

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

***RESPONSE OF THE TOWN OF NEW SHOREHAM TO
BLUEWATER, LLC'S FILING OF OCTOBER 9, 2015***

Bluewater, LLC ("Bluewater") filed with the Division of Public Utilities and Carriers ("Division") on October 9, 2015, a memorandum wherein it contended that it has a realistic expectation of being able to develop a docking facility in Old Harbor. Based upon that filing, the Division concluded that Bluewater had a realistic expectation of being able to develop a docking facility in Old Harbor. The Town of New Shoreham ("Town") filed a motion to reconsider and requested an opportunity to respond and to provide evidence which demonstrates that Bluewater does not have a realistic expectation being able to develop a docking facility in Old Harbor. The Division has granted the Town's motion and in furtherance thereof, the Town submits this memorandum.

In support of its assertion, Bluewater attached to its filing a diagram (Schedule A) which contains a drawing of two purported docking facilities. This diagram is referred to herein as the "Purported Docking Facilities Diagram." It is the position of the Town that Bluewater does not have a realistic expectation of being able to develop either purported docking facility because the consent of the Town is required for the permitting process and construction process to go forward at both of these proposed docking facilities.

The Purported Docking Facilities Diagram depicts the following two proposed docking facilities:

1. A docking facility to be located at the Northerly Ell of the inner harbor along the Red Breakwater. This proposed docking facility is referred to herein as the "Northerly Ell/Red Breakwater proposed docking facility."

2. A docking facility along the East Breakwater of the Old Harbor which connects to the Town's Bait Dock. This proposed docking facility is referred to herein as the "East Breakwater proposed docking facility."

Each of these proposed docking facilities is addressed separately in this memorandum.

I. **THE NORTHERLY ELL/RED BREAKWATER PROPOSED DOCKING FACILITY**

A. **Construction of the proposed docking facility requires the consent of the Town.**

The Northerly Ell/Red Breakwater proposed docking facility as depicted in the Purported Docking Facilities Diagram (Schedule A) runs along the Red Breakwater of the Northerly Ell of the inner harbor. Pursuant to state law, the construction of any such docking facility requires the assent of the State of Rhode Island Coastal Resources Management Council ("CRMC"). The Northerly Ell/Red Breakwater was deauthorized by the United States Army Corps of Engineers ("USACE") and is now owned by the State of Rhode Island.

The construction of a docking facility at this location requires the assent of the CRMC. Bluewater, in its filing, also concedes that the docking facility must be approved by the CRMC as stated in the October 8, 2015 letter of Bluewater's engineer which is attached to Bluewater's filing. In that letter, the engineer acknowledges that the proposed dock is located in CRMC Type 5 Waters and requires CRMC approval. As certified by the Executive Director of the CRMC (Schedule B), the CRMC will not approve construction of this docking facility without the

Town's approval and consent.

By lease dated April 1, 2012 ("CRMC Lease"), the CRMC leased the Northerly Ell/Red Breakwater to the Town for a term of fifty years beginning on April 1, 2012 and ending on April 1, 2062. Pursuant to the express terms of the CRMC Lease, the Town has the right "to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the Town shall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair." (Lease, Article V, Exhibit A to Schedule B emphasis added)

The Town, pursuant to the CRMC Lease, has been given the right to construct and operate a dock on or near the Northerly Ell/Red Breakwater for the next fifty years, and no other person or entity can construct any such dock without the express written consent of the Town as set forth in the statement of Grover Fugate, the Executive Director of the CRMC (Schedule B). The exhibits to the Executive Director's statement are the Lease (Exhibit A to the statement) and a map indicating the area of the leased premises in Old Harbor (Exhibit B to the statement). In his statement, the CRMC Executive Director confirms that the Red Breakwater, also known as the Northerly Ell, within the Old Harbor is the property of the State of Rhode Island and is "managed and controlled by the Town pursuant to the Lease." (emphasis added)

The CRMC Executive Director clearly states that the construction of a dock at the Northerly Ell/Red Breakwater requires the consent of the Town and, furthermore, that the Town would have to be a party to any request for such an assent. As all parties are aware, the Town Council has voted to oppose the Rhode Island Fast Ferry's ("RIFF") proposed operation of a ferry service to Old Harbor. Therefore, the Town will not be a party to any request made to the CRMC for such an assent and will not consent to the construction of any such docking facility by

Bluewater or RIFF.

B. Use of the Existing Floating Dock at the Northerly Ell/Red Breakwater to move passengers of the private ferry to the land and the proposed alternate access extension of the dock to the land behind the Existing Floating Dock both require the consent of Ballard's Wharf Realty, LLC., which has denied its consent in writing.

It is important to note that even if the CRMC were not involved in the docking facility approval process which it clearly is, there cannot be a reasonable expectation that a docking facility for a private passenger ferry service will be constructed if there is no way to get the private passenger ferry customers from the dock to the land and from the land to the dock. The Purported Docking Facilities Diagram depicts at the site of the Northerly Ell/Red Breakwater passenger access from the dock to the land through the "Existing Floating Dock," which is owned by Ballard's Wharf Realty LLC. The Purported Docking Facilities Diagram also depicts at the site of the Northerly Ell/Red Breakwater a proposed "Alternate Access" extension of the dock to Lot 159 on Plat 6. See attached Town of New Shoreham Plat/Lot Map of Old Harbor (Schedule C).

Plat 6, Lot 159 is owned by Ballard's Wharf Realty, LLC. (Schedule D-New Shoreham Tax Assessor Statement of Ownership). The manager of Ballard's Wharf Realty LLC is Blake Filippi (Schedule E-Ballard's Wharf Realty LLC 2015 Annual Report). Blake Filippi, a member of the Rhode Island House of Representatives who serves as the state representative for the people of New Shoreham, has expressed his opposition to the RIFF proposed ferry service and has repeatedly stated that he will not support it. It is no surprise then, that Bluewater has been unable to demonstrate any right to use the Existing Floating Dock to move passengers to the land

or to extend construction of the dock to Lot 159 to create the "Alternate Access." To the contrary, attached to this memorandum as Schedule F is the statement of Blake Filippi, the manager of Ballard's Wharf Realty LLC, wherein he states that Ballard's Wharf Realty LLC has not allowed Bluewater to utilize Ballard's Wharf Realty LLC's riparian/littoral rights, nor has Ballard's Wharf Realty LLC agreed to allow Bluewater's proposed pier to connect to Ballard's Wharf Realty LLC's marine facility (the "Existing Floating Dock"). Accordingly, Bluewater cannot use either the "Existing Floating Dock" or the "Alternate Access" dock extension to move passengers from its ferries to and from the land despite the depictions in the Purported Docking Facilities Diagram.

Without a method of moving private passenger ferry customers to and from the land, the construction of such a docking facility is nonsensical.

For the foregoing reasons, it is clear that Bluewater does not have a realistic expectation of being able to develop a docking facility at the Northerly Ell/Red Breakwater location.

II. **THE EAST BREAKWATER PROPOSED DOCKING FACILITY**

A. **Construction of the proposed docking facility requires the consent of the Town.**

The East Breakwater proposed docking facility as depicted in the Purported Docking Facilities Diagram runs along the East Breakwater of Old Harbor and connects with a dock directly to the south. It is uncontroverted that construction of any such docking facility requires a CRMC permit. In this regard, please refer to the October 8, 2015 letter of Bluewater's engineer discussed above wherein the engineer unequivocally states that the proposed dock is located in CRMC Type 5 Waters and requires CRMC approval. The CRMC will not approve construction of this proposed docking facility without the Town's approval and consent for the reasons stated below.

Please refer to the Purported Docking Facilities Diagram at the site of the East Breakwater which calls for the construction of a proposed docking facility which connects to an existing grey-colored dock outlined in red. This existing grey-colored dock is known as the Bait Dock. The Bait Dock is owned by the Town and was initially constructed by the Town over fifty years ago (Schedule H-Statement of the New Shoreham Town Manager). The diagram shows that the proposed docking facility connects to the Town's Bait Dock. As certified by the CRMC employee assigned to Block Island who would be part of the CRMC permitting process (Schedule G), any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the Town's Bait Dock must be accompanied by the written approval of the Town as the owner of the Bait Dock. Accordingly, without the Town's consent, the application process cannot move forward.

The building of a docking facility which connects to the Town's Bait Dock requires the consent of the Town as the owner of the dock. The Town Council, which is opposed to RIFF

operating a ferry service to Old Harbor, will not provide any such consent to attach the proposed docking facility to the Town's property or to allow hundreds of private passenger ferry service customers to move back and forth across the Town's Bait Dock.

B. Construction of the "Alternate Access" docking facility requires the consent of the Town as the Licensee of the East Dock.

The East Breakwater "Alternate Access" proposed docking facility as depicted in the Purported Docking Facilities Diagram runs along the East Breakwater of Old Harbor, behind the Town's Bait Dock and connects with a dock known as the East Dock. All parties acknowledge that construction of the "Alternate Access" docking facility requires a CRMC permit. The Town operates, manages, repairs and controls the East Dock through a license agreement with the USACE (Schedule H). As certified by the CRMC employee assigned to Block Island who would be part of the CRMC permitting process (Schedule G), any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the East Dock must be accompanied by the written approval of the owner of the East Dock and also by the written approval of the Town as the licensee of the Bait Dock. Accordingly, without the Town's consent, the application process cannot move forward.

C. Construction of the "Alternate Access" docking facility requires the prior consent of the Town through the Town's issuance of a special use permit prior to CRMC's consideration of an application for a permit to construct the docking facility.

Section 4.2(5) of the regulations pertaining to CRMC Management Procedures adopted on March 24, 2015 provides that all "Applicants shall be required to obtain and certify that they

have in their possession current approvals from municipal bodies which are otherwise required for the proposed action. Municipal approval shall be construed to mean compliance and conformity with all applicable comprehensive plans and zoning ordinances and/or the necessary variance, exception and other special relief therefrom (see RICRMP Section 300.1). However, qualifying businesses may be exempt from this requirement provided they meet the provisions of R.I.G.L. § 42-35-3.5." (R.I.G.L. § 42-35-3.5 is not applicable because it requires a preliminary determination by the municipality that the subject proposal is consistent with the applicable municipal zoning ordinances.)

As stated by the New Shoreham Building Official in Schedule I, the construction of the "Alternate Access" docking facility requires a special use permit and the approval of the Town's Planning Board and the Town's Zoning Board of Review. The "Alternate Access" portion of the docking facility as depicted lies above the mean high water mark and is regulated by the Town pursuant to the Town's zoning power to regulate construction of structures of the upland. Specifically, Section 308 of Article 3 of the Town's Zoning Ordinance is applicable. This section applies to the Waterfront Overlay. The "Alternate Access" docking facility would be located in a Type 5 District which is defined in the Zoning Ordinance as the shoreline of the Old Harbor, from the outer end of the east breakwater to the outer end of the west breakwater. Construction of the Alternate Access docking facility in the Type 5 District requires the issuance by the Town of a special use permit.

Accordingly, without the consent of the Town, Bluewater cannot move forward with the CRMC application process.

It should also be noted that the "Alternate Access" dock portion of the docking facility

runs alongside and behind the Town's Bait Dock. As demonstrated in the diagram, this "Alternate Access" dock blocks the Town's access to northerly and easterly sides of the Town's Bait Dock. The Town will not give its consent to such a structure and any attempt by Bluewater to block the Town's access to its Bait Dock will be met by court action.

D. Construction of the "Alternate Access" docking facility is not permitted by the United States Army Corps of Engineers because it would involve building on or attaching to a federal navigation structure.

The construction of the "Alternate Access" docking facility as shown in the Purported Docking Facilities Diagram is not permitted by the USACE because the Alternate Access portion of the docking facility would be built on or attached to a federal navigation structure. Bluewater, in its filing and in the opinion letter of its attorney, emphasizes that the proposed docking facility would not have "any physical contact with Corps' structures (breakwater) which is often a concern for the Corp." (Bluewater filing p.9) The importance of Bluewater making this point was to address the concern that the USACE does not permit building on or attaching to a physical navigation structure; however, the Alternate Access portion of the docking facility would have physical contact with a USACE structure.

The portion of the docking facility referenced as "Alternate Access" is depicted in the diagram as running parallel to and behind the Town's Bait Dock. The Schedule J photograph shows an individual standing on the USACE breakwater behind the Town's Bait Dock. (Although the Town's Bait Dock rests partially on the breakwater, the Bait Dock was built many years ago and has been grandfathered in.)

It is not disputed that the USACE does not and would not permit the "Alternate Access"

docking facility structure to be built on or attached to a federal navigation structure. Please refer to Schedule K, the statement of Michael E. Walsh, P.E. who is the United States Army Corps of Engineers designated Navigation Project Manager for the Block Island Harbor of Refuge Federal Navigation Project, a USACE civil works project ("Project"). Mr. Walsh clearly states that the USACE has a long standing policy not to allow modification to Federal Navigation Structures, which includes building on or attaching to a structure.

Bluewater cannot submit a Section 408 application which contains the consent of the Town to connect the proposed docking facility to the Town's Bait Dock and the "Alternate Access" proposal is not permitted because it would involve the building of a docking facility which goes on or attaches to the civil works project structure. Even Bluewater, in its filing and exhibits, acknowledges that. Accordingly, Bluewater does not have a realistic expectation of being able to develop a docking facility at this site.

F. Written concurrence of the Town of New Shoreham, a non-federal sponsor of the Project, is required for the proposed alteration prior to USACE approval of a Section 408 request.

Bluewater acknowledges in its filing that prior to moving forward with the construction of a docking facility in Old Harbor, it must also obtain the assent of the USACE through the Section 408 application process.

Schedule L attached to this memorandum is the USACE Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects pursuant to 33 USC 408 ("USACE Project Alteration Guide"). Alteration is discussed in the USACE Project Alteration Guide as follows: "Section 408 authorizes the Secretary of the Army to grant

permission for the alteration or occupation or use of the project if the Secretary determines that the activity will not impair the usefulness of the project. Unless otherwise stated, for ease of reference, the use of the term "alteration" in this document also includes "occupation" and "use." For purposes of this document, the words "alteration" or "alter" refers to any action by any entity other than USACE that builds upon, alters or improves, moves, occupies, or otherwise affects the usefulness, or the structural or ecological integrity, of a USACE project. Alterations also include actions approved as "encroachments" pursuant to 33 CRF 208.10."

Section 6.d. of Schedule L states: "A request for Section 408 permission can originate from a non-federal sponsor or an independent requester. For USACE projects with a non-federal sponsor as described in paragraph 6.e., the requester must either be the non-federal sponsor or have the endorsement of the non-federal sponsor prior to a written request, reference paragraph 7.c.(2), being submitted to USACE." Section 6.e.(2) of Schedule L provides: "For USACE projects that were constructed in whole or in part pursuant to a cost-share agreement with a non-federal sponsor, but are operated and maintained by the USACE, the district will obtain written concurrence by each of the non-federal sponsors for the proposed alteration prior to USACE approval of a Section 408 request."

As the non-federal sponsor (See Schedule H) of the Project, the Town must provide its written consent for the proposed alteration and this written consent must be submitted with Bluewater's application in order to initiate the USACE Section 408 approval process.

III. CONCLUSION

All parties acknowledge that neither of the two proposed docking facilities in Old Harbor can proceed without the approval of both the CRMC and the USACE. The Town has demonstrated that the CRMC will not move forward with an application for a permit to construct either docking facility without the express written consent of the Town. Accordingly, Bluewater does not have a realistic expectation of being able to develop a docking facility in Old Harbor, whether or not the USACE is involved in the process.

In addition, the Town has demonstrated that the USACE Section 408 application requires the consent of the Town. Accordingly, Bluewater does not have a realistic expectation of being able to develop a docking facility in Old Harbor, whether or not the CRMC is involved in the process.

Refusal by either the CRMC or the USACE to allow the permitting application process to move forward without the consent of the Town clearly leads to the conclusion that there is no reasonable expectation of Bluewater or RIFF being able to develop a docking facility in Old Harbor.

Town of New Shoreham,
by its Attorneys,
MEROLLA AND ACCETTURO

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CERTIFICATION

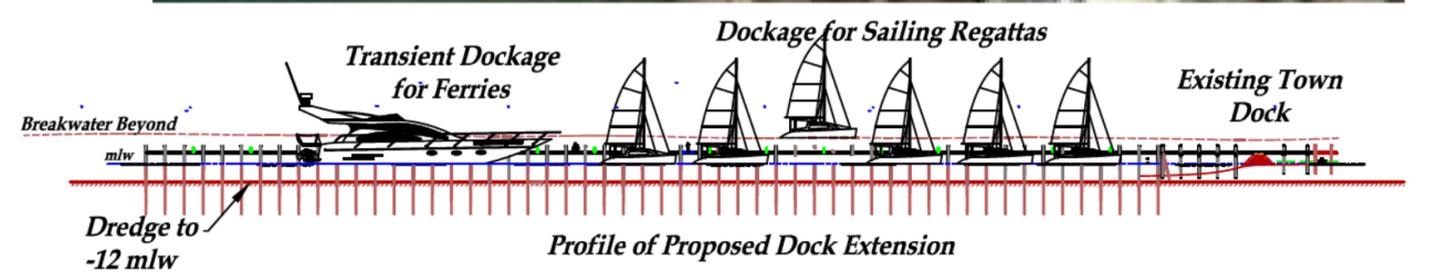
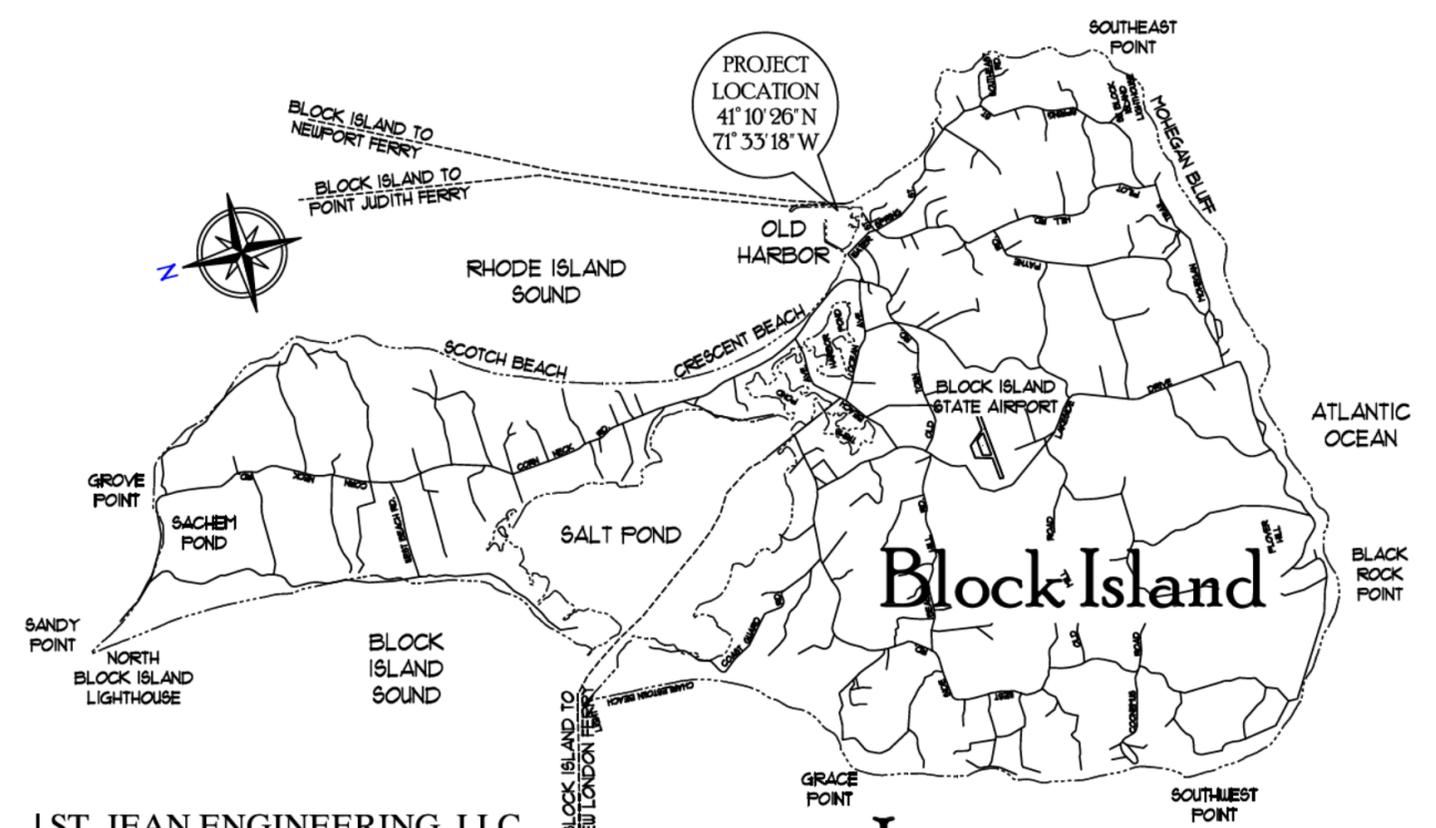
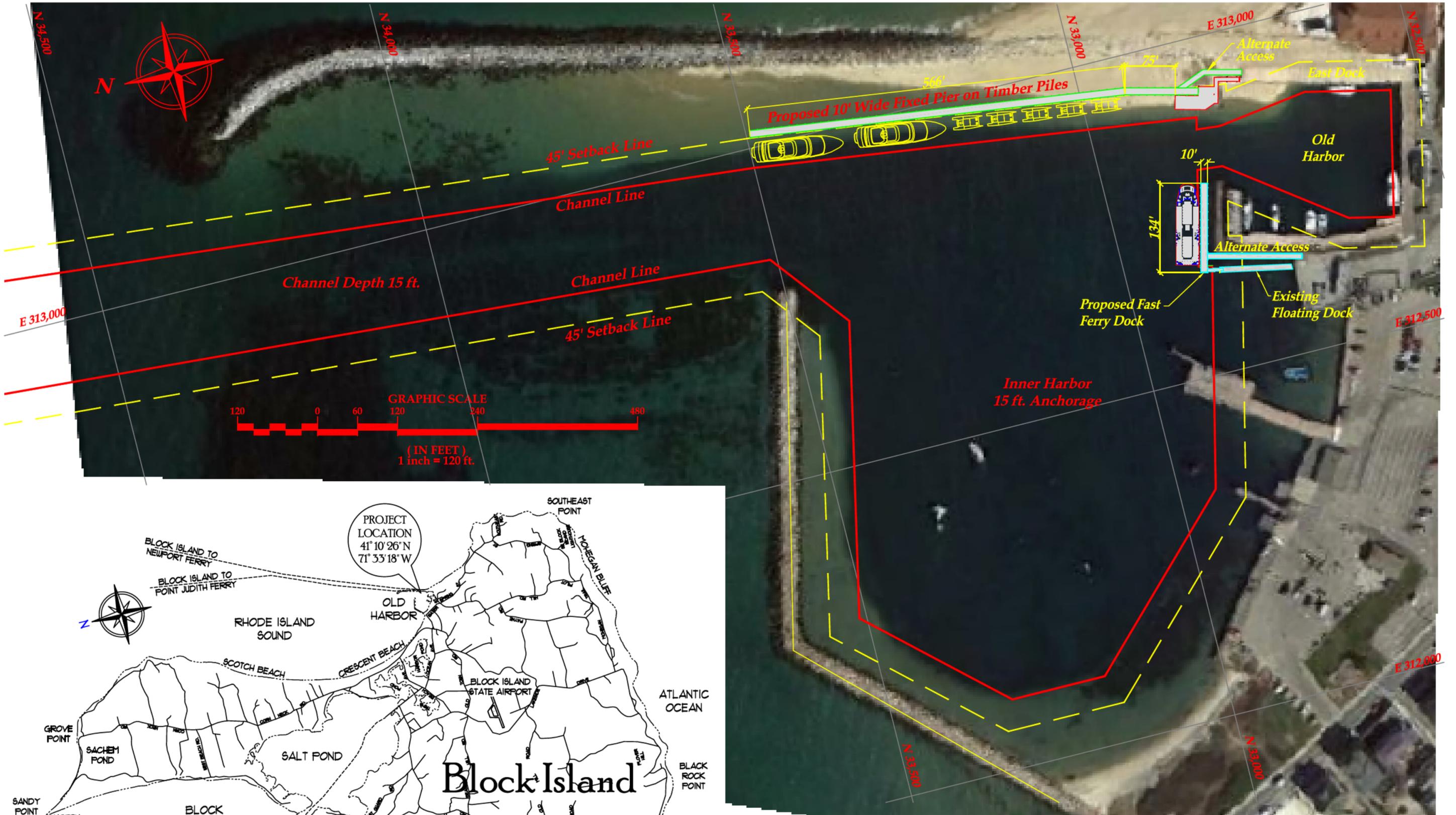
I hereby certify that, on November 5, 2015, I served this document via e-mail on the individuals listed on the attached service list.

/s/ Katherine A. Merolla

Rhode Island Fast Ferry (RIFF) – CPCN Application Docket No. D-13-51
Updated 10-21-15

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SCHEDULE A



ST. JEAN ENGINEERING, LLC
 CIVIL, MARINE AND STRUCTURAL
 CONSULTING ENGINEERING
 1145 Middle Road
 East Greenwich, RI 02818
 Phone: 401.398.0999
 st.jean.engineering@verizon.net

Locus



SCHEDULE B

State of Rhode Island and Providence Plantations
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

(401) 783-3370
Fax (401) 783-3767

RE: CRMC/New Shoreham Lease of Breakwater in Old Harbor

To Whom It May Concern:

I, Grover Fugate, under oath and penalty of perjury, state as follows:

1. I am the Executive Director of the State of Rhode Island Coastal Resources Management Council (CRMC).
2. Attached as Exhibit A to this Affidavit is a true and accurate copy of the Lease between the CRMC and the Town of New Shoreham (Town) for the breakwater/jetty identified with an "X" on the attached Exhibit B. The leased property is sometimes known as the "Red Breakwater" or the "Northern Ell" within Old Harbor, Block Island.
3. Originally constructed at the direction of the Army Corps of Engineers in the waters of the State of Rhode Island, the Red Breakwater is now the property of the State of Rhode Island managed and controlled by the Town pursuant to the Lease.
4. The term of the Lease is from May 2012 through April 2062. The Town is responsible for maintaining the Red Breakwater during the Lease term.
5. Pursuant to State law and the CRMC's Regulations, any alterations to the Red Breakwater, including constructing a dock attached to it, or anchoring a dock to it, would require an Assent from the CRMC. The Town, as holder of the Lease, would have to consent to any such dock and would have to be a party to any request for such an Assent.



Grover J. Fugate
Executive Director
Coastal Resources Management Council
Date: October 27, 2015

State of Rhode Island)
County of Providence)

On this 27th day of October 2015, before me, the undersigned notary public, personally appeared Grover Fugate, personally known to the notary to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to the notary that the contents of the document are truthful and accurate to the best of his knowledge and belief.



John T. Longo
Notary Public
My Commission Expires: 12/4/17



State of Rhode Island and Providence Plantations
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 116
Wakefield, RI 02879-1900

(401) 783-3370
Fax (401) 783-3767



LEASE AGREEMENT

THIS LEASE AGREEMENT is made as of the 1st day of April, 2012, by and between the State of Rhode Island by and through the Coastal Resources Management Council ("CRMC") (hereinafter referred to as "the State" or "CRMC"), and the Town of New Shoreham (hereinafter referred to as the "Town").

I. LEASED PREMISES

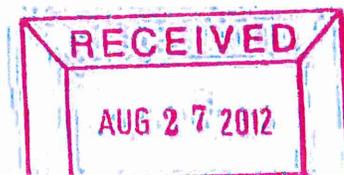
The State hereby leases to Town the following described property in the Block Island Old Harbor known as the Red Breakwater which is further described as follows:

That portion of the project for navigation, Block Island Harbor of Refuge, Rhode Island adopted by the Rivers and Harbors Act of July 11, 1870, consisting of the cut-stone breakwater lining the west side of the Inner Basin; beginning at a point with coordinates N32579.55, E312625.53, thence running northerly about 76.59 feet to a point with coordinates N32655.92, E312631.32, thence running northerly about 206.81 feet to a point with coordinates N32858.33, E312673.74, thence running easterly about 109.00 feet to a point with coordinates N32832.15, E312779.54.

The above-described property is referred to in this Lease Agreement as the "Red Breakwater."

II. TERM

The Town shall hold the Red Breakwater with all the rights, privileges, and appurtenances thereof, for and during the term of fifty (50) years, beginning on April 1, 2012, and ending on April 1, 2062.



III. RENT

The annual rent is one dollar (\$1.00) per year. Payment of the rent for the term of the lease shall be made upon execution of this Agreement by one, lump-sum payment of fifty dollars (\$50.00).

IV. COVENANTS OF TOWN

The Town hereby covenants with the State as follows:

- A. The Town will maintain the Red Breakwater in good order and repair;
- B. The Town will pay the rent in the manner aforesaid;
- C. The Town will use and occupy the Red Breakwater in a careful and proper manner;
- D. The Town will not use or occupy the Red Breakwater for any unlawful purpose, and will conform to and obey all present and future laws and ordinances and all rules, regulations, requirements, and orders of all governmental authorities or agencies pertaining thereto.
- E. The Town will quietly and peaceably surrender up possession of the Red Breakwater to the State at the expiration of this Lease Agreement subject to all reasonable wear and tear.

V. MUTUAL COVENANTS

It is mutually agreed by and between the CRMC and Town that:



A. The Town shall have the right to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the Town shall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair.

B. All fixtures, structures and/or equipment as shall have been installed by the Town during the term of this Lease Agreement on or near the Red Breakwater shall become the property of the Town at the termination of this Lease Agreement. At the end of the lease period the Town shall be renewal of the lease all fixtures, structures and/or equipment shall be removed.

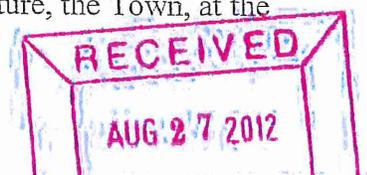
C. The Town shall peaceably and quietly have, hold, and enjoy the Red Breakwater for the term aforesaid.

D. This Lease Agreement and all the covenants, provisions, conditions, hereinbefore contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

E. The execution and performance by the Town of the terms and provisions of this Lease Agreement have been duly authorized by all requisite action and this Lease Agreement constitutes a valid and binding obligation of the Town. The execution and performance of this Lease Agreement will not violate any provision of law, any order of any court, or other agency of government, or any other instrument to which the Town is a party or by which Town is bound. The Town has full power and authority to enter into this Lease Agreement and to consummate the transactions herein contemplated.

E. The execution and performance by the CRMC of the terms and provisions of this Lease Agreement have been duly authorized by all requisite action and this Lease Agreement constitutes a valid and binding obligation of the CRMC. The execution and performance of this Lease Agreement will not violate any provision of law, any order of any court, or other agency of government, or any other instrument to which the CRMC is a party or by which CRMC is bound. The CRMC has full power and authority to enter into this Lease Agreement and to consummate the transactions herein contemplated.

F. Notwithstanding anything herein contained to the contrary, in the event that the Red Breakwater shall be materially damaged by flood, fire, or any act of nature, the Town, at the



Town's option, may cancel this Lease Agreement upon written notice to the CRMC, and the Town shall be under no obligation to repair or replace the Red Breakwater. For purposes of this Lease Agreement, material damage shall be damage which costs one-hundred-and-fifty thousand dollars (\$150,000) or more to repair or replace.

VI. ENTIRE AGREEMENT

This Lease Agreement constitutes the entire understanding and agreement between the parties hereto with respect to the lease of the Red Breakwater, and cancels all previous oral and written negotiations, agreements and, commitments, in connection therewith.

VII. CONSTRUCTION

This Lease Agreement shall be construed pursuant to the laws of the State of Rhode Island.

VIII. CONTROVERSIES AND CLAIMS SUBJECT TO ARBITRATION

All disputes between the parties hereto arising under this Lease Agreement may, with the mutual consent of the parties, be resolved by binding arbitration in Rhode Island pursuant to the rules then prevailing of the American Arbitration Association. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Notwithstanding the foregoing, each party (hereinafter, the "initiating party") specifically reserves the right (i) to seek equitable remedies in a court of competent jurisdiction; and (ii) to bring a third party action against any other party in any proceeding to which the initiating party is a party under circumstances in which the basis of the initiating party's claim against the other party is that such other party is liable, in whole or in part, for any claim or counterclaim being asserted against the initiating party in such proceeding. Notwithstanding the foregoing, each party specifically reserves the right to seek equitable remedies in a court of competent jurisdiction including, without limitation, the right to seek injunctive relief to preserve the *status quo* during the period of arbitration under the terms of this paragraph.



IN WITNESS WHEREOF, the parties hereto have caused this Lease Agreement to be executed by their duly authorized representatives as of the day and date first written above.

WITNESS:

Lisa A. Turner
Lisa A. Turner

STATE OF RHODE ISLAND:
by and through the
Coastal Resources Management Council

Grover J. Fugate
Grover J. Fugate, Executive Director

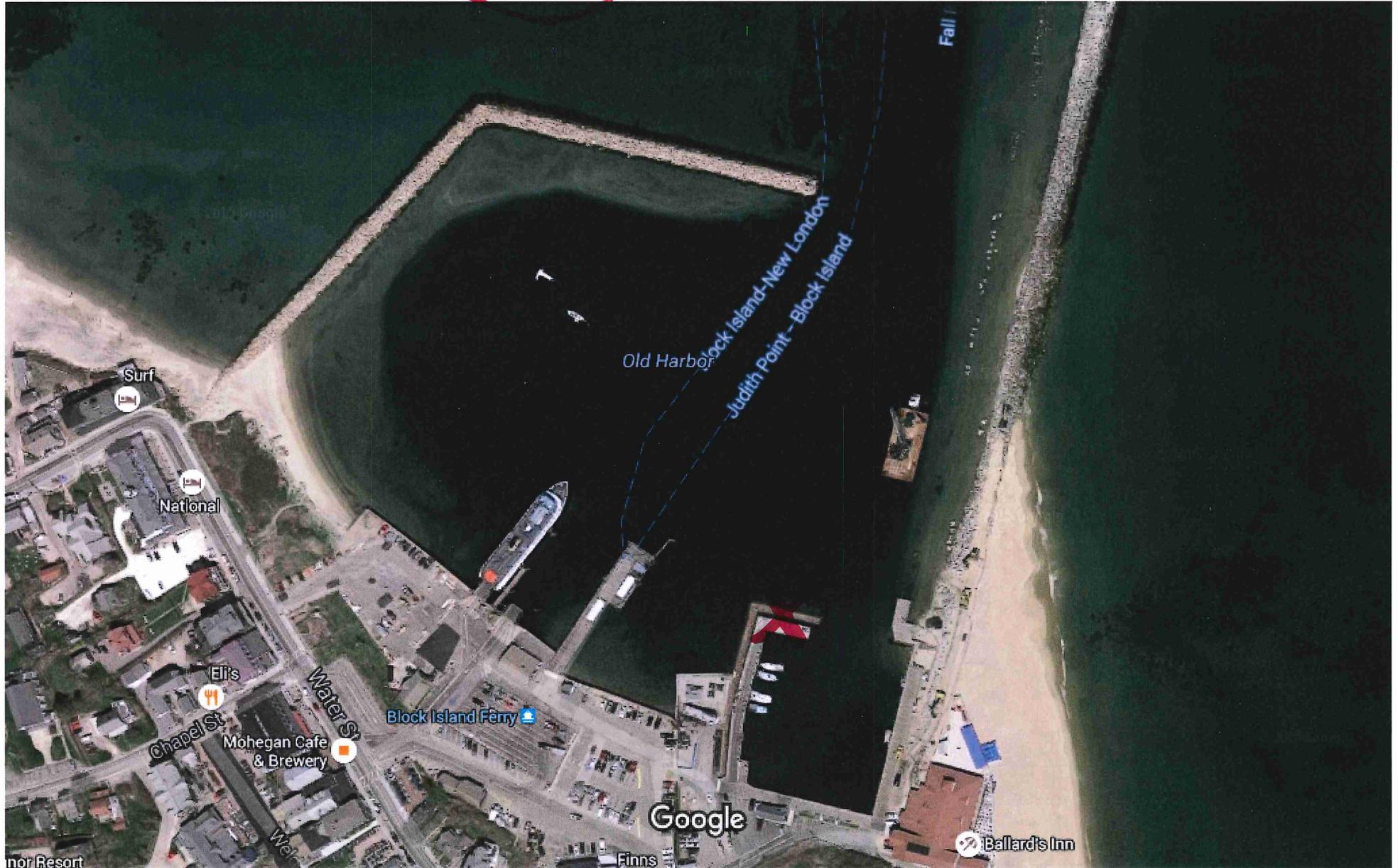
WITNESS:

Shirlyne J. Govern
Shirlyne J. Govern

TOWN OF NEW SHOREHAM:

Nancy O. Dodge
Nancy O. Dodge, Town Manager





Imagery ©2015 Google, Map data ©2015 Google 200 ft

SCHEDULE C



SCHEDULE D

Assessors Online Database

For New Shoreham, RI

[New Search](#)[Print](#)[Google Map](#)[Log Out](#)

432 WATER STREET

[Click to enlarge](#)

Map-Lot-Unit : 06 / 159 / //

Location: 432 WATER STREET

Owner Name: BALLARD'S WHARF REALTY LLC

Account Number: 021720

SEARCH FOR SIMILAR
SALE PROPERTIES



Parcel Value

Item	Assessed Value
Buildings	17,800
Extra Building Features	0
Outbuildings	16,800
Land	301,200
Total:	335,800



Owner of Record

BALLARD'S WHARF REALTY LLC



Ownership History

Owner Name	Book/Page	Sale Date	Sale Price
BALLARD'S WHARF REALTY LLC	335/ 296	12/29/2004	1
FILIPPI, MARION	81/ 174	12/1/1986	0



Land Use [\(click here for a list of codes and descriptions\)](#)

Land Use Code	Land Use Description
3333	LG BUS MDL 96



Land Line Valuation

Size	Zone	Assessed Value
0.18 AC	OHC	301,200

SCHEDULE E

RI SOS Filing Number: 201584863180 Date: 10/23/2015 11:27 AM



State of Rhode Island and Providence Plantations Office of the Secretary of State

Fee: \$50.00

Division Of Business Services
148 W. River Street
Providence RI 02904-2615
(401) 222-3040

Limited Liability Company Annual Report

Filing Period: September 1 - November 1

In accordance with R.I.G.L. 7-16-66(d), each limited liability company failing or refusing to file its annual report within thirty (30) days after the time prescribed by law (R.I.G.L. 7-16-66(b&c)) is subject to a penalty fee of \$25.00.

ANNUAL REPORT YEAR: 2015

1. ID No. 000141439

2. Exact Name of the Limited Liability Company Ballard's Wharf Realty, LLC

3. State of Formation

State: RI

4. Brief Description of the Character of the Business Which is Actually Conducted in Rhode Island

BUSINESS OF ACQUIRING, DEVELOPING, IMPROVING, MANAGING, LEASING,
MARKETING & SELLING REAL ESTATE PROPERTY

5. Principal Office Address

No. and Street: 1092 GREAT ROAD

City or Town: LINCOLN

State: RI

Zip: 02865

Country: USA

6. Mailing Address of Limited Liability Company and Name or Title of Contact Person:

Contact Name: Contact Title:

No. and Street: 1092 GREAT ROAD

City or Town: LINCOLN

State: RI

Zip: 02865

Country: USA

**7. Name and Address of Each Manager of the Limited Liability Company, if Applicable.
DO NOT LIST MEMBERS**

Title	Individual Name First, Middle, Last, Suffix	Address Address, City or Town, State, Zip Code, Country
MANAGER	BLAKE A. FILIPPI	1092 GREAT ROAD LINCOLN, RI 02865 USA

**8. RESIDENT AGENT IN RHODE ISLAND - DO NOT ALTER
Changes Require Filing of Form 642 - R.I.G.L. 7-16-11**

BRIAN LAPLANTE, ESQ. 272 WEST EXCHANGE STREET PROVIDENCE, RI 02903

9. This report must be executed by an authorized person pursuant to R.I.G.L. 7-16-66 (b).

Signed this 23 Day of October, 2015 at 11:28:49 AM by the authorized person. *This electronic signature of the individual or individuals signing this instrument constitutes the affirmation or acknowledgement of the signatory, under penalties of perjury, that this instrument is that individual's act and deed or the act and deed of the company, and that the facts stated herein are true, as of the date of the electronic filing, in compliance with R.I. Gen. Laws § 7-16.*

By BLAKE FILIPPI
Signature of Authorized Person

Form No. 632
Revised 09/07

© 2007 - 2015 State of Rhode Island and Providence Plantations
All Rights Reserved

SCHEDULE F

September 18, 2015

To Whom It May Concern:

I am the manager of Ballard's Wharf Realty, LLC (BWR), which owns Plat 6, Lot 159 in the Town of New Shoreham. Please be advised that BWR has not agreed to allow Bluewater, LLC to utilize BWR's riparian/littoral rights, nor has BWR agreed to allow Bluewater, LLC's proposed pier to connect to BWR's existing marine facility.

A handwritten signature in blue ink, appearing to read 'Blake Filippi', is written over a horizontal line.

Blake Filippi

SCHEDULE G

To Whom it May Concern:

I am employed by the State of Rhode Island Coastal Resources Management Council ("CRMC") as a Supervising Environmental Scientist. I am assigned to Block Island and am involved and familiar with matters pertaining to CRMC permitting in the Old Harbor.

The CRMC recognizes the Town of New Shoreham ("Town") by permitting process (ref. CRMC File No. 1976-11-011, 2012-11-380) as the owner of the Bait Dock which is located adjacent to the East Breakwater in the Old Harbor. Any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the Town's Bait Dock must be accompanied by the written approval of the Town. In addition, any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the East Dock in Old Harbor must be accompanied by the written approval of the owner and of the Town which licenses and operates the East Dock pursuant to the attached license agreement (Exhibit A) as submitted by the Town.

David S. Reis



Coastal Resources Management Council

Date: November 2, 2015

**DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 Virginia Road
Concord, Massachusetts 01742-2751**

**SUPPLEMENTAL AGREEMENT NO.1
between
The SECRETARY OF THE ARMY
and
THE TOWN OF NEW SHOREHAM, RHODE ISLAND**

**License No. DACW33-3-08-024
Wharf at Inner Basin, Harbor of
Refuge, Block Island, Rhode Island**

WITNESSETH:

WHEREAS THE SECRETARY OF THE ARMY, under License No. DACW33-3-08-024 , granted to The Town of New Shoreham, Rhode Island, a LICENSE for the use of a timber wharf and appurtenant mooring facilities located on the easterly wall of the inner basin, Harbor of Refuge, Block Island, Rhode Island, hereinafter referred to as the premises, and:

WHEREAS, the Grantee has agreed to provide construction, operation and maintenance access to the premises for the benefit of the United States and the general public in accordance with the terms and conditions hereinafter set forth.

NOW, THEREFORE, the parties hereto, in consideration of the premises, do mutually further agree as follows:

1. Article 1, TERM is hereby amended to delete "14 May 2012" and replace it with "14 May 2017", thereby extending the term by five years.
2. Other terms and conditions of the aforesaid license are hereby ratified and, except as modified by this Supplemental Agreement, shall remain in full force and effect.

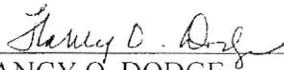
IN WITNESS WHEREOF, I have hereunto set my hand by the authority of the
Secretary of the Army this 10 day of May, 2012

THE UNITED STATES OF AMERICA

By: 
JOSEPH M. REDLINGER
Chief, Real Estate Division

THIS SUPPLEMENTAL AGREEMENT is also executed by the Grantee this
15th day of May, 2012

THE TOWN OF NEW SHOREHAM, RHODE ISLAND

By: 
NANCY O. DODGE
Town Manager

CERTIFICATE OF AUTHORITY

I, Millicent McGinnes, certify that I am the Deputy Town Clerk of the Town of New Shoreham, Rhode Island, the entity which executed the foregoing instrument with the United States of America; that Nancy O. Dodge, who executed said instrument as Town Manager for the Town of New Shoreham, Rhode Island, was then Town Manager of said Town of New Shoreham, Rhode Island; that I know the signature of said Nancy O. Dodge; and that the signature affixed to such instrument is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of
Town of New Shoreham this 4th day of May
2012.

By: 
Types Name: Millicent McGinnes
Title: Deputy Town Clerk

DEPARTMENT OF THE ARMY LICENSE
Wharf at Inner Basin, Harbor of Refuge
Block Island, Rhode Island

THE SECRETARY OF THE ARMY, hereinafter referred to as the Secretary, under authority of 33 U.S.C. Section 408, and pursuant to an agreement dated 27 August 1970 between the United States of America and the Town of New Shoreham (Exhibit "A", attached hereto and made a part hereof), hereby grants to the **Town of New Shoreham**, Block Island, Rhode Island, hereinafter referred to as the grantee, a license for the use of a timber wharf and appurtenant mooring facilities located on the easterly wall of the inner basin, Harbor of Refuge, Block Island, Rhode Island, hereinafter referred to as the premises.

THIS LICENSE is granted subject to the following conditions:

1. TERM

This license is granted for a term of five (5) years, beginning 15 May 2007 and ending 14 May 2012, but revocable at will by the Secretary.

2. CONSIDERATION

The consideration for this license shall be the construction, operation and maintenance of the premises for the benefit of the general public in accordance with the terms and conditions hereinafter set forth.

3. NOTICES

All notices and correspondence to be given pursuant to this license shall be addressed, if to the grantee, to the Town Manager, Town of New Shoreham, P.O. Box 220, Block Island, Rhode Island 02807; and if to the United States, to the District Engineer, Attention: Chief, Real Estate Division, U.S. Army Corps of Engineers, New England District, 696 Virginia Road, Concord, Massachusetts 01742-2751; or as from time to time otherwise be directed by the parties. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope addressed as aforesaid, and deposited, postage prepaid, in a post office regularly maintained by the United States Postal Service.

4. AUTHORIZED REPRESENTATIVES

Except as otherwise specifically provided, any reference herein to "Secretary", "District Engineer", "Installation Commander", or "said officer" shall include their duly authorized representatives. Any reference to "grantee" shall include any duly authorized representatives.

5. SUPERVISION BY THE DISTRICT ENGINEER

The use and occupation of the premises shall be subject to the general supervision and approval of the District Engineer, New England District, hereinafter referred to as said officer, and to such rules and regulations as may be prescribed from time to time by said officer.

6. APPLICABLE LAWS AND REGULATIONS

The grantee shall comply with all applicable Federal, state, county and municipal laws, ordinances and regulations wherein the premises are located.

7. CONDITIONAL USE BY GRANTEE

The exercise of the privileges herein granted shall be:

- a. without cost or expense to the United States;
- b. subject to the right of the United States to improve, use or maintain the premises;
- c. subject to other outgrants of the United States on the premises;
- d. personal to the grantee, and this license, or any interest herein, may not be transferred or assigned.

8. CONDITION OF PREMISES

The grantee acknowledges that it has inspected the premises, knows its condition, and understands that the same is granted without any representations or warranties whatsoever and without any obligation on the part of the United States.

9. COST OF UTILITIES

The grantee shall pay the cost, as determined by the officer having immediate supervision over the premises, of producing and/or supplying any utilities and other services furnished by the Government or through Government-owned facilities for the use of the grantee, including the grantee's proportionate share of the cost of operation and maintenance of the Government-owned facilities by which such utilities or services are produced or supplied. The Government shall be under no obligation to furnish utilities or services. Payments shall be made in the manner prescribed by the officer having such jurisdiction.

10. PROTECTION OF PROPERTY

The grantee shall keep the premises in good order and in a clean, safe condition by and at the expense of the grantee. The grantee shall be responsible for any damage that may be caused to property of the United States by the activities of the grantee under this license, and shall exercise due diligence in the protection of all property located on the premises against fire or damage from any and all other causes. Any property of the United States damaged or destroyed by the grantee incident to the exercise of the privileges herein granted shall be promptly repaired or replaced by the grantee to a condition satisfactory to said officer, or at the election of said officer, reimbursement made therefor by the grantee in an amount necessary to restore the property to a condition satisfactory to said officer.

11. INDEMNITY

The United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the exercise of the privileges herein granted, or for damages to the property of the grantee, or for damages to the property or injuries to the person of the grantee's officers, agents, or employees or others who may be on the premises at their invitation or the invitation of any one of them, and the grantee shall hold the United States harmless from any and all such claims not including damages due to the fault or negligence of the United States or its contractors.

12. RESTORATION

On or before the expiration of this license or its termination by the grantee, the grantee shall vacate the premises, remove the property of the grantee, and restore the premises to a condition satisfactory to said officer. If, however, this license is revoked, the grantee shall vacate the premises, remove said property and restore the premises to the aforesaid condition within such time as the District Engineer may designate. In either event, if the grantee shall fail or neglect to remove said property and restore the premises, then, at the option of said officer, the property shall either become the property of the United States without compensation therefor, or said officer may cause the property to be removed and no claim for damages against the United States or its officers or agents shall be created by or made on account of such removal and restoration work. The grantee shall also pay the United States on demand any sum which may be expended by the United States after the expiration, revocation, or termination of this license in restoring the premises.

13. NON-DISCRIMINATION

a. The grantee shall not discriminate against any person or persons or exclude them from participation in the grantee's operations, programs or activities because of race, color, religion, sex, age, handicap or national origin in the conduct of operations on the premises. The grantee

will comply with the Americans with Disabilities Act and attendant Americans with Disabilities Act Accessibility Guidelines (ADAAG) published by the Architectural and Transportation Barriers Compliance Board. ✓

b. The grantee, by acceptance of this license, is receiving a type of Federal assistance and, therefore, hereby gives assurance that it will comply with the provisions of Title VI of the Civil Rights Act of 1964 as amended (42 U.S.C. 2000d); the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794); and all requirements imposed by or pursuant to the Directive of the Department of Defense (32 C.F.R. Part 300) issued as Department of Defense Directive 5500.11 and 1020.1, and Army Regulation 600-7. This assurance shall be binding on the grantee, its agents, successors, transferees, and assignees.

14. TERMINATION

This license may be terminated by the grantee at any time by giving the District Engineer at least ten (10) days notice in writing provided that no refund by the United States of any consideration previously paid shall be made and provided further, that in the event said notice is not given at least ten (10) days prior to the rental due date, the grantee shall be required to pay the consideration for the period shown in the Condition on **CONSIDERATION**.

15. ENVIRONMENTAL PROTECTION

a. Within the limits of their respective legal powers, the parties to this license shall protect the premises against pollution of its air, ground and water. The grantee shall comply with any laws, regulations, conditions, or instructions affecting the activity hereby authorized if and when issued by the Environmental Protection Agency, or any Federal, state, interstate or local governmental agency having jurisdiction to abate or prevent pollution. The disposal of any toxic or hazardous materials within the premises is specifically prohibited. Such regulations, conditions, or instructions in effect or prescribed by said Environmental Protection Agency, or any Federal, state, interstate or local governmental agency are hereby made a condition of this license. The grantee shall not discharge waste or effluent from the premises in such a manner that the discharge will contaminate streams or other bodies of water or otherwise become a public nuisance.

b. The grantee will use all reasonable means available to protect the environment and natural resources, and where damage nonetheless occurs from the grantee's activities, the grantee shall be liable to restore the damaged resources.

c. The grantee must obtain approval in writing from said officer before any pesticides or herbicides are applied to the premises.

16. HISTORIC PRESERVATION

The grantee shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archaeological, architectural or other cultural artifacts, relics, remains or objects of antiquity. In the event such items are discovered on the premises, the grantee shall immediately notify said officer and protect the site and the material from further disturbance until said officer gives clearance to proceed.

17. DISCLAIMER

This license is effective only insofar as the rights of the United States in the premises are concerned; and the grantee shall obtain any permit or license which may be required by Federal, state, or local statute in connection with the use of the premises. It is understood that the granting of this license does not preclude the necessity of obtaining a Department of the Army permit for activities which involve the discharge of dredge or fill material or the placement of fixed structures in the waters of the United States, pursuant to the provisions of Section 10 of the Rivers and Harbors Act of 3 March 1899 (33 U.S.C. § 403), and Section 404 of the Clean Waters Act (33 U.S.C. § 1344).

18. ADDITIONAL CONDITIONS

a. The grantee shall be responsible for the operation and maintenance of the timber wharf during the term of this license, together with any and all systems necessary for use of the wharf (such as utilities and fire suppression equipment), and shall repair any damages to said structure caused by negligent use as well as ordinary wear and tear. Further, the grantee shall be responsible for the operation, maintenance, repair and replacement of all additive items, such as ladders, mooring cleats and bollards, which are installed or constructed on said structure by the Town.

b. The grantee will maintain and operate the timber wharf and mooring facilities in such a manner as will insure the safety of all personnel and vessels using said facility. The Government may inspect the structure at any time, and if it appears that it is not in good repair or that its useful life has been exceeded, then the Government reserves the right to revoke this license.

c. All grants, conditions, and requirements herein enumerated are limited exclusively to the timber wharf and do not extend to the steel sheet piling bulkhead, the breakwater, and stone ballast located on the inner basin, Harbor of Refuge, Block Island, Rhode Island.

d. The grantee shall manage the timber wharf in the interest of the general public and the facilities shall be available to all members of the general public on equal terms.

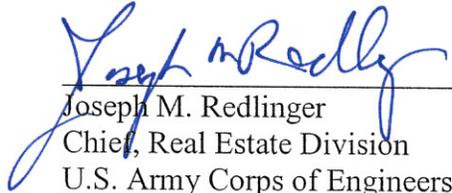
Preferential treatment shall not be granted to residents of the surrounding local community or to any other persons.

e. The grantor reserves the right to dock any of its vessels, whether federally owned or utilized under federal contract for the benefit of the grantor, on the timber wharf without charge. ✓

f. This license succeeds Department of Army Permit to the Town of New Shoreham from 15 May 1987 to 14 May 1997 and License No. DACW33-3-97-24, which had a five-year term beginning 15 May 1997 and which was extended by Supplemental Agreement No. 1 to 14 May 2007.

THIS LICENSE is not subject to Title 10, United States Code, Section 2662, as amended.

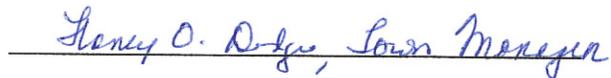
IN WITNESS WHEREOF I have hereunto set my hand by authority/direction of the Secretary of the Army this 18th day of January, 2008.



Joseph M. Redlinger
Chief, Real Estate Division
U.S. Army Corps of Engineers
New England District

THIS LICENSE is also executed by the grantee this _____ day of _____, 200__.

TOWN OF NEW SHOREHAM, RHODE ISLAND



Henry O. Dyer, Town Manager

SCHEDULE H

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

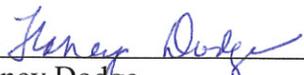
DOCKET No. D-13-51

STATEMENT OF THE NEW SHOREHAM TOWN MANAGER

I, Nancy Dodge, am the Town Manager for the Town of New Shoreham. I have reviewed the Schedule A Purported Docking Facilities Diagram. The proposed docking facility in this diagram at the site of the East Breakwater connects to an existing grey-colored dock outlined in red, which is known as the Bait Dock. The Bait Dock is owned by the Town and was initially constructed by the Town over fifty years ago. The Town operates, manages, repairs and maintains the Bait Dock.

The East Breakwater "Alternate Access" proposed docking facility as depicted in the Purported Docking Facilities Diagram runs along the East Breakwater of Old Harbor, behind the Town's Bait Dock and connects with a dock known as the East Dock. The Town operates, manages, repairs and maintains the East Dock through a license agreement with the USACE which is attached.

The Town of New Shoreham has contributed to the construction and reconstruction of the Project in part pursuant to agreements between the Town and the USACE. See attached August 1970 Agreement, attached License Agreement and attached Right of Entry Agreement. In addition to the items referenced in the attached agreements, the Town pays for certain dredging at the Project, has provided consultants to the Project, an office for the USACE local operations, and utilities to the Project. As the non-federal sponsor of the Project in Old Harbor, the Town must provide its written consent for the proposed alteration and this written consent must be submitted with an application in order to initiate the USACE Section 408 approval process.



Nancy Dodge
New Shoreham Town Manager

AGREEMENT FOR PROSECUTION OF NECESSARY REPAIRS

(HARBOR OF REFUGE, BLOCK ISLAND, RHODE ISLAND)

THIS AGREEMENT entered into this 27th day of August, 1970, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the Government), and the TOWN OF NEW SHOREHAM (hereinafter referred to as the Town),

WITNESSETH THAT:

WHEREAS, the Harbor of Refuge Navigation Project, Block Island, Rhode Island, approved under the River and Harbor Acts of 11 July 1870, 2 August 1882, 5 August 1886, 3 June 1896, and 25 July 1912, provided for construction, maintenance and repair of a vertical bulkhead for mooring vessels; and

WHEREAS, funds have been allocated to make necessary repairs to the existing bulkhead presently estimated to cost \$100,000.00; and

WHEREAS, in repairing said bulkhead there will be available as part of the design of said structure a system of vertical piling and decking suitable for use as a wharf;

NOW, THEREFORE, the parties hereto do mutually agree as follows:

a. Undertaking by the Government:

(1) The Government shall:

(a) Repair the existing bulkhead along the easterly wall of the inner basin by placing quarry stones and vertical wood pilings with a timber decking extending over the bulkhead.

(b) Issue an appropriate license to the Town for the use and maintenance of the timber pier upon completion of the bulkhead repairs. The term of the license will be based on the useful life of the pier and said license will be subject to approval by the Secretary of the Army.

DIV

EXHIBIT "A"

Page 1 of 3

b. Undertaking by the Town:

(1) The Town shall:

(a) Provide, without cost to the Government, all necessary lands, easements and rights-of-way, including a land-based spoil site for the disposal of sand and gravel, needed for the construction, repair and maintenance of the bulkhead and timber pier.

(b) Relocate, without cost to the Government, all electric, water and other existing utilities, except Coast Guard facilities, necessary for construction, repair and maintenance of the bulkhead and timber pier.

(c) Hold and save the Government, its officers, employees, and agents free from damages to property or injuries to persons which may arise as a result of the construction, repair, use and maintenance of the bulkhead and timber pier. This hold and save harmless provision shall not extend to the negligence of the contractors.

(d) Maintain and operate during the period of the license and any renewal or extension thereof, without cost to the Government, the timber pier in such manner as will insure the safety of all personnel and vessels using said facility. It is understood that the Government may inspect the structure at any time, and if it appears that it is not in good repair or that its useful life has been exceeded, then the Government reserves the right to revoke this license.

(e) Provide and maintain access to the timber pier open to all on equal terms.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

TOWN OF NEW SHOREHAM

By Adrian L. Sprague, Jr.
ADRIAN L. SPRAGUE, JR.
President of the Town Council

THE UNITED STATES OF AMERICA

By Frank P. Bane
FRANK P. BANE
Colonel, Corps of Engineers
Division Engineer

CERTIFICATE

I, Edith L. Blane, do hereby certify that I am the Town Clerk of the Town of New Shoreham, of the State of Rhode Island, named herein; that Adrian L. Sprague, Jr., who signed this Agreement in behalf of the Town of New Shoreham, was then the duly elected and designated President of the Town Council; that said Agreement was duly signed for and in behalf of the Town of New Shoreham by virtue of his authority as President of the Town Council, and is within the scope of his statutory powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of the Town of New Shoreham, this 17 day of September, 1970.

Edith Littlefield Blane
Town Clerk

**DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 Virginia Road
Concord, Massachusetts 01742-2751**

**SUPPLEMENTAL AGREEMENT NO.1
between
The SECRETARY OF THE ARMY
and
THE TOWN OF NEW SHOREHAM, RHODE ISLAND**

**License No. DACW33-3-08-024
Wharf at Inner Basin, Harbor of
Refuge, Block Island, Rhode Island**

WITNESSETH:

WHEREAS THE SECRETARY OF THE ARMY, under License No. DACW33-3-08-024 , granted to The Town of New Shoreham, Rhode Island, a LICENSE for the use of a timber wharf and appurtenant mooring facilities located on the easterly wall of the inner basin, Harbor of Refuge, Block Island, Rhode Island, hereinafter referred to as the premises, and:

WHEREAS, the Grantee has agreed to provide construction, operation and maintenance access to the premises for the benefit of the United States and the general public in accordance with the terms and conditions hereinafter set forth.

NOW, THEREFORE, the parties hereto, in consideration of the premises, do mutually further agree as follows:

1. Article 1, TERM is hereby amended to delete "14 May 2012" and replace it with "14 May 2017", thereby extending the term by five years.
2. Other terms and conditions of the aforesaid license are hereby ratified and, except as modified by this Supplemental Agreement, shall remain in full force and effect.

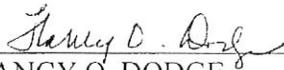
IN WITNESS WHEREOF, I have hereunto set my hand by the authority of the
Secretary of the Army this 10 day of May, 2012

THE UNITED STATES OF AMERICA

By: 
JOSEPH M. REDLINGER
Chief, Real Estate Division

THIS SUPPLEMENTAL AGREEMENT is also executed by the Grantee this
15th day of May, 2012

THE TOWN OF NEW SHOREHAM, RHODE ISLAND

By: 
NANCY O. DODGE
Town Manager

CERTIFICATE OF AUTHORITY

I, Millicent McGinnes, certify that I am the Deputy Town Clerk of the Town of New Shoreham, Rhode Island, the entity which executed the foregoing instrument with the United States of America; that Nancy O. Dodge, who executed said instrument as Town Manager for the Town of New Shoreham, Rhode Island, was then Town Manager of said Town of New Shoreham, Rhode Island; that I know the signature of said Nancy O. Dodge; and that the signature affixed to such instrument is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of
Town of New Shoreham this 4th day of May
2012.

By: Millicent McGinnes
Types Name: Millicent McGinnes
Title: Deputy Town Clerk

DEPARTMENT OF THE ARMY LICENSE
Wharf at Inner Basin, Harbor of Refuge
Block Island, Rhode Island

THE SECRETARY OF THE ARMY, hereinafter referred to as the Secretary, under authority of 33 U.S.C. Section 408, and pursuant to an agreement dated 27 August 1970 between the United States of America and the Town of New Shoreham (Exhibit "A", attached hereto and made a part hereof), hereby grants to the **Town of New Shoreham**, Block Island, Rhode Island, hereinafter referred to as the grantee, a license for the use of a timber wharf and appurtenant mooring facilities located on the easterly wall of the inner basin, Harbor of Refuge, Block Island, Rhode Island, hereinafter referred to as the premises.

THIS LICENSE is granted subject to the following conditions:

1. TERM

This license is granted for a term of five (5) years, beginning 15 May 2007 and ending 14 May 2012, but revocable at will by the Secretary.

2. CONSIDERATION

The consideration for this license shall be the construction, operation and maintenance of the premises for the benefit of the general public in accordance with the terms and conditions hereinafter set forth.

3. NOTICES

All notices and correspondence to be given pursuant to this license shall be addressed, if to the grantee, to the Town Manager, Town of New Shoreham, P.O. Box 220, Block Island, Rhode Island 02807; and if to the United States, to the District Engineer, Attention: Chief, Real Estate Division, U.S. Army Corps of Engineers, New England District, 696 Virginia Road, Concord, Massachusetts 01742-2751; or as from time to time otherwise be directed by the parties. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope addressed as aforesaid, and deposited, postage prepaid, in a post office regularly maintained by the United States Postal Service.

4. AUTHORIZED REPRESENTATIVES

Except as otherwise specifically provided, any reference herein to "Secretary", "District Engineer", "Installation Commander", or "said officer" shall include their duly authorized representatives. Any reference to "grantee" shall include any duly authorized representatives.

5. SUPERVISION BY THE DISTRICT ENGINEER

The use and occupation of the premises shall be subject to the general supervision and approval of the District Engineer, New England District, hereinafter referred to as said officer, and to such rules and regulations as may be prescribed from time to time by said officer.

6. APPLICABLE LAWS AND REGULATIONS

The grantee shall comply with all applicable Federal, state, county and municipal laws, ordinances and regulations wherein the premises are located.

7. CONDITIONAL USE BY GRANTEE

The exercise of the privileges herein granted shall be:

- a. without cost or expense to the United States;
- b. subject to the right of the United States to improve, use or maintain the premises;
- c. subject to other outgrants of the United States on the premises;
- d. personal to the grantee, and this license, or any interest herein, may not be transferred or assigned.

8. CONDITION OF PREMISES

The grantee acknowledges that it has inspected the premises, knows its condition, and understands that the same is granted without any representations or warranties whatsoever and without any obligation on the part of the United States.

9. COST OF UTILITIES

The grantee shall pay the cost, as determined by the officer having immediate supervision over the premises, of producing and/or supplying any utilities and other services furnished by the Government or through Government-owned facilities for the use of the grantee, including the grantee's proportionate share of the cost of operation and maintenance of the Government-owned facilities by which such utilities or services are produced or supplied. The Government shall be under no obligation to furnish utilities or services. Payments shall be made in the manner prescribed by the officer having such jurisdiction.

10. PROTECTION OF PROPERTY

The grantee shall keep the premises in good order and in a clean, safe condition by and at the expense of the grantee. The grantee shall be responsible for any damage that may be caused to property of the United States by the activities of the grantee under this license, and shall exercise due diligence in the protection of all property located on the premises against fire or damage from any and all other causes. Any property of the United States damaged or destroyed by the grantee incident to the exercise of the privileges herein granted shall be promptly repaired or replaced by the grantee to a condition satisfactory to said officer, or at the election of said officer, reimbursement made therefor by the grantee in an amount necessary to restore the property to a condition satisfactory to said officer.

11. INDEMNITY

The United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the exercise of the privileges herein granted, or for damages to the property of the grantee, or for damages to the property or injuries to the person of the grantee's officers, agents, or employees or others who may be on the premises at their invitation or the invitation of any one of them, and the grantee shall hold the United States harmless from any and all such claims not including damages due to the fault or negligence of the United States or its contractors.

12. RESTORATION

On or before the expiration of this license or its termination by the grantee, the grantee shall vacate the premises, remove the property of the grantee, and restore the premises to a condition satisfactory to said officer. If, however, this license is revoked, the grantee shall vacate the premises, remove said property and restore the premises to the aforesaid condition within such time as the District Engineer may designate. In either event, if the grantee shall fail or neglect to remove said property and restore the premises, then, at the option of said officer, the property shall either become the property of the United States without compensation therefor, or said officer may cause the property to be removed and no claim for damages against the United States or its officers or agents shall be created by or made on account of such removal and restoration work. The grantee shall also pay the United States on demand any sum which may be expended by the United States after the expiration, revocation, or termination of this license in restoring the premises.

13. NON-DISCRIMINATION

a. The grantee shall not discriminate against any person or persons or exclude them from participation in the grantee's operations, programs or activities because of race, color, religion, sex, age, handicap or national origin in the conduct of operations on the premises. The grantee

will comply with the Americans with Disabilities Act and attendant Americans with Disabilities Act Accessibility Guidelines (ADAAG) published by the Architectural and Transportation Barriers Compliance Board. ✓

b. The grantee, by acceptance of this license, is receiving a type of Federal assistance and, therefore, hereby gives assurance that it will comply with the provisions of Title VI of the Civil Rights Act of 1964 as amended (42 U.S.C. 2000d); the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794); and all requirements imposed by or pursuant to the Directive of the Department of Defense (32 C.F.R. Part 300) issued as Department of Defense Directive 5500.11 and 1020.1, and Army Regulation 600-7. This assurance shall be binding on the grantee, its agents, successors, transferees, and assignees.

14. TERMINATION

This license may be terminated by the grantee at any time by giving the District Engineer at least ten (10) days notice in writing provided that no refund by the United States of any consideration previously paid shall be made and provided further, that in the event said notice is not given at least ten (10) days prior to the rental due date, the grantee shall be required to pay the consideration for the period shown in the Condition on **CONSIDERATION**.

15. ENVIRONMENTAL PROTECTION

a. Within the limits of their respective legal powers, the parties to this license shall protect the premises against pollution of its air, ground and water. The grantee shall comply with any laws, regulations, conditions, or instructions affecting the activity hereby authorized if and when issued by the Environmental Protection Agency, or any Federal, state, interstate or local governmental agency having jurisdiction to abate or prevent pollution. The disposal of any toxic or hazardous materials within the premises is specifically prohibited. Such regulations, conditions, or instructions in effect or prescribed by said Environmental Protection Agency, or any Federal, state, interstate or local governmental agency are hereby made a condition of this license. The grantee shall not discharge waste or effluent from the premises in such a manner that the discharge will contaminate streams or other bodies of water or otherwise become a public nuisance.

b. The grantee will use all reasonable means available to protect the environment and natural resources, and where damage nonetheless occurs from the grantee's activities, the grantee shall be liable to restore the damaged resources.

c. The grantee must obtain approval in writing from said officer before any pesticides or herbicides are applied to the premises.

16. HISTORIC PRESERVATION

The grantee shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archaeological, architectural or other cultural artifacts, relics, remains or objects of antiquity. In the event such items are discovered on the premises, the grantee shall immediately notify said officer and protect the site and the material from further disturbance until said officer gives clearance to proceed.

17. DISCLAIMER

This license is effective only insofar as the rights of the United States in the premises are concerned; and the grantee shall obtain any permit or license which may be required by Federal, state, or local statute in connection with the use of the premises. It is understood that the granting of this license does not preclude the necessity of obtaining a Department of the Army permit for activities which involve the discharge of dredge or fill material or the placement of fixed structures in the waters of the United States, pursuant to the provisions of Section 10 of the Rivers and Harbors Act of 3 March 1899 (33 U.S.C. § 403), and Section 404 of the Clean Waters Act (33 U.S.C. § 1344).

18. ADDITIONAL CONDITIONS

a. The grantee shall be responsible for the operation and maintenance of the timber wharf during the term of this license, together with any and all systems necessary for use of the wharf (such as utilities and fire suppression equipment), and shall repair any damages to said structure caused by negligent use as well as ordinary wear and tear. Further, the grantee shall be responsible for the operation, maintenance, repair and replacement of all additive items, such as ladders, mooring cleats and bollards, which are installed or constructed on said structure by the Town.

b. The grantee will maintain and operate the timber wharf and mooring facilities in such a manner as will insure the safety of all personnel and vessels using said facility. The Government may inspect the structure at any time, and if it appears that it is not in good repair or that its useful life has been exceeded, then the Government reserves the right to revoke this license.

c. All grants, conditions, and requirements herein enumerated are limited exclusively to the timber wharf and do not extend to the steel sheet piling bulkhead, the breakwater, and stone ballast located on the inner basin, Harbor of Refuge, Block Island, Rhode Island.

d. The grantee shall manage the timber wharf in the interest of the general public and the facilities shall be available to all members of the general public on equal terms.

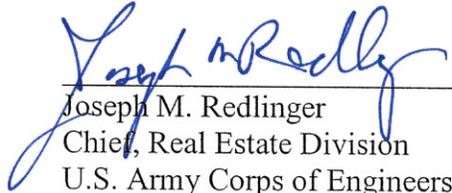
Preferential treatment shall not be granted to residents of the surrounding local community or to any other persons.

e. The grantor reserves the right to dock any of its vessels, whether federally owned or utilized under federal contract for the benefit of the grantor, on the timber wharf without charge. ✓

f. This license succeeds Department of Army Permit to the Town of New Shoreham from 15 May 1987 to 14 May 1997 and License No. DACW33-3-97-24, which had a five-year term beginning 15 May 1997 and which was extended by Supplemental Agreement No. 1 to 14 May 2007.

THIS LICENSE is not subject to Title 10, United States Code, Section 2662, as amended.

IN WITNESS WHEREOF I have hereunto set my hand by authority/direction of the Secretary of the Army this 18th day of January, 2008.



Joseph M. Redlinger
Chief, Real Estate Division
U.S. Army Corps of Engineers
New England District

THIS LICENSE is also executed by the grantee this _____ day of _____, 200 .

TOWN OF NEW SHOREHAM, RHODE ISLAND



Henry O. Dyer, Town Manager

DEPARTMENT OF THE ARMY
RIGHT-OF-ENTRY FOR STAGING AREA

Block Island Harbor of Refuge, Town of New Shoreham, RI
Repairs to East Breakwater

ROE No 2536

The undersigned, hereinafter called the "Owner" in consideration for the mutual benefits of the work described below, hereby grants to the UNITED STATES OF AMERICA, hereinafter called the "Government," a right-of- entry upon the following terms and conditions:

1. The Owner hereby grants to the Government, an irrevocable right to enter in, over and across the land described in Condition 4 for a period of six months beginning October 1, 2014 to March 31, 2015, for use by the Government, its representatives, agents, contractors and assigns as a staging area for the repair of the Block Island East Breakwater, including the right to move, store and remove equipment and supplies, and erect and remove temporary structures on the ROE property and to perform any other work necessary or incidental to the repair of the East Breakwater.

2. All tools, equipment, and other property taken upon or placed upon the land by the Government shall remain the property of the Government and may be removed by the Government at any time before April 30, 2015.

3. If any action of the Government's employees or agents in the exercise of this right-of-way results in damage to the real property, the Government will, at its option, either repair such damage or make an appropriate settlement with the Owner. In no event shall such repair or settlement exceed the fair market value of the fee interest of the real property at the time immediately preceding such damage. The Government's liability under this clause may not exceed appropriations available for such payment and nothing contained in this agreement may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies. The provisions of this clause are without prejudice to any rights the Owner may have to make a claim under applicable laws for any other damages than provided herein.

4. The land affected by this irrevocable right-of-entry is located in the State of Rhode Island, County of Washington, town of New Shoreham and depicted on Exhibit A, Page 1 of 2 "Block Island, Rhode Island, Harbor of Refuge, Repairs to the East Breakwater, Real Estate Plan", as the cross-hatched areas entitled, "Temporary Right Of Entry From Town and T&C Holdings LLC"; see Note 4 and 6 and also shown on Exhibit A, Page 2 of 2 and identified as "Contractor's temporary facilities, POV parking and storage and staging area; approximate 5,000 square feet (area owned by Town or T&C Holdings LLC)"; are attached hereto and made a part hereof.

[SIGNATURES ON NEXT PAGE]

WITNESSES MY HAND AND SEAL this 5th day of May, 2014

Town of New Shoreham, RI

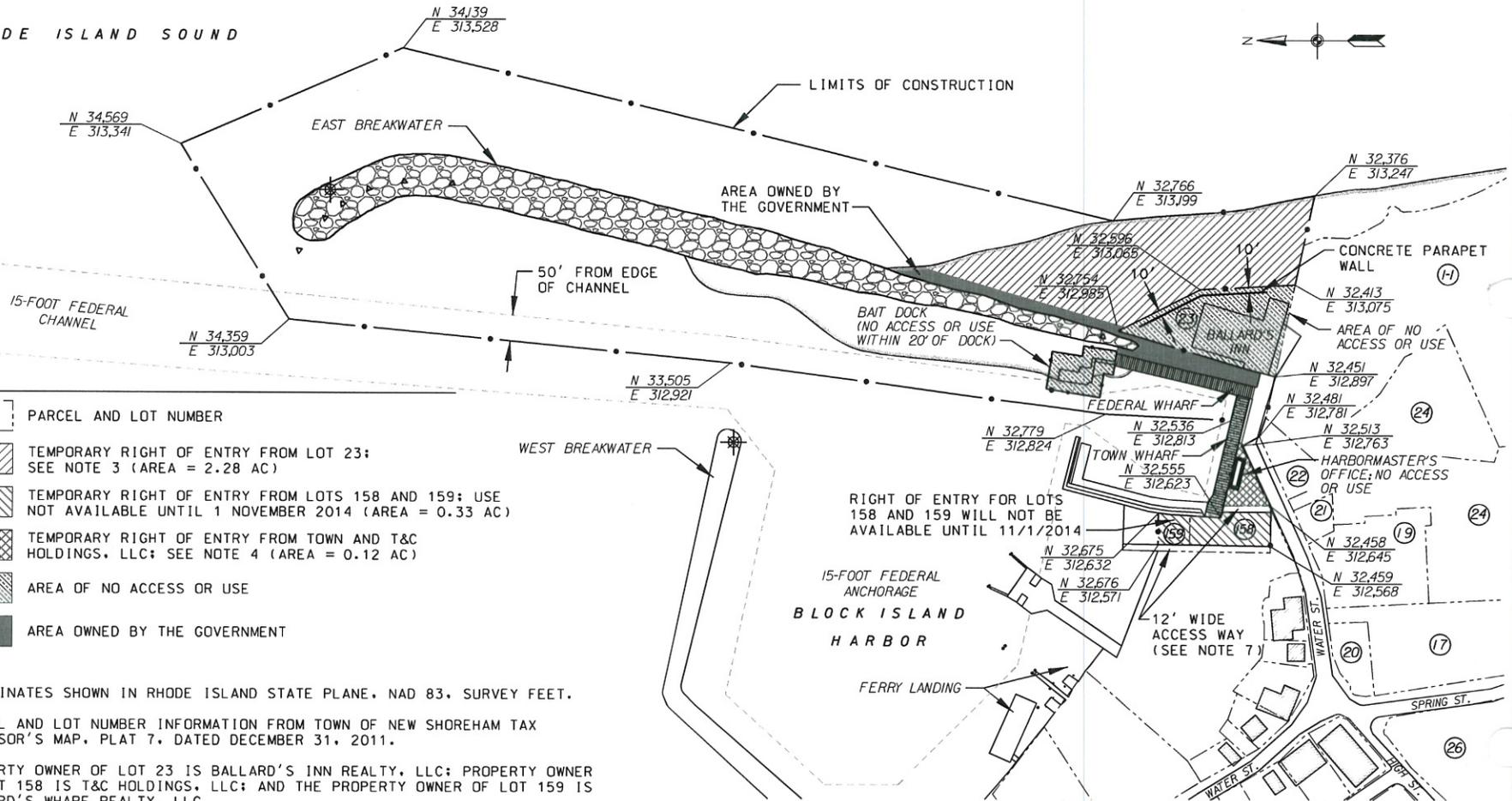
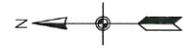
Nancy O. Dodge (SEAL)
Nancy O. Dodge, Town Manager

UNITED STATES OF AMERICA

BY Joseph M. Redlinger

Joseph M. Redlinger
Chief, Real Estate Division
U.S. Army Corps of Engineer Engineers
New England District
696 Virginia Road
Concord, Massachusetts 01742-2751

RHODE ISLAND SOUND



LEGEND

-  PARCEL AND LOT NUMBER
-  TEMPORARY RIGHT OF ENTRY FROM LOT 23; SEE NOTE 3 (AREA = 2.28 AC)
-  TEMPORARY RIGHT OF ENTRY FROM LOTS 158 AND 159; USE NOT AVAILABLE UNTIL 1 NOVEMBER 2014 (AREA = 0.33 AC)
-  TEMPORARY RIGHT OF ENTRY FROM TOWN AND T&C HOLDINGS, LLC; SEE NOTE 4 (AREA = 0.12 AC)
-  AREA OF NO ACCESS OR USE
-  AREA OWNED BY THE GOVERNMENT

NOTES:

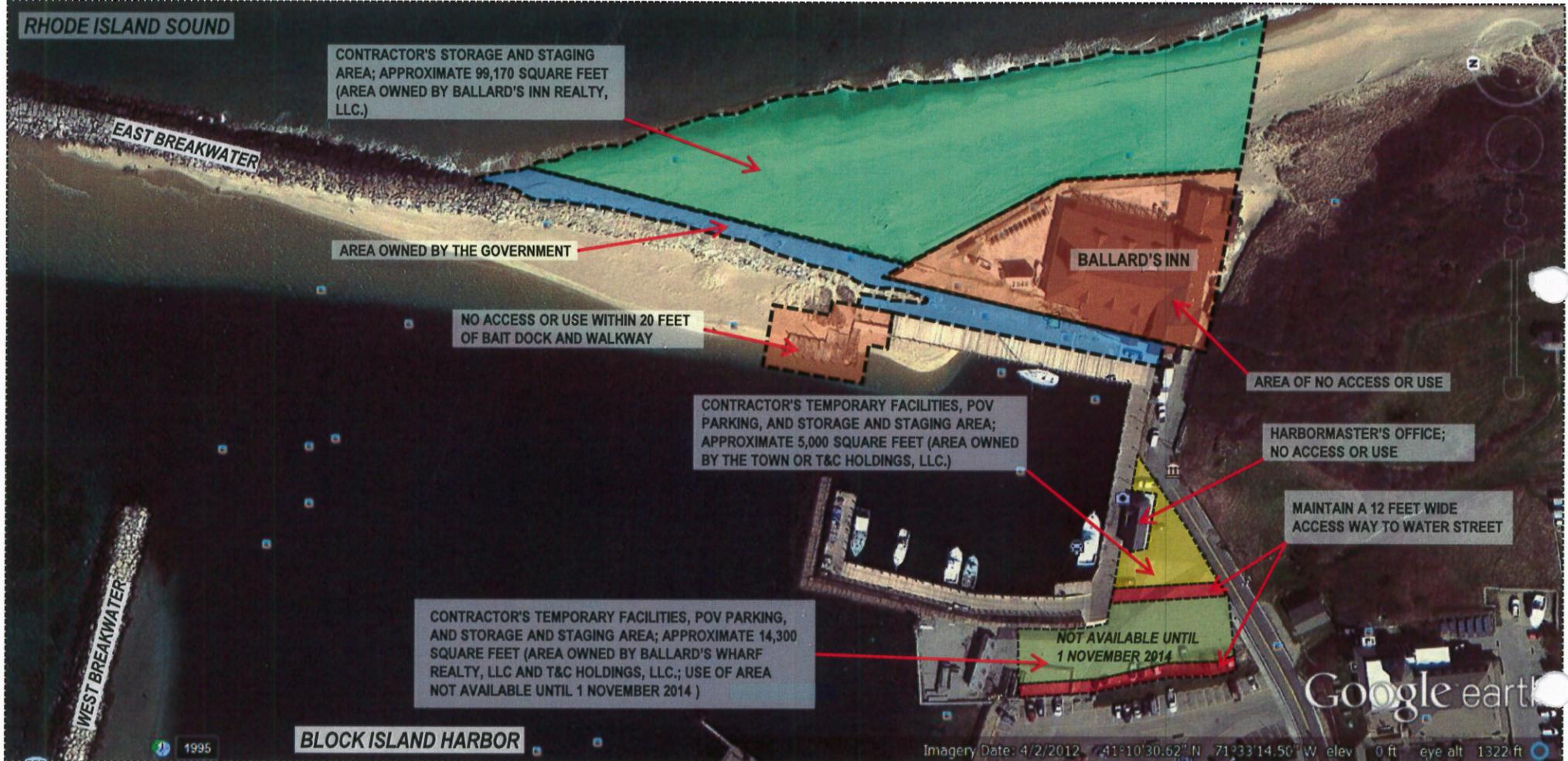
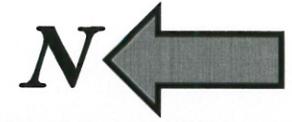
1. COORDINATES SHOWN IN RHODE ISLAND STATE PLANE, NAD 83, SURVEY FEET.
2. PARCEL AND LOT NUMBER INFORMATION FROM TOWN OF NEW SHOREHAM TAX ASSESSOR'S MAP, PLAT 7, DATED DECEMBER 31, 2011.
3. PROPERTY OWNER OF LOT 23 IS BALLARD'S INN REALTY, LLC; PROPERTY OWNER OF LOT 158 IS T&C HOLDINGS, LLC; AND THE PROPERTY OWNER OF LOT 159 IS BALLARD'S WHARF REALTY, LLC.
4. AREA TO BE USED FOR CONTRACTOR'S OFFICE TRAILER, STAGING AND STORAGE AREA, AND EMPLOYEE PARKING.
5. FEDERAL WHARF: VEHICLES, EQUIPMENT, OR MATERIALS WEIGHING MORE THAN 6 TONS SHALL NOT BE ALLOWED ON THE FEDERAL WHARF. THE CONTRACTOR SHALL BE HELD RESPONSIBLE FOR ANY DAMAGE TO THE WHARF CAUSED BY THE CONTRACTOR'S OPERATIONS. REPAIRS TO THE WHARF SHALL BE AT THE CONTRACTOR'S EXPENSE.
6. TOWN WHARF: THE TOWN WHARF IS EXCLUDED FROM ANY RIGHTS OF ENTRY GRANTED BY THE TOWN AND T&C HOLDINGS, LLC.
7. MAINTAIN A 12 FEET WIDE ACCESS WAY TO WATER STREET ALONG WEST SIDES OF PROPERTY LINES.

EXHIBIT A
ROE 2536
PAGE 1 of 2

GRAPHIC SCALE:



DEPARTMENT OF THE ARMY NEW ENGLAND DISTRICT CORPS OF ENGINEERS CONCORD, MASSACHUSETTS		
BLOCK ISLAND, RHODE ISLAND HARBOR OF REFUGE REPAIRS TO THE EAST BREAKWATER		
REAL ESTATE PLAN		
DATE: 4/23/2014	PLOT SCALE: 1" = 200'	FIGURE RE-1



SKETCH 1
CONTRACTOR'S TEMPORARY FACILITIES, AND STORAGE AND STAGING AREA
REPAIRS TO THE EAST BREAKWATER, BLOCK ISLAND HARBOR, BLOCK ISLAND, RI
(ATTACHMENT TO SECTION 01 50 00)

EXHIBIT A
ROE 2536
PAGE 2 of 2

SCHEDULE I

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

STATEMENT OF THE NEW SHOREHAM BUILDING OFFICIAL

I, Marc A. Tillson, am the Building Official and Zoning Enforcement Officer for the Town of New Shoreham. In my capacity as the Zoning Enforcement Officer, I administer and enforce the Town's Zoning Ordinance and am familiar with its provisions and applications. I have reviewed the Schedule A, Purported Docking Facilities Diagram and in particular, the portion of the docking facility near the East Breakwater which is marked, "Alternate Access." The construction of the "Alternate Access" docking facility requires approval from the Zoning Board of Review and in particular a Special Use Permit from Zoning section 318, Waterfront Overlay. Development Plan Review is required from the Town's Planning Board for all uses requiring a Special Use Permit. The "Alternate Access" portion of the docking facility as depicted lies above the mean high water mark and is regulated by the Town pursuant to the Town's zoning power to regulate construction of structures and uses upland of the mean high water mark.

The applicable section of the Zoning Ordinance is Article 3, Section 318, Waterfront Overlay, (D), (4). The "Alternate Access" docking facility would be located in a Type 5 District which is defined in the Zoning Ordinance as the shoreline of the Old Harbor, from the outer end of the east breakwater to the outer end of the west breakwater. Construction of the Alternate Access docking facility in the Type 5 District requires approval from the Town by way of a Zoning Special Use Permit.



Marc A. Tillson
Building Official, Town of New Shoreham

SCHEDULE J



SCHEDULE K

Block Island Harbor of Refuge FNP

From **Walsh, Michael E NAE** Michael.E.Walsh@usace.army.mil [hide details](#)

To **Katherine Merolla** kamlaw2344@aol.com

Cc **Nancy Dodge** townmanager1@new-shoreham.com

Hi Kathy,

In answer to your question about modification or attachment to the East Breakwater at Block Island Harbor of Refuge:

The Corps has a long standing policy not to allow modification to Federal Navigation Structures, which includes building on or attaching to a structure.

Please let me know if you have any further questions regarding the Block Island HOR Federal Navigation Project.

MIKE

~~~~~  
Michael E. Walsh, P.E., PMP

Project Manager

~~~~~  
U.S. Army Corps
of Engineers, New England District

CENAE-PP-PN

696 Virginia Rd., Concord, MA 01742-2751

Michael.E.Walsh@usace.army.mil

www.nae.usace.army.mil

O: (978) 318-8586

M: (978) 831-3093

~~~~~

# SCHEDULE I

DEPARTMENT OF THE ARMY  
US Army Corps of Engineers  
Washington, DC 20314-1000

EC 1165-2-216

CECW-CP  
Circular  
No. 1165-2-216

31 July 2014

EXPIRES 31 July 2016  
Water Resource Policies and Authorities  
POLICY AND PROCEDURAL GUIDANCE FOR PROCESSING REQUESTS  
TO ALTER US ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS  
PURSUANT TO 33 USC 408

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EC 1165-2-216  
31 Jul 14

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31 July 2014

EXPIRES 31 July 2016  
Water Resource Policies and Authorities  
POLICY AND PROCEDURAL GUIDANCE FOR PROCESSING REQUESTS  
TO ALTER US ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS  
PURSUANT TO 33 USC 408

1. Purpose.

a. The purpose of this Engineer Circular (EC) is to provide policy and procedural guidance for processing requests by private, public, tribal, or other federal entities, to make alterations to, or temporarily or permanently occupy or use, any US Army Corps of Engineers (USACE) federally authorized civil works project, referred to as "USACE project" within this document, pursuant to 33 USC 408 (Section 408). Proposed alterations must not be injurious to the public interest or affect the USACE project's ability to meet its authorized purpose.

b. The main body of this EC contains policy applicable to all types of Civil Works projects and an overall step-by-step procedural guide to be tailored at the district level to the appropriate level of detail for a specific Section 408 request. Supplemental guidance including additional procedural, decision-making and coordination detail related to specific infrastructure types (i.e. dams, hydropower, levee systems, channels, and navigation) can be found in Appendices B-E.

c. This EC supersedes the previous policy memoranda on this subject as identified in Appendix A.

2. Applicability. This circular is applicable to all headquarters USACE elements, divisions, districts, laboratories, and field operating activities having civil works planning, engineering, design, construction, and operations and maintenance (O&M) responsibilities. Note that for use in this EC, "district" refers to a USACE district office and "division" refers to a USACE division office. This EC applies to requests for alterations received by districts on or after the date of issuance.

3. Distribution Statement. Approved for public release; distribution is unlimited.

4. References. References for the main EC are in Appendix A.

5. Authority. The authority to grant permission for temporary or permanent alterations is contained in Section 14 of the Rivers and Harbors Act of 1899 and codified in 33 USC 408, titled *Taking possession of, use of, or injury to harbor or river improvements*, and states the following: "*It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels*

*thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: Provided, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: Provided further, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work."*

6. Policy.

a. **Alteration.** Section 408 authorizes the Secretary of the Army to grant permission for the alteration or occupation or use of the project if the Secretary determines that the activity will not be injurious to the public interest and will not impair the usefulness of the project. Unless otherwise stated, for ease of reference, the use of the term "alteration" in this document also includes "occupation" and "use." For purposes of this document, the words "alteration" or "alter" refers to any action by any entity other than USACE that builds upon, alters, improves, moves, occupies, or otherwise affects the usefulness, or the structural or ecological integrity, of a USACE project. Alterations also include actions approved as "encroachments" pursuant to 33 CFR 208.10.

b. **Other Authorizations.** A requester has the responsibility to acquire all other permissions or authorizations required by federal, state, and local laws or regulations, including any required permits from the USACE Regulatory Program (Section 10/404/103 permits). In addition, an approval under Section 408 does not grant any property rights or exclusive privileges.

c. **Alterations within Project Boundaries.** This EC only applies to alterations proposed within the lands and real property interests identified and acquired for the USACE project and to lands available for USACE projects under the navigation servitude.

d. **Requesters.** A request for Section 408 permission can originate from a non-federal sponsor or an independent requester. For USACE projects with a non-federal sponsor as described in paragraph 6.e., the requester must either be the non-federal sponsor or have the endorsement of the non-federal sponsor prior to a written request, reference paragraph 7.c.(2), being submitted to USACE.

e. **Non-Federal Sponsors.** The district will provide a hardcopy or electronic copy of this EC to each non-federal sponsor described below:

(1) A non-federal sponsor that has provided assurances pursuant to Section 3 of the Flood Control Act of 1936, as amended (33 USC 701c), or Section 221 of the Flood Control Act of 1970, as amended (42 USC 1962d-5b), is responsible for ensuring that a USACE project is operated and maintained in accordance with requirements prescribed by USACE. Any proposed alteration that would require permission from USACE under Section 408 must be requested by or come through the non-federal sponsor. Accordingly, for improvements, excavations, construction, or changes to local flood protection works referenced in 33 CFR 208.10(a)(4) and (5), approval from USACE under Section 408 (and in accordance to procedures in this EC) must be obtained by the non-federal sponsor. If a USACE project has multiple non-federal sponsors in this category, concurrence in writing must be obtained by all non-federal sponsors prior to USACE approval of a Section 408 request.

(2) For USACE projects that were constructed in whole or in part pursuant to a cost-share agreement with a non-federal sponsor, but are operated and maintained by USACE, the district will obtain written concurrence by each of the non-federal sponsors for the proposed alteration prior to USACE approval of a Section 408 request.

(3) For requested alterations located in inland and intracoastal waterways, the district will issue a public notice to notify users of the waterways, navigation stakeholders, and other interested parties as the district deems appropriate.

f. Routine Operations and Maintenance Activities. Routine operations and maintenance (O&M) activities specified in the O&M manual and performed by the non-federal sponsor or USACE do not require permission from USACE under Section 408.

g. USACE Shoreline Management and Master Planning Programs. Activities contained in 36 CFR 327 do not require review for purposes of Section 408. The processes in 36 CFR 327 ensure that the requested activity will not be injurious to the public interest and will not impair the usefulness of the project. Engineer Regulation (ER) and Engineer Pamphlet (EP) 1130-2-550, Chapter 3, provides the procedures for the USACE Master Plan Program. ER 1130-2-406 provides the procedures for the USACE Shoreline Management Program.

h. Real Estate Outgrants.

(1) Real Estate outgrants are defined in ER 405-1-12, Chapter 8, or subsequent regulation.

(2) Outgrants issued to implement an approved Project Master Plan, including the Shoreline Management Plan or Operational Management Plan, do not require review for purposes of Section 408. See ER/EP 1130-2-550, Chapter 3.

(3) Outgrants issued pursuant to the procedures in ER/EP 1130-2-550, Chapters 16 or 17 ensure the requested alteration in the outgrant request will not be injurious to the public interest and will not impair the usefulness of the project; thus, meeting the intent of Section 408. However, the USACE team evaluating the outgrant requests involving an alteration to project

structures and projects as discussed in Appendices B – E of this EC must consider the additional criteria and factors discussed in those appendices. In addition, the team evaluating outgrant requests will determine if HQUSACE review is required by following the process described in paragraph 6.t. of this EC. If the determination is that HQUSACE review is required, then the outgrant request will require a documented Section 408 decision in accordance with this EC. When a Section 408 decision is required, the Real Estate Contracting Officer will not issue such outgrant unless the appropriate USACE decision maker with delegated authority grants permission for the alteration pursuant to Section 408. Any special conditions included pursuant to Section 408 must be included in the outgrant. If HQUSACE review is not required, then districts may follow procedures in ER/EP 1130-2-550, Chapters 16 or 17 for issuing the outgrant decision.

(4) Outgrant requests not included in ER/EP 1130-2-550, Chapters 16 or 17 require a Section 408 determination in accordance with this EC. The Real Estate Contracting Officer will not issue such outgrant unless the appropriate USACE decision maker with delegated authority grants permission for the proposed alteration pursuant to Section 408. Any conditions included in the grant of permission pursuant to Section 408 must be included in the outgrant.

i. Previously Approved Alterations. All previous approvals granted for alterations, including “encroachments” approved pursuant to 33 CFR 208.10 prior to the date of this EC are not invalidated by this EC.

j. Unauthorized Alterations. The policy of USACE is to pursue enforcement and correction of unauthorized alterations of covered projects. If an unauthorized alteration is discovered, the district, after consulting with the Offices of Counsel and Real Estate, should take the appropriate steps to remedy the unauthorized alteration. The Chief of Regulatory should be notified of any unauthorized alterations so the appropriate course of action can be taken with respect to Section 10/404/103 permits. Specific enforcement steps the district takes will depend on the particular nature of the unauthorized alteration and whether the unauthorized alteration is located on project boundaries where a non-federal sponsor holds the land rights for operations and maintenance. Non-federal sponsors with operations and maintenance responsibilities for the USACE project, reference paragraph 6.e.(1), remain responsible for ensuring no unauthorized alterations are occurring within the project boundaries.

k. Authorized Project Purpose. No granting of permission is allowed under Section 408 for a proposed alteration that would have an effect of deauthorizing a project or eliminating an authorized project purpose.

l. Completeness. Requests must be for complete alterations. A proposed alteration is considered complete if it results in a fully functional element once construction is completed.

m. Design and Construction Standards. A proposed alteration pursuant to Section 408 must meet current USACE design and construction standards. However a requester is not required to

bring those portions or features of the existing USACE project that are not impacted by the alteration up to current USACE design standards.

n. Hydrologic and Hydraulics Impacts. As a general rule, proposed alterations that will result in substantial adverse changes in water surface profiles will not be approved.

o. Type I Independent External Peer Review (IEPR). Per EC 1165-2-214, because Section 408 requests are not planning studies, Type I IEPRs are not required.

p. Regulatory Program Coordination.

(1) The granting or denial of permission pursuant to Section 408 is not a permit action handled by the Regulatory Program.

(2) If a proposed alteration also requires authorization pursuant to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and/or Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (Section 10/404/103), district Regulatory and Section 408 personnel must coordinate throughout their respective evaluations.

(3) The decision on a Department of the Army permit application pursuant to Section 10/404/103 cannot and will not be rendered prior to the decision on the Section 408 request.

(4) Regulatory funds can only be used for a Section 10/404/103 action, which may include those actions with an associated Section 408 request. Regulatory staff can use Regulatory funds to participate in joint meetings and internally coordinate portions of shared documents when a Section 408 request also requires a Section 10/404/103 action. Regulatory funds cannot be used to develop or coordinate any components of the Section 408 request independent of a Section 10/404/103 action.

(5) Processing Department of the Army permit applications pursuant to Sections 10/404/103 will be accomplished in accordance with current regulations and guidance.

(6) In cases when a Section 408 request requires division or HQUSACE coordination and/or review, no Section 10/404/103 permit decision documentation will be forwarded to the division or HQUSACE in order to preserve the independent decision-making authority of the District and Division Commanders. The district, however, should ensure that the Section 408 documentation clearly articulates if Section 10/404/103 authorization is required.

q. In-kind Contribution Credit under Section 221 of the Flood Control Act of 1970, as amended (Section 221).

(1) Alterations of a USACE Project with an Ongoing Feasibility Study. There may be cases where a non-federal sponsor wishes to undertake alterations to an existing USACE project for which there is an ongoing USACE feasibility study and seek credit eligibility for those

alterations toward its cost share for the not-yet authorized USACE project (under Section 221 of the Flood Control Act of 1970). In such cases, any proposed alteration for which the non-federal sponsor is seeking credit cannot be initiated until the draft feasibility report is released for public review, an in-kind memorandum of understanding (MOU) for the work is executed, and Section 408 permission is issued. Additional authorizations, such as those required pursuant to Section 10/404/103 under the USACE Regulatory Program, may also be required before the non-federal sponsor can initiate any work.

(2) In Kind Contributions for an Authorized USACE Project. In those cases where a non-federal sponsor is undertaking work as an in-kind contribution on an authorized USACE project pursuant to an executed project partnership agreement that provides credit for such work, Section 408 permission is not required.

(3) Detailed guidance on crediting can be found in ER 1165-2-208.

r. Sharing of Sensitive Information. Requesters seeking sensitive information about an existing USACE project to develop a proposed alteration will submit requests for that information in writing. Sensitive information includes information that could pose a security risk or aid those intending to do harm to a USACE project. Examples include but are not limited to design analyses, as-builts or other drawings, specifications, location of deficiencies, operational information, and contingency plans. The office that generated or is responsible for the information requested will review the request in coordination with the district operational security officer, to determine whether it is sensitive. Districts should limit the distribution of sensitive information to only the information that is necessary for the proposed alteration. Districts will advise requesters that the information to be provided is sensitive and direct requesters to provide a list of individuals with whom the information will be shared. Districts will advise requesters that the sensitive information will not be shared with individuals not on the list. Reviewers should work with their District Office of Counsel to determine if a non-disclosure statement is needed. Districts may in some cases have to withhold sensitive information regardless of its necessity for the development of a proposed alteration. Requests for data submitted to USACE by other agencies will not be provided and will be referred to the other agency for a release determination.

s. Categorical Permission. The district, division, and/or HQUSACE have the ability to create a categorical permission for Section 408 that would cover potential alterations that are similar in nature and that have similar impacts. Categorical permissions should be established by providing public notice of the activities covered by the categorical permission. There should be appropriate documentation and analysis developed to determine that the impacts of activities covered by the categorical permission are permissible and that environmental compliance for those activities has been met. Once established, a simplified process to validate application of the categorical permission and specify any special conditions that may apply on a site-specific basis may be used.

t. Section 408 Decision Level. Certain proposed alterations, once recommended by the district and division, will require a final decision by the Director of Civil Works at HQUSACE. All other decisions on proposed alterations may be rendered by the District Commander unless a Division Commander establishes a regional process that requires that the decision be made by the Division Commander. If the answer to any of the following questions is “yes” and the district and division recommend approval, then the Section 408 request requires HQUSACE level review and decision, reference paragraph 7.c.(7):

- (1) Does the proposed alteration require a Type II IEPR, reference EC 1165-2-214?
- (2) Does the proposed alteration require an Environmental Impact Statement (EIS) in which USACE is the lead agency?
- (3) Does the proposed alteration change how the USACE project will meet its authorized purpose? An example would be a proposed alteration to permanently breach a levee system for ecosystem restoration purposes but raise all structures behind the levee to achieve the same flood risk management benefits. This project still meets the authorized flood risk management purpose, but in a different manner.
- (4) Does the proposed alteration preclude or negatively impact alternatives for a current General Investigation (GI) or other study?
- (5) Is the non-federal sponsor for a USACE project proposing to undertake the alteration as in-kind contributions eligible for credit under Section 221 of Flood Control Act of 1970, as amended?
- (6) Is the proposed alteration for installation of hydropower facilities?
- (7) Is there a desire for USACE to assume operations and maintenance responsibilities of the proposed navigation alternation pursuant to Section 204(f) of Water Resources Development Act (WRDA) of 1986?

If the district is unsure, the district should engage the division and HQUSACE, reference Paragraph 9 of this EC, Vertical Teaming.

## 7. Procedures.

a. District Section 408 Coordinator. The District Commander will designate a Section 408 Coordinator responsible for ensuring processes in this EC are met and to ensure the proper coordination occurs among all the necessary district elements, including but not limited to, regulatory, real estate, counsel, planning, engineering, programs and project management, and/or operations. The Section 408 Coordinator will also ensure proper coordination among other districts if the USACE project crosses more than one district’s area of responsibility. In addition the Section 408 Coordinator will track district expenditures, including funding provided by any

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non-federal interests, for processing Section 408 requests on a fiscal year basis by funding source.

b. Description. In order to grant permission under Section 408, USACE must determine that the proposed alteration does not impair the usefulness of the USACE project, which includes retaining the project's authorized purpose, and is not injurious to the public interest. Because proposed alterations vary in size, level of complexity, and potential impacts, the procedures and required information to make such a determination are intended to be scalable. Based on the proposed alteration, districts will determine data, analyses and documentation necessary in order to make a determination regarding whether or not the proposed alteration does not impair the usefulness of the project and is not injurious to the public interest. Requirements for data, analyses and documentation may be subject to change as additional information about the Section 408 proposal is developed and reviewed.

c. Step-by-Step Procedures. The procedures have been grouped into nine steps: pre-coordination, written request, required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, HQUSACE review, notification, and post-permission oversight. Not all the steps will be applicable to every Section 408 request. In simple cases, steps may be combined or occur simultaneously. For more complex cases, there may be the need for extensive coordination between the district and requester throughout the process. Supplemental information for these steps specific to dams and reservoirs, hydropower, levees and floodwalls, flood risk management channels, and navigation can be found in the appendix appropriate to the type of infrastructure (Appendices B-E). At any time in the process if the district determines that the requirements will not or cannot be met, the district may deny the request prior to completing all the required steps. If a request is denied, the requester will be advised in writing as to the reasons for denial.

(1) Step 1: Pre-Coordination. Early coordination between USACE, the requester and/or non-federal sponsor, if applicable, is strongly recommended because it will aid in identifying potential issues, focusing efforts, minimizing costs, and protecting sensitive information. Districts shall ensure requesters are provided a hardcopy or electronic copy of this EC.

(2) Step 2: Written Request. The purpose of this step is to document the initiation of the Section 408 process. Information from this step will be used by the district to determine documentation and approval requirements.

(a) All requests for Section 408 permission must be submitted in writing to the District Commander of the appropriate USACE district office having jurisdiction over the USACE project that would be impacted by the alteration. Each district has the flexibility to determine the format in which this written request is submitted; however,

(b) The written request must include:

- i. a complete description of the proposed alteration including necessary drawings, sketches, maps, and plans that are sufficient for the district to make a preliminary determination as to the location, purpose and need, anticipated construction schedule, and level of technical documentation needed to inform its evaluation. Detailed engineering plans and specifications are not required at Step 2, but could be submitted at the same time if available;
- ii. a written statement regarding whether the requester is also pursuing authorization pursuant to Sections 10/404/103 and, if so, the date or anticipated date of application/pre-construction notification submittal;
- iii. information regarding whether credit under Section 221 of the Flood Control Act of 1970, as amended, or other law or whether approval under Section 204(f) of WRDA 1986 is being or will be sought;
- iv. a written statement of whether the requester will require the use of federally-owned real property or property owned by the non-federal sponsor; and,
- v. a written statement from the non-federal sponsor endorsing the proposed alternation, if applicable.

(3) Step 3: Required Documentation. The purpose of this step is to outline the documentation necessary for the district to determine whether the proposed alteration would impair the usefulness of the project or be injurious to the public interest. The list below is meant to provide an overview of the general requirements, but requirements are scalable to the nature of the proposed alteration.

(a) Technical Analysis and Design. The district should work closely with the requester to determine the specific level of detail necessary to make a decision for a particular alteration request. The minimum level of detail will be 60% complete plans and specifications and supporting technical analysis.

(b) Hydrologic and Hydraulics System Performance Analysis. The purpose of a hydrologic and hydraulics system performance analysis is to determine the potential hydrologic and hydraulics impacts of proposed alterations. Districts will determine if such an analysis is needed and, if so, the appropriate scope of analysis based on the complexity of the proposed alteration. The requester will be responsible for the analysis. Hydrologic and hydraulic system performance analyses will be applied to alterations that alter the hydrologic and/or hydraulic conditions (e.g., reservoir operations, bridge constrictions, hydropower installation, etc.) See Appendix F for more details regarding the requirements of a hydrologic and hydraulics system performance analysis.

(c) Environmental Compliance.

i. A decision on a Section 408 request is a federal action, and therefore subject to the National Environmental Policy Act (NEPA) and other environmental compliance requirements. While ensuring compliance is the responsibility of USACE, the requester is responsible for providing all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and ordinances. NEPA and other analysis completed to comply with other environmental statutes (e.g. Endangered Species Act) should be commensurate with the scale and potential effects of the activity that would alter the USACE project. The district will work with the requester to determine the requirements, which will be scaled to the likely impacts of the proposed alteration and should convey the relevant considerations and impacts in a concise and effective manner.

ii. The NEPA compliance process should be completed in an efficient, effective and timely manner consistent with guidance issued by the Council on Environmental Quality on March 6, 2012 entitled *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*. NEPA compliance should follow the process set forth in 40 CFR Parts 1500-1508 and the USACE civil works NEPA implementing regulations found in 33 CFR Part 230. Documentation for Section 408 requests do not require the same level of analysis or documentation needed for planning studies and, therefore, Appendix A and other portions of Part 230 specific to planning studies do not apply. However, in some cases, documentation from studies may be used to inform a Section 408 decision, such as a report that would be required for Section 204(f) of the Water Resources Development Act of 1986.

iii. For any final Environmental Impact Statement (EIS) or Environmental Assessment (EA) or other environmental compliance document, the requester's proposal will be identified as the "requester's preferred alternative."

iv. USACE has jurisdiction under Section 408 only over the specific activities or portions of activities that have the potential to alter a USACE project. Therefore, if a proposed alteration is part of a larger project (and/or its associated features) that extends beyond the USACE project boundaries, the district should determine what portions or features of the larger project USACE has sufficient control and responsibility over to warrant their inclusion in the USACE environmental review. The scope of analysis for the NEPA and environmental compliance evaluations for the Section 408 review should be limited to the area of the alteration and those adjacent areas that are directly or indirectly affected by the alteration. For example, a pipeline can extend for many miles on either side of the USACE project boundary. In this example, the scope of analysis would likely be limited to the effects of the pipeline within the USACE project boundary, but would not address those portions of the pipeline beyond the USACE project boundary. In contrast, a proposal to alter a levee system might require USACE to examine that proposal's potential effects on the reliability of the levee system to provide flood risk reduction to the area behind the levee system itself. As a general rule, if there are features of a larger project occurring outside of the USACE project boundaries that are so intimately connected to the features of the larger project altering a USACE project that they cannot be meaningfully

distinguished (e.g., a setback levee that is located outside of the original project boundary of the levee being replaced), the USACE Section 408 NEPA document should be broad enough to address all those effects. Generally, elements of the larger project that are not intimately connected to the features that would alter the USACE project (e.g., concessions being constructed off USACE property by the same entity requesting permission to construct boat access to a USACE reservoir) should not be included in the USACE environmental review.

v. Only reasonable alternatives need to be considered in detail, as discussed in the CEQ NEPA regulations at 40 CFR Part 1502.14. Reasonable alternatives must be those that are feasible, and such feasibility must focus on the accomplishment of the underlying purpose and need (of the requester) that would be satisfied by the proposed federal action (granting of permission for the alteration). For Section 408 requests, reasonable alternatives should focus on two scenarios: 1) no action (i.e., no proposed alteration in place) and 2) action (i.e. proposed alteration in place). Thus, examination of alternative forms of a proposed alteration that the requester has not proposed should only be included to the extent necessary to allow a complete and objective evaluation of the public interest and informed decision regarding the alteration request.

vi. Districts must make diligent efforts to involve the public in the decision-making process, including soliciting appropriate information from the public to inform the environmental analysis and public interest determination. For the purposes of Section 408 requests that are expected to have less than a significant effect on the human or natural environment, a public notice soliciting input will serve as the method of advising all interested parties of the proposed alteration for which permission is sought and by which information necessary to inform USACE's evaluation and review is solicited. As such, this public notice must be circulated to the public as early in the evaluation of a proposed alteration as possible to generate meaningful public and agency input to inform the evaluation and decision-making processes. Generally, Section 408 EAs should not be circulated for public comment. In circumstances where a proposed alteration is associated with a current study or other uncommon circumstances, the decision to circulate the Section 408 component of that EA will be approved by the Division Commander or the Division Commander's designee. Any decision to circulate an EA/Finding of No Significant Impact (FONSI) for a Section 408 request that also requires a Section 10/404/103 permit decision must be coordinated with the Regulatory Program to ensure that only information pertinent to non-Regulatory Program matters is included in the documented to be circulated.

vii. A number of categorical exclusions that allow completion of the NEPA process in an efficient manner for those activities that individually and cumulatively would not result in significant effects on the environment are included in 33 CFR 230.9. For example, categorical exclusions in 33 CFR 230.9(b) and (i) may have applicability to some of the smaller scale activities that may be encountered under Section 408. Real estate grants for rights-of-way as referenced in 33 CFR 230.9(i) should be broadly interpreted to include grants of rights-of-way by either USACE or the non-federal sponsor. A categorical exclusion may be used for Section 408, provided that care is taken to ensure that the proposed alteration is within the intended scope of the specific categorical exclusion used and extraordinary circumstances that may

require the preparation of an EIS or EA have been taken into consideration. It is recommended that the applicability and use of the categorical exclusion be documented in accordance with recent CEQ guidance, *Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act*.

viii. The district should use, to the extent possible, any NEPA documentation that may already exist for the federal project. In some cases NEPA documentation has already been completed through an existing or ongoing civil works study. The districts should use the information to the extent feasible and supplement the existing information as needed.

ix. If the proposed alteration is covered by an EIS in which USACE is a cooperating agency, the district may adopt or supplement that EIS and develop a Record of Decision (ROD) that is specific to the proposed alteration. For hydropower alterations, USACE and FERC have entered into an MOU for meeting NEPA requirements (see Appendix C).

(d) Real Estate Requirements. A list of all real property interests required to support the proposed alteration must be provided, including those in federally managed lands and those owned by the requester. If a non-standard estate is proposed, the district must follow the normal approval requirements outlined in EC 405-1-11 and Chapter 12, ER 405-1-12 or subsequent regulation. Maps clearly depicting both existing real estate rights and the additional real estate required must also be provided. If the lands are under the control of the Army, the applicant will work with the district to determine lands impacted. Additional information may be needed. If it is determined that an outgrant of Army land is required, a *Report of Availability and Determination of Availability* must be completed by the district in accordance with AR 405-80 and Chapter 8, ER 405-1-12 or subsequent regulation.

(e) Discussion of Executive Order 11988 Considerations. The district may require the requester to submit sufficient data in order that the district may conduct its analysis in accordance with ER 1165-2-26 to ensure that the proposed alteration is compliant with EO 11988. The request should be assessed as to whether there would be induced development in the floodplain as a result of the proposed alteration and address the positive and negative impacts to the natural floodplain functions.

(f) Requester Review Plan Requirement. The district has the flexibility to decide whether or not the requester must prepare a review plan for the alteration for district approval. A review plan is required when a Type II Independent External Peer Review (IEPR) is required. If the district determines, by following procedures in EC 1165-2-214, a Type II IEPR is required, then at minimum the requester is required to submit a Type II IEPR review plan. The Risk Management Center (RMC) will be the Review Management Organization (RMO) and is required to endorse in writing all review plans for Type II IEPRs to ensure that the review plans reflect a level of review commensurate with the scope and scale of the proposed alterations. All requester-generated review plans for Type II IEPRs will be approved by the Division Commander.

(g) Operations and Maintenance. Requesters must identify any operations and maintenance requirements needed throughout the life of the proposed alteration and the responsible entity for the operations and maintenance into the future. For instances when there may be a desire for USACE to assume or incorporate operations and maintenance of the proposed alteration as part of its responsibilities for the USACE project being modified, a justification must be provided. See Appendix E for federal assumption of maintenance associated with navigation features. Any alteration to a project operated and maintained by a non-federal sponsor and for which an update to the operations and maintenance manual is required, the non-federal sponsor will provide USACE with sufficient information to update the O&M manual. The modified O&M manual will be subject to environmental compliance in the same manner as the requested alteration. The non-federal sponsor will acknowledge in writing their continued responsibility to operate, maintain, repair, rehabilitate and replace the USACE project at no cost to the government and will hold and save the government free from all damages arising from construction, operation, maintenance, repair, rehabilitation, and replacement of the project.

(h) Other Information. Based on the alteration request, the district may require the requester to provide additional information to complete its evaluation.

(4) Step 4: District-Led Agency Technical Review.

(a) District Review Plans. The purpose of the district review plans is to define the requirements, procedures, and specific details of how the district-led Agency Technical Review (ATR) will be conducted for Section 408 proposals. In addition, district decisions about required documentation, Type II IEPRs and approval level should be documented in the review plans. Districts have the option to develop an overarching review plan, called a Procedural Review Plan, that establishes the review procedures to be used for Section 408 requests similar in nature and that have similar impacts. Procedural Review Plans must be endorsed in writing by the Risk Management Center and approved by the Division Commander. Otherwise, the district will develop an alteration-specific review plan to be approved by the Division Commander.

(b) District-led Agency Technical Review. For the purposes of Section 408, the purpose of a district-led ATR is to determine if requirements set forth in this EC have been met. Reviewers can be from the home district. If lacking the appropriate expertise, the district should supplement their staff with outside subject matter experts through appropriate communities of practice, centers of expertise, or other offices. Review teams should be comprised of reviewers with the appropriate independence and expertise to conduct a comprehensive review in a manner commensurate with the complexity of the Section 408 proposal. It should be noted, DrChecks can be used for Section 408 ATRs, but it is not required. The ATR team will make the following determinations:

i. Impair the Usefulness of the Project Determination. The objective of this determination is to ensure that the proposed alteration will not limit the ability of the project to function as authorized and will not compromise or change any authorized project conditions, purposes or outputs. All appropriate technical analyses including geotechnical, structural, hydraulic and

hydrologic, real estate, and operations and maintenance requirements, must be conducted and the technical adequacy of the design must be reviewed. If at any time it is concluded that the usefulness of the authorized project will be negatively impacted, any further evaluation under 33 USC 408 should be terminated.

ii. Injurious to the Public Interest Determination. Proposed alterations will be reviewed to determine the probable impacts, including cumulative impacts, on the public interest. Evaluation of the probable impacts that the proposed alteration to the USACE project may have on the public interest requires a careful weighing of all those factors that are relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. The decision whether to approve an alteration will be determined by the consideration of whether benefits are commensurate with risks. If the potential detriments are found to outweigh the potential benefits, then it may be determined that the proposed alteration is injurious to the public interest. This determination is not the same as the "contrary to the public interest determination" that is undertaken pursuant to Sections 10/404/103. Factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from the interested parties, including tribes, agencies, and the public.

iii. Legal and Policy Compliance Determination. A determination will be made as to whether the proposal meets all legal and policy requirements. District Office of Counsel concurrence is required. The compliance determination for any Section 10/404/103 permit decision associated with the proposed alteration is separate from and will not be included in this compliance determination.

(5) Step 5: Summary of Findings. Upon completion of the district ATR and demonstration of environmental compliance, the district will develop a Summary of Findings (content and format scalable to the alteration) to summarize the district rationale and conclusions for recommending approval or denial. The Summary of Findings will serve as the basis for the final decision on the proposed alteration. If the district determines that HQUSACE approval is required, the district will submit the Summary of Findings to the division for review. The Summary of Findings will be signed by the District Commander (or designee) and contain the following, if applicable:

- (a) Summary of rationale and conclusions for recommending approval or denial;
- (b) Written request;
- (c) A physical and functional description of the existing project, including a map;
- (d) Project history and authorization;

- (e) Impact to the usefulness of the USACE project determination;
  - (f) Injurious to the public interest determination;
  - (g) Policy Compliance certification;
  - (h) Certification of Legal Sufficiency from District Office of Counsel;
  - (i) Certification by the Chief of the District Real Estate Division that the real estate documentation is adequate;
  - (j) A description of any related, ongoing USACE studies (if applicable), including how the proposed alteration may impact those studies;
  - (k) Summary of any changes to the O&M manual. If the district has determined that USACE would assume O&M responsibilities as part of its responsibilities for the USACE project, include the rationale and any anticipated increase in USACE O&M costs.
  - (l) Summary of any changes to a project partnership agreement (PPA) or local cooperation agreement (if applicable);
  - (m) Applicable environmental compliance documentation including but not limited to NEPA documentation, Endangered Species Act (ESA) documentation, and other necessary documentation;
  - (n) Finding of No Significant Impact (FONSI) or Record of Decision (ROD) (These will be signed concurrently with the Section 408 decision. If HQUSACE approval is required, these will be draft and will be signed by the Director of Civil Works);
  - (o) Summary of the acceptance and use of funds pursuant to Section 214 if applicable as outlined in Appendix G; and,
  - (p) Any additional final conclusions or information, including any associated controversial issues.
- (6) Step 6: Division Review (if required).
- (a) Upon receipt of the district prepared Summary of Findings for HQUSACE review and decision, the division will review the submittal and provide comments to the district within 30 days unless the division notifies the district that additional review time is needed. The division will review the Summary of Findings for policy compliance and legal sufficiency; quality assurance and completeness; identification of conflicts with ongoing studies; and confirmation of the need for HQUSACE review and decision. The district is responsible for addressing division comments prior to submission to HQUSACE. The timeline required to address comments may

vary depending on significance of the division comments. If the division decides the district may approve the Section 408, that rationale should be documented as part of the administrative record.

(b) The Division Commander will either deny the Section 408 request or recommend approval to HQUSACE. If the division denies the request, this decision will be transmitted to the district. If the division recommends approval, the division will forward an electronic copy of the Summary of Findings and the Division Commander's recommendation to the appropriate HQUSACE Regional Integration Team (RIT). This may be forwarded to HQUSACE during the publication period of the final EIS (if an EIS is required for the alteration).

(7) Step 7: HQUSACE Review (if required).

(a) Upon receipt of the Section 408 submittal from the division, the RIT will forward the Summary of Findings and division recommendation to the HQUSACE Office of Water Project Review (CECW-PC) for a policy compliance review. The RIT will ensure that the appropriate reviewers include engineering and other appropriate subject matter experts such as navigation, levee safety, dam safety, real estate and environmental. HQUSACE will review and provide comments within 30 days, unless HQUSACE notifies the division that additional review time is needed. The timeline required to address comments will vary depending on significance of the HQUSACE comments. The RIT will coordinate the results, as needed, to correct or improve the package as necessary to address concerns. The district is responsible for addressing HQUSACE comments or coordinating with the requester for comment resolution.

(b) The RIT will draft the final HQUSACE decision memorandum for the Director of Civil Work's signature.

(c) If the Summary of Findings contains a draft FONSI, the Director of Civil Works will sign the FONSI concurrently with the Section 408 decision, if permission is granted.

(d) If the Summary of Findings contains a draft ROD, HQUSACE will not finalize the Section 408 decision sooner than 30 days after the publication of the final EIS and the district has transmitted an updated draft ROD. HQUSACE will finalize the ROD concurrently with the Section 408 decision.

(e) The RIT will provide the final HQUSACE decision memorandum and signed FONSI or ROD, if applicable, to the division that will in turn provide the decision to the district.

(8) Step 8: Notification. The District Commander is responsible for providing a written notification to the requester for all Section 408 requests, regardless of the decision level. Appendix H contains an example letter.

(a) If the final decision is to deny the request, the requester will be advised in writing as to the reason(s) for denial.

(b) If the final decision is to approve the request, the District Commander will provide a written approval document. In situations where the district also is evaluating a Section 10/404/103 permit application, the district may forward the Section 408 decision letter with the Section 10/404/103 permit decision, once it is made. For cases involving a categorical permission, the written approval will be validation that the categorical permission is applicable.

(c) Special Conditions. For approved alterations, the District Engineer may include special conditions. Examples of special conditions may include:

i. The requester must obtain approval by the district of 100% plans and specifications prior to construction.

ii. The requester must have both the Section 408 permission and appropriate real estate document prior to construction.

iii. The requester must obtain the appropriate Section 10/404/103 permits prior to construction.

iv. The requester must be responsible for implementing any requirements for mitigation, reasonable and prudent alternatives, or other conditions or requirements imposed as a result of environmental compliance.

v. Note, in the event of any deficiency in the design or construction of the requested activity, the requestor is solely responsible for the remedial corrective action, and any permission granted under Section 408 should explicitly state this responsibility.

#### (9) Step 9: Post-Permission Oversight.

(a) Construction oversight. The district should develop procedures for monitoring construction activities. The purpose is to ensure the Section 408 permittee is constructing the alteration in accordance with the permission conditions. Any concerns regarding construction should be directed to the Section 408 permittee (and the non-federal sponsor if the Section 408 permittee is not the non-federal sponsor) for resolution. Oversight should be commensurate with the level of complexity of the alteration.

(b) As-builts. Drawings showing alterations as finally constructed will be furnished by the Section 408 permittee to the district after completion of the work. As-builts must be provided within 180 days of construction completion.

(c) Operations and Maintenance (O&M) Manual Updates. The Section 408 permittee and/or non-federal sponsor is required to provide the district with sufficient information to update the O&M manual, as required. O&M manual updates may range from simple removal and replacement of paragraphs or entirely new manuals depending on the scope and complexity of the alteration. The district is responsible for reviewing and approving or developing any updates

needed to the O&M manual as a result of the alteration. At a minimum, the update should include a description of the new features, reference to the Section 408 approvals, as-builts, and instructions regarding O&M of any new features not included in the existing manual. Reference ER 1110-2-401 or ER 1130-2-500 for information on O&M manuals.

(d) Post Construction Closeout. Post construction closeout requires an on-site inspection of the completed alteration. The district may coordinate post construction closeout with the other federal, state or local agency. Where projects require an update to the O&M manual or PPA, the USACE district must conduct the post construction inspection and provide notification to the applicant and non-federal sponsor regarding acceptance or any corrective actions that are required. Notification that the alteration was constructed in accordance with the permit conditions must include a copy of the updated O&M manual.

(e) Administrative Record. The district will keep an administrative record for each Section 408 proposal. The administrative record should include all documents and materials directly or indirectly considered by the decision maker and should be ordered chronologically. It should include documents, materials, and a record of the offices and staff that are pertinent to the merits of the decision, as well as those that are relevant to the decision-making process.

8. Funding. Potential available sources of funds for review activities include:

a. Applicable project-specific appropriated funds in investigations, construction, operations and maintenance, or flood control - Mississippi River and Tributaries may be used for Section 408 reviews that are specific to the applicable project. Vertical team concurrence through division and HQUSACE RIT must be obtained prior to use of investigations or construction funds.

b. For federally authorized levee systems, channels, and dams operated and maintained by a non-federal sponsor, district Inspection of Completed Works funds may be used. In addition, on a case by case basis, for Section 408 requests critical to the functioning of these levee systems, channels, and dams and for reducing risk to life safety, requests for funding may be submitted to the HQUSACE Levee Safety Program Manager;

c. For federally authorized navigation projects, district project condition surveys funds may be used if the navigation projects do not have funding within their operations and maintenance account;

d. Funding for district coordination on Federal Energy Regulatory Commission (FERC) Activities. The funding for district coordination regarding FERC activities related to non-federal hydropower development will be provided by HQUSACE. Districts should request funding from HQUSACE through their respective division in coordination with their designated FERC Hydropower Coordinators. The request will be processed at HQUSACE through their respective regional integration team and forwarded to the HQUSACE Hydropower Business Line Manager, CECW-CO-H, for final approval and processing;

e. Funding to Process Section 408 Requests under Section 214. Funds may also be accepted under the authority of Section 214 of WRDA 2000, as amended, to expedite the review and evaluation of a Section 408 request. Funds may only be accepted from non-federal public entities. Examples of acceptable uses include, but are not limited to Agency Technical Review, real estate evaluation, copying or other clerical/support tasks, site visits, travel, coordination activities, additional personnel (including support/clerical staff), contracting support for technical services and environmental review and filing the environmental compliance documents. The processes applicable to accepting funds under the authority of Section 214 or WRDA 2000, as amended, are contained in Appendix G.

f. Federal Transportation Projects. In certain circumstances for alterations necessary for federal transportation projects, USACE may accept and expend funds provided by a state DOT agency pursuant to section 6002(j) of Public Law 109-59 (codified at 23 USC 139(j)) provided the Secretary of Transportation finds such review activities directly and meaningfully contribute to an underlying transportation project. In such cases, USACE only may accept funds in amounts necessary for USACE to meet the time limits for environmental review established for the project and may only accept funds for activities beyond the normal and ordinary capabilities permitted by USACE's general appropriations; and,

g. Funding to Process Section 408 Requests under Section 204(b). Water Resources Development Act of 1986, as amended, Section 204(b) allows non-federal interests to contract with USACE to provide technical assistance in obtaining all necessary permits, which includes Section 408 permission, associated with non-federal improvements to navigation features pursuant to Section 204(a) of WRDA 86.

9. Vertical Teaming. Vertical teaming between the district, division, and HQUSACE is encouraged when there is doubt as to the appropriate course of action related to the application of this guidance. Vertical teaming is also recommended to promote early coordination of potential alterations that may have Congressional interest or policy implications. Please coordinate through the appropriate HQUSACE's RIT.

FOR THE COMMANDER:



STEVEN L. STOCKTON, P.E.  
Director of Civil Works

9 Appendices  
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