

MEMORANDUM

TO: JEE
FROM: DKI
RE: ARMY CORPS SUBMISSION
DATE: JUNE 8, 2009

I provide in this memo background relating to the request by Amy Dempsey and Alan Smith to include in a submission to Army Corps an undertaking to implement certain turtle nesting conservation measures, including a 50-meter restricted zone from mean high water at the turtle nesting beach. The zone is outlined on the attached photograph of LSJ.

As we discussed, Amy's, Alan's and Bob deJongh's request to undertake a Storm Water Pollution Prevention plan will be eliminated from the submission.

BACKGROUND

I. In an effort to resolve an outstanding notice of violation issued by Army Corps in September 2003, an after-the-fact permit modification application was filed with Army Corps requesting after-the-fact approval of the existing dock and pilings and the rip rap in its current configuration and approval of a proposed swim dock, relocated barge landing, underwater speed bumps for beach enhancement and enhancement/mitigation measures relating to the two ponds on the Island. A public notice was issued for that application in May 2005.

II. On August 3, 2005, Bill Karr received from Army Corps a letter summarizing comments received in response to the public notice. Army Corps received comments from US Fish & Wildlife Service and National Marine Fisheries Service on June 8, 2005. I have copies of those comments if you wish to review them. Army Corps agreed with the comments, requested responses to the same and made additional requests for information.

III. In the continuing attempt to resolve this matter over the past several years, requests for approval of the swim dock, relocated barge landing, speed bumps, and certain aspects of the pond mitigation (e.g., fountains for aeration) were all withdrawn from the application. In the interim, Army Corps approval was also requested for a concrete landing pad already placed on the existing barge landing and the two r/o intake lines already installed under the existing dock.

IV. Action on the application started and stalled until September 2008, when Jose Rosario visited the island with Amy and John Amerling. However, when Army Corps failed to take any action after the visit to the Island, Alan Smith took the lead

on this matter in April 2009. Alan attempted to move Jose Rosario forward, only to find out that, as a result of recent restructuring at Army Corps, Mr Rosario was now working only on so called current "enforcement issues" related to LSJ, while Jose Cedeno was assigned to work on the original after-the-fact permit, resolution of the Notice of Violation and related matters. After sending and receiving a series of e-mails from both Mr. Rosario and Mr. Cedeno, Alan scheduled a meeting on April 27, 2009 in Puerto Rico to discuss how we could move forward on all issues and resolve matters with Army Corps.

V. That meeting was attended by Amy, Bob deJongh, Alan, myself, Jose Rosario and Sindulfo Castillo (Mr. Castillo is the supervisor of Messrs. Rosario and Cedeno – Mr. Cedeno could not be present). ACOE confirmed at the meeting that it had received third-party complaints regarding activities on the Island which Army Corps believe to have been unauthorized. Mr. Rosario added that, based on his observations during his recent visit to the Island, he believes at least some of the complaints were warranted. Of particular concern to Army Corps and Mr. Rosario were allegations of shoreline alteration, particularly north of the existing dock, though Mr. Rosario also noted concerns regarding allegations of unauthorized beach enhancement. Army Corps also noted concern with observed changes to the landscape of LSJ as well as impacts from upland construction activities, and the resulting increased potential for erosion and sediment runoff into the waters within Army Corps' jurisdiction. Army Corps made it clear to us that in order to resolve outstanding issues, the shoreline approaching the point of the Island north of the existing dock (in and around the area below the office pavilion construction site) would have to be restored to its condition in 2000. Army Corps also told us at the meeting that the only way to move forward is to ensure that FWS and NMFS concerns/requests in their June 2005 comment letters were either adequately addressed or disposed of by the withdrawn aspects of the permit application. To the extent that Army Corps' previous requests in its August 3, 2005 letter for additional information were still relevant to matters that had not been withdrawn from LSJ's permit application, Army Corps required responses to its information requests as well. Army Corps requested a submission that summarized the status of the various comments and information requests.

VI. Amy has prepared a submission to Army Corps which summarizes the June 8, 2005 comments from FWS and NMFS, as well as the additional information requested from Army Corps on August 3, 2005, and indicates how those comments and requests are to be addressed or have been disposed of. A copy of Amy's proposed submission is attached for your review.

VII. Among the points raised in Amy's submission is LSJ's undertaking to create in the recorded (that is, recorded by FWS) turtle nesting area a 50-meter zone in which protective measures are to be implemented for the protection of nesting sea turtles and their habitat.

VIII. In their respective letters of August 3, 2005 and June 8, 2005, Army Corps and FWS both specified the following turtle nesting conservation measures:

- “1. Avoid the removal of vegetation, fence installation, construction activities, beach armoring and light installation within 50 meters from high tide.
2. Designate a buffer zone of additional 20 meters to minimize indirect impacts from the project and plant sea grapes and native trees within the Zone.
3. Prepare and implement a comprehensive lighting plan to avoid detrimental impacts of artificial lighting on sea turtles. The goal of the plan should be that lights not be seen directly, indirectly or cumulatively from the beach. Light management strategies such as shielding, lowering of lights, locating the lights away from sight view of the beach, using an alternative light source such as low pressure sodium vapor, and planting of vegetation barriers are some of the available alternatives to reach the plan goal. In already constructed projects, all lights visible from the beach should be eliminated or relocated so as not to be visible. Those remaining lights shall be modified in order to avoid or minimize the possibility of disorientation.
4. Enhance coastal vegetation with planting of native species (e.g., sea grapes) within the maritime zone. Protect coastal vegetation and nesting habitat from vehicular traffic in the area.

IX. As I explained to you, I requested that Amy provide me with the legal justification for FWS's and Army Corps' 50-meter buffer zone and related conservation measures. Amy could provide no legal authority specifying the particular measures requested by Army Corps and FWS. All Amy could provide me with was a Model Lighting Ordinance for Marine Protection. That Model Ordinance was formulated to implement Florida law requiring the Florida Department of Environmental Protection to designate coastal sea turtle nesting areas and establish guidelines for local government regulations to control coastal lighting to protect sea turtle nesting habitats. This Model Ordinance is not law in the Virgin Islands and does not even mention the 50-Meter or 20-Meter zone recommendations of FWS. Nevertheless, Amy advised me that the 50-meter zone is what FWS/Army Corps have asked for on all the other projects on which she has worked where there were known nesting beaches (Great Pond, Robin Bay, Diamond Keturá). She further advised me that FWS/Army Corps:

“are not requesting that no construction occur they are asking that no habitable structures be build. A habitable structure being one which would have a person in residence which would require lights at night, that is what they are trying to prevent. Gazebos, decks, roadway (unlit), picnic areas, storage areas, sheds and the like can be built. They just don't want buildings which would require lighting at night. We can even drop the sentence about not building during turtle nesting season since anywhere we could build is upslope or behind the pond and would not be accessible by the turtles.”

X. Lending support to Amy's view is that in its August 3, 2005 letter, Army Corps advised that "FWS expressed strong concerns over the potential direct, indirect and cumulative impacts that would bring the construction of marine facilities into the endangered sea turtles and its habitat." Army Corp listed the above conservation measures verbatim stating that FWS recommended them in an effort to avoid "continuous habitat degradation and destruction." Furthermore, Army Corps stated that the implementation of the above-mentioned conservation measures would help to ameliorate possible direct and cumulative effects the proposed project and related amenities would have on the sea turtles nesting habitat. Army Corps also cautioned that "if for any reason, subject measures could not be fully implemented; the FWS would request initiation of the forma consultation pursuant to the Section 7 of the Endangered Species Act."

XI. The problem with Section 7 consultation, apart from the additional time and documentation that it requires, is that FWS has expressly stated as a firm policy that FWS will not engage in Section 7 Consultation with respect to existing unauthorized matters in after-the-fact permit requests. Army Corps advised at the meeting that under circumstances where FWS has recommended Section 7 consultation, Army Corps will not proceed with a permit without that Consultation. Thus, to avoid the application of the FWS recommendation for Section 7 consultation, which FWS will not do with respect to after-the-fact requests to authorize existing structures, Amy believes that Army Corps will require that we develop and implement turtle conservation measures consistent with those stated by FWS in the June 8, 2005 letter and confirmed by Army Corps in its August 3, 2005 letter.

XII. A fair reading of the FWS letter and the Army Corps letter would suggest that FWS and Army Corps comments regarding turtle nesting conservation measures were primarily directed to the indirect and cumulative impacts of increased upland construction. FWS specifically stated that "although the construction of marine facilities may not directly affect the sea turtle nesting habitat, the construction of barge landing facilities allows for additional future development of the island. We believe that the upland development would adversely affect sea turtles nesting habitat in the island."

XIII. However, inasmuch as we are no longer requesting relocation of the barge landing, or approval of the speed bumps, with which, as FWS stated in its letter, FWS was primarily concerned, there is no reason to obtain FWS's consent to those measures. Consequently, we can argue that FWS's recommendations regarding turtle nesting need not be incorporated by Army Corps to avoid application of Section 7 Consultation. To the extent that we are requesting approval of the concrete landing pad that has already been installed, I note that the pad was installed to enable the barge to land and cut off its motors, thereby limiting prop scour. This is precisely what FWS recommended when it stated in its June 8 letter "we recommend that the barge landing not be relocated and that the existing barge landing be modified, possibly through the installation of bollards [also installed at

the site in connection with the concrete pad] or breasting/mooring piles at the site to allow safe docking without a lot of prop wash.” Because we implemented the very recommendations made by FWS, arguably, there is no need for further consent regarding the concrete pad and therefore there is no need to implement the conservation measures to avoid Section 7 Consultation.

XIV. Amy’s and Alan’s contention, however, is that FWS recommended those measures in the context of a letter, not only disapproving of a relocated barge landing, but also recommending alteration of the existing barge landing. Moreover, the purpose of stabilizing the existing barge landing was to facilitate upland construction, which upland construction, as FWS expressly stated in its letter, is the primary concern that the turtle nesting conservation measures were meant to address. As Army Corps must still approve the concrete landing pad, the consensus among Alan, Amy and Bob deJongh is that Army Corps will insist that the recommended measures be implemented. If we don’t voluntarily undertake such measures, the concern is that we will not be appearing to be acting in good faith to resolve our outstanding issues with Army Corps.

XV. Therefore, consistent with the foregoing measures “recommended” by FWS and confirmed by Army Corps, Amy has proposed including the following in our submittal to Army Corps:

1. LSJ will maintain a 50-meter setback from MHW [Mean High Water] along the turtle nesting beach, as shown in the attached Exhibit 1. [JEE – note that I have attached to this e-mail a photograph showing the set back area which Amy proposes as Exhibit 1.] No building or structure erected within the setback will be used or occupied as a dwelling or sleeping unit for permanent occupancy. All lighting in any non-dwelling building erected or maintained within the setback will have turtle friendly lighting or be retrofitted with such lighting.

There are some existing structures within this area and some existing lighting. The lighting will be modified to make them more turtle friendly.

2. A buffer of suitable coastal vegetation, i.e. seagrapes (*Cocoloba uvifera*) will be re-established along the turtle nesting beach.
3. A comprehensive turtle lighting plan will be developed for the island, and once implemented a lighting inspection will be conducted to correct any problematic lights. [JEE- Please note that in the Army Corps letter, Army Corps expressly stated that “Once fully implemented a lighting inspection should be conducted to identify and correct remaining problematic lights.”]

The applicant will conduct a survey of the existing island lighting and will make all necessary lighting changes to make the beach area more conducive for turtle nesting. A combination of lighting changes and vegetation will be utilized to prevent stray light

from reaching the beach. It should be noted that due to security issues surrounding the applicant and many of his guests, high levels of security must be maintained, which of course requires light in various areas of the island.

4. LSJ will restrict driving of vehicles along the turtle nesting beach, except in case of emergency or for necessary maintenance and no vehicles shall be allowed to travel on the turtle beach during turtle nesting season until the beach has been inspected and all turtle nests have been conspicuously marked and a buffer zone around the nest(s) has established and marked out.

XVI. Amy's proposed language is moderately less stringent than the measures actually recommended by Army Corps. In Amy's proposal, LSJ does not undertake to avoid all construction activities, including fence and light installation, as stated in the recommended measures. Nor does LSJ agree to an additional 20 meter buffer zone; LSJ only proposes that a "buffer of suitable coastal vegetation, i.e. seagrasses (*Cocoloba uvifera*) will be re-established along the turtle nesting beach."

Please let me know whether you wish to include the Turtle Nesting conservation measures in the submission to Army Corps.

***Attachments: Proposed Army Corps Submission
 Map Showing 50-Meter Zone.