

STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.:

Docket No.: D-13-51

AFFIDAVIT
OF CHARLES A. DONADIO, JR.

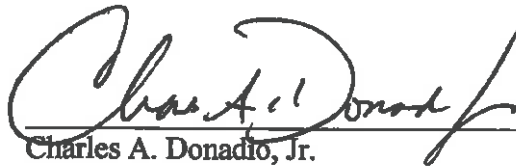
I, Charles A. Donadio, Jr., being sworn upon oath, depose and say:

1. That I am President of Rhode Island Fast Ferry, Inc. ("RIFF") and as such I have personal knowledge of the facts set forth in this Affidavit;
2. This Affidavit is submitted as the "declaration" of RIFF in furtherance of and in addition to that affidavit of RIFF filed on September 11, 2015 in which RIFF identified the docking facility it intends to utilize on Block Island (the "September 11, 2015 Affid." is hereby incorporated by reference).
2. That in its September 11, 2015 Affid. RIFF provided to the Division a Lease Option Agreement by and between RIFF and Bluewater LLC ("Bluewater") for use of facilities to be constructed by Bluewater in Old Harbor, Block Island as a disembarkation and embarkation point for RIFF;
3. That in its September 11, 2015 Affid. RIFF provided an affidavit of Bluewater's Principal Member attesting to Bluewater's intent to construct such a facility and the steps Bluewater has taken in furtherance of that intent;
4. That this affidavit is submitted in order to provide a chronology of regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old

Harbor as well as the reasonably anticipated start date for RIFF's services as required by Division Order 22166, dated and effective October 20, 2015.

5. That attached hereto as Exhibit "A" is a timeline pursuant to which RIFF reasonably anticipates the availability of dockage and start of its service based upon a regulatory process of 12-18 months and an additional 3-4 months to construct the facility.

6. That, in part, RIFF bases this affidavit on information provided by Bluewater, by and through its counsel Kelley, Drye & Warren, LLP (KDW") as well as Bluewater's contracting consultant, Anaconda Marine Management. See KDW Letter of November 12, 2015 and Anaconda Letter of November 15, 2015 (attached hereto as Exhibits "B" and "C").



Charles A. Donadio, Jr.
President
Rhode Island Fast Ferry, Inc.

Subscribed and sworn to in _____, Rhode Island, on the ___ day of November, 2015.

Notary Public

EXHIBIT A

RHODE ISLAND FAST FERRY TIMELINE



2018

2018

2017

2016

2015

2015

EXHIBIT B

KELLEY DRYE & WARREN LLP

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AFFILIATE OFFICE
MUMBAI, INDIA

November 12, 2015

State of Rhode Island and Providence Plantations
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, R.I. 02888

Attn: John Spirito, Jr., Hearing Officer

Re: In re: Rhode Island Fast Ferry, Inc., Docket No. D-13-51
33 U.S.C. § 408 and Bluewater, LLC's Proposed Docking Facilities

Dear Mr. Spirito:

We are writing in support of Bluewater, LLC's ("Bluewater") opposition to the Town of New Shoreham's ("the Town") Motion to Reconsider in connection with Bluewater's proposal to develop two docks in the Old Harbor of Block Island. Contrary to the Town's assertions in its Memorandum filed on November 5, 2015, Bluewater does not require the written consent of the Town to obtain a permit for the proposed docking facilities from the U.S. Army Corps of Engineers ("the Corps") pursuant to 33 U.S.C. § 408 ("section 408"). As detailed below, 33 U.S.C. § 408 does not require the Town's approval for a section 408 permit because the Town is not a non-federal sponsor of the Corps' Block Island project as that term is used in the section 408 process.¹

A brief history of the Corps' Block Island Harbor project is critical to the application of section 408 in these circumstances. The Block Island Old Harbor is a harbor of refuge constructed by the Corps of Engineers pursuant to a congressional authorization that dates back to 1870. There have been no significant changes to the original congressional authorization, with two notable exceptions. In 1986 and 2012, Congress de-authorized the outer harbor and inner breakwater. See Water Resources Development Act of 1986 ("WRDA"), Pub. L. 99-662 (Nov.

¹ This letter also responds to the Hearing Officer's request for additional information regarding the timeline for the section 408 process.

17, 1986); Consolidated Appropriations Act of 2012, Pub. L. 112-74 (Dec. 23, 2011). The table below contains the significant legislative actions for the federal project.

| <u>Block Island Harbor of Refuge, RI</u> | | |
|--|---|--|
| July 11, 1870 | Main breakwater | Annual Report 1868, p. 785; S. Misc. Doc. 81, 40th Cong., 2d sess. |
| November 17, 1986 | De-authorizing two 15-foot anchorages in the outer harbor authorized by the River and Harbor Act of 1912 Inner Harbor | Section 1002, Pub. L. 99-662 |
| December 23, 2011 | De-authorizing the inner breakwater | Section 113, Pub L. 112-74 |

Although both the outer harbor and inner breakwater have been de-authorized, the United States retains its navigational servitude and power over navigable waters for the purposes of commerce and national defense. Both of Bluewater’s proposed dock locations are within the boundaries of the federal project and thus controlled by the Corps.

The Town now apparently erroneously claims that it is a non-federal sponsor of the Corps’ Block Island project, entitling it to prevent the Corps’ consideration of a section 408 application by Bluewater. In short, the Town is not a non-federal sponsor of the project. The Town would only be a non-federal sponsor if it had a cost-share agreement with the Corps. *See* 33 U.S.C. § 2211(e). The Town, however, does not have a cost-share agreement with Corps for this project. 33 U.S.C. § 2211 provides that non-federal interests (e.g. state, tribal, or local agencies or governments) for a navigation project for a harbor shall pay a percentage of costs associated with general navigation features for projects that were not awarded before November 17, 1986. *See* 33 U.S.C. § 2211(a)(1). The Corps’ Block Island project was authorized in 1870. Therefore, there is no cost-sharing sponsor for the project.

By its plain terms, section 408 does not require the written consent of the Town, even if the Town were a non-federal cost sharing sponsor, which it is not. The Corps requires a permit under section 408 for proposed modifications to authorized Corps projects. The Secretary of the Army’s authority to grant permission for temporary or permanent alterations to Corps projects is contained in Section 14 of the Rivers and Harbors Act of 1899, as codified in 33 U.S.C. § 408, which states, in relevant part:

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.

33 U.S.C. § 408. Nothing in the statute’s terms requires the approval of a non-federal sponsor for a section 408 permit.

Federal regulations governing the Corps' section 408 permitting process also do not state that the Town's approval is required, whether it is a federal sponsor or not. *See* 33 C.F.R. § 320.4.

Finally, the Town cites the provisions of the Corps' Circular 1165-2-216, Town's Mem. at 11, which provides guidelines on the permitting process under section 408, but its arguments applying the Circular to the Town's role are incorrect. *See* Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects (July 31, 2014), http://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC_1165-2-216.pdf.2-53 (hereinafter "EC"). Contrary to the Town's assertion, the EC recognizes that a request for a section 408 permit can originate from either a non-federal sponsor *or* an independent requester.

More specifically, the EC delimits three specific circumstances that require a request to be made by a non-federal sponsor or require the concurrence of a non-federal sponsor. None of these circumstances apply to the Block Island project, so the Town has no basis to claim it must approve the Bluewater section 408 application as a non-federal sponsor. First, approval by a non-federal sponsor is required for a request involving certain local flood protection projects. *See* EC 1165-2-216 at 3. The flood control statues and regulations regarding changes to local flood protection works are not implicated by the Corps' Block Island project authorization, and therefore the approval of a non-federal sponsor is not required for alterations to this project.

Second, the EC 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 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." *See* EC 1165-2-216 at 3. As explained above, the Corps project at Block Island dates back to 1870 and was not constructed in whole or in part pursuant to a cost-share agreement with the Town. Therefore, no written concurrence from the Town is required for a section 408 request.

Third, the EC states that "[f]or 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." *See* EC 1165-2-216 at 3. Here, Bluewater's proposed docks are not located in inland or intracoastal waterways. Therefore, this provision of the Circular is inapplicable.

Finally, the EC describes the required elements for a permit request and provides that a written statement by a non-federal sponsor endorsing the proposed alteration is required, "if applicable." *See* EC 1165-2-216 at 9. As the foregoing demonstrates, there is no applicable requirement for a non-federal sponsor, and therefore no written consent from the Town is required for Bluewater's application for a section 408 permit.

Next, although the Town contends that an email from a Corps civilian project manager attached to its Memorandum shows that the Corps will not provide a section 408 permit to Bluewater, this email does not support the Town's position. While it is not clear what question

was posed to the Corps civilian employee, his answer does not address either of the two docks proposed by Bluewater since neither dock requires “modification or attachment” to a Corps structure, such as a breakwater.

An incomplete email from a Corps civilian engineer does not, moreover, represent any form of authoritative determination, formal or otherwise, from the Corps regarding what the Corps will or will not approve. A civilian engineer lacks the authority to bind the Corps. The United States Supreme Court has long held that such representations by agency officials, or their designees, cannot be relied on to establish the position of a federal agency. *See generally Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.”).

Indeed, any decision whether to provide a section 408 permit would only be made following a formal process as set forth in 33 C.F.R. § 325.2, governing the Army’s processing of permit applications. These procedures require review by the district engineer; issuance of a public notice; consideration of public comments; meetings between applicants and individuals who object to the application, where appropriate; review in accordance with the environmental procedures required by the National Environmental Policy Act of 1969; a determination of the need for a public hearing; issuance of a statement of findings or record of decision; and forwarding to higher headquarters, if required, for a decision in a format prescribed by the Chief of Engineers, among other requirements. *See* 33 C.F.R. § 325.2. The EC also provides detailed requirements for the District-led Agency Technical Review and requires the concurrence of the District Office of Counsel before a permit may be issued. *See* EC 1165-2-216 at 13-14. Thus, any Corps decision with regard to a section 408 permit that is pertinent to these proceedings would require completion of this prescribed process.

Bluewater is well aware of the Corps requirements, and the designs that are submitted to the Corps as part of the section 408 submission will fully comply with the Corps’ engineering requirements. We anticipate that the Corps will make a decision on the issuance of a 408 permit in accordance with federal regulations.

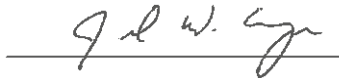
In sum, the applicable statute, regulations, and Corps’ Circular demonstrates that the Town is not a cost-sharing sponsor for the Block Island project. Therefore, the Town is simply another interested party, and it does not have a right to veto the section 408 permit; nor is Bluewater required to provide a letter of support from the Town to obtain a section 408 permit.

As for timing, the Corps permitting process typically requires 12 to 18 months to complete. The EC sets forth a nine-step process for review of a section 408 permit application. EC 1165-2-216 at 8-18.² Bluewater has already completed the first step in the process, pre-coordination with the Corps. The Corps will also evaluate Bluewater’s proposed docking facilities in accordance with section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 404;

² The relevant portions of the EC are attached. *See* Attachment A.

section 404 of the Clean Water Act, 33 U.S.C. § 1344; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1413. The Corps is currently preparing as-built drawing of the Corps' breakwater and channels and will provide these drawings to Bluewater by the end of the month so that Bluewater can design its proposed docking facilities with the required setbacks and not impact the Corps' existing project. The Corps' schedule for review is concurrent with the various State permitting requirements and includes the time for required coordination with other state and federal agencies. Significantly, the Water Resources Reform and Development Act of 2014 requires the Corps to significantly expedite the section 408 permit process. *See* Water Resources Reform & Development Act of 2014, § 1007, Pub. L. 113-121, 128 Stat. 1193 (June 10, 2014). Thus, the permitting timeline could shorten.

Sincerely,

A handwritten signature in cursive script, appearing to read "J. W. Corrigan", is written over a horizontal line.

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David Frulla, Partner
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EXHIBIT C



November 15, 2015

Bluewater LLC
42 Water Street - PO Box 1818
Block Island RI 02807
Attention: Paul Filippi

Dear Paul:

Per our discussions concerning the development and build out of the Bluewater Marina Project located in Old Harbor BI, please find below the suggested phasing of the project as well as construction timing schedules. Also, as discussed, we are proceeding with the overall project from a combined build method approach - the Mt. Hope site will be designed and constructed as all floating while the Lot 158 site will be designed and constructed as all fixed piers. Also please be aware that many of the construction tasks will run concurrently. Example would be piling installation during the same period that docks are delivered and then relocated to the BI site. All materials required for the project including docks, composite pilings, power and water supply stations, power transformers, ramps and safety equipment will be ordered prior to the commencement of site work.

At this time we estimate total construction and activation of both Phase 1 Mt Hope, as well as the Phase 2 Lot 158 site will require approximately 80-100 working days post-dredging.

Phase 1 - Mt Hope - Floating Structures - the projected construction of this section will follow the preliminary design as supplied by St. Jean Engineering LLC dated 10/8/2015. It should be noted that using 641 linear feet of pre-constructed floating docks in this application will shorten installation considerably. Special needs will be addressed in the form of multi-stage ramps with slopes acceptable to USADA standards



P1 - Dredging - 10-20 working days. All material removal in the area to the West of the ACOE breakwater would occur prior to construction with a final target depth of 15' MLLW. It is our understanding the dredged material will not require multiple handling stages and this may shorten projected timing of any dredging activity but cannot be determined at this time. Project commencement would not include mobilization of equipment or weather impacts.

P1 – Utility Connection - 10 Working Days - We are assuming utility connection points will be pre-installed (water and sewer) as well as the power supplier to a location chosen by the Rhode Island State Electrical Code inspector.

P1 - Anchor Pilings - 10 Working Days - at this stage, this aspect will proceed under the assumption that composite pilings 14 inches in diameter and 50 feet overall length will be utilized to anchor the floating docks in place. Composite pilings are both extremely strong with long life and are environmentally safe, as they do not require CCA treatment and meet modern BMP's. 32 sections of floating dock would be utilized with each section requiring 3 anchor pilings for a total of 96 pilings. These pilings are driven completely as a stand alone function and the floating docks are then attached at a later stage. This approach is pre-set so all this work will be accomplished prior to dock arrival on site.

P1 - Floating Dock Build and Delivery - 5 working Days - post delivery to arrival at Staging Point at the BI site. The docks would be pre ordered and pre assembled by one of 3 servicing vendors we use for this type of work and would be delivered to a staging point on the main land. The docks would be launched and towed by our marine contractor to the BI site. This type of work can be contracted and in process in the very early stages immediately after permitting is secured and we will only address delivery to the construction site as part of timing. There will be another realized timing savings as the sections will be coupled in groups of 3 essentially arriving in 10 chains of 3 sections each.

P1 - Floating Dock Installation - 20 Working Days - post delivery to site. Assemble all sectional flexible connection points, dock anchoring cages and main pier access ramps. See anchor cages typical below. This anchoring design allows a very simple and straight forward installation of the docks as all connections as described previously can be adjusted in the field to allow for any site construction variations.



P1 - Utility Installation - 10 Working Days - this final activation step in the project would include installing all power, water and sewer services. Cabling and piping would be installed in pre engineered utility spaces in the floating docks so no extra time is needed for

construction. Utility supply pedestals are installed in pre determined locations and connected to common supply points.

Phase 2 – Lot 158 - 15 Working Days post material delivery - this fixed pier will be constructed of 2.5 CCA Marine Lumber with a Decking area approaching 2,680 Square feet. This entire area is designed as a Ferry landing which reduces the utility demands when compared to the East basin and will result in a minimal amount of time to construct. Special needs will be addressed in the form of multi-stage ramps with slopes acceptable to USADA standards.

Regards,

Jeff Boyd

Jeffrey D. Boyd
Chairman