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DATE: 01-19-16

TIME: 11:25  AM  PM BY: JWS

FILE NO OPA-PA: 15-014, 15-017, 16-001

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9 **BEFORE THE PUBLIC AUDITOR**  
10 **PROCUREMENT APPEALS**  
11 **TERRITORY OF GUAM**

12 IN THE PROCUREMENT APPEAL OF )

13 MORRICO EQUIPMENT, LLC, )

14 Appellant. )

15 Docket No. OPA PA-15-014  
16 Docket No. OPA PA-15-017  
17 Docket No. OPA PA-16-001

18 **MOTION TO DISMISS**  
19 **FOR LACK OF JURISDICTION**  
20 **AND FOR RECUSAL**  
21 **& MEMORANDUM OF POINTS**  
22 **AND AUTHORITIES**

23 **MOTION TO DISMISS OR RECUSE**

24 Pursuant to 5 G.G.A. § 5703 and 2 GAR § 12104(c)(9), the Guam Solid Waste  
25 Authority (“GSWA”) hereby moves to dismiss the appeal of Morrico Equipment, LLC  
26 (“Morrico”) due to the Public Auditor’s lack of jurisdiction and recusal or disqualification from  
27 hearing this matter. This motion is supported by the following Memorandum of Points and  
28 Authorities, the record of the proceedings and papers on file, together with any and all  
arguments to be adduced at the hearing of the within entitled motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

The Public Auditor has no jurisdiction over matters not properly submitted to her. 5  
G.C.A. § 5703; 2 G.A.R. § 12103. As the matter is not “properly submitted” to the OPA, the  
OPA lacks jurisdiction to hear the appeal and the appeal must be dismissed. Further, the Public  
Auditor should recuse herself pursuant to 2 G.A.R. § 12601. GSWA hereby incorporates by

1 reference its Motion to Dismiss for Lack of Jurisdiction and for Recusal in Docket No. OPA-  
2 PA-15-014 filed on December 23, 2015. GSWA incorporates by reference the arguments made  
3 therein and submits that the same points and authorities supports dismissal and recusal for all  
4 three of the appeals.

5 Further, there is the question on these consolidated appeals whether the OPA has  
6 jurisdiction over a decision issued pursuant to the authority of the Federal Receiver under  
7 District Court of Guam in CIVIL CASE NO. 02-0022 United States of America v. Government  
8 of Guam. The OPA does not. "The OPA generally has the jurisdiction to review de novo  
9 "matters properly submitted to her" for the purpose of promoting the integrity of the  
10 procurement process and Guam Procurement Law. 5 GCA § 5703; 2 Guam Administrative  
11 Rules and Regulations (GAR) § 12103. While having the authority to review de novo all  
12 matters properly before her, the OPA's review is limited to procurement protests dealing with a  
13 violation of Guam law, whether statutory or regulatory, directly related to the "source selection,  
14 solicitation or award of contract." 5 GCA § 5425. *Data Management Resources, LLC, v. OPA,*  
15 *Guam Department of Education*, March 29, 2012, Findings of Facts and Conclusions of Law, p.  
16 3. Whether the Federal Receiver is in compliance with 28 U.S.C.A. § 259(b) or the District  
17 Court's Order is purely a federal question, and not one that direct relates to the method of  
18 sources selection, solicitation or award of contract as defined in Guam Procurement law.

19 The challenged decisions were made under the authority of the Federal Receiver under  
20 District Court of Guam in CIVIL CASE NO. 02-0022 United States of America v. Government  
21 of Guam, not 5 G.C.A. § 5425(g). See Order re: Appointment of Receiver, *United States of*  
22 *America v. Government of Guam*, Civil Case No. 02-00022, p.16. A true and correct copy of  
23 the Order re: Appointment of Receiver is attached as **Exhibit "A"**. The Order clearly provides  
24 "the Receiver shall follow the procedures required in Guam's statute and regulations, *unless, in*  
25 *the best judgment of the Receiver, such compliance would unreasonably delay the progress in*  
26 *meeting the mandates of the Consent Decree[.]*" *Id.* at p. 16. The Receiver determined in its  
27 best judgment, that to continue with IFB GSWA004-15, would unreasonably delay the progress  
28 in meeting the mandates of the Consent Decree. That is well within the authority of the

1 Receiver appointed by the District Court. The OPA does not have jurisdiction to interpret  
2 whether a federally appointed receiver is in compliance with a federal court order.

3 Morrico then argues that the procurement does not fall under the Receiver's authority  
4 over Consent Decree projects. Morrico's argument is short sighted and undermined by the plain  
5 language of the Order re: Appointment of Receiver. The ability to conduct basic operations and  
6 fund the responsibilities of GSWA is the very crux of the Receivership. The Order re:  
7 Appointment of Receiver was issued as an extraordinary measure four years after the Consent  
8 Decree due to "[t]he problem of a highly dysfunctional, largely mismanaged, overly  
9 bureaucratic, and politically charged solid waste systems, which [was] beyond correction by  
10 conventional methods." *Id.* at p. 1. Most notably was the Government of Guam's "lack of  
11 funding" and "systemic inertia plaguing the Government of Guam." *Id.* at p. 13. With respect  
12 to the lack of funding, the District Court noted that "[p]ursuant to ¶10(a) of the Consent  
13 Decree, the Government of Guam was required to submit a financial plan for funding the  
14 various Consent Decree projects, which included the funding source or sources and a schedule  
15 to secure funds for the capital and operating costs necessary to implement said actions." *Id.* at  
16 10. Accordingly, the District Court appointed the Receiver and vested it with "the power and  
17 authority under Rule 70 [of the Federal Rules of Civil Procedure] to perform *all acts it deems*  
18 *necessary to achieve expeditious compliance with the Consent Decree.*" *Id.* at p. 15.

19 The Receiver determined it was necessary to proceed with IFB GSWA0002-16 to  
20 achieve expeditious compliance with the Consent Decree. The mandates of the Consent Decree  
21 simply cannot be met if GSWA is unable to reasonably and timely procure equipment necessary  
22 for its operations. This determination is well within the authority of the Receiver appointed by  
23 the District Court. The OPA does not have jurisdiction to interpret whether a federally  
24 appointed receiver's determination complies with a federal court order.

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**CONCLUSION**

For the foregoing reasons, the appeal should be summarily dismissed for the OPA's lack of jurisdiction to hear the appeal under 5 G.C.A. § 5703. The appeal should also be dismissed due to the disqualification or recusal of the Public Auditor in accordance with 2 G.A.R. § 12601.

Respectfully submitted this 19<sup>th</sup> day of January, 2016.

  
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VANESSA L. WILLIAMS, ESQ.  
*Attorney for Guam Solid Waste Authority*

**EXHIBIT**

**“A”**

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IN THE DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

v.

GOVERNMENT OF GUAM,

Defendant.

CIVIL CASE NO. 02-00022

**ORDER RE: APPOINTMENT OF RECEIVER**

In the four years since the Consent Decree was entered, which includes the court meeting with the parties and conducting site visits for the last several months, the following observations have become increasingly clear: (1) there has been an historical and present lack of commitment by the island’s leaders in addressing this solid waste crisis, (2) the present Governor is committed to coming into compliance with the Consent Decree, and (3) despite the Governor’s bests efforts and those of the employees of the Department of Public Works (“DPW”), they alone cannot solve this problem without a concerted effort by all sectors of the Government of Guam. The problem of a highly dysfunctional, largely mismanaged, overly bureaucratic, and politically charged solid waste system, which this Governor has inherited from past administrations, is beyond correction by conventional methods. Accordingly, this court invokes its equity jurisdiction and Rule 70 of the Federal Rules of Civil Procedure and hereby appoints a receiver to manage, supervise and oversee the Solid Waste Management Division (“SWM”) of DPW.

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**I. BACKGROUND**

The historical background of this case leading up to the entry of the Consent Decree on February 11, 2004, has been presented in several prior orders and need not be reiterated at length here. The court, however, will stress that the Consent Decree was entered into by the parties after extensive arms-length negotiations.

Since the Consent Decree was entered, protracted litigation has resulted from the Government of Guam's noncompliance, which has led to this court's further oversight.<sup>1/</sup> Concerned over the Government of Guam's lack of progress, on December 6, 2006 the United States filed a Request for a Status Hearing. *See* Docket No. 56. Thereafter it filed a Motion to Enforce Consent Decree, and the Government of Guam filed a Motion to Modify Consent Decree. *See* Docket Nos. 69 and 76. Both motions were filed on January 31, 2007, and were heard by the U.S. Magistrate Judge on March 8, 2007. The Government of Guam requested another four years to complete its duties and responsibilities under the Consent Decree.<sup>2/</sup> The U.S. Magistrate Judge subsequently recommended that this court deny that request. *See* Docket No. 125. This court adopted that recommendation. *See* Docket No. 177.

In October 2007, this court began conducting monthly status hearings and site visits. *See* Docket No. 146. For its failure to abide by the mandates of the Consent Decree, this court, *inter alia*, imposed stipulated penalties of more than \$2.855 million against the Government of Guam.<sup>3/</sup> *See* Docket No. 177.

More recently, the court invoked the Supremacy Clause, invalidating Section 98 of Public Law 29-19, thereby removing the impediment that officials from the Government of Guam

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<sup>1/</sup> Since the entry of the Consent Decree, there have been approximately 200 additional pleadings filed dealing with the enforcement of the Consent Decree.

<sup>2/</sup> The Government of Guam's "revised schedule" proposed that operations at the new landfill in Dandan begin on or about July 30, 2010, with the eventual closure of the Ordot Dump slated for December 16, 2011.

<sup>3/</sup>At the Government of Guam's request, the court stayed the imposition of these penalties in exchange for the Government of Guam's deposit of said funds with the court as proof of its good faith efforts to come into compliance with the Consent Decree.

1 argued had prohibited them from proceeding with the development of the Dandan landfill. *See*  
2 Docket No. 218.

3 Despite this court's greater involvement and repeated calls for a unified approach in  
4 expeditiously resolving the solid waste crisis, there has been minimal progress. The actions  
5 undertaken by the Government of Guam were spurred by this court's orders, rather than out of a  
6 genuine commitment to meet its responsibilities to its citizenry. At the March 2008 status  
7 hearings, the court was again reminded of how little has been done.

## 8 II. DISCUSSION

9 The court has repeatedly emphasized that time is of the essence. That time has now run  
10 out. The U.S. Environmental Protection Agency ("EPA") issued its first administrative order in  
11 1986 directing that the Government of Guam cease discharging leachate from the Ordot Dump.  
12 Despite the passage of 22 years, this dump is still in operation with no realistic end in sight.  
13 Accordingly, the court must consider drastic remedies to ensure that this islandwide health and  
14 environmental hazard does not continue. These remedial measures include the imposition of  
15 monetary damages, the appointment of a special master or court monitor, the imposition of a  
16 moratorium and the immediate closure of the Ordot Dump, or the appointment of a receiver.

### 17 A. ALTERNATIVE MEASURES

18 The court first considers whether it should impose monetary damages to exact  
19 compliance. "Courts of equity have traditionally viewed injuries to real property as incapable of  
20 being repaired by an award of money judgments. . . . A threat to public health may render legal  
21 remedies inadequate in environmental cases." Jason Feingold, *The Case for Imposing Equitable*  
22 *Receiverships Upon Recalcitrant Polluters*, 12 UCLA J. ENVTL. L. & POL'Y 207, 218 (1993)  
23 (hereinafter "*Recalcitrant Polluters*").

24 The environmental threat here cannot be disputed. The Ordot Dump is unlined on its  
25 bottom and uncapped at its top, and thus acts like a sponge, retaining rain water and releasing it  
26 after it has percolated through the dump and absorbed contaminants. *See* Docket No. 55. Mr.  
27 Pankaj Arora, Environmental Engineer for the U.S. EPA, stated that the "[f]ailure to close the  
28 Ordot Dump will cause other environmental and health problems in addition to the continued



1 discharge of leachate. During the DPW's operation of the Ordot Dump, the Dump has continued  
2 to pose a vector issue (*i.e.* flies, rodents, and other pests), an odor problem, and a fire hazard."<sup>4/</sup>  
3 Arora Decl. Docket No. 73. The imposition of monetary damages is an inadequate remedy and  
4 would not resolve the continuing harm to the environment and the citizens of Guam.

5 Moreover, given the Government of Guam's limited financial resources, any monetary  
6 damages ordered would divert money better spent on Consent Decree projects. Furthermore, this  
7 court cannot ignore that a monetary judgment against the Government of Guam, could  
8 "eventually be passed on to nonculpable taxpayers." *See* Summary and Comments, 10 *Env't'l*  
9 *Law Rep.* 10059 (Mar. 1980).

10 Next, the court considers the appointment of a special master which is authorized by Rule  
11 53 of the Federal Rules of Civil Procedure. At this point in the litigation, however, such an  
12 appointment would be a step backwards in terms of complying with the Consent Decree. The  
13 special master would oversee compliance with the Consent Decree and upon submission of a  
14 "master's report," this court would conduct "appellate-type review." Stuart P. Feldman, *Curbing*  
15 *the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 *B.C.*  
16 *ENV'T'L AFF. L. REV.* 809, 820 (1991). This additional level of judicial review would likely result  
17 in further delay and inaction by the Government of Guam.

18 The appointment of a special monitor would be even more problematic and subject to  
19 challenge. *See, e.g., Hook v. Arizona*, 907 *F.Supp.* 1326 (D. Ariz 1995) (challenge to  
20 appointment of a special monitor to oversee Defendant's compliance with court-ordered remedial  
21 measures due to violations of prison inmates' constitutional rights). "In accomplishing their task,  
22 monitors generally play a less intrusive role than masters or receivers. Nevertheless, litigants  
23 frequently challenge references to monitors." Feldman, *Curbing the Recalcitrant Polluter*, 18  
24 *B.C. ENV'T'L AFF. L. REV.* at 826. Because there is no authority in statute or rule for such an  
25 appointment, this court would have to rely solely on its inherent authority to undertake this  
26 measure.

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28 <sup>4/</sup> From its own site visits, the court is well aware that not only are the surrounding residents  
exposed to these health hazards, but the DPW employees tasked to work at the Ordot Dump must  
likewise endure these deplorable conditions.

1 This court also rejects the imposition of a moratorium to immediately close the Ordot  
2 Dump. Although this prohibition would ensure that no future trash is deposited at the Ordot  
3 Dump, it would almost certainly guarantee rampant and widespread illegal dumping. Thus,  
4 rather than a specific focus on the discharge of pollutants at one site, there would be an imminent  
5 threat of leachate draining into the waters throughout the island. This alternative is not realistic  
6 and would indeed result in greater harm to the community.

7 In sum, these alternative remedies would do little to achieve compliance with the Consent  
8 Decree. Accordingly, the court must consider the appointment of a Receiver.

9 **B. AUTHORITY TO APPOINT A RECEIVER**

10 The court is fully cognizant that the appointment of a receiver to ensure compliance with  
11 federal environmental laws is a remedy reluctantly and rarely used. Such an appointment is  
12 rooted in traditional notions of an equitable receivership and in Rule 70 of the Federal Rules of  
13 Civil Procedure. Environmental receiverships have gained acceptance as a remedial measure by  
14 the courts.

15 **1. TRADITIONAL NOTIONS OF RECEIVERSHIP**

16 A traditional receivership involved a court in equity appointing a neutral third party to be  
17 responsible for holding and protecting specific property, such as real property, estates, and failed  
18 businesses. *See generally* Joanne R. Denworth and James Burn, *Moyer's Landfill: Case Study of*  
19 *a Federal Equity Receivership*, 4 TEMPLE ENVTL. L. & TECH. J. 17, 21 (1985). "Receivers  
20 historically have been appointed as custodians for property deemed to be in jeopardy of loss from  
21 improper diversion or destruction." Feingold, *Recalcitrant Polluters*, 12 UCLA J. ENVTL. L. &  
22 POL'Y at 212.

23 The concept of a receiver has evolved from being simply a custodian of property, and has  
24 been used in certain cases as an agent of reform. "The most dramatic and controversial  
25 receiverships of the late twentieth century, the institutional reform cases, exemplify the modern  
26 exercise of equitable authority to appoint a receiver to address persistent non-compliance with  
27 judicial decrees." *Recalcitrant Polluters, supra* at 214. A receiver was appointed to implement  
28 court-ordered school desegregation in *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976).

1 More recently, a receiver was appointed to oversee and administer medical services in  
2 California's state prison system. See *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL  
3 2932253 (N.D. Cal. Oct. 3, 2005) (Findings of Fact and Conclusions of Law Re Appointment of  
4 Receiver).

5 These modern remedial receiverships have also arisen in environmental cases.  
6 Environmental receiverships found its genesis in 1979, when the City of Detroit, the City's  
7 Water and Sewerage Department and the State of Michigan were sued by the United States  
8 Environmental Protection Agency for violating the Federal Water Pollution Control Act, 33  
9 U.S.C. § 1251 *et seq.* *United States v. City of Detroit*, 476 F. Supp. 512 (1979). The parties  
10 entered into a consent judgment, but despite limited progress "failed to comply with the  
11 judgment of th[e] court and federal law governing water pollution." *Id.* at 520. The court *sua*  
12 *sponte* ordered the appointment of a receiver "to secure compliance with the law and th[e] court's  
13 judgment." *Id.* The court recognized that such authority to appoint a receiver was "founded in  
14 the broad range of equitable powers available to [a district] court to enforce and effectuate its  
15 orders and judgments." *Id.*

16 Relying on *City of Detroit*, the court in *Town of Greenwich v. Department of*  
17 *Transportation*, 10 Env'tl. L. Rep. 20178 (1980), appointed a receiver to take control of the  
18 Connecticut Department of Transportation ("DOT") to close down a power plant for violating air  
19 pollution regulations promulgated pursuant to the federal Clean Air Act 42 U.S.C. § 7401 *et seq.*  
20 As in *City of Detroit*, the parties in *Town of Greenwich* entered into a consent judgment, but it  
21 was undisputed that the DOT did not comply and continued to violate the air pollution  
22 regulation. *Id.* The court appointed a receiver "to secure compliance with the law and the  
23 judgment of th[e] Court." *Id.*

24 Since *City of Detroit*, other courts have ordered receiverships when environmental laws  
25 were implicated and concerns regarding health and safety had been raised. See, e.g., *Ohio ex rel.*  
26 *Brown v. Chem-Dyne Corp.*, Case No. CA-80-03-0021, 1981 WL 5234 (Ohio App. Oct. 28,  
27 1981) (unreported) (affirming the appointment of a receiver over a private company that had  
28 unlawfully accumulated hazardous waste that polluted the water, and then violated a stipulated

1 agreement to cease the pollution); *O'Leary v. Moyer's Landfill, Inc.*, 677 F.Supp. 807, 815 (E.D.  
2 Pa. 1988) (holding that the court "retain[ed] ongoing jurisdiction for the duration of the  
3 receivership over claims arising with respect to the property in the Receiver's control as a means  
4 of protecting the court's own judgment."); *Dep't of Env't'l Prot. v. Emerson*, 563 A.2d 762 (Me.  
5 1989) (affirming the appointment of a receiver to oversee operation of a tire storage and disposal  
6 facility and ensure compliance with state laws regarding, *inter alia*, hazardous waste, solid waste  
7 management and hazardous clearance); *Ohio ex rel. Celebrezze v. Gibbs*, 573 N.E.2d 62, 67-68  
8 (Ohio 1991) (affirming appointment of a receiver and further holding that state law "enabl[ed]  
9 the trial court to exercise its sound jurisdiction to limit or expand a receiver's powers as it deems  
10 appropriate."); *United States v. Acadia Woods Add. #2 Sewer Co.*, 41 F. Supp. 2d 632 (W.D. La.  
11 1999) (appointing a receiver to run a wastewater city treatment plant to ensure compliance with  
12 federal Clean Water Act).

## 13 2. AUTHORITY TO IMPOSE A RECEIVERSHIP

14 A court has authority, as a court in equity, to establish a receivership. Federal courts are  
15 invested with jurisdiction over "all cases in law and equity." U.S. CONST. Art. III, § 2. Indeed,  
16 one court stated that its authority to appoint a receiver "is founded in the broad range of equitable  
17 powers available to this court to enforce and effectuate its orders and judgments." *City of*  
18 *Detroit*, 512 F.Supp. at 520. Other courts have followed *City of Detroit* and relied on equity  
19 jurisdiction to appoint federal receivers in cases where there were violations of environmental  
20 laws. *E.g.*, *Town of Greenwich*, 10 Env'tl. L. Rep. 20178 ("A court appointed Administrator will  
21 be selected . . . [and t]he authority of this Court to exercise such broad remedial power is well  
22 articulated by Judge Feikens in [*City of Detroit*] and cases cited therein."); *Alisal Water Corp.*,  
23 326 F.Supp. at 1026 (stating that the evidence at trial "suggests powerfully that significant  
24 equitable relief, including the appointment of a receiver for certain specified purposes, is  
25 warranted here"); *Acadia Woods*, 41 F. Supp. 2d at 633 (appointing a receiver "based upon the  
26 broad range of equitable powers available to this Court to enforce and effectuate its orders and  
27 judgment").

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1 Courts have also relied on Rule 70 of the Federal Rules of Civil Procedure, which states:  
2 “[I]f a party fails to comply [with a judgment] within the time specified . . . the court may direct  
3 the act to be done at the cost of the disobedient party by some other person appointed by the  
4 court.” Fed. R. Civ. P. 70. See *Town of Greenwich*, 10 Env’tl. L. Rep. 20178 (“The  
5 Administrator . . . is vested with the power and authority provided under Rule 70 of the Federal  
6 Rules of Civil Procedure to perform all acts he deems necessary to achieve expeditious  
7 compliance . . . .”); *City of Detroit*, 476 F.Supp. at 516 (stating that the receiver was “vested  
8 with the power and authority as provided under Rule 70 of the Federal Rules of Civil Procedure  
9 to perform any act necessary to achieve expeditious compliance with the Consent Decree.”).

10 Although neither party has moved for the appointment of a receiver, both parties have  
11 conceded this court’s authority to appoint one. See Docket Nos. 147 and 152. At this court’s  
12 request, both parties submitted the names of individuals and/or firms to serve as potential  
13 receiver. See Docket Nos. 204 and 206. The court advised the parties that it would interview  
14 these candidates, and subsequently met with seven out of the nine nominees.<sup>5/</sup> These interviews  
15 were both educational and enlightening, and further bolsters the court’s belief that nothing short  
16 of an appointment of a receiver will resolve this crisis.

17 **C. EVIDENCE IN THIS CASE SUPPORTS APPOINTMENT OF A RECEIVER**

18 The history of this case demonstrates that the Government of Guam is paralyzed by an  
19 institutional and systemic quagmire that has prevented it from effectively complying with the  
20 Consent Decree. The court acknowledges that the Government of Guam, and specifically DPW,  
21 has recently shown some advancement toward gaining some compliance with the Consent  
22 Decree. However, progress is limited and sporadic.

23 **1. HISTORY OF NONCOMPLIANCE WITH THE MANDATES OF THE CLEAN WATER ACT**

24 From the court’s perspective, and in light of the record of this case, the Government of  
25 Guam should not be surprised by the court’s resort to this drastic measure. The record reveals  
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27 <sup>5/</sup> The court attempted to interview all nine candidates. One declined to be interviewed, and the  
28 court was unable to make contact with the other.

1 that the Government of Guam has been on notice of its violation of the Clean Water Act for  
2 twenty-two years, when the U.S. EPA issued an Administrative Order in 1986 directing DPW to  
3 cease discharge of leachate by May 1, 1987. *See* Lee Decl. Docket No. 75. DPW failed to  
4 comply. *Id.* Another Administrative Order was issued in 1990, again requiring the cessation of  
5 discharges by June 30, 1992. *See* Complaint, Docket No. 1; Answer, Docket No. 7; Consent  
6 Decree, Docket No. 55. Although the U.S. EPA granted an extension until August 15, 1992,  
7 DPW again failed to meet this deadline. In 1997, the U.S. EPA amended the 1990  
8 Administrative Order that required DPW to submit a proposed schedule for the design and  
9 construction of a cover system to eliminate the discharge of leachate from the Ordot Dump. *See*  
10 Complaint, Docket No.1; Lee Decl., Docket No. 75. Although DPW submitted a proposed  
11 schedule, it was rejected because it lacked the funding commitment to make the plan credible.  
12 *See* Complaint, Docket No.1; Lee Decl., Docket No. 75. Moreover, for two years prior to the  
13 filing of the Complaint, the United States and the Government of Guam engaged in intense  
14 negotiations, and the United States submitted a proposed consent decree, which was signed by  
15 the former governor, the Hon. Carl T.C. Gutierrez, in 2003 just before leaving office. *See* Report  
16 and Recommendations, p. 3 n.2, Docket No. 125. In light of the change in administration, further  
17 settlement negotiations began with new Government of Guam officials, *id.*, and ultimately, the  
18 parties entered into the Consent Decree on February 11, 2004. *See* Docket No. 55. The Consent  
19 Decree, herein at issue, was signed by the current governor, Hon. Felix P. Camacho. *See*  
20 Consent Decree, Docket No. 55. Yet, more than four years after entering the Consent Decree,  
21 compliance with its mandates are minimal: the Ordot Dump remains the island's only means of  
22 solid waste disposal; construction of the new landfill at Dandan cannot begin until award of the  
23 contract which is expected to occur in five months; the Government of Guam cannot, with any  
24 certainty, articulate the means of funding either the closure of the Ordot Dump or the  
25 construction of the new landfill; and the Government of Guam has not even decided on the  
26 procurement method for the closure of the Ordot Dump or construction of the new landfill.

27       There are several reasons which lead this court to conclude that the Government of Guam  
28 is unable to achieve true compliance with the mandates of the Consent Decree. These reasons

1 support the necessity of the appointment of a receiver in this case.

2 **2. LACK OF FINANCIAL COMMITMENT**

3 Most troubling to this court is the lack of financial commitment evinced by the  
4 Government of Guam toward funding Consent Decree projects. The Government of Guam has  
5 known it was in violation of the Clean Water Act since 1986, and was ordered, twenty-two years  
6 ago, to cease discharge of leachate. *See* Lee Decl. Docket No. 75.

7 Pursuant to ¶10(a) of the Consent Decree, the Government of Guam was required to  
8 submit a financial plan for funding the various Consent Decree projects, which included the  
9 funding source or sources and a schedule to secure funds for the capital and operating costs  
10 necessary to implement said actions. The Government of Guam's Revised Financial Plan  
11 indicated a preference for financing the initial sum of approximately \$100 million through  
12 revenue bonds. *See* Motion to Enforce Consent Decree, Docket No. 69, at Attachment 14. These  
13 revenue bonds would then be re-paid through the steady collection of tipping fees and residential  
14 customer rates. Despite such a clear need to improve its collection rates in order to obtain these  
15 revenue bonds, Lawrence Perez, the director of DPW, testified that the agency has only increased  
16 its residential revenue collection rate from 30% to 50%.

17 This poor collection rate has been an ongoing problem. For example, back in April 2006,  
18 the Public Utilities Commission ("PUC") contracted with the Georgetown Consulting Group  
19 ("GCG") to examine whether DPW was capable of efficiently billing and collecting an increased  
20 rate revenue which would be required to fund the Government of Guam's obligations under a  
21 proposed revenue bond.<sup>6/</sup> The GCG's August 2006 "Focused Audit Report and  
22 Recommendations" found that:

- 23 (a) DPW's current billing and collection system is unable to competently  
24 handle even the current rate revenue levels much less the increased burden  
25 necessary to support the revenue bonds.

26 <sup>6/</sup> At that time, it was anticipated that the existing rates would have to be increased 400% over  
27 the next three years in order to pay for the revenue bonds. *See* Motion to Enforce Consent  
28 Decree, Docket No. 69, at Attach. 12.

1 (b) Substantial remedial action, including operational changes, legislation,  
2 regulatory action and rule-making must immediately occur to enable DPW  
3 to bill and collect the revenue necessary to fund revenue bond  
4 requirements.

5 (c) If this remedial action does not occur, DPW will not be able to bill and  
6 collect the revenues necessary to fund revenue bond obligations and this  
7 burden would fall, in part, on the General Fund. Regulatory principles  
8 could obstruct the PUC (i) from awarding rate increases to compensate for  
9 DPW billing and collection mismanagement; and (ii) from increasing  
10 SWM residential customer rates unless the quality of residential service is  
11 dramatically improved.

12 *See Motion to Enforce Consent Decree, Docket No. 69, at Attach. 12.*

13 Because of GCG's findings regarding DPW's poor residential service and billing and  
14 collection mismanagement, the PUC would not approve any increase in rates. Despite such  
15 findings by GCG, DPW has not made any concerted effort to improve its billing practices. A  
16 year later in August 2007, the Guam Public Auditor conducted a Public Auditor's Performance  
17 Audit and again problems concerning collection procedures were identified. The Public Auditor  
18 estimated that \$4 million in government revenues were lost due to thousands of residential  
19 customers who may not have been billed or had not been provided services. Regardless of the  
20 findings by the GCG in 2006 and the Public Auditor in 2007, little has been done in terms of  
21 improving DPW's collections. It is disconcerting that DPW's collection rates have not improved  
22 at a more significant level, particularly when financial resources are so limited.

23 The lack of a consistent revenue stream from collections is further exacerbated by the  
24 Guam Legislature's failure to provide funding for any of the Consent Decree projects. At the  
25 status hearings last week, Mr. Perez testified that DPW prepares two budget proposals annually.  
26 The first is an operating budget and the second is a supplemental budget, which he represented  
27 was a "wish list" of "unfunded mandates" that included Consent Decree projects. No funding  
28 has been provided by the Guam Legislature for the Consent Decree projects. In fact, he stated  
that the only funding for Consent Decree projects are from grants received and monies the  
Governor reallocates using his transfer authority. Without a commitment to fund the necessary  
projects, there is little chance that the closing of the Ordot Dump and opening of the landfill at  
Dandan will ever occur.



1                   **3. LACK OF COOPERATION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES**

2                   The court finds that there has been an historical failure of the leadership of the  
3 Government of Guam to respond to the solid waste crisis. The past and current leaders have  
4 failed to take the bold measures necessary to protect the lives and welfare of the citizens of  
5 Guam. The record in this case reveals that the Executive and Legislative Branches, in several  
6 instances, have not been able to work cooperatively to ensure compliance with the Consent  
7 Decree.

8                   The Legislature has not only failed to provide any funding for Consent Decree projects,  
9 but it has actively prohibited the expenditure of monies toward development of the landfill at the  
10 Dandan site. For example, the Legislature enacted Section 98 of Guam Public Law 29-19  
11 (“Public Law 29-19”), which essentially prohibited the expenditures of funds for any landfill site  
12 that the Government of Guam did not yet own. Because the condemnation proceedings in  
13 Dandan had not begun, this public law prevented all expenditures that would have facilitated the  
14 opening of Dandan.<sup>7/</sup> Therefore, the completion of a Hydrogeological Report on the Dandan site  
15 by Mr. Tor Gudmundsen was significantly delayed because of lack of payment. The actions of  
16 the Legislature left the court with no other alternative but to invoke the Supremacy Clause to  
17 strike down Section 98 of Public Law 29-19 as a means to enforce compliance with the mandates  
18 of the Consent Decree. *See* Docket No. 188.

19                   Additionally, the court ordered the Government of Guam to pay \$2.855 million in  
20 stipulated penalties by January 24, 2008.<sup>8/</sup> The Governor used his transfer authority to take  
21 money from the budget of the Guam Public School System so that said funds could be deposited  
22 with the court. Thereafter, the Legislature, rather than collaborate with the Governor on how to  
23

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24 <sup>7/</sup> This court notes that the Government of Guam did not initiate condemnation proceedings until  
25 this court imposed a deadline of January 24, 2008. Counsel for the Government of Guam  
26 represented to this court that the condemnation complaint was filed that day in the Superior  
27 Court of Guam.

28 <sup>8/</sup> *See supra*, note 3.

1 resolve the government's financial woes, chastised the Governor for using his transfer authority  
2 in such a manner.

3 The Governor's transfer authority is an insufficient means of funding the Consent Decree  
4 projects. Guam's solid waste crisis can only be resolved with the concerted efforts of both the  
5 executive and legislative branches. This court has repeatedly requested that both branches work  
6 together and speak with a united voice in finding a solution to this problem so that this court  
7 would not have to resort to appointing a receiver. It is clear, unfortunately, that the court's pleas  
8 for cooperation have fallen on deaf ears.

9 **4. LACK OF TANGIBLE PROGRESS**

10 The lack of funding is only one of DPW's problems preventing it from completing the  
11 Consent Decree projects. There is a systemic inertia plaguing the Government of Guam. The  
12 Public Auditor made a number of recommendations in her August 2007 audit that do not  
13 necessarily require the expenditure of funds. For example, the Public Auditor recommended that  
14 the Government of Guam enter into service contract agreements with the commercial haulers.  
15 Despite having several months to draft these agreements, the Government of Guam is still  
16 working on them and is hoping to get them finished "soon."

17 Additionally, the road design work has been completed for over a year and half, there  
18 have been no requests for proposals or invitations to bid put out and no work done in this  
19 regard.<sup>2/</sup> Mr. Perez testified that because of the Government of Guam's financial constraints, it is  
20 DPW's preference to enter into a private public partnership where a private company would fund  
21 the project and provide a "Design, Build, Operate" bid as to the combined road work and the  
22 building and operation of the new landfill. However, this possibility has been offered in the past  
23 when the court has asked how the Government of Guam was going to meet the mandates under  
24 the Consent Decree. *See* Docket No. 67. Despite these representations, no bid has been

25 \_\_\_\_\_  
26 <sup>2/</sup> In fact, during the hearing last week, Mr. Perez testified that DPW had not decided on a  
27 precise procurement process to be used, whether an invitation to bid or request for proposal. At  
28 this late juncture, it is troubling that DPW is undecided as how to best proceed.



1 recognizes the level of commitment shown by Governor Felix P. Camacho and appreciates the  
2 hard work and limited progress of DPW in the last few months, the Government of Guam lacks  
3 the resources, experienced personnel, and necessary support to comply with the Consent Decree  
4 on its own. Governor Camacho expressed his frustration when he compared the Government of  
5 Guam to a rocking horse: "There is much motion, but no progress." The court concurs with the  
6 Governor's characterization of the situation, but cannot accept the lack of forward movement.

7       Accordingly, the court hereby appoints as Receiver Gershman, Brickner & Bratton, Inc.  
8 ("GBB") of Fairfax, Virginia, a solid waste management consulting firm included in the  
9 Government of Guam's list of potential receivers. This appointment is, without a doubt, one of  
10 the most monumental decisions this court has ever made. It is not made lightly or with relish.  
11 Rather, this decision was reached after much deliberation and upon consideration of the complete  
12 record in this case.

13       Therefore, having conducted monthly hearings and site visits in the above-entitled matter  
14 to determine the progress made toward complying with the Consent Decree; having considered  
15 all the submissions heretofore filed by the parties; in light of the Government of Guam's lengthy  
16 history in failing to comply with the Consent Decree and violating the Clean Water Act, 33  
17 U.S.C. § 1251, *et seq.*; and because of the failure of less drastic remedies to secure compliance  
18 with the Clean Water Act:

19       **IT IS HEREBY ORDERED** that under the broad range of equitable powers available to this  
20 court to enforce and effectuate its orders and judgment and Rule 70 of the Federal Rules of Civil  
21 Procedure, GBB, acting by and through its Special Principal Associate David L. Manning, is  
22 appointed as the Receiver and is vested with the power and authority provided under Rule 70 to  
23 perform all acts it deems necessary to achieve expeditious compliance with the Consent Decree.

24 **A. RECEIVER'S AUTHORITY/DUTIES**

25       1. **IT IS ORDERED** that the Receiver shall have full power and authority to enforce the  
26 terms of the Consent Decree, and assume all of the responsibilities, functions, duties, powers and  
27 authority of the Solid Waste Management Division of the Department of Public Works, and any  
28 and all departments, or other divisions of the Department of Public Works insofar as they affect

1 the Government of Guam's compliance with the Consent Decree.

2       **2. IT IS FURTHER ORDERED** that the Receiver shall have the authority required or  
3 necessary for the complete management and control of the Consent Decree projects, including  
4 but not limited to:

5               (a) The supervision of all of Government of Guam's employees associated  
6 with the Consent Decree projects;

7               (b) The performance of existing contracts;

8               (c) The entering into future contracts deemed necessary. In awarding any  
9 future contracts, the Receiver shall follow the procedures required in Guam's  
10 statutes and regulations, unless, in the best judgment of the Receiver, such  
11 compliance would unreasonably delay the progress in meeting the mandates of the  
12 Consent Decree;

13               (d) The hiring of all such consultants, professionals, contractors,  
14 engineering firms or counsel which the Receiver deems necessary for the  
15 performance of administrative, financial advisory, legal, accounting, engineering,  
16 construction, and operations services;

17               (e) The facilitation of financing and/or borrowing of such funds necessary  
18 to carry out the duties relating to the Consent Decree as set forth in the  
19 Government of Guam's Revised Financial Plan. If, in the best judgment of the  
20 Receiver, the Revised Financial Plan fails to provide the means or methods of  
21 financing necessary or would unreasonably delay the progress in meeting the  
22 mandates of the Consent Decree, the Receiver is authorized to modify the Plan to  
23 provide for alternative means or methods of debt financing it deems appropriate;

24               (f) The application to the Consolidated Commission on Utilities for rate increases  
25 for residential waste collection services and/or tipping fees on a temporary or permanent  
26 basis, as appropriate, unless, in the best judgment of the Receiver, such action would  
27 unreasonably delay the progress in meeting the mandates of the Consent Decree;  
28

1 (g) The full and complete access to the staff, documents, books, records,  
2 electronic databases and facilities of any and all Government of Guam departments or  
3 divisions of the Department of Public Works and to make such employees and items  
4 available to any consultants, accountants, attorneys or other such persons employed by the  
5 Receiver;

6 (h) The full and complete access to the documents, books, records, electronic  
7 databases held by any Government of Guam entity that has in its custody records deemed  
8 necessary by the Receiver to ensure compliance with the Consent Decree; and

9 (i) Consultation with the United States Environmental Protection Agency with  
10 respect to any aspect of complying with the Consent Decree, and to secure technical  
11 advice or assistance from such agency for the purpose of assuring compliance with the  
12 Clean Water Act and all other applicable laws and regulations.

13 **B. TERMS OF APPOINTMENT**

14 1. This appointment shall be for the period necessary to achieve compliance with the  
15 Consent Decree, unless:

16 (a) The Receiver recommends termination of this Order as no longer necessary, or  
17 modification thereof, and said termination or modification is accepted by this court;

18 (b) The Receiver requests to be relieved and such request is approved by this  
19 court;

20 (c) This Order is otherwise modified or terminated by this court.  
21

22 2. The Receiver may, at any time, apply to this court for instructions and/or modification  
23 of this Order, and may seek instructions as to whether funds should be expended for a particular  
24 purpose.

25 3. The Receiver shall submit quarterly reports to this court regarding the progress made  
26 toward compliance with the Consent Decree.

27 4. The Receiver is responsible solely to this court. The Receiver shall not be personally  
28 liable for any act done in compliance with this Order. No suit shall be filed against the Receiver

1 without the consent of the court.

2 **C. REMUNERATION**

3 1. **IT IS HEREBY ORDERED** that the Receiver shall receive remuneration at the rates set  
4 forth in the attachment hereto and in the following manner:

5 (a) On or before the 7th day of each month, the Receiver shall file and serve the  
6 court, with a copy to the Government of Guam, a summary of time expended and  
7 expenses incurred during the month immediately preceding, along with a billing  
8 statement and request for compensation. The court shall review the request for  
9 compensation for reasonableness by the 20<sup>th</sup> of each month, and shall direct that payment  
10 be made to the Receiver for all compensation and expenses incurred and found by the  
11 court to be reasonable by the 25<sup>th</sup> of each month.

12 (b) Payments shall be limited to 90% percent of fees and 100% percent of  
13 all expenses deemed reasonable. Ten (10%) percent of fees shall be held in trust  
14 accruing interest at prevailing rates for trust accounts to the credit of the Receiver  
15 and shall be payable upon completion of the project.

16 2. The Receiver shall file an application for the payment of fees to any consultant and/or  
17 professional hired as authorized herein, such as accountants, legal counsel, and others hired to  
18 assist in the performance of administrative duties. Such professional fees shall be paid by the  
19 same procedures as set forth for the payment of the Receiver. However, with respect to 10%  
20 retainage held in trust, the Receiver may request its release to other consultants and/or  
21 professionals hired at the time their work is completed.

22 3. Defendant shall be responsible for compensation and expenses of the Receiver and of  
23 any and all persons or entities employed or contracted by the Receiver in carrying out the  
24 provisions of this Order.

25 **D. ORDERS AS REGARD TO OTHER PARTIES/ENTITIES**

26 1. **IT IS HEREBY ORDERED** that the parties, including but not limited to the United States  
27 Environmental Protection Agency, Department of Public Works and Guam Environmental  
28 Protection Agency, shall use their best efforts to assist the Receiver in the performance of its

1 duties. Furthermore, the parties shall cooperate with, and assist, the Receiver to the extent  
2 necessary and appropriate to permit the Receiver to carry out its responsibilities under this Order.

3       **2. IT IS FURTHER ORDERED** that the parties, including but not limited to the United  
4 States Environmental Protection Agency, Department of Public Works and Guam Environmental  
5 Protection Agency, are to immediately comply with this Order and are enjoined from interfering  
6 in any manner, or from failing to cooperate either directly or indirectly, with the Receiver in the  
7 performance of its functions and duties.

8 **E. CONTINUING JURISDICTION**

9       1. This court retains specific and continuing jurisdiction to enforce the provisions of this  
10 Order, and to enter such further orders to effectuate the purposes of the Receivership and  
11 compliance with the Consent Decree.

12       2. This court retains jurisdiction to enable any party, subject to this Order, to apply to this  
13 court at any time for further orders and directions as may be necessary or appropriate to carry out  
14 or construe this Order, to modify any of its provisions, to enforce compliance, and to punish  
15 violations of its provisions.

16       In conclusion, the appointment of GBB as Receiver is a positive step in moving the  
17 Government of Guam forward. The Receiver has extensive experience in solid waste  
18 management operations and will ensure compliance with the Consent Decree and the Clean  
19 Water Act, thus, protecting the natural resources for future generations. It is the court's hope that  
20 the Governor and the new Speaker of the Guam Legislature, the Hon. Judith Won Pat, will  
21 cooperate with this court's order to see that the Ordot Dump crisis is resolved as expeditiously as  
22 possible.

23       **IT IS SO ORDERED.**



**/s/ Frances M. Tydingco-Gatewood**  
**Chief Judge**  
**Dated: Mar 17, 2008**





SOLID WASTE  
MANAGEMENT  
CONSULTANTS

March 15, 2008

Honorable Frances Tydingco-Gatewood  
Chief Judge  
District Court of Guam  
520 West Soledad Avenue  
Hagåtña, Guam 96910

Re: Letter of Engagement for Services Pursuant to Designation as Receiver

Dear Judge Tydingco-Gatewood:

The purpose of the letter is to confirm the designation of Gershman, Brickner & Bratton, Inc. (GBB) as Receiver pursuant to your Court Order that you have told us will be dated March 17, 2008.

GBB herein designates David L. Manning to be signatory for GBB as Receiver. He would sign correspondence as "David L. Manning, as Receiver Gershman, Brickner & Bratton, Inc. for the United States District Court Territory of Guam." I will be GBB's overall Officer-in-Charge of this engagement. Other GBB officers, staff, and associates will be utilized as the activities dictate. In particular, Chace Anderson, GBB Vice President, will play a significant role.

Approach to this Engagement

In undertaking this assignment, our initial approach will be along the following lines:

1. Review all information in this matter on file with the Court.
2. Make an initial determination of other information needed by the Receivership and prepare a request for the information to be sent to the Defendant.
3. Conduct a visit and associated meetings in Guam for the purpose of:
  - a. Becoming familiar with the Solid Waste Management Division, its staff, management, infrastructure, operations, and current set of consultants and contractors;
  - b. Establishing offices in facilities provided by the Court and meeting with Court officials who are involved in this matter;
  - c. Meeting with Guam Government officials and other stakeholders, including the U.S.E.P.A. Regional office officials who have relevance to accomplishing the objectives in the Consent Decree; and
  - d. Visiting the site of the Ordot Dump and the proposed site(s) for the new landfill.

Gershman, Brickner & Bratton, Inc.

8550 Arlington Boulevard, Suite 203  
Fairfax, Virginia 22031-4620  
(703) 573-5800 FAX (703) 698-1306

E-MAIL: [gbb@gbbine.com](mailto:gbb@gbbine.com)  
Printed on recycled paper

  
3/15/08

4. Prepare a draft Plan of Action and submit it to the Court and other parties as directed by the Court for review and comment.
5. Finalize the Plan of Action and submit it to the Court for approval.
6. Upon approval of the Court, distribute the Plan of Action throughout the Guam Government to appropriate parties and to other parties as necessary, conducting meetings with these individuals and groups as necessary to explain the Plan of Action.
7. Start implementation of the Plan of Action, reporting as necessary to the Court, and updating and issuing addenda to the Plan of Action as is necessary.

During the course of our work, GBB will plan, coordinate, and report on the activities among its staff and others who are involved from the Defendant and other parties as appropriate. GBB will keep the Court apprised of anticipated work activities, staffing, scheduling, and budgeting as they occur, including invoicing and activities reporting as outlined in the Court's Order. GBB will assess specific requirements and identify appropriate resources to be applied and update its work plan, schedule and budget estimates for the work required.

The effective commencement date of our services will be March 17, 2008.

#### Invoicing and Reporting

Attached to this letter is a compensation rate schedule that will be the basis for charges relevant to this matter. Because travel time to and from Guam will be significant, staff travelling to and from Guam will be allowed to charge up to one-half of their "gate-to-gate" travel time as billable time to this matter. Also, prior to our first trip to Guam, we will submit to the Court for review and approval our plan for our room and board arrangements when on Guam. In addition to our fees and the cost of our room and board arrangements, we will incur some other expenses in connection with our work for the Court in this matter. While these costs could be estimated and added to our fees, we are concerned that such an approach would add more cost to the Receivership than is necessary. Therefore, we prefer to exclude these expenses from our fees and develop a plan that will assure that we cover only our actual and reasonable expenses. We will also submit our plan for these expenses to the Court for review and approval prior to our first trip to Guam. We look forward to receiving guidance from you in this regard.

It is our understanding that the Court has available funds in the amount of approximately \$2.8 million that can be used to cover the expenses of the Receivership and that the Court will assure that these funds are replenished from time to time as is necessary to assure that the Receivership is able to successfully achieve its purpose of full compliance with the Consent Decree in this matter.

Invoicing and activities reporting will be done formally on a monthly basis per the requirements of the Court Order. More frequent contact will be made with the Court either by phone, in person, or by e-mail as the situation requires.

*Handwritten signature*  
3/15/08

Honorable Frances Tydingco-Gatewood  
March 15, 2008  
Page 3

We look forward to this assignment and in achieving the objectives of the Court to bring the Guam Government in compliance with the Consent Decree. If there are any questions, please do not hesitate to contact me.

Sincerely,


GERSHMAN, BRICKNER & BRATTON, INC.



Harvey W. Gershman  
President

Attachment

cc: David Manning, GBB  
Chace Anderson, GBB

  
3/15/08

**ATTACHMENT**

**GERSHMAN, BRICKNER & BRATTON, INC.  
COMPENSATION RATE AND FEE SCHEDULE (1, 2)  
FOR RECEIVER ASSIGNMENT PER COURT ORDER DATED MARCH 17,  
2008**

| <u>POSITION</u>  | <u>(\$ PER HOUR)</u> |
|--|----------------------|
| President (Gershman)   | 250.00               |
| Special Principal Associate (Manning)                            | 250.00               |
| Executive Vice President (Brickner)                              | 225.00               |
| Sr. Vice President (Bratton)                                     | 210.00               |
| Vice President (Anderson, Bernheisel)                            | 185.00               |
| Principal Associate/Principal Engineer                           | 165.00               |
| Sr. Project Manager/Sr. Project Engineer/ Sr. Associate Engineer | 160.00               |
| Project Manager/Sr. Associate                                    | 140.00               |
| Project Engineer/Sr. Consultant/Support Director                 | 125.00               |
| Consultant II/Engineer II/Contract Administrator                 | 105.00               |
| Consultant I/Engineer I  | 85.00                |
| Support Manager  | 65.00                |
| Administrative Secretary/Word Processor/ Editor/Staff Accountant | 60.00                |
| Clerical/Support Staff/Research Assistant/Graphics Coordinator   | 45.00                |

- (1) Effective January 1, 2008, subject to 4 percent annual increase as of January 1, 2009.  
(2) For payments not received within 30 days of invoicing date, interest charge of 1.00 % per month will be applied.

*JHO*  
3/15/08