GUAM WATERWORKS AUTHORITY

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December 3, 2009

VIA FEDERAL EXPRESS

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G. Street, N.W.
Suite 600
Washington, D.C. 20005

Re: Docket No. CWA 309(a)-09-030

Dear Clerk of the Board:

Enclosed, please find an original and six (6) copies of the Supplemental Brief in Support of Guam Waterworks Authority's Consolidated Petition for Review filed on behalf of the Guam Waterworks Authority.

Please note that GWA's copy is sent without the exhibits due to its voluminous size. Can you please date stamp the copy marked GWA's copy of the Supplemental Brief and return it in the self-addressed stamped envelope enclosed herewith.

Sincerely,

Samuel J. Taylor
GWA Legal Counsel

Enclosures

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

In the Matters of:	)	
	)	
GUAM WATERWORKS AUTHORITY'S NORTHERN DISTRICT SEWAGE TREATMENT PLANT APPLICATION FOR A MODIFIED NPDES PERMIT UNDER SECTION 301(h) OF THE CLEAN WATER ACT (NPDES Permit No. GU0020141)	)	**DOCKET NO. 309(a)-09-030**
and	)	
GUAM WATERWORKS AUTHORITY'S AGANA SEWAGE TREATMENT PLANT APPLICATION FOR A AMODIFIED NPDES PERMIT UNDER SECTION 301(h) OF THE CLEAN WATER ACT (NPDES Permit No. GU0020087)	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF THE GUAM WATERWORKS AUTHORITY'S CONSOLIDATED PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

This Supplement Brief is being filed in support of the issues identified in the Guam Waterworks Authority's Petition for Review filed on November 5, 2009, in NPDES Permit Nos. GU0020141 and GU0020087, as authorized by the Environmental Appeal Board's ("EAB") Order dated November 3, 2009. The Petitions for review are being filed on a consolidated basis due to the significant overlap in the issues raised with respect to the permits.

Section 301(h) of the Clean Water Act ("the Act") authorizes the EPA to issue variances ("waivers") from the general requirements that municipal wastewater treatment plants install secondary treatment. Petitioner contends the EPA Region IX Director ("Director" or "Administrator") acted in an arbitrary and capricious manner by denying GWA's primary discharge waivers for its NPDES permits for the Hagåtña and Northern District Sewage Treatment Plants thereby constituting an abuse of discretion. An agency action is arbitrary and capricious when the agency "failed to articulate a rationale" for what it did. Arrington v. Daniels, 516 F.3d 1106, 1116 (9th Cir. 2008).

In this brief GWA proves that the Director arbitrarily and capriciously changed long-standing policies of the EPA that GWA was properly entitled to rely on. Lynch v. Dawson, 820 F.2d 1014, 1021 (9th Cir. 1987) (citing Motor Vehicle Mfr's Assn. v. State Farm Mutual Ins. Co., 463 U.S. 29, 57 (1988) ("an agency that changes its policy is obligated to supply a reasoned analysis for that change"). Moreover, a policy that has underwent change commands less deference than a policy of a long-standing nature. Id. (citing to Secretary of Interior v. California, 464 U.S. 312, 320 at n.6 (1984). In this case, the Region IX Director failed to supply adequate reasons for its decision and changed long-standing policies relative to GWA's NPDES permits as the two plants.

The EPA's actions in this case were clearly discretionary policy decisions and the Director of Region IX has the discretion to grant, modify or deny the waivers, although under Lynch, *supra,* the EPA cannot deny the waivers in an arbitrary or capricious manner. *See* 33 U.S.C. § 1311(h) and 40 C.F.R. §§ 122.41 and 124.63; *see also* Croplife America v. EPA, 329 F.3d 876, 883-84 (D.C. Cir, 2003) (discussion of what constitutes a policy statement compared to regulation).[1]

I. LEGAL ARGUMENT

A. Background.

Petitioner's NDPES permits with a 301(h) waiver expired in 1991. The Public Utility Agency of Guam ("PUAG"), the legal entity that predated the Guam Waterworks Authority ("GWA"), had submitted a timely permit renewal application in December 1990 as required under 40 C.F.R. § 124.63. In March of 1991, the Guam Environmental Protection Agency ("GEPA") concurred with the 301(h) waiver and has never issued a state action since that time. Exhibit A.

PUAG operated under an administrative extension for six years until April 4, 1997, when USEPA sent PUAG a letter informing them that they intended to issue a tentative denial of the secondary treatment waiver and offered PUAG the opportunity to resubmit their permit application. In that letter the EPA stated that **in order to receive the treatment waivers, Petitioner deep ocean outfalls for the plants would need to be extended**. Exhibits B and C. In June, 1997, EPA sent a letter acknowledging Petitioner's intent to submit a revised application under 40 C.F.R. §

[1] "Under administrative law, as a general matter, the case law reflects two related formulations for determining whether a challenged action constitutes a regulation or merely a statement of policy. One line of analysis focuses on the effects of the agency action. The court should consider whether the agency action (1) imposes any rights and obligations, or (2) genuinely leaves the agency and its decision makers free to exercise discretion. The second line of analysis focuses on the agency's expressed intentions. The court should consider (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency. However, as the United States Court of Appeals for the District of Columbia Circuit recently noted in General Electric v. EPA, these two lines of analysis overlap at step three of the Molycorp formulation, in which the court determines whether the agency action binds private parties or the agency itself with the "force of law." General Electric and other cases also make it clear that the agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the "force of law," but the record indicates otherwise."

125.59(d)(1). Exhibit D. On October 6, 1997, USEPA sent Petitioner an approval of the proposed baseline surveys for the proposed outfalls. On March 27, 1998, Petitioner resubmitted their application and included projects to extend the outfalls as per the April 4, 1997 letter in order to keep its primary treatment waivers. Additional information was provided in a June 30, 2000 supplemental submittal for Agana and a February 5, 2001 submittal relative to the Northern District submittal. Exhibit E.

In the basis for the tentative decision, EPA stated that Petitioner's application was deficient, but acknowledges that Petitioner submitted additional information to support the application – although only information submitted through 2001 was considered in the determination. Unfortunately, Petitioner had received no further communications from EPA after 1998 regarding submittal requirements or deficiencies in its permit applications despite the clear authority for the EPA to authorize or request additional information under 40 C.F.R. § 125.59(f)(1) and the obvious need for such information to be provided given the 11 years following the last communication from EPA on the matter. In e-mails from Richard Remigio, dated June 17, 2009, and April 4, 2009 respectively, EPA confirmed that no other correspondence from EPA to Petitioner was included in the determination. Exhibit F; *see also* Exhibit G.

By EPA's own admission, the "window" for submittal of additional information closed in 2001 despite the obvious need for more information, the on-going construction of the outfalls by Petitioner, the Stipulated Order, the obvious positive change in operations following the replacement of Petitioner's appointed governing board with an elected board, i.e., the Guam Consolidated Commission on Utilities ("CCU") and other valid reasons. Exhibit G. Had the EPA issued a permit in 2001, the permit would have expired in 2006, and Petitioner would be a year away from preparing another renewal application. As noted by a Honouliuli commenter, the timely response expectation

certainly gives all the outward appearances of being a one way street and constitutes nothing more than an arbitrary denial. *See,* CHC's Consolidated Petition for Review No. 09-01 filed with EAB filed on March 11, 2009.

In 2001, Guam passed Public Law 26-76 which created the Guam Consolidated Commission of Utilities ("CCU"). This act replaced the appointed Board of Directors with an elected board and converted Petitioner into a Guam Public Corporation instead of a legislative line agency subject to political interference. The first elected board took office on June 1, 2003 and at that time Petitioner had a debt of $60M and extensive non-compliance under both the Clean Water and Safe Drinking Water Acts.

In December of 2002, the USEPA sued Petitioner in the United States District Court on Guam (case no. CV 02-00035) and sought injunctive relief and civil penalties under CWA Section 309(b) and (d), 33 U.S.C. § 1319(b) and (d), and for violation of the terms and conditions applicable to Petitioner's NPDES permits. In fact, the Stipulated Order resulting from this suit specifically required Petitioner to complete a design and renovate both the Northern District and Agana STP's "to bring ...[them] into compliance with NPDES permit requirements." *See* Exhibit H. However, the SO, including the 2006 amended version, has never referred to or required secondary treatment.

In 2006, the Stipulated Order was amended by the consent of both parties. The Amended SO did not mention secondary treatment despite the fact it was five years after EPA determined the window to provide comments were closed (see discussion in Section II, B, below) and as previously stated above, the intent of the SO was to bring Petitioner into compliance with NPDES permit requirements. Why then initiate a separate Denial of our permits when compliance is the goal of the SO, and the SO was devoid of any mention of any requirement for Petitioner to move to secondary

treatment? In reality there was no good reason for the two enforcement actions (see Section B, 5, *infra*).

Since 2003, Petitioner under the control of the CCU has made enormous strides in its compliance and reporting, a fact acknowledged by the USEPA itself in its November 9, 2007 brief in District Court of Guam Case No. 02-00022 at page 6. Exhibit I. Most recently Petitioner has been focusing its limited resources fully on the items and issues identified in the Stipulated Order and the Water Resources Master Plan which Petitioner is required to implement. [2] See Exhibit J.

In the six (6) years since the CCU took office in 2003, the EPA has not requested or allowed Petitioner to provide additional information to support the 301(h) waiver application despite knowing that Petitioner was making great strides towards compliance and the obvious lack of information provided on the permits since 2001. The period began in the 8 years following the filing of a lawsuit in 2001 by EPA for violation of NPDES permits, resulted in the creation of CCU in 2002 and the taking of office of the Commissioners in January of 2003, the Stipulated Order in June of 2003 which arose from the 2001 suit, the creation of a Master Plan and approval thereof by EPA in 2006-2007.

In sum, the EPA took Petitioner completely by surprise in December of 2008 when the head of EPA's Region IX Pacific Office informed officials of Petitioner during meetings on Guam that EPA was probably going to deny Petitioner's 301(h) waivers.

B. <u>The Timing Of The Denial Is Arbitrary, Capricious Given The Fact The Administrator Failed To Consider The Existence Of Other Federally Driven Directives, EPA Statements And EPA Actions Including, But Not Limited To, The Formations Of The Original Stipulated Order, The 2006 Amendments To The Stipulated Order, EPA's Approval Of Petitioner's 20 Year Water Resources Master Plan And The Pending Military Buildup</u>.

1. <u>There Was A Very Clear "Commitment" And "Policy" By EPA To Allow Petitioner To Maintain The Waivers.</u>

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[2] Guam is an island with a population of approximately 175,000 persons.

In its response to Petitioner's comments, the EPA denied that it either "explicitly or implicitly made any... commitment [to renew the 301(h) waivers]." *See Administrative Record* in EAB Docket No. 309(a)-03-030 (hereafter "*Administrative Record.*"). Petitioner disagrees, and said as much in its comments to the Tentative Denial. Exhibit K.

In fact, in its April 4, 1997 letter the EPA indicated to Petitioner that it intended to renew the 301(h) waivers if Petitioner built new outfalls. *See* Exhibit B. To quote EPA, "[t]he extension of the outfalls are essential to Petitioner meeting Guam Water Quality Standards for the respective discharges and renewal of their respective NDPES permits" a clear intimation that the outfalls were a prerequisite for GWA to maintain its waivers. *See* Exhibit C. In a letter dated April 21, 1998, Alexis Strauss, the same person who later denied Petitioner's waiver in 2009, implied that the outfalls were necessary in order for EPA to process the waivers when she stated that the "failure to supply the necessary information [relative to the outfall extensions] can result in waiver denial..." Exhibit L. Petitioner at that time was having difficulty coming up with funding for the outfall extension. *See* Exhibit M. The EPA reinforced Petitioner's understanding of the EPA's policy via the EPA's prior letters and where the outfalls were included in the Stipulated Order and the secondary treatment requirement was excluded. *See* Exhibit J.

The EPA participated in the approval of design of Petitioner's outfall plans and the implementation. Unfortunately the EPA failed to point out to GWA that an outfall designed for secondary treated wastewater would have been shorter and shallower and any reduction in depth and length would have significantly reduced the cost. Ironically, it is even possible that GWA could have repaired or "lined" the existing outfall to accommodate a secondary discharge instead of installing a new pipe which would have been completed at a fraction of the cost.

The EPA participated in the formation and approval of the Petitioner's Water Resources Master Plan ("WRMP") which is a twenty year planning document that **did not include** secondary treatment despite the mandate to examine all treatment solutions. Exhibit N. Given the fact that the Amended Stipulated Order (2006) requires Petitioner to implement the WRMP, if the EPA was truly intent on having Petitioner move to secondary treatment at a minimum it should have included the requirement that GWA plan for a waiver denial in its comments to the WRMP it was proffering in 2006 and 2007 – EPA failed to do so. Ironically, the EPA was submitting comments on the WRMP as late as January 17, 2007 and still the EPA never mentioned secondary treatment. Exhibit O.

In sum, the SO is an enforcement document that included the WRMP which is a 20 year planning document and both lack a requirement for secondary treatment. Thus, Petitioner should not be required to suffer additional enforcement actions for the same violation to ensure compliance when the EPA could have easily added secondary treatment to either the Stipulated Order or the Master Plan. The EPA failed to do so and Petitioner is entitled to rely on the EPA's actions and statements in this regard.

The EPA, under Work Assignment ETS-0-20(RE), Technical Directive 5, hired Mr. Bill Hahn, SAIC, who was directed to provide technical assistance to EPA Region 9 in reviewing the draft Guam Water Resources Master Plan submission provided by the Guam Waterworks Authority (GWA) as required by a June 5, 2003 USEPA Stipulated Order (the Order). This May 15, 2006 memorandum lays out SAIC's comments on the draft WRMP (dated April 7, 2006) submitted as a requirement of the Order. SAIC also was provided with comments EPA Region 9 submitted on an earlier draft WRMP Work-in-Progress Report, dated October 27, 2005. As part of his tasking from Region IX EPA, Mr. Hahn noted that paragraph 10 of the Stipulated Order required GWA to prepare a Master Plan that is "specifically required to address the following requirements:

> "A comprehensive analysis, using as a guideline the '10 States Standards' as they apply to wastewater, of wastewater treatment, collection, and conveyance systems, improvement alternatives, and needs for the next twenty years."

Exhibit P. Ergo, Petitioner was entitled to rely on EPA's written policies, statements and actions – all of which when taken together could only lead Petitioner to believe that the EPA was allowing it to retain its waivers if it built the outfalls.

Contrary to the EPA's position, it is obvious that the above actions, policies and decisions are very relevant because Petitioner should be entitled to rely on EPA's statements and actions as extensions of policy by the EPA in terms of the status of Petitioner's waivers, especially due the long record on the subject. If EPA had allowed for further submission of documents, GWA could have been able to prove that it currently meets (or will very soon meet) its NPDES permit requirements for both plants which is the ultimate goal of the EPA, GWA and the Clean Water Act. Exhibit Q.

The EPA cannot reasonably argue that it was not thinking of the long-term impacts of the WRMP in terms of compliance because the WRMP includes some analysis from the EPA regarding potential new regulations with major cost impacts such as the possible (yet uncertain) determination that some of Petitioners wells will be subject to the regulations governing Ground Water Under Direct Influence of Surface Water ("GWUDI"). If GWUDI is declared to be applicable, Petitioner would be required to expend significant capital that would interfere with Petitioner's ability to move to secondary treatment. *See* Exhibit N. However, while the EPA tries to sell the idea that secondary treatment at this juncture is so important, the fact of the matter is that the EPA waited twelve (12) years from the initial tentative denial in 1997 to 2009 to issue a Denial and they acted just prior to Petitioner's completion of the outfalls which GWA had been told were a precondition to continuing to obtain the waivers – how can you get more arbitrary and capricious than that?

The EPA also tries to argue that the way this matter arose was not arbitrary because their participation in the long-term planning relative to formulating and approving the Master Plan has no bearing despite the fact the WRMP is supposed to have been a 20 year planning document. In fact, during all of the discussions related to the WRMP, the EPA made no mention of even the possibility of secondary treatment – not once! Petitioner spent more than $5 million dollars on the Master Plan only to learn the financial portion of the plan and a very large portion of its capital planning is meaningless due to the 301(h) denial. If we accept EPA's position, Petitioner would now be required to choose between installing sewer lines in Northern Guam to protect Guam's aquifer or moving to secondary treatment since both are estimated to cost about $300 million and may limit other critical environmental protection projects as well. EPA has also had discussions with GWA regarding Capital Improvement Priorities as recently as October 18, 2008 that also made no mention of secondary treatment or the need to include this massive expenditure in the planning. Exhibit R.

Describing EPA's actions as frustrating at this juncture is an understatement. In sum, allowing the EPA to walk away from their prior statements and actions now and forcing secondary treatment into Petitioner's rate/planning structure at this point is beyond arbitrary.

2. Per The EPA, The "Window" To Submit Additional Data Was Closed.

Unlike typical NPDES permit proceedings, EPA makes a tentative decision to grant or deny section 301(h) modifications prior to proposing a permit. Puerto Rico Aqueduct and Sewer Authority v. U.S. Environmental Protection Agency, 35 F.3d 600, 603 (1994); *see also* 40 C.F.R. § 125.59(d). A publicly owned treatment works that has submitted a timely application for such modification may revise it once as of right. Puerto Rico at 603, *see also* § 125.59(d)(1). The EPA also may authorize or request the submission of additional information. Puerto Rico at 603., *see also* § 125.59(f)(1). As discussed above, despite the obvious changes to the system, the discharge and Petitioner's operation,

Petitioner was clearly and unequivocally informed that the opportunity (or "window") to submit additional data was simply closed in 2001 despite the clear need for more data before the waiver was denied. *See* Exhibit G.

The EPA stated in their response to comments that there was no "window" after which Petitioner was denied the ability to summit additional date in support NPDES permits. This statement is simply false. Id. In fact, during a March 2008 teleconference with EPA personnel who have oversight over permits in Region IX, an EPA representative specifically stated that the window to submit additional information had closed in 2001. Id. Ironically, the EPA utilized Discharge Monitoring Report data submitted after that date in making their Final Decision, but the statement that no additional data could be submitted clearly indicates that Petitioner had no reason to assume that any additional studies or information would be considered. Petitioner is hard pressed to find something more arbitrary or capricious than having the EPA on one hand say that Petitioner could not submit more data in support of its permit applications while at the same time using post 2001 DMR data to support their decision to deny our permits.

This notion also applies to EPA's statement that Petitioner could have submitted additional information during the public notice period of the denials, yet the EPA made it clear that any additional information from Petitioner would not be considered and is not relevant to their decision. Id. An invitation to submit data while clearly telling someone you won't consider the submission is simply taunting Petitioner without providing Petitioner with a meaningful opportunity to plead its case.

Petitioner did complete toxicity monitoring and priority pollutant monitoring (contrary to EPA's assertions in its Final Denial) when verbally requested to do so by EPA (see discussion on

studies below). Exhibit S. Ultimately it begs the question of whether Petitioner is entitled to rely on statements and policy decisions from EPA representatives.

3. CCU and the Stipulated Order.

The EPA stated in its Final Decision that it was Petitioner's responsibility to submit correct information, and "in the more than 11 years since EPA's 1997 tentative denial Petitioner has failed to provide adequate information." *See Administrative Record.* Petitioner strongly reiterates all of the arguments that were made in our response to the tentative denials. *See* Exhibit K. Petitioner also reiterates that it was not provided an opportunity to provide comments, data or other submissions dated after 2001 since the "window" had already closed (a "catch 22" worthy of Mr. Heller) because the waiver appears to have been denied solely on the grounds that Petitioner didn't submit adequate documentation in support of its permit yet Petitioner was denied the ability to submit more information at any time after 2001. Exhibit G. However, the EPA has admitted that Petitioner was not a well functioning agency until after the arrival of the CCU in 2003, i.e., after the "window" had closed. *See* Exhibits G and I. Why then not initiate the action to deny the waiver in 2001 when the suit was filed? The answer is clear, the EPA, just like Petitioner, was waiting for the outfalls to be completed although it turned out later this was not the case since Petitioner was in fact denied the opportunity to submit more information. Id.

To recap, in 2002 (just after the "window closed"), in its lawsuit the EPA was recommending "receivership," and alleging that GWA was a threat to public safety; yet in 2003 GWA was placed under the CCU and then in 2007 the EPA recommended to a United States District Court that the CCU step in to solve Gov. Guam's solid waste problem. Exhibit I. Thus, just when the CCU is hitting its stride and preparing another bond issuance in excess of $100 million (the first issued in 2005 in the amount of $104 M), the Petitioner is now going to be hit with an "end of days" proclamation, i.e.,

comply with Amended SO, modify the 2006 version of the Amended SO to include military buildup ($200 M) along with other unspecified EPA projects,[3] go to secondary treatment ($300M), take approx. 50 to 100 wells and prepare for GWUDI designation ($200 to $500M), implement the Master Plan ($900M) and who knows "what else" in the future – all with a total of 40,000 water customers and about 15,000 wastewater customers and then figure out a way to pay for all of this over the next 5 years.

Ironically, the EPA has admitted that the "Petitioner" of 2009 is not the same as the "Petitioner" of 2003 when the Stipulated Order was issued and the last written correspondence on the 301(h) waiver issue was received in 1998. Regardless, the fact remains that the EPA should have informed Petitioner following the lawsuit in 2002 and the governance of Petitioner under a new board that Petitioner had to file an updated permit application or that it was precluded from doing so when Petitioner was negotiating the Stipulated Order in 2003 and again in 2006. At a minimum, the EPA should have included the necessary planning to move to secondary treatment in the WRMP. These facts are important when you consider that Petitioner has lost considerable time and money from 2003 to the present in upgrading its existing plants and installing new outfalls specifically designed for primary treatment when it could have otherwise been using the time and money it spent to move to Secondary Treatment.

It is also clear to anyone who will look (and even acknowledged by the EPA themselves in court) that the Guam Waterworks Authority under the CCU is not the same agency as that which previously existed and to expect the GWA of 2009 to be cognizant of, and considering information provided by EPA in 1998 when the EPA knows that much of Petitioner's record keeping during the "pre-CCU" period is currently unavailable – an unreasonable and arbitrary position on the EPA's part.

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[3] Mentioned by the USEPA's attorney at the hearing on GWA's Motion for Dispute Resolution regarding Paragraphs 39 and 42 held on September 10, 2009.

Exhibits D, T and I. It is even more unreasonable when you consider that almost 100% of the focus of communication between the two agencies from 1997 to date has been the outfall extension for primary treatment, Stipulated Order projects and EPA-funded bond projects with no mention of secondary treatment. Ironically, even the EPA is missing documentation from this period which is further proof that their expectations are more than unreasonable. Exhibits D and T.

EPA states in the denial that the CWA establishes a permit term not to exceed five years, and that implicit in this requirement is an understanding that a 5 year period is a reasonable time for a planning horizon. If true, why wait from 1986 to 1997 to issue the first Tentative Denial? Also, why wait from 1986 to 2009 to issue the final denial if the five year period is so crucial? Furthermore, why wait from 1997 to go from the first Tentative Denial to another Tentative Denial in 2009? Clearly the building of the outfalls was the component that forestalled the first denial and the SO should have forestalled the latter. Petitioner obviously could not reasonably anticipate that the waivers will be granted indefinitely, however, a non-arbitrary mechanism for the denial would be when is when the plants exceed their design limits of 12 MGD each or when GWA has had time to address the military buildup and not just the arbitrary and capricious timing that exists in this Final Denial – especially with the existence of the SO which is designed to bring Petitioner into compliance with its NPDES permits. *See* Exhibit H.

EPA is well aware of Petitioner's planning horizons, the plants design limits and what effect the military buildup would have on Petitioner's plants. However, implicit in the Stipulated Order and the EPA approval of the Water Resources Master Plan was the concept that EPA's priorities for Petitioner did not include secondary treatment within the 20 year planning horizon and if secondary treatment was in fact a priority it should have been included.

4. **The Military Buildup Seems To Be What Prompted The Denial More Than Actual Scientific Data or Environmental Protection.**

The EPA stated in its response that "EPA believes that the outfalls extensions would still have been required had EPA made an earlier determination on the waivers, especially in light of the pending military build-up that will increase flows" and that the military build-up issue "is not relevant to EPA's 301(h) analysis." *See Administrative Record.*

However, the EPA clearly stated in their December 21, 1998 letter that failure to construct the outfalls would result in denial of the waivers and force Petitioner into secondary treatment. *See* Exhibits B and C. Neither EPA nor Petitioner was aware of the proposed military build-up until 2006 or 2007. Thus, the EPA's current statements that the outfalls were not constructed in vain because the build-up is imminent is disingenuous at the very least and appears to be EPA creating a retroactive requirement in order to justify the $20M that was spent by Guam's ratepayers in order to meet EPA's stated requirements for "maintaining the secondary treatment waivers."

In fact, basing the decision on the impending build-up places Petitioner into the untenable position of being forced to move to secondary based upon a proposed and undefined volume and location of population increase. Moreover, because the NEPA reviews and alternative analyses have not yet been presented, and EPA's own analysis of the initial military draft EIS determined that document to be highly deficient, Petitioner cannot yet define future planning related to that build-up nor can the EPA. Exhibit T.

Petitioner is working closely with both the military's Joint Guam Program Office ("JGPO") and EPA to define those impacts, and Petitioner has committed to working with the military to both expand the plant. However, since neither the growth nor the location of that growth is guaranteed Petitioner cannot, as EPA apparently has, make its decisions regarding the waivers based upon that theoretical growth nor should the military buildup be the "impetus" for the decision to deny Petitioner's waivers.

5. The Denial Is Legally Barred.

The EPA's 2001 lawsuit was an enforcement action under 33 U.S.C. § 1319 and included specific allegations that Petitioner was violating its NPDES permit limits for both Hagåtña and Northern. The result of the lawsuit was the Stipulated Order which constituted a judgment in the case and contained explicit directives on how the EPA believed that Petitioner should approach NPDES compliance at its Northern and Agana STP's. *See* Exhibit H. The Stipulated Order resulting from this enforcement action did not require secondary treatment as a means to achieve NPDES compliance and referred to an examination of whether or not advanced primary treatment was required. *See* Exhibit J.

Ultimately, it is, arbitrary, capricious and unlawful for the EPA to initiate another enforcement action relative to denying Petitioner's waiver when the EPA has already waived its ability to deny Petitioner's waivers by entering into the Stipulated Order that did not contain any secondary treatment requirement, because just like Petitioner, the EPA is bound to the terms of the Order and the Order. United States v. Armour and Co., 402 U.S. 673, 681-82. Moreover, the Stipulated Order was specifically put in place to bring Petitioner's Agana and Northern STP plants into compliance with its NPDES permits. *See* Exhibit H. Moreover, the Stipulated Order is an ongoing enforcement action and the Court is now having quarterly hearings to review Petitioner's compliance with the Clean Water Act and Safe Drinking Water Act. *See e.g.* 33 U.S.C. § 1319(g)(6). Stated another way, the EPA cannot have its cake and eat it too since it has previously issued Orders for non-compliance and has also sued GWA for non-compliance with its NPDES permits and entered into the SO with Petitioner as a means to ensure compliance. In sum, after entering into a contract (SO) with Petitioner as to what it must do to comply with regulations going forward (including treatment), the EPA wants

to add another enforcement action to the existing action by denying its NPDES permits and issuing an Order requiring immediate compliance. Exhibit V.

Petitioner and EPA are still subject to the terms of the formal Stipulated Order signed by the parties and approved by the United States District Court in 2003 and the 2006 amendments thereto which means that Petitioner is lawfully entitled to rely on the lack of any requirement in the SO to move to secondary treatment– especially since the SO included a provisions that it would later be amended to include additional compliance requirements. Exhibit W. The Stipulated Order is binding on both the EPA and Petitioner and should be construed as written. United States v. Armour and Co., 402 U.S. 673, 681-82. To allow the denial at this juncture would certainly be unlawful and arbitrary since the EPA has already admitted that the Stipulated Order was to bring both Northern and Agana STP's into compliance with their NPDES permits. Id., *see also* Exhibits H and I. Enforcement of all permit requirements should have therefore been added to the Stipulated Order but they were not, and failing to add them should be construed as waiver by EPA to deny Petitioner's primary treatment at its Agana and Northern STP's.

The Final Decision by the EPA on this issue constitutes res judicata as to the subject matter of the underlying enforcement action since there is no legal authority for the EPA to engage in multiple enforcement actions for the same violation while one enforcement action is still pending.

C. The EPA Failed To Properly Consider The Changes That The Petitioner Was Undertaking At The Direction Of EPA That Would Have An Effect On Its Sewage Discharges From The Plant And That Denying The 301(H) Waiver Was Unlawful Or Factually Incorrect In Light Of Said Circumstances.

The EPA's statement that "Petitioner has not continued the monitoring programs specified in its current permits" is simply wrong. *Administrative Record.* Petitioner did indeed initiate and conduct offshore monitoring prior to putting the new outfalls on line for the Hagåtña and Northern District Wastewater Treatment Plants thereby showing that the post-CCU era Petitioner's

commitment to compliance with environmental regulations and EPA directives. Exhibit X. Also contrary to EPA's comments, Petitioner completed priority pollutant and toxicity testing in 1998, 2001, 2003, 2007 and 2008. *See* Exhibit S. EPA, while stating this priority pollutant scans were not done, similarly states that analyses that were completed were inadequate and that it was Petitioner's responsibility to complete additional studies. *See Administrative Record.* However, there is nothing in writing from EPA regarding this requirement. In fact, even in the April 21, 1998 letter EPA states that "further discussions with our office would be helpful." Exhibit L. This letter, as well as the April 4, 1997 letter, mainly references the monitoring required for the outfall designs and Petitioner did complete benthic analysis are required by EPA prior to installing the outfalls. Exhibit B at 2. Additional environmental reporting for the final installation is now in progress in accordance with Petitioner's Army Corps of Engineers permit for the outfalls, which unlike EPA, did have specific written requirements. Exhibit Y.

EPA further stated that their April 4, 1997, letter that they clearly required additional monitoring. Id. However, this letter specifically described the monitoring required to install the new outfalls and nothing more. Petitioner reiterates the arguments on this issue in our response to the tentative denial, and that any additional monitoring requested by EPA would have been completed, despite the fact that until the outfalls were installed, this information would not have been particularly useful in determining any impacts associated with the new outfalls. Exhibit K.

Moreover, EPA determined that Petitioner had "adequate" time in which to collect the data to demonstrate that the plant does not impact the environment, and that additional time is not necessary. *See Administrative Record.* However, Petitioner only completed installation of the new deep ocean outfalls December of 2008, an event EPA had indicated was required in order for Petitioner to maintain its waivers, yet GWA was provided with the opportunity to submit a few months worth of

testing between the Tentative Denial and the project completion which means the timing is highly suspect – especially since the "window" to provide more information was closed.

The EPA signed the Stipulated Order in 2003, which included the outfall projects which were clearly designed for primary treatment only (e.g. longer, deeper and more expensive than for a secondary treatment plant). Exhibit K. If the EPA intended that the outfalls were required for maintaining the primary treatment waivers, then Petitioner must have adequate time after their installation in order to implement studies that would demonstrate that there are not impacts especially since the EPA has itself recognized that as a practical matter it is extremely difficult to demonstrate that a discharge meets the requirements of 40 C.F.R. § 125.61. Puerto Rico Aqueduct and Sewer Authority v. US at 609. Failing to provide adequate time to conduct tests from the new outfalls required by the EPA is simply arbitrary and capricious and unlawful as the EPA must provide an adequate opportunity for Petitioner to conduct tests on infrastructure it requires as a condition of an enforcement action and which, according to the EPA, are specifically designed to bring Petitioner into compliance. Petitioner has not initiated the required studies at this point because Petitioner was specifically told prior to the outfalls coming online by the EPA (2008) that the "window" for submitting additional information closed in 2001 and the tests would ultimately constitute a waste of money if the waivers are denied. Exhibit G, *see also Section B (2), infra,* relative to how the EPA closed the "window."

The EPA indicated that Petitioner has failed to provide determinations or concurrences from various Guam agencies. *Administrative Record.* However, Petitioner submitted requests to those agencies and has received no response, either positive or negative and it is unreasonable that Petitioner should be held responsible for anything other than its own actions. Exhibit Z. Petitioner

cannot compel other agencies to provide responses and has specifically asked EPA on numerous occasions to assist with discussions with GEPA on mixing zone and other related issues. Exhibit AA.

In fact, GEPA has stated that if the appropriate environmental protections can be demonstrated, they will not have any objection to primary treatment but have not clearly defined what that consists of. EPA concurred as recently as September 2009 that they need to assist GEPA with understanding mixing zones, and Petitioner even volunteered to submit the Honolulu mixing zone forms but has received no commitment from GEPA that this data collection format would be acceptable. Exhibit BB. Apparently GEPA failed to respond to EPA's March 24, 2008 letter to GEPA that requested GEPA's opinion to support EPA's own position and to encourage them to refuse concurrence (or Petitioner never received a copy of such letter). Exhibit CC.

In all discussions with EPA, they were only requiring Petitioner to address the issues identified in the Stipulated Order which only referred to primary treatment and potentially whether advanced primary treatment would bring the plants into compliance with the NPDES permits. Furthermore, Petitioner disputed what the EPA's concept of what constitutes an "Operational Performance Evaluation" under Paragraphs 39 and 42 of the Stipulated Order since the Order itself fails to state what the evaluations must consist of and GWA did not receive notice from the EPA about the requirements of such an evaluation until November 27, 2007. Exhibit J and Exhibit DD. EPA has provided no written indication since 1997 that Petitioner should be doing anything other than the offshore monitoring in the permit and the SO and WRMP were in fact all policy decisions from the EPA clearly militated towards primary treatment.

Communication from the EPA regarding toxicity testing was given verbally, yet Petitioner did in fact implement toxicity testing despite a lack of written communication on the subject. EPA states that it verbally told Petitioner what the requirements were. *Administrative Record.* Petitioner

contends that it responded to even verbal requests for information, as shown by the toxicity testing and priority pollutant testing that was being done. Exhibit S.

EPA used predictive modeling to assess the outfalls, however the outfalls are so new that no model could conceivably be effective. *Administrative Record.* By depriving Petitioner sufficient time to directly assess the impacts of the EPA-required extensions, Petitioner has been deprived of the necessary time to assess any potential impacts on water quality from these outfalls. Petitioner is being told to come into compliance by the EPA. Unfortunately, when Petitioner acted in reliance on the EPA's statements, negotiations and concurrence (on SO and WRMP), the rug gets pulled out from under Petitioner which only highlights the "doublespeak" theme that runs throughout this Petition.

Moreover, when EPA stated in its Denial that Petitioner has had "adequate" time since 1997 to provide data, unfortunately EPA fails to address the following facts:[4]

- The EPA provided no written communication on the issue of secondary treatment since 1998 and never mentioned it until December of 2008 during a meeting held at GPA between EPA representatives and GWA personnel.
- Communication from the 1990s was geared to design and installation of the new outfalls and the data that needed to be collected **prior** to the outfall installation with no mention about testing data to be required thereafter.
- EPA provided Petitioner with a completely different set of priorities in 2003 and again in 2006 which are all driven toward primary treatment (or Advanced Primary Treatment) and that are already stretching Guam's affordability matrix to it maximum.

D. The Regional Administrator Failed To Adequately Consider And Address Scientific Facts Relative To Non-Point Source Pollution And Septage Discharges As Compared To Data Which Shows That Petitioner's Primary Treatment Plants Do Not In Fact Pose A Danger To The Environment.

[4] *See Administrative Record.*

The offshore studies that have been completed for all of Petitioner's permitting facilities, as well as the preliminary results from Dr. Raymundo's study and GEPA's beach closure sampling, show the greatest threat to Guam's offshore environment is non-point source pollution. Exhibit EE and Exhibit FF. For example, GEPA maintains a beach report which shows numerous advisories in areas where there is no wastewater plant or where the wastewater effluent could not possibly impact. *See* http://node.guamepa.net/programs/emas/beach.html #REPORT. More specifically, contrary to GEPA's assertion that the problems in Agana Bay are due to the STP, sampling of the Agana River shows extremely high bacteria level in the river that discharges directly into the bay and prevailing currents from the Agana STP go South, away from the bay. Exhibit GG.

Guam also relies on a sole source aquifer for the majority of its drinking water. EPA concurs in their response that protection of the aquifer is critical. *See Administrative Record.* The EPA further states that protection of the offshore environment is also critical. Id. Petitioner concurs with that assessment. However, Petitioner believes that protection of the offshore environment will best be accomplished by implementing stringent non-point source protection programs. Petitioner applauds the efforts of GEPA in this area and encourages EPA to provide GEPA will all possible assistance.

There are, however, numerous other studies that clearly demonstrate that primary treated wastewater discharged through an appropriately designed outfall does not in fact have a negative detriment on the environment and as stated above, Petitioner's notes that the outfall design was approved by both U.S. EPA and Guam EPA.

Hawaii's Mamala Bay report which looked at a discharge from primary treatments into an ocean environment very clearly shows that "there is no evidence from the Mamala Bay microbiological or hydrodynamic modeling studies that secondary treatment at either Sand Island or

Honouliuli will provide any effective benefits for effluent discharged to Mamala Bay." *See* e.g., City and County of Honolulu's Petition for Review of its 301(h) waivers in EAB Docket 09-01.

Hawaii was ordered by EPA to undertake this study but no similar order was given for studies to Petitioner. However, EPA feels that Petitioner should have known what information we were supposed to provide. There is clearly a double standard being exercised by EPA given the fact that Petitioner and the Sand Island and Honouliuli plants are almost identical in terms how the EPA should treat the two in terms of processing the denials. The EPA has granted waivers at similarly situated facilities in exchange for an overall better environment – i.e., San Diego's waiver extension in exchange using the treated effluent for irrigation and other beneficial purposes. Why not allow Guam the same opportunity?

Despite EPA's lack of communication on this issue, Guam does have relevant marine studies ongoing and those studies can be used by Petitioner in support of its NPDES permit applications. For example, Dr. Laurie Raymundo of the University of Guam undertook a study on coral impacts that is specific to domestic wastewater. Exhibit EE. Ironically, the decision by EPA to preclude Petitioner from filing additional data in support of its permit application precluded Petitioner from being able to file this document thereby depriving Petitioner the opportunity to provide proof in support of its permit application. Just like Mamala Bay study, the preliminary results from the Raymundo study indicate that the corals in the immediate vicinity of the wastewater treatment plants do not show significant impacts and that those in the area of non-point source pollutants are heavily impacted. Id. Petitioner continues to work with the University of Guam, USEPA and the Department of Defense to identify studies that will best document any possible impacts and ensure the best protection of Guam's waters and reefs.

Petitioner is also working to reduce non-point source pollution by reducing sewage pump station failures and sanitary sewer overflows (SSOs). Despite Guam's aging infrastructure and the affordability limitations of Guam's populace, Petitioner has made significant strides towards reducing pump station failures and performing system maintenance designed to reduce SSOs. In fact, Petitioner's five (5) year rate plan and accompanying capital project program contains projects that will eliminate major system bottlenecks and significantly improve pump station reliability. However, forcing Petitioner to move to secondary would certainly derail these efforts by replacing projects specifically designed to eliminate non-point source pollution and provide proven improvements to human health and the environment with the dubious possibility of improved point source impacts from the treatment plants which according to all existing data shows little or no positive environmental impact.

Guam relies primarily on the Northern Lens Aquifer for its drinking water. As the impending military buildup strains our water supplies, this resource becomes ever precarious and we desperately want to avoid what happened in Saipan where a good aquifer turned bad due to over-pumping (this is already beginning to occur on Guam). Unfortunately there are numerous septic systems over the lens that threaten the quality of water in the lens and the Notice of Final Decision by the Administrator places the aquifer at risk by diverting Petitioner's scarce financial and administrative resources from aquifer protection to secondary treatment – a very questionable move in any event given Hawaii's marine testing data and the Raymundo report. In the Water Resources Master Plan identified nearly $300M in capital costs would be needed over 20 years just to extend sewer services to eliminate only those septic systems within 200 feet of an existing sewer or 1,000 feet from a well and requiring Petitioner to implement secondary treatment would either eliminate or greatly reduce the availability of funding for this worthwhile project.

In fact, forcing Petitioner to spend the estimated $300M on secondary treatment would have a much larger negative environmental impact than any benefit (if any) gained by going to secondary treatment. In addition, this expenditure would pull funding from non-point source pollution sources and from aquifer protection, both of which are much more critical to protecting the health and environment of the island. EPA stated that this would be considered in implementation schedules, but has no obligation to do so. *Administrative Record.* However, the island's environment and the health of its populace cannot be held hostage to an alleged "technical" violation when the potential environmental benefit of such an act when there are other clear and overarching environmental protection priorities that need addressed which will be adversely affected by this decision – i.e, arbitrary.

E. <u>The EPA Acted In An Arbitrary And Capricious Manner By Concluding That The EPA's Own Standards And Policies Governing Affordability Of Secondary Treatment Are Irrelevant</u>.

EPA acknowledged that protection of Guam's drinking water source aquifer must be a high priority, and that they are "willing to work with Petitioner to develop a schedule for implementing projects consistent with multiple water infrastructure priorities." *Administrative Record.* EPA states that affordability is not a criterion for extending the waivers, yet acknowledges its importance. While Petitioner recognizes better than anyone the criticality of properly treated wastewater to Guam's environment and its economics, the costs of secondary treatment relative to its unproven environmental worth cannot be ignored by the agency, particularly given the socioeconomic realities of the island and Petitioner's small customer base who would be called on to pay for these costs.

EPA's own policy definition of affordability 2.5% or less of median household income would be breached if Petitioner is required to implement secondary treatment. Exhibit HH. On the low income side of the spectrum in 2005 nearly 25% of Guam's households were already nearly over the

4% affordability marker, meaning that their rates are already unaffordable to them. Exhibit II. The analysis in the Master Plan did not include the following rate increases that have already been approved: (a) 16.55% approved on August 13, 2007; (b) 6.6% approved on March 30, 2009, and (c) 34.9% over the next 4 years including 14% that went became effective on both lifeline and non-lifeline rates on August 1, 2009. *See* Guam Public Utilities Commission Website at www.guampuc.com. In fact, according to GWA's analysis, GWA will breach the affordability threshold in 2017 – long before it finishes the tasks in the Master Plan that do not include the costs associated with moving to secondary treatment. Exhibit JJ. The affordability threshold will probably be met even sooner when Petitioner adjusts its rates to more accurately reflect the true cost-of-service to residential customers as required under the Stipulated Order.

EPA's basic approach to assessing the affordability is intended to address the reality that small or isolated systems frequently face higher costs of meeting given standards. This is also true for any Pacific Island system in meeting the costs to implement the Clean Water Act and the Safe Drinking Water Act and the new rules. The Department of Defense currently adds a factor of 2.76 onto costs expended on Guam because of its isolation and size which requires materials to be shipped and limits the availability of technologies, workers and expertise. The addition of secondary treatment to Guam's critical priority list as approved by EPA would require rates that are, by EPA's definition, not affordable thereby rendering the EPA decision somewhat hypocritical in terms of establishing a policy and then refusing to acknowledge its relevance in terms of making decisions.

F. The Regional Administrator Lacked An Adequate Basis For Refusing To Consider The Scientific Bases Of Petitioner's Responses To The 2008 Tentative Determination.

Petitioner reiterates the comments in its response to the tentative determination, noting that EPA has failed to address or inadequately addressed many of the issues Petitioner brought up in this response. Exhibit K. Specific areas of concern are addressed below.

1. Bacteria

EPA disagrees that the permits should reflect the fact that their pathogenic indicator organism is, based upon EPA's own research, a faulty method of measuring bacterial contamination because the permits have not been renewed since 1986. *See Administrative Record.* Petitioner strongly disagrees with this conclusion and reiterates its arguments in response to the tentative determination concerning chlorine and enterococci. Exhibit K.

Petitioner specifically requested the opportunity to discuss bacteria outside of the waiver process (as secondary treatment is not a process required to treat for bacteria) but again was told by EPA that the "window" for those discussions had closed in 2001. Exhibit G. EPA erred when they indicate that they did not make this statement.

2. Enterococcus As Pathogen Indicator.

Tests that actually identify the presence of fecal pathogen (disease causing bacteria) contamination in water and the environment from mammalian sources, particularly those which can infect humans, are difficult, tedious, time consuming and expensive. They generally take so long that by the time a positive test result is obtained, it may well be too late to manage a problem for which they could be a cause. *See* http://www.epa.gov/waterscience/criteria/recreation/experts/index.html (EPA 823-R-07-006; June 2007). Because of this, organisms that are used to evaluate water quality and the environment are not the actual pathogens that can cause disease, but rather they are classes of bacteria that tend to live in the same conditions as the pathogens and can be identified quickly. Id.

It has long been recognized that the organisms that have historically been used to indicate

the presence of fecal contamination in tropical environments are not reliable for this purpose. The reason is that the classes of organisms used for water and environmental quality evaluations are able to thrive in the soils where the growth conditions are always warm and moist. This ability then prevents a determination of the actual source of the indicator organisms and does not provide precise human health related information on the quality of the water or the environment being monitored. Research done by the University of Hawaii Water Resources Research Center by Roger Fujioka et. al. in the early 1990's was among the first presentations documenting this situation, and some alternative organisms were proposed. Exhibit KK. In 1999, they published a second study in Guam, using the same methods as the Hawaii studies. Exhibit LL. This study found that "soil becomes an environmental non-faecal source of faecal indicator bacteria" and concluded that "USEPA water quality standards may not be directly applicable to tropical island environments." Id.

The *Development of New or Revised Recreational Water Quality Criteria* (EPA 823-R-07-006; June 2007) notes that enterococci, the indicator organism in the WQS and referenced in the TDD, has several shortcomings in its use as a fecal indicator and that experts "agreed that enterococci are probably not appropriate indicators in all climatic regions (e.g. in tropical and subtropical climates)." *See* http://www.epa.gov/waterscience/criteria/recreation/experts/index.html (EPA 823-R-07-006; June 2007). EPA, in concurrence with the need of a better method for microbiological evaluation of waters and the environment, has an ongoing program to seek out alternative indicator organisms which provide more precise information on the presence of fecal contamination and likely sources of it.

EPA stated in the Honouliuli TDD response that "[u]ntil new methods to detect pathogens are finalized and adopted in 40 C.F.R Part 136 and criteria using these new methods are developed and promulgated, the existing criteria remain in effect." *See Administrative Record in*

Docket 09-01. In EPA's 301(h) analysis of whether a discharge can attain water quality standards for bacteria, EPA must use the currently applicable water quality standards. 40 C.F.R. § 125.62(a)(1)(i); *see also* 63 Fed. Reg. 36742, 36787 (July 7, 1998) (mixing zones are inseparable from the standards themselves). This statement proves fundamentally that EPA's scientific arguments lack rigor to make decisions which will result in significant environmental and cost impacts on the Island of Guam which means their decision is arbitrary and capricious. Furthermore, Enterococci are a poor indicator for tropical environments such as Guam according to numerous studies, including EPA's. Exhibits KK and LL and the study entitled *Development of New or Revised Recreational Water Quality Criteria, supra.* Unfortunately, EPA insists on holding Petitioner to an inappropriate unscientific standard that its own data simply does not support. EPA's argument that this is based on the law is rendered ineffective by its own failure to issue a decision for 11 years which also clearly demonstrates that EPA has discretion in these matters. Thus, the lop-sided and arbitrary exercise of discretion by the EPA is exactly at issue here and Petitioner believes that its discretion should be carefully reviewed by the EAB..

The Department of Marine Science from the University of South Florida in their Coliphage and Indigenous Phage in Mamala Study (1996), demonstrates that with a properly designed outfall there is no impact to recreational waters from primary treated waste. Exhibit MM. EPA states that GWA had not performed proper monitoring to determine impacts. *Administrative Record.* However as discussed above, the EPA approved outfalls were on line for just a few months when the Tentative Determination Document was issued thereby providing GWA with no opportunity whatsoever to study impacts from the new outfalls that are necessary under the University of South Florida Study as to whether the outfalls were properly designed or not and thereby entitling Petitioner to retain its waivers.

Petitioner believes that an alternate and reasonable approach would be the EAB remand the decision back to EPA so that it can postpone a final decision on this topic while allowing Petitioner and other Guam entities including WERI to contribute to research on appropriate indicator species for tropical environments, and/or allow Petitioner an opportunity to propose disinfection to address the hypothetical bacteria issue raised in the EPA TDD and Final Decision. *Administrative Record.* The EPA regulations include a provision for disinfection "where appropriate" under the waivers. 40 C.F.R. 125.57(a)(9). However, when Petitioner requested the opportunity to implement disinfection in March of 2008, as discussed above, Petitioner was informed that the "window" for submitting additional information was closed in 2001. This issue is especially arbitrary considering the fact that the EPA had never suggested disinfection prior to its reference in the TDD as being relevant to Petitioner's retention of its waivers.

3. Guam Water Quality Standards

In addition to bacteria (discussed above), EPA's tentative decision states that Petitioner has not submitted sufficient information to determine whether or not the proposed discharge can meet the WQS for nutrients, whole effluent toxicity, toxic pollutants and pesticides. *See Administrative Record.*

a. Nutrients.

EPA stated that Petitioner failed to submit adequate receiving water monitoring data to demonstrate that the proposed discharge would attain WQS for nutrients at and beyond the zone of initial dilution. Id. According to EPA's tentative decision document, the basis of design for the new outfall and an initial dilution of 100:1 were used in making the tentative determination, and concluded that this is a conservative estimate (EPA's own calculated initial dilution was 219:1). Id. The new outfall was designed to meet nutrient concentration compliance (with orthophosphate as the limiting

factor at the zone of initial dilution), and according to EPA's own calculations, this design is conservative. Exhibit NN. Receiving water data from the existing, old outfall would not have been relevant to the ZID for the new outfall because the location, depth and diffusion are significantly different. Petitioner has been monitoring receiving water data and submitting such data to EPA since the new outfall was put on line. However, this monitoring data does not include nutrients. (Please refer to the discussions above regarding the need for additional information.)

EPA acknowledges that Petitioner submitted receiving water monitoring data in 1998. *Administrative Record.* The TDD also states that EPA has expressed to Petitioner on "several occasions" since 1997 that Petitioner "should collect and provide EPA with more recent monitoring information, such as water quality data for nutrients." Id. However, Petitioner has received no written feedback on the 1998 data submittal, and has had no written communication from EPA on nutrients since September 23, 1997. Moreover, while acknowledging that PUAG, the precursor entity to Petitioner, did not complete all quarterly offshore monitoring required by the existing 1986 permit, Petitioner notes that there was no requirement in this permit for nutrient monitoring. Exhibit OO. Petitioner disputes the assertion that it was requested to do additional nutrient monitoring in the time since the CCU has been in office. Petitioner also disputes EPA's assertion that such monitoring would have shown whether or not Petitioner could meet GWQS with the new outfall, since it the outfalls were clearly designed to meet such standards but was not put on line until December 2008 and January 2009. The EPA approved leaving out the diffuser for the Northern STP outfall pending the provision of more concrete information regarding the military buildup and the diffuser would have to be in place to conduct proper testing to ensure Petitioner meets appropriate water quality standards. Exhibit PP. Thus, it is arbitrary for the EPA to state that we don't meet water quality standards when

they know full well that additional work to the Northern STP outfalls would be necessary to provide any meaningful testing relative to the standards.

In the Honouliuli WWTP response to TDD comments, EPA noted that there has been a change in the Hawaii WQS since 1991 when their previous decision was made, and that therefore their decision reflects new criteria. *See Administrative Record in Docket 09-01.* However, EPA stopped requesting nutrient information in 1997 and stopped accepting information from Petitioner in 2001, the same year that the latest Guam WQS were issued. Thus, for any decision based on the standards of the 2001 WQS, EPA must allow Petitioner an opportunity to provide additional information and studies so that all information is scientifically rigorous (instead of based on "inadequate information") and relevant to the most current standards otherwise the EPA's decision is arbitrary, unreasonable and contrary to mandates that the agency base its decisions on what's best for the environment. Failing to provide this opportunity is simply an arbitrary decision that lacks any logic and instead seems to have an ulterior motive other than environmental protection.

Petitioner requests that EPA provide Petitioner with a specific request for the nutrient Monitoring data required with the new outfalls and most recent WQS and allow Petitioner an opportunity to meet that request prior to issuance of a final decision.

b. <u>Toxicity.</u>

EPA states that Petitioner has failed to demonstrate that the discharge is not toxic due to a lack of representative WET data. *See Administrative Record.* However, each time the Pacific Island's office has requested Petitioner to sample for WET, Petitioner has done so (the claim of inadequate information based on the 1997 EPA letter is discussed in detail elsewhere in this document).

EPA states "in response to EPA's expressed concern for the lack of WET data, Petitioner

finally submitted results for a single WET test from December of 2007." Id. Thus, when EPA actually asked the post-CCU Petitioner to do a WET test, Petitioner promptly did so. Petitioner also completed a WET test at Hagåtña in 2003 that was submitted to EPA but is not referenced in the TDD. Exhibit S. Since 2003, Petitioner has made every effort to comply with EPA requests. Id. In sum, had EPA provided feedback or additional requests for sampling after 2003 Petitioner would have complied.

EPA also stated that Petitioner utilized an inappropriate species. Petitioner used the same Species that was listed in its Umatac-Merizo and Baza Gardens NPDES permits. *Administrative Record.* These plants discharge into fresh water, but lacking any guidance from EPA on desired species, the biologist chose to be consistent with other permit requirements results. No feedback was ever received from EPA regarding this choice until the TDD was issued.

Petitioner is confident that, like the two tests completed, any additional testing would also have shown that the discharge is not toxic at the ZID. If EPA found these submittals inadequate, they should have submit in writing a request for Petitioner to do additional WET testing and specified the species to be used. EPA should postpone the waiver decision until adequate testing can be completed to fully analyze this issue.

c. Toxic Pollutants & Pesticides.

EPA stated that in their 1997 letter they instructed Petitioner to conduct toxic pollutant analysis and that Petitioner did so in 1998. According to the TDD, "concentrations of all eight of the detected toxic pollutants were estimated to be below the water quality criteria at the ZID." *See Administrative Record.* Stated another way, the discharge is **not** toxic.

EPA also states that Petitioner has not done any additional toxic scans. This is simply false.

Petitioner completed toxic scans pursuant to requests from EPA's Pacific Island's Office in 2003, 2007 and 2008. Exhibit S. These results also showed that the discharge is non-toxic. These results have been submitted to both the Pacific Islands Office and the Water Division who then provided contrary directions to Petitioner relative to the submittals, i.e., Pacific Island's Office responses were geared towards primary treatment while the Water Division is attempting to deny Petitioner's waivers. Petitioner believes this dichotomy cannot stand as it constitutes conflicting policy decisions by the EPA and Petitioner is lawfully entitled to rely on submissions from the Pacific Island's Office.

As noted in earlier sections of this response, EPA's basis for concluding that Petitioner has not demonstrated that the discharge would not be toxic is because "Petitioner has not provided additional toxic pollutant analyses as specified by EPA." *Administrative Record.* EPA's 1997 letter did request annual analysis and no communications from EPA since that date have requested such analysis. In sum, the "new" Petitioner created as a Guam Public Corporation and managed by the CCU has completed all additional analysis requested by EPA, as shown by the 2003, 2007 and 2008 results.

EPA's conclusion that Petitioner has not completed adequate analysis to demonstrate that the discharge is not toxic is false. *See Administrative Record.* If EPA feels that additional data is necessary, EPA should ask Petitioner to perform additional monitoring prior to finalizing a decision in order to demonstrate that all information is scientifically based instead of basing the decision on "inadequate information." If no further testing is allowed to be performed, the EPA's decision is arbitrary, unreasonable and contrary to policy statements from the Lisa Jackson, the Director of the EPA, that the agency bases its decisions on what's best for the environment and science. *See Opening Memo to EPA Employees from EPA Director Dated January 23, 2009 on EPA's website at the following address: http://blog.epa.gov/administrator/category/memos/.*

4. Percent Removal.

In the EPA's final determination they noted that low influent BOD is not an acceptable reason for Petitioner's failure to meet the 30% removal requirement in the 301(h) regulation. However, the EPA regulations specifically provide for an allowance for "circumstances beyond the applicant's control" as long as that circumstance does not include weak influent due to excessive inflow and infiltration. 40 C.F.R. § 125.60(c)(1)(iii). Petitioner has clearly demonstrated that excessive inflow and infiltration is not the cause of low influent BOD because BOD levels do not fluctuate with rainfall. *See e.g.,* Exhibit K; *see also* Exhibit QQ.

G. The Regional Administrator Failed To Properly Considered All Of Petitioner's Non-Industrial Source Control Programs.

1. Pretreatment

Due to the limited number of industrial activities on Guam Petitioner acknowledges that implementation of an industrial pretreatment program has not been a priority and has focused our pretreatment efforts instead on commercial and residential discharges (fats, oil and grease instead), which are a much bigger impact to the system and therefore to the environment.

However, Petitioner has submitted to EPA a draft proposed program and is working with the legislature and its rate regulatory body to codify the program and institute the fees. Exhibit RR. It should be noted that the majority of requirements of the industrial pretreatment program are in fact already included in Petitioner's regulations found in Title 28 Guam Administration Rules § 2120, entitled Regulations Regarding the Use of Public Sewers. Thus, since there is almost no industrial activity on Guam and there are already existing regulations governing discharges into Petitioner's sewer system the Petitioner has not brought a formal pretreatment program to the forefront and instead concentrated on compliance with the Stipulated Order since resources are limited. This is not an excuse, although Petitioner notes that the USEPA is more than aware of the lack of industrial

activity on Guam and the need for Petitioner to focus on other priorities to just bring Petitioner back into financial and operational health since the 2002 lawsuit.

2. Industrial Pretreatment.

EPA states that Petitioner has not complied with the pretreatment provisions of the regulations. *See Administrative Record.* The regulations applicable to Categorical Industrial Users is found in 40 CFR Part 403. The TDD states that Petitioner did not provide updated information regarding categorical industrial dischargers to the treatment system. *Administrative Record.* Petitioner submitted with its 2000 NPDES application update a copy of the Discharge Survey that was completed in 1999. Exhibit SS. Based upon survey responses and a review of industrial customers via Petitioner's billing records showed that there are only two Categorical Industrial Users as defined in the regulation discharging into the Agana WWTP collection system. Since EPA only looked at information provided through 2001, this would not have included the recent requests that Petitioner made to the Pacific Islands Office for assistance in dealing with military categorical industrial discharges to Petitioner facilities. DoD has been extremely uncooperative in providing information or sampling and analysis at their categorical industrial facilities (e.g. Naval Hospital and AAFB Landfill). Petitioner requests that EPA provide assistance in enforcing pretreatment requirements on federal facilities. Petitioner acknowledges that the Guam Memorial Hospital is also a Categorical Discharger and is pursing efforts to have that facility complete monitoring pursuant to GWA's existing regulations.

The Pacific Island's Office is more than aware that Petitioner's primary pretreatment issue is not toxics nor industrial wastes from factories, rather our biggest problems are from fats, oils and grease. Petitioner has kept the Pacific Island's Office abreast of efforts to reduce FOG contributions to the collection system. This effort has included numerous requests that GEPA and EPA provide

assistance, as the FOG regulations under GEPA contradict those of Petitioner, and are inadequate. Guam Public Health has some enforcement responsibility for grease traps but has limited resources to conduct inspections. Petitioner is working with the enforcement agencies to ensure that discharges are being monitored and violations rectified. EPA will no doubt argue that this is not relevant to compliance with 301(h) requirements; however, it does demonstrate that Petitioner has a robust pretreatment program which focuses on the issue that has the largest impact to operations and therefore effluent quality.

3. **Non-industrial Source Control.**

EPA states that Petitioner does not have a non-industrial source control program. Petitioner staff states that public education was in fact conducted in 1999, however, copies of the campaign are no longer available. EPA has had no discussions with Petitioner since 1997 regarding this issue.

The post-CCU Petitioner has a full time Public Relations Manager and Petitioner currently performs extensive on-going public education that includes education of the public on proper disposal of waste. Petitioner has offered to submit a CD containing examples of some of Petitioner's public education campaigns over the past couple of years, however no response from the EPA was provided (apparently the data was too voluminous to review). Petitioner also does an extensive public relations campaign to eliminate illegal discharges by septage haulers (see BOD above) and we have in fact provided EPA with detailed information on our septage hauler program and studies based on impacts from septage haulers. Petitioner would have been more than happy to provide all relevant information to EPA at any time upon request, or to modify the program to include any elements that EPA considers to be necessary. However, in its Final Decision the EPA simply labeled Petitioner's non-industrial source control program as "inadequate" without even exploring what Petitioner's program

consists of or acknowledging Petitioner's offer to submit its public relations campaigns. *See Administrative Record.*

Petitioner requests that EPA provide Petitioner with assistance on defining the desired elements of this non-industrial program and with the opportunity to implement such a program. Failing to respond or otherwise instruct Petitioner on what the program should consist of in EPA's viewpoint is arbitrary and capricious because it subject Petitioner to an unknown standard.

H. The Regional Administrator Failed To Present Accurate And Factual Information In The Final Decision And The Associated Documentation.

The data in Table 1 regarding the new outfall is inaccurate. Design drawings were submitted to EPA for review and approval prior to construction and Petitioner recommends that these be reviewed and asks that this information be corrected. *See* Exhibit NN.

I. The Regional Administrator Did Not Give Adequate Reasons, And Did Not Have An Adequate Basis To Change The EPA's Position And Petitioner Was Entitled To Rely On EPA's Prior Actions And Statements.

It has become impossible to discuss the issue of secondary treatment without referencing Guam's impending military build-up. The military build-up will dramatically increase the population of the island of Guam and may drive the plant capacity over its current design of 12 MGD. Once the plant has to be upgraded to increase its capacity, there is clearly no longer an opportunity for a waiver to apply. However, but-for the build-up, Petitioner's treatment plants would not need a capacity increase within the 20-year planning horizon of the WRMP. Therefore, any need to go to secondary within that planning horizon is driven directly by DoD impacts (both direct and indirect). Therefore DoD should be fully responsible for any necessary upgrades to secondary treatment that take place within that planning horizon. It appears that this was the intention of EPA when it issued its denial at

this juncture thereby forcing this issue onto the scene in the midst of a Stipulated Order, Master Plan and Financial Plan implementation.

III. CONCLUSION

The EPA's Decision to Deny GWA's 301(h) waivers should be overturned for the following reasons:

- EPA failed to address GWA's permit application for 9 years and Petitioner has been given no opportunity to resubmit updated information under the current applicable WQS. Thus, Petitioner must be given the opportunity to resubmit and address the new standards.
- GWA should be entitled to rely on EPA's statements and decisions relative to status as a party to the formulation of the Stipulated Order, the SO Amendment, the Petitioner's Master Plan and its involvement in the GWUDI decision, it is clear that EPA's priorities for Petitioner do not (and should not) include secondary treatment at this time.
- EPA's statement that Petitioner has not provided the requested information to support its application is disingenuous since no information has been requested by EPA since 1998 relative to the permits and Petitioner therefore had no choice but to determine that all such information was adequately addressed in the 2000 and 2001 submittals.
- Moving to secondary treatment would violate the EPA's own policy on affordability with no demonstrable environmental benefit.
- Petitioner must be allowed adequate time to operate with the new outfall and to complete the Performance Evaluation Studies required under the Stipulated Order to demonstrate Petitioner's compliance with the discharge regulations under the new WQS. This is especially relevant since the EPA is the entity that forced Petitioner to install the new outfalls notion that they were a prerequisite to keeping primary treatment and the outfalls were included in the

Stipulated Order to ensure Petitioner's compliance with its NPDES permits.

- There is a lack of rigorous scientific behind EPA's assertions that there it would be deleterious to continue the waiver and that this needs to be mitigated.
- More data and analysis is required so that both EPA and Petitioner can deal with the facts, and given the circumstances, there is no reason not to allow Petitioner a year or so to achieve this – especially when one considers the costs for secondary treatment as compared to the testing whether primary treatment or advanced primary treatment is effective.
- Petitioner has relied repeatedly on statements from the EPA which now have been rendered meaningless and Petitioner should not be penalized for following EPA directives.
- There are more environmentally sound projects that require the EPA's attention such as installing public sewers in the areas over the sole and limited aquifer, ensuring that GWUDI is met, improving operations and putting capital into the water and wastewater system for the betterment of all.
- The CCU and Petitioner is committed to providing more reliable and cost-effective service and has put forth a plan to do so and requiring secondary treatment at this juncture will severely disrupt those well laid plans.
- The EPA decision results in an Order over a subject matter that has already been litigated in 2001 and would result in having Petitioner putting in place another Order when the Stipulated Order already has provisions that allows modification of the Order.
- The EPA decision will make water and wastewater services unaffordable as early as 2017 and even earlier when Petitioner modifies its rate structure to base the rates on cost-of-service.
- This appeal centers around whether or not the Denial of Petitioner's waivers at this stage is the most appropriate method is the best to ensure compliance by Petitioner, i.e., a choice between

the collaborative process via the Stipulated Order where GWA is an active participant, can negotiate terms and works with the EPA under the supervision of a United States District Court or whether Petitioner is forced to fight the heavy-handed arbitrary, capricious, unfair and unjust decision of the EPA to the bitter end.

In sum, this matter should be dismissed in its entirety to allow the Stipulated Order and Master Plan process to work as they were originally intended. In the alternative, and at a minimum, this matter should be remanded back to the EPA for consideration as to whether or not there are other alternatives that better serve the public good and provide for better environmental protection over the long-term. Everyone knows that fostering a cooperative spirit between a regulator and regulated entity is always preferred over a bitter fight which only increases rancor, distrust and erodes whatever cooperative spirit exists.

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Attorney for Petitioner.

Dated this 3rd day of December, 2009.

Exhibit:	Description:
A	March 6, 1991 letter from Fred Castro to Norm Lovelace;
B	April 4, 1997 letter from Felicia Marcus to Richard Quintanilla, GWA GM;
C	December 21, 1998 letter from Norm Lovelace to Richard Quintanilla, GWA GM;
D	June 18, 2009 e-mail Richard Remigo to Julie Shane, GWA Senior Engineer Supervisor;
E	June 30, 2000 and February 5, 2001 letters from Herbert Johnson, GWA GM to Norm Lovelace re: Revised NPDES Permit Application for Agana and Northern District Wastewater Treatment Plants;
F	June 18, 2009 and April 4, 2009 e-mails from Richard Remigio to Julie Shane, GWA Engineer;
G	November 3, 2009 Declarations of Julie Shane, GWA Senior Engineer Supervisor and Paul Kemp, GWA Asst. GM for Compliance and Safety;
H	November 28, 2007 pleading entitled United States' Response to Defendants' Motion for Dispute Resolution in USA v. GWA and Government of Guam; District Court of Guam Civil Case No. 02-00035;
I	November 9, 2007 pleading entitled United States' Reply to Brief in Response to Status Hearing in USA v. Government of Guam; District Court of Guam Civil Case No. 02-00022;
J	Paragraphs 10, 39 and 42 of the Stipulated Order as amended in October 2006;
K	June 30, 2009 letters (for Northern District WWTP and Agana WWTP) from Leonard Olive, GWA GM to Richard Remigio re" GWA's comments to USEPA's tentative denials;
L	April 21, 1008 letter from Alexis Strauss to Richard Quintanilla, GWA GM;
M	May 6, 1997 letter from Richard Quintanilla, GWA GM to Felicia Marcus and September 15, 1999 letter from Herbert Johnson, GWA GM to Norm Lovelace both indicating funding problems;

Exhibit:	Description:
N	June 12, 2007 letter from Michael Lee to John Benavente, GWA Interim GM re: Water Resources Master Plan;
O	January 17, 2007 letter and comments from Michael Lee to David Craddick, GWA GM re: Water Resources Master Plan;
P	May 15, 2006 Report from Bill Hahn to USEPA re: Water Resources Master Plan;
Q	November 2009 Northern District WWTP Status Report prepared by GWA's PMC Veolia Water Company;
R	October 13, 2008 USEPA's Priority CIP Project List;
S	WET tests and Toxicity testing;
T	July 18, 2009 e-mail from Mike Lee and April 7, 2009 e-mail from Richard Remigio WET tests and toxicity testing;
U	August 25, 2009 letter and comments on EIS from Enrique Manzanilla of USEPA to Major General David Bice;
V	September 30, 2009 Findings of Violation and Order for Compliance from Alexis Strauss of USEPA Region 9;
W	Intro for Stipulated Order for Preliminary Relief (October 3, 2006);
X	GWA's DMR Data for January 29, 2009 (1st Qtr.); April 29, 2009 (2nd Qtr.); July 28, 2009 (3rd Qtr.); and October 28, 2009 (4th Qtr.);
Y	August 23, 2007 Actual permits for the outfalls POH-2006-81 and POH-2006-82;
Z	Three memorandums dated March 6, 1998 all from Richard Quintanilla, GWA GM to Bureau and Planning Administrator, Department of Agriculture Administrator and Guam Environmental Protection Agency Administrator;
AA	July 25, 2008 e-mail from Mike Lee to Don Antrobus;
BB	October 29, 209 e-mail from Julie Shane to Ivan Quinata;
CC	March 24, 2009 letter from Doug Eberhardt to Lorilee Crisostomo;
DD	November 27, 2007 letter from Mike Lee to Paul Kemp;

Exhibit:	Description:
EE	Study prepared by Dr. Laurie Raymundo, UOG Associate Professor;
FF	June 15, 2007 Report of the Experts Scientific Workshop on Critical Research Needs for the Development of New or Revised Recreational Water Quality Criteria;
GG	GWA's River Data Studies;
HH	OMB's analysis of EPA's affordability criteria and EPA Study on Affordability;
II	Sections 14. 7 and 14. 8 of the WRMP;
JJ	Affordability analysis and Guam DOL's Household Income Report;
KK	First Fujioka study (Hardina & Fujioka Report (© 1991 John Wiley & Sons, Inc.) entitled Soil: The Environmental Source of Escherichia coli and Enterococci in Hawaii's Streams);
LL	Second Fujioka study (R. Fujioka, et al. Report (© 1999 The Society for Applied Microbiology) re: Soil: the Environmental source of Escherichia coli and Enterococci in Guam's streams);
MM	Mamala Bay Study (April 1996);
NN	Basis of Design for the Northern District Treatment Plant Outfall Extension dated September 2001;
OO	Actual NPDES Permits for Northern and Hagåtña dated June 30, 1986;
PP	September 28, 2009 letter from Mike Lee to Julie Shane;
QQ	Graphs of Biological Oxygen Demand and Total Suspended Solids
RR	November 18, 2009 e-mail from Mike Lee to Julie Shane;
SS	Commercial Wastewater Discharge Survey.

CERTIFICATE OF SERVICE

I, Samuel J. Taylor, hereby certify that on December 3, 2009, Thursday, I will cause to be served a true and correct copy of the foregoing Supplemental Brief in Support of the Guam Waterworks Authority's Consolidated Petition for Review in Docket No. CWA 309(a)-09-030, via Federal Express courier to the below listed persons.

Clerk of the Board
United States Environmental Protection Agency
Environmental Appeals Board
1341 G. Street, N.W.
Suite 600
Washington, D.C. 20005

Laura Yoshii
Acting Regional Administrator
United States Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

Dated this 3rd day of December, 2009.

SAMUEL J. TAYLOR