

MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

Robert D. Fox
484-430-2312
rfox@mankogold.com

Admitted in PA

August 27, 2019

Via Electronic and First Class Mail

Senator Novelle E. Francis
Senate President
33rd Legislature of the Virgin Islands
Capital Building, Charlotte Amalie
P.O. Box 1690
St. Thomas, Virgin Islands 00804

401 CITY AVENUE, SUITE 901
BALA CYNWYD, PA 19004
TEL: 484-430-5700
FAX: 484-430-5711
WWW.MANKOGOLD.COM

A LIMITED LIABILITY PARTNERSHIP
FORMED IN PENNSYLVANIA

Partner responsible:
John F. Gullace (NJ)
Brenda H. Gotanda (HI)



Re: Summer's End Group, LLC - Army Corps of Engineers
Permitting Issues

Dear President Francis:

Manko, Gold, Katcher & Fox, LLP represents nineteen (19) individuals, all residents or property owners in Coral Bay, St John, who oppose the permitting, construction and operation of a private, over 140 slip commercial mega yacht 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 an application (the "Application") to the U.S. Army Corps of Engineers ("Corps") for the Proposed Project pursuant to either or both of Section 404 of the Federal Clean Water Act and Section 10 of the Federal Rivers and Harbors Act. The purpose of this letter is to correct the gross misrepresentations that SEG has made to the Legislature, namely that a decision on SEG's Corps permit is imminent and that the only thing holding up issuance of the Corps permit is the Legislature's approval of the Coastal Zone Management ("CZM") permit.¹ Nothing could be further from the truth.

By way of background, my firm has been involved in opposing the Proposed Project, and more specifically the Application, since 2014. My firm, one of the largest environmental law firms in the United States, has extensive expertise in permitting matters under both federal statutes at issue here. Significantly, my firm more often represents the developers of the project and not the opponents. I state that so it is clear that this is not a "knee jerk" reaction to this development by a firm that represents opponents to projects "in their backyard." We undertook

¹ I have reviewed the letter dated August 23, 2019 sent to you by Attorney Andrew Simpson and concur completely with Mr. Simpson that SEG's CZM permit is no longer valid and lawful.



this representation because the Proposed Project is, has been and will be fundamentally flawed and a violation of applicable legal requirements.

As to SEG's specific misrepresentations, I have set forth below a timeline which demonstrates how far away the Application remains from any regulatory approval by the Corps:

1. SEG submitted its initial application in April 2014.
2. The Corps deemed the initial application as incomplete.
3. SEG submitted a revised application in September 2014.
4. In February 2015, the Corps issued a Public Notice and a request for public comment on the revised application.
5. During the public comment period, our firm submitted extensive comments regarding deficiencies in the Application. These comments included reports authored by renowned experts on a variety of topics including, without limitation, economic feasibility, ecosystem impacts, stormwater quality impacts, impacts to cultural and historic resources and endangered species, and navigational and marina siting deficiencies.
6. At the same time, over 5500 individuals signed a petition, an additional 815 individuals sent letters, and 11,239 individuals sent variations of a form letter, all opposing the Proposed Project.
7. Most significantly, 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"). 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 additional information before the Corps proceeded with review of the 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 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 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, USFWS 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, 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."

8. In response, in June 2015 SEG took its "third bite of the apple" and submitted another revised Application. However, this revision was more of the same, making only two physical changes to the Proposed Project: elimination of both a 75 buoy mooring field and repairs to existing rip rap.

9. The Corps issued a new Public Notice and request for comments on July 9, 2015. In response, my clients and all five federal agencies reiterated their comments as to the deficiencies in the revised (now for a third time) Application. In addition, the Corps received over 15,000 communications, virtually all of which (including from over 90% of the storefront businesses of Coral Bay) opposed the Proposed Project.
10. On October 22, 2015 the Corps issued an official comment letter to SEG (see Exhibit 1), requiring SEG to respond to 113 specific comment deficiencies and to perform numerous additional studies. The Corps stated that the Application would be held in abeyance for 30 days pending receipt of a response by SEG. Absent a response, the Corps would deactivate the permit for a period of one year.
11. As of July 2016, SEG had not responded AT ALL to the Corps' extensive comment letter. In the interim, parcels that SEG had certified in its Application that it possessed legal authority to develop (Parcels 13-A and 13-B) were sold. The new owner stated unequivocally that he would not allow those parcels to be used as part of the Proposed Project.
12. One year after its October 2015 comment letter went unresponded to, the Corps deactivated the Application.
13. In August 2017, SEG finally submitted a partial response to the Corps and for the fourth time revised its site plan, this time to remove parcels 13-A and 13-B. However, the revised Application remained deficient in many respects and in some cases exacerbated issues by removing previously proposed mitigation measures.
14. In October 2017, the Corps responded to SEG's resubmission by identifying continued deficiencies in the Application and requesting a number of post-Hurricane Irma updates.
15. In December 2017, SEG submitted its response.
16. The Corps responded by letter dated January 26, 2018. (See Exhibit 2). At that late date, four years after SEG submitted its initial Application, the Corps reiterated that SEG had not yet submitted the required information. Most importantly, the Corps expressly concluded in its response letter that:

Based on current site conditions and the most recent information that you have provided my staff has preliminarily determined that your proposal may be contrary to the Public Interest. Pursuant to the Corps' Regulations at 33 CFR 320.4(a)(1) your permit application would be denied if ultimately found to be contrary to the Public Interest.

17. In February 2018, SEG submitted additional information to the Corps.
18. In July 2018, the Corps sent formal letters to NOAA Protected Resources Division for consultation under Section 7 of the Endangered Species Act and to NOAA National Marine Fisheries Habitat Conservation Division for consultation on essential fish habitat under the Magnuson-Stevens Fisheries Act. (See Exhibits 3 and 4 respectively). In those letters, the Corps states that the Proposed Project "may affect and is likely to affect" several threatened species of turtles, rays, sharks, grouper and critical habitat for seagrass and corals.
19. In response to the Corps' request for consultation, NOAA issued Requests for Additional Information ("RAIs") to the Corps. In response to these RAIs, the Corps directed SEG to complete additional studies. Nearly nine months later, SEG has not commenced any studies approved by the agencies, but rather has recently submitted a mere scoping proposal as to what the studies could include. As a result, to date the consultations by NOAA have not yet formally begun, and under the best of circumstances will take at least six months to complete once started, and they cannot start until all agreed studies are completed by SEG.

As the above timeline of events demonstrates, SEG has grossly misrepresented the status of the Application. Nothing is imminent and for SEG to characterize it as such after five years of its own delays and failure to respond to public and agency comments is egregious. Moreover, the express, repeated written statements by the Corps reveal that the Corps has identified significant flaws in the Proposed Project that would lead to denial of the Application. These statements include the Corps' preliminary finding that the Proposed Project is not in the Public Interest and its statements to NOAA that the Proposed Project will likely affect threatened species, critical habitat, seagrass and coral. Indeed, based on the current administrative record, we would certainly challenge any issuance of a permit for the Proposed Project as being arbitrary and capricious.

Senator Novelle E. Francis
August 27, 2019
Page 6

For all of these reasons, we respectfully request that the Virgin Islands Legislature not act on the CZM permit until the issues with that permit have been resolved and the Corps is in fact, not as SEG falsely claims, ready to issue its own permitting decision.

Very truly yours,



Robert D. Fox
For MANKO, GOLD, KATCHER & FOX, LLP

RDF/pa