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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE



August 20, 2015

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August 12, 2015

Via Electronic and Overnight Mail

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Re: Proposed Construction of St. John Marina, Coral Bay, St. John, USVI
SAJ-2004-12518 (SP-JCM)

Dear Messrs. Kinard, Collazo, Cedeño-Maldonado and Castillo:

I. Introduction

Manko, Gold, Katcher, & Fox LLP and Sive, Paget & Riesel, P.C. are submitting these comments on behalf of the Coral Bay Community Council (“CBCC”) and nineteen (19) individuals (listed on Appendix 1)¹ who oppose the permitting, construction and operation of a private, 145 slip commercial mega marina proposed to be located in Coral Bay, St. John, U.S. Virgin Islands (the “Proposed Project”). The applicant, the Summer’s End Group, LLC (“SEG”), has submitted a second revised application (the “Application”) to the U.S. Army Corps of

¹ Requests made in this letter by CBCC are also made on behalf of these nineteen (19) individuals.

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Engineers (“Corps”) for a permit for the Proposed Project pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

The CBCC is a non-profit 501(c)(3) charitable organization with 400 voting members who are required to be residents or property owners surrounding Coral Bay. Anyone else can participate and donate funds. CBCC’s mission is to provide an effective means for residents of Coral Bay to participate in planning the future of Coral Bay development. It focuses on land and water use planning, infrastructure, development and environmental issues relating to Coral Bay. CBCC also implements community improvement and youth projects and undertakes research and watershed restoration projects through grants, donations and volunteers.

In addition, the CBCC acts as the Coral Bay watershed management agency, and is implementing the Coral Bay Watershed Management Plan. Consequently, the organization has a strong commitment to community involvement in environmental stewardship and capacity planning for development, so that Coral Bay’s water quality continues to improve, and people have safe drinking water, clean air and other environmental benefits.

SEG submitted its initial application in April 2014. The Corps found that the initial application lacked important information and deemed that application incomplete. SEG submitted a revised Application in September 2014. The Public Notice is based on a second revised application (third application) dated May 30, 2015. Copies of SEG’s first, second and current application are attached as Appendix 2. The Corps issued a public notice and request for public comment on the first revised application on January 7, 2015 and reissued the Public Notice on February 4, 2015.

During the public comment period on SEG’s first revised application, the Corps received comments from the United States Environmental Protection Agency (“EPA”); the National Oceanic Atmospheric Administration (“NOAA”) through the National Marine Fisheries Service (“NMFS”) and through the Habitat Conservation Division (“HCD”), the United States Fish & Wildlife Services (“USFWS”) and the National Park Service (“NPS”). Copies of the federal agency comment letters are attached as Appendix 3. All five agencies concluded that the Application, even as revised, still lacked essential information to be complete and requested that SEG perform specific studies and provide that essential information before the Corps proceeded with review of the first revised application. The relevant agencies also designated Coral Bay as an Aquatic Resource of National Importance (“ARNI”), thereby heightening both the level of protectiveness required of natural resources and the standard of review of the application.

EPA and NOAA/NMFS went further and recommended outright denial of the first revised application. Specifically, EPA, by letter from Regional Administrator Judith Enck, dated March 3, 2015, concluded that:

After reviewing the available data, EPA remains concerned that the proposed St. John Marina will result in significant impacts to

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aquatic resources of national importance. . . . In addition, the applicant has failed to comply with the Clean Water Act Section 404(b)(1) Guidelines due to the lack of a suitable alternatives analysis and a detailed mitigation plan to compensate for the project's unavoidable impacts to the greatest extent possible. *EPA therefore recommends the denial of a Department of the Army permit for this project.*

(emphasis added).

Similarly, in February 2015 and again on March 2, 2015, NOAA/NMFS recommended that the Corps not authorize SEG's project. As NOAA stated:

As detailed in the enclosed letter dated February 5, 2015, NOAA's National Marine Fisheries Service ("NMFS") recommended the Department of the Army *not authorize the project*. This recommendation was provided as an EFH [Essential Fish Habitat] conservation recommendation and was based on the *likelihood of the work adversely impacting a substantial amount of seagrass habitat as well as an undetermined amount of coral habitat.*

(emphasis added).

In addition, after reviewing these agency comment letters, USFW rescinded the previous Boating Infrastructure Grant Program Award which SEG had obtained, which funding was directly related to the Proposed Project. In its rescission letter dated March 17, 2015, enclosed with Appendix 3, USFWS listed 21 separate concerns and deficiencies related to the Proposed Project which, because they were not addressed, rendered the project ineligible for funding because of the potential of the Proposed Project to "significantly degrade or destroy valuable resources of the area."

CBCC also submitted extensive comments on the first revised application. CBCC included copies of personal letters in opposition to the Proposed Project which are attached hereto as Appendix 4. Those letters were comprehensive and detailed in their opposition and many were submitted by individuals with expertise on a wide variety of topics directly relevant to the Corps' review of the Proposed Project pursuant to the Corps' regulations and the 404(b)(1) Guidelines. In addition, CBCC enclosed with its comments a petition signed by over 5,500 people in opposition to the Proposed Project. A copy of that petition was attached to CBCC's original comments and attached hereto in Appendix 4. As evidenced by that petition and letters, there is widespread public opposition due to the many significant negative impacts associated with the Proposed Project. Note that CBCC attaches as Appendix 5 an updated petition signed by over 7,500 people in opposition to the Proposed Project as well as an additional 3,500 letters

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in opposition. The CBCC also attaches as Appendix 6 a letter from almost all of the small businesses in Coral Bay who unanimously oppose the Proposed Project.

In addition, the CBCC retained outside, independent experts in a variety of disciplines to analyze the first revised application and relevant information. These analyses were submitted with CBCC's comments and demonstrated that the Application was palpably deficient and lacked sufficient information on a variety of required factors under the Corps' regulations and the 404(b)(1) guidelines. On the basis of these deficiencies alone, CBCC urged that the Proposed Project should be denied. Alternately, CBCC comments asserted that if the Proposed Project was not denied, SEG should be required to submit a complete application containing all of the required information and expert information in order to allow the public full and fair opportunity to comment on a complete application.

And finally, if despite the foregoing, the Corps proceeded with its review of the first revised application on its merits, CBCC concluded that it is indisputable that the Proposed Project would have numerous significant adverse impacts that require denial, including but not limited to (i) significant degradation of the waters of Coral Bay; (ii) significant adverse effects on special aquatic sites, essential fish habitat and ARNI; (iii) significant adverse effects on recreational, aesthetic and economic values; (iv) significant adverse effects on the continued existence of endangered or threatened species; (v) significant adverse effects on cultural and historical resources; (vi) significant negative effects on navigation; and (vii) the presence of practicable alternative locations for a St John marina that would avoid these and the Proposed Project's other negative impacts.

Remarkably, and in sharp contrast to the many significant adverse impacts of the proposal, the first revised application made no showing that the Proposed Project would have any benefits. In short, even the limited information contained in the first revised application, as supplemented by the expert analyses submitted by CBCC, demonstrated that the Proposed Project was contrary to the public interest and failed to satisfy the public interest and other criteria of Section 10 and Section 404. Furthermore, as documented in our experts' analyses, the Proposed Project would significantly adversely affect special aquatic sites including sea grass and would significantly adversely affect the aesthetic and economic values of Coral Bay. Corps regulations prohibit issuing a Section 404 permit where such significant degradation of the waters of the United States will result, and the Corps should accordingly deny SEG's application.

Notwithstanding the obvious deficiencies in the Application, the comments and recommendations of the federal agencies, extensive comments and expert reports of CBCC and overwhelming public opposition to the Project, SEG submitted the present, second revised application dated May 30, 2015 and made only two physical changes: elimination of both a 75-buoy mooring field and repairs to an existing rip-rap revetment. SEG made minor revisions to the language describing the Proposed Project, but not to the Project itself except as noted above. It is important to note the following about the current Application:

(1) The elimination of the mooring field eliminates what SEG previously claimed was a central element of its compensatory mitigation for the Proposed Project;

(2) SEG submitted NO new Environmental Assessment Report (“EAR”) for the revised Application. *See* E-mail from the Corps dated July 21, 2015 confirming this fact, attached as Appendix 7;

(3) SEG did not provide ANY of the additional studies recommended by the federal agencies and did not respond to ANY of the comments provided by the federal agencies or the CBCC; and

(4) SEG’s did not address ANY of the concerns and deficiencies that triggered USFW’s rescission of SEG’s Boating Infrastructure Grant Program Award.

For all practical purposes, in the most important aspects (size, location, orientation, environmental impacts, navigation) SEG’s second revised application remains completely unchanged from the prior submission. The Application even retains the same permit number as the two prior reiterations and contains the exact same EAR. As such, none of the fatal deficiencies in the Application identified by the federal agencies and the public have been cured – indeed, most have not even been addressed.

For these reasons, CBCC respectfully requests the following:

(1) The Application be denied because SEG has failed, after several requests from the Corps, the other federal agencies, and the public, to provide even the most basic information required for proper review of the Application. Public resources should not be wasted in reviewing an application where SEG, after repeated notice, willfully chooses not to provide essential information to federal agencies and the public;

(2) In the event that the Corps determines to allow SEG a “fourth bite at the apple,” which CBCC opposes, the Corps should, in the words of the USFWS, “place this permit application in abeyance until our concerns have been addressed.” Specifically, the Corps should require SEG to perform, within a defined time, all studies and provide all information recommended by the federal agencies prior to the Corps continuing review of the Application;

(3) Relatedly, given that the Proposed Project would significantly impact the environment, an Environmental Impact Statement (“EIS”) should be required pursuant to the National Environmental Policy Act. Per the Corps’ regulations, where it is obvious, as it is here, that an EIS is required, the Corps may proceed to the EIS stage without preparing an Environmental Assessment (“EA”). 33 C.F.R. 325, Appendix B, Section 7(a). And it is obvious given, as set forth below, the many actual and potential significant impacts that would result from the Proposed Project. Regardless, any decision by the Corps with respect to preparation of an EIS should be subject to public notice and comment, as is consistent with the Corps regular

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practice and is required in this instance because the Proposed Project is unprecedented and should require the preparation of an EIS.² Finally, as is a standard procedure, the EIS should be completed prior to the Corps' further review of the application;³

(4) If and when the Corps proceeds with its review of the Proposed Project, the CBCC requests a public hearing on the Application. A public hearing is warranted for the Application because, among other reasons, the Proposed Project (i) faces unprecedented opposition from local residents, small business owners, property owners, and tourists and part year residents who return year after year to enjoy this unique nature-based community – Coral Bay – as is witnessed by over 16,000 letters and over 7,500 signatures on a petition in opposition; (ii) lacks the detail required in the Application; (iii) would cause potentially devastating effects on the Coral Bay ecosystem and community; and (iv) is out of scale with Coral Bay; and

(5) If the Corps declines to deny the Application now, as it should, the Application should ultimately be denied on its merits because, for the reasons set forth more fully below, the Proposed Project has significant adverse impacts with no demonstrated benefits, and as such is contrary to the public interest, fails to satisfy numerous other criteria of Section 10 and Section 404, and contravenes other federal statutes.

II. The Corps Should Deny the Application or Discontinue Review Until SEG Provides the Requested and Required Information.

The Corps permit processing regulations are clear. An applicant must submit sufficient information for public notice, 33 C.F.R. §§ 325.1(d)(1) and (10). On two prior occasions the Corps' determined that SEG's application was incomplete and required revision. The recently submitted Application is no different. It is essentially unchanged and contains none of the information requested by the federal agencies.

The Corps has express authority to deny an incomplete application, request additional information before proceeding with review, and consider comments already received in subsequent permit actions. First, the district engineer can determine whether an application contains enough detailed information to be complete. 33 C.F.R. §§ 325.1(1) and (2). 325.2(a)(1)

² See 40 C.F.R. 1501.4(e)(2). Notably, the Jacksonville District regularly seeks public comments on draft EAs and draft Findings of No Significant Impact (FONSIs). Two recent examples include: Release No. 15-042 (April 1, 2015) available here: <http://www.saj.usace.army.mil/Media/NewsReleases/tabid/6071/Article/583225/corps-invites-comment-on-lido-key-beach-sand-source-draft-environmental-assessm.aspx>; Release 15-033 (March 3, 2015) available here: <http://www.saj.usace.army.mil/Media/NewsReleases/tabid/6071/Article/580496/environmental-report-on-proposed-dike-repairs-available-for-review.aspx>.

³ Per the Corps' regulations, the environmental review process should begin as soon as practicable after all relevant information is available. 33 C.F.R. 325, Appendix B, Section 7(a). As noted in (2) above, the Corps should mandate additional studies necessary to adequately inform the environmental review process prior to continuing the review of the application. See 33 C.F.R. 325, Appendix B, Section 3 ("The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an [EA] or [EIS].").

and (2). Second, the district engineer can request from the applicant “any additional information necessary for further processing.” 33 C.F.R. § 325.2(a)(1). And third, the district engineer “will consider all comments received in response to the public notice in his subsequent actions on the Permit application.” 33 C.F.R. § 325.2(a)(3).

In the instant matter, the Corps initially issued a public notice for the Application on January 7, 2015 and reissued the notice on February 4, 2015. In response to the reissued public notice, in addition to the comments submitted by the CBCC, the Corps received extensive comments from EPA, NOAA, NMFS, USFWS and the NPS.

EPA and NOAA HCD specifically recommended denial of the permit. In addition, all five agencies identified informational deficiencies in the first revised application that needed to be cured by SEG before these agency reviews and review by the Corp should proceed. We have set forth below those information requests by agency and a summary of whether SEG provided the information in the second revised Application prior to the Corps’ issuing this most recent Public Notice:

	EPA Requests	Provided by SEG?
1	Comprehensive benthic survey of complete project area, including transit routes	No
2	Comprehensive mitigation plan, including mitigation methodology for impact to seagrass and coral	No
3	Benchmark of water quality data and monitoring plan	No
4	Quantification of wastewater loading data	No
5	Quantification of solid wastes generated by aquatic and terrestrial elements	No
6	A revised EAR	No
7	An EIS	No

	NOAA/NMFS Requests	Provided by SEG?
1	An Essential Fish Habitat Assessment Performed by the Corps	No
2	Assessment by the Corps and SEG of impact on ARNI species tarpon and snook	No
3	A more comprehensive alternatives analysis	No
4	A biological monitoring plan	No
5	A spill contingency plan	No
6	An amended compensatory mitigation plan	No
7	A list of BMPs	No
8	A sea turtle survey	No
9	A complete benthic survey, including transit routes	No

10	Details of pile driving and quantification of potential acoustic impacts	No
11	Details of mooring plan	Mooring Plan withdrawn
12	Details of construction plan for in-water and shoreline construction, including sediment and turbidity control measures	No
13	Water quality monitoring data and sediment monitoring program	No
14	Current data for tidally-influenced and wind-driven transport patterns for Coral Bay	No
15	Transit locations for the Proposed Project to determine impact on ESA resources	No

	USFWS	Provided by SEG?
1	A revised impact analysis on seagrasses	No
2	Study of long-term effect of contamination on habitat	No
3	Revised mitigation plan	No

	NPS	Provided by SEG?
1	Revised EAR to address potential impacts to Virgin Islands Natural Park and Virgin Islands Coral Reef National Monument, and in particular Hurricane Hole	No
2	Evaluation of impacts to park and monument soundscapes, lightscapes, cultural and archeological resources and visitor use and experience	No

There is no doubt that additional information is needed to properly review this Application. The Corps has the authority to deny an incomplete permit application and/or require that SEG provide that information based on prior public comments the Corps has received. As a threshold matter, then, CBCC contends that SEG's refusal to provide this information is grounds for and warrants denial of the Application.

The public and federal agencies should not be required to continue to expend considerable resources to comment on an incomplete, deficient application when SEG has been given the explicit charge to correct those deficiencies and has failed to do so. That is simply inequitable and contrary to the letter and spirit of the Corps' permit and public participation regulations and processes.

To the extent that the Corps is not prepared to deny the permit without giving SEG a "fourth bite at the apple," CBCC requests that SEG provide all of the information outlined above, within a defined time period, and that the Corps not perform any further review of the

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Application until SEG complies with that request. If SEG does not provide that information by the deadline set by the Corps, CBCC respectfully requests that the Corps deny the permit.

III. The Comments Previously Submitted by CBCC and the Federal Agencies Should Be Made Part of the Administrative Record.

The Corps' regulations provide that receipt of comments will be acknowledged by the Corps "and they will be made a part of the administrative record." 33 C.F.R. § 325.2(a)(3). In the most recent Public Notice, the Corps stated:

Since this is a new public notification procedure, we encourage all agencies and the general public to submit new comments in response to this Public Notice, even if comments were submitted in response to the previous Public Notice.

CBCC has submitted these new comments to the new Public Notice. However, for two reasons, CBCC contends that its previous comments, including all attached letters in opposition and all other letters received by the Corps pursuant to the prior notice, should be part of the administrative record for this Application. First, the revised Application is essentially unchanged. Therefore, all prior comments, except those relating to the deleted mooring field and rip-rap repairs, remain valid. Second, and especially troubling, is the Corps' concession that the Corps lost many of the comments submitted during the prior comment period. By email dated March 30, 2015, the Corps acknowledged internally that "most of the emails for the project, December 2014 through March 2015" were lost and that fact should be communicated to CBCC because the "case is sensitive and transparency should be kept with all parties." On June 4, 2015 the Corps' IT Department confirmed that "the data is completely lost and unrecoverable." The Corps never formally advised the CBCC of these facts, which the CBCC uncovered only recently.

In sum, the CBCC should not be prejudiced by the issuance of a new Public Notice and the public should not have the burden of submitting new comments when SEG failed to address prior comments in the first instance and the Corps lost the original information.

IV. The Corps' Determinations Regarding Endangered Species Are Contrary to the Administrative Record.

The new Public Notice states explicitly as follows:

Note: This public notice is being issued based on information furnished by the applicant. This information has not been verified or evaluated to ensure compliance with laws and regulations governing the regulated program.

The Corps thus concedes that its Public Notice and any determinations therein were based solely on SEG's unverified assertions, without consideration of existing, contrary information in the administrative record. That determination is especially inappropriate given the Corps' loss of the prior comments, which the Corps did not review before making this determination.

On that basis, the Corps made two separate determinations regarding the Project's impacts on endangered species: (1) the Corps determined that the proposed project "will not affect Federally protected whales, dolphins or nesting sea turtles;" and (2) the Corps preliminarily determined that the Proposed Project "may affect, but is not likely to adversely affect, the above-referenced Federally protected sea turtles (in water), lobed star coral, elkhorn coral, and designated critical habitat for acroporid corals." The Public Notice then states that the Corps will request federal agency concurrence with these determinations pursuant to Section 7 of the Endangered Species Act.

The Corps' Public Notice omits that (1) the Corps already sought concurrence from these federal agencies regarding compliance with Section 7 of the Endangered Species Act; (2) the agencies responded and those responses are part of the administrative record; and (3) the agency responses directly contradict the Corps' determinations in the Public Notice. For example, EPA's March 3, 2015 letter to the Corps states that "the threatened/endangered species found in the project area and its vicinity *are likely* to be affected by the construction and the significant increase in boat traffic that would result from the proposed marina." (emphasis added.) As another example, NOAA's January 16, 2015 e-mail to the Corps concludes that due to the inadequate information in SEG's EAR "we continue to be unable to determine the potential extent of project impacts to ESA resources" and asked for 11 additional studies/pieces of information to allow NOAA to make an appropriate determination under the Endangered Species Act. Therefore, the Corps' determination, which admittedly relied only on the unverified assertions made by SEG, are, at a minimum, premature because there is sufficient information, or at worse, flatly contradicted by the comments submitted by the federal agencies having jurisdiction over these issues and with whom the Corps already consulted.

SEG itself completed a NMFS Endangered Species Act Section 7 checklist. In that checklist, attached hereto as Appendix 8, SEG acknowledged the following regarding the Proposed Project.

- The bay is surrounded by mangroves which provide fish habitat and a nursery ground;
- The bay contains dense seagrass beds, submerged aquatic vegetation (SAV) and therefore is Essential Fish Habitat;
- The seagrass beds are also forage habitat for endangered sea turtle species and endangered sea turtles have been noted foraging in the bay;
- The bay is known as a black tip, lemon and nurse shark nursery and bull sharks are known to enter the bay to prey on the other juvenile shark species;
- There are endangered coral species in Coral Bay. Elkhorn (*Acropora palmata*) and Staghorn (*Acropora cervicornis*) coral were listed as federally endangered species under the Endangered Species Act in 2006;
- The waters surrounding St. John, including Coral Bay, have been proposed to be designated as Critical Habitat for Elkhorn coral (50 C.F.R. Parts 223 and 226, Vol. 73, No. 25, February 6, 2008); and
- *Dendrogyra cylindrus*, *orbicella annularis*, and *orbicella faveolata*, which were both listed as threatened on September 10, 2014, are present in the near shore environment on the far side of the harbor and small colonies are present on the hard bottom to the east of the Proposed Project.

SEG's checklist concedes that the Project will result in the loss of seagrass and SAV and that "sea turtles may also be impacted by vessels during construction." SEG's checklist provides no studies or even written analysis for the contrary conclusion that these endangered species or habitat will not be impacted by the Proposed Project.

Therefore, the Corps' determination in the Public Notice regarding impacts to endangered species is contrary not only to the prior determinations of the federal agencies, but also to SEG's own admissions.

Furthermore, the Corps' determination in the Public Notice that the Proposed Project "will not affect Federally protected whales, dolphins or nesting sea turtles" does not comport with the observation that dolphins are frequently seen in Coral Bay Harbor in close proximity to the location of the Proposed Project. It is well known that pile driving is a cause of incidental take of marine mammals and therefore this determination by the Corps does not appear to have a factual or scientific basis. Appendix 43 presents specific data relating to the presence of dolphins in Coral Bay Harbor.

V. The Corps' Determination Regarding Essential Fish Habitat are Contrary to the Corps' Relevant Regulations and to the Existing Administrative Record.

As with its determinations regarding impacts to endangered species, which were based solely on the unverified assertions made by SEG, the Corps' Public Notice stated the following regarding potential impacts of the Proposed Project on Essential Fish Habitat:

Based on the available information, the Corps' initial determination is that the proposed action would not have a substantial adverse impact on EFH or Federally managed fisheries in the Caribbean Sea.

The Corps' initial determinations concerning impacts on EFH was made contrary to the procedures established under the Magnuson–Stevens Act of 1996 and contrary to the undisputed evidence in the administrative record.

The Corps correctly acknowledges, and all the federal agencies concur, that Coral Bay and the project area contain EFH. Indeed, the federal agencies have designated Coral Bay as an ARNI.

Potential impacts to EFH trigger procedural requirements under the Magnuson–Stevens Act. Specifically, Section 305(b)(2) of the Act states that:

Each federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act.

See also 50 C.F.R. § 600.920(a)(1), which contains identical language. Based on its review of the Application, the Corps determined that the Project may adversely affect EFH. As a result, the Public Notice specified that the Corps is initiating the required consultation with NMFS under the Magnuson–Stevens Act.

However, the Corps' initial determination that the Project “would not have a substantial adverse impact on EFH” potentially triggered consultation with federal agencies under what is known as the “abbreviated consultation procedure” under § 50 C.F.R. 600.920(h), rather than the “expanded consultation procedures” mandated by § 50 C.F.R. 600.920(i). Expanded consultation is mandated where “there are substantial adverse effects to EFH.” The administrative record demonstrates that the expanded consultation procedure applies in this matter, and the Corps' initial determination regarding impacts to EFH is contrary to the requirements of the Magnuson-Stevens Act and to the administrative record.

First, by letter dated February 5, 2015, NMFS communicated to the Corps its recommendations regarding potential impacts of the Proposed Project on EFH. NMFS referenced that the consultation with the Corps was pursuant to the expanded consultation process of 50 C.F.R. §600.920(i). Although NMFS never received from USFWS or the Corps an EFH Assessment, as part of the expanded consultation, NMFS reviewed SEG's EAR and visited the Site. Based on that consultation, NMFS found that "the proposed project may result in substantial and unacceptable impacts to ARNI."

Further, NMFS made a specific recommendation regarding impacts to EFH. NMFS could not have been more clear on that issue: NMFS concluded that the Project "will adversely impact EFH" and recommended that "the Department of the Army shall not authorize the project as proposed."

NMFS stated to the Corps that NMFS may revise its recommendation upon review of additional information, including a complete impact assessment on corals and seagrass, a more robust alternatives analysis, a biological monitoring plan, a spill contingency plan and amended mitigation plan. Neither the Corps nor SEG has to this date provided any of the additional information identified by the NMFS.

Significantly, 50 C.F.R. § 600.920(k) requires the Corps to respond to the NMFS recommendation within thirty (30) days of receipt. In a case where the Corps' response is inconsistent with the NMFS recommendation, the regulations require that the Corps:

Must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action and the measures needed to avoid, minimize, mitigate or off-set such effects.

The Corps did not respond to the NMFS recommendation within thirty (30) days. Further, the Corps' conclusions in the Public Notice do not satisfy the requirements of Section 50 C.F.R. §600.920(k) because the Corps concedes its preliminary determination in the Public Notice was based [MC1] on SEG's unverified assertions, not based on any independent evaluation by the Corps, did not account for the recommendations of the NMFS, did not review any of the additional information requested by NMFS which SEG failed to provide, does not contain any scientific justification by the Corps for its disagreement with NMFS, and could not be based on review of prior comments which the Corps concedes it lost.

In sum, the only information in the administrative record as of the time of the Public Notice is that (a) an expanded consultation with NMFS occurred, (2) NMFS concluded that the Proposed Project will significantly adversely affect EFH, (3) NMFS recommended that the Proposed Project be denied, (4) NMFS agreed to conduct further review if SEG provided

requested additional information, (5) that information has not been provided, and (6) the Corps did not provide a response to NMFS as required by 50 C.F.R. § 600.920(k). As such, the Corps' preliminary determination that the Proposed Project would not have a substantial adverse impact on EFH is unfounded, contrary to the existing administrative record, and in contravention of regulations under the Magnuson-Stevens Act.

VI. The Project Does Not Have the Required CZM Approval.

The Public Notice states:

In the Virgin Islands, the Department of Planning and Natural Resources permit constitutes compliance with the Coastal Zone Management Plan.

CBCC agrees that the Proposed Project requires compliance with the Coastal Zone Management Plan ("CZM Plan") and that final approval of a DPNR permit may constitute compliance with the CZM Plan. However, CBCC contends that SEG has not obtained a final DPNR permit and therefore the Proposed Project is not in compliance with the CZM Plan.

Pursuant to the Code of the Virgin Islands, a coastal zone permit for a major water project, such as the Proposed Project, requires recommendation by the Coastal Zone Management Committee (which the applicant claims has been received for the Proposed Project) AND approval by both the Government and the Legislature (which has not occurred). The Code provides:

Any coastal zone permit which the appropriate Committee of the Commission or the Commissioner recommends for approval pursuant to this section, together with the recommended terms and conditions thereof, shall be forwarded by the Committee or Commissioner to the Governor for the Governor's approval or disapproval within thirty days following the Committee's or Commissioner's final action on the application for the coastal zone permit or the Board's decision on appeal to grant such a permit. The Governor's approval of any such permit or lease must be ratified by the Legislature of the United States Virgin Islands. Upon approval and ratification of such permit, occupancy and any development proposed in connection therewith shall not commence until the permittee has complied with the requirements of the United States Army Corps of Engineers pursuant to Title 33 of the United States Code.

Since the Government and Legislature have not approved the Board's recommendation, the Proposed Project does not have a final CZM permit and SEG has not demonstrated consistency with the CZM Plan. Without such a final permit, the Corps' permit cannot be granted to SEG.

VII. The Existing Administrative Record Identifies Impacts to Cultural and Historic Resources.

The Public Notice states that the Corps is "not aware" of any known historic properties within the permit area. CBCC previously submitted comments on concerns about (i) evidence of historic shipwrecks; (ii) impacts to future archaeological research and recovery within the Proposed Project footprint; and (iii) impacts to the many historic structures within the viewshed of the Proposed Project, including both Fort Frederikvaern on the Fortsberg peninsula and the Moravian Church which are listed on the National Register of Historic Resources. In addition, the St. John Historical Society and the National Park Service have stated that Project will impact historic and archeological resources. All of that information was in the administrative record prior to issuance of the Public Notice.

VIII. The Application is Deficient Because the Applicant No Longer Owns or Controls the Property Subject to the Application.

SEG's certification that it is authorized to do the work set forth in the Application is deficient because its authorization expired. Specifically, SEG has neither a current nor a future property interest to undertake the activity proposed in the Application because its property interest has similarly expired.

CBCC provided this information previously to the Corps by letter dated April 9, 2015 from Robert Fox (attached as Appendix 9). Specifically, SEG's application contains the following certification. "I certify that this information in this application is complete and accurate. I further certify that I possess the authority to undertake the work described herein or am acting as the duly authorized agent of the applicant." (See Appendix 2). Chaliere Summers signed the Application on September 22, 2014 certifying to all of the above. SEG's certification was submitted to comply with its legal obligation pursuant to 33 C.F.R. § 325.1(d)(8) of the Corps' regulations, which specifies that a signature on an application for a Corps permit is

. . . an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application.

Accordingly, the Corps' regulations and the certification in the Corps' application both independently require, as a prerequisite for accepting a permit application for review, that the applicant possess or will possess the requisite property interest necessary to implement the Proposed Project and has the legal authority to do the work to implement the proposed project.

The principles behind these requirements are straightforward. The Corps does not render advisory opinions. Nor does the Corps waste its time and resources or the resources of other federal agencies and the public reviewing projects where the applicant does not have legal authority to implement that project. These principles are especially true regarding the Proposed Project, which has engendered extraordinary public, community and federal agency interest and comment. To proceed with review of an application such as this, which is legally void *ab initio* because the applicant does not possess a property interest and has no legal authority to implement the project, represents a waste of public and private time and resources. The Corps' regulations and application certification requirements were created expressly to prevent precisely that result.

Chaliese Summers signed SEG's initial application on April 1, 2014, an amended application on September 2, 2014 and another on May 30, 2015, all of which certified to all of the above (See Appendix 2). Ms. Summers did so purportedly based solely upon a Proof of Legal Interest form identifying Limited Powers of Attorney related to three properties necessary for the Proposed Project: (1) property owned by Mr. Phillips and Ms. Rodriguez; (2) property leased by Messrs. O'Connor and Morrisette; and (3) property owned by the Merchants Commercial Bank. One of the parcels owned by Merchants Commercial Bank is known as Parcel 13-A Estate Carolina ("Parcel 13-A") and currently houses the Voyages restaurant. Merchants Commercial Bank assigned Parcel 13-A to its wholly-owned single purpose entity 13-A Estate Carolina LLC.

Recently we confirmed conclusively that SEG possesses absolutely no property interest in Parcel 13-A. After rescission of SEG's Boating Infrastructure Grant by the United States Fish and Wildlife Service, the bank listed Parcel 13-A for sale. (A copy of the MLS listing is attached to the letter in Appendix 9). We have confirmed that there is no existing Power of Attorney for Parcel 13-A, Parcel 13-A has no legal entanglements preventing its sale, and SEG possesses no legal interest in Parcel 13-A; consequently, SEG has no legal authority to perform the work specified in the Application relating to Parcel 13-A.

Significantly, Parcel 13-A is critical to SEG's Application to the Corps. SEG proposes improvements to Parcel 13-A including:

- a new stormwater management system necessary to preserve water quality in Coral Bay;
- a new generator;
- a new domestic water treatment plant;
- a new sanitary sewer treatment facility; and
- a new water cistern.

In addition, a major storm water drainage gully runs through Parcel 13-A and enters Coral Bay harbor at the precise location of the proposed marina.

As a result, SEG's certification is no longer valid and it does not comply with the requirements of 33 C.F.R. § 325.1(d)(8) for a parcel of land that is critical to the Proposed Project set forth in the Application. Therefore, the Corps should deny the Application on that basis.

Most importantly, Ms. Summers' certification that SEG has the authority to undertake the work described in the Application is no longer true and accurate, so the Application should be deemed incomplete, the Public Notice should be rescinded, and the Application should be denied.

IX. The Application Does Not Contain the Requisite Information for the Corps to Review the Application and Therefore the Application Should Be Denied.

The Corps' regulations require the Corps to make specific factual findings regarding the impact of the proposed project on the physical, chemical and biological components of the aquatic environment. 40 C.F.R. § 230.11. These factual determinations include findings on individual and cumulative impacts on the physical substrate, water circulation and the aquatic ecosystem. In the absence of detailed information in the Application on these issues, the Corps' regulations state specifically that the Corps must determine that:

There does not exist sufficient information to make a reasonable judgment as to whether the [project] will comply with these guidelines.

40 C.F.R. § 230.12(a)(3)(iv). The Applicant has been given three opportunities to submit a complete application. Moreover, the federal agencies have outlined over 25 pieces of information not contained in the Application that are required to make review possible. SEG has not provided that information. Therefore, on its face, the Application provides insufficient information on these critical, required issues and as such the Application should be denied.

X. The Application Fails On Its Merits

The CBCC has conducted its own independent research – including the retention of experts in various disciplines – to evaluate the extent of the impacts of the Proposed Project on the public interest. These assessments have found that the Proposed Project will have overwhelmingly negative impacts in all of the areas of concern to the Corps and public alike. Consistent with 33 CFR § 320.4(a), the Corps must look at a number of factors to determine whether it is appropriate to grant a permit. Where the Corps finds that granting a permit would be contrary to the public interest, the permit will be denied. In its evaluation of whether the Proposed Project is in the public interest, the general criteria to be considered in evaluating a

permit application are: (1) the relative extent of the public and private need for the project; (2) the practicability of reasonable alternative locations and methods to accomplish the goal of the project; and (3) the extent and permanence of the likely beneficial and/or detrimental impacts of the Proposed Project on the uses to which the area is suited. (33 C.F.R. § 320.4(a)(2).)

A. There is neither a public nor a private need for the Proposed Project.

As a threshold issue, the Corps is required to evaluate the public and private need and the practicability of reasonable alternatives to the Proposed Project, as well as the impacts arising from the Proposed Project. Specific impacts relating to a variety of environmental, social and economic factors are discussed in more detail below, but it is important to first note that the Application contains no information identifying the public and private need for a project of the scale and type proposed. The Proposed Project is entirely too large for the location, is situated in an area which is the most exposed to ocean waves in the entire Coral Harbor on a daily basis and especially during extreme weather, and has no demonstrated need nor financial benefit. For a full analysis of the lack of a need for the project, the lack of any demonstrated financial viability of the Proposed Project, see the expert reports of Richard Voith attached hereto as Appendices 10 and 11, and the Report of David Silverman, attached hereto as Appendix 12.

B. There are practicable and more reasonable alternative locations and methods to accomplish the goal of the Proposed Project.

There are a multitude of practicable and more reasonable alternative locations for a marina, both within and outside of Coral Bay, that would accomplish the goal of providing more leisure boats access to the island of St. John. The Proposed Project is plainly too large for Coral Bay, with 145 slips and an additional 12 moorings in a Bay that currently accommodates far fewer boats. The CBCC has conducted an alternatives analysis that highlights the practicability of alternative marinas, both in location, design, and size. *See* CBCC Alternatives Analysis, Appendix 13. Specifically, without adding any marina, there are over 200 existing moorings throughout the National Park and Monument, including 30-plus moorings for boats up to 60 feet near Cruz Bay, providing customs and other boating facilities. In addition, there are properties controlled by the Virgin Islands Port Authority that provide potential alternatives, including Cruz Bay Creek and Enighed Pond Port. The Cruz Bay Creek and Enighed Pond alternatives both rank high on important criteria including the availability of infrastructure, easy transport to airport, medical and shopping, road access and proximity to population. Further, within Coral Harbor itself, alternatives include the Moravian Church Site and use of mooring balls and docks. Since there are practicable alternatives that are more economically viable than the Proposed Project and have less environmental impact, the Corps must reject the Application.

- C. The Proposed Project is not in the public interest based on an analysis of relevant factors as set forth in 33 CFR § 320.4(a).
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This section summarizes the accompanying expert analyses of factors relevant to whether the Proposed Project is in the public interest. While the Corps may assign varying weights to each factor due to the unique nature of the Proposed Project, in this matter, regardless of how each factor is weighed, these analyses demonstrate beyond doubt that the Proposed Project is contrary to the public interest and that the Application should be denied.

1. Conservation

Coral Bay contains significant marine diversity including highly diverse benthic habitat and Essential Fish Habitat, and is susceptible to degradation from stressors such as overfishing, pollution from development, pollution from increased recreational vessel use and transit, and other human impacts. The CBCC has conducted its own literature review of studies documenting the ecological diversity of Coral Bay, which review is included as Appendix 14 (Coral Bay Biodiversity Memo). In addition, the CBCC retained expert Rafe Boulon to provide his expert opinion regarding the composition of the ecosystems in Coral Bay, and the importance of protecting this valuable ecosystem from the destruction the Proposed Project would entail. Mr. Boulon concluded that the Proposed Project would create significant adverse impacts on the ecosystems of Coral Bay as a result of many sources of pollution associated with the Proposed Project, including toxic paints on the vessels frequenting the marina and wastes generated by and at the marina. In addition, Mr. Boulon concluded that the Proposed Project would result in significant adverse impacts to protected resources, including EFH, seagrasses, mangroves and sea turtles, and that the proposed mitigation was neither adequate nor sustainable and would not offset the impacts to these resources. Mr. Boulon's expert report is attached hereto as Appendix 15.

The CBCC undertook an initial inventory of natural resources in the inner Coral Harbor area of Coral Bay in 2004 and updated it in 2006. Comparable data was also collected in 2012 and 2014, in July/August (benthic portion), the same season of the year as the initial inventory. Appendix 16, CBCC Coral Harbor Natural Resources Inventory, includes these reports along with additional observational and academic research on natural resource inventories of fish and wildlife, EFH and endangered species. Notable is the presence of many species of corals and fish, as well as shoreline and migratory birds. The delineation of seagrass and algae habitat vs. unconsolidated sediment in 2004 was reported in 2009 and later by a local environmental assessor demonstrated that submerged aquatic vegetation has expanded over a larger area of Coral Harbor. Seagrass in visible shallow areas has notably increased, along with small patches of coastal fringing sandy shorelines and shallows.

Mangrove areas have continued to expand and are being populated by new and expanded stands of all three species of mangroves: Red, black and white mangroves, around the non-direct ocean exposed fringing shorelines of the harbor. Indeed, "restoration" efforts have not been

necessary, since propagation of seedlings has occurred naturally and boaters and other shoreline users have been respectful of allowing the seedlings to grow unmolested, even in high use shoreline areas near the town dinghy dock. (See mangrove photos attached hereto as Appendix 17.) In short, the Proposed Project would significantly impact ecological resources, including the recent expansion of seagrass, mangroves and other valuable habitat.

2. Navigation

The CBCC retained James Robertson as an expert to analyze the navigation-related impacts of the Proposed Project. Mr. Robertson has over 25 years of experience with the United States Coast Guard, and is now a private maritime consultant. Mr. Robertson's report is attached hereto as Appendix 18.

Mr. Robertson concludes that the location of the Proposed Project is unsuitable for a marina, and especially unsuitable for a marina of this size and is poorly designed based on the wind and wave action in the vicinity of the marina. Mr. Robertson further concludes that the Proposed Project raises significant safety concerns, both for normal weather and extreme weather events. For these reasons, the Application should be rejected.

Mr. Robertson's conclusions are consistent with the CBCC's Navigation, Marina Design & Hurricane Concerns comments attached hereto as Appendix 19. In addition, the CBCC concludes that:

- the dock design is inconsistent with Corps guidelines on structures placed over submerged aquatic vegetation;
- the location of the fuel dock will jeopardize existing mangrove habitats; and
- the design will greatly impair the ability to sail in and out of Coral Bay.

3. 404(b)(1) Guidelines

The 404(b)(1) Guidelines require the Corps to consider the "adverse effects of the discharge of pollutants on aquatic ecosystem diversity." 40 C.F.R. § 230.10(c)(3). The aquatic ecosystem in Coral Harbor, as well as St. John's nearby Hurricane Hole and submerged lands of the Virgin Islands National Park and the Coral Reef National Monument, contain some of the most pristine waters and well-preserved coral reefs and diverse aquatic ecosystems in the Caribbean. The Proposed Project will significantly negatively impact and cause degradation of the aquatic ecosystem in Coral Harbor and surrounding waters through both the construction phase and operational phase of the marina, an action prohibited by the Section 404(b)(1) Guidelines contained in 40 C.F.R. § 230.10(c). See CBCC 404(b) General Comments attached hereto as Appendix 20 and CBCC Megayacht and Marina Water Contamination Comments in Appendix 21.

Significant degradation will occur specifically because the Proposed Project is located above active flourishing seagrass EFH; the orientation of the docks and boats in the slips is primarily east/west in violation of the Florida Dock Guidelines, which are attached hereto as Appendix 22; the Proposed Project will cause significant shading which will destroy seagrass (See Report on General Environmental and Other Impacts, David Silverman attached as Appendix 23); and boat bottom paint contaminants will enter the ecosystem and kill larvae in Coral Bay which is a nursery for various aquatic species. The limited information provided by SEG and the studies developed by CBCC and its experts demonstrate that the Proposed Project will inevitably cause significant degradation of Coral Harbor in a host of ways. The Section 404(b)(1) Guidelines, codified at 40 C.F.R. 230.10(c), dictate that SEG's application must therefore be denied, as the Proposed Project clearly "will cause or contribute to significant degradation of the waters of the United States."

Finally, the mitigation efforts contained in the Application are not "in-kind," and are grossly insufficient given that the Proposed Project will cause and contribute to significant degradation of aquatic resources. In addition, it is not possible to determine the appropriate compensatory mitigation – to the extent any such consideration is appropriate – because the Application lacks baseline hydrology, water quality and other fundamental data.⁴ See CBCC Compensatory "Out Of Kind" Mitigation Comments in Appendix 24.

4. Water Quality

The CBCC retained the services of Dr. Sarah Gray, Professor in the Environmental and Ocean Sciences Department at the University of San Diego, to determine the effects on water quality in Coral Bay from the Proposed Project. Since 2008, Dr. Gray has led a team which is studying the impacts to Coral Bay from land-based sedimentation, and the mineralogy and metal concentrations of watershed and marine sediments in Coral Bay. Dr. Gray has prepared a report of her findings, which are attached hereto as Appendix 25.

After reviewing the documents prepared by SEG about the Proposed Project, Dr. Gray concludes that construction and operation of the Proposed Project in Coral Harbor creates a strong potential for adverse effects on the water quality of Coral Bay for several reasons. First, because the sediments found in Coral Harbor are generally fine-grained, construction and operation of the Proposed Project will re-suspend these sediments in the water column,

⁴ See, e.g., O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225 (5th Cir. 2007) (holding that the Corps acted arbitrarily and capriciously by issuing a FONSI based on an EA that failed to articulate how the mitigation measures would render the adverse effects of the project insignificant and failed to consider the cumulative effects of the project, area urbanization, and permits issued to third parties); Friends of Back Bay v. U.S. Army Corps of Eng'rs, 681 F.3d 581 (4th Cir. 2012) (ordering the preparation of an EIS because the baseline condition contemplated in the mitigated FONSI was factually incorrect, making the Corps' determination that no EIS was necessary arbitrary and capricious); Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997) (holding that the Corps violated NEPA because they did not provide evidence that the mitigation measures identified in the conditional FONSI were not demonstrated to be likely to be effective).

increasing turbidity and degrading water quality. The re-suspended sediments may also be transported laterally via currents to sensitive coral reef habitats around Coral Bay, negatively impacting these natural resources.

The re-suspension of sediments may also remobilize and redissolve pollutants that are currently trapped in the sediments, dispersing these pollutants and making them bio-available. In addition, the Proposed Project itself would be a source of pollution, including but not limited to the discharge of boat paint chips rich in metals, organic matter from sewage, etc.

Dr. Gray also notes that the “Water Quality Monitoring Plan” proposed by SEG is inadequate to accurately establish baseline (pre-construction) water quality conditions, as well as inadequate to monitor the effects on water quality from the construction and operation of the Proposed Project.

The CBBC has also prepared comments on Wastewater Treatment and Nutrients, which is attached hereto as Appendix 26. CBCC concludes that the Proposed Project does not adequately address wastewater treatment and potential nutrient loadings to the harbor for, among other reasons (1) the proposed Cromaglass™ treatment system has experienced failure in other installations and has failed to meet nitrogen standards; and (2) the transient or live-aboard passengers and crew on vessels less than 80 feet long will likely prefer to use shoreline restroom facilities, and there is no evidence that this seasonal spike in usage is incorporated in the shoreside wastewater treatment plans.

5. Economic Feasibility and Economic Benefits to the Community

The Application and Public Notice contain no information supporting the purported need for or the economic feasibility of the Proposed Project, or of any economic benefits of the Proposed Project. The only attempt at a financial justification of the Proposed Project is contained in *The St. John Marina Market Study, Feasibility and Economic Analysis* prepared by SEG, which is attached hereto as Appendix 27 (“SEG Market Study”), and the limited financial claims in the USFWS application attached thereto (both of which are unchanged in this second revised Application). In order to analyze the claims made in the SEG Market Study and applications to the Corps and the USFWS for the BIG funding, CBCC retained Richard P. Voith, Ph.D., President and Founding Principal of Econsult Solutions Inc. and adjunct Professor at the Wharton School at the University of Pennsylvania (from which he received his doctorate in economics). Dr. Voith is an expert in Real Estate Economics and Economic Development and has authored over 40 professional articles and book chapters on the subject. He also frequently provides peer review of scholarly articles on these topics.

After reviewing the Application, Dr. Voith concludes in his first report that the SEG report is completely inadequate to demonstrate the economic feasibility of the proposed Marina and the need for the Marina. Among other things, Dr. Voith concludes that:

- The SEG Market Study provides virtually no quantitative analysis of projected financial performance, and does not contain a financial pro forma;
- The SEG Market Study does not quantify the size of any potential market segments of users of the Proposed Project;
- There is no data on pricing, sales, vacancies, seasonality, auxiliary businesses, labor costs, maintenance, expenditures, insurance and other costs, all of which are necessary for a financial evaluation;
- The SEG Market Study is silent on the financial risks of the Proposed Project, including risks from construction delays, weather delays and market risks. An evaluation of risk is essential to any financial evaluation and to the viability of investment in the Proposed Project; and
- The SEG Market Study contains inadequate information on investment in the Proposed Project;

Based on his evaluation, Dr. Voith concludes that the Application is completely inadequate to demonstrate the economic feasibility of the Proposed Project and the need for the Proposed Project.

Dr. Voith's curriculum vitae and first report are attached hereto as Appendix 10.

Dr. Voith has issued a second report evaluating SEG's claims regarding claimed economic benefits to the St. John community from the Proposed Project. After reviewing SEG's economic evaluation in the Application as well as the application for BIG funding, Dr. Voith concludes that the SEG submissions are completely inadequate to demonstrate any potentially positive economic impacts from the Proposed Project on the St. John economy. Among other things, Dr. Voith concludes:

- The economic impacts claimed in the SEG submissions are based on flawed economic data that is outdated (2006-2008), using an outdated model that is based on the Florida boating market, a market that is not comparable on its face to the St. John market in terms of vessel sizes and overall economy;
- The SEG submissions do not account for economic or environmental risks that will decrease any positive economic impacts. These risks include construction risk, weather-related risk, market risk and risks of damage to the ecosystem.
- SEG's submissions are silent on the potential negative impacts on the tourist economy.

- SEG's claims regarding increased real estate property values and job creation were unsupported by any facts; SEG's claims are nothing more than unsubstantiated opinions.
- SEG's claim that St. John residents would be recipients of any economic benefits is inaccurate.

Dr. Voith's second report is attached hereto as Appendix 11.

Furthermore, CBCC members, including local business leaders, assisted CBCC member David Silverman in conducting an economic analysis demonstrating that the Proposed Project would actually have a *negative* impact on the public and is not economically beneficial. See Appendix 12. Report on Estimated Economic Impacts, David Silverman. Mr. Silverman's analysis shows that the Proposed Project would have a net negative impact both on the community of Coral Bay and the island of St. John. Numerous citizen comment letters have also drawn this same conclusion that the current successful and regionally appropriate tourism economy would be badly hurt if the Proposed Project would be permitted, as have the local small business owners.

6. Historic Properties



There are several historic structures within the viewshed from the shoreline where the Proposed Project is proposed to be built, including the Moravian Church, the Customs House on Usher Cay, and the Fortsberg Hill. Upon implementation of the Proposed Project, it will dominate the entire bay and shoreline. Mega yachts that are longer and larger than any of the buildings on the shoreline will intrude upon the viewshed vistas from the shoreline, the water and road levels. Also, the current focal points of the Emmaus Moravian Church and manse, the view up the valley toward the old plantation and mill ruins, and the old house on Usher Cay (known for at least a century as the customs house, although this is not historically accurate) – the white house visible in 1840s drawing/watercolor here – will also be lost.

Both Fortsberg and the Moravian Church are listed on the National Register of Historic Places (as are several other sites within ½ mile, although not so prominently viewed: Bay rum factory, Carolina Plantation great house, slave village and mill and more). The Application failed entirely to address impacts to any of these historic resources. Further, there is no indication that

SEG or the Corps has complied with the requirements of Section 106 of the National Historic Preservation Act and its implementing regulations with respect to the historic structures located within the viewshed of the Proposed Project that are eligible for listing on the National Register of Historic Places, 16 U.S.C. § 470(f) and 36 C.F.R. § 800. The Corps cannot complete its review of the Application until the Section 106 process has been completed.

The St. John Historical Society has submitted a comment letter opposed to the construction of the Proposed Project. The Historical Society notes the absence of a complete archaeological assessment of the Proposed Project area and recommends denial of the Application because of its scale and likely impact on historical resources. *See* Appendix 28. The CBCC has commented on the inadequacy of the submerged lands archeological survey in Appendix 29.

The Proposed Project is also in close proximity to the Virgin Islands National Park and Hurricane Hole, part of the Virgin Islands Coral Reef National Monument. As discussed by the CBCC's expert Rafe Boulon in his report attached hereto as Appendix 15, the Proposed Project will have a negative impact on the nearby National Park and National Monument. Mr. Boulon concludes that the Proposed Project's proximity to a portion of the Virgin Islands Coral Reef National Monument called Hurricane Hole has the potential to significantly degrade Hurricane Hole's pristine mangrove and juvenile fish habitat, which is unrivaled in the northern Virgin Islands. *See also* the National Park Service letter attached hereto as Appendix 3.

In short, the requirements of Section 106 of the National Historic Preservation Act have, to date, been disregarded.

7. Fish & Wildlife Values

A. Sharks

CBCC consulted with Dr. Gregory B. Skomal, Senior Marine Fisheries Scientist, Massachusetts Marine Fisheries; Adjunct Scientist, Woods Hole Oceanographic Institute and Adjunct Professor, University of Massachusetts, to determine the effects of the Proposed Project on sharks. For the past ten years, Dr. Skomal has been collaborating with other scientists to study the use of Coral Bay by juvenile blacktip and lemon sharks. Dr. Skomal has prepared an expert report attached hereto as Appendix 30.

According to Dr. Skomal, Coral Bay is used by newborn and juvenile blacktip and lemon sharks as a shark nursery, since it is an area having plenty of food and also where young sharks can avoid predation. Based on intensive field studies, Dr. Skomal determined that newborn and juvenile blacktip and lemon sharks demonstrate high site fidelity to core areas within Coral Bay, primarily in the site of the Proposed Project. Further, Dr. Skomal believes that Coral Bay is one of the most productive and important nurseries for these species in the U.S. Virgin Islands. Because the Proposed Project would displace this important shark nursery by habitat alteration

and/or destruction, Dr. Skomal concludes that the Proposed Project would create irreversible and deleterious impacts on the local shark population and therefore the marine ecosystem in the region.

8. Flood Hazards & Floodplains

The Proposed Project is situated in a location that is exposed to storms and would pose a significant threat to public safety and environment during storm events as a result. In addition to anecdotal evidence that boats wash up on the shoreline of the Proposed Project after storms, VI Licensed Surveyor Lawrence Best concluded that the Proposed Project is in fact located in the most exposed location out of seven nearby marinas, save for the St. Croix Marina in Christianstead. *See* Appendix 31, Letter from Lawrence Best, Registered Professional Land Surveyor, License No. 649LS. *See* Appendix 19 CBCC analysis of Navigation, Marina Design and Hurricane Concerns for storm surge data and conclusions.

9. Aesthetics

The CBCC has prepared a rendering of the marina at 75% occupancy to help focus attention on the actual development being proposed – if boaters use it, rather than limited and unoccupied rendering provided in the Public Notice by the Applicant, seeking to diminish its visual impact: Appendix 32. The scale, location and design of the Proposed Project will profoundly alter the aesthetic of Coral Bay, currently a pristine, natural area. The Proposed Project will occupy a large footprint and create an overdeveloped eyesore destroying the natural beauty of Coral Bay. Additional renderings of the marina complex and its visual and actual impacts on the aesthetics of the community can be seen in David Silverman's analysis in Appendix 23. *See also* Appendix 15, Boulon Report.

10. Noise

The Proposed Project calls for driving 1,333 pilings leading to the creation of excessive and continuous noise during an unspecified construction period that is likely to exceed one year. Coral Bay is a natural amphitheater which will exacerbate this noise level for residents and visitors and wildlife throughout the construction process. SEG provides no analysis of noise levels to the ambient air and under water. Attached information regarding noise levels from pile driving supports the conclusion that unacceptable and potentially damaging noise levels will result from the Proposed Project. *See* Appendix 33.

The acoustic energy of pile driving is also known to adversely impact marine mammals protected under the Marine Mammals Protection Act. *See* Appendix 43 for relevant data on the presence of dolphins in the location of the Proposed Project.

11. Shore Erosion and Accretion

Coral Bay is known to take the brunt of tropical force weather, including storm surge and tidal and wave induced erosion. There is significant concern that a marina dock piling structure, with or without vessels tied at the docks, and a concentration of over 100 watercraft in this particular location, would be disastrous in the event of a typical strong hurricane, resulting in significant loss to property, serious environmental damage, and possible loss of life. The roadway that transects the proposed site is the sole access to certain communities on the south shore of St John. If a major storm event were to toss large numbers of vessels and marina debris onto the roadway this would present a severe public health and public safety issue for the entire population living south of the marina location.

12. Recreation

The Proposed Project crosses approximately 2/3 of Coral Harbor, making it extremely difficult for all boaters, including recreational boaters, to navigate in and out of Coral Harbor. See James Robertson's report attached as Appendix 18 at p. 2. The bay is currently used for sailing, fishing, paddle-boarding, kayaking, and small pleasure boating under 15 feet, among other recreational uses, all of which would be severely impeded if not totally eliminated due to the Proposed Project. The Proposed Project is also located in an area that currently provides wade-in access and launch access for locals for access to small skiffs for fishing and recreational purposes. If the Proposed Project is approved, it would become illegal to enter the water in these areas, due to the planting of mangrove seedlings. For further information on negative impacts of the project on recreation, also see the Comment Letter from the Coral Bay Yacht Club included in Appendix 34. In addition, the physical barrier created by the marina docks would effectively limit sailing out of the harbor and force the relocation or loss of two successful sailing programs for youths (Kids and the Sea) and the ANTs program for adults.

13. Water Supply

The CBCC has conducted a Water Needs Analysis, attached hereto as Appendix 35. Based on the Application, the Proposed Project will require 12,000 gallons per day and 4,380,000 gallons per year on average. Peak demand could be four (4) times that. Assuming 40 inches of rain per year and allocation based on total roof area of full Phase II build-out, the average rainfall collection will only be 1,939 gallons per day and 698,133 gallons per year. This leaves a shortfall in non-peak demand of 10,061 gallons per day and 3,681,867 gallons per year that is proposed to be trucked 8 miles over the only public access road for all purposes to Coral Bay. There is no indication in the Application how these water needs would impact the local community.

14. Energy Needs

The inadequacy of the electrical power has been addressed in a number of individual comment letters, including from marina operators in the United States and other knowledgeable people with information on the electrical systems in the Virgin Islands. See Letters included in Appendices 4 and 5. Furthermore, many of the larger yachts have their own power systems and European power systems that could not operate on local power, so would continue to use on-board generators which would cause additional air and water pollution and require significant amounts of fuel.

15. Safety

Above-ground storage tanks required for the Proposed Project pose a significant risk to public safety. Specifically, the proposed location is approximately 25 feet from a retaining wall near a private residence and only 15 feet from a restaurant building. See comment from CBCC staff Patricia Reed, enclosed herewith as Appendix 36, and does not follow EPA Caribbean Marina Guidelines per CBCC report in Appendix 37.

Further, the drawings submitted to the Army Corps leave out the presence of the busy roadway (Route 107), which must be crossed by all pedestrians leaving the dock and going to the principal marina building on the drawing. This design is unsafe on its face.

The Application does not demonstrate how 145 boats will be safely moored or accommodated on-island in the event of a tropical storm or hurricane. Without a safety plan for these boats, it can only be assumed that the Proposed Project and the boats therein will be severely damaged in a storm. See Robertson Report, attached hereto as Appendix 18, at p. 2 and CBCC Navigation, Marina Design and Hurricane Comments in Appendix 19, pp 18-22.

16. Considerations of Property Ownership

The CBCC has prepared a report on the littoral boundaries of Coral Bay, which demonstrates that the Proposed Project infringes upon the littoral rights boundaries of virtually every other property owner in Coral Bay. This precludes any other landowner on the harbor shore from using their littoral rights in a manner similar to SEG. See David Silverman's Littoral Boundaries Report attached as Appendix 38. At least one of the shoreline property areas of Coral Bay – the Moravian Church – concurs in this analysis and has formally protested the content of the Proposed Project as infringing on the littoral rights of the Church. See Appendix 38.

17. General Environmental and Other Impacts

Attached as Appendix 23 is a letter report prepared by David Silverman which provides a detailed evaluation of the adverse impacts from the Proposed Project and additional grounds for

denial. Attached as Appendix 39 are videos of the proposed piling field and entire marina complex. Mr. Silverman is a resident of Coral Bay and previously served for ten years as a member of the Coastal Zone Management Board in Long Island, New York, in which capacity he reviewed hundreds of applications for Coastal Zone consistency. Mr. Silverman is a CBCC Board member and has been actively involved in reviewing and commenting on the Application. Mr. Silverman concludes, among other things:

- SEG has not obtained a legally authorized CZM consistency determination because the determination has not been signed by the Governor, has not been ratified by the Legislature, and the Board approval was obtained in an unlawful manner. Therefore, the Application does not, as required, demonstrate consistency with the Virgin Islands Coastal Zone Management Plan;
- The Application underestimates the impact on seagrass;
- The Application contains erroneous or unsupported calculations regarding the size of the dock area and the size of the area that will suffer from boat shading; and
- The mitigation proposal is undefined and inadequate in terms of the calculations and value of mitigation required.
- The cumulative impacts of the Proposed Project on sedimentation and water quality, aesthetic and historical resources are significant.
- Mr. Silverman has created a scale model of the density of the pilings which demonstrates visually the direct and indirect impacts to approximately 17 acres of seagrass as a result of construction, shading and ongoing turbidity from propeller wash and toxic effluents, as well as impacts to water movement and aquatic function of the area.

Finally, for your convenience, we have attached as Appendices 40, 41 and 42, the resumes of the Principal CBCC contributors to these comments, the SEG's EARs, which are unchanged from prior applications, and CBCC's Coastal Zone Management Comments.

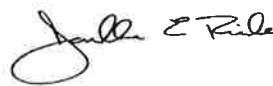
For all of the reasons described above, the CBCC and the individuals identify herein respectfully request that the Application be denied.

Sincerely,



Robert D. Fox, Esquire
For Manko, Gold, Katcher & Fox, LLP

Sincerely,



Jonathan E. Rinde, Esquire
For Manko, Gold, Katcher & Fox, LLP

Mr. Donnie Kinard
Mr. José Cedeño-Maldonado
August 20, 2015
Page 30

Sincerely,

Handwritten signature of Mark A. Chertok in blue ink, followed by a vertical slash and a lowercase 's' in parentheses, indicating a signature for another person.

Mark A. Chertok, Esquire
For Sive, Paget & Riesel, P.C.

Sincerely,

Handwritten signature of Maggie Macdonald in blue ink, followed by a vertical slash and a lowercase 's' in parentheses, indicating a signature for another person.

Maggie Macdonald, Esquire
For Sive, Paget & Riesel, P.C.

/kl

Enclosures

cc: Judith Enck, Administrator, Region 2, USEPA
Charles Lobue, Region 2, USEPA
Michael Piccirilli, U.S. Fish and Wildlife Service
Lisamarie Carrubba, NOAA
Roy Crabtree, NMFS
Lia Ortiz, NMFS

APPENDICES

1. List of Individuals
2. SEG's Three Applications
3. Federal Agency Comment Letters
4. Original Opposition Letter and Original Petition in Opposition
5. New Opposition Letters and Petition in Opposition
6. Opposition Letters from Coral Bay Businesses
7. Email from Corps dated July 21, 2015
8. SEG's NMFS Endangered Species Act Section 7 Checklist
9. April 9, 2015 Letter from Robert Fox to the Corps
10. Report on the Economic Feasibility, Richard Voith, Ph.D.
11. Report on Estimated Economic Impacts, Richard Voith, Ph.D.
12. Report on Estimated Economic Impacts, David Silverman
13. CBCC Alternatives Analysis
14. CBCC Coral Bay Biodiversity Memo
15. Report on Ecosystem Impacts, Rafe Boulon, M.S.
16. CBCC Coral Harbor Natural Resources Inventory
17. Mangrove Photos
18. Report on Navigation, James Robertson

19. Report on Navigation, Marina Design and Hurricane Comments
20. CBCC's 404(B) General Comments
21. CBCC's Mega Yacht and Marina Water Contamination Comments
22. Florida Dock Guidelines
23. Report on General Environmental and Other Impacts, David Silverman
24. CBCC Compensatory "Out of Kind" Mitigation Comments
25. Report on Water Quality, Sarah Gray, Ph.D.
26. CBCC's Wastewater Treatment and Nutrients Comments
27. SEG's St. John Marina Market Study, Feasibility and Economic Analysis
28. St. John Historical Society Letter dated July 13, 2015
29. CBCC's Archeological Comments
30. Report on Impacts on Shark Habitat, Gregory B. Skomal, Ph.D.
31. Letter from Lawrence Best, Registered Professional Land Surveyor
32. CBCC's Marina Renderings
33. CBCC's Noise Comments
34. Letter from Coral Bay Yacht Club, dated August 15, 2015
35. CBCC's Water Needs Comments
36. CBCC's Above Ground Fuel Storage Tank Safety Comments

37. EPA's Caribbean Marina Guidelines
38. Report on Littoral Boundaries, David Silverman
39. Videos of Renderings of SEG Marina
40. CBCC Resumes
41. SEG's EARs
42. CBCC's Coastal Zone Management Comments
43. Dolphin Noise Impacts