

**UNITED STATES DEPARTMENT OF COMMERCE  
Herbert C. Hoover Building  
14<sup>th</sup> Street and Constitutional Avenue, N.W.  
Washington D. C. 20230**

**VILLA MARINA YACHT HARBOUR, INC.**

**PETITIONER**

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**CASE NUM.:CZM-2001-0529-117  
JOINT APPLICATION #178  
USACE NUM. 198800516(IP-VG)**

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**APPELLANTS INNITIAL 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:

1. Petitioner received on October 1, 2003 Notice from the Puerto Rico Planning Board (“PRPB”) dated September 26,2003 objecting Petitioners request for Consistency Determination under 15 CFR 930.1

2. The “PRPB” lists the comments from agencies and individuals and states as basis for the objection certain alleged “unresolved issues that are related with PRCMP policies” that remain, including policy numbers 30.00, 30.01, 30.02 and 30.07, although no specific issues or objections to the project are made and only a literal translation of the policies where listed.

3. The “PRPB” also lists three (3) requirements “to conduct the proposed activity in a manner consistent with the Puerto Rico Coastal Management Program “PRCMP”, that in fact were already complied and submitted by petitioner;

a. Review of the project plan to address the issues presented by Mr. Richard

Vito, to include bathymetry of the area and the correct dimensions of the Sardinera Bay.

- b. Review the environmental document to include the most recently submitted studies, "address pending issues and complete the DNR requirements for completeness of the document".
- c. Obtain EQB endorsement about compliance with Article 4(c) of the Environmental Policy Law. Mentioning that the process should be undertaken within the Submerged Land Concession application to the DNER.

4. 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"<sup>1</sup>.

#### FACTS OF THE CASE

1. Petitioner "VMYH" built and operates a "full service marina" open to the general public since the early 70's.

2. **On February 7, 1989** "VMYH" obtained a federal permit from the United States Army Corps of Engineers ("USACE") for a marina expansion (125 slips) substantially similar in design as the presently proposed expansion (originally for 125 additional slips and actually reduced to 95 to accommodate all concerns), and located in the same site, Sardinera Bay. **Permit Number 88IPM-20516. (EXHIBIT A)**

3. As part of the federal permit, on **November 10, 1988** the "PRPB" issued a "Consistency Determination" for the expansion (Case number CZ-88-0512-172). (EXHIBIT B)

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<sup>1</sup> The PRCMP was submitted to NOAA on July 12, 1978.

4. Due to miscommunication or inadvertence in the follow up on certain proposed design changes in the breakwater submitted to the "USACE" the permit expired.

5. 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, designed and located substantially similar to the previously approved and deemed compatible expansion (**Joint Application #179**) that required a federal permit from "USACE". As part of the federal permitting process a Consistency Certification was requested from the PRPB, as part of the delegated and limited powers under the Coastal Zone Management Act.

6. On July 11, 2001<sup>2</sup> the "PRPB" issued letter to petitioner requesting information regarding four (4) issues to deem the application complete for commencement of the regulatory period. The issues were the following;

- a. Endorsement of the Environmental Document by the Environmental Quality Board "EQB"<sup>3</sup>;
- b. Comments from consulted agencies in relation to the environmental documents<sup>4</sup>;
- c. Study of currents and effects of the breakwater;

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<sup>2</sup> This was done in an untimely manner as Section 930.60 of the Acts requires 30 days notice after submission of the request, or submission of the information.

<sup>3</sup> Note that it is recognized that an Environmental Document has been submitted as part of the application, in fact on May 18, 2000 the EQB expressed that the Joint Application was complete.

<sup>4</sup> It should be noted that these comments are received directly by the PRPB and not Petitioner, and should have not been required from petitioners. In any case, they were furnished and commented by petitioner by letter dated September 27, 2001.

- d. Diagram with dimensions and distances from the Sea Lover's marina expansion and the proposed "VMYH" expansion;

6. **On July 19, 2001** Petitioner submitted to the EQB 30 copies of the Environmental Documents including all required modifications and information

7. **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, the EQB's specific endorsement of the Environmental Document could not be produced since it is out of Petitioner's control and Petitioner contends such endorsement is not required and/or responsibility of the state agency to receive and emit within the review period, thus commencement of the review period should have begun then. The EQB had stated in relation to the 125 marina expansion that the process was complete and that once the federal agency determination on the Joint Application, the EQB would then "proceed with the corresponding action". Letters dated January 29, 2001, December 20, 2000 and October 7, 2000 from Ecosystems and Associates answering all concerns were also attached<sup>5</sup>. (EXHIBIT C)

8. No answer to petitioners September 27, 2001 submittal was issued by the "PRPB", again in contravention to Section 930.60(1) and (2).

9. **On March 6, 2002** USACE published PUBLIC NOTICE of the project

10. **On April 5, 2002**, Petitioner again presented documentation, including comments from all consulted agencies in regards to the Environmental Document, and request of information

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<sup>5</sup> Note that the dates are from years 2000 and 2001 as this issues had been addressed since then, under the previous consistency application case number CZM-2000-0520-0078, case which was objected because of lack of information and re-addressed under

dated July 1, 2001. Again no answer to petitioner was issued by the "PRPB" identifying if the process was complete or what information was missing or pending if any in contravention to Section 930.60(1) and (2) of the Act and Section 930.62 as the application was complete at that time and no objection to the information was issued by the "PRPB".<sup>6</sup>

11. 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. (EXHIBIT D)

12. 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 and concerns, and further provided information to the "PRPB" regarding the Coastal Dynamics Study, Breakwater and Bathymetry, Channel Clearances, Agency's comments, Fishermen's Association, alternative analysis, erosion conclusions, Fuel Spill Contingency Plan, Pump-out station to be mobile and Breakwater Construction. (EXHIBIT E)

13. On **January 30, 2003**, more than 9 months after the April 5, 2002 letter in which Petitioner submitted 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<sup>7</sup> (EXHIBIT F);

- a. New plan, and descriptive memorial of the expansion to include information about existing and new parking. (first time requested);

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the current case.

<sup>6</sup> 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).

- b. Answer Sea Lover's Marina concerns expressed in his letter. This information had been addressed at least three times in our previous letters, and incredibly was part of the final objection letter. Mr. Vito is the owner of Sea Lovers Marina, a competitor to the petitioner who's credibility should be put under a microscope, specially considering that the USACE has notified him of non-compliance with its expansion permits as USACE has deemed he could have over-extended. In addition, no backup is offered to his conclusions. It is particularly worrisome that Sea Lovers Expansion obtained and passed thru the Consistency Determination without any problems and that none of the studies, information, conditions and process requested and applied to the present case were requested or applied to Sea Lovers Expansion which is located in the same Bay. From a mere inspection of the file it can be noted that two different measuring stakes have been applied.

14. On March 5, 2003 "VMYH" responded to the PRPB's January 30, 2003 letter submitting the newly requested information regarding parking, as well as a reference to the letters addressing Mr. Vito's comments. Again Sea Lover's Marina issue was covered, stating that the distances and clearances were more than appropriate as the industry standard is one and a half times the length of the vessel (Sea Lovers Vessels are no more than 40' so a clearance of 60' would be adequate. The proposed distances are 150' at the main breakwater and 75' from the maximum clearance of vessels of the end docks of the Sea Lover's Expansion. Again it was expressed that the

review period should have commenced on April 5, 2002.

15. On July 9, 2003 the PRPB submitted copies of letters received from agencies and individuals and requested basically the same information and issues covered in the previous letters. At this time, without notice 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.<sup>9</sup> 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.<sup>10</sup>

16. On July 11, 2003 the PRPB was copied with a letter sent by Petitioner thru its agent Environmental Permitting, Inc. to the "USACE" submitting Bathymetry Analysis, Wave Refraction/ Defraction and Analysis for the Breakwater prepared by Dr. Alfredo Torruellas, Ph.D. of Caribbean Oceanography Group. It also includes the site plan with distances, and aerial photograph with the marine chart, existing marinas, Sea Lover's expansion and the proposed VMYH expansion. This reports covered all aspects of the proposed expansion, the breakwater design, stability and function, the currents, etc. (EXHIBIT G)

17. On July 29, 2003 Petitioner responded to the PRPB's July 9 letter addressing again

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<sup>8</sup> Again the PRPB did not follow the Section 930.60(a)(1).

<sup>9</sup> Although the review period commencement date was not mentioned, in the PRPB objection letter dated September 26, 2003 it is said that it began on March 5, 2003 when the application was considered complete. Again in violation of the Act.

<sup>10</sup> As additional complications and inapplicable procedures, the PRPB in section 3 of the letter requires that the proposal had to be evaluated under a Site Approval process ("Consulta de Ubicación") clearly a process not covered and contrary to the Act.

issue by issue and making reference to the submitted studies. DNER issues were addressed as the NOAA Fisheries had expressed no danger to marine resources, Fish And Wild Life had issued a non-jeopardy opinion and its comments had already been incorporated to the expansion and that Sea Grant had endorsed the project. Again, the issue of local fishermen and Sea Lovers was covered in detail, providing the explanation to the reasoning of the clearances. The issue of the non-applicability of the Site Approval (“Consulta de Ubicación”) process was also covered.

18. It is important to mention that in regards to SHPO, a Phase I Archeological Study had been submitted for the land site and that on December 10, 1992 the “Instituto de Cultura Puertorriqueña” has issued a negative resources opinion. It is obvious that no change could have happen since then. In addition, the expansion does not cover land, thus it would be sub-aquatic resources where the “Consejo para la Conservación y Estudio de Sitos y Recursos Arqueológicos Subacuáticos” has issued a non jeopardy opinion on August 25, 2000 for the site. Both Documents were submitted to Rose Ortiz of the “PRPB”.

19. It is also important to mention that as expressed in the PRPB’s Objection Letter, the DNER did not submit their comments during the granted period, thus it would not be fair to object on the grounds that DNER needs more time as it is not a justified reason to extend the review period. In fact, in the case of Sea Lovers Marina expansion, the principal objector to the project, it was approved without any comments from the DNRE. (EXHIBIT H)

20. On August 7, 2003 as part of the federal agency (“USACE”) process a meeting with US Coast Guard staff took place and Rose Ortiz from the PRPB was invited by petitioner. In the meeting the project was discussed in terms of navigational safety and Coast Guard expertise. The US Coast Guard was pleased with the project and has not issued any comments or requirements to

date, thus its endorsement must be assumed. The proper depths were also confirmed with the US Coast Guard.

19. 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.<sup>11</sup>

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

21. Appellant filed a Request for Reconsideration to the PRPB but no answer was ever received.

### DISCUSSION OF THE OBJECTIONS

1 The PRPB recaps the comments by agencies and individuals, so we will again engage issue by issue, expressing why it should not be a ground to object;

**DNER:** First of all, as admitted by the “PRPB”, **the DNER did not submit their comments during the granted period.** In any case all concerns have been addressed in the environmental document and supporting studies. In terms of design and functionality of the breakwater, navigation safety and environmental concerns, they have been covered in all studies submitted. The DNER in turn deferred the issue to the federal agency “USACE” who is the agency in charge of the permit for the expansion and with the expertise as the DNER admits.

In addition, no Sub-aquatic Resources have been found, NOAA Fisheries has expressed no danger to marine resources, US Fish and Wild Life has issued a non-

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<sup>11</sup> In reality it is Petitioners position that the review period

jeopardy opinion and its comments have already been incorporated to the expansion plans.

**EQB:** The EQB has stated in relation to the 125 marina expansion that the Joint Application Process was complete and that once the federal agency determination on the Joint Application the EQB would the “proceed with the corresponding action”. See letter dated May 18, 2000 from the EQB (EXHIBIT D).

“VMYH” has submitted since the beginning an environmental document in compliance with the law, it would be the “PRPB” and the Consistency division at fault for not procuring such endorsement as proponent agency.

**Proponent understands it has complied and that such endorsement was not a condition stated in the July 9, 2003 letter.**

**FWS:** US Fish and Wild Life has issued a non-jeopardy opinion and its comments have already been incorporated to the expansion plans.

**NMFS:** ENDORSED. NOAA Fisheries has expressed no danger to marine resources

**SHPO:** Required Phase I. A Phase I Archeological Study had been submitted for the land site and that on December 10, 1992 the “Instituto de Cultura Puertorriqueña” has issue a negative resources opinion. It is obvious that no change could have happen since then. In addition, the expansion does not cover land, thus it would be sub-aquatic resources where the “Consejo para la Conservación y estudio de Sitos y Recursos Arqueológicos Subacuáticos” has issued an non jeopardy opinion on August 25, 2000 for the site. Both Documents

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had expired as it should have commenced on April 5, 2002.

were submitted to Rose Ortiz of the “PRPB”.

**SEA GRANT:ENDORSED THE PROJECT.** The program from the University of Puerto Rico expressed that in terms of use planning and conservation of the environment it is better to expand existing marinas such as Villa Marina in a already impacted area (Sardinera Bay) than to impact new areas by building new marinas to accommodate high demand of pier space.

**Fisherman Asociation:** As expressed in all our documentation covering their concerns, the channels are appropriate and the new breakwater will not only create a more stable bay but will protect better their small boats.

**Mr. Inserni and Vito’s Comments:** they have been addressed in multiple occasions. Vito is the owner of Sea Lover’s marina a direct competitor with a personal agenda. They have not provided basis for their allegations and furthermore Mr. Vito has been involved in a USACE investigation regarding over extension of the approved expansion. His interests and intentions are obvious. As already mentioned from a review of the Sea Lover’s expansion it can be noted that his approval was quick and easy, with none of the requirements the PRPB now applying to VMYH. The process itself has been abusive and discriminatory.

2. The PRPB objection is allegedly based on PRCMP policies numbers 30.00, 30.01, 30.02 exclusively in regards to the need for compliance with Article 4(c) of the Environmental Policy Law (Law number 9 of June 18, 1970) and makes no other connection to the facts of the case. It is VMYH contention that it has complied with Article 4(c) as it has submitted an Environmental Document that was commented by the EQB and its observations included as it was deemed ready for Public Notice to convert into a Negative Environmental Impact Declaration (DIA-N), which is not a requisite for the Consistency Program. In addition, the EQB has stated in relation to the 125 marina expansion that the Joint Application Process was complete and that once

the federal agency determination on the Joint Application the EQB would the “proceed with the corresponding action”. See letter dated May 18, 2000 from the EQB.

3. In addition, the “PRPB” objection is allegedly based on “PRCMP” policy number 30.07. It then proceeds to require 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.

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. Sea Grant from the University of Puerto Rico expressed the clear justification in terms of public need, resource management and use planning that is better to expand an existing marina in an impacted area than to impact new areas. The public access will be unobstructed as more than adequate navigational channels are present in the proposed expansion, as well as harmony with other marinas as the only objection from the marinas is Sea Lover’s Marina that we have provided adequate clearances.

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 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.

**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.**

As expressed by NOAA in its 30 year celebration:

“The nation’s coastal and ocean resources are under increasing pressure from population growth and development. Coastal areas host over 50% of the total U.S. population within only 17% of the nation’s land area. Between 1994 and 2015, coastal population is projected to increase by 28 million people. This movement to the coast has presented difficult challenges for coastal resource managers.”

Accordingly, expanding an existing marine better preserves the fundamental objectives, also identified in the 30 year celebration; State and federal coastal zone management efforts are guided by the CZMP's Strategic Framework, which is organized around three major themes: **Sustain Coastal Communities, Sustain Coastal Ecosystems, and Improve Government Efficiency.**

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

- Protect natural resources
  - Manage development in high hazard areas
- Manage development to achieve quality coastal waters
- **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**
  - Provide public access for recreation**
- **Redevelop urban waterfronts and ports, and preserve and restore historic, cultural, and esthetic coastal features**
  - Simplify and expedite governmental decision-making actions
  - Coordinate state and federal actions
  - Give adequate consideration to the views of federal agencies
  - Assure that the public and local government have a say in coastal decision-making
- Comprehensively plan for and manage living marine resources

**CONDITIONS TO CONDUCT PROPOSED ACTIVITY  
IN A MANNER CONSISTENT WITH PRCMP**

The "PRPB" stated three (3) requirements "In order to conduct the proposed activity in a manner consistent with PRCMP"

- a. **Revise the project plan to address the issues raised by Vito (Sea Lover's Marina), to include bathymetry and correct dimensions of the Sardinera Bay.**

It is Incredible that the Sea Lover's issue was part of the objection letter, as if it was not addressed. The issues raised by Vito, a direct competitor with a personal agenda and interests and who has been a target of investigations by the "USACE" for violation to the permit for the marina expansion, have been addressed in at least 5 occasions.<sup>12</sup> In addition, a new bathymetry study was submitted since July , 2003 including the correct dimensions of the Sardinera Bay by aerial photo with superimposed existing and proposed expansion and site plan with correct dimensions and clearances.

This condition has already been met.

- b. **Review the Environmental Document to include the most recently submitted studies and including the DNER requirements.**

The recently submitted studies have been made in support to the environmental document which has been reviewed and commented by all agencies and has incorporated all issues and concerns. The new studies cover by themselves all issues regarding the breakwater, wave refraction, bathymetry, etc. The revised Descriptive Memorial serves as the basis for the

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<sup>12</sup> An investigation in connection with the handling of the present case as well as the Sea Lover's case is in order, and Petitioner is considering filing request for investigation as it is too much of a coincidence that Sea Lovers Permit, which was filed after VMYH original request, was granted with minimal requirements, and VMYH has been objected with no basis and the PRPB has violated procedures of the Act, and part of the objection is based on Vito's comments.

development. We believe the Environmental Document prepared by Ecosystems and Associates as well as the new studies in support prepared by Dr. Torruella comply with such requirement.

**c. EQB Endorsement about compliance with Article 4(c).**

The “PRPB” instruction to procure such endorsement thru the DNER processing of an application for a “Submerged Land Use Concession” and DNER as proponent agency can not be applied in the instant case and is not compatible with the ACT. VMYH submitted its Environmental Document under the current Coastal Zone Management Consistency Determination process, thus the PRPB had to be the proponent agency. VMYH can not procure a Concession License and pay for the fees until the federal agency has approved the expansion over the finalized submerged lands. The federal permit can not be issued until the Consistency Certification has been issued. It seems the CZ department did not handle the Environmental Document properly and now wants to put the blame on petitioner.

In any case, The EQB has stated in relation to the 125 marina expansion that the Joint Application Process was complete and that once the federal agency determination on the Joint Application the EQB would the “proceed with the corresponding action”. It seems the EQB understands this is a federal permitting process and compliance has been made in terms of 4(c) with the submission of the environmental document.

“VMYH” has submitted since the beginning an environmental document in compliance with the law, it would be the “PRPB” and the Consistency division at fault for not procuring such endorsement as proponent agency as required by the Certification Process, it can not divert the responsibility through a different process and agency.

Proponent understands it has complied and that such endorsement was not a condition stated in the July 9, 2003 letter, and thus can not be a condition for objection.

**CONCLUSION AND REQUEST**

“VMYH” believes that the proposed expansion, which was already approved and

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 \_\_\_th day of February 2003.**

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  
San Juan, Puerto Rico 000940-1119**

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

  
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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 \_\_\_th day of February 2003.

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

**Secretary Of Commerce**  
**United States Department of Commerce**  
**Att. Molly Holt**  
National Oceanic and Atmospheric 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 States Army Corps of Engineers**  
**Attention: Edwin Muñiz,**  
400 Fernández Juncos Avenue,  
San Juan, Puerto Rico 00901-3299.

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