



## **St. Croix Environmental Association**

*A Chapter of the Virgin Islands Conservation Society*

5032 Anchor Way, Suite 3, Christiansted VI 00820

(340) 773-1989 Fax (340) 773-7545 e-mail sea@viaccess.net

[www.stxenvironmental.org](http://www.stxenvironmental.org)

Comments on the William and Punch, LLC  
Application for a Department of Army permit pursuant to  
the Clean Water Act § 404 and the Rivers and Harbors Act § 10  
March 28, 2008

### General Comments

The St. Croix Environmental Association (SEA) asserts that an Environmental Assessment (EA) must be completed on the proposed project pursuant to the National Environmental Policy Act (NEPA) and US Army Corps of Engineers (USACE) Section 404(b)(1) Guidelines. We believe that completion of the EA should not be onerous to the applicant due to the substantial effort William & Punch, LLC has already invested in preparing an Environmental Assessment Report for a Major Coastal Zone Management (CZM) Permit. We believe that subjecting the project to the NEPA and Sec. 404 assessment process will lead to an improved project design as measured by economic as well as environmental metrics.

SEA recognizes that some adverse impacts of the William and Punch project may be unavoidable without jeopardizing the project's basic purpose. In such cases, SEA requests the USACE require the applicant to demonstrate that the adverse impacts cannot be avoided or minimized, and submit a compensatory mitigation plan.

To receive public input on the Sec. 404 / 10 Permit Application and to begin the NEPA scoping process, SEA requests a public hearing be held on St. Croix the Sec. 404 / 10 Permit Application.

### Specific Comments

- 1) The potential direct and indirect impacts on federally-listed coral species resulting from the proposed deposit of dredged and fill material on hardbottom must be addressed by USACE through consultation with the National Marine Fisheries Service pursuant to the Endangered Species Act of 1973 (ESA) Section 7.
- 2) SEA finds that the beach nourishment component of the project triggers the requirement of an Environmental Assessment or EA equivalent document pursuant to NEPA and USACE Section 404 Guidelines.
- 3) On-site and off-site impacts of the proposed jetties on near-shore currents and sand attenuation must be modeled and analyzed as part of an Environmental Assessment.
- 4) SEA requests that the applicant fully address the potential impacts of the proposed project on the William/Prosperity wetland. SEA recommends that the applicant retain a qualified wetland ecologist to assess the impacts of altered hydrology on William/Prosperity wetland ecology.

- 5) SEA disagrees with the conclusion in the Public Notice that *the proposed project may affect but is not likely to adversely affect threatened or endangered species or their critical habitat*. Information submitted by the applicant to date does not support such a conclusion.
- 6) USACE must enter into an ESA § 7 consultation with the US Fish and Wildlife Service with regard to impacts of the proposed project on three threatened and endangered sea turtle species and their nesting habitat.
- 7) SEA recognizes that some adverse impacts of the William and Punch project may be unavoidable without jeopardizing the project's basic purpose. In such cases, SEA requests that USACE require the applicant to provide a) a discussion showing that the adverse impacts cannot be avoided or minimized, and b) a mitigation plan that proposes compensation for lost functional values of aquatic resources.
- 8) SEA believes that the proposed Williams and Punch project design will be enhanced as a result of following NEPA and USACE Section 404(b)(1) Guidelines.
- 9) SEA requests that USACE hold a public hearing on the application by William and Punch, LLC for a Section 404 /10 permit.

#### Discussion Supporting Specific Comments

1) The USACE Public Notice dated March 4, 2008 re. Permit Application No. SAJ-2007-6364 (IP-VG) ([http://www.saj.usace.army.mil/regulatory/pnwebshare/Antilles\\_Public\\_Notices/20080304-saj-2007-6364.pdf](http://www.saj.usace.army.mil/regulatory/pnwebshare/Antilles_Public_Notices/20080304-saj-2007-6364.pdf)) (hereafter, Public Notice) states that: *A benthic survey conducted in April 2007 described that the seabottom is dominated by hard bottom areas sparsely covered with communities of soft and stony corals*. In fact, the MARINE BENTHIC SURVEY prepared by Island Resources Foundation (IRF), documents that over 70% of the sea bottom in the project area is hardbottom habitat. While neither Elkhorn nor Staghorn coral (*Acropora spp.*) were found along any of the IRF transects, *A. palmata* was found just north of the study boundary. Also, according to a map provided by the applicant as part of their application for a Virgin Islands Coastal Zone Management permit, Staghorn coral (*A. cervicornis*) is present approx. 900 ft. directly seaward of the project area (Responses to CZM of Deficiencies for Estates William and Punch, Frederiksted, St. Croix V.I., February 28, 2008, Exhibit L).

The Public Notice states that: *The construction of the jetties would require the deposit of approximately 33,000 cubic yards of fill material over 133,000 square feet of navigable waters of the U.S., and further that: The footprint of the beach restoration and enhancement activities would cover an approximate area of 280,370 square feet*. Thus the proposed project will involve the deposit of fill material on approximately 9.5 acres of sea bottom, much of which is hardbottom habitat.

According to the USACE Guidelines for Specification of Disposal Sites for Dredged or Fill Material Subpart B—Compliance with Section 404(b)(1) Guidelines: *no discharge of dredged or fill material shall be permitted if it: ...Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended (CFR 40 Part 230 Subpart B sec 230.30(b)(3)).*

It is further noted that: *Where consultation with the Secretary of the Interior occurs under Section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final (CFR 40 Part 230 Subpart D §230.30(c)).*

Hardbottom has been identified as critical for the conservation of these two federally-listed threatened coral species and has been proposed for designation as a Primary Constituent Element (PCE) and *critical habitat* for the species under the Endangered Species Act of 1973 (ESA) (Federal Register Vol. 73, No. 25 pp 6895-6919). SEA finds that the potential direct and indirect impacts on federally-listed coral species resulting from the proposed deposit of dredged and fill material on hardbottom must be addressed by USACE through consultation with the National Marine Fisheries Service (NMFS) pursuant to ESA §7.

2) According to the Public Notice: *The project would consist of... beach restoration and enhancement.... According to the applicant, the proposed activities would be conducted by the placement of sand of similar grain size, texture and color. Some of the sand material would be derived from the material to be dredged from the marina access and flushing channel and the remaining material would be obtained from an outside source. This activity would require the discharge of over 20,000 cubic yards of sand material into navigable waters of the U.S. The footprint of the beach restoration and enhancement activities would cover an approximate area of 280,370 square feet.*

Thus the proposed project includes a beach nourishment component that covers approximately 6.4 acres of sea bottom, much of which is hardbottom habitat. According to a National Ocean and Atmospheric Administration (NOAA) Coastal Services Center publication entitled “Beach Nourishment: A Guide for Local Government Officials Assessment of Section 404 Clean Water Act Regulatory Issues” (<http://www.csc.noaa.gov/beachnourishment/html/human/law/sec404.htm>):

- *The Section 404 permitting process includes requirements for the submittal of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) (or EIS Equivalent Document) for beach nourishment projects.*
- *USACE has its own six-step Water Resource Planning process (WRP) developed under the Water Resource Planning Act, as amended (WRPA) (42 U.S.C. 1962a-2) (as described in Engineering regulation ER 1105-2-100) that is integrated with NEPA and Section 404 permitting of beach nourishment projects.*
- *(Section 404) permits are required for private entities desiring to complete a beach nourishment project. For private entities, Section 404 requires completion of a NEPA document that is equivalent to an EIS or EA.*
- *Obtaining approval for a Section 404 permit for a beach nourishment project of any size is a complex and lengthy process. The primary requirement is that the applicants must be able to prove that they have selected the “least environmentally damaging practicable alternative” in order for the project to be approved. This means that the applicant must document that a sequence of avoidance, minimization, and compensation has been followed, in that order. This sequence is required under the Section 404(b)(1) Guidelines (40 CFR Part 230).*

According to another NOAA Coastal Services Center publication, “Beach Nourishment: A Guide for Local Government Officials National Environmental Policy Act (NEPA) Compliance Requirements for Beach Nourishment Programs” (<http://www.csc.noaa.gov/beachnourishment/html/human/law/nepa.htm>):

- *The objective of NEPA is to help the lead agency to approve well planned projects, by selection of a preferred alternative that effectively avoids and minimizes potential adverse environmental impacts. The preferred alternative is defined in the regulations as the "least environmentally*
- *damaging practicable alternative." The term practicable in this definition means a project that is feasible and can be done within logistical, engineering, cost, and environmental constraints. This implies that the preferred alternative may not in fact be the one that has the least environmental impact, since factors may be important. The burden of proof, however, for demonstrating that the*

*"least environmentally damaging practicable alternative" is selected is placed on the project proponent....*

- *The NEPA compliance process is triggered if a beach nourishment project is either funded by federal dollars or a Section 404 Clean Water Act permit is submitted.... Therefore, all beach nourishment projects are required to comply with this far-reaching law.*
- *The assessment conducted to comply with NEPA is documented in the form of an Environmental Assessment (EA) if impacts are not considered significant, or more detailed Environmental Impact Statement (EIS) if impacts are significant.*
- *Some projects are categorically excluded from NEPA (categorical exclusion or CATEX) but beach nourishment projects are not because they have the potential for adversely impacting the environment.*

According to "Guidance for Applicants, Suggested Staffing, Procedural Implementation of Section 404 of the Clean Water Act U.S. Army Corps of Engineers, Savannah District"

(<http://www.sas.usace.army.mil/permit/nepa.pdf>):

- *The Department of the Army, Corps of Engineers, Savannah District ("USACE") is charged with implementation of Section 404 of the Clean Water Act ("CWA") ( 33 U.S.C. § 1344) and Section 10 of the Rivers & Harbors Act of 1899 ( 33 U.S.C. § 401 et .seq.) The issuance or denial of a permit by the Corps of Engineers pursuant to these statutes is a federal action and as such requires compliance with the National Environmental Policy Act of 1969 ("NEPA") ( 42 U.S.C. § 4321-4347), the National Historic Preservation Act of 1966, as amended ( 16 U.S.C. § 470 et seq.), ("NHPA"), the Endangered Species Act (16 U.S.C. 1531 et seq.) and other relevant statutes and executive orders.*
- *These guidelines (SECTION 404 (B) (1) GUIDELINES OF THE CWA) are sequential and require that the applicant: avoid unnecessary environmental impacts by preparing an analysis of alternatives that would potentially result in less adverse impact than the proposed project; to the maximum extent practicable, minimize unavoidable adverse impacts of the preferred alternative; and prepare a compensatory mitigation plan necessary to replace the wetland functions that would be lost as a result of unavoidable adverse impacts.*
- *The USACE can only issue a permit for the least environmentally damaging practicable alternative that meets the project's basic purpose.*

Contrary to the finding of David S. Hobbie, Regulatory Division (which appear without title or further reference as page 5 of the Public Notice) that: *Preliminary review of this application indicates that an Environmental Impact Assessment will not be required*, SEA finds that the beach nourishment component of the project alone triggers the requirement of an Environmental Assessment or EA Equivalent Document pursuant to NEPA and USACE Section 404 Guidelines.

3) According to the Public Notice: *the proposed marina will require dredging of a 150-foot wide access and flushing channel and the construction of two perpendicular dog leg jetties to stabilize the flushing channel and to provide adequate wave attenuation.* This description is unclear when compared with Drawing 5 of the Permit Application, where there appear to be two jetties perpendicular to the shoreline to protect the flushing channel, plus two dog-leg jetties to protect the marina access channel. More importantly however, the Public Notice does not address the Environmental Assessment requirements for the USACE issuance of a Section 10 permit pursuant to the River and Harbors Act of

1899, which regulates the building of any jetty or breakwater, or excavation or deposition of materials in any navigable water of the United States that would affect the course or condition of those waters. It is possible that the jetties (and beach nourishment) may actually represent net positive environmental impacts for sea turtle nesting habitat on the applicant's site through the disruption of seasonal migration of sandy beach along this stretch of St. Croix's western shoreline. However, there is currently inadequate information to make such an assessment. On-site and off-site impacts (positive or negative) of the proposed jetties on near-shore currents and sand attenuation must be modeled and analyzed as part of an Environmental Assessment to be prepared by the applicant.

4) According to the Public Notice: *the proposed project would not require the discharge of fill material into the existing mangrove forest. The majority of the streams located within the project footprint would be filled for the construction of the hotel, golf course, residential development, and other related amenities.* Drawing No. 8 of the Public Notice, however, reflects that the proposed road approaching the roundabout at the south end of the project would be constructed within the delineated Williams/Prosperity Wetland. There appears a notation on Drawing No. 8 that this intrusion of the delineated wetland represents "site development by others." This statement is not clear in the context of a proposed project on property owned by the applicant that includes as an integral part, relocation of the present road and construction of the roundabout.

Section 404 permits are required for projects that take place in or over wetlands or stream channels that convey natural runoff, including intermittent streams, where the fill activity is below the ordinary high water mark. SEA requests a clarification of whether or not the proposed project will result in discharge of fill material onto delineated wetland or points below the high water mark on intermittent streams conveying natural runoff into the wetland.

According to guidelines developed by the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army (Section 404(b)(1) Guidelines), Subpart E--Potential Impacts on Special Aquatic Sites (<http://www.usace.army.mil/cw/cecwo/reg/40cfr230.pdf>), the following impacts should be considered in making factual determinations and findings of compliance or non-compliance:

*Sec. 230.41 Wetlands:*

*(b) Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in advancement of succession to dry land species. It may reduce or eliminate nutrient exchange by a reduction of the system's productivity, or by altering current patterns and velocities. Disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife....*

SEA requests that the applicant fully address the potential impacts of the proposed project on the William/Prosperity wetland. Analyses should address, but not necessarily be limited to, impacts on surface and ground water hydrology, specifically seasonal fluctuations in water level; and bird habitat, specifically habitat of territorially-endangered species. Here again, the net environmental impacts may be positive or negative, but without additional analyses, there is no way of predicting potential impacts. SEA recommends that the applicant retain a qualified wetland ecologist to assess the impacts of the project on wetland ecology.

5/6) The ENDANGERED SPECIES discussion in the Public Notice fails to mention Staghorn or Elkhorn corals, Federally-listed threatened corals found in the immediate vicinity of the project (Ref. SEA discussion point #1).

The Public Notice also fails to mention the Federally Endangered Leatherback Sea Turtle (*Dermochelys coriacea*). The Preliminary Sea Turtle Impact Study conducted by the West Indies Marine Animal Research and Conservation Services, Inc. (WIMARCS) found that: *The beach at Sprat Hole has ideal sand and vegetation conditions for the nesting habitat of the endangered sea turtles of the U. S. Virgin Islands. Three sea turtle species nest on this beach. However this beach is predominantly a Hawksbill Sea Turtle nesting beach and any modifications to this beach will impact this nesting.*

Finally, it should be noted that seven Territorially Endangered birds utilize the William/Prosperity wetland. The Territorially Endangered Least Grebe has nested at the William/Prosperity wetland. Breeding was confirmed by the presence of unfledged young in that wetland on 5 October and 14 November 2006 (McNair D. B., L. D. Yntema, and F. E. Hayes. 2008. In press. Status of least grebe *Tachybaptus dominicus* in the United States Virgin Islands. 2008. Caribbean Journal of Science 44). The first confirmed record of Least Grebes on St. Croix occurred in 2002 (McNair, D. B., L. D. Yntema, C. D. Lombard, C. Cramer-Burke, and F.W. Sladen. 2005. Information on rare and uncommon birds from recent surveys on St. Croix, United States Virgin Islands. *North American Birds* 59:536-551). Other territorially endangered birds that have been observed at the William/Prosperity Wetland and are recorded in the bird list of L.D. Yntema include: the White-cheeked Pintail, Great Blue Heron, Great Egret, Snowy Egret, Black-crowned Night-heron, and White-crowned Pigeon.

SEA disagrees with the statement in the Public Notice that *the proposed project may affect but is not likely to adversely affect threatened or endangered species or their critical habitat*. Information submitted by the applicant to date does not support such a conclusion. SEA asserts that, in addition to the ESA § 7 consultation with NMFS discussed in SEA comment #1, USACE must enter into an ESA § 7 consultation with the US Fish and Wildlife Service with regard to impacts of the proposed project on three Federally-threatened and endangered sea turtle species and their nesting habitat. Territorially listed species should be addressed by VI DPNR Division of Fish and Wildlife in their review of the Environmental Assessment Report attached to the applicant's major CZM Permit application.

7) According to the "Guidance for Applicants, Suggested Staffing, Procedural Implementation of Section 404 of the Clean Water Act U.S. Army Corps of Engineers, Savannah District" (<http://www.sas.usace.army.mil/permit/nepa.pdf>):

- *Although a detailed compensatory mitigation plan is not required to begin processing of a permit application, adequate compensatory mitigation would be required prior to a final permit decision. The detailed plan must provide adequate in-kind functional replacement for wetland and stream functions that would be lost as a result of unavoidable adverse impacts associated with the project. A functional assessment may be necessary to quantify impacts, as well as the adequacy of any proposed mitigation plan. Mitigation can be accomplished by creating, restoring, enhancing or preserving wetlands and/or streams on or near the project site. All mitigation plans must be approved by USACE prior to implementation*

The purpose, policy and procedures for determination of mitigation under the Clean Water Act are clearly set forth in a Memorandum of Agreement (MOA) signed between the Department of Army and US EPA in 1990 (<http://www.usace.army.mil/cw/cecwo/reg/mou/mitigate.htm>). According to the MOA:

- *The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which*

*must be met for activities to be permitted under Section 404. The type of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation.*

- *Avoidance. Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.*
- *Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions.*
- *Compensatory Mitigation. Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.... In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered.... Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.*

SEA recognizes that some adverse impacts of the William and Punch project may be unavoidable without jeopardizing the project's basic purpose. In such cases, which may include beach nourishment, marina dredging and depositing fill in the Williams/Prosperity wetland, SEA requests a) a discussion showing that the adverse impacts cannot be avoided or minimized, and b) a mitigation plan that proposes compensation for lost functional values of aquatic resources, especially those associated with the William/Prosperity wetland and marine hardbottom habitat in depths less than 30 meters.

8) SEA believes that the proposed Williams and Punch project design will be enhanced as a result of following NEPA and USACE Section 404(b)(1) guidelines for sequential assessment of environmental impact avoidance, minimization, and compensatory mitigation (see citation under SEA comment #2). We also believe that the process should not be onerous, due to the amount of effort that William and Punch has already invested in the Environmental Assessment Report included in their application for a Major Coastal Zone Permit.

9) To enable USACE to develop a Statement of Findings, and fully assess potential impacts of the proposed project on endangered species, historic properties, water quality, general environmental effects, and other public interest factors, with more than unverified information furnished solely by the applicant, SEA requests that USACE hold a public hearing on the application by William and Punch, LLC for a Section 404 / 10 Permit.

Respectfully Submitted,

Paul Chakroff  
Managing Director