order to fulfill its rights and responsibilities under this License. GRRP shall have the discretion to create such joint ventures, partnerships, corporations or combinations thereof, involving only the foregoing entities and their wholly owned subsidiaries and affiliates, in order to hold the rights and to fulfill the responsibilities of this License. GRRP may assign its rights and obligations hereunder to any of the above-mentioned companies, partnerships or joint ventures.
3. Prohibited Assignment: (a) Other than as set forth in Section 2, the License Agreement shall not be assigned without the express written consent of GEDA and the Government of Guam. The consent of GEDA and the Government of Guam may be withheld unless GRRP can establish to the satisfaction of GEDA and the Government of Guam that the proposed assignee has the ability, expertise or experience to fulfill the purposes of this License.

(b) There shall be no change in the identity of the stockholders of Enprotech Guam without GEDA's written consent. The MSW Agreement shall provide that Enprotech Guam shall at all times maintain a mutually agreeable minimum percentage interest or a minimum investment in GRRP.
4. Term: This Agreement shall terminate on the earlier of the date of execution and delivery of the MSW Agreement by all parties thereto or the 23rd anniversary of the date hereof.
5. Financial Obligations: GRRP, its partners or assignees, shall be solely responsible for financing the design, construction and operation of the Facility. Neither the Government of Guam nor GEDA shall have any financial obligation to pay for any part of the design, construction or operation of the Facility except as contemplated by the MSW Agreement or as otherwise agreed in writing.

C. Schedule of Development: GRRP, its partners or assignees, shall design, construct and operate the Facility in accordance with the following schedule:

a. Within 120 days of the date of this Agreement, or such longer period as the parties shall agree, CEDA and GRRP shall, in good faith, negotiate and enter into the MSW Agreement which shall provide mutually acceptable terms for the following, among others:

i. The terms and conditions on which GRRP shall finance the design, construction and operation of the Facility.

ii. The development of a program manual which outlines the preliminary specifications, projected plant performance, site layouts and general project descriptions.

iii. The guarantee of GRRP that the Facility shall be capable of processing specific and agreed upon quantities of solid waste, generating a specific amount of electricity compatible with GPA interconnection and generation requirements or other agreed upon energy forms for sale to others.

iv. The recovery of agreed upon recyclable material, as economically feasible.

v. The guarantee of a maximum quantity of residue with a specific content of combustible material.

vi. The commitment of the Government of Guam to deliver to the Facility not less than 75,000 tons of acceptable solid waste per year from the commencement of commercial operations of the Facility through the term of the MSW Agreement.

vii. The commitment of the Government of Guam to pay to GRRP a processing fee on a per ton basis for all solid waste delivered to the Facility and establishing a procedure for adjusting such fee, from time to time, to reflect certain changed costs.

viii. A detailed "Schedule of Progress" which shall establish a schedule for the completion of the various increments of the design, construction and operation of the Facility in a workmanlike and expeditious manner.

ix. Consistent with the understanding that GRRP is the owner of the Facility for tax purposes, the transfer of the Facility at the conclusion of the term of the MSW Agreement to the Government of Guam or its designee, in good order and repair, under terms to be mutually negotiated.

x. A deadline by which GRRP shall complete and file with all relevant regulatory agencies of the Territory of Guam and of the United States, any and all permit applications required for the design, construction and operation of the Facility.

xi. A term of 20 years following the commencement of the operation of the Facility but in no event more than 23 years from the date hereof.

xii. Termination of the MSW Agreement upon mutually agreed circumstances, including a schedule of payments or other mutually agreed method of determining amounts due on termination.

xiii. Any other provision necessary, in the reasonable judgment of the parties, to permit the construction and permanent financing of the Facility by independent financial institutions without recourse to any affiliate of GRRP, its partners, GEDA or the Government of Guam.

b. On or before the execution of the MSW Agreement, GEDA and GRRP shall enter into an agreement to provide GRRP with a mutually acceptable site of sufficient size for the design, construction and operation of the Facility for a mutually acceptable period. The parties understand that the Guam legislature may have to approve the use of any such site.

7. a. This Agreement may be terminated (i) with the written consent of GRRP and GEDA; (ii) by GRRP upon 60 days written notice to GEDA; (iii) by GEDA if GRRP shall, after 60 days written notice, fail to proceed diligently and in good faith to complete the negotiation and execution of the MSW Agreement or otherwise fail to cure a breach of this Agreement; or (iv) by GRRP if GEDA or the Government of Guam shall, after 60 days written notice, fail to proceed diligently and in good faith to complete the negotiation and execution of the MSW Agreement.

b. If this Agreement is terminated pursuant to Section 7(a)(iv), GEDA and the Government of Guam shall be liable, in accordance with the Government Claims Act (P.L. 17-29, as amended), for all damages, costs and expenses incurred in reliance upon this license, whether before or after its amendment. However, the recovery of damages shall not include those allegedly incurred by IEEI. If this Agreement is terminated for any other reason, no party shall be liable to any other party.

8. GRRP Warranties: GRRP hereby warrants, covenants and guarantees that it now has or shall obtain by subcontract or otherwise, the expertise necessary to carry out its obligations set forth herein. GRRP has the requisite legal power and authority to enter into this Agreement; has complied with all

internal corporate requirements for its execution and the same constitutes a valid and binding obligation upon it. The consummation of the transactions contemplated by this Agreement will violate no law, rule or regulation applicable to GRRP nor result in any default of any agreement or undertaking binding upon GRRP.

9. GEDA and the Government of Guam Warranties: The Government of Guam and GEDA hereby warrant, covenant and guarantee as follows:

a. GEDA and the Government of Guam shall provide such assistance as they are reasonably capable of providing to expedite and facilitate the performance of GRRP under this License. They shall use their best efforts to assist in the issuance of permits, easements, approvals and agreements from various agencies of the Territory of Guam and the United States.

(b.) The Government of Guam and GEDA have all the requisite legal power and authority to enter into this Agreement to grant the license extended hereunder; this Agreement has been fully executed and delivered by the Government of Guam and GEDA and constitutes a valid and binding obligation on each; the consummation of the transaction set forth herein and the compliance by the Government of Guam and GEDA with its terms and agreements shall not violate any law, rule or regulation applicable to either.

10. Avoidance of Partnership: Nothing set forth herein shall be construed to create a partnership or joint venture between the parties hereto. Neither party shall be deemed to be the general agent for the other or to permit the other to bid for or make commitments on behalf of or undertake any contracts binding upon the other.

11. Merger: No modification, change or waiver of this Agreement or any provision hereof shall be valid or binding on the parties unless it is agreed to in writing signed by the parties sought to be bound. This Agreement is a full and complete embodiment of the parties' oral agreements and understandings arrived at to date. All other agreements, understandings and contracts are waived and of no force and effect.

12. Guam Contract: This Agreement shall be governed by and construed in accordance with the laws of the Territory of Guam.

13. Repayment of GEDA Loan: In May of 1989, GPI and GEDA entered into an agreement providing for the stay of Superior Court of Guam Civil Case No. CV1001-88 and for the payment of money by GPI to GEDA which shall satisfy the previous and

existing indebtedness of IEEI to GEDA. That agreement is modified as follows:

a. GPI shall pay to GEDA upon the execution of this Agreement the sum of \$10,000.

b. Upon the issuance of a building permit by the Department of Public Works to GPI for the Facility or upon a termination of this Agreement pursuant to Section 7(a)(ii) or 7(a)(iii), GPI shall pay to GEDA the sum of \$255,000.

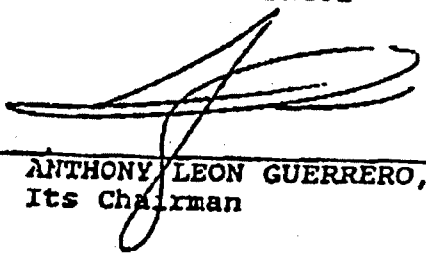
14. Release of IEEI: Nothing in this Amended License Agreement shall be deemed to be a release of GEDA's claims against IEEI for moneys loaned. Upon the receipt of the sum of \$255,000 from GPI, GEDA shall execute such full and complete releases of IEEI as GPI shall request, provided that IEEI releases GEDA from any and all claims and liability arising in any way from or related to the original License Agreement. GPI represents that IEEI is aware of and agrees to the stay of the prosecution of GEDA's claims against it in Superior Court of Guam Civil Case No. 1001-88.

15. Condition of this Amendment: This Amendment is expressly made conditional upon the full and complete assignment of the 1982 License Agreement from IEEI to GPI, such that IEEI will have no interest in the License, either as originally drafted or as amended. In the event of the failure of IEEI to assign the License to GPI or that the License should revert to IEEI, then this Amendment shall be void and of no force and effect and IEEI shall only have those rights created by the original unamended License, subject to all of GEDA's defenses and claims, including the claim that the License is terminated and void. The License is being conditionally amended solely for the benefit of GRRP, its partners and assignees. Nothing set forth in this Amendment shall in any way be considered a waiver or forgiveness by GEDA or the Government of Guam of any previous

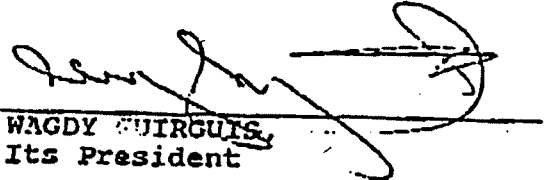
breach or non-performance by IEEI. GEDA reserves all of its rights against IEEI, unaffected by anything agreed to herein.

**GUAM ECONOMIC DEVELOPMENT
AUTHORITY,**

By 
CHARLES CRISOSTOMO,
Its Administrator

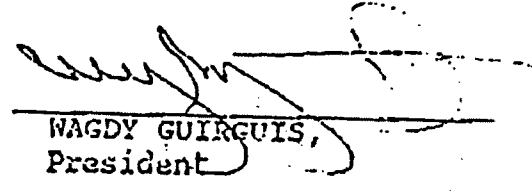
By 
ANTHONY LEON GUERRERO,
Its Chairman

GUAM POWER, INC.,

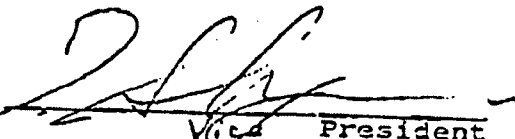
By 
WAGDY GUIRGUIS,
Its President

GUAM RESOURCE RECOVERY PARTNERS,

By **GUAM POWER, INC.,**
a General Partner

By 
WAGDY GUIRGUIS,
President

By **ENPROTECH GUAM, INC.,**
a General Partner

By 
Vice President

GOVERNMENT OF GUAM

BY Joseph F. Ada
JOSEPH F. ADA,
Governor of Guam
NOV 15 1990

APPROVED AS TO FORM:

MCCULLY, SWAVELY & LANNEN, P.C.
Attorneys for Guam Economic
Development Authority

BY Duncan G. McCully
For: DUNCAN G. MCCULLY

ATTORNEY GENERAL

Elizabeth Barrett Anderson
Elizabeth Barrett Anderson

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ATTORNEY GENERAL'S OFFICE

TERM SHEET
FOR
MSW AGREEMENT FOR
GUAM WASTE-TO-ENERGY FACILITY

DECEMBER 30, 1994

The terms set forth below represent the understanding of Guam Resource Recovery Partners ("GRRP") the Government of Guam ("Guam"), with respect to the basic business issues to be incorporated in the Service Agreement to be entered into pursuant to the Amended License Agreement, dated 15 November 1990, between GRRP and Guam.

This term sheet shall not, by itself, constitute a binding agreement between the parties nor is it intended to be a comprehensive description of all the terms and conditions of the Service Agreement. Rather, it is the intent of GRRP and Guam that, immediately following the initialing of this Term Sheet, each party will negotiate in good faith and with due diligence a definitive Service Agreement, which will incorporate these business terms and such other terms as GRRP and Guam may agree and be executed by the parties within sixty days (60) after the date hereof. The parties expect to use the February 22, 1993 draft Solid Waste Disposal Agreement, Appendix E, as a general form for completing the negotiations.

1. Description of the Facility:

The design and performance of the Facility are outlined in the attached schedules under Appendix "A".

The Facility design and performance parameters are:

- a. A design/nameplate rating of 300 TPD.
- b. An annual throughput capacity of 93075 tons/year (85% availability) after the first contract year, based on a design HHV of 4900 BTU/lb.
- c. The best evidence of the composition and quantity of the solid waste on Guam is set forth on the GEPA report entitled "GEPA Solid Waste Study, 28-Dec-93" (19 pages) and attached as Appendix B. The quantity and composition of solid waste which may be recycled on Guam without adversely affecting the operation of the Facility is that set forth in the "Assessment of Financial Feasibility of Recycling" prepared by GEPA and attached as Appendix C. GRRP has determined that Guam's solid waste stream, after recycling as set forth on Appendix C, is adequate to finance and operate the Facility described in this

term sheet. Guam will agree that until coverage factors in excess of Facility capacity of 1.10 are produced, then it will not support or participate in recycling in excess of that identified in Appendix C. Before the execution of the Service Agreement, the Facility and Appendixes B and C will be reviewed by two LOC Banks for non-binding assurances of financeability. Subsequent failure to finance because of perceived inadequacies of Guam's wasteflow will cause the Service Agreement to terminate but the Amended License will continue.

d. The Contractor shall be Volund Ansaldo and may only be changed as provided in paragraph 22.

e. The Facility will comply with all Federal and Territorial regulations in effect or proposed as of the date of this Term Sheet, including those proposed by USEPA concerning emissions (scheduled to be effective in September of 1995). However, the compliance with the above proposed USEPA regulations shall be a change order resulting in an increase in the Construction Cost under paragraph 5 (Direct Costs). However, the maximum amount of the increase shall be \$4,000,000.00. Any other change to a Federal or Territorial regulation occurring after the date of this Term Sheet shall be an Uncontrollable Circumstance.

GRRP will provide certain guarantees and warranties regarding the Facility's availability, capacity, and energy efficiency, compliance with environmental standards, ash production, consumption of limestone and utility usage. The Facility will also be required to pass certain performance tests prior to acceptance.

The Facility site will include an area of at least 30,000 square feet for the construction of a Materials Recovery Facility ("MRF") to be built at Guam's discretion.

GRRP has the first right to design and construct the MRF at the site.

2. Construction Cost:

The base construction cost of the Facility (as described in the project manual attached as Appendix A) is \$49,090,909.00 as of July 1, 1994. The base price will be escalated from July 1, 1994 to the date notice to proceed is given at a rate calculated by multiplying an escalation factor determined at the notice to proceed date which shall be a number determined by dividing the applicable index at notice to proceed date by the same index for July 1, 1994 which result shall not in any case be less than 1.0. The indexes shall apply as follows: fifty percent (50%) of the July 1, 1994 construction cost will escalate in accordance with certain Guam construction indices to be agreed upon within the

Service agreement; twenty five percent (25%) of the July 1, 1994 construction cost escalated by the U.S. mainland Machinery and Equipment Index; and twenty five percent (25%) of the July 1, 1994 construction cost escalated by the U.S. mainland Labor Index. However, if notice to proceed is delayed as a result of GRRP's negligence, fault, a change in the Contractor, Operator or Guarantor, or failure to perform its obligations, there shall be no escalation of the construction cost during the period of such delay. Similarly, there shall be no escalation of the construction cost during the twelve (12) month period following scheduled financial closing where the parties attempt to achieve the Qualifying Service Fee (see paragraph 15 below).

Except as specifically provided in elsewhere in this term sheet, this construction cost is the guaranteed maximum all-in price for all engineering, procurement, and construction of the Facility. The construction Contractor shall be Volund Ansaldo and may only be changed as provided in paragraph 22.

Local sales, excise, or use taxes imposed by Guam are not included in the above construction cost and will be an additional amount to be financed, if paid. They will not, however, be included in the costs to be used in determining pursuant to paragraph 15 whether the estimated service fee exceeds the Qualifying Service Fee.

The construction cost above excludes the cost of acquiring the site, site development costs not provided for in the allowances provided GRRP schedule 9, Appendix A, dated January 23, 1993 (attached as Appendix D), the GPA interconnect cost, and off-site utility costs. The estimated cost of these additional items is Four Million Eight Hundred Thousand and 00/100 Dollars (\$4,800,000.00) [CHECK]. The treatment of these items for purpose of the "qualifying service fee" test is described in paragraph 15 below. Within sixty (60) days of notice of site control, GRRP will complete the work necessary to propose fixed prices for the additional items. Before the execution of the MSW Agreement, Guam will provide evidence of site control.

3. Development Fee:

The development fee is Three Million Eight Hundred Thousand and 00/100 Dollars (\$3,800,000.00), payable as follows: One Million Five Hundred Thousand and 00/100 Dollars (\$1,500,000.00) (Phase I) at financial closing and the balance of Two Million Three Hundred Thousand and 00/100 Dollars (\$2,300,000.00) (Phase II) paid based upon achievement of development/design, milestones certified by GRRP and billed directly to the trustee, without cost substantiation. The payment of the Phase II development fee will be synchronized with the construction drawdown schedule. The development fee includes all costs incurred by and fees payable by GRRP in connection with the design, development, and construction

of the project, and there will be no further compensation for these items.

4. Direct Costs:

Change orders requested by Guam or required as a result of an Uncontrollable Circumstance shall be billed on a direct cost basis as determined in accordance with the definition in the February 22, 1993 draft of the Solid Waste Disposal Agreement, attached as Appendix "E".

The overhead will be determined by multiplying paragraph "a" of the Direct Costs definition by a factor of one (1.0). In the case of change orders due to Uncontrollable Circumstance, a profit factor of five percent (5%) shall be applied only to clause "a" of the definition. In the case of change orders requested by Guam, a profit factor of ten percent (10%) shall be applied to clause "a", five percent (5%) shall be applied to clauses "b" and "c". In both cases, the profit factor shall be applied to "d" except on materials and equipment purchased from the Operator or Contractor, in which case GRRP profit shall be zero percent (0%).

5. Equity:

The financing structure will provide for a minimum GRRP equity of five percent (5%) of the total financed cost with a twenty-two percent (22%) annual after tax return on the unamortized portion of the actual equity invested for the term of the Service Agreement. Equity will amortize fully over the term of the debt. GRRP will provide financing for 95% of financed costs through the issuance, through GEDA, of tax-exempt Private Activity Bonds payable by GRRP and secured by the various agreements between GRRP and Guam.

Guam shall be entitled to turn over the Facility at the end of the Service Agreement for a purchase price of One and 00/100 Dollar (\$1.00).

6. Scheduled Acceptance Date:

The scheduled acceptance date is nine hundred (900) days from the date notice to proceed is given. Notice to proceed will be given on financial closing date.

GRRP will earn an early construction bonus of fifty percent (50%) of the saved monthly interest during construction for each day of early completion. The bonus will be calculated on the actual saved interest.

7. Energy Efficiency Guarantee:

GRRP will guarantee that the Facility will generate 400 KW net per ton of acceptable waste processed with a design heating value of 4900 BTU/lb.

8. Energy Revenues:

Energy revenues derived from the processing of the guaranteed capacity (see item 10, below) is to be credited to Guam on the following basis:

a. One hundred percent (100%) of the initial base rate granted by GPA or achieved by petition of the GRRP from the Guam Public Utility Commission ("GPUC").

b. Fifty percent (50%) of revenues earned by any increase of the initial GPUC base rate which GRRP is able to obtain in any appeal from the GPUC proceedings.

In addition, Guam and GRRP will share equally (50/50) revenues earned on energy conversions rate greater than 400 KW per design ton (4900 BTU/lb.).

9. Guaranteed Availability; Guaranteed Capacity:

The guaranteed availability of the Facility is eight-five percent (85%) equivalent to 7446 hours per billing year beginning with the second contract year. The availability for the first year after acceptance of the Facility will be eighty percent (80%).

The guaranteed capacity of the Facility is 93,075 tons per year at a nominal process rate of 300 TPD for acceptable waste with a higher heating value 4900 BTU/lb.

The daily throughput is adjusted in accordance with the design capacity boiler as provided for in the Furnace Waste Capacity Diagram and Chart (Appendix F) for Acceptable Waste in the range of 3800 to 6000 BTU/lb. All other auxiliary equipment, including the air pollution control equipment shall be sized for processing Acceptable Waste in the range of 3800 to 6000 BTU/lb.

10. Other Performance Guarantees:

The Service Agreement will also contain guarantees with respect to the following matters as set forth in their entirety on Exhibit C attached:

- a. Emissions and environmental compliance;
- b. Quality and quantity of ash produced;
- c. Lime, urea, carbon and other omission controlling material consumption;

- d. Maximum Utility utilization; and
- e. Excess tonnage.

11. Excess Tonnage:

Insofar as the Facility processes acceptable waste in excess of the guaranteed tonnage (i.e., 93,075 tons/year), GRRP will be entitled to a \$15/ton fee for each ton processed in excess of the guaranteed tonnage. In addition to its fifty percent (50%) share of energy produced from such additional waste.

12. Landfill Charge:

GRRP will pay Guam a landfill charge for by-passed waste (i.e., the difference between the waste actually processed by the Facility in any year and the guaranteed capacity, other than as a result of an Uncontrollable Circumstance or the unavailability of acceptable waste). The landfill charge will be Guam's actual costs as determined by an independent outside accounting firm, plus a fixed charge of Seven and 50/100 Dollars (\$7.50) per ton.

13. Initial Operations and Maintenance Charge:

The Facility shall be operated and maintained by Volund Ansaldo. The operator may only be changed as provided in paragraph 22 below. The GRRP shall be entitled to replace the contractor for convenience or cause and the Government's consent shall not be unreasonably withheld.

The initial operations and maintenance charge for September 1992, is estimated to be Four Million Four Hundred Forty-One Thousand Two Hundred Fifty and 00/100 Dollars (\$4,441,250.00) subject to escalation in accordance with paragraph 14. The fixed component is Two Million Eight Hundred Thousand and 00/100 Dollars (\$2,800,000.00) which escalates in accordance with the "operating fee escalation schedule", including labor, machinery and chemicals indexed below. The administrative component equals Two Hundred Thousand and 00/100 Dollars (\$200,000.00) per annum which is fixed and shall not escalate. The balance represents a good faith estimate of "pass through" costs which are not guaranteed.

14. Escalation Indices for Operation and Maintenance Charge:

- a. The fixed component of the operation and maintenance charge will be escalated from September 1, 1992 by multiplying such fixed component by an escalation factor for billing year "n" equal to the number, which shall be the greater of 1.0 or the number.

The following escalation indices are applicable to the Base Operating Fee and the Excess Operating Fee:

0.50 times the Labor Index for billing year "n" divided by the Labor Index for September, 1992

plus 0.45 times the Machinery and Equipment Index for billing year "n" divided by the Machinery and Equipment Index for September 1992

plus 0.05 times the Chemicals Index for Billing Year "n" divided by the Chemical Index for September 1992.

. The indices to be used as the Labor Index, the Machinery and Equipment Index and the Chemical Index will be agreed in the Service Agreement.

15. Financing Costs:

All of the costs of developing, designing and constructing the Facility, including soft costs and legal, accounting and underwriting fees, will be financed through the combination of third party debt and GRRP equity discussed in paragraph 5. The parties contemplate that the third party debt will be tax exempt bonds issued by GEDA but with recourse solely to GRRP, the project and to the letter of credit issued by a financial institution obtained by GRRP and acceptable to Guam (whose acceptance will be in accordance with GRRP's financing schedule and not be unreasonably withheld). The bonds and the equity will fully amortize over the twenty (20) year term of the Service Agreement. It will be GRRP's responsibility to obtain the necessary financing on terms which will satisfy the Qualifying Service Fee test described below. GRRP will use its best efforts to obtain financing on terms which will achieve the lowest reasonably achievable Qualifying Service Fee. GRRP shall consult with Guam in connection with, and Guam shall have the right (but not the obligation) to participate in, obtaining financing for the Facility.

Guam will pay a service fee for the first 93,075 tons of acceptable waste delivered to the Facility each year equal to the sum of the capital charge (principal and interest payments on bonds outstanding at acceptance of the Facility and equity repayment) and the fixed, administrative, and "pass through" components of the operation and maintenance charge. (The fee for acceptable waste in excess of 93,075 tons per year is set forth in paragraph 11.)

A Qualifying Service Fee has been agreed to in the amount of \$167.09 per ton, as of the date of this term sheet. The Qualifying Service Fee was calculated using the model attached as Appendix G. (The parties agree that should, before the execution of the Service Agreement, Appendix G be shown to include incorrect assumptions or otherwise be in error, then it shall be modified by mutual agreement.) The Qualifying Service Fee is, and shall be,

calculated without including sales or excise taxes imposed by Guam, or the costs of interconnection facilities, site acquisition, off site utilities, or site development in excess of the amounts estimated in paragraph 2 above. At, or shortly before, the execution of the Service Fee Agreement, the Qualifying Service Fee shall be recalculated using an interest rate of 200 basis points above the prevailing rate for 20-year tax exempt revenue bonds issued by Guam. After the execution of the Service Fee Agreement, the Qualifying Service Fee shall be fixed and will only be increased if the escalation of the construction cost or the operations and maintenance charge is in excess of that used in the model or as the result of an Uncontrollable Circumstance.

From time to time prior to financial closing, GRRP and Guam will calculate an estimated service fee using the model attached as Appendix G and the best available current data of project costs, including currently known costs (e.g., the construction contract price, the development fee, and the fixed component of the operation and maintenance charge) and cost which may change or which are currently not know (e.g., bond interest rates, letter of credit fees and other financing terms, and consultants and underwriting fees). Guam's obligation to proceed further with the Service Agreement is conditioned on the estimated gross service fee (i.e., before reduction for estimated energy revenues and interest savings due to early completion) calculated on both the bond sale date and the financial closing date, but without including in the project cost for purposes of such calculation the costs of interconnection facilities, site acquisition, off-site utilities and site development costs in excess of the maximum allowance shown on Appendix D, being no greater than the qualifying service fee agreed to at execution of the Service Agreement by the Governor of Guam. (Even though excluded from the foregoing calculation, the costs of interconnection facilities, site acquisition, off-site utilities, site development costs in excess of the specified allowance, and all other construction or site related costs must be fixed prior to the bond sale date and financial closing.)

In the event that as of the bond sale date the estimated gross service fee exceeds the Qualifying Service Fee, and the cause is other than Guam fault or an Uncontrollable Circumstance, then Guam has no obligation to proceed and (1) GRRP has the option (but not the obligation) to reduce its fees or to provide alternative financing so as to achieve the Qualifying Service Fee, (2) Guam would not be required to go forward with financing (unless the pro forma initial tipping fee were reduced pursuant to clause (1) above), (3) the parties would use their best efforts during the twelve months following the scheduled financial closing date to achieve the Qualifying Service Fee, and (4) if, despite those efforts, financing calculated to achieve the Qualifying Service Fee cannot be achieved within twelve (12) months, the Service Agreement shall terminate but the Amended License shall continue, unless the failure to achieve the Qualifying Service Fee was attributable to

GRRP fault, any matter within the control of GRRP or the Contractor/Operator, relating to the design of the Facility, or the result of change of the Contractor, operator or guarantor, in which case it would terminate also. If as the result of an Uncontrollable Circumstance the financial closing does not occur within twelve (12) months of the scheduled financing closing date, then the Service Agreement shall terminate but the Amended License shall stay in effect.

The "best efforts obligation" described in (3) above shall be described in a side letter and would not include any modification of a material right or obligation under the Service Agreement. Both Guam and GRRP shall cooperate with an LOC Bank's reasonable request for a modification of the Facility or the Service Agreement; however, neither party shall be required to modify a material right or obligation. The requirement by an LOC Bank that GRRP increase its equity above five percent (5%) shall not cause the Qualifying Service Fee to be increased.

Once financial closing has occurred, the service fee payable by Guam will be based on the actual amounts of the capital charge, operation and maintenance cost, electrical energy revenues, and other items included in the calculation of the service fee; including any increase in costs which are Guam's responsibility under the Service Agreement, but excluding increases in costs which are GRRP's responsibility under the Service Agreement. However, without Guam's prior consent, the service fee shall not exceed the Qualifying Service Fee, except as a result of costs excluded from the qualifying service calculation as described above or increased costs due to Guam's request or fault or to Uncontrollable Circumstance.

16. Insurance:

The provisions for Insurance on the Facility have not been agreed to by the parties and, therefore, must be negotiated before the execution of the Service Agreement. The Qualifying Service Fee, paragraph 15, assumes a premium of \$ _____, which will be modified in the Service Agreement.

17. Permits:

GRRP shall be responsible for obtaining all necessary permits and approvals for the project, including preparations of all applications and any related environmental impact statements or assessments, design and engineering work, and studies. Guam will cooperate with GRRP and support all such permit applications and will use its best efforts (to be defined in the Service Agreement or a related side agreement) to assist GRRP in obtaining such permits (so long as the Facility design and permit applications are consistent with applicable laws and regulations, and agency procedures and practices). If GRRP is unable to obtain all

required permits and approvals by the schedule financial closing date, the Service Agreement and the Amended License will, at Guam's option, terminate with no fee or reimbursement being paid to GRRP, provided such failure to obtain permits and approval are not the result of Guam fault.

18. Events of Default:

The Service Agreement events of default by GRRP will be limited to material repeated failure to perform its Service Agreement obligations, failure to pass all performance tests and achieve acceptance of the Facility by the scheduled acceptance date (subject to the rights to extend the acceptance date and/or to buy down the performance guarantees described in Sections 7.14 through 7.17 of the February 22, 1993 draft of the Solid Waste Disposal Agreement), failure to meet certain minimum performance requirements [of 74460 tons per year and 80% availability] over an extended period of time, bankruptcy of GRRP or the Guarantor, and failure to commence cures within a reasonable period following notice; bankruptcy, project abandonment. Otherwise, once the Facility is accepted, failure to meet performance guarantees would result in monetary surcharges (e.g., bypassed waste charges, lime charges, payment of applicable fine, payment for lost energy revenue), but would not, by themselves, constitute an event of default or trigger forfeiture of the Facility (although failure to pay such monetary surcharges would be an event of default). If an event of default (as described above) occurs and is continuing, GRRP would be obligated to pay or defease any outstanding Facility debt. If the Service Agreement is terminated due to a GRRP default, GRRP shall turn the Facility over to Guam for no additional charge. However, GRRP shall have the right to operate the Facility for the remainder of the term of the Service Agreement.

19. Guarantor:

The Guarantor of GRRP's obligations shall be Volund Ansaldo. The terms and extent of the guaranty shall be set forth in the Service Agreement and shall include the guarantee of all of GRRP's obligations under the Service Agreement, including financial obligations and obligations relating to construction, operation, performance and termination. However, the guarantee shall not be effective until the financial closing date.

The Guarantor may only be changed as set forth in paragraph 22.

20. Financial Closing; Notice to Proceed; Legislative Approval:

The Service Fee Agreement, which shall include all terms set forth in this term sheet, shall be conditioned upon approval by the Legislature of Guam before March 15, 1995. If legislative approval

is not obtained by that date, GRRP and the Government shall use their best efforts to determine the reason for the non-approval and shall, in good faith, attempt to agree on modification to the Service Agreement which will result in legislative approval. In the event that legislative approval is not obtained before March 15, 1996, then at the option of either party the Service Agreement shall terminate and GRRP shall not be paid any fee or be reimbursed for any costs, but the Amended License shall continue. GRRP and Guam shall use their best efforts to obtain legislative approval; however, the best efforts of Guam will be defined in a side letter.

If legislative approval is obtained, the financial closing must occur ("scheduled financial closing date") and notice to proceed must be given to the contractor no later than seven hundred thirty (730) days after the date of legislative approval or as extended by an Uncontrollable Circumstance or Guam fault.

21. Term of Agreement:

The term of the agreement is twenty (20) years from the later of the acceptance date by Guam of the completed Facility or the Facility scheduled acceptance date.

22. Change of Contractor, Operator or Guarantor:

GRRP shall have the right to change the Contractor, Operator, or Guarantor subject to the approval of Guam, which shall not be unreasonably withheld. Guam shall not withhold its approval if the proposed Contractor, Operator, or Guarantor meets the following standards:

Contractor: Has designed and constructed facilities of similar complexity and value within three years preceding the notice to proceed date and such facilities have been in successful operation for a period no less than eighteen months.


Operator: Is operating facilities of similar complexity and has successfully operated such waste processing facilities for a minimum of three years prior to the notice to proceed date.

Guarantor: Is of equal or better credit worthiness to Volund Ansaldo and is acceptable to an LOC bank without an increase in the fees charged for the LOC.

In the event such approval is requested, GRRP shall provide a full detailed and substantiated disclosure of the reasons for the change.


GOVERNMENT OF GUAM:

Dated: 12/30/94

By 
CHARLES P. CRISOSTOMO, Adminis-
trator of the Guam Economic
Development Authority

GUAM RESOURCE RECOVERY PARTNERS:

Dated: 12/30/94

By 
WAGDY GUIRGUIS, Its Duly
Authorized Representative

CALVO & CLARK LLP

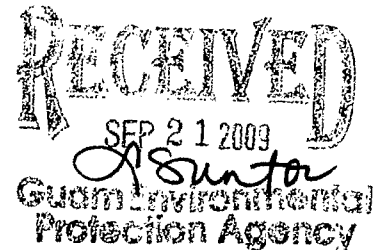
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WWW.CALVOCLARK.COM

writer's direct e-mail:
aclark@calvoclark.com

September 21, 2009

VIA HAND DELIVERY

Administrator
Attention: Ms. Conchita SN Taitano
GUAM ENVIRONMENTAL PROTECTION AGENCY
17-3304 Mariner Avenue
Tiyan, Guam



RE: Comments to Layon Permit and Request for Hearing

To Whom it May Concern:

Pursuant to 10 G.C.A. § 51104 and Section 23104(c)(4) of the Solid Waste Disposal Rules and Regulations ("SWDRR"), Guam Resource Recover Partners ("GRRP"), a party substantially affected by the pending *Layon* landfill permit application, hereby submits its objections and requests a hearing in accordance with the Administrative Adjudication Law.

Section 51104 of Title 10 of the G.C.A. provides as follows:

If, within forth-five (45) days after publication and broadcast, the Agency receives written notice of opposition to the Agency's intention to issue such permit and a request for a hearing is made, the Agency shall provide for a hearing in accordance with the Administrative Adjudication Law, if requested by a substantially affected party or an informal public meeting if request by any other person.

See also Section 23104(c)(4) of the SWDRR.

GRRP currently has pending before the Guam Environmental Protection Agency ("Agency" or "GEPA") an application for a MSWLF operations permit for its proposed landfill at *Guatali* Parcel B. Although GRRP has encountered some success in its collaboration with GEPA technical staff in its review of GRRP's permit application, more recently GEPA's involvement in the *Layon* landfill has detrimentally impacted the Agency's review of GRRP's

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Administrator

Attention: Ms. Conchita SN Taitano

GUAM ENVIRONMENTAL PROTECTION AGENCY

September 21, 2009

Page 2

permit application. Efforts have been made in the *Consent Decree Proceeding*¹ to stop GRRP's project from moving forward. In particular, in June the Receiver² reported to the District Court of Guam that GEPA was being pressured to give another landfill permit application "equal . . . priority." See *Consent Decree Proceeding*, Special Report of the Receiver filed June 5, 2009, attached as Attachment B. It is well-known that the only other landfill permit application before GEPA is GRRP's. As part of the Receiver's quest to investigate this purported pressure, GEPA turned over all of GRRP's original landfill permit application documents, even though such documents are clearly outside the scope of the District Court's order. See *Consent Decree Proceeding*, Order re: Special Report, filed June 5, 2009, attached as Attachment C (limiting production of documents to communications generated after October 1, 2008. GRRP's permit application was filed in June 2008). Even more recent, earlier this month, the District Court of Guam ordered that "all work associated with the opening of the Layon landfill be the priority of the Government of Guam." See *Consent Decree Proceeding*, Order re: Special Report filed September 3, 2009, attached as Attachment D. This interference with GRRP's permit application to the benefit of the *Layon* permit application without due process, unfairly deprives GRRP of its right to equal consideration and was motivated and even instigated in part by GEPA and/or some of its employees. See *Consent Decree Proceeding*, Special Report of the Receiver, Concerns Regarding the Guam Environmental Protection Agency, filed September 3, 2009, attached as Attachment E. Based upon these recent events, it is clear that the *Layon* landfill permit application has, and will continue to, substantially affect GRRP's right to due process and impact GEPA's review of GRRP's permit application.

Additionally, GRRP currently has an Amended License Agreement with the Government of Guam dated November 15, 1990. The Amended License grants GRRP a twenty-three year exclusive right to develop, finance, design, construct and operate a waste reduction facility. The Amended License also requires the Government of Guam to enter into a municipal solid waste agreement that guarantees the Government's delivery of an annual minimum waste tonnage to GRRP.³ Thus, as an alternate source for the disposal of solid waste that threatens GRRP's guaranteed minimum waste tonnage, the proposed *Layon* landfill substantially impacts GRRP's rights under the Amended License. See Amended License, attached as Attachment A.

¹ *United States v. Government of Guam*, District Court of Guam Case No. 02-00022.

² Gershman, Brickner & Bratton, Inc. is the Receiver appointed by the District Court of Guam in the *Consent Decree Proceeding*.

³ The Government of Guam and GRRP had previously negotiated and entered into a municipal solid waste agreement as contemplated by the Amended License known as the 1996 Solid Waste Construction and Services Agreement. Notwithstanding the question concerning the 1996 Agreement's status, the Amended License remains a valid and binding agreement between the Government of Guam and GRRP.

Administrator
Attention: Ms. Conchita SN Taitano
GUAM ENVIRONMENTAL PROTECTION AGENCY
September 21, 2009
Page 3

In addition to the above, GRRP states the following objections to the *Layon* landfill permit application:

1. Proceeding with a government landfill at *Layon* is illegal. It violates Public Law 24-06, which became law in March 1997. Public Law 24-06 directs, without any limitation or exception, that the "MSWLF **shall be** located at either Guatali or Malaa, or both." (Emphasis added.) Although GEPA has sought to rely on the Consent Decree as a basis to proceed with the *Layon* permit application, the Consent Decree does not excuse GEPA, or any other Government of Guam agency, from complying with Public Law 24-06 or any other law. See *Consent Decree Proceeding*, Consent Decree filed Feb. 11, 2004, at ¶ 47, attached as Attachment F ("This Consent Decree in no way affects the Government of Guam's responsibilities to comply with all applicable federal and territorial laws and regulations."). Thus, even under the Consent Decree the Government of Guam's pursuit of the landfill at *Layon* is illegal as it contravenes and ignores the mandatory and unconditional directive of Public Law 24-06.

2. There is no other law or regulation allowing the Government of Guam to proceed with a landfill at any location other than *Guatali* or *Malaa*. The Draft Guam 2006 Integrated Solid Waste Management Plan (the "draft 2006 SWMP"), which was submitted to the Legislature in September 2006 but never approved, never went into effect since it was submitted without an economic impact statement as required by the Administrative Adjudication Law.⁴ Thus, the draft 2006 SWMP, which designates the Government of Guam's landfill at *Dandan/Layon* is ineffective and void.

The economic impact statement was never prepared because GEPA's Administrator purposely attempted to circumvent the law by wrongly certifying that the cost to the public to implement the draft 2006 SWMP, including the development of a landfill at *Layon*, would be less than \$500,000.00. GEPA admittedly excluded the cost of projects mandated by the Consent Decree. See Administrator's Determination, attached as Attachment G. GEPA's stated exclusion, however, is nowhere allowed by law. See 5 G.C.A. § 9300 *et seq.*

⁴ See 5 G.C.A. § 9301(e) (requiring an economic impact statement for any rule costing the general public in excess of \$500,000.00). Rule means any "rule, regulation, standard, classification, procedure or requirement of any agency designed to have or having the effect of law or interpreting, supplementing or implementing any law enforced or administered by it, including any regulation under which the agency makes charges for services it provides, or to govern its organization or procedure, but does not include regulations, resolutions or directions relating solely to internal policy, internal agency organization or internal procedure which do not directly affect the rights of or procedures available to the public and does not include administrative adjudication." 5 G.C.A. § 9107.

CALVO & CLARK LLP

Administrator
Attention: Ms. Conchita SN Taitano
GUAM ENVIRONMENTAL PROTECTION AGENCY
September 21, 2009
Page 4

The legal mandate for the closing of the Ordot dump and opening of a new landfill has been required by Guam law since the enactment of Public Law 22-115 (1994), and was separately re-mandated in Public Law 23-95 (1996) and Public Law 24-06 (1997) – well before the 2004 Consent Decree. The legal requirement for the economic impact statement existed since the enactment of Public Law 25-173 in October 2000 – also before the Consent Decree. Thus, GEPA could not seek to avoid the Government of Guam’s existing statutory responsibility to provide an economic impact statement as a part of the draft 2006 SWMP by relying on the Consent Decree, especially given that the Consent Decree expressly states the Government of Guam is not relieved of its responsibility to comply with Guam law. See Consent Decree, ¶ 47. See also *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007) (“A federal consent decree or settlement agreement cannot be a means for state officials to evade state law.”); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (holding that parties to a consent decree “could not agree to terms which would exceed their authority and supplant state law”); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (“Some rules of law are designed to limit the authority of public officeholders. . . . They may chafe at these restraints and seek to evade them,’ but they may not do so by agreeing to do something state law forbids. Because a consent decree is not just an agreement between two parties, but is also a judicial act, district courts must ensure that the consent decrees they approve respect this principle as well as the rights of third parties.” (internal citation and alteration omitted)).

Since the Legislature never approved the draft 2006 SWMP it could not have lapsed into effect without the requisite economic impact statement. See 5 G.C.A. § 9301(e) (“[N]or shall any proposed rule or regulation go into effect without a completed economic impact statement.”). Accordingly, the *Layon* landfill violates Guam law, namely Public Law 24-06, which mandates the construction of the next government landfill to be constructed at *Guatali* or *Malaa*. By violating Guam law, the *Layon* landfill further violates paragraph 47 of the Consent Decree. GRRP’s objection to the *Layon* landfill on the basis of illegality has been a matter of record since before the Consent Decree was filed. See January 15, 2004 Objection and Comment to the Consent Decree by GRRP, attached as Attachment H. Illegality of the project does not cure itself with the passage of time.

3. The draft *Layon* permit falsely states that *Guatali* and *Malaa* were eliminated from consideration because “it [sic] does not meet the Resource Conservation and Recovery Act (RCRA) Subtitle D requirement for landfill siting.” See Draft Permit, *Layon* Municipal Solid Waste Landfill, Inarajan, Guam Executive Summary at p. 4. GEPA is well aware that *Guatali* and *Malaa* do satisfy RCRA Subtitle D landfill siting requirements. As

Administrator
Attention: Ms. Conchita SN Taitano
GUAM ENVIRONMENTAL PROTECTION AGENCY
September 21, 2009
Page 5

acknowledged in GEPA's Preliminary Site Suitability Report (March 2004) ("PSSR"), *Guatali* and *Malaa* were evaluated by J.C. Tenorio and Associates, Inc., Consulting Engineers, using RCRA Subtitle D requirements and were found suitable. See PSSR at pp. 2-3 ("None of the previously identified sites were evaluated based on . . . RCRA Subtitle D location restrictions and design requirements. The two partial exceptions to this statement are the sites which were evaluated by . . . J.C. Tenorio and Associates, Inc., Consulting Engineers.").

In addition, GEPA's PSSR is not an evaluation based on RCRA Subtitle D landfill siting requirements. Rather, the evaluation of sites was done based on arbitrary "Exclusionary Criteria" not found in RCRA Subtitle D. See PSSR at pp. 4-5, attached as Attachment I. For example, the PSSR states that *Malaa* was excluded "based on existing land use incompatibility" and "slope exclusionary criteria," and *Guatali* was eliminated by "slope and geological exclusionary criteria." See PSSR at pp. 6-7. RCRA Subtitle D landfill siting criteria does not include "land use incompatibility," "slope exclusionary criteria," or "geological exclusionary criteria." Thus, there is no federal or territorial law or regulation warranting the exclusion of *Guatali* or *Malaa*, and the Government's attempt to develop a landfill at a site other than those two sites is illegal under Public Law 24-06, and even at odds with paragraph 47 of the Consent Decree.

4. The current construction of structures and improvements at the *Layon* landfill site violates GEPA's conditions on the project's clearing and grading permit. A clearing and grading permit for the landfill operations road and mass grading of cells 1 and 2 at the *Layon* site was issued by the Department of Public Works, which permit included conditions imposed by GEPA including, without limitation, a prohibition on the construction of structures.

The Government of Guam entered into a contract with a private contractor for, *inter alia*, the construction of the landfill operations road, the mass grading for cells 1 and 2, and the installation and construction of pipes and drainage appurtenances and drainage structures at the *Layon* landfill (the "*Layon* Contract"). Work is proceeding and continuing under the *Layon* Contract, to include installation of pipe and drainage appurtenances and construction of a drainage discharge structure. At a hearing held before the Thirtieth Guam Legislature's Committee on Rules, Natural Resources, and Federal, Foreign, and Micronesian Affairs on July 17, 2009, GEPA's chief engineer admitted under oath that the construction of the drainage discharge structures violated the conditions imposed by GEPA for the *Layon* clearing and grading permit that no structures or other improvements are authorized.

CALVO & CLARK LLP

Administrator

Attention: Ms. Conchita SN Taitano

GUAM ENVIRONMENTAL PROTECTION AGENCY

September 21, 2009

Page 6

Guam law mandates that GEPA shall maintain an action to restrain any violation or threatened violation of the provisions of 10 G.C.A. Chapter 51 or the rules and regulations authorized therein. *See* 10 G.C.A. § 51112. Failure to follow any permit restrictions is a violation of 10 G.C.A. § 51114. Guam law also mandates that the Administrator shall suspend or revoke a clearing and grading permit whenever it is determined that the permittee has not complied with a provision of any other applicable law, ordinance, rule or regulation. *See* § 10111 of the Guam Soil Erosion and Sediment Control Regulations (“Soil Erosion Regulations”). Notwithstanding that the construction of structures and improvements at *Layon* is a violation of the conditions imposed by GEPA, and therefore a violation of 10 G.C.A. § 51114, neither GEPA nor its Administrator have taken any effort to restrain the illegal construction at *Layon* or to suspend or revoke the clearing and grading permit.

5. The current construction activities at the *Layon* landfill site violate § 23104(a) of the SWDRR. The SWDRR provides that it shall be unlawful for any person to initiate construction of a solid waste management facility without a landfill operations permit (“Landfill Operations Permit”). In particular, 22 GAR § 23104(a) (emphasis added) provides as follows:

(a) Permits Required. It **shall be unlawful** for any person to **initiate construction** of, establish or operate any solid waste management facility or modify an existing solid waste management facility **without a permit** issued in accordance with the provisions of this Chapter.

See also SWDRR § 23102(a)(33):

A facility has commenced construction if either: (A) on-site physical construction program has begun; or (B) the owner or operator has entered into contractual obligations which cannot be cancelled or modified without substantial loss for physical construction of the facility to be completed within a reasonable timeframe.

The Agency has not issued a Landfill Operations Permit for the proposed landfill at *Layon*. By entering into the *Layon* Contract, by constructing the landfill operations road, excavating cells 1 and 2, and installing and constructing pipes and drainage appurtenances and drainage structures, and by approving and issuing a clearing and grading permit for the landfill

CALVO & CLARK LLP

Administrator
Attention: Ms. Conchita SN Taitano
GUAM ENVIRONMENTAL PROTECTION AGENCY
September 21, 2009
Page 7

operations road and mass grading of cells 1 and 2, the Government of Guam is violating 22 GAR § 23104(a).

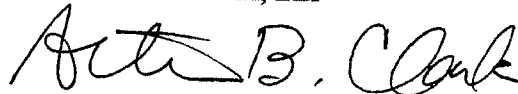
Despite these violations, neither GEPA nor its Administrator have taken any effort to restrain the illegal construction at *Layon* or to suspend or revoke the clearing and grading permit.

The construction activities currently occurring at *Layon* violate the existing clearing and grading permit and constitute activities that can only occur with a properly issued Landfill Operations Permit. GEPA and its Administrator must immediately take action to stop these violations.

For all the reasons set forth above, GRRP requests a AAL hearing pursuant to 10 G.C.A. § 51104 and SWDRR § 23104(c)(4).

Sincerely,

CALVO & CLARK, LLP



Arthur B. Clark

cc: Client
Enclosures

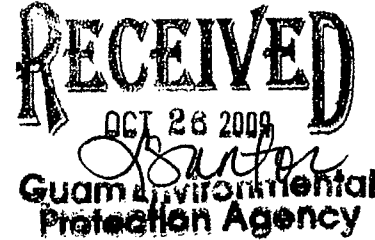
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Administrator
Attention: Ms. Conchita SN Taitano
GUAM ENVIRONMENTAL PROTECTION AGENCY
September 21, 2009
Page 8

List of Attachments

A	Amended License
B	Special Report of the Receiver filed June 5, 2009
C	Order re: Special Report, filed June 5, 2009
D	Order re: Special Report filed September 3, 2009
E	Special Report of the Receiver, Concerns Regarding the Guam Environmental Protection Agency, filed September 3, 2009
F	Consent Decree filed Feb. 11, 2004
G	Administrator's Determination re Draft Guam 2006 Integrated Solid Waste Management Plan
H	January 15, 2004 Objection and Comment to the Consent Decree by GRRP
I	Preliminary Site Suitability Report (March 2004)

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7 GUAM RESOURCE RECOVERY PARTNERS



8 BEFORE THE BOARD OF DIRECTORS
9 GUAM ENVIRONMENTAL PROTECTION AGENCY

10 IN THE MATTER OF

11 GOVERNMENT OF GUAM'S SOLID
12 WASTE MANAGEMENT FACILITY
13 PERMIT APPLICATION FOR THE LAYON
14 MUNICIPAL SOLID WASTE LANDFILL,

STATEMENT OF ISSUES

Respondent

15
16
17 **INTRODUCTION**

18 On August 7, 2009, GEPA published a Notice of 45-day Public Comment Period
19 and Public Hearing for the Municipal Solid Waste Landfill & Title V of the Clean Air Act Draft
20 Permits for Layon.

21 Pursuant to 10 G.C.A. § 51104 and Section 23104(c)(4) of the Solid Waste
22 Disposal Rules and Regulations ("SWDRR"), on September 21, 2009, Guam Resource Recovery
23 Partners ("GRRP"), filed with the Guam Environmental Protection Agency ("Agency" or
24 "GEPA") its written objections to the pending *Layon* landfill permit application, and requested a
25 hearing in accordance with the Administrative Adjudication Law ("AAL").

26 In response thereto, the Agency advised GRRP to initiate the hearing process
27 under the AAL by filing a verified statement setting forth the basis for GRRP's objection to the
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1 issuance of a landfill permit for the proposed *Layon* Municipal Solid Waste Landfill ("*Layon*
2 landfill").

3
4 Accordingly, pursuant to the request of the Agency, GRRP hereby submits its
5 statement of issues, upon information and belief, setting forth the statutes and regulations and
6 particular matters which would authorize and require a denial of the Agency action sought.

7 STATEMENT OF ISSUES

8 1. The proposed *Layon* landfill constitutes an anticipatory repudiation of
9 GRRP's Amended License Agreement with the Government of Guam dated November 15, 1990.

10 The Amended License grants GRRP a twenty-three year exclusive right to
11 develop, finance, design, construct and operate a waste reduction facility. The Amended License
12 also requires the Government of Guam to enter into a municipal solid waste agreement that
13 guarantees the Government's delivery of an annual minimum waste tonnage to GRRP.¹ Thus, as
14 an alternate source for the disposal of solid waste that threatens GRRP's guaranteed minimum
15 waste tonnage, the proposed *Layon* landfill substantially impacts GRRP's rights under the
16 Amended License. See Amended License, attached as Attachment A.

17 2. The proposed *Layon* landfill is illegal because it violates Public Law 24-06,
18 which became law in March 1997.

19 Public Law 24-06 directs, without any limitation or exception, that the "MSWLF
20 shall be located at either Guatali or Malaa, or both." (Emphasis added.) Although GEPA has
21 sought to rely on the February 11, 2004 Consent Decree filed in *United States v. Government of*
22 *Guam*, District Court of Guam Case No. 02-00022 ("Consent Decree"), as a basis to proceed with
23 the *Layon* permit application, the Consent Decree does not excuse GEPA or any other
24 Government of Guam agency from complying with Public Law 24-06 or any other law. See
25 Consent Decree, at ¶ 47, attached as Attachment B ("This Consent Decree in no way affects the
26 Government of Guam's responsibilities to comply with all applicable federal and territorial laws

27 ¹ The Government of Guam and GRRP had previously negotiated and entered into a municipal solid waste agreement
28 as contemplated by the Amended License known as the 1996 Solid Waste Construction and Services Agreement. Notwithstanding the question concerning the 1996 Agreement's status, the Amended License remains a valid and binding agreement between the Government of Guam and GRRP.

1 and regulations.”). GRRP’s objection to a landfill at a location other than at *Guatali* or *Malaa* on
2 the basis of illegality has been a matter of record since before the Consent Decree was filed. *See*
3 January 15, 2004 Objection and Comment to the Consent Decree by GRRP, attached as
4 Attachment C. The U.S. and Government of Guam confirmed the need for the Government of
5 Guam to comply with Guam law in the selection of a new landfill site. In response to GRRP’s
6 comments, the U.S. and the Government of Guam wrote that an analysis of alternative sites “will
7 not necessarily conflict with the Guam Legislature’s preferred alternatives. First, Guam DPW
8 could conclude, after completing the EIS, that *Guatali* or *Malaa* is its preferred alternative.
9 Alternatively, Guam DPW could decide, after considering its option in the EIS process, that a
10 new site is preferable and ask the Guam Legislature to ratify its decision in new legislation.” *See*
11 U.S.’ Memorandum in Support of Motion to Enter Consent Decree (filed Feb. 2, 2004), attached
12 as Attachment D and the Government of Guam’s Joinder in the Motion to Enter (filed Feb. 3,
13 2004), attached as Attachment E.

14 There is no other law or regulation allowing the Government of Guam to proceed
15 with a landfill at any location other than *Guatali* or *Malaa* as required by Public Law 24-06.
16 Although a Draft Guam 2006 Integrated Solid Waste Management Plan (the “draft 2006 SWMP”)
17 was submitted to the Legislature in September 2006 identifying *Layon* as a potential site, it was
18 never approved by the Legislature and could not have lapsed into effect because the Agency
19 failed to submit an economic impact statement as required by the Administrative Adjudication
20 Law.²

21 Five G.C.A. § 9301(e) provides that “[n]o proposed rule or regulation shall be
22 transmitted to *I Liheslaturan Guåhan* for consideration without an economic impact statement,
23 nor shall any proposed rule or regulation go into effect without a completed economic impact
24

25
26 ² Rule means any “rule, regulation, standard, classification, procedure or requirement of any agency designed to have
27 or having the effect of law or interpreting, supplementing or implementing any law enforced or administered by it,
28 including any regulation under which the agency makes charges for services it provides, or to govern its organization
or procedure, but does not include regulations, resolutions or directions relating solely to internal policy, internal
agency organization or internal procedure which do not directly affect the rights of or procedures available to the
public and does not include administrative adjudication.” 5 G.C.A. § 9107.

1 statement." Although 5 G.C.A. § 9301(i) does not require an economic impact statement if the
2 "annual economic impact to the general public is Five Hundred Thousand Dollars (\$500,000.00)
3 or less," the Agency failed to provide an economic impact statement even after it determined that
4 the cost to the general public would be more than \$500,000 per year. See Guam 2006 Integrated
5 Solid Waste Management Plan (September 2006) attached as Attachment F at p. 51 (estimating
6 \$60 per ton to develop two cells with a capacity of 500,000 tons each, or \$60 million total) and p.
7 29, Table 4.4, and p. 51 (estimating \$20 per ton to operate the landfill with an estimated starting
8 annual tonnage in 2007 of 145,231 tons, or \$2,178,465 to operate for the first year, and increasing
9 thereafter).

10 Accordingly, the draft 2006 SWMP, which designates the Government of Guam's
11 landfill at *Dandan/Layon* is ineffective and void, and the *Layon* landfill violates Guam law,
12 namely Public Law 24-06, which mandates the construction of the next government landfill to be
13 constructed at *Guatali* or *Malaa*.

14 3. Elimination of *Guatali* and *Malaa* were not based on any federal or local
15 law.

16 The draft *Layon* permit falsely states that *Guatali* and *Malaa* were eliminated from
17 consideration because "it [sic] does not meet the Resource Conservation and Recovery Act
18 (RCRA) Subtitle D requirement for landfill siting." See Draft Permit, *Layon Municipal Solid*
19 *Waste Landfill*, Inarajan, Guam Executive Summary at p. 4. Contrary to the draft *Layon* permit,
20 *Guatali* and *Malaa* do satisfy RCRA Subtitle D landfill siting requirements. As acknowledged in
21 GEPA's Preliminary Site Suitability Report (March 2004) ("PSSR"), *Guatali* and *Malaa* were
22 evaluated by J.C. Tenorio and Associates, Inc., Consulting Engineers, using RCRA Subtitle D
23 requirements and were found suitable. See PSSR at pp. 2-3 ("None of the previously identified
24 sites were evaluated based on current (as early as 1992) RCRA Subtitle D location restrictions
25 and design requirements. The two partial exceptions to this statement are the sites which were
26 evaluated by the *Draft Environmental Impact Statement – Solid waste Management Facility for*
27 *the Island of Guam*, 1995 (J.C. Tenorio and Associates, Inc., Consulting Engineers). These two
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1 sites (Guatali and Malaa) were selected from previous studies from the 1970s and 1980s and
2 evaluated using RCRA Subtitle D Requirements.”).

3 GEPA’s elimination of *Guatali* and *Malaa* was not based on an evaluation based
4 on RCRA Subtitle D landfill siting requirements. Rather, the elimination of *Guatali* and *Malaa*
5 was done based on arbitrary “Exclusionary Criteria” not found in RCRA Subtitle D. *See* PSSR at
6 pp. 4-5, attached as Attachment G. For example, the PSSR states that *Malaa* was excluded
7 “based on existing land use incompatibility” and “slope exclusionary criteria,” and *Guatali* was
8 eliminated by “slope and geological exclusionary criteria.” *See* PSSR at pp. 6-7. RCRA Subtitle
9 D landfill siting criteria does not include “land use incompatibility,” “slope exclusionary criteria,”
10 or “geological exclusionary criteria.” Thus, there is no federal or territorial law or regulation
11 warranting the exclusion of *Guatali* or *Malaa*, and the Government’s attempt to develop a landfill
12 at a site other than those two sites is illegal under Public Law 24-06, and even at odds with
13 paragraph 47 of the Consent Decree.

14 4. The current construction of structures and improvements at the *Layon*
15 landfill site violates 10 G.C.A. § 51104 and § 10111 of the Guam Soil Erosion and Sedimentation
16 Control Regulations (the “Soil Erosion Regulations”).

17 A clearing and grading permit for the landfill operations road and mass grading of
18 cells 1 and 2 at the *Layon* site was issued by the Department of Public Works, which permit
19 included conditions imposed by GEPA including, without limitation, a prohibition on the
20 construction of structures. Per section 10103.D.3, the issuance of a grading permit “shall
21 constitute an authorization to do only that work which is described in the permit and in the plans
22 and specifications approved by the Administrator.”

23 The Government of Guam entered into a contract with a private contractor for,
24 *inter alia*, the construction of the landfill operations road, the mass grading for cells 1 and 2, and
25 the installation and construction of pipes and drainage appurtenances and drainage structures at
26 the *Layon* landfill (the “*Layon* Contract”). Work is proceeding and continuing under the *Layon*
27 Contract, to include installation of pipe and drainage appurtenances and construction of a
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1 drainage discharge structure. At a hearing held before the Thirtieth Guam Legislature's
2 Committee on Rules, Natural Resources, and Federal, Foreign, and Micronesian Affairs on July
3 17, 2009, GEPA's chief engineer admitted under oath that the construction of the drainage
4 discharge structures violated the conditions imposed by GEPA for the *Layon* clearing and grading
5 permit that no structures or other improvements are authorized.

6 Failure to follow any permit restrictions is a violation of 10 G.C.A. § 51114.
7 Guam law mandates that GEPA shall maintain an action to restrain any violation or threatened
8 violation of the provisions of 10 G.C.A. Chapter 51 or the rules and regulations authorized
9 therein. See 10 G.C.A. § 51112. Guam law also mandates that the Administrator shall suspend
10 or revoke a clearing and grading permit whenever it is determined that the permittee has not
11 complied with a provision of any other applicable law, ordinance, rule or regulation. See § 10111
12 of the Soil Erosion Regulations. Notwithstanding that the construction of structures and
13 improvements at *Layon* is a violation of the conditions imposed by GEPA, and therefore a
14 violation of 10 G.C.A. § 51114 and Soil Erosion Regulations § 10111, neither GEPA nor its
15 Administrator have taken any effort to restrain the illegal construction at *Layon* or to suspend or
16 revoke the clearing and grading permit.

17 5. The current construction activities at the *Layon* landfill site violate §
18 23104(a) of the SWDRR. The SWDRR provides that it shall be unlawful for any person to
19 initiate construction of a solid waste management facility without a landfill operations permit
20 ("Landfill Operations Permit"). In particular, 22 GAR § 23104(a) (emphasis added) provides as
21 follows:

22 (a) Permits Required. It shall be unlawful for any person to
23 **initiate construction** of, establish or operate any solid waste
24 management facility or modify an existing solid waste management
25 facility **without a permit** issued in accordance with the provisions
26 of this Chapter.

26 See also SWDRR § 23102(a)(33):

27 A facility has commenced construction if either: (A) on-site
28 physical construction program has begun; or (B) the owner or
operator has entered into contractual obligations which cannot be
cancelled or modified without substantial loss for physical

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construction of the facility to be completed within a reasonable timeframe.

The Agency has not issued a Landfill Operations Permit for the proposed landfill at *Layon*. By entering into the *Layon* Contract, by constructing the landfill operations road, excavating cells 1 and 2, and installing and constructing pipes and drainage appurtenances and drainage structures, and by approving and issuing a clearing and grading permit for the landfill operations road and mass grading of cells 1 and 2, the Government of Guam is violating 22 GAR § 23104(a).

Despite these violations, neither GEPA nor its Administrator have taken any effort to restrain the illegal construction at *Layon* or to suspend or revoke the clearing and grading permit.

The construction activities currently occurring at *Layon* violate the existing clearing and grading permit and constitute activities that can only occur with a properly issued Landfill Operations Permit. GEPA and its Administrator must immediately take action to stop these violations.

Respectfully submitted this 26th day of October, 2009

CALVO & CLARK, LLP
Attorneys at Law
Attorneys for Guam Resource Recovery Partners

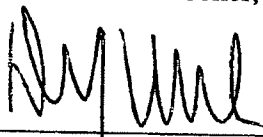
By: Arthur B. Clark
ARTHUR B. CLARK

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VERIFICATION

GUAM)
) ss.
Municipality of Hagåtña)

The undersigned, being first duly sworn, deposes and says that he is the project coordinator and duly authorized representative of Guam Resource Recovery Partners, that he has read said Statement of Issues and knows the contents thereof to be true and correct, except as to the matters which are therein stated upon information and belief; and as to those matters, he believes them to be true.



DAVID J. SABLAN

SUBSCRIBED AND SWORN to before me this 26th day of October, 2009.



NOTARY PUBLIC

MONICA N. SARUSAL
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: Oct. 08, 2011
P.O. Box 326741 Hagatna, Guam 96932

List of Attachments

A	Amended License
B	Consent Decree filed Feb. 11, 2004
C	January 15, 2004 Objection and Comment to the Consent Decree by GRRP
D	US Motion to Enter Consent Decree filed Feb. 2, 2004
E	Government of Guam Joinder in the Motion to Enter filed Feb. 3, 2004
F	Guam 2006 Integrated Solid Waste Management Plan (September 2006)
G	Preliminary Site Suitability Report (March 2004)

Alicia G. Limtiaco
Attorney General



Phillip J. Tydingco
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

June 18, 2009

Piper Jaffray & Co.
El Segundo, California

Citigroup Global Markets Inc.
Seattle, Washington

Re: Government of Guam
Limited Obligation (Section 30) Bonds
Series 2009A

Ladies and Gentlemen:

The letter is addressed to you, as the Underwriters, pursuant to Section 7(e)(9) of the Bond Purchase Agreement, dated June 3, 2009 (the "Bond Purchase Agreement"), between Piper Jaffray & Co., as representative of the Underwriters, and the Government of Guam (the "Government"), providing for the purchase of \$202,425,000 principal amount of Government of Guam Limited Obligation (Section 30) Bonds, Series 2009A (the "Bonds"). The Bonds are being issued pursuant to Article 8 of Chapter 51 of Title 10 of the Guam Code Annotated, as amended (the "Bond Act"), and an Indenture, dated as of June 1, 2009, as supplemented by a Supplemental Indenture, dated as of June 1, 2009 (as so amended, the "Indenture"). Capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Indenture or, if not defined in the Indenture, in the Bond Purchase Agreement.

I have reviewed the Bond Act, the Bond Purchase Agreement, the Continuing Disclosure Agreement of the Government, dated the date hereof (the "Continuing Disclosure Agreement"), the Indenture, the Official Statement, dated June 3, 2009, relating to the Bonds (the "Official Statement"), certifications of the Government, the Trustee, the Co-Trustee and others, and opinions of counsel to the Trustee and the Co-Trustee, and such other documents, opinions and matters to the extent I deemed necessary to provide the opinions or conclusions set forth herein.

The opinions and conclusions expressed herein are based on an analysis of existing laws, regulations, rulings and court decisions and cover certain matters not directly addressed by such authorities. Such opinions or conclusions may be affected by actions taken or omitted or events occurring after the date hereof. I have not undertaken to determine, or to

Opinion Letter

To: Piper Jaffray & Co. and
Citigroup Global Markets, Inc.
Re. Government of Guam Limited Obligation (Section 30)
Bonds 2009 Series A
Page 2

inform any person, whether any such actions are taken or omitted or events do occur or any other matters come to my attention after the date hereof. I call attention to the fact that the rights and obligations under the Bond Purchase Agreement and the Continuing Disclosure Agreement and their enforceability may be subject to bankruptcy, insolvency, reorganization, arrangement, fraudulent conveyance, moratorium and other laws relating to or affecting creditors' rights, to the application of equitable principles and to the exercise of judicial discretion in appropriate cases. I express no opinion with respect to any indemnification, contribution, penalty, choice of law, choice of forum, choice of venue, waiver or severability provisions contained in the foregoing documents.

Based on and subject to the foregoing, and in reliance thereon, as of the date hereof, I am of the following opinions or conclusions:

- (i) the Government is at the date hereof the duly organized and validly existing government of the territory of Guam and has full legal right, power and authority to enter into and perform the Bond Purchase Agreement, the Indenture and the Continuing Disclosure Agreement, to authorize, issue and sell the Bonds and to carry out and consummate all transactions required of it as contemplated by the Bond Purchase Agreement, the Indenture and the Continuing Disclosure Agreement;
- (ii) the Bond Purchase Agreement, the Indenture, and the Continuing Disclosure Agreement were duly authorized, executed and delivered by the Government and each is in full force and effect as of the date hereof and constitutes a valid and legal obligation of the Government enforceable in accordance with its terms;
- (iii) the enactment or adoption of the Bond Act and the GEDA Resolutions and the execution and delivery of the Indenture, the Continuing Disclosure Agreement and the Bond Purchase Agreement, and the consummation of the transactions contemplated thereby, and the compliance with the provisions thereof, will not conflict with or constitute on the part of the Government a breach of or a default under any existing law, administrative regulation, court order or consent decree of the Government or any department, division, agency or instrumentality of the United States, to which the Government is subject, or any agreement, resolution or instrument to which the Government is a party or may otherwise be subject;
- (iv) all approvals, consents or orders of any governmental authority, board, agency or commission having jurisdiction the obtaining of which would constitute a condition precedent to the performance by the Government of its obligations under the Bond Purchase Agreement, the Authorizing Instruments, the Continuing Disclosure Agreement or the Bonds and which can reasonably be obtained by the time of Closing have been obtained;
- (v) there is no litigation or proceeding, pending (with service of process having been received by the Government or otherwise known to me) or, to my knowledge, threatened and having merit (either in Guam, state or federal courts), in any way contesting or affecting the existence of the Government or the title of any official of the Government to such person's office, or seeking to restrain or to enjoin the issuance, sale or delivery of the Bonds, or the pledge of the Section 30 Revenues to the payment of the principal of and interest or

Opinion Letter

To: Piper Jaffray & Co. and

Citigroup Global Markets, Inc.

Re: Government of Guam Limited Obligation (Section 30)

Bonds 2009 Series A

Page 3

premium, if any, on the Bonds, or in any way contesting or affecting the validity or enforceability of the Bonds, the Authorizing Instruments, the Continuing Disclosure Agreement or the Bond Purchase Agreement, or contesting in any way the completeness or accuracy of the Preliminary Official Statement or the Official Statement, or contesting the power of the Government or its authority with respect to the Bonds, the Authorizing Instruments, the Continuing Disclosure Agreement or the Bond Purchase Agreement;

(vi) as of the date of the Official Statement and as of the Closing Date, the statements contained in the Official Statement under the captions "LITIGATION" and "THE 2009A BONDS – Authority for the Bonds" are accurate in all material respects;

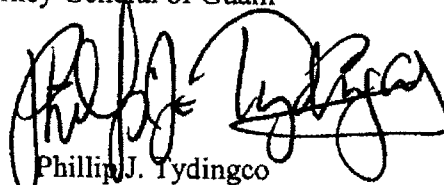
(vii) I have no reason to believe that the Official Statement (except for the information under the caption "BOOK-ENTRY SYSTEM" and the financial statements and other financial and statistical data included therein, and the Appendices to the Official Statement as to which I express no view) as of its date and as of the date hereof contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and

(viii) the Bond Act, approving and authorizing the Bonds, was duly passed by the Guam Legislature and signed by the Governor of Guam.

The letter is delivered to you as Underwriters of the Bonds, is solely for your benefit as such Underwriters and is not to be used, circulated, quoted or otherwise referred to or relied upon for any other purpose or by any other person. The letter is not intended to, and may not, be relied upon by holders of the Bonds or any other party to whom it is not specifically addressed.

ALICIA G. LIMTIACO
Attorney General of Guam

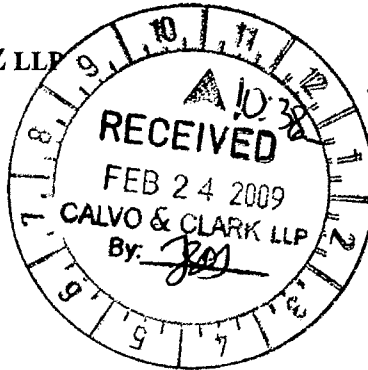
By:



Phillip J. Tydingco
Chief Deputy Attorney General

1 **LUJAN AGUIGUI & PEREZ LLP**
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FILED
SUPERIOR COURT
GUAM
FEB 24 2009
COURT CLERK

8 **IN THE SUPERIOR COURT OF GUAM**

9 ROSSANA SAN MIGUEL, et al.,
10 Plaintiffs,
11 -v-
12 DEPARTMENT OF PUBLIC WORKS,
13 Defendants.

CIVIL CASE NO. CV 0892-04

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

14 **MOTION**

15 Plaintiffs Rossana San Miguel, et al. (collectively referred to as the "Taxpayers")
16 by and through their undersigned counsel hereby move this Court for Summary Judgment. This
17 motion is made pursuant to Rule 56(c) of the Guam Rules of Civil Procedure, and is based on the
18 below memorandum of points and authorities, declarations on file, all papers on file herein, any
19 matters upon which the Court may take judicial notice, and upon such oral and documentary
20 evidence as may be presented at the hearing on this motion.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. BACKGROUND**

23 This is an action initiated by the Taxpayers on August 20, 2004 to enjoin the
24 Defendants (collectively referred to as the "Agencies") from spending public money contrary to
25 law to build a new landfill at Dandan, Inarajan instead of at *Guatali* or *Malaa* as provided by
26 Public Laws 23-95, 24-06, and 25-175. The Taxpayers filed their suit pursuant to 5 G.C.A. §
27 7103, which grants resident taxpayers standing to sue the government of Guam or its officers or
28

1 employees for the purpose of enjoining such officers or employees “from expending money
2 without proper appropriation, without proper authority, illegally, or contrary to law.”

3
4 On October 18, 2004, the Agencies moved to dismiss or for summary judgment in
5 the alternative. On January 15, 2005, the Taxpayers sought a preliminary injunction to prevent
6 the Agencies from spending public moneys on environmental impact statements on the three
7 potential landfill sites selected by the Agencies because said selections did not include the sites
8 mandated by Guam law, namely, *Guatali* and/or *Malaa*, or both.

9
10 On July 6, 2005, the court denied the Agencies’ Rule 12(b)(6) motion to dismiss
11 finding that there are sufficient facts to support the Taxpayers’ claims that the landfill be located
12 at *Guatali* or *Malaa* or both. The court, however, considering evidence outside the pleadings,
13 granted partial summary judgment with regard to the *Guatali* site, finding that the reference to
14 *Guatali* in Public Law 23-95 meant Parcel A of Lot 439-R1, and because Parcel A is owned by
15 the Federal government the Agencies need not consider it; the court, however, denied summary
16 judgment with respect to *Malaa* finding the existence of genuine issues of material facts as to
17 why *Malaa* was not chosen as a landfill site.

18
19 With regard to the Taxpayers’ request for a preliminary injunction, by order dated
20 September 19, 2005, the court denied said request. Taxpayers sought reconsideration of the
21 court’s grant of partial summary judgment, which was denied.

22
23 The Taxpayers appealed the lower court’s orders denying the Taxpayers’ motion
24 for preliminary injunction and request for reconsideration. On February 20, 2008, the Guam
25 Supreme Court issued an Opinion, 2008 Guam 3, affirming the lower court’s denial of the
26 preliminary injunction, and declining to exercise its discretionary jurisdiction over the appeal of
27 the denial of the motion for reconsideration and the underlying order upholding the Agencies’
28 exclusion of *Guatali*.

On April 7, 2008, the Taxpayers filed a petition for rehearing before the Guam
Supreme Court arguing that the court should have applied the doctrine of implied repeal to
conclude that Public Law 24-06’s unconditional requirement to build a landfill at *Guatali* and/or

1 *Malaa* repealed Public Law 23-95's conditional requirement that the government build a landfill
2 at *Guatali* or *Malaa* unless there is a legitimate reason those site can not be used. On July 3,
3 2008, the Supreme Court denied the petition for rehearing finding that the issue of implied repeal
4 was not briefed by the parties and cannot be raised for the first time in a petition for rehearing.
5 (San Miguel v. DPW, CVA 05-017 (Order Jul. 3, 2008).)

6 On July 18, 2008, the Agencies filed their Answer and on December 9, 2008 the
7 Agencies filed a motion for judgment on the pleadings.

8 **II. STANDARD FOR SUMMARY JUDGMENT**

9 The Court may grant summary judgment pursuant to Rule 56(c) of the Guam
10 Rules of Civil Procedure ("GRCP") when "the pleadings, depositions, answers to interrogatories,
11 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as
12 to any material fact and that the moving party is entitled to a judgment as a matter of law."
13 GRCP 56(c). See *Manvil Corp. v. E.C. Gozum & Co.*, 1998 Guam 20, ¶ 6. A party seeking
14 summary judgment "always bears the initial responsibility of informing the ... court of the basis
15 for its motion, and identifying those portions of 'the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with affidavits, if any' which it believes
17 demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S.
18 317, 323, 106 S.Ct. 2548, 2558 (1986). This burden may be discharged by showing to the court
19 "that there is an absence of evidence to support the nonmoving party's case." 477 U.S. at 325,
20 106 S.Ct. at 2554.

21 Once the initial burden is met by the movant, "the non-movant cannot merely rely
22 on allegations contained in the [pleadings] . . . , but must produce at least some significant
23 probative evidence tending to support the [pleadings]" *Edwards v. Pacific Fin. Corp.*, 2000
24 Guam 27, ¶ 7; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986).
25 The nonmoving party must set forth by affidavit, or as otherwise provided in Rule 56, specific
26 facts showing that there is a genuine issue for trial. See *T.W. Elec. Service, Inc. v. Pacific Elec.*
27 *Contractors Assn.*, 809 F.2d 626, 630 (9th Cir. 1987). A genuine issue of fact exists if there is
28

1 "sufficient evidence" which establishes a factual dispute requiring resolution by a fact-finder. *See*
2 *Edwards*, 2000 Guam 27, ¶ 7. A material fact is one that is relevant to an element of a claim or
3 defense and whose existence might affect the outcome. *See id.* Disputes over irrelevant or
4 unnecessary facts will not preclude a grant of summary judgment. *See id.* The nonmoving party
5 may not rely on the statement that "it will discredit the moving party's evidence at trial and
6 proceed . . . in the way of evidence to support its claim." *See T.W. Elec. Service, Inc.*, 809 F.2d at
7 630. "The resisting party must respond with more than mere hearsay and legal conclusions."
8 *Kaiser Cement Corp. v. Fischbach and Moore, Inc.*, 793 F.2d 1100, 1104 (9th Cir. 1986).

9
10 Moreover, in the light of the facts that are developed, if a nonmoving party's claim
11 is "implausible," then the nonmoving party must come forward with "more persuasive evidence."
12 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348
13 (1986). A nonmovant's Rule 56(e) evidence opposing summary judgment must be more than
14 merely possible or colorable. The evidence must be sufficient to withstand a motion for directed
15 verdict and support the verdict of a reasonable jury. *See Liberty Lobby*, 477 U.S. 242. If the
16 nonmoving party fails to make a sufficient showing of an essential element of its case with
17 respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of
18 law. *See Celotex*, 477 U.S. at 322-323.

19 **III. THE PROVISIO OF PUBLIC LAW 23-95 WAS IMPLICITLY REPEALED BY** 20 **PUBLIC LAW 24-06**

21 Public Law 24-06 implicitly repealed Public Law 23-95 such that the proviso in
22 Public Law 23-95 that the Agencies may not use *Guatali* or *Malaa* as the landfill site if there is a
23 legitimate reason either or both sites cannot be used is eliminated making the use of *Guatali* or
24 *Malaa*, or both, mandatory and unconditional. Further, the development of the landfill at Malaa
25 is consistent with the Consent Decree, which requires compliance with Guam law. (*See United*
26 *States v. Government of Guam*, District Court of Guam Civil Case No. 02-00022 at ¶ 47 (Consent
27 Decree Feb. 11, 2004), attached as Exhibit A to the Taxpayers' Request for Judicial Notice
28 ("RJN") filed herewith.) Public Law 24-06 has been the law of the land since 1997, predating
and thus incorporated into the Consent Decree.

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A. The Doctrine of Implied Repeals

The question of a whether an earlier law is repealed does not depend on the express words used, but is a question of legislative intent. *See* 2008 Guam 3 at ¶¶ 46-47. *Cf. Professional Engineers in California Gov't. v. Kempton*, 155 P.3d 226, 240 (Cal. 2007) (“Because the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature, application of the doctrine is appropriate in those limited situations where it is necessary to effectuate the intent of drafters of the newly enacted statute.”). And although repeals by implication are disfavored, the repeal of an earlier law *is* implied when there is either an irreconcilable conflict between the two laws or the later law covers the whole subject of the earlier law and is clearly intended as a substitute. *See Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (“There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; . . .”) cited in *Abalos v. Cyfred Ltd.*, 2006 Guam 7 ¶ 20.

These two categories of implicit repeals are distinct; thus, where a later act covers the whole subject of the earlier act, there is no requirement that the two laws be irreconcilably inconsistent or repugnant to each other. *See In re Henderson's Tobacco*, 78 U.S. 652, 657 (1870) (“[A]nd even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.”); *Gardens at West Maui Vacations Club v. County of Maui*, 978 P.2d 772, 778 (Haw. 1999) (“[W]hen the latter act is exclusive, that is, when it covers the whole subject to which it relates, and is manifestly designed by the legislature to embrace the entire law on the subject, it will be held to repeal by implication all prior statutes on that matter whether they are general or special, even though they are not

1 repugnant, unless it is expressly provided that prior special acts shall not be affected.”). Both of
2 these categories of the doctrine of implied repeal apply here.

3 **B. Public Law 23-95 and Public Law 24-06 are Irreconcilably Inconsistent**

4
5 Guam Public Law 23-95:2 (May 8, 1996) provides that:

6 The primary site for the new landfill shall be that area in Central
7 Guam, known as Guatali, located near the old GORCO Oil site. . . .
8 If for any legitimate reason, it is found that Guatali cannot be used,
9 the secondary site shall be that area known as Malaa. The same
10 conditions shall apply to Malaa as stated for Guatali if Guatali
11 cannot be used.

12 Public Law 23-95’s “if for any legitimate reason” requirement is a proviso to the development of
13 a landfill at *Guatali* or *Malaa*. However, unlike Public Law 23-95, Public Law 24-06’s mandate
14 to build a MSWLF at *Guatali* and/or *Malaa* is without condition, and it fails to repeat or continue
15 Public Law 23-95’s proviso. Because of this proviso in Public Law 23-95 and the lack thereof in
16 Public Law 24-06, the two statutes are in conflict with each other. *See Fasi v. City and County of*
17 *Honolulu*, 439 P.2d 206 (Haw. 1968) (“Where two statutes cover the same ground in identical or
18 equivalent language, but one imposes an additional requirement or limitation, the statutes are in
19 conflict with each other.”)

20 More than just failing to restate the proviso of Public Law 23-95, however, certain
21 other provisions of Public Law 24-06 *vis-a-vis* Public Law 23-95 clearly place the two statutes at
22 odds such that they fall within the “irreconcilably inconsistent” rubric of the doctrine of implied
23 repeals.

24 **1) The Plain Language Of Public Law 24-06 Requires The MSWLF To**
25 **Be Built At *Guatali* And/Or *Malaa***

26 As in all cases, the starting point for statutory construction must be the language of
27 the statute itself. *See Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23 (“In cases involving statutory
28 construction, the plain language of a statute must be the starting point.”). Even when trying to
harmonize an apparent inconsistency between two separate statutes, the exercise of examining the
plain language of each individual statute must be first pursued. *See Sumitomo Const. Co., Ltd.*
Government of Guam, 2001 Guam 23 ¶ 17 (“We must first attempt to reconcile the two statutes.

1 In determining whether there is an implied repeal, courts resort to rules of statutory construction.
2 It is a cardinal rule of statutory construction that courts must look first to the language of the
3 statute itself.”) (citations omitted).

4 Examining just the language of Public Law 24-06, the mandate to build a MSWLF
5 at *Guatali* and/or *Malaa* is indisputably non-discretionary. Section 4(e) of Public Law 24-06
6 provides that the new MSWLF “shall be located at either Guatali or Malaa, or both.” There is no
7 proviso or condition. Use of the word “shall” is clear and unambiguous in its mandate on where
8 the new landfill site must be located. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (“The
9 word ‘shall’ is ordinarily the language of command.” (quoting *Anderson v. Yungkau*, 329 U.S.
10 482, 485 (1947)) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935))). *See also Lexecon, Inc. v.*
11 *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (interpreting “shall” as creating
12 an “obligation impervious to judicial discretion.”); 1 G.C.A. § 715(9).

13 Section 4 of Public Law 24-06 additionally requires that “the Department of Public
14 Works shall immediately contract with a single, private entity for the financing, design,
15 development, construction and operation of a new MSWLF facility,” which contract Section 4
16 further mandates “shall require that the contractor comply with the Environmental Impact Study
17 created by Juan C. Tenorio and Associates dated November 20, 1995 . . .” Guam Pub. Law 24-
18 06:4(b) (Mar. 20, 1997). Since the Environmental Impact Study created by Juan C. Tenorio and
19 Associates (“Tenorio EIS”) only studies *Guatali*, *Malaa* and the Ordot expansion (see Declaration
20 of Juan C. Tenorio filed on Mar. 30, 2005), it is quite impossible to comply with the Tenorio EIS
21 by building a MSWLF at Dandan. Notwithstanding the well-established legal principle that
22 repeals by implication are disfavored, where, as here, it is impossible to reconcile the proviso of
23 Public Law 23-95 with the mandatory language of Public Law 24-06 to build a MSWLF in
24 compliance with the Tenorio EIS, the presumption against a repeal by implication is rebutted and
25 the doctrine of implied repeal must be applied. *See Northwestern University v. State*, 371 N.E.2d
26 1046, 1050 (Ill. App. Ct 1977) (“[W]hen there is a clear repugnance between two laws, and the
27 provisions of both cannot be carried into effect, the later law must prevail, and the former yield to
28

1 the last expression of the legislative will.” (quoting *Dingman v. The People*, 51 Ill. 277, 279
2 (1869))).

3
4 **2) Recognition Must Be Given To Other Well-Accepted Rules Of
Statutory Construction**

5 Interpreting Public Law 24-06 as allowing the Agencies to exclude *Guatali* and
6 *Malaa* would not give effect to the mandatory “shall” and “shall immediately” language
7 employed by the Legislature, including the shall comply with the Tenorio EIS language, and
8 would render such language superfluous. This construction would be contrary to another well-
9 settled rule of statutory construction. *See Pangelinan v. Gutierrez*, 2004 Guam 16 ¶ 21 (“[W]e
10 are hesitant to adopt an interpretation of a congressional enactment which renders superfluous
11 another portion of that same law.” (quoting *Mackey v. Lanier Collection Agency & Serv. Inc.*,
12 486 U.S. 825, 837 (1988))); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal
13 principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that,
14 if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”
15 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

16 Inverse to the rule that a court should not interpret a statute such that it renders any
17 portion of it superfluous is the rule that a court should not interpret a statute such that it requires
18 the inclusion of additional words. Any reading of Public Laws 23-95 and 24-06 as being in
19 harmony requires an impermissible rewriting of Public Law 24-06 to insert the Public Law 23-95
20 proviso. Such overstepping by a court is contrary to its duty in the construction of a law to
21 simply “ascertain and declare what is in terms or in substance contained therein, not to insert what
22 has been omitted, or to omit what has been inserted. . .” 6 G.C.A. § 2513. *See People v. Guzman*,
23 107 P.3d 860, 865 (Cal. 2005) (“[A]s we have often explained, inserting additional language into
24 a statute violates the cardinal rule of statutory construction that courts must not add provisions to
25 statutes.”) (internal quotations omitted).

26 Although in some instances conflicting earlier laws can act as conditions or
27 provisos to later laws, this principle is distinguishable here because it only applies in the case
28 when the earlier law is specific and the later law is general. *See Sexton v. Cornette*, 623 S.E.2d

1 898, 901(Va. 2006) (stating rule of construction that “where there are two statutes, the earlier
2 special and the later general, and the terms of the general are broad enough to include the subject
3 matter provided for in the special, a presumption arises that the earlier special act is to be
4 considered as remaining in effect as an exception to the later general law.”). When the order is
5 reversed, however, the effect is the opposite and the later, specific law supersedes the earlier,
6 general law, and the earlier laws are deemed amended. *See City of Auburn v. Eastern Nebraska*
7 *Pub. Power Dist.*, 138 N.W.2d 629, 635 (Neb. 1965) (“Where a legislative act is complete in
8 itself but is repugnant to or in conflict with a prior law which is not referred to nor in express
9 terms repealed by the latter, the earlier statute is repealed by implication as to the latter act, but
10 only to the extent of the repugnancy or conflict.” (quoting *State ex rel. Meyer v. County of*
11 *Lancaster*, 113 N.W.2d 63, 69 (Neb. 1962))). *But see Gardens at West Maui Vacations Club*, 978
12 P.2d 778 (when the later act covers the whole subject to which it relates, all prior statutes on that
13 matter are repealed by implication regardless of whether they are general or special).

14 Comparing Public Laws 23-95 and 24-06, there can be no doubt that Public Law
15 24-06 is more specific. Both laws describe the site location for the next MSWLF – *Guatali*
16 and/or *Malaa*; however, Public Law 24-06 goes further and specifies its location as “described in
17 the Environmental Impact Statement of November 1995.” Pub. Law 24-06:4(e). In addition,
18 Public Law 24-06 adds specific provisions for the hiring of a developer. Thus, it is only partially
19 correct that Public Law 23-95 was not abrogated by Public Law 24-06. Only that portion of
20 Public Law 23-95 requiring a MSWLF be built at *Guatali* and/or *Malaa* was continued by Public
21 Law 24-06, but not the proviso.

22 Even the language at Section 1 of Public Law 24-06 that the site of the MSWLF is
23 “to be determined by the government of Guam,” does not make Public Laws 23-95 and 24-06
24 consistent. Unlike Public Law 23-95, Public Law 24-06 mandated the government to build the
25 landfill at one of two specific sites in no express order. *See* Pub. Law 24-06:4(e) (“The MSWLF
26 shall be located at either *Guatali* or *Malaa*, or both, . . .”). Thus because the Legislature did not
27 pick one particular site, Section 1 was correct in pointing out that the Island’s MSWLF was to be
28

1 constructed at a site “to be determined by the government,” limited, however, to only two sites to
2 the exclusion of all other sites, so none other could be considered. *See Rinehart v. Rinehart*, 2000
3 Guam 14 ¶ 9 (“In addressing this contention, we see fit to follow the maxim *expressio unius est*
4 *exclusio alterius*. This rule of statutory construction means that if an option is expressed in a law,
5 *all other options not expressed were intentionally excluded.*”) (emphasis added).

6
7 Moreover, Public Law 24-06 removed Public Law 23-95’s earlier mandate that
8 *Guatali* must be considered first, and only if it could not be used, then *Malaa* could be considered
9 next.² Public Law 24-06 no longer requires either site be considered in any specific order. Thus
10 Public Law 24-06, in saying that the site was to be determined by the government, did not
11 continue the proviso of Public Law 23-95; to the contrary, it released the government of the
12 proviso’s requirement to prefer *Guatali* over *Malaa*. So the phrase “to be determined by the
13 government,” rather than affirming a legislative intent to leave Public Law 23-95 unaffected,
14 actually affirms the opposite – Public Law 24-06 unshackled the government from having to
15 prefer one site over the other – thus falling squarely in line with another rule of statutory
16 construction that when a legislature “enacts a new statute that applies to preexisting statutes, [the
17 court] presumes the legislature intended some change in existing law.” *Jenkins v. Montallana*,
18 2007 Guam 12 ¶ 17 (quoting *Lavidas v. Smith*, 987 P.2d 212, 216 (Ariz. App. 1999)). *See also*
19 2B Sutherland Statutory Construction § 51:2 (6th ed.) (“It is assumed that whenever the
20 legislature enacts a provision it has in mind previous statutes relating to the same subject
21 matter.”). The Court must conclude, therefore, that the Legislature’s omission of an earlier
22 proviso was intentional.

23 **C. Public Law 24-06 covers the whole subject of Public Law 23-95**

24 The second independent basis for applying the doctrine of implicit repeal is when a
25 later act covers the whole subject of an earlier act. *See Professional Engineers in California*
26 *Gov’t. v. Kempton*, 155 P.3d 226, 240 (Cal. 2007) (“In order for the second law to repeal or
27 supersede the first, the former must constitute a revision of the entire subject, so that the court

28

² Public Law 23-95 is entitled: “An act to designate the primary and secondary sites of a new landfill . . .”

1 may say it was intended to be a substitute for the first.” (Quoting *Board of Supervisors v.*
2 *Lonergan*, 616 P.2d 802, 810 (Cal. 1980)) (quoting *Penziner v. West American Finance Co.*, 74
3 P.2d 252, 260 (Cal. 1937))). Public Law 24-06 also falls within this second category.

4 Prior to Public Law 24-06, there only existed piecemeal legislation relative to the
5 closing of the Ordot Dump and the opening of a new MSWLF. See Guam Pub. Laws 22-115:1
6 (Apr. 25, 1994) and 24-06:1. Public Law 24-06 is the first comprehensive legislative framework
7 for the opening of a new MSWLF, the first titled “Act.” See title to Public Law 24-06 (“An Act
8 to Establish the Procedure and Criteria to be Used by the Government of Guam in Privatizing the
9 Funding, Design, Construction and Operation of a New Municipal Solid Waste Landfill
10 Facility”). See also Pub. Law 24-06:2 (“This Act shall be known as the Solid Waste Landfill
11 Authorization Act of 1997”); Pub. Law 24-06:1 (“The purpose of this Act is to establish policy
12 and legal authority for the privatization of a [MSWLF] for Guam by means of a long-term
13 contract for the development, construction and operation of a MSWLF at a site to be determined
14 by the government of Guam.”). The Solid Waste Landfill Authorization Act of 1997 embodies
15 all objects contained in all earlier, related legislation and provides a comprehensive and expansive
16 legislative framework for the development of a MSWLF.

17 The naming of Public Law 24-06 as the “Solid Waste Landfill Authorization Act
18 of 1997” is a further indication of the Legislature’s intent to establish a comprehensive legislative
19 framework for the development of a MSWLF. In interpreting legislative intent, courts are often
20 guided by the nature of the statutes involved, the state of the law when they were passed, the
21 circumstances surrounding its enactment, as well as the language and respective titles thereof.
22 See *In re Adoption of Sewall*, 51 Cal. Rptr. 367, 379-380 (Cal.Ct. App. 1966) (“In the
23 construction of statutes, where there is doubt or ambiguity, resort may be had to the title, which,
24 though not conclusive, is a legitimate aid in arriving at the legislative intent.”). The naming of
25 Public Law 24-06 as the Solid Waste Landfill Authorization Act of 1997 is clearly indicative of
26 the legislative intent to establish a comprehensive legislative framework for the development of a
27 MSWLF.
28

1 In addition, the Court can also be guided in determining legislative intent by
2 examining the available facts set out in Public Law 24-06 itself. *See State v. Parmalee*, 496 A.2d
3 186, 188 (Conn. 1985) (“In construing a statute, this court will consider its plain language, its
4 legislative history, its purpose and the circumstances surrounding its enactment.”). Public Law
5 23-95 is devoid of any reference to the Tenorio EIS, and there has been no evidence presented to
6 indicate whether the Guam Legislature even had a copy of the Tenorio EIS prior to passing Bill
7 537 (later enacted into law as Public Law 23-95). Public Law 24-06, on the other hand, wholly
8 relies on and adopts the Tenorio EIS. “In response to Public Law 22-115, the Department of
9 Public Works has created a Draft Environmental Impact Statement dated November 1995, which
10 identifies MSWLF alternatives.” Pub. Law 24-06:1. *See also* Pub. Law 24-06:4(e). Given
11 Public Law 24-06’s adoption of the Tenorio EIS, it would appear that the earlier concerns of the
12 Legislature were fully assuaged by the Tenorio EIS, such that the Legislature saw fit to remove
13 the “any legitimate reason” proviso of Public Law 23-95.³

14
15 **IV. THE AGENCIES DO NOT HAVE THE AUTHORITY TO SELECT A LANDFILL**
16 **SITE OTHER THAN *GUATALI* OR *MALAA* AND THERE IS NO LAW THAT**
17 **SUPPORTS THE AGENCIES’ SELECTION OF DANDAN**

18 **A. The Agencies Do Not Have The Authority To Select A Landfill Site Other**
19 **Than *Guatali* or *Malaa***

20 Other parts of Public Law 24-06 (sec. 1 – “DPW ‘is the appropriate government
21 agency for the development of a new landfill,” and sec. 4(u) – “both GEPA and DPW ‘shall
22 monitor the performance of the contractor’”) do not support the conclusion that GEPA and DPW
23 have the authority to select a landfill site other than *Guatali* or *Malaa*. It may be the case that the
24 particular phrases do not contradict the proviso of Public Law 23-95, but neither do they confirm
25 nor reassert that proviso. These phrases are also consistent with the unconditional requirement of
26 Public Law 24-06 to immediately begin developing a MSWLF at *Guatali* and/or *Malaa* using the

27
28 ³ In light of the implicit repeal of Public Law 23-95’s proviso, the Court’s finding in its September 19, 2005 Decision & Order Re Preliminary Injunction that the Agencies appropriately considered and rejected *Malaa* is clearly erroneous and must be revisited by the Court. *See People v. Hualde*, 1999 Guam 3 ¶13.

1 Tenorio EIS, thus they contribute nothing to the debate. It is the other, mandatory language of
2 Public Law 24-06 that is conclusive. *See* Pub. Law 24-06:4.

3
4 Since Public Law 24-06 selects *Guatali* and/or *Malaa*, a harmonious as well as a
5 plain language reading of the authorization given to GEPA in Public Law 24-272 to “identif[y]
6 *potential sites for future* sanitary landfills” must mean that GEPA only has the authority to
7 identify MSWLF’s that may be used *after* the development of a MSWLF at *Guatali* and/or
8 *Malaa*. *See* Guam Pub. Law 24-272:10 (Oct. 2, 1998) (codified at 10 G.C.A. § 51119(a)(6)). In
9 any event, it is indisputable that nothing in Public Law 24-272 authorizes GEPA to select the
10 *actual* site, present or future, as opposed to only identifying potential future sites.

11 The authority to select the next landfill site clearly remained with the Guam
12 Legislature. This conclusion is bolstered by the enactment of Public Law 23-95. Previously, in
13 Public Law 22-115, the Legislature authorized the Governor of Guam to select the next landfill
14 site, but then expressly repealed this authorization in Public Law 23-95. *See* Public Law 23-95:2.
15 There can be no doubt about the Legislature’s intent in repealing an earlier grant of authority
16 given to the Executive Branch concomitant with an exercise of that authority by the Legislature
17 itself – the authority to select the next landfill site was reserved to the Legislature. *See University*
18 *of Guam v. Guam Civil Service Com’n*, 2002 Guam 4 ¶ 13 (“In an express repeal, a legislature
19 expressly declares its intent to abrogate an earlier statute.”).

20 **B. There Is No Law Approving Dandan or Any Site Other Than *Guatali* Or**
21 ***Malaa* As The Island’s Next MSWLF**

22 Further, there is no credence in the Agencies’ position that the Legislature
23 approved their selection of Dandan by the Legislature’s inaction with regard to the 2006
24 Integrated Solid Waste Management Plan (“ISWMP”), which identifies the Dandan site. The
25 2006 ISWMP did not comply with Guam law, thus it is invalid.

26 Guam law requires that the Agencies adopt and update the Island’s ISWMP
27 pursuant to the provisions of the Administrative Adjudication Law (“AAL”). *See* 10 G.C.A. §
28 51103(a)(2) (authorizing Guam EPA to prepare and adopt in accordance with the AAL a solid

1 waste management plan). The AAL requires an Economic Impact Statement ("EIS") for any rule⁴
2 promulgated under the AAL that will cost the general public in excess of \$500,000. *See* 5 G.C.A.
3 § 9301. The 2006 ISWMP was submitted to the Legislature without an EIS, despite that the 2006
4 ISWMP (*see e.g.*, sec 6.5.2) specifically requires the development of the Dandan site, the cost of
5 which has been reported to be in excess of \$110 million. (*See* Quarterly Report of the Receiver at
6 p. 13, attached as Exhibit B to the RJN.)

7
8 Guam EPA never prepared an EIS because its administrator certified that the cost
9 to the public to implement the 2006 ISWMP would be less than \$500,000.⁵ (*See* Administrator's
10 Determination attached as Exhibit C to the RJN.) Guam EPA skirted the issue by saying that it
11 only needs to consider those elements that are not existing legal obligations. (*See id.* at p. 1.)
12 However, there is no provision whatsoever in the AAL recognizing the purported exemption for
13 existing legal obligations and it appears that Guam EPA's reliance thereon is a mere attempt to
14 circumvent the clear mandate of the AAL. Since it is the Agencies who are relying upon this
15 exemption, it is incumbent upon the Agencies to identify where in the law this exemption is
16 authorized. Without the EIS, the 2006 ISWMP was never properly promulgated. *See* 5 G.C.A. §
17 9301(e) ("No proposed rule or regulation shall be transmitted to *I Liheslaturan Guåhan* for
18 consideration without an economic impact statement, **nor shall any proposed rule or regulation**
19 **go into effect without a completed economic impact statement.**") (emphasis added). Thus, the
20 Agencies' contention that the Legislature approved the selection of Dandan by its failure to act on
21 the submitted 2006 ISWMP is simply incorrect.
22
23

24 ⁴ "The word *rule* means any rule, regulation, standard, classification, procedure or requirement of
25 any agency designed to have or having the effect of law or interpreting, supplementing or
26 implementing any law enforced or administered by it, including any regulation under which the
27 agency makes charges for services it provides, or to govern its organization or procedure . . ." 5
28 G.C.A. § 9107.

⁵ Further, if an EIS is not done because the impact is less than \$500,000, the AAL requires the
Bureau of Budget Management and Research ("BBMR") to conduct a preliminary cost impact
assessment one year after adoption. *See* 5 G.C.A. § 9301(j). To the best of the Taxpayers'
knowledge, such cost impact assessment has not been performed by BBMR.

1 **V. THE LEGISLATURE HAS CLARIFIED THAT GUATALI ALSO INCLUDED**
2 **LOT 439-R1, PARCEL B**

3 Shortly after the Guam Supreme Court issued its opinion declining to exercise
4 review over the lower court's interlocutory grant of partial summary judgment (*see* 2008 Guam
5 3), the Legislature passed Bill 383, now Public Law 29-116. In that law, the Legislature clarified
6 that Guatali as used in Public Law 23-95 also included Parcel B of Lot 439-R1, Santa Rita, not
7 just Parcel A, as found by the Court in its July 6, 2005 order. (See Jul. 6, 2005 Decision & Order
8 at pp. 7-8).

9 Public Law 29-116 provides as follows:

10 Section 5. (a) Legislative Intent. *I Liheslaturan Guahan* finds that the legal
11 authority permitting a landfill to be constructed at *Guatali* pursuant to Public Law
12 23-95 in that area in central Guam, known as *Guatali*, located near the old
13 GORCO Oil site must be further clarified due to the parceling of that site as
14 *Guatali* Parcel A and *Guatali* Parcel B. The original survey of Lot 439-R1 was
15 done in 1968. Since then, the parcel has been divided as follows:

16 (1) Lot R14, Tract 241 1 (Land Management Office of the Recorder Instrument
17 No. 630801) formerly known as the GORCO Oil site now known as the Shell
18 Refinery;

19 (2) Parcel A of Lot 439-R1 as described by Doc Nos. 90143 & 115867 with a
20 total area of 809,374.74 square meters, or 80.937 hectares or two hundred (200)
21 acres, now owned by the U.S.

22 Department of Interior, National Park Service (Land Management Office of the
23 Recorder Document Nos. 90143 and 115867) in 2001; and

24 (3) Parcel B of Lot 439-R1 with a total area of 352,872.12k square meters, or
25 87.20 acres, now owned by the government of Guam *Chamorro* Land Trust
26 Commission (Land Management Office of the Recorder Doc. No. 503740) in
27 2001.

28 (b) *I Liheslaturan Guahan* hereby reaffirms its prior authorization and permitted
use of Parcel B of Lot No. 439-R1, Santa Rita, Guam, containing an area of
352,872.1B square meters as shown on that map recorded at the Office of the
Recorder, Department of Land Management, government of Guam on August 8,
2001, under Instrument No. 641990 as a municipal solid waste landfill.

In light of this clarifying legislation, the Court must revise its grant of partial
summary judgment and find that the Agencies are expending money contrary to law by
proceeding with a MSWLF at Dandan when the law in effect requires the MSWLF to be built at
Guatali, i.e., Parcel B of Lot 439-R1, Santa Rita.

Because the July 6, 2005 order granting partial summary judgment as to *Guatali* is
an interlocutory order it is "subject to revision at any time before the entry of final judgment

1 adjudicating all the claims and the rights and liabilities of all the parties” and does not have
2 binding res judicata effect. See *San Miguel*, 2008 Guam 3 ¶ 16-17 (declining review of the
3 Taxpayers appeal from the trial court’s denial of their motion for reconsideration of an
4 interlocutory order granting partial summary judgment.); GRCP 54(b); *U.S. v. Desert Gold Mine*
5 *Co.*, 433 F.2d 713, 715 (9th Cir. 1970) (a grant of partial summary judgment not certified under
6 Rule 54(b) “remain[s] subject to reconsideration and revision either by the same judge, a
7 successor judge or a different judge to whom the case might be assigned.”); *Reams v. Tulsa Cable*
8 *Television, Inc.*, 604 P.2d 373, 375 (Okl. 1979) (“Moreover, since any interlocutory summary
9 adjudication is subject to alteration or modification by the trial court before entry of final
10 judgment determining all the issues raised by a claim, it can have no binding res judicata effect.”).

11 Following the precedent set forth in *Jenkins v. Montallana*, the legislative
12 clarification of Public 29-116 requires reversal of the July 6, 2005 order. The Guam Supreme
13 Court in *Jenkins v. Montallana*, 2007 Guam 12 ¶ 18, held that “ [a]n amendment which in effect
14 construes and clarifies a prior statute must be accepted as the legislative declaration of the
15 meaning of the original act, where the amendment was adopted soon after [a] controversy arose
16 concerning the proper interpretation of the statute.” (Quoting *W. Sec. Bank v. Super. Ct.*, 933
17 P.2d 507, 514 (Cal. 1997) (quoting SUTHERLAND STATUTORY CONSTRUCTION 522.31 (5th ed.
18 1993))). Thus, Public Law 29-116, because it was enacted only ten months after the Guam
19 Supreme Court opinion declining review “is indicative of a legislative intent that the amendment
20 ***apply to all existing causes of action from the date of its enactment***” and dictates that the Court
21 revise the July 2005 order to provide that Guatali means Parcel B. See *W. Sec. Bank*, 933 P. 2d
22 at 515. See also *Greenwich Hospital v. Gavin*, 829 A.2d 810 (Conn. 2003) (“ Implicit in our
23 decisions allowing the legislature to clarify its intent in prior legislation was the recognition that
24 pending cases, even those that eventually spawned the clarifying legislation, could be affected.”).

25 Further, the Court’s reversal of the July 5, 2006 order does not impinge upon the
26 discretionary law of case doctrine. A court may depart from the law of the case where “an
27 intervening change in the law has occurred.” See *People v. Hualde*, 1999 Guam 3 ¶13. This
28

1 exception has also been stated to allow reconsideration “if there is a compelling reason, such as a
2 change in, or clarification of, law that makes clear that the earlier ruling was erroneous.” *See*
3 *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir. 2006). Public Law 29-116
4 clarifies existing law warranting reversal of the July 5, 2006 order.⁶ “Not to reconsider in such
5 circumstances would condemn the parties to the unedifying prospect of continued litigation when
6 they knew that a possibly critical ruling was in error and, unless it became moot in the course of
7 the proceedings, would compel a reversal of the final judgment at the end of the case.” *Id.*

8 VI. CONCLUSION

9 Public Law 23-95 and Public Law 24-06 are irreconcilably inconsistent. Public
10 Law 23-95's proviso disallowing construction of a MSWLF at *Guatali* or *Malaa* for “any
11 legitimate reason” was not continued in Public Law 24-06. Further, it is impossible to abide by
12 the mandatory language of Public Law 24-06 to comply with the Tenorio EIS at any site other
13 than *Guatali* and/or *Malaa*. In addition, Public Law 24-272 nowhere authorizes GEPA to *select*
14 the next landfill site; such selection was reserved to the Guam Legislature. *See* Public Law 23-
15 95:2. GEPA may only prepare a plan that *identifies future potential sites*. The authorization
16 given to the Agencies in Public Law 23-95 to exclude *Guatali* and *Malaa* for any legitimate
17 reason was implicitly repealed by Public Law 24-06. Further, the Agencies have no legislative
18 authorization to proceed with a MSWLF at Dandan, as required by Guam law. Accordingly, the
19 Agencies violated Guam law by going forward with developing a landfill at a site other than
20 *Guatali* or *Malaa*, and by doing so are expending public funds contrary to law. *See* 5 G.C.A. § 7.

21 Additionally, Public Law 29-116, enacted shortly after the opinion in *San Miguel*,
22 2008 Guam 3, clarifies that *Guatali* means Parcel B of Lot 439-R1, consistent with the rule set out
23 in *Jenkins*. Thus, the Court must revise the July 6, 2006 order and find that *Guatali* means Parcel
24 B of Lot 439-R1.

25
26
27 ⁶ It appears that a question of fact remains as to whether relocating the footprint identified by Juan Tenorio in his EIS
28 to move it from Parcel A to Parcel B would comply with the Legislature's directive in Public Law 24-06 to follow
the Tenorio EIS. Nevertheless, because the law still mandates the construction of an MSWLF at *Malaa*, if *Guatali* is
unavailable, the Court may still immediately resolve the question of whether the Agencies are expending public
money contrary to law by proceeding with the Dandan MSWLF.

1
2 Although the Court earlier ruled that prior legislative reference to Guatali was
3 limited to Parcel A, Public Law 26-119 has clarified that the Court's interpretation of such earlier
4 legislation was incorrect, thus the question still remains whether to build the MSWLF at Guatali
5 or Malaa. There is no question, however, that the MSWLF must be built at either Malaa or
6 Guatali, or both, as required by Public Law 24-06, and may not be built at Dandan.

7 For the foregoing reasons, the Taxpayers respectfully request that the Court
8 GRANT their request for summary judgment and (1) declare that all construction at Dandan is an
9 illegal expenditure of public money, contrary to Public Law 24-06, (2) issue a permanent
10 injunction enjoining the Agencies from expending public money on the construction of the
11 landfill at Dandan, (3) award personal judgment against the individual defendants, jointly and
12 severally, for the return to the government of monies illegally expended, and (4) award the
13 Taxpayers their attorneys' fees and costs.

14 Respectfully submitted this 23rd day of February, 2009.

15
16 **LUJAN AGUIGUI & PEREZ LLP**

17
18 By:

19 
20 _____
21 **ANTHONY C. PEREZ, ESQ.**
22 *Attorneys for Plaintiffs Rossana San Miguel*
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Edo B. Amador
Governor

Michael W. Cruz, Jr.
Lieutenant Governor

11/16/2008

The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Salazar:

Thank you for your continued leadership and support of policy initiatives that positively affect U.S. territories, including Guam. As I expressed to you last month, the government of Guam remains faced with a critical need to build new facilities and improve existing facilities to support both our population and the expected increase associated with the "U.S.-Japan Alliance: Transformation and Realignment for the Future" entered into by the United States and Japan in 2005 and ratified recently by the Secretary of the U.S. Department of State and the Foreign Minister of Japan in the Guam International Agreement.

I humbly request for your support of my request to U.S. Department of Agriculture Secretary Tom Vilsack to fund the construction of a new sanitary landfill in Lagoon, Guam. The total project cost is approximately \$170 million. The request comes as scientific data has determined that the remaining useful life of the existing landfill is estimated to be less than 36 months.

Our only civilian landfill is currently an old, non-compliant dump that must be closed for the protection of public health and the environment. After years of struggling to comply with environmental regulations and more recently, court orders, and despite continued technical assistance from the U.S. Department of the Interior (DOI), on March 17, 2008, the United States District Court of Guam issued a Court Order that placed the Solid Waste Management Division of the Department of Public Works in Guam in Receivership. Guam is committed to resolving this problem and building a new, compliant facility that will meet current and future needs.

However, the economic forces that have adversely impacted the financial markets nationwide have made conventional municipal financing resources an unrealistic solution for our immediate needs. This situation has compelled the government of Guam to consider alternative financing solutions to fund essential community facilities and infrastructure projects over an abbreviated

period of time as outlined by the U.S. Department of Defense in their efforts to move the III Marine Expeditionary Force to Guam from Okinawa.

Among the most important of these facilities is the Layon landfill, which will serve the entire island community. Coupled with an accelerated effort to develop and implement recycling and hazardous waste strategies, we are confident that Guam can reduce the volume of materials directed to the new landfill and come into compliance with the five-year old Consent Decree. Ultimately, this project would bring resolution to a challenge our community has struggled with for decades.

I also ask for your support of my request to the Secretary of Agriculture in granting a waiver for certain population criteria, allowing the government of Guam to apply for funding for this project. The waiver authority granted to the Secretary is in the 2008 Farm Bill. As you are aware, the island population, based on 2000 US Census data, is estimated to be 154,805. Furthermore, of the thirty-two (32) Census Designated Places (CDP), only the Tamuning CDP at 10,833 exceeds the USDA Water & Environmental Programs population threshold. The Tamuning CDP represents approximately seven percent of the entire island population.

It is my understanding that the previous administration was in negotiations with DOI on language that would support funding for Guam infrastructure projects regardless of population. It is my desire that this effort continue to develop as this would be crucial to the availability of resources to fund critical infrastructure projects for our island.

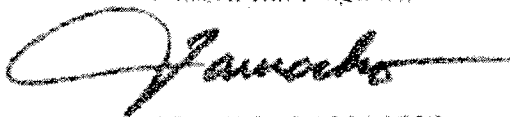
Finally, I ask for you to advocate on behalf of Guam that the island receive assistance from USDA as a Substantially Underserved Trust Area (SUTA) as outlined in Public Law 110-246, signed in June 2008.

I humbly request your support to the USDA in authorizing the provisions as summarized in SUTA to the Guam Landfill project as well as for other critical infrastructure projects in support of the rural residents of the Island of Guam.

With the urgency for this project, I can attest that this project is "shovel ready" and preliminary work on this project has since commenced.

Again, I respectfully request your assistance in addressing the critical issues facing the people of Guam.

Sinsere yan Magåhet,



FELIX P. CAMACHO
I Muga' Låhen Guahan
Governor of Guam



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John P. Camacho
Governor

Michael W. Cruz, Sr.
Assistant Governor

10/15/2009

Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Avenue SW
Washington, DC 20250

Dear Secretary Vilsack,

Haga Adan! I wanted to take this opportunity to congratulate you on your recent confirmation as the 30th Secretary of the U.S. Department of Agriculture (USDA). On behalf of the people of Guam, we are truly excited about the opportunity to be able to work with you for the best interests of our island and our great nation. I am certain that under your leadership, Guam will see many opportunities that can help our community address longstanding challenges.

As you know, the impact of the relocation of U.S. Marines from Okinawa to Guam as part of the "U.S.-Japan Alliance: Transformation and Realignment for the Future" entered into by the United States and Japan in 2005 will certainly impact the social and economic base of our community. The Government of Guam continues to prepare our island to meet these challenges in a relatively short amount of time, and I ask your support in meeting one of the most fundamental needs of both this move and our island.

I humbly request for your support in assisting our island with funding a critical infrastructure project- the construction of a new sanitary landfill in Lagon, Guam. The total project cost is approximately \$170 million. The remaining useful life existing of the existing landfill is estimated to be less than 36 months.

This timeline, already compressed by existing conditions, has become even more urgent due to anticipated military activity. Buildup plans envision the relocation of U.S. Marines from Okinawa to Guam, improving Guam's Naval Base to serve as a forward operations and logistics hub, and development of Andersen Air Force Base to serve the new forward-based requirements. The current military population on the island is expected to grow from the current state of approximately 14,000 active duty personnel and dependents to nearly 40,000 in a five year period.

The impacts of relocating approximately 8,000 Marines and 9,000 family members, plus the movement of other forces and capabilities in the interest of national security will be

significant for our American community of 170,000 people. Not least among these impacts will be the additional solid waste management challenges for a system that is already strained.

On February 11, 2004, the Government of Guam and the U.S. Environmental Protection Agency signed a Consent Decree that ordered the government of Guam to close the Ordot Dump, cease all toxic leachate discharges into the Lonfil River in Central Guam, open a new municipal solid waste landfill facility, and develop and implement recycling and hazardous waste strategies to reduce the volume of materials disposed in a new landfill.

After years of struggling to comply with the federal government on this matter, on March 17, 2008, the United States District Court of Guam issued a Court Order that placed the Solid Waste Management Division of the Department of Public Works in Guam in Receivership. The ultimate goal of the Receiver and the government of Guam is to close the old facility and build a new, compliant landfill that will serve the entire island community.

With your assistance, I would like to finally resolve this decades-old issue and provide the new landfill our island has needed for many years. To accomplish this goal, I would like to request your favorable consideration to support a waiver for the population criteria, as authorized in Public Law 110-246, and allow the Government of Guam to apply for funding for this critical project. The island population, based on the 2000 US Census, is estimated to be 154,805. Furthermore, of the thirty-two (32) Census Designated Places (CDP), only the Tamuning CDP at 10,833 exceeds the USDA Water & Environmental Programs population threshold. The Tamuning CDP represents approximately 7% of the entire island population.

It is my understanding that the previous administration was in negotiations with the U.S. Department of Interior (DOI) on language that would support funding for Guam infrastructure projects regardless of population. It is my desire that this effort continue to develop as this would be crucial to the availability of resources to fund critical infrastructure projects for our island.

The 2008 Farm Bill also makes reference to Substantially Underserved Trust Areas (SUTA), of which Guam and the other U.S. Affiliated Pacific Islands are SUTA eligible.

SUTA provides the Secretary of Agriculture with the authority to, among other authorities:

- May make available from loan or loan guarantee programs administered by the Rural Utilities Service to qualified utilities or applicants financing with an interest rate as low as 2 percent, and with extended repayment terms,
- May waive non-duplication restrictions, matching fund requirements, or credit support requirements from any loan or grant program administered by the Rural

Utilities Service to facilitate the construction, acquisition, or improvement of infrastructure

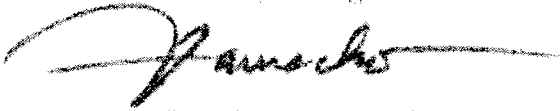
- May give the highest funding priority to designated projects in substantially underserved trust areas; and
- Shall only make loans or loan guarantees that are found to be financially feasible and that provide eligible program benefits to substantially underserved trust areas.

I humbly request your support in authorizing the above provisions as summarized in SUIA to the Guam Landfill project as well as for other critical infrastructure projects in support of the rural residents of the Island of Guam.

With the urgency for this project, I can attest that this project is "shovel ready" and preliminary work on this project has since commenced.

Again, I respectfully request your assistance with addressing the critical issues facing the people of Guam. Thank you for your time and consideration on this urgent matter.

Sinsorn yan Magahet



FELIX P. CAMACHO
I Maga' Lahen Chuahan
Governor of Guam



Felix P. Camacho
Governor

GUAM

ECONOMIC DEVELOPMENT AUTHORITY
Ateridad Inadilanton Iknunmihan Guahan



Michael W. Cruz, M.D.
Lieutenant Governor

NOTICE OF PUBLIC HEARING

Dated: November 3, 2009

NOTICE IS HEREBY GIVEN that on Wednesday, November 18, 2009 at 10:00 a.m., the Guam Economic Development Authority (GEDA) will hold a public hearing on behalf of Guam Resources Recovery Partners (GRRP) at the GEDA offices located at the ITC Building, 590 South Marine Drive, Suite 511, Tamuning, Guam, to consider the following:

APPLICATION OF PRIVATE ACTIVITY BONDS

GEDA will conduct a public hearing on behalf of GRRP as required by Section 147(f) of the Internal Revenue Code of 1986, as amended, at which time it will hear and consider information concerning GRRP's February 2009 Application for Private Activity Bonds in the aggregate principal amount of \$150,000,000.

GRRP intends to use the bond proceeds to construct a landfill on Lot 439-R1, municipality of Santa Rita, near the Old Guam Oil Refinery, and to construct a Waste-to-Energy (WTE) plant (collectively the "Projects"). The total cost of the Projects is estimated to be \$250,000,000. GRRP will apply for further bond allocations for Solid Waste Disposal Facilities over the next three years to cover the full cost of the Projects. A combination of bonds and equity financing arrangements will fund the entire amount necessary for the Projects.

GEDA encourages interested parties to attend this public meeting and comment on the issues being discussed. If you wish to provide testimony and are unable to attend the meeting, GEDA will be accepting written comments that are delivered prior to the time of the hearing, and for ten days thereafter which will be made a part of the public record.

Questions regarding this matter should be directed to GEDA at 671-647-4332.

/s/ ANTHONY C. BLAZ
Administrator

Pursuant to Public Law 25-12, funding for this ad was paid by GEDA's General Fund