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IN THE SUPERIOR COURT OF GUAM

GERSHMAN, BRICKNER & BRATTON,
INC. AS FEDERAL RECEIVER FOR
GUAM SOLID WASTE AUTHORITY,

Civil Case No. CV0593-24

Plaintiff,

MOTION TO DISMISS

v.

GUAM WATERWORKS AUTHORITY and
DB INSURANCE CO., LTD.,

Defendant.

Pursuant to Guam Rules of Civil Procedure 7 and 12, and 12 G.C.A. § 14109(c), the Attorney General, on behalf of Defendant Guam Waterworks Authority ("GWA"), respectfully moves the Court to dismiss Plaintiff's Complaint in this action due to a lack of subject matter jurisdiction.

INTRODUCTION

On October 31, 2024, Plaintiff Gershman, Brickner & Bratton, Inc. ("GBB" or "Plaintiff"), purportedly in its capacity as a federal receiver for the Guam Solid Waste Authority ("GWSA"), filed a case against Defendant, Guam Waterworks Authority ("GWA") and DB Insurance Co., LTD. See Complaint. GBB alleges negligence and

ORIGINAL

1 World War II and used it as a disposal site for military refuse from the wartime years,
2 including munitions, unexploded ordnance, and toxic military waste. Later, the Ordot
3 Dump became the only municipal solid waste disposal facility on island.

4 The United States Environmental Protection Agency ("USEPA") declared Ordot a
5 Superfund site in 1983, pursuant to the Comprehensive Environmental Response,
6 Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601-9675. After determining
7 that it would take no further action pursuant to CERCLA, USEPA issued a series of
8 unilateral administrative orders pursuant to the Clean Water Act ("CWA"), 33 U.S.C. §
9 1251-1389, under which the United States retained sovereign immunity, directing
10 GovGuam to fund and complete remediation of the Ordot Dump. GovGuam was unable
11 to comply with USEPA's orders due to a lack of funding, so the United States sued
12 GovGuam pursuant to the CWA in 2002, alleging that GovGuam was allowing the
13 discharge of leachate from the Ordot Dump into the Lonfit River and two of its
14 tributaries. In 2004, after two years of litigation in the United States District Court for the
15 Territory of Guam ("Federal Court"), the parties entered into a comprehensive Consent
16 Decree. See ECF 55.³ In 2008, again due to the lack of funding and effort required to
17 close the Ordot Dump, the Federal Court appointed GBB as a receiver to complete the
18 work of the now-defunct Solid Waste Management Division of the Department of Public
19 Works and satisfy the terms of the 2004 CWA Consent Decree with the United States,
20 including the closure of the Ordot Dump. The primary goal of the closure was to prevent
21 future leachate generated at the dump from entering the Lonfit River or its tributaries.

22
23 ³ Unless otherwise noted, Electronic Case Filing (ECF) Numbers are citations to the docket in *United*
24 *States v. Gov't of Guam*, No. Civ. 02-00022 (D. Guam Aug. 7, 2002), a matter currently before Judge
Frances M. Tydingco-Gatewood in the United States District Court for the Territory of Guam. As required
by General Rule 4.1, the docket in its entirety is available through LexisNexis, at
<https://advance.lexis.com/api/permalink/70105af7-8824-445f-8611-3427b6333bd5/?context=1519217>. If
the Court cannot access any of the cited documents, counsel will provide courtesy copies upon request.

1 **B. Guam Solid Waste Authority and Guam Waterworks Authority.**

2 In 2011, the Guam Legislature passed the Guam Solid Waste Authority Act
3 (Public Law 31-020) creating GSWA as the successor to the Solid Waste Management
4 Division of the Department of Public Works. As codified at 10 G.C.A. § 51A101 *et seq.*,
5 “[t]he Solid Waste Management Division, a sub-entity of the Department of Public
6 Works shall continue in existence as an autonomous, public corporation now referred to
7 as the Guam Solid Waste Authority [.]” *Id.* § 51A103. GSWA is responsible for the
8 collection, transportation, disposal, storage, recycling, and processing of solid waste on
9 Island of Guam. *Id.* § 51A104(a)(4). In 2019, the Federal Court partially terminated the
10 receivership thereby severely limiting GBB’s powers. ECF 1880 at Exhibit 3. GSWA’s
11 Board regained “administrative and managerial responsibility over GSWA’s day-to-day
12 operations, including control over the bank accounts related to said operations, with the
13 exception of the Ordot Dump Post-Closure Reserve Account.” *Id.* at 4. GBB only
14 retained the power to “oversee and control all work associated with the post-closure of
15 the Ordot Dump.” *Id.* at 2. The post-closure work at the Ordot Dump is comprised of
16 only three tasks: “(1) implementing remediation plan for potentially explosive gases; (2)
17 completing development of groundwater monitoring program; and (3) expanding the
18 leachate monitoring program.” *Id.*

19 On March 15, 2013, GWA entered into an agreement with GBB to accept
20 leachate wastewater discharged from the Ordot Dump following completion of the
21 closure construction. GWA agreed to treat the leachate at rates set by the Guam Public
22 Utilities Commission. See Letter from Martin Roush, General Manager for GWA, to
23 David Manning, GBB representative (Mar. 13, 2013); see also Ex. 1 at 5.

1 **C. Dero Road Waterline Leak.**

2 While the Ordot Dump stopped accepting waste in 2011, and closure
3 construction was completed in 2016, the amount of leachate generated at the dump did
4 not decline as expected for a closed landfill, even an unlined one. ECF 2115, Exhibit A
5 at § 3.3. The anomaly suggests faulty closure design and construction. *Id.* §§ 2.1, 3.4,
6 5. Until the error in the Ordot Dump's design and construction is corrected, surface
7 water and groundwater from areas outside the dump will continue to infiltrate through
8 the ground, mingle with the waste and existing leachate, and contribute to and increase
9 the leachate volume requiring treatment. *Id.*, § 2.2; Sixth Joint Report at 4-5, ECF 2001.

10 In December 2022, GWA discovered leaks from its waterline along Dero Road.
11 ECF 1964. GWA promptly repaired the leaks. The leaks, compounded by the faulty
12 closure design and construction, may have caused increases in leachate volumes at
13 the Ordot Dump facility, requiring treatment by GWA.

14 On May 19, 2023, GWA met with GSWA and the Public Utilities Commission to
15 identify a resolution to the past costs associated with the treatment of an increased
16 volume of leachate due to the GWA leaks that would not increase utility rates for Guam
17 residents. ECF 2148. The next month, GWA informed counsel and representatives for
18 GovGuam, USEPA, and GBB that efforts to discuss a GWA credit or rate rebate
19 resulting from discovered leaks had commenced. *Id.*

20 Months after GovGuam filed its case against the contractors for design and
21 construction defects impacting leachate volume and sought the addition of GBB as a
22 defendant, on August 13, 2023, for the first time, GBB demanded \$2.65 million from
23 GWA on behalf of GSWA for the increased cost in leachate treatment caused by the
24 waterline leaks. ECF 2145 at 2. GWA declined the request, citing the need to collect

1 more data to conduct an analysis and determine "a reasonable credit[.]" Ninth Report,
2 ECF 2136 at Exhibit K. GWA reiterated that GWA and GSWA were working toward a
3 resolution and the possibility of a credit.

4 Discussions between the two agencies continued, and on August 15, 2024, after
5 a year of negotiation, GWA offered GSWA an account credit of approximately \$1 million
6 as a starting point for a settlement for excess leachate volumes received prior to
7 December 2022 due to the Dero Road water leak. ECF 2148. GSWA responded to
8 GWA's request on the same day, asking that the GWA/GSWA resolution be included in
9 the Eighth Joint Status Report, stating that "GSWA is not being harmed and GWA
10 would like to resolve this matter. The credit shows good faith effort to that end." *Id.* at
11 Exhibit I.

12 On August 21, 2024, GWA received a second demand letter from GBB that
13 ignored the agencies' negotiations and purportedly sought to settle the cost for leachate
14 treatment associated with the Dero Road water leak for \$4.4 million. ECF 2145 at 2.
15 GWA again informed GBB of the agreement in principle already reached between GWA
16 and GSWA on September 20, 2024. ECF 2149. GWA offered to meet with GBB on
17 October 29, 2024, to discuss the letter but withdrew its offer after learning that GBB
18 would file suit against GWA regardless of a meeting. ECF 2149. GBB initiated the
19 present action on October 31, 2024. GBB did not exhaust its administrative remedies
20 prior to bringing the instant lawsuit. Moreover, GBB did not have GSWA's board's
21 approval to bring the lawsuit on its behalf.

22 **LEGAL STANDARD**

23 Rule 12(b)(1) provides the basis for dismissing a civil action for lack of subject
24 matter jurisdiction. Guam R. Civ. P. 12(b)(1). Jurisdiction is a threshold issue and any

1 motion challenging a trial court's jurisdiction over a matter may be dispositive of the
2 entire case. See *Petition of Quitugua v. Flores*, 2004 Guam 19, ¶ 31 (Guam Oct. 4,
3 2004). In evaluating a motion to dismiss for lack of jurisdiction, the court can consider
4 matters outside the pleadings. *Linsangan v. Govt. of Guam*, 2020 Guam 27, ¶ 38
5 (Guam Dec. 29, 2020).

6 If a party is immune to suit, the court will not have subject matter jurisdiction over
7 the matter. See *Ehlert v. U. of Guam*, 2019 Guam 27, ¶ 11 (Guam Dec. 30, 2019) ("The
8 doctrine of sovereign immunity, which is a component of subject matter jurisdiction,
9 applies in Guam."). Additionally, when a party is suing on behalf of another, they must
10 have the authority to sue, and any argument disputing their authority must be made by
11 motion before the pleading or through the responsive pleading. *De Saracho v. Custom*
12 *Food Mach., Inc.*, 206 F.3d 874 (9th Cir. 2000) (citing *Summers v. Interstate Tractor &*
13 *Equip. Co.*, 466 F.2d 42, 49–50 (9th Cir.1972)). Where "the bar of sovereign immunity
14 is absolute," dismissal with prejudice is permitted. *Id.* at *3.

15 Based upon the foregoing, and the arguments appearing below, the Court
16 should dismiss GBB's Complaint against Defendants with prejudice for lack of subject
17 matter jurisdiction.

18 ARGUMENT

19 The Court lacks subject matter jurisdiction. In the "context of a Rule 12(b)(1)
20 motion to dismiss on the basis of sovereign immunity, the party asserting subject
21 matter jurisdiction has the burden of proving its existence, i.e. that immunity does not
22 bar the suit." *S.C. v. Gov't of Guam*, No. CV 21-00015, 2022 WL 892081, at *1 (D.
23 Guam Mar. 25, 2022) (citing *Wood v. Guam Power Auth.*, 2000 Guam 18 (Guam June
24

1 2, 2000)). GBB has entirely failed to meet its burden. Moreover, based upon the
2 applicable facts and law, GBB cannot meet its burden.

3 **A. GWA is protected by sovereign immunity.**

4 GWA is a public corporation and autonomous agency of Guam. 12 G.C.A. §
5 14103; 5 G.C.A. § 6102. As such, it is protected from suit by sovereign immunity. 5
6 G.C.A. § 6102 (“[The Government Claims Act] applies “to the entire government of
7 Guam, as specifically stated herein . . . reference to an autonomous agency shall
8 include public corporations, autonomous and semi-autonomous agencies, including . . .
9 the Guam Waterworks Authority.” See, e.g., *Bautista v. Agustin*, 2015 Guam 23, ¶ 20
10 (Guam Aug. 4, 2015) (“The Retirement Fund is an agency of the Government of Guam,
11 and sovereign immunity applies to the Retirement Fund.”).

12 When a party is protected by sovereign immunity, the case has a jurisdictional
13 defect that requires dismissal of the action. Guam R. Civ. P. 12(h)(3) (“Whenever it
14 appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the
15 subject matter, the court shall dismiss the action.”); see *Ehler*, 2019 Guam 27, ¶ 11.
16 When sovereign immunity applies, “the court lacks subject matter jurisdiction, and the
17 action is barred.” *Bautista* at ¶ 16. Sovereign immunity can only be waived “by duly
18 enacted legislation.” *Id.* at ¶ 22. GBB’s suit has not been brought pursuant to a statute
19 that has waived GWA’s sovereign immunity.

20 Additionally, a claimant must satisfy the administrative prerequisites set forth in
21 the Government Claims Act before filing suit against the government. *Guam Police*
22 *Dep’t v. Superior Ct. of Guam*, 2011 Guam 8, ¶ 32 (Guam May 10, 2011) (“a claim is
23 required to be filed administratively before a claimant is able to file an action against the
24 government.”).

1 Thus, only for expressly limited causes of action *and* upon fulfillment of
2 prerequisites expressly defined in the Government Claims Act, has the legislature
3 waived the government's sovereign immunity from suit. *Id.* Here, the claimant has
4 neither asserted any waiver of GWA's sovereign immunity nor adhered to the
5 administrative procedure provided in and required by the Government Claims Act.
6 Therefore, the Court lacks subject matter jurisdiction over this case and must dismiss
7 the lawsuit against GWA.

8
9 **1. Citation to a specific legislative waiver of sovereign immunity is required
for GBB to sue GWA and it does not exist in this case.**

10 *First*, no legislation exists that waives GWA's sovereign immunity in this case.
11 The Organic Act "grants the Legislature the power to waive sovereign immunity as it
12 sees fit." *Wood v. Guam Power Auth.*, 2000 Guam 18, at *4 (citing *Munoz v. Gov't of*
13 *Guam*, Civ. No. 76-16A, 1978 WL 13511, at *1 (D: Guam App. Div. Mar. 13, 1978)); 48
14 U.S.C.A. § 1421a. Therefore, a plaintiff suing the government or its agencies must point
15 to a specific legislative waiver of sovereign immunity. 48 U.S.C.A. § 1421a; *see Ehlert*,
16 2019 Guam 27, ¶ 11 (Guam Dec. 30, 2019). In the absence of such legislative waiver,
17 sovereign immunity applies to any "government agency, whether denominated as a line
18 department, an agency or a public corporation" 5 G.C.A. §§ 6102 & 6105. GWA is
19 therefore entitled to immunity from suit based upon sovereign immunity unless GBB
20 brought its case in accordance with, and cited to, a legislative exception.

21 But here, GBB did not bring its case pursuant to, or cite to, any waiver of
22 immunity identified in the Act or otherwise. 5 G.C.A. § 6105. GBB instead brought
23 common law negligence and breach of contract claims against GWA. See Complaint at
24 ¶ 46-55, 59-64. However, GWA retains its sovereign immunity from these claims.

1 Therefore, GWA is immune to GBB's suit, and "[w]ithout a waiver of sovereign
2 immunity, the courts lack subject matter jurisdiction over the claim." *Wood*, 2000 Guam
3 18, at *2. Accordingly, the Court should dismiss GBB's suit against GWA upon this
4 basis alone.

5 **2. Even if GBB amended its Complaint to bring claims under the Government**
6 **Claims Act, GWA would still be immune from suit due to GBB's failure to**
7 **timely exhaust its administrative remedies.**

8 *Second*, even if GBB attempted to amend its Complaint to include claims under
9 the Government Claims Act, its claims would be procedurally deficient and untimely.
10 This is because the Act sets forth an administrative process requiring a claimant to
11 submit an administrative claim within 18 months from the date the claim arose. 5 G.C.A.
12 § 6106(a). The claimant can only file an action in court. *i.e.*, a court only has subject
13 matter jurisdiction, if the claimant timely exhausts its administrative claim by being
14 notified that the government has rejected its administrative claim, or if six months have
15 passed since the date of submitting its claim, either within the 18-month limitation. 5
16 G.C.A. § 6209.

17 For claims against the government, the statute of limitations as articulated in the
18 statutory claim act is jurisdictional in nature and, as an express limitation on the waiver
19 of sovereign immunity, may not be waived. *Pacific Rock Corp. v. Dep't of Educ.*, 2001
20 Guam 21 9C 18; *Cooper v. United States*, 47 Fed. Cl. 115, 117 (2000) (citing *Hart v.*
21 *United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990). Here, the Government has only
22 waived sovereign immunity for those claims lodged within an 18-month period from the
23 date the claim arose after the claim has been denied or the expiration of six months
24 since submission. 5 GCA § 6106(a); *Guam Police Dep't*, 2011 Guam 8 ¶ 31 ("a claim is
required to be filed administratively before a claimant is able to file an action against the

1 government"). Where a party fails to file a timely administrative claim, and thus has
2 failed to comply with the Government Claims Act, the court does not have jurisdiction to
3 proceed and cannot entertain the suit. *Guam Police Dep't*, 2011 Guam 8 9C 32. This
4 procedural defect is applicable to both tort and contract claims, as "the procedures set
5 forth in the Government Claims Act for making a claim against [an agency] will still
6 apply to those claims unless otherwise stated by the contract." *Antonio B. Won Pat Int'l*
7 *Airport Auth., Guam v. DFS Guam L.P.*, 2023 Guam 7, 9 n.4 (Guam Aug. 7, 2023). To
8 date, GBB has not submitted an administrative claim. Moreover, GBB's Complaint does
9 not state that it submitted a claim and/or satisfied the conditions precedent to filing suit
10 pursuant to the Act. See Ex. 1. Thus, GBB has failed to exhaust its administrative
11 remedies pursuant to the Act and the Court lacks subject matter jurisdiction over GBB's
12 claims against GWA.

13 GBB's letters to GWA demanding payment on August 16, 2023 and August 21,
14 2024 do not constitute the submission of an administrative claim. Even assuming,
15 *arguendo*, that the demand letters were a proper claims under the Act, which they are
16 not, GBB failed to send either of them—or any other relevant communication—within 18
17 months of the date GBB alleges the claim arose. In its Complaint, GBB admits that, "[I]n
18 late 2020, while analyzing accumulated annual data from 2017, the Receiver noticed a
19 trend indicating that the leachate at the Ordot Dump appeared to be increasing in
20 amounts that could not reasonably be attributed to decomposing waste at the dump
21 and groundwater from rainfall." Ex. 1 at ¶ 27. However, GBB waited almost three years
22 after GBB noticed the leachate issue and four or five years after the issue began before
23 sending its first demand letter. GBB cannot overcome GWA's sovereign immunity by
24

1 amending its Complaint to add a claim under the Government Claims Act now, and any
2 effort to do so would be futile and a waste of judicial resources.

3 "Ordinarily, a case dismissed for lack of subject matter jurisdiction should be
4 dismissed without prejudice so that a plaintiff may reassert his claims in a competent
5 court." *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988). But where, as here,
6 "the bar of sovereign immunity is absolute," dismissal with prejudice is permitted. *Id.*

7
8 **B. GBB did not have the Authority to Initiate Litigation for GSWA against
9 GWA and Acted *Ultra Vires*.**

9 GBB did not have the authority to initiate litigation on behalf of GSWA against
10 GWA. GBB can only litigate on behalf of GSWA if it has statutory or legal standing. See
11 *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881). The District Court revoked
12 GBB's power to litigate on behalf of GSWA in its 2019 Order and returned it to GSWA.
13 ECF 1880. Further, GSWA (or its duly authorized agent) can only initiate suit when its
14 Board of Directors has approved the action beforehand. See 10 G.C.A. § 51A104
15 (a)(5); 10 G.C.A § 51A105. Here, GSWA's Board was never asked for permission for
16 GBB to sue on its behalf and it never voted to approve any such suit or action. Hearing
17 Tr. 48:11-20, Dec. 18, 2024, attached as Exhibit 2. Therefore, GBB was not authorized
18 to bring suit on behalf of GSWA, acted *ultra vires*, and lacks standing in the instant
19 case.

20 **1. GBB has no authority to file suit on behalf of GSWA against GWA.**

21 *First*, pursuant to the federal Order applicable on October 31, 2024 (the date of
22 filing of the Complaint herein), GBB only had that court's authority to "take lead on"
23 discussions between GSWA and GWA regarding "rate reductions" and "rate rebates."
24 ECF 1992 at 2: GSWA, however, has authority over the rate rebate *agreement* with

1 GWA as an "administrative and managerial" matter. ECF 1880 at 4. Beginning in 2019,
2 GSWA's Board has possessed "administrative and managerial responsibility over
3 GSWA's day-to-day operations." *Id.* GBB only retained the limited ability to "oversee
4 and control all work associated with the post-closure of the Ordot Dump." *Id.* at 2. The
5 remaining Ordot post-closure work includes "(1) implementing remediation plan for
6 potentially explosive gases; (2) completing development of groundwater monitoring
7 program; and (3) expanding the leachate monitoring program." *Id.* Such post-closure
8 work does not include authority to bring suit against GWA or any entity. Indeed, even
9 most recently at the December 18, 2024 status conference, the federal court reiterated
10 that GBB was to take the "lead on discussions with GWA regarding a possible rate
11 reduction for leachate treatment and a rate rebate," and required GBB to be a "full
12 participant[]" in the settlement negotiations. ECF 2145 at 3. There is no mention of
13 revoking GSWA's authority to bring suit against GWA if it so chose (which it did not)
14 and granting such power to GBB. *Id.* Therefore, GBB did not have the authority to bring
15 the instant lawsuit on behalf of GSWA against GWA in this matter and it must be
16 dismissed.

17 **2. GSWA's Board never authorized GBB to file this action.**

18 *Second*, GBB was not authorized to bring this action against GWA because
19 GSWA's board had not approved the action. GSWA has the power to sue, but this
20 power can only be utilized when a majority vote of the Board of Directors approves the
21 decision in advance. See 10 G.C.A. § 51A104 (a)(5); 10 G.C.A. § 51A105 ("All powers
22 vested in [GSWA], except as provided herein, shall be exercised by a GSWA Board of
23 Directors."). GBB never requested a vote from the GSWA Board to approve bringing
24 the suit against GWA and a vote was never taken. Ex. 2. Instead, GBB filed suit on

1 October 31, 2024 without consulting GSWA, without GSWA's Board's approval, and
2 when GSWA and GWA had already come to an agreement in principle to settle the
3 matter in August 2024. Therefore, GBB acted *ultra vires* and without authority when it
4 brought suit purportedly on behalf of GSWA against GWA. GBB lacks standing, and its
5 suit against GWA is not authorized and should be dismissed.

6 **CONCLUSION**

7 For the foregoing reasons, Defendant respectfully requests that GBB's
8 Complaint be dismissed with prejudice.

9
10 Respectfully submitted this 6th day of January, 2025.

11
12 **OFFICE OF THE ATTORNEY GENERAL**
13 **Douglas B. Moylan, Attorney General**

14 By: 

15 **Fred Nishihira**
16 Deputy Attorney General

17 ***Attorneys for Defendant Guam Waterworks***
18 ***Authority***

EXHIBIT 1

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24 **THE DISTRICT COURT OF GUAM**

25 **GOVERNMENT OF GUAM,**

26 **Plaintiff,**

27 **v.**

28 **BLACK CONSTRUCTION
CORPORATION; BROWN &
CALDWELL; GEO-LOGIC
ASSOCIATES f/k/a VECTOR
ENGINEERING, INC. f/k/a AUSENCO
VECTOR; and GHD, INC. f/k/a
WINZLER & KELLY**

Defendants.

CIVIL CASE NO.

**COMPLAINT WITH JURY
DEMAND**

1 Plaintiff the Government of Guam (“Guam”) files this Complaint against Defendants Black
2 Construction Corporation; Brown & Caldwell; Geo-Logic Associates, Inc.; and GHD, Inc. f/k/a
3 Winzler & Kelley, for causes of action arising from Defendants’ faulty design and construction of
4 a closure remedy of the Ordot Dump.

5 INTRODUCTION

6
7 1. In 2008, largely due to a political environment that delayed or prevented Guam
8 from committing time and attention to the funding and effort required to close the Ordot Dump,
9 this Court appointed Gershman, Brickner & Bratton, Inc. (“GBB”) to stand in Guam’s shoes, meet
10 the terms of the 2004 Clean Water Act Consent Decree with the United States, and close the Ordot
11 Dump. The primary goal of the closure was to stop leachate generated at the dump from entering
12 the Lonfit River and polluting waters of the United States. Consent Decree, ECF 55 (“Consent
13 Decree”).¹

14
15 2. While the Ordot Dump stopped accepting waste in 2011, and closure construction
16 was completed in 2016, the amount of leachate generated has not declined as expected for a closed
17 landfill, even an unlined one. *See Geosyntec, Final Report: Investigation of Leachate Flow (2024)*
18 (attached as Exhibit A) at § 3.3. The anomaly is due to faulty closure design and construction. *Id.*
19 §§ 2.1, 3.4, 5. Until the error in the Ordot Dump’s design and construction is corrected, surface
20 water and groundwater from areas outside the dump will continue to infiltrate through the ground,
21 mingle with the waste and existing leachate, and contribute to the leachate volume, significantly
22 increasing disposal costs ultimately borne by the public. Ex. A at § 2.2; Sixth Joint Report at 4-5,
23 ECF 2001. Guam and its taxpayers should not be paying to treat this excess leachate.

24
25
26
27 ¹ Unless otherwise noted, Electronic Case Filing (ECF) Numbers are citations to the docket in
28 *United States v. Gov’t of Guam*, No. Civ. 02-00022 (D. Guam Aug. 7, 2002), a matter currently
pending in the District Court of Guam before Judge Frances M. Tydingco-Gatewood.

1 3. Contractors including Black Construction Corporation, Brown & Caldwell, Geo-
2 Logic Associates, Inc., and GHD, Inc., were hired to develop, implement, and oversee the closure
3 design and construction. Certain aspects of the closure are operating as expected, but the ability of
4 water to infiltrate the dump's leachate collection systems reflects significant errors. Ex. A at § 5.

5
6 4. Guam and its taxpayers have been damaged because the construction of the closure
7 of the Ordot Dump followed a faulty design, and changes made during construction exacerbated
8 the impact of the original design errors. *Id.* §§ 2.1, 5. These errors have interfered with the dump's
9 final closure, delayed termination of the receivership, and added significant cost for Guam's
10 taxpayers and ratepayers. Between the closure construction's completion in 2016 and the approval
11 of the treatment rate change in 2023, Guam's taxpayers and ratepayers have been paying \$27.42
12 per 1,000 gallons to treat water that should have never entered the dump or the dump's leachate
13 collection system. *Petition to Create New and Specific Rate Classification for Wastewater*
14 *Discharge for Leachate*, GWA Docket No. 23-08 at 4, 8-9, ECF 1996-1. Since the 2023 leachate
15 treatment rate change, Guam's taxpayers have still been paying \$14.72 per 1,000 gallons to treat
16 this excess water entering the dump. *Id.* at 6. According to Guam's experts, the treatment of
17 leachate that would not have existed had the Ordot Dump's closure been properly designed
18 amounts to Guam's taxpayers and ratepayers writing a \$3.72 million check to date. Ex. A at §§
19 3.4, 5. These additional costs will continue in perpetuity unless remedied.

20
21
22 5. Geo-Logic & Associates, Inc. ("Geo-Logic"), under the direction of Brown &
23 Caldwell and GBB, designed a system to collect and carry leachate from the dump to holding tanks
24 located downhill, at the south side of the Ordot Dump. Errors in the design and construction
25 concentrated on the western side of the dump have allowed infiltration from both groundwater and
26 surface water, such as rain, and caused an increased volume of leachate. *Id.* § 2.1.

1 6. Geo-Logic’s design had multiple errors. First, Geo-Logic decided to locate a
2 leachate collection trench (“WLIT”) in a streambed. The streambed’s topography was problematic
3 because it was located at the water table; *i.e.*, the bottom of the streambed abutted groundwater.²
4 Further, the surrounding land was naturally graded to drain into the stream.³ Finally, the waste at
5 Ordot on the western side of the landfill juts out, making little space between the mountain of
6 waste and what became—by design—the relocated stream. In short, Geo-Logic designed the
7 relocation of the naturally occurring stream that ran along Ordot’s western side farther west and at
8 a higher elevation than it existed naturally. However, water still flowed toward the historic stream
9 bed and newly installed WLIT.
10

11 7. Second, Geo-Logic designed the WLIT such that it was located beneath another
12 leachate-carrying trench, the Perimeter Leachate Collection Trench (“PLCT”). The WLIT’s
13 location directly below the PLCT means that leachate in the PLCT will enter the WLIT in the case
14 of any cracks or breaks in the surface of the PLCT, which one would expect to see if the PLCT
15 were not properly maintained. *Id.* § 2.1(1).
16

17 8. Third, in addition to design errors approved at the start of the closure project, Brown
18 & Caldwell, Geo-Logic, and GHD (“Closure Contractors”) made design changes in the field
19 during the construction that have allowed further infiltration of groundwater and surface water
20 from areas outside the dump into the leachate collection system. During construction, the Closure
21 Contractors sought approval from GBB to change the design that originally called for a non-porous
22
23
24
25

26 ² Brown & Caldwell Project Team, *Design Report: Ordot Dump Closure Construction* at 26-27
(Permitting Copy Mar. 2013) [hereinafter *2013 Design Report*].

27 ³ Brown & Caldwell, *Conceptual Site Model Update II: Ordot Dump Post-Closure Facility* at 2–
28 8 (Oct. 2021) [hereinafter *2021 Conceptual Site Model II*].

1 liner wrapped around three sides of the WLIT.⁴ Despite data demonstrating that the bedrock
2 surrounding the WLIT was very permeable and would allow water to flow through it,⁵ GBB
3 approved the change and the liner was not used at all. The WLIT was placed directly into bedrock
4 that had the permeability of sand. *Id.* § 2.1(2).

5
6 9. Fourth, during construction, the Closure Contractors changed the design for the fill
7 used around, atop, and uphill of the WLIT from compact materials to highly permeable sands,
8 corals, and gravels. *Id.* § 2.1(4). Thus, the fill material used allows surface water and groundwater
9 to infiltrate the WLIT, flow into the leachate tanks, and be sent for treatment along with the
10 leachate. *Id.*

11 10. When Guam received GBB's \$56 million future cost estimate, there was cause for
12 alarm. Rather than accept this as Guam's burden and destiny, Guam has since that time pushed for
13 answers.
14

15 11. In response to GBB's astronomical future costs estimate, this Court ordered GBB
16 to conduct an investigation of the rising leachate levels at the Ordot Dump. Order Re: Next Steps
17 Post-Hearing 1, ECF 1952. GBB thereafter tasked Brown & Caldwell to investigate its *own* work.
18 Not surprisingly, Brown & Caldwell's investigation has pointed to all the wrong places, failed to
19 report what the evidence shows and, most recently, placed blame on a third party for a leak
20 occurring *outside* the landfill. The truth, however, is that off-site water leaks would have minimal
21 impact on the leachate levels at the Ordot Dump had its closure been properly designed and
22 constructed. Ex. A at § 5. Indeed, Brown & Caldwell's investigation was flawed from the outset,
23
24

25
26 ⁴ GHD Project Team, *Final Construction Quality Assurance Report: Ordot Dump Closure
Construction and Dero Road Sewer Improvements* at 14 (Feb. 2016) [hereinafter *Final CQA
Report*].

27 ⁵ *2013 Design Report* at App. D.
28

1 as it only looked for a single, contemporaneous source of increased leachate and did not evaluate
2 whether errors were made in the original design or in design changes made during construction.

3 12. Therefore, Guam has conducted its own investigation and has come to the
4 conclusion that certain of GBB's contractors failed in the design and construction of the Ordot
5 Dump and are liable to Guam in several respects. Guam's expert report concludes that the Closure
6 Contractors should not have located WLIT in the very porous bedrock, very near the groundwater
7 table, and directly below the PLCT. *Id.* §§ 2.1, 5(2). During construction, the Closure Contractors
8 should not have removed the originally-designed geomembrane lining of the WLIT. *Id.* § 2.1(2).
9 Further, the areas surrounding the WLIT and areas uphill of the trench should not have been filled
10 with material that is highly permeable and allows surface water and groundwater to infiltrate the
11 trench, travel to the leachate storage tanks, and ultimately be treated along with the leachate
12 dewatering from the waste mass. *Id.* § 2.1(4).

13 13. Guam has suffered damages for years. Guam's taxpayers have paid significantly
14 for remedial measures such as excess leachate treatment from the leachate storage tanks, tanker
15 trucks brought on site to collect leachate from the overflowing secondary containment system.

16 14. Guam's experts have uncovered the design decisions, made before and during
17 construction, that led to the errors and determined a remedy to fix the errors. Guam brings this
18 lawsuit for damages and injunctive relief. While once Guam stood in a position unable to timely
19 close the dump, Guam now seeks to act quickly to remediate the long-standing issue of excess and
20 improper leachate generation at the Ordot Dump.

21 15. Guam deserves to have the Ordot Dump remediated so that it is properly closed as
22 it should have been in the first instance. Guam deserves to be compensated, with interest, for the
23

1 money spent paying to treat excess and improper leachate and investigate the Construction
2 Contractor's errors.

3 4 **PARTIES**

5 16. Plaintiff, the Government of Guam, brings this action in its own name, pursuant to
6 48 U.S.C. § 1421a. Guam is represented by and through the Attorney General of the Territory of
7 Guam with principal offices at 590 S. Marine Corps Drive, ITC Building, Ste. 902, Tamuning,
8 Guam 96913. *See* 48 U.S.C. § 1421g(d)(1). The Attorney General is authorized to "conduct on
9 behalf of the government of Guam the prosecution of all offenses against the laws of Guam" and
10 "represent[] the citizens as a whole for redress of grievances which the citizen individuals cannot
11 achieve." *See* 5 G.C.A. §§ 30103, 30109(a).

12
13 17. Defendant, Black Construction Corporation ("Black Construction"), is a
14 corporation organized and existing pursuant to the laws of the Territory of Guam, with its principal
15 place of business located in the Harmon Industrial Park, J. L. Baker St, Tamuning, Guam 96913.
16 Black Construction is a subsidiary of Tutor Perini Corporation, organized pursuant to the laws of
17 the State of Massachusetts, with its principal place of business located at 15901 Olden Street,
18 Sylmar, CA 91342.

19
20 18. Defendant, Brown & Caldwell ("Brown & Caldwell"), is a corporation organized
21 and existing pursuant to the laws of the State of California, with its principal place of business
22 located at 201 N. Civic Dr., Suite 115, Walnut Creek, California 94596.

23 19. Defendant, Geo-Logic Associates, Inc. (f/k/a Vector Engineering, Inc.; f/k/a
24 Ausenco Vector) ("Geo-Logic"), is a corporation organized and existing pursuant to the laws of
25 the State of California, with its principal place of business located at 2777 East Guasti Road, Suite
26 1, Ontario, California 91761.
27
28

1 Such topography is lost on modern maps. Today, the Ordot Dump is a mountain of waste reaching
2 230 feet above mean sea level.

3 25. The Ordot Dump has a long history of operational and environmental problems.
4 The United States Navy established the Ordot Dump before World War II and used it as a disposal
5 site for military refuse from the wartime years, including munitions, unexploded ordnance, and
6 toxic military waste. Later, the Ordot Dump became the only municipal solid waste disposal
7 facility on island.
8

9 26. Until its closure, the Ordot Dump operated as an unlined and uncapped dump,
10 allowing rain and surface water to percolate through and carry hazardous substances and other
11 contaminants into the groundwater and the Lonfit River. When water mixes with landfill waste, it
12 becomes leachate. Leachate released from the Ordot Dump ultimately entered Pago Bay and the
13 Pacific Ocean, into which the Lonfit River and its tributaries empty.
14

15 **B. The Clean Water Act Litigation and Consent Decree**

16 27. At Guam's request, the United States Environmental Protection Agency
17 ("USEPA") declared Ordot a Superfund site in 1983, pursuant to the Comprehensive
18 Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601-9675.
19

20 28. Although the Superfund designation provided USEPA with the ability to use
21 federal funding to clean up the site, the United States chose not to do so. Instead, the United States
22 issued a series of unilateral administrative orders pursuant to the Clean Water Act ("CWA"), 33
23 U.S.C. § 1251-1389, directing Guam to fund and remediate Ordot without federal aid.
24

25 29. Guam was unable to comply with USEPA's orders. Consequently, the United
26 States sued Guam pursuant to the CWA in 2002, alleging that Guam was allowing the discharge.
27
28

1 of leachate from Ordot into the Lonfit River and two of its tributaries. Complaint for Injunctive
2 Relief and Civil Penalties, ECF 1.

3 30. In 2004, after two years of litigation, the parties entered into a comprehensive
4 Consent Decree with the approval of this Court. *See* Consent Decree.

5
6 31. The Consent Decree required Guam to, among other things, close the Ordot Dump
7 and stop the discharge of leachate. To fully close the Ordot Dump, the Consent Decree directed
8 Guam to complete certain remedial actions: (1) design, construct, and install a cap over Ordot; and
9 (2) design, construct, and install a surface water diversion system. *Id.* In order to monitor the
10 progress of the closure, the Consent Decree also required Guam to submit written quarterly reports.
11 *Id.*

12
13 32. By 2008, despite its best efforts, Guam remained unable to comply with the terms
14 of the Consent Decree. Guam's solid waste system was plagued by lack of coordinated
15 governmental support, experienced personnel, and dedicated funding. Accordingly, this Court
16 appointed a federal receiver to effectuate the terms of the Consent Decree, including the closure
17 of the Ordot Dump. *See* Appointment Order.

18
19 **C. The Federal Receivership**

20 33. On March 17, 2008, this Court appointed GBB as receiver, and charged it with the
21 duty to "protect[] the natural resources [of Guam] for future generations" by "ensur[ing]
22 compliance with the Consent Decree and the Clean Water Act." Appointment Order at 19. To
23 fulfill its duties, the Court gave GBB "full power and authority to enforce the terms of the Consent
24 Decree, and assume all of the responsibilities, functions, duties, powers and authority of the Solid
25 Waste Management Division of the Department of Public Works [of Guam]." *Id.* at 15. The Court
26 specifically authorized GBB to, among other things: "enter . . . into future contracts deemed
27
28

1 necessary,” “hir[e] . . . consultants, professionals, contractors, engineering firms or counsel,” and
2 “facilitat[e] the financing and/or borrowing of such funds necessary to carry out the duties relating
3 to the Consent Decree.” *Id.* at 16-17.

4 34. As a court-appointed receiver, GBB owes a duty to this Court to properly execute
5 its duties, keep the Court fully informed of its actions in effectuating the terms of the Consent
6 Decree, and obey the Court’s orders. GBB owes Guam a fiduciary duty to manage and operate the
7 Ordot Dump properly, effectively, efficiently, and without causing further harm.

8 35. On April 29, 2019, the Court partially terminated the Receivership. *See* Order Re:
9 Partial End of Receivership, ECF 1880. However, GBB remains obligated by Court Order to
10 “oversee and control all work associated with the post-closure of the Ordot Dump.” *Id.* at 2. The
11 Receivership is ongoing and will remain in place “for the period necessary to achieve compliance
12 with the Consent Decree.” Appointing Order at 17.

13
14
15 **D. The Closure of the Ordot Dump**

16 36. The Ordot Dump officially stopped accepting waste on August 31, 2011, pursuant
17 to an order from GBB issued in anticipation of the dump’s closure. To carry out the closure, GBB,
18 signing for Guam, entered contracts with various engineers and design and construction companies
19 to complete the work required pursuant to the Consent Decree, which took place in the 2014 and
20 2015 dry seasons. The Ordot Dump was finally closed in 2016.

21
22 **1. Roles of the Defendants**

23 37. Black Construction is a construction company with experience in civil engineering.
24 On December 6, 2013, GBB, signing for Guam, contracted with Black Construction to construct
25 the closure at the Ordot Dump and make improvements to the sewer system along Dero Road (the
26
27
28

1 “Black Construction Contract”). Pursuant to the Black Construction Contract, Guam would pay
2 over \$40.5 million to Black Construction for its services.

3 38. Black Construction agreed to indemnify both Guam and GBB for any and all costs
4 arising from its negligent and willful acts, including “destruction or damage to any property” and
5 “contamination of or adverse effects on the government.” Black Construction further agreed to
6 pay Guam and GBB reasonable attorneys’ fees incurred from Black Construction’s conduct.
7

8 39. Brown & Caldwell is an environmental consulting, engineering, construction, and
9 operations company that contracted with the former Solid Waste Management Division of the
10 Department of Public Works, through GBB, on May 20, 2011, to assist with the closure of Ordot
11 Dump (the “Brown & Caldwell Closure Contract”). Pursuant to the Brown & Caldwell Closure
12 Contract, Guam would pay Brown & Caldwell nearly \$6.2 million for its services.
13

14 40. Brown & Caldwell agreed to be responsible for the “professional and technical
15 accuracy of all work” and “without additional cost to the Government, correct or revise all errors
16 or deficiencies in [its] work.” Pursuant to the contract, Guam reserved all rights and causes of
17 action arising from Brown & Caldwell’s failure to perform per the contract, notwithstanding
18 Guam’s review, approval, and acceptance of Brown & Caldwell’s work. Brown & Caldwell further
19 agreed that it was “liable to the Government for negligent performance of any of the services
20 performed” pursuant to the Brown & Caldwell Closure Contract.
21

22 41. The Brown & Caldwell Closure Contract also contains indemnification provisions
23 that inure to the benefit of Guam. Brown & Caldwell agreed to hold both Guam and GBB harmless
24 for any and all costs arising from Brown & Caldwell’s negligent and willful acts, including
25 “destruction or damage to any property” and “contamination of or adverse effects on the
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1 government.” Brown & Caldwell further agreed to pay Guam and GBB reasonable attorneys’ fees
2 incurred from Brown & Caldwell’s conduct.

3 42. Brown & Caldwell served as the engineer on record for the closure of the Ordot
4 Dump and is the prime consultant responsible for the design of the Ordot Dump’s closure system.
5 Brown & Caldwell additionally provided construction quality assurances for the closure of the
6 Ordot Dump. In May 2018, Brown & Caldwell entered a separate contract with GBB, signing for
7 Guam, to act as operator of the Ordot Dump. Brown & Caldwell remains the current “Operator”
8 of the Ordot Dump.
9

10 43. Brown & Caldwell hired GHD, a global multi-disciplinary professional services
11 firm, in 2011 as a subcontractor. GHD contracted with GBB in December 2013 for construction
12 management services on the Consent Decree projects (the “GHD Contract”). Pursuant to the GHD
13 Contract, Guam would pay GHD nearly \$6.5 million for its services.
14

15 44. GHD agreed to be responsible for the “professional and technical accuracy of all
16 work” and “without additional cost to the Government, correct or revise all errors or deficiencies
17 in [its] work.” Pursuant to the contract, Guam reserved all rights and causes of action arising from
18 GHD’s failure to perform per the contract, notwithstanding Guam’s review, approval, and
19 acceptance of GHD’s work. GHD further agreed that it was “liable to the Government for negligent
20 performance of any of the services performed” pursuant to the GHD Contract. The GHD Contract
21 also contains indemnification provisions that inure to the benefit of Guam. GHD agreed to hold
22 both Guam and GBB harmless for any and all costs arising from GHD’s negligent and willful acts,
23 including “destruction or damage to any property” and “contamination of or adverse effects on the
24 government.” GHD further agreed to pay Guam and GBB reasonable attorneys’ fees incurred from
25 GHD’s conduct.
26
27
28

1 45. Geo-Logic, an environmental and geotechnical engineering firm, contracted with
2 Brown & Caldwell in 2011 to serve as the construction manager subconsultant to GBB, charged
3 with completing a geotechnical analysis and final cover system design. Geo-Logic provided
4 construction management and construction quality assurance for the capping system drainage and
5 environmental control construction for the closure of the Ordot Dump, and assisted with preparing
6 the closure and post closure plans. Pursuant to the contract, Guam would pay Geo-Logic \$600,000.

7
8 46. In 2016, GHD and Geo-Logic (as GHD's subcontractor) were tasked with
9 performing additional closure construction management and construction quality assurance
10 services at the Ordot Dump. Following the completion of closure construction, GHD and Geo-
11 Logic began providing additional post-closure support. For these additional services, GHD
12 charged roughly \$360,000, and Geo-Logic charged over \$1.3 million.

13
14 47. Brown & Caldwell, GHD and Geo-Logic all understood, or should have
15 understood, that their contracts were with Guam and for the benefit Guam.

16
17 **2. The Closure Contractors Designed the Ordot Dump's Closure and
Developed Closure and Post-Closure Plans**

18 48. Pursuant to the Consent Decree, USEPA Regulations, and Guam's Rules and
19 Regulations, the Closure Contractors prepared closure and post-closure care plans "describing the
20 steps necessary to close" the Ordot Dump. *See* 40 C.F.R. § 258.60; GAR Title 22, Division 4, Ch.
21 23 § 23601. To assist it with completing these duties, GBB employed a number of contractors.

22 49. To develop the *Final Closure Plan: Ordot Dump Closure Construction* ("Closure
23 Plan"),⁶ Brown & Caldwell created work plans for topographic surveys, geotechnical
24 investigations, delineation of waste limits, leachate generation potential, jurisdictional wetland
25

26
27 ⁶ Brown & Caldwell Project Team, *Final Closure Plan: Ordot Dump Closure Construction*
(Permitting Copy Mar. 2013) [hereinafter *2013 Closure Plan*].

1 delineation, and hydrogeological investigations. Brown & Caldwell employed subcontractors to
2 conduct the hydrogeological and geotechnical studies; Geo-Logic and GHD provided design and
3 construction quality assurance services.

4
5 50. The Closure Contractors required assistance with conducting hydrogeologic and
6 topographical studies and employed three additional companies: (1) Marianas Drilling constructed
7 and installed groundwater monitoring wells and landfill gas collection trenches; (2) APTIM/Shaw
8 Environmental completed an interim slope stability analysis of the Ordot Dump and produced a
9 revised topographic map; and (3) ARC Environmental obtained requisite permits to access
10 wetlands, evaluated how the closure of Ordot would alter leachate flow to the nearby low-laying
11 wetlands, created a wetlands delineation map, and assisted in preparing the stormwater pollution
12 prevention plan.

13
14 51. The Closure Contractors completed the Closure Plan in March 2013, and GBB
15 subsequently submitted it to USEPA and the Guam Environmental Protection Agency ("GEPA").⁷
16 GEPA provided comments and conditionally approved the 100% Design Submittal for the closure
17 in 2013. GEPA conditioned its approval on, among other things, the submission of an
18 Environmental Protection Plan describing the methods and procedures used to protect Guam's
19 natural resources.

20
21 52. As designed, the closure of Ordot would include, in part, an engineered cover
22 system, a leachate collection and removal system, and a surface water diversion system.

23 53. For the engineered cover system, the Closure Plan presents cover designs, with the
24 design that was chosen consisting of the following layers from top to bottom: (1) an erosion layer
25 consisting of geocell with crushed coral stone infill; (2) a geocomposite drainage layer; (3) a
26

27 ⁷ *Id.*; see also ECF 1067-1 at 4.
28

1 geomembrane barrier/infiltration layer; (4) a geocomposite landfill gas/leachate interception layer;
2 and (5) a crushed coral foundation layer. GEPA and USEPA approved GBB's use of an alternative
3 cover after GBB presented them with a Hydrologic Evaluation of Landfill Performance ("HELP")
4 model to demonstrate that the cover system that was chosen would provide equivalent protection
5 from water infiltration and erosion.⁸
6

7 54. The HELP model, created by Geo-Logic, additionally provided an estimate of the
8 leachate that would be generated at Ordot following its closure. *The HELP model projected that,*
9 *once closed, Ordot would generate "[a] peak daily discharge of 48,700 gallons [of leachate,] and*
10 *an average annual discharge of 1,310,400 gallons" of leachate.*⁹ Based on this information, the
11 Closure Contractors designed the onsite leachate management system, comprised of a
12 geocomposite drain, perimeter collection trench, and two leachate interceptor trenches. The
13 leachate interceptor trenches were designed to "collect leachate that is seeping out at the base of
14 the Dump along the western and southeastern sides of the site."¹⁰ The trenches were designed to
15 then convey leachate by gravity piping to the leachate storage tanks.¹¹
16

17 55. The Closure Contractors' reports represented that a surface water diversion system
18 would capture run-off and preclude stormwater from mingling with leachate-contaminated
19 groundwater. The design of the surface water diversion system anticipated that run-off would flow
20 down the installed cap, collect in concrete-lined ditches, pass through perimeter channels, and
21 discharge into four stormwater detention ponds.
22
23
24

25 ⁸ 2013 Design Report at App. S.

26 ⁹ 2013 Design Report at 77 (emphasis added).

27 ¹⁰ 2013 Closure Plan at 36.

28 ¹¹ *Id.*

1 56. The Closure Plan also states that the Ordot Dump would be closed in accordance
2 with applicable permits, the Consent Decree, and applicable USEPA and GEPA regulations.¹²

3 57. The *Post-Closure Care Plan for Ordot Dump Post-Closure Facility* (“Post Closure
4 Care Plan”), prepared primarily by Brown & Caldwell, contains instructions on developing annual
5 post-closure care cost estimates and financial assurance. It also describes how GSWA and Guam
6 should monitor and inspect the Ordot Dump during the 30-year post-closure period set forth in the
7 Consent Decree.¹³

8 58. In the Post-Closure Care Plan, the Closure Contractors expressly warranted that the
9 “closure corrective measures, principally [the] installation of a geosynthetic cap and drainage
10 improvements, will reduce leachate generation rates by 98 to 99%, and *will reduce contaminated*
11 *stormwater discharges by 100%.*”¹⁴

12
13
14 **3. The Closure Contractors Designed and Constructed the Ordot Dump’s**
15 **Closure**

16 59. Brown & Caldwell, with support from Geo-Logic and GHD, managed construction,
17 which Black Construction primarily performed.

18 60. Brown & Caldwell, Black Construction, GHD, and Geo-Logic began constructing
19 the final cap system in December 2013.

20 61. GHD served as the Construction Manager, designed the stormwater ponds and
21 leachate storage systems for the closure of the Ordot Dump, and provided construction quality
22 assurance services.

23
24
25 ¹² *Id.* at 3.

26 ¹³ Brown & Caldwell, *Post-Closure Care Plan for Ordot Dump Post-Closure Facility*, (Oct. 2021)
[hereinafter *Post-Closure Care Plan*].

27 ¹⁴ Brown & Caldwell, *Compensatory Mitigation Plan – Ordot Dump Site*, (July 2013) at 3-2
28 (emphasis added).

1 62. Black Construction was the general contractor in charge of construction.

2 63. Geo-Logic, under contract with GHD, oversaw the earthwork, geosynthetics works,
3 concrete work, and capping system drainage and environmental control construction.

4 64. Constructing and installing cover systems for dump sites or landfills generally
5 reduces the volume of leachate by preventing the percolation of rainwater through the waste mass.
6 *See Ex. A at § 1.4(2).* However, the leachate at the Ordot Dump has increased to volumes over
7 five times those measured prior to the completion of closure construction in 2016.

8 65. Brown & Caldwell, Black Construction, GHD, Geo-Logic, and their subcontractors
9 were responsible for all aspects of the design, construction, installation, and other activity
10 concerning the cover system.

11 66. The Closure Contractors additionally designed a surface water diversion system
12 wherein run-off would flow down the installed cap, collect in concrete-lined ditches, pass through
13 perimeter channels, and discharge into four unlined stormwater detention ponds.

14 67. Brown & Caldwell, Black Construction, GHD, Geo-Logic, and their subcontractors
15 were responsible for all aspects of the design, construction, installation, and other activity
16 concerning the surface water diversion system.

17 68. In addition to constructing the cap, Defendants also designed, constructed and
18 installed a leachate collection and removal system ("LCRS") to collect leachate generated as the
19 waste mass at the Ordot Dump dewatered so that it could be transported to, and treated at, the
20 Hagåtña wastewater treatment plant.

21 69. The LCRS is comprised of three bolted steel storage tanks manufactured by Fusion
22 Tanks and Silos and installed by Shearer and Associates, both subcontractors hired by Black
23 Construction. The tanks each hold approximately 16,000 gallons, measure 25.2 feet in diameter,
24

1 and contain regular and emergency equipment including liquid level controls for leachate pumps,
2 liquid level gauges, floor sumps, access hatches and ports, and wall connections to drains, pipes,
3 and secondary containment for leachate overflow.

4 70. The rest of the LCRS consists of the PLCT, the WLIT, a duplex pumping system
5 with controls, and a force-main that discharges into Guam Waterworks Authority's ("GWA")
6 sewer through a flow meter. The PLCT and WLIT collect leachate generated at the Ordot Dump
7 and deliver the leachate to the storage tanks, where the leachate is eventually discharged into the
8 GWA sewer.

9
10 71. The cap and LCRS are the primary remedial components intended to reduce the
11 volume of leachate, contain it, control its migration, and prevent its release. GBB, Brown &
12 Caldwell, GHD, and Geo-Logic submitted reports assuring Guam and this Court that their work
13 would reduce the volume of leachate and prevent the discharge of leachate from the Ordot Dump.
14 Unfortunately, Defendants' negligent design, construction, and installation of the LCRS has
15 increased the volume of leachate, as well as Guam's costs of disposing of the leachate, and
16 continues to contribute to the contamination of the Lonfit River and its tributaries via seeps and
17 containment overflows. Ex. A at §§ 1.3, 3.2, 4.1.

18
19
20 **4. Brown & Caldwell is Hired as the Operator of the Ordot Dump**

21 72. In May 2018, GBB, signing for Guam, contracted with Brown & Caldwell to
22 operate the Ordot Dump (the "Brown & Caldwell Operator Contract").¹⁵ Pursuant to the Brown &
23 Caldwell Operator Contract, Brown & Caldwell would receive a minimum of \$6.5 million to
24

25
26
27 ¹⁵ Agreement to Operate the Ordot Facility By and Between Gershman, Brickner & Bratton, Inc.,
28 in its Capacity as Receiver for the Guam Solid Waste Authority, Government of Guam, as Owner,
and Brown and Caldwell Constructors, as Operator (May 2018).

1 operate Ordot Dump over an initial period of 7 years: 2018 through 2025.¹⁶ As of January, 2024,
2 Guam's estimated payment to Brown & Caldwell for the initial contract period has risen to \$7.6
3 million.¹⁷

4 73. Under the Brown & Caldwell Operator Contract, Brown & Caldwell agreed to be
5 solely responsible for "all costs" associated with operating the Ordot Dump, as well as fines
6 attributable from its own negligence.¹⁸

7
8 74. Brown & Caldwell further agreed to assume operation of the LCRS. Brown &
9 Caldwell agreed to minimize the production of leachate, monitor the facility for leachate leaks,
10 and take "immediate action" to control and remediate any leachate leaks.¹⁹

11 **E. The Effects of the Design and Construction Defects**

12
13 **1. Leachate Discharge at the Ordot Dump has Worsened Since the Closure**
14 **Plan Was Completed**

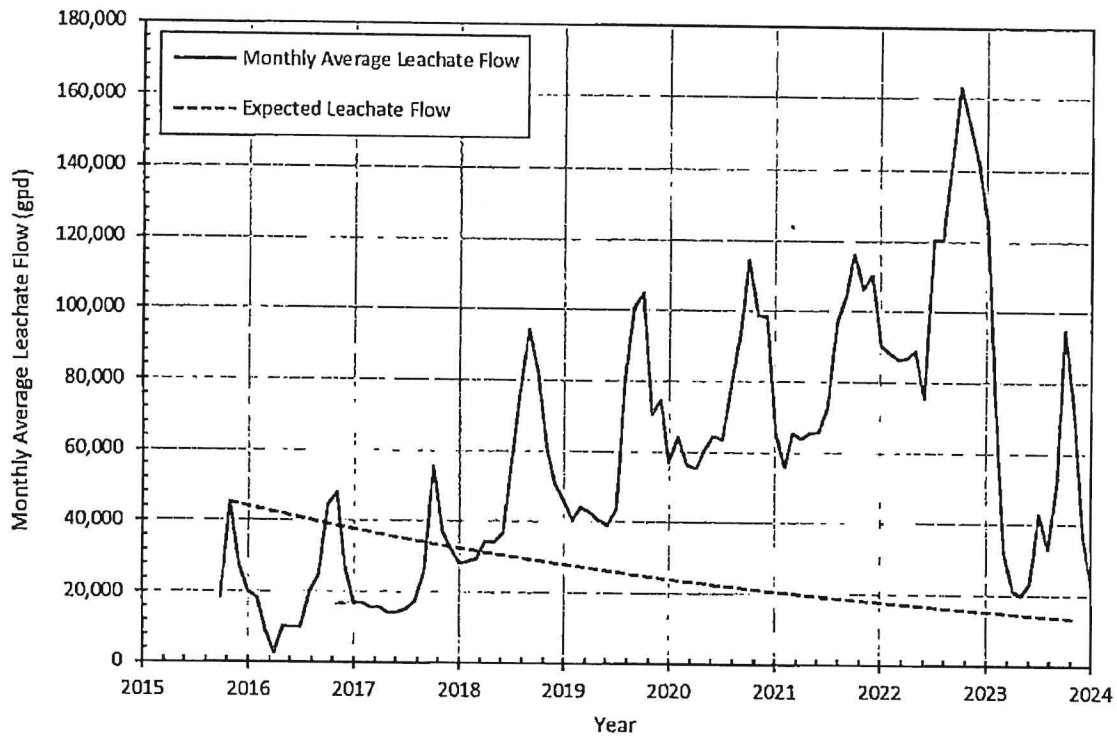
15 75. Based on Defendants' representations, had the engineered cover system, LCRS,
16 and stormwater management system been designed and constructed with proper care, there would
17 be a decline in leachate generated at Ordot since its closure. *See* Ex. A at § 3.3 (Figure 6). The
18 graph above shows the vast discrepancy between the expected decreasing trend in leachate flow
19 versus the actual increasing monthly leachate flow at the Ordot Dump from 2015 to 2024.

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21
22
23
24 ¹⁶ *Id.* §§ 2.01, 3.01.

25 ¹⁷ Gershman, Brickner & Bratton, "Revised Special Report of the Receiver to the Board of
26 Directors of the Government of Guam, Guam Solid Waste Authority" at 4 (Oct. 23, 2023, rev. Jan.
16, 2024) [hereinafter "Revised Special Report of Receiver"].

27 ¹⁸ Brown & Caldwell Operator Contract at § 5.05(A).

28 ¹⁹ *Id.* § 5.05(F).



76. As stated in the Third Joint Report Regarding Receiver's Remaining Work and the Financing Plan, the quantity of leachate generated at the Ordot Dump quadrupled between 2015 and 2022, from 615,000 gallons per month between November 2015 and October 2016, to 2,656,000 gallons per month between May 2021 and April 2022. See Third Joint Report Regarding Receiver's Remaining Work and the Financing Plan, 3, ECF 1948. The average quantity of leachate produced at Ordot peaked between January 2022 and December 2022, at approximately 3,380,000 gallons per month. Ex. A at App. A.

77. Previously, GBB asserted that "[p]rojected peak daily flows after closure are 50,000 gpd, with a much lower long-term average flow projected at 3,600 gpd." Quarterly Report of the Receiver, ECF 1067-6. This initial estimate, which should be the maximum average daily flow at a closed landfill (*i.e.*, it should decrease over time), was already in excess of the design maximum of 48,700 gpd. *Since 2015, the average flow rate of leachate for the LCRS has exceeded its*

1 *design maximum of 48,700 gpd more than 80% of the time and continues to exceed it to this*
2 *day.* Indeed, the amount of leachate has been high enough to exceed the design capacity of the
3 LCRS, enter the emergency secondary containment area, and necessitate the use of trucks to collect
4 leachate for transport to the wastewater treatment plant. Third Joint Report Regarding Receiver's
5 Remaining Work and the Financing Plan at 5, ECF 1948. Expensive emergency measures should
6 not be considered a part of the design capacity.
7

8 78. In contrast, Brown & Caldwell claims that the design capacity of the LCRS is
9 210,500 gallons per day ("gpd").²⁰ However, this number is incorrect because it includes both the
10 maximum storage tank capacity *and* the secondary containment storage capacity (*i.e.*, emergency
11 overflow containment).²¹ It is not standard practice to include secondary containment in the total
12 design capacity of a leachate storage system. Ex. A at § 1.3. Moreover, exceeding daily average
13 flow capacity stresses the total design capacity and renders it inaccurate. *Id.* Thus, Brown &
14 Caldwell's analysis is wholly inconsistent with the facts on the ground at the Ordot Dump.
15

16 79. Since 2022, the volume of leachate has declined, averaging approximately
17 1,400,000 gallons per month in 2023, but it still regularly exceeds the average daily flow capacity,
18 and the total design capacity, of the LCRS and is increasing instead of decreasing overall. It is
19 anticipated that, absent a remedy, increased leachate flow will continue in perpetuity.
20

21 80. Flaws in the design, construction, installation, and/or operation of the WLIT and
22 the stormwater management system is responsible for the abnormal volume of leachate post-
23 closure.
24
25

26 ²⁰ Brown & Caldwell, *LCRS As-Built Design Capacity Evaluation* at 2-2 (Oct. 2021).

27 ²¹ *Id.*
28

1 as ordered by USEPA, was to characterize the sources and volumes of leachate flow to the LCRS,
2 with the WLIT being of primary concern.²⁷ Shortly after, however, Brown & Caldwell scrapped
3 that plan, said the issue was not the WLIT, and decided to focus on the as-built capacity of the
4 LCRS instead of the design calculations, the ability of the LCRS to handle storm events instead of
5 increase in leachate volume, and the PLCT instead of the WLIT.²⁸ When Brown & Caldwell began
6 collecting data for this leachate monitoring program, the annual leachate flow was at an all-time
7 high, averaging approximately 1,850,000 gallons per month in 2019. Leachate flows averaged
8 approximately 21,000 gpd in 2016 and 23,000 gpd in 2017 before jumping to 1,550,000 gpd in
9 2018. Yet Brown & Caldwell has never adequately investigated how and why groundwater and
10 surface water can infiltrate the WLIT.
11

12 86. By narrowing the evaluation to only storm events, Brown & Caldwell precluded
13 the discovery of issues in the design and construction of the WLIT.
14

15 87. Brown & Caldwell again identified the WLIT as a problem during a reconnaissance
16 of Ordot performed in November 2022, after site personnel observed multiple groundwater
17 seepages, including a major seep running approximately 35 feet along the western drainage
18 channel.²⁹

19 88. The reconnaissance revealed that leachate flow from the WLIT between August
20 and October 2022 represented 63–90% of total leachate flow at that time. Ex. A at §§ 3.1, 3.3.
21
22
23
24

25 ²⁷ Brown & Caldwell, *LCRS As-Built Design Capacity Evaluation* at 1-1 (Oct. 2021).

26 ²⁸ Brown & Caldwell, *November Site Reconnaissance Trip Report and Leachate Flow Study*
27 *Update* (Technical Memorandum [No. 1] Feb. 4, 2023) [hereinafter *November Site Recon.*].

28 ²⁹ See *November Site Recon.* at 9.

1 89. Had the atypical leachate discharges from the WLIT been properly investigated and
2 resolved closer to the date of closure, Guam could have avoided incurring costs of treating millions
3 of gallons of leachate.
4

5 **ii. Due to the Design and Construction Defects Stormwater is Creating Increased**
6 **Leachate Volumes**

7 90. Ordot's closure design included a management system intended to prevent all
8 surface water, including stormwater, from mingling with leachate generated at the Ordot Dump.
9 On January 28, 2013, GBB represented that, as designed, "stormwater is prevented from contact
10 with the leachate by an impervious cover system and managed by a stormwater collection system
11 on the Ordot Dump." *See Letter Re: Confirmation of Acceptance of Leachate Wastewater*
12 *Discharge from Ordot Dump at 2, ECF 1067-7.*

13 91. All of the drainage structures in the stormwater collection system are designed to
14 collect the runoff from a 25-year, 24-hour storm event of 20 inches, to allow for a typhoon effect,
15 and three out of four stormwater detainment ponds were designed to provide excess storage
16 volume.³⁰
17

18 92. Had the surface water system been designed and constructed properly, it would
19 preclude stormwater from mingling with leachate-contaminated groundwater.

20 93. Defendants continued to take the position throughout 2023 that leachate generation
21 bore no relationship to stormwater.
22

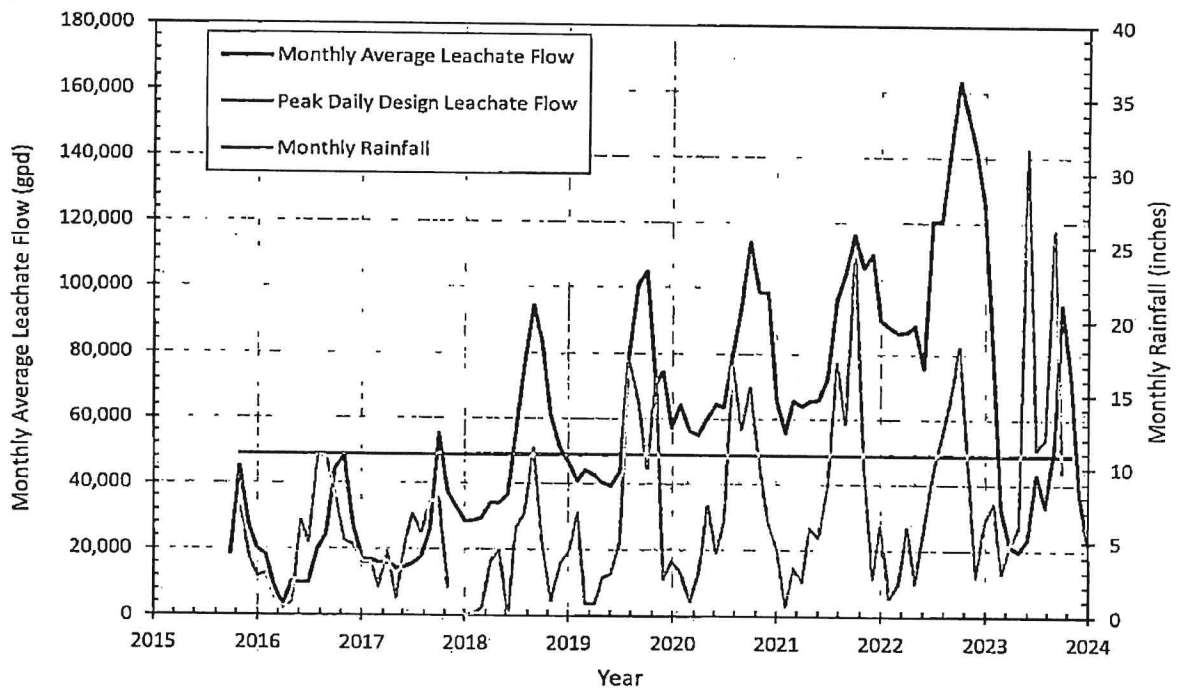
23 94. Yet, data shows that leachate generated at the Ordot Dump generally increases in
24 months with greater monthly precipitation and decreases when precipitation declines. Ex. A at §
25
26

27 ³⁰ *See 2013 Design Report at 60.*
28

1 1.4. In other words, leachate volume is directly impacted by precipitation, something that should
2 not happen at a properly closed landfill. *Id.*

3 95. In a technical memorandum dated July 21, 2023, Brown & Caldwell continued to
4 assert that “a correlation between rainfall and the previously noted long-term increasing flow
5 trends is not apparent at this time.”³¹

6
7 96. The graph below, based on data provided to GSWA, depicts the actual relationship
8 between monthly precipitation and average leachate flow.



22 97. During storm events, groundwater elevation measured at the Ordot Dump's
23 groundwater monitoring wells and observed at the stormwater ponds also increases at a volume
24 and rate that exceeds the closure design. Ex. A at App. A.

25
26
27 ³¹ July 2023 Update at 11.

1 98. On October 23, 2023, in a special report to the GSWA Board of Directors, GBB
2 conceded that stormwater was infiltrating leachate at the Dump. Although it had assured the
3 General Manager of GWA that stormwater would be prevented from contact with leachate in 2013
4 (ECF 1067-7), GBB told GSWA in 2023:

5
6 “[i]t is normal for groundwater levels to rise in response to precipitation
7 events. The Dump is an unlined landfill with municipal solid waste
8 materials resting on the bedrock surface. As the water table rises in response
9 to precipitation, this groundwater potentially contacts the waste and
10 leachate, picking up contaminants. The leachate collection trenches
11 included in the design of the closure took this into account and were
12 properly sized to collect this leachate. The design expected that leachate
13 volumes would increase as a response to seasonal precipitation changes, and
14 storm events, and would have to be collected and treated as leachate.”

15 Notice of Filing of Special Report of the Receiver to the Board of the Guam Solid Waste Authority,
16 9, ECF 2009.

17 99. Had Defendants built the system according to design specifications that prevented
18 stormwater from coming into contact with leachate, there would be only a minimal observed
19 relationship between leachate generation and precipitation and leachate volumes would be
20 decreasing over time. Instead, increased leachate volumes from groundwater infiltrating the waste
21 mass as well as clean groundwater from outside of the waste mass are infiltrating the WLIT in
22 response to storm events.

23 100. Following an inspection of the stormwater management system performed in
24 March 2023, GSWA was told repeatedly that the Ordot Dump’s remedy was sound. According to
25 GBB, the inspection “did not identify cover system or stormwater management infrastructure
26 integrity issues that would result in increases in infiltration and subsequent increases in flows
27
28

1 beyond the anticipated design flows. Therefore, further investigation of the cover system by such
2 means as dye-tests or other methods is not warranted.”³²

3 101. Further investigation *is* warranted. Fractures in the underlying bedrock may explain
4 the influence of both stormwater and groundwater on leachate flow from the WLIT. The Closure
5 Contractors and Black Construction constructed two stormwater ponds at the highest points of
6 historic groundwater flow pathways through fractures in the underlying bedrock. The Closure
7 Contractors and Black Construction were aware that fractures in the bedrock underlying the Dump
8 were conduits for groundwater movement and that groundwater would be routed towards the
9 southwestern border of the Dump, directly intersecting the WLIT and the Western Drainage
10 Channel. The Closure Contractors knew that portions of the detention ponds may be constructed
11 into the bedrock; Black Construction would have observed the fractures during construction.³³

12
13
14 102. Because Defendants failed to line the stormwater ponds, stormwater collected in
15 those ponds percolates through bedrock fractures and intercepts the LCRS.

16 103. Had the closure design adequately accounted for stormwater influence, the water
17 level in the WLIT would not increase during storm events to the extent and speed that it does,
18 mingling with leachate, and greatly amplifying the volume of leachate generated at the Ordot
19 Dump.
20
21
22
23
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25

26 ³² *July 2023 Update* at 4.

27 ³³ *2013 Design Report* at 55.

28

1 **iii. Due to the Design and Construction Defects Leachate Overflows and Seeps**
2 **Discharge to the Lonfit River**

3 104. Since the Ordot Dump's closure, there have been four documented releases of
4 leachate into the Lonfit River and additional releases in the form of seeps of leachate percolating
5 to the surface at the perimeter of the Ordot Dump.

6 105. On September 13, 2017, a break in the pipe carrying leachate to the wastewater
7 treatment plant caused the release of an estimated 6,000 gallons of leachate.¹ The pipe was repaired
8 and no other corrective action was taken. Brown & Caldwell asserted that the release was not
9 caused by any lack of the LCRS as-built design capacity. No reason for the pipe break was
10 identified.

11 106. On October 18, 2017, 7,300 gallons of leachate overflowed the top of the
12 emergency secondary containment area during a period of heavy rainfall. Brown & Caldwell
13 asserted that the overflow and release was caused by a power outage, not by any lack of the LCRS
14 as-built design capacity.¹ However, the incident report labels the power outage a "secondary causal
15 effect" and named "high inflows" into the PLCT and WLIT as a "primary causal effect."¹

16 107. On September 11, 2018, during Typhoon Manghut, a blockage in a pipe carrying
17 leachate from the PLCT and WLIT caused an overflow at the WLIT of 40,000-50,000 gallons of
18 leachate.¹ In 2021, Brown & Caldwell asserted that the release was not caused by LCRS design
19 issues. *Id.* Yet, in 2023, GBB told GSWA that the system had been overwhelmed by the high flows
20 from Typhoon Manghut, well beyond the design capacity of the system. Notice of Filing of Special
21 Report of the Receiver to the Board of the Guam Solid Waste Authority at 6, ECF 2009. Had the
22 LCRS been designed and constructed properly, stormwater would not have such an impact on
23 leachate volumes. Ex. A at § 1.4.
24
25
26
27
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1 108. On May 24, 2023, during Typhoon Mawar, leachate pumps at the Ordot Dump
2 stopped working, causing a release of up to 100,000 gallons of leachate.¹ According to GBB,
3 pumps stopped working when power was lost at the dump.¹
4

5 109. Properly closed landfills typically do not experience sharp increases in leachate
6 generation during heavy rain events. Ex. A at § 1.4. Parts of the Ordot Dump's closure were
7 likewise designed to prevent infiltration of stormwater during heavy rain events. Brown &
8 Caldwell designed and constructed a geomembrane cover to prevent rainwater from infiltrating
9 the waste mass of the closed dump and a surface water diversion system to capture run-off from
10 that cover. However, due to design and construction defects associated with the LCRS and WLIT,
11 leachate generation skyrockets during the wet season and heavy rain events from stormwater and
12 groundwater infiltration.
13

14 110. Releases occur in the form of seeps at the Ordot Dump outside of heavy rain events.
15 In November 2022, Brown & Caldwell began investigating seeps observed at the dump. As set forth
16 in Joint Status Reports and a Technical Memorandum prepared by Brown & Caldwell, three
17 separate seeps at the Ordot Dump were observed that were likely resulting in releases to the Lonfit
18 River:

- 19 a. "One seep was observed approximately 40-feet before the drainage discharged into
20 the Lonfit River. This area showed signs of erosion and likely intercepted the
21 groundwater table."³⁴
- 22 b. "During reconnaissance of the pre-closure location of the Eastern-most Leachate
23 Drainageway, stormwater discharge and groundwater from the subsurface water
24 diversion trench near Stormwater Pond 4 was discharging at the Facility outfall,
25 which generally follows the Eastern-most Leachate Drainageway. As a result,
26 continuous water flow was observed at this location." *Id.*
- 27 c. "The re-emergence of groundwater seepage at the LEAS-2 location became evident
28 after the 31-inches of rainfall during and after Typhoon Mawar. Following this
precipitation event, the volume of groundwater seepage, though limited, observed

³⁴ See November Site Recon. at 8.

1 at LEAS-2 was sufficient to result in flow to the Lonfit River.”³⁵

2 111. Samples of seeps collected near the western drainage channel in December 2022
3 were above background groundwater quality for six constituents: (1) alkalinity, (2) total dissolved
4 solids, (3) total organic carbon, (4) iron, (5) chloride, and (6) ammonia.³⁶

6 112. Further, the leachate emanating from the Ordot Dump contains reportable levels of
7 nearly 300 materials listed as toxic “hazardous waste” pursuant to section 3001 of the Solid Waste
8 Disposal Act, 42 U.S. Code § 6921.³⁷ See 40 C.F.R. 261.30.

9 113. Pursuant to the Brown & Caldwell Operator Contract, Brown & Caldwell is
10 required to monitor the Ordot Dump for leachate leaks, take “immediate action” to control and
11 remediate observed leaks, and take action to document and monitor seeps.³⁸

13 **iv. Due to the Design and Construction Defects, Water Sources Beyond the Footprint**
14 **of the Ordot Dump Impact Leachate Volume**

15 114. GBB has blamed the anomalous leachate volumes at the Ordot Dump on a leak
16 from a water pipe situated outside the facility along Dero Road. The leak was first identified and
17 repaired in December 2022, coinciding with the onset of Guam’s dry season.

18 115. Immediately following the repair, leachate volumes generated at the Ordot Dump
19 experienced a significant but temporary drop. Since its repair, leachate volumes have once again
20 skyrocketed, more than quadrupling from the low in April 2023 and reaching a maximum volume
21 that is twice the design capacity of the LCRS. Ex. A at § 1.4 (Figure 3).

24 ³⁵ See July 2023 Update at 9.

25 ³⁶ *Id.* at 10.

26 ³⁷ See GBB, *Semi-Annual Groundwater Monitoring Data Through November 2023* (Feb. 28,
2024).

27 ³⁸ See Brown & Caldwell Operator Contract at § 5.05(F).

1 116. It is likely that water leaking from the pipe migrated via the fractures in the
2 underlying bedrock and through the waste mass, and intermixed with leachate, stormwater, and
3 groundwater, all of which was collected by the WLIT as leachate. The pipe leak alone, however,
4 does not explain the anomalous volume of leachate observed at Ordot. Instead, the repair of the
5 leak indicated that the Ordot Dump had been infiltrated by water outside the facility continuously
6 since its closure and remains at risk to receive external sources of water infiltration, absent
7 remedial measures. Ex. A at § 4. Water outside of a properly closed landfill should not infiltrate
8 the facility. Indeed, data collected from 2023, after the leak had been repaired, demonstrates that
9 other sources of groundwater, surface water and stormwater continue to infiltrate the WLIT and
10 LCRS.
11

12
13 **2. The Closure Contractors and Black Construction Concealed Problems with**
14 **the Design and Construction of the Ordot Dump's Closure**

15 117. The Closure Contractors and Black Construction began construction with a faulty
16 understanding of the sub-surface conditions at the Ordot Dump. The Closure Contractors, Black
17 Construction, and their subcontractors encountered conditions while onsite that indicated
18 significant issues existed with the design and/or construction of the LCRS and WLIT in particular.
19

20 **i. The Construction Contractors Located the WLIT in Permeable Bedrock,**
21 **Contrary to the Design**

22 118. Despite acknowledging and observing that groundwater moves quickly and easily
23 in the surficial soil and saprolite layer found directly above the bedrock and in the fractured upper
24 layer of the bedrock, the Closure Contractors proceeded as if the bedrock underlying the Ordot
25 Dump would be nearly impervious with an average hydraulic conductivity of 1×10^{-7}
26
27
28

1 centimeters/second, and act as natural containment for leachate.³⁹ In reality, the soil underlying
2 and surrounding the Ordot Dump is composed of highly porous bedrock, or very fine-grained
3 volcanic sediment with high clay content. In fact, the bedrock at the site has an average hydraulic
4 conductivity of 1×10^{-3} centimeters/second—the hydraulic conductivity of sand (i.e., it is highly
5 porous). Ex. A at § 2.1(2). Water can easily move through such a permeable material.
6

7 119. Brown & Caldwell stated in February 2023 that a larger, more expansive fracture
8 system may be providing direct groundwater connections beneath the Ordot Dump, leading to the
9 increasing leachate volume in the WLIT.⁴⁰ However, Brown & Caldwell was aware of this
10 possibility during construction, as it observed discrete bedrock fracture zones during construction
11 of the LCRS.⁴¹

12 120. The Closure Contractors, and Black Construction approved departures from the
13 original LCRS design without sufficient evaluation or data. In one contract change order, for
14 example, Black Construction requested major changes such as eliminating a low permeability
15 channel from the construction plan because “in situ soils are impermeable enough” and eliminating
16 the Eastern Leachate Interceptor Trench from the construction plan as unnecessary, on the grounds
17 that all leachate would be contained in the PLCT.⁴² Geo-Logic, GHD, Brown & Caldwell, and
18 GBB approved the changes, with the reason for the change listed as a “[r]ecommendation of [GHD,
19 Brown & Caldwell, Geo-Logic, and Black Construction] based on field conditions,” without
20 further explanation. *See* Quarterly Report of the Receiver, ECF 1675-9.
21
22
23
24

25 ³⁹ 2013 Design Report at 55.

26 ⁴⁰ November Site Recon. at 7.

27 ⁴¹ *Id.*

28 ⁴² *See* Black Construction Company, *Change Order No. 02* (2014).

1 121. In addition, the Closure Contractors and Black Construction, with GBB's approval,
2 utilized a highly permeable fill material atop and surrounding the WLIT. This departed from the
3 initial design, which called for compact fill that would have prevented surface water and
4 groundwater infiltration into the WLIT. Instead, the fill that was used permits the free flow of
5 water into the WLIT, and ultimately into the leachate tanks, particularly during storm events. Ex.
6 A at § 2.1(4).
7

8 122. Similarly, the Closure Contractors removed the geomembrane liner from the WLIT
9 design without explanation. Like the geomembrane layer of the cap, this geomembrane liner would
10 have served to make the WLIT far less susceptible to groundwater infiltration. *Id.* § 2.1(2).
11 However, the as-built WLIT consists of a perforated pipe placed in a trench and wrapped in
12 geocomposite filled with gravel. Asserting that the bedrock would be as effective as the
13 geomembrane (an assertion that was false in light of the fact that the bedrock was as permeable as
14 sand), Black Construction simply created a "natural containment channel" for the WLIT by cutting
15 approximately two feet into bedrock. In essence, they created a preferred pathway for groundwater
16 and surface water to the WLIT. *Id.* § 2.1.
17

18 123. In March 2019, Brown & Caldwell noted that the groundwater monitoring well
19 north of the WLIT contained groundwater at levels approximately 50 or 60 feet higher than parts
20 of the WLIT. With the groundwater table high enough to immerse the perforated portion of the
21 WLIT, groundwater entered the WLIT in significant volumes and mingled with leachate, greatly
22 increasing its volume.
23

24 124. Brown & Caldwell never raised these issues with the construction of the WLIT to
25 the attention of the Court or Guam, and have not adequately investigated the likely impact of
26 groundwater infiltration into the WLIT on leachate levels.
27
28

1 125. Rather, Brown & Caldwell concluded that an initial evaluation of data collected
2 through December 2020 demonstrated that the WLIT was not a major contributor to the total
3 leachate flow in the LCRS and that “the monitored leachate flows were easily handled by the
4 existing system.” Brown & Caldwell’s conclusion was in error.
5

6 **ii. Defendants’ Relocation of the Stream was a Design Defect**

7 126. The design of the LCRS also included the relocation of an approximately 510-foot
8 section of a natural drainage channel along the western boundary of the Ordot Dump to allow for
9 capping of the waste in the original location of the streambed. Black Construction contracted
10 Western Stream Works as its specialty contractor to perform this work in 2014.
11

12 127. Brown & Caldwell provided quality assurance for the western channel relocation.
13 It therefore reviewed each Construction Drawing and Specification section with Western Stream
14 Works and verified conformance to the design specifications.⁴³ However, Western Stream Works
15 did not initially construct the relocated channel according to the Contract Documents, with
16 discrepancies in alignment, depth, channel slope, bank slope, and material size and placement.
17

18 128. The Closure Contractors and Black Construction allowed the location of the WLIT
19 within a stream bed marked by a fractured bedrock system and very near the groundwater table,
20 permitting vast quantities of groundwater to infiltrate the leachate collection and removal system.
21

22 129. Typically, an unconfined groundwater table will mirror surface topography. Ex. A
23 at § 2.1(3). When Western Stream Works relocated the western channel to a higher elevation and
24 filled the old channel with soil, it raised the groundwater table in the vicinity of the WLIT such
25 that the groundwater table intersects the ground surface at the elevation of the historic streambed—
26 now the WLIT. This allows for significant groundwater inflow to the WLIT, particularly during
27

28 ⁴³ See *Final CQA Report* at 12.

1 the wet season and storm events. *Id.* § 2.1(1). This is contrary to the design goal of preventing
2 groundwater and surface water infiltration into the WLIT.

3
4 **iii. Brown & Caldwell Engages in Mere cursory Investigations to Hide the Design
and Construction Defects**

5 130. Brown & Caldwell admits that the WLIT was constructed despite data gaps for
6 existing groundwater measurements and chemistry. It knew that these data gaps would prevent
7 them from rigorously evaluating the potential impacts of leachate on groundwater near the Ordot
8 Dump. As late as 2021, USEPA was meeting with Brown & Caldwell regarding its “fail[ure] to
9 fully acknowledge the interconnection between site leachate and groundwater” at the Ordot
10 Dump.⁴⁴

11
12 131. Not only did Defendants fail to acknowledge the true extent of the interconnection
13 between leachate and surface water and groundwater at the Ordot Dump, USEPA concluded that
14 “there was a large gap in downgradient coverage whereby contaminated groundwater could
15 potentially migrate undetected.”⁴⁵

16
17 132. The October 2023 Special Report to GSWA states that USEPA’s concerns about
18 the insufficiency of the closure design established for the LCRS have been addressed, stating:
19 “USEPA’s comments were addressed in a March 22, 2019, revised version of the LCRS Capacity
20 Evaluation report in which the data gathered and evaluated to date indicated the facility design
21

22
23
24
25 ⁴⁴ USEPA Letter to GEPA, “U.S. EPA Response to Draft ‘Technical Memorandum: RCRA-
Compliant Groundwater Monitoring Program’ October 2021” at 3 (Nov. 5, 2021); GBB Letter to
26 GEPA, “Ordot Dump Post-Closure Facility – US EPA Background and Summary Statements” at
2 (Dec. 16, 2021).

27 ⁴⁵ USEPA Letter to GEPA, “U.S. EPA Response to Draft ‘Technical Memorandum: RCRA-
Compliant Groundwater Monitoring Program’ October 2021” at 3 (Nov. 5, 2021).
28

1 capacity was adequate to manage the anticipated design flows, which included anticipated clean
2 groundwater entering the system.”⁴⁶

3 133. The Report does not mention USEPA’s rejection of the March 2019 report or the
4 agency’s comment that it was “disappointed that despite [US]EPA’s nearly two-year request for a
5 root cause analysis and design evaluation, Brown and Caldwell’s effort does not appear to be as
6 robust as would have been expected.”⁴⁷

7
8 134. Defendants are also misrepresenting the issues with regard to increased leachate
9 generation and disposal. Brown & Caldwell repeats that the LCRS was designed and constructed
10 to account for the infiltration of clean groundwater resting on top of the lower bedrock, and the
11 LCRS may have the capacity to manage “anticipated design flows” including “anticipated clean
12 groundwater entering the system.”⁴⁸ But, in March 2019, Brown & Caldwell stated that the
13 discharge from the WLIT was a result of an “**unanticipated** introduction of upgradient clean water
14 flow.”⁴⁹

15
16 135. The negligence of Defendants’ actions in designing, constructing, and installing the
17 LCRS is causing groundwater and surface water to compound the volume of leachate and
18 dramatically increase the costs of the remedy at the Ordot Dump. Brown & Caldwell, Black
19 Construction, GHD, Geo-Logic, and their subcontractors were responsible for the design,
20 construction, installation, and other activity concerning the LCRS and are liable to Guam for their
21 negligence.
22

23
24
25 ⁴⁶ “Revised Special Report of Receiver” at 5.

26 ⁴⁷ USEPA Letter to Brown & Caldwell, “Back Up Data Needs to be Provided” (Apr. 2, 2019).

27 ⁴⁸ “Revised Special Report of Receiver” at 5.

28 ⁴⁹ 2019 LCRS TM at 6.

1 **iv. Guam Has Incurred Significant Costs Treating the Atypical Amounts of**
2 **Leachate Generated at the Ordot Dump Due to the Design and Construction**
3 **Defects**

4 136. Guam has spent \$2.85 million in excess leachate treatment costs and an additional
5 \$870,000 to Brown & Caldwell between 2015 and 2023 due to the design and construction defects
6 at the Ordot Dump. Ex. A at § 3.4. This represents a total estimated cost of \$3.72 million in excess
7 of expected operation costs. *Id.*

8 137. On July 6, 2023, GWA filed a petition seeking the Public Utilities Commission's
9 approval to create a new and specific rate classification for wastewater discharge for leachate
10 ("leachate disposal rate"), reducing the currently applied disposal rate from \$28.92 per 1,000
11 gallons (kgal), at GWA's present Commercial 3 facility rate, to a new, specific leachate disposal
12 rate of \$14.72 per kgal. *See* Petition to Create New and Specific Rate Classification for Wastewater
13 Discharge for Leachate, GWA Docket No. 23-08, ECF 1996-1.

14 138. The new leachate disposal rate was based largely on a 2021 cost of service analysis
15 performed by Geo-Logic, acting as a subcontractor of Brown & Caldwell.

16 139. In 2019, Brown & Caldwell acknowledged that "[d]ischarging the WLIT water to
17 the GWA sewer is wasteful of sewerage capacity and quite expensive."⁵⁰ It proposed solutions
18 such as monitoring constituents of interest to produce a reliable characterization of WLIT waters,
19 routing the WLIT to clean stormwater Pond 2, and installing an upgradient groundwater barrier
20 wall near the uphill end of the perforated pipe.

21 140. Brown & Caldwell did not pursue any of the proposed solutions. Instead, it chose
22 to stop investigating the WLIT, allow leachate volume to quadruple, and blame the exorbitant cost
23 on GWA's leachate disposal rates.
24
25

26
27 ⁵⁰ *Id.* at 6.
28

1 148. Brown & Caldwell and GHD have further breached their obligations to perform
2 professional and technically accurate work, and their covenants to correct and revise deficient
3 work at no extra cost to Guam.

4 149. Brown & Caldwell's, Black Construction's, and GHD's breaches of contract are
5 material.
6

7 150. As a direct and proximate result of Brown & Caldwell's, Black Construction's, and
8 GHD's breaches, Guam has been damaged in an amount to be proved at trial, but in no event is
9 less than \$3.72 million. Ex. A at §§ 3.4, 5(5). Guam's damages include costs incurred in treating
10 anomalous leachate generated at Ordot Dump, damage to property at Ordot Dump, ongoing
11 contamination of the environment at and surrounding Ordot Dump, and future costs associated
12 with repairing Brown & Caldwell, Black Construction, and GHD's deficient work.
13

14 151. Pursuant to the Ordot Contracts, Brown & Caldwell, Black Construction, and GHD
15 are required to indemnify Guam for all liabilities, claims, penalties, forfeitures, suits, and costs and
16 expenses (including costs of settlement and reasonable attorney's fees), arising from their
17 negligent and willful conduct.
18

19 **Second Cause of Action**

20 **Breach of Warranty (Brown & Caldwell, Black Construction, GHD)**

21 152. Guam restates and incorporates by reference herein the allegations set forth above.

22 153. Brown & Caldwell, Black Construction, and GHD warranted that they were capable
23 of performing the closure remedy at Ordot to professional engineering standards and that CQA
24 measures would eliminate any mistakes during design and construction.
25
26
27
28

1 42 U.S.C. §§ 9601(14), 9601(29), 9607(a), and the Solid Waste Disposal Act, 42 U.S. Code §§
2 6903(5) and 6921. *See also* 40 C.F.R. § 261.30. For instance, a release of up to 100,000 gallons of
3 leachate occurred during a storm event in 2023.

4
5 172. Brown & Caldwell is a “response action contractor” pursuant to § 119(a) of
6 CERCLA, 42 U.S.C. § 9619(a). A response action contractor is liable for a release caused by its
7 negligence, gross negligence, or intentional misconduct. 42 U.S.C. § 9619(a)(2). Brown &
8 Caldwell’s professional negligence and negligent operation and maintenance of the Ordot Dump
9 has caused or contributed to the continued releases of leachate.

10
11 173. Guam has incurred and will continue to incur necessary costs of response caused
12 by the releases and threatened releases of hazardous substances at the Ordot Dump.

13 174. Guam’s response actions regarding the Site are not inconsistent with the National
14 Contingency Plan, 40 C.F.R. Part 300.

15 175. Pursuant to § 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A), Defendant
16 Brown & Caldwell is liable to Guam, in whole or in part, for cost recovery from any costs of
17 response, including expert fees and attorneys’ fees, incurred and that could be incurred in the future
18 by Guam at Ordot Dump. *See Key Tronic Corp. v. U.S.*, 114 S. Ct. 1960 (1994).

19
20 176. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Defendant Brown &
21 Caldwell is liable to Guam for environmental response costs incurred by Guam related to the Ordot
22 Dump, plus interest, in an amount to be proven at trial.

23
24 **Fifth Cause of Action**

25 **Declaratory Judgment of Liability for Future Response Costs Pursuant to Section 113(g)(2)**
26 **OF CERCLA, 42 U.S.C. § 9613(g)(2)(B) (Brown & Caldwell)**

27 177. Guam restates and incorporates by reference herein the allegations set forth above.
28

1 178. Guam will continue to incur costs associated with the Ordot Dump that are
2 recoverable from Defendant Brown & Caldwell as response costs pursuant to CERCLA.

3 179. Section 113(g)(2)(B) of CERCLA, 42 U.S.C. § 9613(g)(2)(B), specifies that, in any
4 action for recovery of costs pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, “the court
5 shall enter a declaratory judgment on liability for response costs . . . that will be binding on any
6 subsequent action or actions to recover further response costs”

7
8 180. Guam is entitled to entry of a declaratory judgment that Defendant Brown &
9 Caldwell is liable for future response costs incurred by Guam in connection with the Ordot Dump
10 to the extent that such costs are incurred in a manner not inconsistent with the National
11 Contingency Plan.

12 **DEMAND FOR JURY TRIAL**

13
14 181. Guam demands a trial by jury for all issues so triable.

15 **CONCLUSION**

16
17 **WHEREFORE**, Guam prays that this Court enter judgment against Defendants as
18 follows:

19 182. Enter a judgment in favor of Guam on all claims asserted against Defendants;

20 183. Enter a judgment in favor of Guam and against Brown & Caldwell, Black
21 Construction, and GHD that they breached obligations under their respective contracts with Guam
22 related to their work on the closure of Ordot Dump and award Guam its damages suffered as a
23 result of Defendants’ breach;

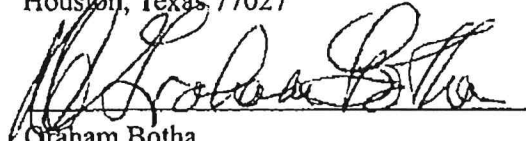
24
25 184. Enter a judgment in favor of Guam and against Brown & Caldwell, Black
26 Construction, and GHD that they breached warranties owed to Guam related to their work on the
27
28

1 Dated: the 6th day of May, 2024

2
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EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

UNITED STATES OF AMERICA,)
) Case No. 02-CV-00022
)
 Plaintiff,) December 18, 2024
) 7:50 a.m.
 vs.)
)
 GOVERNMENT OF GUAM,)
) U.S. District Court
 Defendant.) 520 W. Soledad Avenue, Fl 4
) Hagatna, Guam 96910
)
 _____)

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE FRANCES M. TYDINGCO-GATEWOOD
UNITED STATES CHIEF JUDGE

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1 reductions and rate rebates, which is exactly what GSWA and GWA
2 were discussing. The lawsuit that was filed seeks \$4.4 million
3 in cash. It does not discuss rebates. It does not discuss rate
4 reductions. It does not discuss credits.

5 And although I disagree with the statement that the
6 first time counsel for the Receiver heard about -- or the
7 Receiver heard about it was on September 11th, regardless, they
8 did not file suit until October 31st, seven weeks later. And so
9 they were well aware of those discussions, at a minimum, seven
10 weeks before they filed suit, Your Honor.

11 And one last point, Your Honor, that I just wanted to
12 add for the record, and Mr. Gayle, please correct me if I am
13 incorrect, but I believe what the Board for GSWA was insinuating
14 was that typically for GSWA to file a lawsuit, they would require
15 a vote of the Board, an affirmative vote of the Board to file
16 suit. That has been my experience with similar agencies and
17 private corporations, and from their perspective, that vote was
18 never requested and never taken.

19 THE COURT: Do you want to confirm that, Mr. Gayle?

20 MR. GAYLE: Yes, he's absolutely correct.

21 THE COURT: All right. Thank you.

22 All right. Well, my point -- the point is, look, no
23 matter what, it just appears to me very suspicious that -- and
24 very disappointing that you all aren't trying to resolve this
25 issue. It really does seem like an easy fix. This is another