

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

In re: )  
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GUAM WATERWORKS AUTHORITY )  
) NPDES Appeal Nos. 09-15 and 09-16  
Northern District Sewage Treatment Plant )  
Agana Sewage Treatment Plant )  
)  
NPDES Permit Nos. GU0020141 and GU0020087 )  
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**REGION 9'S OPPOSITION TO PETITIONER GUAM WATERWORKS  
AUTHORITY'S REQUEST FOR STAY  
AND RESPONSE TO PETITIONER'S STATUS REPORTS**

Introduction

Respondent, the United States Environmental Protection Agency, Region 9 ("Region") hereby submits its Opposition to Petitioner Guam Waterworks Authority's ("GWA") Request for Stay and Response to Status Reports pursuant to the Environmental Appeal Board's ("Board") October 28, 2010 Order Requesting Region's Response and Scheduling Status Conference ("Order").<sup>1</sup> Specifically, the Board directed the Region to address GWA's representation that "DoD, EPA and GWA are working together to solve GWA's secondary treatment problems" and its request to stay this case until 'resolution of the solutions outlined in the FEIS.'" Order at pp. 2-3.

At the outset, the Region notes that it was unsure as to whether GWA had filed a formal request for a stay through its Amended Status Report of September 3, 2010 and whether the Board would treat it as such. The Region appreciates the Board's clarification on this issue and

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<sup>1</sup> The Order requires the Region's Response by November 11, 2010. However, because that date is a holiday (Veterans Day), the Board's Clerk explained to the Region's counsel on November 2, 2010, that the Region's Response is actually due on November 12, 2010.

the opportunity to respond.

The Region opposes GWA's stay request because there are presently no enforceable commitments or timetables to provide funding to upgrade GWA's Northern District and Agana Wastewater Treatment Plants ("WWTPs") to secondary treatment. In addition, there is nothing that presently requires GWA to upgrade those WWTPs with secondary treatment units. Without funding or enforceable requirements, there are no plans for upgrades that would warrant a stay of the Board's consideration of GWA's petitions for review. Instead, the pendency of GWA's petition to the Board represents a live and genuine dispute between GWA and the Region. The pendency of that dispute before the Board operates to stay the effectiveness of the Region's decision-making, and GWA has no incentive to upgrade its treatment facilities.

The Final Environmental Impact Statement ("FEIS") to which GWA refers, and the Record of Decision (ROD) for the Guam military relocation that was subsequently issued by the Department of Defense ("DoD") on September 20, 2010, describe only potential solutions regarding secondary treatment, rather than concrete and definite commitments or steps towards construction of secondary treatment at GWA's Northern District and Agana sewage treatment plants. As explained below, the ROD describes several contingencies and uncertainties requiring resolution prior to development of plans for, much less implementation of, secondary treatment upgrades at the Northern District and Agana plants. At the present time, there is no binding document or mechanism for funding, let alone a proposal for one, that would ensure that the upgrades to secondary will in fact take place. Thus, contrary to GWA's assertions, resolution of the issues described in the ROD is not imminent or certain.

The Region objects to and opposes GWA's stay request based on these considerations and specifically disagrees with GWA's contentions on three grounds. First, GWA's Amended

Status Report of September 3, 2010, fails to explain the uncertainties associated with funding and implementation of secondary upgrades at its Northern District and Agana plants. Second, the ROD itself describes outstanding and unresolved questions regarding the funding available for these upgrades and the timing for implementation, the most relevant of which are explained below with the applicable excerpts attached.<sup>2</sup> Third, the Board should be aware that the United States government has recently filed Status Reports in the pending enforcement against GWA in the District Court for Guam, which reflect the positions of the Region and DoD concerning uncertainties associated with the upgrades at these plants that are clearly reflected in the ROD.

1. GWA's Amended Status Report fails to explain uncertainties associated with possible upgrades to secondary at the Northern District and Agana sewage treatment plants.

GWA's recent amended status report does not inform the Board of uncertainties related to upgrades to secondary treatment. GWA stated that it "fully expects that its plants will be upgraded to secondary treatment as a mitigation for the relocation of the U.S. forces to Guam." GWA Amended Status Report at p. 3. The status report does not explain, however, that none of the affected parties has finalized the specific obligations and commitment regarding any such mitigation.

Significantly, GWA itself cited language in the FEIS that indicated that substantial barriers to the upgrades at both plants exist:

If DoD should fail to secure necessary financing from the Government of Japan, significant environmental impacts will continue to occur . . . These will include increased flows to already noncompliant treatment plants, resulting in further impacts to receiving waters due to poorly treated wastewater, and adverse impacts to fishing and recreational use of these waters. Consistent with the Navy's commitment to keep from significantly impacting utilities on Guam, the DoD would apply force flow

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<sup>2</sup> Additional uncertainties are explained in the Declaration of Nancy Woo ("Woo Declaration"), attached hereto as Exhibit A. Specifically, Ms. Woo, Associate Director of the Region's Water Division, describes the uncertainties and on-going nature of negotiations with DoD and the Government of Japan regarding potential funding for upgrades to secondary at the Northern District and Agana plants, and the potential impact of a Board decision on GWA's appeal on these negotiations. Woo Declaration at ¶¶ 4 and 5.

reductions and/or adaptive program management of construction . . . .

Failure to secure funding will result in failure to meet an impending enforcement order regarding secondary treatment requirements . . . [and] require that DoD delay or not issue construction contracts or task orders until such time as the financing is received from the Government of Japan and the necessary improvements to the GWA [Northern District] WWTP secondary treatment capability are implemented. Such action would severely impact the construction pace and the ability of the Navy to complete required construction to support the Marine Corps relocation.

Id. at p. 2 (citing FEIS). (*See also*, Id. at p. 3, citing comparable statements from FEIS concerning the Agana WWTP.)

GWA correctly noted that “DoD will continue to coordinate with the relevant Government of Japan agencies, Guam Consolidated Commission on Utilities, and other local authorities who are involved in the process of finalizing business structures and technical solutions to meet these program requirements,” which include WWTP upgrades to achieve limits based on secondary treatment. Id. at p. 3 (citing FEIS). The Region does not dispute that DoD, the Region and GWA are working towards achieving these solutions, but disagrees that any of them are imminent. As stated in the Declaration of Nancy Woo (Exhibit A), “It is my belief that all of the discussions described above will continue to occur for some period of time which cannot be predicted with any degree of certainty.” Woo Declaration at ¶ 6. Thus, given the uncertainty in both the timing and amount of any funding for secondary treatment upgrades to the Northern District and Agana treatment plants, a stay of the Board proceedings in this matter is not warranted.

2. The ROD describes planning and funding uncertainties regarding upgrades to secondary treatment requirements at the Northern District and Agana sewage treatment plants.

DoD explains in the ROD (at p. 62) that it is “seeking approximately \$600M in financing from [the Government of Japan] for water and waste water treatment system upgrades,”

including secondary treatment at the Northern District and Agana plants.<sup>3</sup> As described in the Woo Declaration, it is entirely uncertain whether or when this financing will be secured. Woo Declaration at ¶¶ 5, 6. Although anticipating that this financing will be secured, the ROD does not specify the timing of the financing and, in fact, DoD appears to anticipate that the financing could be delayed, noting that “if the required upgrades do not occur, both DoD and civilian population will be impacted. . . . As mitigation for this scenario, DoD will implement APM [Adaptive Program Management] which will reduce impacts to the GWA waste water system by lowering peak population levels during construction, thus also lowering peak waste water loading.” ROD at p. 62. In other words, recognizing the continued uncertainties concerning funding, DoD is planning on the possibility that it will have to scale back the military relocation if the water and wastewater upgrades cannot be completed in a timely manner.

In the ROD, DoD apparently assumed that GWA will upgrade its wastewater treatment facilities to add secondary treatment as a result of EPA’s denial of its 301(h) waivers. ROD at p. 61 (“on September 30, 2009, USEPA Region 9 issued a final decision to deny the variance on secondary treatment at the [Northern District plant]. This decision is also applicable to the [Agana plant].”). This assumption suggests that DoD either views the Region’s decisions as final and/or awaits a final decision on GWA’s petition to the Board of the Region’s denial. As explained in the Woo Declaration, the upgrades of Northern District and Agana WWTPs to secondary treatment are not presently required by the Stipulated Order that was filed in the enforcement action brought by the United States against GWA. Woo Declaration at ¶ 4. Ms. Woo, in fact, believes that “a decision by the Environmental Appeals Board of GWA’s pending appeals would provide clarity... concerning the Environmental Protection Agency’s final

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<sup>3</sup> A complete copy of the ROD is available at <http://www.guambuildupeis.us/record-of-decision>. Excerpts of the ROD are attached hereto as Exhibit B.

decision on GWA's applications for waivers from secondary treatment for the Agana and Northern District WWTPs, which, in turn, may assist in clarifying how soon GWA may be required to upgrade these WWTPs." Woo Declaration at ¶ 6.

3. The United States' Status Reports in the pending enforcement action against GWA identify a number of issues that must be resolved prior to implementation of secondary treatment at the Northern District and Agana plants.

The United States government, on behalf of the Region and in coordination with DoD, filed a Status Report with the District Court of Guam in response to the Court's order scheduling a hearing for November 10, 2010. U.S. October 13, 2010 Status Report at p. 1. (Excerpts attached without exhibits, as Exhibit C.) In regard to GWA's appeal of the Region's Section 301(h) determinations, the United States noted that the Board had issued an order requiring information from the Region and GWA regarding the likelihood of settlement of the enforcement action and that the Region had indicated that a settlement did not appear imminent and that the Region considered GWA's appeal to be an active matter. *Id.* at p. 7. The United States pointed out that GWA stated in its own status report to the Board that a stay would be appropriate because a settlement is possible but that GWA noted that such settlement is "entirely dependent upon GWA receiving adequate federal funding from the United States Government to upgrade the plants to secondary treatment." *Id.*, citing GWA's Status Report. Thus, GWA itself acknowledges contingencies and potential barriers to WWTP upgrades to secondary treatment. Lastly, the United States explained to the Court that DoD has issued a ROD for the Guam military relocation that includes a solution that addresses many wastewater issues, including "improvements to the Northern District ...[and] Agana WWTP[s] to achieve secondary standards" (*Id.* at p. 2), but "the amount, source and timing of funding is still uncertain." *Id.* at p. 17.

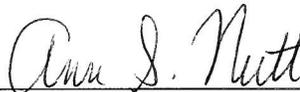
GWA subsequently filed its own status report with the District Court. In its November 2, 2010 reply to GWA's status report, the United States explained that "the ROD served a specific, limited function: DoN [Department of Navy] selected solutions for its utility needs associated with the military build-up. DoD did not commit to either implement them or pay for them." U.S. November 2, 2010 Reply at p. 9-10 (excerpts attached without exhibits, as Exhibit D).

Conclusion

Because of the significant remaining uncertainty regarding funding to upgrade the GWA treatment facilities, the Board should disregard GWA's assertions that upgrades to secondary treatment are imminent and that a stay would be appropriate. A stay would not be appropriate. The Region believes that GWA's appeal requires resolution and that a final decision from the Board would bring clarity to the Guam military relocation process, specifically regarding the necessity for upgrades to secondary treatment at the Northern District and Agana plants. With a final disposition of this matter by the Board, DoD and GWA could determine whether treatment plant upgrades are required and conduct their affairs accordingly, in particular with regard to funding negotiations with the Government of Japan.

Respectfully submitted,

Date: 11/12/10



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**CERTIFICATE OF SERVICE**

I, Ann S. Nutt, hereby certify that a true and correct copy of the United States Environmental Protection Agency, Region 9's Opposition to Petitioner Guam Waterworks Authority's Request for Stay and Response to Status Reports, In the Matter of Guam Waterworks Authority Northern District and Agana Sewage Treatment Plants, NPDES Appeal Nos. 09-15 and 09-16, was filed, with exhibits, and copies were e-mailed to the persons listed below:

Via the Central Data Exchange to:  
Clerk of the Board  
United States Environmental Protection Agency  
Environmental Appeals Board  
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Via electronic mail in Adobe Acrobat®.pdf format to:  
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11/12/2010  
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