



DEPARTMENT OF DEFENSE
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
ATILLES OFFICE
400 FERNANDEZ JUNCOS AVENUE
SAN JUAN, PUERTO RICO 00901-3299
December 22, 2010

Antilles Regulatory Section
SAJ-2010-02881 (IP-EWG)

Eng. Francisco E. Lopez
Autoridad de Energía Eléctrica
P.O. Box 364267
San Juan 00936-4267

Dear Mr. Lopez:

Reference is made to your Department of the Army (DA) permit application, submitted through Joint Permit Application Number 1059, of September 20, 2010 for the Via Verde Natural Gas Pipeline (NGPL) project. The proposal is to construct and install a 24-inch diameter steel NGPL for approximately 92 miles with a construction right-of way (ROW) of 150 feet wide, that transverses the island of Puerto Rico from the Eco Eléctrica Liquid Natural Gas Terminal in municipality of Peñuelas, to the Cambalache Termoeléctrica electric power plant in the municipality of Arecibo, then east to the Palo Seco facility in the municipalities of Toa Baja and San Juan. The pipeline route will encompass both private and public lands which include commercial, industrial, and agricultural land uses. The total project area is about 1,672 acres that will impact 235 river and wetland crossings, for a total of 369 acres of jurisdictional Waters of the United States. Please refer to case number SAJ-2010-02881 (IP-EWG) in future correspondence regarding this project.

We also make reference to meetings held on October 26, 27 and 28, 2010 with US Fish and Wildlife Service (FWS), State Historic Preservation Office (SHPO) and Federal Highway Administration (FHA) respectively, in which the requirements managed by each agency were discussed with members of your consulting firm.

A careful review of your project and preliminary review of the comments from resource agencies and the public has revealed various environmental and public interest concerns which cannot be adequately evaluated with the information at hand. As discussed with your contractor and the other resource agencies in previous meetings, the information on record does not fully address the public interest factors and information of the Via Verde NGPL project regarding public safety, environmental impacts, endangered species, habitat conservation and historic properties required for the Corps to adopt a position in the review process at this point.

Although you provided information with your permit application that address some of the comments herein provided, please be advised that the information and or referenced materials provided is largely deficient, very conceptual, and failed to adequately address the issues raised by the agencies and the general public. We believe PREPA (Spell)

needs to provide a more comprehensive and detailed response to address the issues of concern. Furthermore, the Corps believes that project impacts have not been adequately quantified; thus precluding proper evaluation of the project's direct and secondary impacts on the aquatic environment. We are concerned about the potential direct, indirect, and cumulative impacts of the project on the aquatic resources.

As part of the permit application you provided detailed maps and drawings depicting locations of most of the jurisdictional areas within the proposed route and ROW. However, a review of the National Wetland inventories revealed the existence of jurisdictional areas that were not identified or accounted for in the Jurisdictional Determination (JD) submitted as part of the permit application. Please be advised that these areas will be eventually ground-truth during a jurisdictional determination site visit, which would be coordinated in the near future.

The Corps evaluated the alternative analysis submitted as part of the permit application, and found it deficient in scope and detail, as it does not focus on minimization of impacts to jurisdictional areas and it rather provides a route selection matrix overview of additional project routes. Although the applicant's has outlined other alternatives considered for the development of the alignment, we still believe that the analysis is largely qualitative and lacks sufficient details for an adequate review. The analysis mentions the rationale for the final selection of the preferred route; however, it fails to provide a quantification of the impacts, costs, and other issues that were crucial in the final selection.

Also, as per FWS letter of December 15, 2010, enclosure 1, the Eco Eléctrica facility has not contemplated the construction of a connection or modification to connect the Via Verde Project. Also, the letter stated that the storage capacity of the facility is not sufficient to provide services to the new Via Verde Project. Furthermore, informal conversations with Mr. Daniel Pagan on December 20, 2010, revealed that PREPA has contemplated a natural gas barge offload option off a small key near the Eco Eléctrica plant that can provide the capacity needed to provide natural gas to the Via Verde project with modification to the infrastructure of the key. Such infrastructure modification would have to be part of this permit evaluation, and the aforementioned option has not been discussed in the alternative analysis provided with permit application. The U.S. Army Corps of Engineers (Corps) believes that without an actual connection to a natural gas supply system the Via Verde natural gas pipeline cannot be considered under the National Environmental Policy Act as a single and complete project.

The Postal Office returned several Public Notices due to insufficient addresses. It is the Corps responsibility to notify the public of projects adjoining their properties. You could either, obtain correct mailing addresses and forward it to this office or hand deliver it to the adjoining property owner. If to be delivered, then a return receipt is requested. Be advised that we would grant these neighbors an additional 30-day comment period.

Attached is a list of the letters received in response to the Public Notice issued for the above referenced permit application. Copies of the response letters are also enclosed. The following paragraphs summarize the comments provided in those letters. Please review and provide a detailed written response to each of the issues raised in said letters. To expedite the evaluation of your permit application, we request your response be provided in English.

The National Marine Fisheries Service (NMFS), Protected Resources Division (PRD) by email dated November 19, 2010, indicated that a preliminary review of the available documentation suggested that the project will likely require consultation with said agency pursuant to Section 7 of the Endangered Species Act. Furthermore NMFS Essential Fish Habitat by letter dated December 19, 2010, stated that the service would require consultation under Magnuson Stevens Act due to the potential presence of important essential fish habitats.

FWS, by letter dated December 15, 2010, Boquerón Field Office stressed the need for the development of a Biological Assessment to address more than 32 ESA species potentially encountered on the project path, adherence with NEPA requirements of a single and complete project, alternative analysis, habitat impacts and mitigation. FWS further recommends that the permit be denied as currently proposed.

Federal Highway Administration (FHWA), by email dated December 17, 2010, stated that the "Policy on the Accommodation of Utilities on Highways Right of Way" adopted by the Puerto Rico Highway and Transportation Authority (PRHTA) and approved by FHWA on May 30, 1990 does not include longitudinal installation of pipeline conveying gas, oil, gasoline and other flammable or dangerous substances within the control access lines of controlled-access highways nor within tunnels or on major bridges. Hence, a project level agreement for this particular utility accommodation would be needed.

SHPO, by letter dated September 17, 2010, stated that in accordance with the consultation requirements pursuant to Section 106 of the National Historic Preservation Act (NHPA), a Cultural Resource Assessment (Phase 1A and Phase 1B) will be required to identify the presence/absence of cultural resources of archaeological/historic significance within the project's area of potential effects. No position can be provided until Phase 1A and 1B are finalized and the data is evaluated.

The Environmental Protection Agency (EPA) by letter of December 21, 2010, recommended the permit for the project be denied, since the project has the potential to cause or contribute to significant degradation of waters of the U.S., including aquatic resources of national importance, and therefore, does not comply with Section 404(b)1 Guidelines. Also EPA recommends the development of an Environmental Impact Statement (EIS).

The College of Engineers and Surveyors of Puerto Rico (CIAPR) by letter of December 17, 2010 suggest that there are other alternatives such as the use of the Costa Sur complex in combination with the Aguirre Power Plant which can generate 73% of the Island electricity.

The Sierra Club stressed by way of its membership that they are opposed to the project and requested that Corps hold public hearings (PH) and prepare an EIS.

The general public, interest groups, and others, sustained that they are opposed to the project, the project has not addressed property rights, environmental impacts, ESA, EFH, habitat conservation, potential safety risks, health hazards and its effects on the nearby communities; the lack of discussion of alternatives regarding alternative renewable resources, which also minimize impacts to the aquatic resources.

After reviewing the responses stated above, the Corps agrees with the comments from the resource agencies and the general public, and reserves the option to request an EIS and hold a PH. A comprehensive and detailed rebuttal on the comments from the agencies must be provided. Any other information you feel may be helpful in order to fully justify the proposal should also be submitted at this time.

As required by NEPA and the Clean Water Act (CWA) Section 404(b)(1) Guidelines, the Corps must consider a broad range of alternatives during the evaluation of a permit application. Under these regulations, the Corps must give detailed consideration to practicable alternatives that focus on the accomplishment of the applicant's and the public's interest and needs. The regulations define a practicable alternative as an alternative that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. The Corps is neither a proponent nor an opponent of the applicant's proposal which will be identified as the "applicant's preferred alternative." However, 40 CFR Part 230.10(a) allows permit issuance for only the least environmentally damaging practicable project alternative. That is, no discharge of dredged or fill material shall be permitted if there is a practicable alternative, which would have less adverse impact on the aquatic ecosystem providing the alternative does not have other significant adverse environmental consequences.

Further, pursuant to 33 CFR Part 320.4, the Corps must evaluate the project to ensure that it would not be contrary to the public interest. In that regard, the Corps must assess the relative extent of the public and private need for the project, and the extent and permanence of the beneficial and/or detrimental effects that the project is likely to have on the public and private uses to which the area is suited. In addition, the Corps must evaluate the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed work or structure.

We are concerned about the potential direct, indirect, and cumulative impacts of the proposed project on the aquatic resources. In order to implement the procedural provisions of NEPA and complete our regulatory analysis of compliance with Section 404(b)(1) guidelines and the public interest review factors we request your submittal of the following information:

- a) **Alternative Sites Analysis:** Please submit an analysis describing alternative energy solutions, alternative sites considered to locate the proposed project, including the Gasoducto del Sur. The purpose of such analysis is to clearly establish and document that the preferred and proposed alternative is the least environmentally damaging practicable project alternative. As part of this alternatives analysis we request that you: (1) define a set of criteria for site evaluation; (2) define a system to rate a site against each of the criteria; (3) describe a method to comparatively weigh each rating as to its importance; and (4) prepare a report describing the search for the sites, identification of their location and rating, and a narrative which shows which site is the preferred alternative.
- b) **Avoidance and Minimization:** Please provide documentation of your evaluation of practicable modifications or alternatives to the project layout or design, which could prevent and/or minimize impacts to waters of the United States and the aquatic environment, and discuss why the proposed impacts could not be minimized any further. In this regard, please evaluate and discuss the practicability of reducing the size of the proposed structures, and relocating, modifying or eliminating some of the project components to avoid and minimize the project's direct, indirect and cumulative impacts.
- c) **Compensatory Mitigation** Your application did not include any compensatory mitigation plan designed to offset impacts to 369 acres of waters of the U.S. As outlined in the 1990 Memorandum of Agreement between the DA and EPA concerning the determination of mitigation under the CWA, mitigation should only be considered after all practicable measures have been made to avoid and/or minimize wetlands impacts. Upon demonstrating that the proposed project represents the least-environmentally damaging practicable alternative, and after all effort has been made to avoid and/or minimize wetland impacts, you must provide a mitigation plan to offset unavoidable wetland impacts. The Compensatory Mitigation Plan shall discuss feasible measures, which would be implemented to compensate for the project's unavoidable direct, indirect and cumulative impacts to the aquatic environment. This is for proposed impacts that cannot be avoided or minimized. The purpose of this plan is to show how compensatory work would balance the impacts of the project. Your mitigation and monitoring plan must be approved prior to issuance of a DA permit. Your mitigation and monitoring plan should include the following twelve fundamental components: 1) objectives (restoration, enhancement, etc.), 2) site selection

criteria, 3) site protection instruments (e.g., conservation easement), 4) baseline information for impact and compensation sites (reference to each wetland impact and mitigation polygon should be based on an accepted wetland classification system (i.e., FLUCCS, or FNAI)), 5) credit determination methodology, 6) mitigation work plan (e.g., a description of all wetland and upland enhancement and restoration activities to include prescribed fire, pine canopy thinning, exotics removal, culvert installation, grading, gyro-tracking, and planting, and timeframes for initiation and completion), 7) maintenance plan with schedule 8) ecological performance standards (e.g., should be measurable and attainable). 9) monitoring requirements (e.g., quantitative and qualitative vegetative community analysis), 10) long-term management plan, 11) adaptive management plan, and 12) financial assurances (e.g., please reference Regulatory Guidance Letter 05-1: *Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds* for your edification on types of financial assurance).

- d) Wetlands: Please provide an assessment of all direct, indirect, and secondary impacts, and mitigation activities. Secondary impacts should be assessed for all wetlands (except those targeted for direct impact) both on and off the project impact site, which fall within 300' of the development footprint. We request that as part of the above mentioned mitigation efforts (including avoidance, minimization and compensation) for the proposed project you consider further measures to prevent and minimize impacts, and offset the project's unavoidable impacts to jurisdictional areas. Also, please describe which measures would be implemented during the construction and operation of the project to minimize such impacts.
- e) The Corps concurs with the comments expressed by the agencies with regards to Horizontal Directional Drilling (HDD). As stated by the agencies, the use of HDD in the Karst region shall be fully assessed and evaluated. In previous projects the Corps has discovered that bentonite mud was accidentally released, resulting in detrimental consequences. Also, as part of the permit application a Frac-Out Plan was provided that stated that "pits" would be constructed to collect return mud. The plan also states that the mud would be collected from the "pits" and taken to a sedimentation pond where the sterile residuals are separated to be reused. Residuals are listed as bentonite, polymers, and surfactants. It is not clear if the "pits" or the sedimentation ponds are lined to avoid contaminant discharge, nor how many sedimentation ponds would be constructed. Also, the plan mentions the use of dye tracers, the use of such tracer would need to be coordinated with the EPA.

- f) Fish and Wildlife Values: Please respond to the comments provided by FWS and NMFS in the attached communications. All the concerns presented by these resource agencies would have to be fully addressed during our evaluation and coordination of the permit application to initiate consultation under Magnuson Stevens Act.
- g) Threatened & Endangered Species: Please review FWS and NMFS in the attached letters. This information will be necessary to initiate consultation with NMFS and FWS, under Section 7 of the ESA.
- h) Cultural Resources: Please inform us of the progress with regards to providing a complete Phase IA and Phase IB Archaeological Studies for the project; we request that you please provide us with copies of any pertaining correspondence and documentation exchanged with SHPO.
- i) Infrastructure and Utilities – Please provide evidence of your coordination with the appropriate Commonwealth of Puerto Rico government agencies for the evaluation of the project's proposed plan for obtaining and providing utilities and services including to carry out your project.
- j) Cumulative Impacts: In order for the Corps to consider environmental cumulative impacts of the proposed project, we request to provide information regarding other existing, in progress or proposed projects that could affect the aquatic resources to be impacted by the development of the proposed project. In particular, please provide information regarding your evaluation of potential past, present and foreseeable future environmental impacts of the proposed action in relation to such projects and describe the corresponding minimization and mitigation measurements being proposed. In this regard future expansions of PR-22, construction of PR-10, Waste to Energy plant in Arecibo are examples of projects that need to be considered in the analysis.
- k) Please provide a map depicting the proposed staging areas and access roads. The Corps is concerned about the presence of wetland areas in or immediately adjacent to the proposed right-of-ways. Please explain what preventive measure would be implemented by PREPA to avoid additional impacts into these areas during construction activities.
- l) Water Quality: Please describe the potential impacts of the proposed project on water quality and the measures to be implemented during the project construction and operation to avoid and minimize such impacts. In this regard, please describe in particular the measures that would be implemented to avoid and minimize the potential adverse environmental effects of accidental leaks into the aquatic environment.

m) You are reminded that two necessary prerequisites to the issuance of a DA permit for your project are the issuance Water Quality Certification and a Coastal Zone Management (CZM) Consistency Certification by Puerto Rico's Environmental Quality Board, and the Planning Board, CZM office. Therefore, keep this office informed of the status of your applications for these certifications. In this regard, please provide us with copies of any requests for information that you may have received from any of these agencies and your corresponding responses, and clarify any project modifications that may have resulted from your coordination.

Please provide information pursuant to Section 176(c) of the Clean Air Act regarding whether your proposal will not exceed de minimis levels of direct or indirect emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153.

Your application will be held in abeyance for 45 days pending receipt of your response. If within the next 45 days from the date of this letter we have not received a written communication from you, we will take final action on your Department of the Army permit application. Final action could include withdrawal or denial of your permit application. Should the file be withdrawn, it will be retained for a period of one year.

You are cautioned that any work performed below the mean high waterline or ordinary high waterline in waters of the United States, or the discharge of dredged or fill material into adjacent wetlands, without a DA permit could be subject to enforcement action. Receipt of a permit or endorsement from other agency does not obviate the requirement for obtaining a DA permit for the work described above prior to commencing work.

If you have any questions or comments regarding this case, you may contact Mr. [REDACTED], at telephone numbers 729-6905/6944 ext. 3059, or at the letterhead address.

Exemption (b)(6) Exemption (b)(6)
Sincerely,
Exemption (b)(6)

[REDACTED]
Antilles Regulatory Section

Enclosures – Attached CD

Copy to:
Mr. Larry Evans
BC Peabody Consulting, P.A.
509 Guisando de Avila, Suite 100
Tampa, FL 33613