



*Office of the Governor of Guam*

March 27, 2013

David L. Manning  
GBB Solid Waste Management Consultants  
Receiver Representative  
DPW Solid Waste Management Division  
542 North Marine Corps Drive  
Tamuning, Guam 96913

**Re: Government of Guam v. 1,382,428 Square Meters, More or Less, Situated in the Municipality of Inarajan, Guam, et. al.**  
**Superior Court of Guam Civil Case No. CV0084-08**

Dear Mr. Manning:

This is to respond to your letter dated February 7, 2013, addressing the concerns raised in my February 4 letter to the Attorney General of Guam regarding payment of the Superior Court of Guam's judgment in the Layon Landfill condemnation case. Essentially, the federal Receiver disagrees that the funding for the judgment should be appropriated from the proceeds of the Government of Guam Limited Obligation (Section 30) Bonds. Rather, the Receiver suggests instead that the Government of Guam satisfy the judgment by taking advantage of its "taxing and borrowing authority."

As was correctly pointed out, it is the Receiver's responsibility to fully implement the Consent Decree. To this end, the Consent Decree charges the Receiver with the construction and operation of the new landfill, including the taking of any "*other measures necessary to comply with Government of Guam regulations regarding siting.*" Unquestionably, acquisition of the real property necessary to host the landfill is basic prerequisite for construction of the landfill, and therefore it cannot be denied that the Receiver's fiduciary duties include the taking of *any and all* steps necessary to accomplish said acquisition. To this end, the Receiver's response in denying responsibility to implement the Consent Decree with respect to completing the acquisition process, as well as the rationale given for that denial is inadequate and legally erroneous for a number of reasons.

First, the argument that the Landfill Bonds were never intended to be used to pay for land acquisition costs is contrary to the facts. Indeed, it was the Government's position going back to 2009 that all outstanding and future capital costs incurred by the Government to comply with the Consent Decree should be paid out of the proceeds of the Landfill Bonds. The Receiver

acknowledged the Government's positions immediately after the Landfill Bonds were issued (*see* July 15, 2009 Quarterly Report of the Receiver p. 21), and soon after, the Receiver registered its agreement when it trumpeted full funding as an accomplishment of the receivership. (*See* April 8, 2010 Quarterly Report of the Receiver p. 2).

Paying the just compensation judgment is also clearly a cost of complying with the Consent Decree. The District Court expressly ordered the Government to condemn the land for the Layon Landfill pursuant to the Consent Decree. [Dkt. 177-2 p.3.] Nothing in the District Court's order provided for separate funding of the acquisition cost. The Receiver's first report to the District Court represented that the acquisition cost of the land was an unpaid capital cost of compliance that needed to be funded. (*See* July 10, 2008 Quarterly Report of the Receiver p. 17.)

Both the Receiver and the Government also knew before the Landfill Bonds were issued that the condemnation action could result in an award of additional just compensation to the former landowners. The Indenture and the Supplemental Indenture for the Landfill Bonds were drafted broadly enough to allow for the costs of acquiring the Layon Landfill to be paid out of the Landfill Bonds for that reason, and any interpretation of the definition of the "Series 2009A Project" in the Supplemental Bond Indenture to exclude land acquisition is unwarranted. The definition clearly provided for the payment of "acquisition" costs of the Layon Landfill. (Supplemental Bond Indenture § 12.01). To parse out "acquisition" to mean acquiring everything necessary to the completion of the Layon Landfill *except for the land* is to ignore the intent and purpose of the Landfill Bonds.

The argument that the Receiver believed the site for the Layon Landfill had already been paid for is also untenable in light of the Receiver's own representations to the District Court. From its first report to the District Court, the Receiver acknowledged that the acquisition was not complete and that the total cost of the land acquisition had not yet been determined. (July 10, 2008 Quarterly Report of the Receiver p. 6). Among the "areas requiring capital funding" listed by the Receiver, the first one identified by the Receiver was "[a]cquisition of land for new landfill and access road." (*Id.*) In subsequent reports, the Receiver continued to acknowledge that the outcome of the condemnation litigation would affect the overall capital cost of the Consent Decree. (*See e.g.* April 11, 2012 Quarterly Report of the Receiver p. 34).

Second, there is no rational basis for using the Landfill Bonds to pay for the closure of the Ordot Dump to the exclusion of paying for the Layon Landfill land. Essentially, the Receiver's argument is that despite there being sufficient funds available from the Landfill Bonds, the Government should nevertheless raise separate funds to pay the just compensation judgment. In effect, the Receiver takes the position that unexpected (*i.e.* unbudgeted) costs of closing the Ordot Dump must be paid out of the Landfill Bonds, but the Landfill Bonds may not be used to pay for acquiring the Layon Landfill because they were unexpected.

The Receiver's position makes no sense. First, if the Government could raise money to pay just compensation, it could also raise money to pay for a commensurate shortfall in funding the closure of the Ordot Dump, particularly since unlike the just compensation judgment, the cost of closing the Ordot Dump is not due immediately nor is it accruing interest at a rate of more

than \$110,000 per month. Second, while the Receiver clearly failed to adequately budget for both land acquisition and the cost to close the Ordot Dump, compliance with the Consent Decree still requires payment for both the land acquisition and closure of the Ordot Dump.

The Landfill Bonds were specifically created to pay such obligations, and this remains true even if the Receiver did not adequately budget for them. Since the Government cannot avoid paying for both of these obligations, the Government and the Receiver must work together to achieve a viable solution, which necessarily starts with paying the just compensation judgment immediately rather than incur additional interest and risk reversion of the land back to its former landowners.

Moreover, should the former landowners be forced to file suit to recover title to the land due to the Receiver's refusal to use the Landfill Bonds to pay just compensation, the Government runs the risk an immediate default under the Landfill Bond indentures and falling out of compliance with the Consent Decree. This could trigger immediate repayment to the bondholders, causing a massive shortfall in funding for all Consent Decree projects. If title to the land reverts back to the former landowners, the Government would likely have to pay significant amounts to the former landowners to use the Layon Landfill. It will also be much more costly to re-condemn the landfill in a subsequent action now that it is improved. Given these unpalatable alternatives, the only rational use of the Landfill Bonds at this time is to use the available proceeds of the Landfill Bonds to pay the just compensation judgment.

Fourth, it is untrue that a District Court order prohibits using remaining Landfill Bonds funds for purposes other than the closure of the Ordot Dump. (Receiver Letter p. 4.) That is not what the District Court ordered. The District Court has not issued any order which would prevent the Receiver from satisfying an unpaid obligation undertaken by the Government to comply with the Consent Decree.

On November 3, 2011, the District Court issued an order which followed the Receiver's recommendation to deny the Government's request for reimbursement of costs already paid by the Government. [Dkt 836 p. 3.] Since the Government's request did not include any unpaid obligations, the District Court's order did not have any effect on the Government's ability maintain compliance with the Consent Decree and did not affect any third parties.

That request is readily distinguishable from this one. Here, the Government is requesting payment of an overdue, unpaid Consent Decree capital obligation to third parties. Failure to pay the obligation will result in irreparable harm to the Government's ability to comply with the Consent Decree.

The limitations of the District Court's November 3, 2011 order were also revealed by subsequent events. In early 2012, the Receiver asked the District Court to approve payment of safety repairs to Route 4 from capital funds at a cost of several million dollars. (*See*, Dkt. 885.) The Receiver's request was approved, notwithstanding the November 3, 2011 order. These repairs were arguably necessary as a matter of public safety but were not required to implement the Consent Decree and were not included in either the Landfill Bonds or the Receiver's budget

for the Consent Decree projects. Since acquisition of the land for the Layon Landfill was strictly required under the Consent Decree and payable out of the Landfill Bonds by the Receiver's own admission, the District Court's November 3, 2011 order clearly cannot be read to prohibit using the Landfill Bonds to pay the just compensation judgment.

Lastly, the Receiver's position creates an emergency where there was none in that the Government is being placed in the position of having to inform the Superior Court that it is unable to pay the just compensation judgment. This has two immediate potential consequences: First, given the strict requirements of the Constitution and the Organic Act, title to the land will revert to its former owners. Second, it is possible that the Government will be in immediate default under the Supplemental Indenture because the Government's rights to System Revenues generated by the Layon Landfill will be impaired. Furthermore, if title to the land does revert back to its former owners and the Government stops receiving System Revenues, it will not only have an enormous effect on the sustainability of the project going forward but it could result in an incurable default of the Landfill Bond indentures triggering immediate repayment.

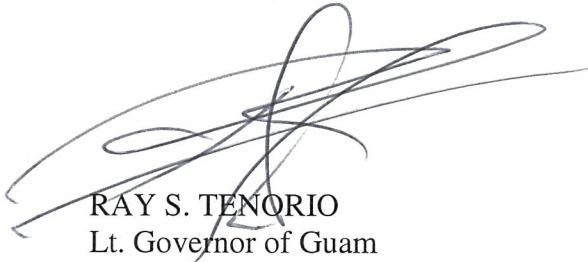
This emergency is completely avoidable. Paying the judgment out of the Landfill Bonds now and then working together with the Government to ensure that there are sufficient funds to pay for closure of the Ordot Dump is a workable alternative, particularly given the Receiver's confidence that additional funds can be raised, if necessary. Furthermore, the Government (together with the Receiver) could use the opportunity to seek federal funding for the costs specifically associated with clean-up and closure of the Ordot Dump since the federal government has been a primary source of the environmental problems at the Ordot Dump going back to World War II.

In short, and for these reasons, it would be unconscionable to expect the people of the Guam to shoulder additional tax and debt burden when there is already \$40 million from the Landfill Bond proceeds available to pay the just compensation judgment. To the extent that the Landfill Bond proceeds are insufficient for that purpose, the Government welcomes the assistance of the Receiver to develop a plan for paying for Consent Decree projects, preferably with an emphasis on seeking federal grants to reflect the federal government's creation of many of the environmental problems associated with the Ordot Dump and its imposition of the current obligations on Guam.

However, the Government's dire funding situation likely will require the Government to challenge the Receiver's refusal to use the Landfill Bonds to pay just compensation judgment to the detriment of the Government and the people of Guam. The Receiver has an obligation to approve payment of the just compensation award now and to work with the Government to fund any shortfall in connection with the remaining Consent Decree projects, including closure of the Ordot Dump. In the meantime, it would seem that simple fiscal prudence requires that any other further joint requisitions requested by the Receiver not be authorized by the Office of the Governor until these funding issues are resolved.

On behalf of the people and the Government of Guam, I therefore respectfully request that the Receiver reconsider its position and agree to use the Section 30 funds for payment of the just compensation judgment related to the condemnation of the Layon Landfill.

*Senseramente,*



RAY S. TENORIO  
Lt. Governor of Guam

Cc: Attorney General of Guam