Lido. Eduardo Ferrer Ramírez de Arellano
Attorney at Law

September 21, 2004

Branden Blum
NOOA
1305 East-West Highway
Silver Spring, Maryland 20910

RE: CZM- 2001-0529-117
Joint Application #178
USACE Num. 198800516(IP-VG)

Dear Mr. Blum:

As we spoke on Monday enclose two copies of the Appellant's Request for Extension of Time to File Supporting Documents and Translations and the Appellant's Reply Brief.

If you have any questions contact me at (787) 721-8062 Ext. 239.

Sincerely,

María B. González
Secretary

PO Box 485 • San Juan, Puerto Rico 00902 • Tels. (809) 721-8063 • Fax (809) 721-3127

UNITED SATSTES DEPARTMENT OF COMMERCE
Herbert C. Hoover Building
14th Street and Constitutional Avenue, N.W.
Washington D. C. 20230

VILLA MARINA YACHT HARBOUR, INC.	*	
	*	**CASE NUM.:CZM-2001-0529-117**
PETITIONER	*	**JOINT APPLICATION #178**
	*	**USACE NUM. 198800516(IP-VG)**
	*	

APPELANT'SS REQUEST FOR EXTENSION OF TIME TO FILE SUPPORTING DOCUMENTS AND TRANSLATIONS

TO THE HONORABLE SECRETARY:

COMES NOW, Petitioner Villa Marina Yacht Harbour, Inc.("VMYH"), through the undersigned attorney who very respectfully informs, states and moves as follows:

On August 3, 2004 our Reply Brief is due today September 8, 2004, and both parties are to submit the translation of all Spanish language documents that form part of the supporting documents.

2. On August 6, 2004 the Puerto Rico Planning Board requested an extension of time until September 30, 2004 to submit the translations due to the amount of documents that needed to be translated.

3 On August 26, 2004 the extension of time was granted.

4. VMYH had engaged a company to conduct such translations and they had promised the documents by the deadline but the same are not ready.

5. VMYH respectfully requests the same and extension of time, until Septmeber 30,

2004 is granted to submit a motion listing and including all supporting documents and translations of the Initial Brief as well as the Reply Brief.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 8th day of September 2004.

hereby Certify that a copy of the present document was sent via certified mail to;

Secretary Of Commerce
United Stated Department of Commerce
Att. Molly Holt
National Oceanic and Admospheric Administration
1305 East-West Highway, Room 6111
Silver Spring, Maryland 20910.

Angel David Rodríguez
President
Puerto Rico Planning Board
PO Box 41119
San Juan, Puerto Rico 000940-1119

United Stated Army Corps of Engineers
Attention: Edwin Muñiz,
400 Fernández Juncos Avenue,
San Juan, Puerto Rico 00901-3299

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	*	

APPELANTS REPLY BRIEF

TO THE HONORABLE SECRETARY:

COMES NOW, Petitioner Villa Marina Yacht Harbour, Inc.("VMYH"), through the undersigned attorney who very respectfully informs, states and moves as follows:

Petitioner "VMYH" believes it has submitted all required information and complied with sections 930.57 and 930.58 of the Act (15 CFR 930), including all requirements listed in the objection letter, and that the PRPB's objections, decisions and procedures in the instant case have been in contravention of the Act. Furthermore, the proposed activity (existing marina expansion) is consistent with the objectives and purpose of the Coastal Zone Management Act and "PRCMP"[1]

On **April 3, 2001** "VMYH" submitted a Joint Application for the proposed expansion of the existing marina consisting of 125 additional slips and the construction of a new 398' breakwater.[2]

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[1] The PRCMP was submitted to NOAA on July 12, 1978.
[2] VMYH had submitted previously an almost identical expansion, on the same site, and it had been approved by the USCE and the PRPB issued a consistency determination in that case. (see Petitioner's Brief and **Annex 1 and 2**)

The only consistency objections by the PRPB to be considered on the present appeal have to be limited to the specific objections expressed in the objection letter dated September 26, 2003 (Annex 3), listed in page 6 of the PRPB's Brief. They can be resumed as follows;

1. Compliance with Article 4© of the Environmental Policy Law (Law Number 9) of Puerto Rico, as a method of exerting "commonwealth control". Specifically Puerto Rico EQB Endorsement about compliance with 4© which process calls for applicant to submit an environmental document and for the PRPB as proponent agency submits for compliance the Puerto Rico EQB.

2. Based on "PRCMP" policy number 30.07 the PRPB required a better justification in terms of "public benefit", harmony with other marinas and impacts of public use, as the submerged lands where the expansion is proposed belongs to the Commonwealth of Puerto Rico.[3]

In its Brief, it seems that the PRPB, recognizing its deficiencies, intends to amend its objections by including a series of arguments and discussions that we object and request not be considered, including other agency objections, comments or requirements not allegedly obtained or completed, and new technical conclusions made *sua sponte* by the PRPB for the first time in its Brief.[4] Our scope of discussion will be limited to the basis of objection included in the objection

[3] **The PRPB apparently forgets that the project is to be located on navigable waters of the United States and thus it is the USCE who emits the permits and that the Commonwealth of Puerto Rico only under the delegated assignment of the CZMA has power only to make a revisable determination of consistency. As it has been observed, the PRPB acts like it was the agency with power to analyze the project on its merits an authorize or reject the same, power that only the USCE has. The PRPB determination should be made in terms of consistency in Planning and Uses of Land, not technical issues which by definition are analyzed by the USCE.**

[4] For example at the end of page 10 they conclude that the expansion will result in excessive "sedimentation" "current patterns" and "non point pollution" when from its own admissions they have stated that the current and related studies have yet to be commented by any

letter[5], not the new ones included in the PRPB's Brief. For that reason, we will not engage in the discussion of the comments listed for agencies or individuals, other than referring to our Brief and the fact that the US Coast Guard found no objection to the expansion in regards to safety and navigation as stated in their letter **(Annex 4)**, and that, as admitted by the PRPB, the DNER "did not send their comments during the granted period" so that no objection can be presumed, in fact in other cases their silence has constituted no obstacle for a consistency determination (a prime example: the recent consistency determination for petitioners competitor and objector to the present expansion, Sea Lovers marina Approved without comment by the DNER see **Annex 5** and Appelant Brief).

PRPB'S VIOLATIONS OF THE CZMA

The PRPB blatantly violated Sections 930.60 and 930.62 of the CZMA as it did not comply with the requirement to notify within 30 days of the receipt of the applicant's consistency certification (see Section 930.60(a) of the Act) that either it is considered complete or the information missing. This requirement includes completed applications or even incomplete certifications. In cases where it considered incomplete, that can be caused by only two issues 1) failure to provide a consistency certification in accordance with Section 930.57 o 2) fails to submit necessary data and information required pursuant to Sec. 930.58.

It is important to note that the necessary data referred to is limited to the data and information listed in Section 930.58(a) of the Act, which in fact was produced in the instant case upon filing, including Diagrams, Explanatory Memo, Certification, and Environmental Study including coastal effects, etc. that was part of the Joint Application process, set and agreed by the local and federal agency. **(see the Joint Application, Annex 6)**.

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agency.

[5] See page 6 of PRPB's brief in which only two "unresolved issues related with the PRCMP policies" are listed.

Again, once the PRPB received the completed certification and information it had 30 days to notify that the deficiencies had been corrected and that the review period had commenced when the information and data was received by the State Agency. (Sec. 930.60(2). The PRPB never informed petitioner the review commencement date or completeness of the information, was negligent in not commencing the review period when all information was submitted, and negligent in the procurement of compliance with Article 4(c) of the local Environmental Law, principal excuse for its consistency objection.

Furthermore, according to Sec. 930.60(3)(b) state agencies request for information or data in addition to that required by Sec. 930.58 "shall not extend the date of commencement of the State agency review", which by its action the PRPB did by continuing to request new information.

According to Section 930.62 that PRPB had to issue its objection or concurrence "at the earliest practicable time", and concurrence shall be conclusively presumed if it's not received within 6 months following commencement of the State agency review. The PRPB had the obligation to express the status of the matter and the reason for its delay if it had not issued its decision within three months of the review period Sec. 930.62(b). The PRPB did not do that, and it purposely extended the review period beyond reasonable time.

Following is a timeline expressing the PRPB's violations to the CZMA;

On **April 3, 2001** "VMYH" submitted a Joint Application for the proposed expansion that was part of the State and federal agreed and set procedure for the federal permit process as well as State Agency action as part of the delegated and limited powers under the Coastal Zone Management Act. (See Annex 6)

On **June 11, 2001** the "PRPB" issued its first communication to petitioner indicating that the application was incomplete under section 930.58 of the Act and requesting information and documents (Annex 7). This was outside the time allowed by Section 930.60(a) of the Act. In its Brief the PRPB tries to induce to error mentioning letters from other agencies which have nothing to do with the PRPB consistency determination, information required or review period.

Dated September 27, 2001, and marked received as September 28,2001, Petitioner submitted to the "PRPB" the required information, including agency comments on the Environmental Study, a copy of the study with currents and breakwater information, and diagram with distances (Annex 8). As for the EQB's specific endorsement of the Environmental Document, petitioner complied with the filing of a comprehensive environmental document to the proponent agency (State Agency including the DNER and PRPB) since July 19, 2001. (Annex 9) It was the PRPB's responsibility to procure as "proponent agency" such endorsement. Two things to note, according to Law Number 9, only the proponent agency can submit the environmental Document and request the endorsement from the Puerto Rico EQB as it is required for any government action not specifically excluded by law. So in fact it is the agency who is required to obtain the certification of compliance for its determination, proponent's only obligation is to submit the document and amend it if necessary to include any comments by the PR EQB.

The PRPB was negligent in processing the environmental documents and in fact never acted as proponent agency or followed up to obtain such endorsement as required by law. As clearly stated in Article 4© of Law Number 9, a transcription is included in the PRPB's Brief at page 9. The environmental document for the expansion was in fact commented by the EQB and all concerns including the DNER's were addressed and included in the document as part of

petitioners "Site Consultation" for a Hotel to the PRPB which was later desisted by petitioner on April 5, 2002. At the same date the PRPB received an explanatory letter and a copy of the completed Environmental Document so that the PRPB, as proponent agency, could procure the EQB endorsement of compliance (Annex 10). The PRPB never acted on Petitioners request and thus the EQB finally answered that the Endorsement process had been terminated because the "site consultation" had been withdrawn.[6]

No answer to petitioners September 27, 2001 submittal was issued by the "PRPB", again in contravention to Section 930.60(1) and (2), even though petitioner requested that the application be considered complete.

On April 5, 2002, Petitioner again presented the documentation and requested the review period to commence (Annex 10). **Again no answer to petitioner was issued by the "PRPB" in contravention to Section 930.60(1);(2) of the Act and Section 930.62.**[7]

Again, on **December 17, 2002** petitioner resubmitted and discussed again all issues, claiming that the review period should have commenced at least on April 5, 2002 when all information was submitted. (Annex 11)

On **December 18, 2002** a copy of a letter sent to USACE in reference to USACE concerns was sent to the "PRPB". This letter prepared by Environmental Permitting, Inc. covered in detail all issues an concerns, and further provided information to the "PRPB" regarding the Coastal Dynamics Study, Breakwater and Bathymetry, Channel Clearances, Agency's comments,

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[6] This was admitted by the PRPB, see page 3 of PRPB's Brief.

[7] **Petitioner believes the review period started at least on April 5, 2002 under Section 930.60(a) and thus concurrence should have been presumed by October 2002 under Section 930.62(a).**

Fishermen's Association, alternative analysis, erosion conclusions, Fuel Spill Contingency Plan, Pump-out station to be mobile and Breakwater Construction.(Annex 12)

On **January 30, 2003**, (first answer to petitioner's September 27, 2001 and April 5, 2002 letters submitting and resubmitting all information required under Section 930.58 of the Act) the "PRPB" issued a letter requesting new information. **This letter should not have been deemed to extend the review period[8] (Annex 13). This was the PRPB's first communication since the original letter dated June 11, 2001(19 months after).[9]**

Nevertheless, on **March 5, 2003** "VMYH" responded to the PRPB's January 30, 2003 letter submitting the newly requested information. Again it was expressed that the review period should have commenced on April 5, 2002.(Annex 14)

On July 9, 2003 the requested again the same information and issues covered in the previous letters. **At this time, without ever stating when the review period began, the "PRPB" provided until August 4, 2003 to provide the requested information**, stating it would issue its "final decision" upon expiration of the term provided.[10] It is important to mention that there is no mention of any further requirement regarding the EQB or Environmental Documents. It must have been concluded that Petitioner had already complied. (Annex 15)

On July 29, 2003 Petitioner responded to the PRPB's July 9, 2003 letter addressing again issue by issue and making reference to the submitted studies. (Annex 16)

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[8] Section 930.60(b).

[9] It is important to clarify that the "agreements" referred to in the letter were from the PRPB members and have nothing to do with petitioner who in the January 30, 2003 meeting required that the determination be resolved and insisted that all required information had been provided.

[10] The PRPB never informed petitioner about the commencement date of the review period, or complied with notification after three months in contravention of the Sections 930.60(2) and 930.62(b) of the CZMA.

No Decision was issued by the PRPB by August 4, 2003 as they had expressed.

On August 22, 2003 Rose Ortíz of the "PRPB" requested from Petitioner that the review period be extended. Petitioner reluctantly agreed to extend the period, as Ortiz represented that only the DNER response was pending. In reality it is Petitioners position that the review period in fact had expired as it should have commenced on at least April 5, 2002

On September 26, 2003, received on October 1, 2003, the PRPB issued an objection letter.

"UNRESOLVED ISSUES" EXPRESSED IN THE PRPB OBJECTION LETTER

1. Compliance with Article 4© of the Environmental Policy Law (Law # 9 of Puerto Rico):

As for the EQB's specific endorsement of the Environmental Document, petitioner complied with the filing of a comprehensive environmental document to the proponent agency (State Agency including the DNER and PRPB) since July 19, 2001. (Annex 9) It was the PRPB's responsibility to procure as "proponent agency" such endorsement. Two things to note, according to Law Number 9, only the proponent agency can submit the environmental Document and request the endorsement from the Puerto Rico EQB as it is required for any government action not specifically excluded by law. So in fact it is the agency who is required to obtain the certification of compliance for its determination, proponent's only obligation is to submit the document and amend it if necessary to include any comments by the PR EQB.

The PRPB was negligent in processing the environmental documents and in fact never acted as proponent agency or followed up to obtain such endorsement as required by law. As clearly stated in Article 4© of Law Number 9, a transcription is included in the PRPB's Brief at

page 9. The environmental document for the expansion was in fact commented by the EQB and all concerns including the DNER's were addressed and included in the document as part of petitioners "Site Consultation" for a Hotel to the PRPB which was later desisted by petitioner on April 5, 2002. At the same date the PRPB received an explanatory letter and a copy of the completed Environmental Document so that the PRPB, as proponent agency, could procure the EQB endorsement of compliance (Annex 10). The PRPB never acted on Petitioners request and thus the EQB finally answered that the Endorsement process had been terminated because the "site consultation" had been withdrawn.[11]

Ironically the PRPB seems to object indicating that the DNER has not commented and finalized its review of the documentation, even when they admit they did not do so in a timely manner, and alleging that petitioner did not obtain EQB endorsement for compliance with the local environmental law when it is in fact the PRPB as proponent agency the one obligated to procure the same after petitioner submits the environmental document. The state objects imputing its own negligence and absence of diligence to petitioner who submitted all required documentation in various occasions and had no further control over the state agencies.

2. Better Justification in Terms of "Public Benefit":

The justification has been indicated and sustained since the beginning, the expansion of an existing marina in order to provide the general public, visitors and tourists with dockage and services that by definition need to take place in the water over submerged lands.[12]

The PRPB objection based on "lack of justification in terms of public benefit", has no merit, it is answered by definition; there is no other way to build marinas and they have to be in the coastal

[11] This was admitted by the PRPB, see page 3 of PRPB's Brief.
[12] See discussion on Petitioners Brief.

zone. There is no beach or beach access or impediment to any view enjoyment of the area as it is an expansion to an existing marina.

Appeal Ground I: The Activity is Consistent with the objectives of the CZMA:

"VMYH" believes that the proposed expansion, **which was already approved and certified compatible in the past**, is consistent with the objectives and purpose of the Act as defined in Section 930.121, 15 C.F.R. 930.121 as it better serves the public interest in facilitating marina and docking services (admiralty) that is consistent with the current use and development of the area, Interstate Commerce and the public need for marina services, that is compatible with the current land use and development of the area and that represent the best way to provide such ervices to the general public. The current demand for dockage exceeds supply and the best option is to expand existing marinas not to impact new areas. (See Sea Grants opinion letter included as Annex 17). Expansion of existing marine facilities is one objective of the CZMA.

The object of the PRCMP, as expressed by the Commonwealth of Puerto Rico in its submittal of the Plan to NOAA on July 12, 1978 was to avoid structures in the coastal zone that were deemed not to be water dependant. The expansion of a marina is clearly a water dependent activity that can not be developed outside the coastal zone. In terms of use planning there can not be other use and a marina expansion is clearly consistent with the existing use, development, etc.

On its Brief the PRPB tries to cite part of the policies of the PRCMP the objections to development in coast, but omits the most important part, that those objections are for uses that are not water dependant. In addition, the proposed expansion extends from an existing marina (breakwater) out to sea and does not impact any existing access. Again, the USCG letter

contradicts their concerns for safety, access and navigation.

As identified by Section 303 of the Act, the Programs are expected to consider or undertake the following:

Give development priority to coastal-dependent uses

Have orderly processes for the siting of major facilities

- **Locate new commercial and industrial development in, or adjacent to, existing developed areas**

There are no adverse coastal effects identified by the PRPB to be addressed, as the objection was incredibly based on lack of information. In any case, all important issues have been addressed and covered beyond the normal scope. This expansion in terms of national/public interest outweighs the non-existent adverse effects. Furthermore, in the Oceanographic studies it is concluded that the expansion will provide more stability for the area, and that if the expansion is not performed the Sea Lover's expansion, already approved, will not work.

The marina expansion clearly follows the object of the PRCMP, which was to avoid structures in the coastal zone that were deemed not to be water dependant. The expansion of a marina is by definition a water dependent activity that can not be developed outside the coastal zone.

"VMYH" has complied with all required information requirements, and has produced an unprecedented compilation of Oceanographic studies to justify such development and has complied with all requirements listed for consistency with the PRCMP. There is no alternative to conduct the activity, and Appellant has complied with all conditions presented in the objection letter as to make it compatible and consistent. **Furthermore, the PRPB did not follow procedures and thus did not object in time, it required new information in an untimely manner and violated sections 930.60(1) (2) and 930.62 of the Act.** Petitioner believes the review period started at least on April 5, 2002 under Section 930.60(a) and thus concurrence should have been presumed by

October 2002 under Section 930.62(a).

Wherefore, "VMYH" hereby request that the Honorable Secretary make a finding deeming the proposed marina expansion "consistent with the objectives" of the CZMA.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 8th day of September 2004.

I hereby Certify that a copy of the present document was sent via certified mail to;

Secretary Of Commerce
United Stated Department of Commerce
Att. Molly Holt
National Oceanic and Admospheric Administration
1305 East-West Highway, Room 6111
Silver Spring, Maryland 20910.

Angel David Rodríguez
President
Puerto Rico Planning Board
PO Box 41119
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United Stated Army Corps of Engineers
Attention: Edwin Muñíz,
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