

Appendix L – Response to the August 20, 2015 letter of Manko, Gold, Katcher and Fox LLP

The Applicant provides the following responses to the August 20, 2015 letter of Manko, Gold, Katcher and Fox, LLP on behalf of the Coral Bay Community Council (the “Fox Letter”).

The Applicant acknowledges that CBCC is a non-profit organization whose members represent a segment of the population within Coral Bay. As is the case with most non-profits, CBCC relies on donations, dues and granted funds to perform its community function. Thus its ability to provide continuing, consistent services related to watershed management and other environmental projects it has initiated in the past is limited by their organizational status, inability to generate profits, and reliance on volunteers for their work. Applicant appreciates the time, effort, and money CBCC has devoted to reviewing and commenting on the Summer's End Project, including the Fox Letter.

In order to minimize confusion, and reduce the volume of papers filed in this proceeding, the Applicant has responded to all individual letters, and issues raised in the form petition circulated on the internet in the general response related to public comments. Likewise, reviewing agency comments are addressed in their totality in individual responses, and although selective quotes from those letters were utilized in the Fox Letter, we will not repeat those responses here. For your convenience, the binder submitted in this matter contains the following documentation:

Appendix A – Revised Upland Plans

Appendix B – Revised Dock Plans/Documentation on Grated Decking

Appendix C – Response to Federal Agencies

- NMFS PRD
- NMFS HCD
- FWS
- NPS
- EPA
- USGC

Appendix D – Wave Study Technomarine – Wind and Wave Analysis (21 pages)

Appendix E – Mitigation Plans – Benthic Mitigation Plan (18 pages)

Appendix F – Monitoring Plans - Environmental, Acoustic And Water Quality Monitoring (10 Pages)

Appendix G – Economic Impact Study

- Market Analysis (42 pages)

Appendix H – V.I. Government Agency Responses

- VIWMA Permit for Sewerage Disposal
- VIWMA Permit for Waste Disposal
- WAPA Concurrence Letter.
- CZM Staff Findings
 - ◆ Land (18 Pages)
 - ◆ Water (19 pages)

Appendix I – DPNR Concurrence to Relocate Vessels

Appendix J – John Benhams Response to Riparian Rights

Appendix K – CZM and WQC

Appendix L - Manko, Gold, Katcher & Fox, LLP and Sive, Paget & Riesell, P.C.
Response

Appendix M – Public Comment Responses

Appendix N - CBCC Assembled Comments Response

Appendix O - Statement of Qualifications

In addition, the Applicant has prepared a response to the Rebuttal letter, dated as of August 15, 2017. That 71-page letter addresses the following topics:

- Alternative Project Locations (pages 4-38);
- Alternative Designs and Layouts (pages 38-41);
- Federal Investment in Coral Bay (pages 41-43);
- Wind and Waves (page 43);
- Virgin Islands National Park and Virgin Island Coral Reef Monument (pages 43-46);
- Economic Impact and Market Study (page 46; pages 50-56) ;
- Infrastructure (pages 46-47);
- Size and Design of Docking Structure (pages 47-56);
- Impacts to Seagrass and Benthic Habitat (pages 56-61);
- Property and Littoral Rights (pages 61-64);
- Ambient an Underwater Noise (pages 65-67);
- Environmental Assessment v. Environmental Impact Statement (pages 67-69)
- Coastal Zone Management & Water Quality Certifications and Permits (pages 67-69);
- Cumulative Impacts (page 70);
- National Environmental Policy Act (NEPA)-Items not directly address in other section of the response (pages 70-71).

Consequently, this response is limited to addressing only those comments not directly addressed elsewhere, or simply directing the reader to where the responsive information has been presented.

First, the Letter notes the comments of National Marine Fisheries Service (“NMFS”) and the Environmental Protection Agency (“EPA”) as having designated Coral Harbor as an “Essential Fish Habitat” and an “Aquatic Resource of National Importance,” and those have been addressed in the responses to those agencies. However, the EFH designation simply requires that ACOE confer with NMFS; it does not dictate the outcome. ACOE has complied with that requirement.

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As to the ARNI designation, that simply adds further conference obligations to the ACOE in its communications with EPA. We have no reason to believe that the ACOE will not fully comply with its obligations under the 2002 Dispute Resolution Process.

The Fox Letter correctly asserts that ACOE review process must provide opportunity for public participation and comment. In this case, the project has undergone a local government public hearing process (with notice and opportunity to participate), and then an administrative appeal, which resulted in the project permit being granted and then the process by which that permit was granted being confirmed by the Board of Land Use Appeals. In connection with that process, CBCC devoted resources to publicizing information on the project in its efforts to collect signatures for petitions and letters of opposition and reviewed the entire record of submittals at the local government level.

Since the application was submitted to ACOE, ACOE has issued two notices requesting public comment and has comments from members of the public, reviewing agencies and CBCC. At the same time, because their concerns regarding the project did not merit a denial of the permit at the local level, CBCC and a competing marina project are seeking further judicial review of the local government approval to attempt (for a third time) to assert the project does not meet the required standards to receive a permit. With all of this activity, CBCC's counsels assertion that ACOE should hold a public hearing in order to meet its statutory mandate is not well founded. Instead, this is simply a delay effort where numerous opportunities for participation have already been made available, and CBCC has simply not been satisfied with the outcome.

ACOE regulations state:

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a DA permit application or on a Federal project, that a public hearing be held to consider the material matters at issue in the permit application or with respect to Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in §327.11 of this part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

33 CFR 327.4(b) and (c).

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The Fox Letter also implies that because CBCC has filed suit and the permit has not been ratified by the Legislature, the permit is invalid; that position is without basis in law or fact. While ratification of the permit is required before the permit can be utilized (see, e.g., 12 VIRR § 910-10; 12 VIC § 910(g)), the failure of the Legislature to take up the permit for consideration does not void the approval of the project. There is no legal impediment to ACOE's review and processing of the pending application. The ACOE can issue a permit contingent on effectiveness of all other permits required to construct and operate the marina; the issuance of contingent permits is an absolutely normal part of the process, where multiple agencies have jurisdiction over some part or parts of a larger project.

In the 2015 Fox Letter it is asserted that the Applicant has refused to provide additional information. As indicated above, the Applicant has submitted all of the information that was requested by ACOE. That includes responses to the comments received to date, and several supplements to its previously submitted application to address changes in project design, address species that have been ESA listed since the initial project application, as well as provide additional information to respond to questions raised in the public comment process.

An updated archeological report has been prepared to provide additional information about historic resources in the project area, and the project has been modified to eliminate all impacts to identified submarine resources.

The project has also been modified to eliminate the 75 boat mooring field previously proposed and Parcel 13-A and Parcel 13-B have been removed from the upland portion of the project, reducing the footprint and minimizing the impacts associated with the upland development.

The Fox Letter asserts that the proposed marina is overly exposed to ocean waves. A detailed Wave And Wind Analysis which demonstrates that waves will not have a significant impact on boats during normal sea conditions has been prepared and submitted (Appendix D). During hurricane season, the occupancy of the marina is projected to be low because larger vessels will be required to leave the Territory in order to maintain their insurance coverage. In the event of a hurricane, small boat owners will be asked to remove boats from the marina to lessen the potential for damage. For additional information on the analysis please review Appendix D.

The Fox Letter asserts that the project is too large, there is no demand for a marina on St. John and that the project as proposed is not financially feasible. Both economic and market studies have been prepared and submitted (Appendix G), and neither agree with Fox's conclusion. Instead, a demand is shown, and both costs and recovery mechanisms are openly explained. We will not repeat the entire study here, nor the alternatives analysis in the Rebuttal, but a brief summary is included.

The estimated total project cost is \$43.4 Million with approximately \$5 million going for upland development, leaving some \$38 million for the marina. By industry standards this is in the upper range, for a 144 slip marina. There are several reasons:

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- The docks are designed to allow sunlight to pass through, to minimize shading effects. This required a special aluminum grate type structure, supported by concrete piles. These minimize disruption to the seagrasses and sealife.
- The location is expensive, with little construction infrastructure. St John does not have a significant cargo port, and uses small barges and landing craft to move supplies to the island.
- A large amount of mitigation is involved, both within the lease area, and outside, to deal with cleaning up many years of not having a managed marina.
- Proximity to a national park and sensitive eco-systems requires thorough engineering, planning and studies.

Locally owned boats cannot use the Park Service moorings, nor can large yachts over 100'. The demand far out strips the supply. To solve this capacity problem, the marina has been designed as two types of marinas. The North Marina docks are for the small, transient and local long-term vessels – vessels that currently strain the availability of private moorings, impose additional anchoring burdens on the seagrasses and corals, or cannot come to St John at all. Those vessels need to be incentivized by very low rate to choose a marina that has full services. They can then enjoy utilities, security, waste and waste water disposal, while having the convenience of being at a dock.

The second, or South Marina docks will accommodate Mega yachts and provide significant services to provide water, electricity, waste water disposal and security. Providing those services will generate significant revenue and job opportunities.

The range and number of slip sizes is based on the available data showing the vessels in the area, with both the vessels that do visit St John, and the ones that cannot, which is nearly one third vessels operating in the Northern Leeward Islands. The North Docks are similar in size to the population of sailing charter vessels, and sport fishing boats that have been observed in the area. The sizes of the mega yacht South Docks, mirror the distribution of the yachts observed.

A critical size or mass must be established, such that the marina will achieve economic self-sufficiency. The point where that operation has revenue that is equal to all expenses, including debt repayment and establishing cash reserves, is called the breakeven point. It is well established that most small businesses should achieve breakeven within three to four years. Before this is achieved, the business will be losing money, and need cash infusions. This is usually planned in the financing, such, that once the breakeven is passed, the positive profits will pay back the losses. If the operation is undersized, then it will be unable to set aside reserves, accrue too many ongoing losses, and be very vulnerable to small market changes.

In designing this, both physically and economically, the 144 slip mix of small slips and large mega yacht slips, was considered to be the critical mass for this location and market.

Note that by achieving critical mass, as in the 144 slip YCSE marina, yields nearly a significant improvement in the balance sheet at the end of 7 years. In all probability, the 128 and

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115 slip designs, would not attract investment nor obtain financing due to the delayed recovery of investment.

Research indicates that in her first year of operation the Yacht Club at Summer's End will reach occupancy of 66% by non-seasonal users with boats up to 75', and 31% by seasonal guests whose yachts exceed 75', not including the facilities' 12 moorings. Painstaking effort has been spent to follow best use practices in the evaluation of the St. John market resulting in the proposed design of the St. John marina that best serve this ideal. The result is a combined marina project that maximizes the consideration for the environment, the recreational boating market and the people of St. John.

We must note that one of the project opponents has also prepared an economic feasibility analysis for its own marina proposal, also for Coral Harbor, which finds sufficient demand for both marinas.

CBCC has questioned whether there is a better location for the project. A detailed Alternatives Analysis has been included in the general rebuttal response at pages 4-37, as listed above.

The Fox Letter questioned whether the project is in the public interest because of concerns regarding impacts to the natural environment. The project has been designed to minimize impacts to natural resources the most recent surveys of environmental resources are submitted as Appendices E and F.

CBCC has questioned whether the project will impede navigation and that the design of the marina and location of the fuel dock will negatively impact mangroves and seagrass. The Applicant has committed to working with the USCG (see Appendix C) if additional aids to navigation are required across the existing private channel and will be installing two informational buoys at the entrance of the harbor to aid boaters in avoiding shallow areas rich in natural resources. A revised mitigation plan is included in Appendix E which addresses potential mitigation for all unavoidable impacts to seagrass and mangroves. The project is actually intended to restore mangroves to areas in which they had long since been removed. The project has been designed to avoid impact to any corals. The Applicant intends to work with the reviewing agencies to identify any additional mitigation necessary and to design mitigation that meets the requirements of applicable regulations.

Water quality has been addressed in numerous additional filings, and responses can be found at Appendices E, F, H, and M, in addition to the comments in the Rebuttal Response at pages 43, 56-61, and 65-71. Since it was a matter of some focus, we will repeat here that no marine maintenance, scraping or painting will be allowed in the marina, as further addressed in the response to USFW. It is more than a little ironic that one of the objections to the project is that the sedimentation caused by the upland developments, which has directly lead to the turbidity and opacity of Coral Harbor, was caused in significant part by the membership of the CBCC.

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There is no question that the Project will affect the viewshed. Much as the historical properties in Charlotte Amalie, Christiansted and other locations such Old San Juan continue alongside newer developments, so can the historic properties of Coral Bay. Those properties are already affected by the multitude of residences which have been built above them on the hillsides surrounding Coral Bay.