

# *Schacht & McElroy*

*Michael R. McElroy  
Leah J. Donaldson*

*Attorneys at Law*

*Michael@McElroyLawOffice.com  
Leah@McElroyLawOffice.com*

*Members of the Rhode Island  
and Massachusetts Bars*

*21 Dryden Lane  
Post Office Box 6721  
Providence, RI 02940-6721*

*(401) 351-4100  
fax (401) 421-5696*

January 2, 2018

Luly E. Massaro, Clerk  
Division of Public Utilities and Carriers  
89 Jefferson Boulevard  
Warwick, RI 02888

Re: Docket No. D-13-51  
In Re: Rhode Island Fast Ferry, Inc.

Dear Luly:

Enclosed for filing are an original and three copies of Interstate Navigation Company and the Town of New Shoreham's Motion to Vacate Division Order No. 22877 Granting RIFF a One-Year Continuance to Satisfy Conditions Precedent Contained in Division Order No. 22548 Granting RIFF's CPCN Application.

If you have any questions, please feel free to call.

Very truly yours,



Michael R. McElroy

**Rhode Island Fast Ferry (RIFF) – CPCN Application Docket No. D-13-51**  
**Updated 11/28/17**

<b>Name/Address</b>	<b>E-mail Address</b>	<b>Phone</b>
Alan Shoer, Esq. (for RIFF) James Hall, Esq. Adler Pollock & Sheehan One Citizens Plaza, 8 <sup>th</sup> Floor Providence, RI 02903-1345	<a href="mailto:Ashoer@apslaw.com">Ashoer@apslaw.com</a> ;	401-274-7200
	<a href="mailto:NVerdi@apslaw.com">NVerdi@apslaw.com</a> ;	
	<a href="mailto:Jhall@apslaw.com">Jhall@apslaw.com</a> ;	
Charles A. Donadio, Jr., President RI Fast Ferry	<a href="mailto:Charlie@vineyardfastferry.com">Charlie@vineyardfastferry.com</a> ;	401-295-4040
Christy Hetherington, Esq. (for Division) Dept. of Attorney General 150 South Main St. Providence, RI 02903	<a href="mailto:Chetherington@riag.ri.gov">Chetherington@riag.ri.gov</a> ;	401-222-2424
	<a href="mailto:Jmunoz@riag.ri.gov">Jmunoz@riag.ri.gov</a> ;	
	<a href="mailto:Dmacrae@riag.ri.gov">Dmacrae@riag.ri.gov</a> ;	
Michael McElroy, Esq. (for Interstate Navigation) Leah Donaldson, Esq. Schacht & McElroy PO Box 6721 Providence, RI 02940-6721	<a href="mailto:Michael@McElroyLawOffice.com">Michael@McElroyLawOffice.com</a> ;	401-351-4100
	<a href="mailto:Leah@mcelroylawoffice.com">Leah@mcelroylawoffice.com</a> ;	
	<a href="mailto:nspd2000@yahoo.com">nspd2000@yahoo.com</a> ;	
	<a href="mailto:emazze@verizon.net">emazze@verizon.net</a> ;	
	<a href="mailto:jlq@BlockIslandFerry.com">jlq@BlockIslandFerry.com</a> ;	
	<a href="mailto:MVManitou@aol.com">MVManitou@aol.com</a> ;	
	<a href="mailto:Megan@BlockIslandFerry.com">Megan@BlockIslandFerry.com</a> ;	
<a href="mailto:suel@BlockIslandFerry.com">suel@BlockIslandFerry.com</a> ;		
Katherine A. Merolla, Esq. (for New Shoreham) Merolla & Accetturo Kent Office Bldg. 469 Centerville Rd., Suite 206 Warwick, RI 02886	<a href="mailto:KAMLAW2344@aol.com">KAMLAW2344@aol.com</a> ;	401-739-2900
Shirlyn Gobern, Interim Town Manager	<a href="mailto:townmanager@new-Shoreham.com">townmanager@new-Shoreham.com</a> ;	401-466-3211
Richard LaCapra 5 Carmine Street New York, New York 10014	<a href="mailto:rlacapra@lacapra.com">rlacapra@lacapra.com</a> ;	212-675 - 8123
<b>File original &amp; four (4) copies w/:</b> Luly E. Massaro, Clerk Division of Public Utilities & Carriers 89 Jefferson Boulevard Warwick, RI 02888	<a href="mailto:Luly.massaro@puc.ri.gov">Luly.massaro@puc.ri.gov</a> ;	401-780-2107
	<a href="mailto:John.spirito@dpuc.ri.gov">John.spirito@dpuc.ri.gov</a> ;	
	<a href="mailto:Thomas.kogut@dpuc.ri.gov">Thomas.kogut@dpuc.ri.gov</a> ;	
	<a href="mailto:Terry.mercer@dpuc.ri.gov">Terry.mercer@dpuc.ri.gov</a> ;	
<b>Interested Parties:</b>		
Jeannette Alyward, Town Clerk Town of North Kingstown	<a href="mailto:jalyward@northkingstown.org">jalyward@northkingstown.org</a> ;	401-294-3331

STATE OF RHODE ISLAND  
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC. : DOCKET No. D-13-51

**INTERSTATE NAVIGATION COMPANY D/B/A THE BLOCK ISLAND FERRY  
AND THE TOWN OF NEW SHOREHAM'S MOTION TO VACATE DIVISION  
ORDER NO. 22877 GRANTING RIFF A ONE-YEAR CONTINUANCE TO  
SATISFY CONDITIONS PRECEDENT CONTAINED IN DIVISION  
ORDER NO. 22548 GRANTING RIFF'S CPCN APPLICATION**

Interstate Navigation Company d/b/a The Block Island Ferry (“Interstate”) and the Town of New Shoreham (“Town”) submit this Motion to Vacate Division of Public Utilities and Carriers (“Division”) Order No. 22877 Granting Rhode Island Fast Ferry (“RIFF”) a One-Year Continuance to Satisfy Conditions Precedent Contained in Division Order No. 22548 Granting RIFF’s CPCN Application because of RIFF’s failure to make realistic attempts to secure permits for a docking facility in Old Harbor and RIFF’s misrepresentations to the Division regarding the same. In support thereof, Interstate and the Town state as follows:

**I. PROCEDURAL HISTORY**

On July 2, 2013, RIFF filed an application seeking a certificate of public convenience and necessity (“CPCN”) to operate a summer-only, passenger-only ferry service between Quonset Point, North Kingston and Old Harbor, Block Island.

In October and November of 2015, the issue of whether the U.S. Army Corps of Engineers (“USACE”) Section 408 application process required the Town’s approval as a pre-condition for filing was raised, briefed by the parties, and ruled upon by the Division. At that time, the Town stated that it was a non-federal sponsor of the proposed docking facility project, and therefore RIFF or Bluewater, Inc. (“Bluewater”) would need the Town’s written consent to begin the USACE Section 408 approval process. Bluewater argued that the Town’s claims had

no basis, and provided an opinion letter from Joseph Corrigan of Kelley Drye & Warren LLP in Washington D.C. to support its argument.<sup>1</sup> Mr. Corrigan also stated that the permitting process “typically requires 12 to 18 months to complete.”<sup>2</sup> RIFF simultaneously presented a timeline to the Division depicting the anticipated availability of a docking facility, including all related permits, based on a regulatory process of 12-18 months, which would have ended in April 2017.<sup>3</sup>

On December 10, 2015, the Division issued Order No. 22254 finding Bluewater’s claims credible, based on “documents offered by Bluewater,” and therefore determined that RIFF had a “realistic expectation” of having access to a docking facility in Old Harbor.<sup>4</sup> The Division further found that “the expected timeline for completing the construction of a new docking facility in Old Harbor is not unreasonably long as to necessitate additional delays in adjudicating RIFF’s pending CPCN application.”<sup>5</sup> The Division also discussed compulsory permitting processes before USACE and the Rhode Island Coastal Resources Management Council (“CRMC”).<sup>6</sup>

On September 22, 2016, the Division issued Order No. 22548 granting RIFF’s CPCN application, subject to the satisfaction of certain conditions precedent (“Conditions Precedent”).<sup>7</sup>

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<sup>1</sup> See Letter from Kelley Drye & Warren LLP, dated November 12, 2015, at 2 (“In short, the Town is not a non-federal sponsor of the project.”). (Attached as Exhibit A.)

<sup>2</sup> *Id.* at 4; 18 months from November 2016 would be April 2017.

<sup>3</sup> See Affidavit of Charles A. Donadio, Jr., dated November 2015, at 2 (“...attached hereto ... 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.”). (Attached as Exhibit B.)

<sup>4</sup> Order No. 22254, at 21.

<sup>5</sup> *Id.*, at 22.

<sup>6</sup> *Id.*, at 21-23.

<sup>7</sup> These conditions precedent are set forth in Paragraph 2, on pages 141-142 of Order No. 22548:

Before a CPCN is issued, RIFF must demonstrate to the Division that: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; (2) that it has leased, purchased or otherwise identified the vessel(s) it will use in providing its proposed ferry services consistent with the commitments and evidence presented during this case; (3) that it has satisfied all Coast Guard requirements associated with the provision of its proposed ferry services; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance.

The Division required that RIFF satisfy these conditions within one year.<sup>8</sup> Therefore, RIFF's authority to operate a summer-only, passenger-only ferry between Quonset Point, North Kingstown and Old Harbor, Block Island (granted under Order No. 22548) would be nullified and voided if RIFF failed to satisfy the Conditions Precedent by September 22, 2107.<sup>9</sup>

On November 28, 2016, the USACE notified Bluewater that, contrary to the November 2015 opinion letter provided by Joseph Corrigan of Kelley Drye & Warren LLP (attached as Exhibit A), Bluewater's request for Section 408 permission must include a written statement from the Town endorsing Bluewater's proposed docking facility, because the Town is the non-federal sponsor for the east wharf and bulkhead located on the east side of the federal navigation project's inner basin.<sup>10</sup>

On May 15, 2017, Bluewater submitted an application to the USACE which proposed a docking facility that was different from the docking facility that Bluewater had previously submitted during the Division proceedings.

On June 22, 2017, the USACE notified Bluewater that its proposed docking facility would require separate evaluation and permitting by the USACE Regulatory Division.<sup>11</sup> This

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<sup>8</sup> Order No. 22548, at 142.

<sup>9</sup> Paragraph 3, on page 142 of Order No. 22548 states:

That RIFF shall satisfy the conditions contained in "Ordered" paragraph "2," above within one (1) year from the issue date of this Report and Order. Failure to satisfy these conditions within the time specified shall result in the nullification and voiding of the authority granted herein.

Continuances may be granted by the Division for just cause.

<sup>10</sup> See Letter from USACE to Paul Filippi, dated November 28, 2016, at 2 ("In your letter you indicated that "...the project (FNP) does not have a non-federal project sponsor, as that term is used in the section 408 process." However, that information is inaccurate. On August 12, 1970 the Town of New Shoreham entered into an agreement with the Federal Government relative to the east wharf and bulkhead located on the east side of the FNP's inner basin... The subject agreement establishes ... the Town of New Shoreham as the non-federal sponsor (NFS) for that feature of the FNP."). (Attached as Exhibit C.)

<sup>11</sup> See Letter from USACE to Joseph W. Corrigan, dated June 22, 2017, at 1 ("... it has been determined that the proposed alterations will require evaluation and separate permitting by the Corps' Regulatory Division... Section 408 evaluation cannot be completed without the required NEPA coordination, which must also be conducted by the District's Regulatory Division. Therefore, in order for us to continue evaluating your Section 408 request, we require that an application be submitted to the Corps' Regulatory Division."). (Attached as Exhibit D).

separate evaluation and permitting is required for the USACE Section 408 application to move forward. To date, over six months later, Bluewater has still not submitted the required application to the USACE Regulatory Division.

On September 13, 2017, RIFF filed a motion for an open-ended stay of the compliance date set forth in Division Order No. 22548 (“Motion to Stay”). In its Motion to Stay, RIFF argued that it had “worked diligently to ensure that it would satisfy all the requisite conditions by the Division’s deadline.”<sup>12</sup> RIFF attributed its inability to timely satisfy the Conditions Precedent to “the appeal process.”<sup>13</sup> However, there is no stay of the conditional order granting the CPCN and there was nothing to stop Bluewater and/or RIFF from moving forward with the requisite applications to construct the newly proposed docking facility. Indeed, RIFF and Bluewater represented to the Division that they were moving ahead with such applications.

On September 14, 2017, the Town and Interstate objected to RIFF’s request for a “stay,” but agreed that the Division had authority to grant a reasonable continuance for a specific period of time.

On September 18, 2017, the Division found “sufficient cause” to grant a one-year continuance (to September 22, 2018) for RIFF to satisfy Conditions Precedent set forth in Order No. 22548.<sup>14</sup> The Division based this conclusion, at least in part, on RIFF’s representations set forth at the conference held with the Hearing Officer and in its Motion to Stay.<sup>15</sup>

On November 2, 2017, the Town issued a set of data requests to RIFF (“Town Data

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<sup>12</sup> RIFF Motion to Stay, at 3.

<sup>13</sup> *Id.*

<sup>14</sup> Order No 22877, at 7.

<sup>15</sup> Order No 22877, at 5.

Requests”).<sup>16</sup> These requests focused, in part, on what actions, if any, RIFF or Bluewater had taken to procure licenses or permits from the USACE, CRMC, Rhode Island Department of Environmental Management (“RIDEM”), or the Town Building Inspector for the construction of docking facilities for RIFF’s proposed ferry service.

On November 22, 2017, RIFF submitted responses to the Town’s Data Requests.<sup>17</sup> In these responses, RIFF admitted the following:

1. Permits or approvals will be required from USACE, CRMC, and RIDEM in order to construct a docking facility in Old Harbor. *See* Response to I-22, I-24.
2. No permits or approvals have been granted to RIFF or Bluewater in connection with any proposed docking facility in Old Harbor, including USACE, CRMC, RIDEM, or the Town Building Inspector. *See* Response to D-11, D-12, D-13, D-14, I-10, I-12, I-15.
3. RIFF has not submitted any documents to the USACE, CRMC, RIDEM or the Town Building Inspector in connection with an application to construct a docking facility in Old Harbor. *See* Response to D-1, D-3, D-5, I-10, I-12, I-15.
4. Bluewater has not submitted any documents to CRMC, RIDEM, or the Town Building Inspector in connection with an application to construct a docking facility in Old Harbor. *See* Response to D-3, D-5, I-10, I-12, I-15, I-23.
5. Bluewater has not filed the required application to USACE’s Regulatory Division. *See* Response to D-2.

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<sup>16</sup> On November 14, 2017, RIFF filed objections to twelve of the Town’s Data Requests. The Town moved to compel responses to these data requests and strike RIFF’s objections. On December 13, 2017, the Division denied the Town’s motion to compel further responses.

<sup>17</sup> RIFF did not provide responses to the twelve data requests to which it objected. In fact, RIFF did not even furnish the complete USACE application because it did not include the referenced attachments. *See* Response to D-1.

## II. ARGUMENT

*A. Despite repeated promises to do so, RIFF and Bluewater have admittedly failed to submit required permit applications for a docking facility in Old Harbor.*

Contrary to what RIFF represented in its docking timeline, in its Motion for Stay, and in statements to the Division, RIFF has taken no action and Bluewater has taken very limited action to attempt to secure the required permits and approvals for a proposed docking facility in Old Harbor. In fact, RIFF and Bluewater admittedly failed for over two years to even submit the required applications and related documents to nearly every entity necessary to gain permits or approvals for the proposed docking facility.

RIFF admits that permits or approvals from USACE, RIDEM, and CRMC are needed. RIFF also admits that, despite advising the Division that it was “working diligently” to satisfy the Conditions Precedent, RIFF and Bluewater have failed to submit the required applications for such permits and this failure has continued for over two years. RIFF and Bluewater advised the Division over two years ago that the permit process would be complete by April of 2017. Yet as of this filing, the permit application processes before RIDEM and CRMC have not even begun, and the application process before the USACE has stalled due to the failure to file the appropriate application with the USACE Regulatory Division. This is hardly indicative of “diligent” attempts to meet Division deadlines.

Further, RIFF refuses to accept responsibility for its failure to take these necessary steps. In its Motion for Stay, RIFF blamed the appeal process, as well as the Town and Interstate, for RIFF’s failure to satisfy the Conditions Precedent. Similarly, in its Response to Town Data Requests, RIFF blamed the USACE for delays in the review process.<sup>18</sup> In truth, the responsibility

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<sup>18</sup> See Response to I-30.

for RIFF's failure to timely satisfy the Conditions Precedent lies with RIFF, not with Interstate, the Town, the USACE, or the appeal process.<sup>19</sup> Rather, it was RIFF's strategic choice to delay the permitting process, as well as RIFF's strategic choice to mislead the Division and the parties regarding these delays.

RIFF maintains that it can secure a docking facility in Old Harbor, and the Town and Interstate maintain that, as a matter of law, RIFF will not be able to do so. RIFF's CPCN was conditioned upon RIFF's ability to demonstrate to the Division that it has access to suitable docking/landing facilities in Old Harbor within one year. RIFF has failed to do so, and, more importantly, it has failed to even try to do so despite representing to the Division and other parties that it has "worked diligently" to secure suitable docking facilities, as well as other Conditions Precedent.

It is disingenuous for RIFF to delay the permitting processes before USACE, CRCM, RIDEM and the Town Building Inspector for an unknown period of time, while simultaneously representing to the Division and the Superior Court that the Town and Interstate have not yet proven RIFF's inability to secure a docking facility in Old Harbor.

*B. The Division should place little or no weight on Bluewater's claims regarding the timing of permitting and related applications.*

Bluewater has hired Joseph Corrigan of Kelley Drye & Warren LLP to assist with its USACE application for the proposed docking location. Bluewater has twice submitted opinion letters from Mr. Corrigan as evidence in this docket: first in November 2015 and again in November 2017.

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<sup>19</sup> It is RIFF's obligation to satisfy the Conditions Precedent, not Bluewater's, yet RIFF continues to state that Bluewater is responsible for these filings and to use Bluewater's inactivity as an excuse for RIFF's failure to move forward.

In late 2015, the Town advised the Division, RIFF, and Bluewater that the Town was a Section 408 non-federal sponsor for RIFF's proposed docking facility. Bluewater (and RIFF) strongly denied this, and in November 2015 RIFF submitted an opinion letter from Mr. Corrigan as "proof." The Division relied on Mr. Corrigan's letter in Order No 22254 and found that RIFF had a reasonable expectation of gaining access to an Old Harbor docking facility. The parties and the Division now know that the Town was correct, and Mr. Corrigan was incorrect. The Town is, in fact, a non-federal sponsor, as confirmed by the USACE in November of 2016.

Mr. Corrigan's November 2015 letter also assured the Division that the permitting process would be complete in 12 to 18 months, which would have resulted in permits being secured by April of 2017. However, it is now over two years since that letter was written and relied upon by the Division, yet RIFF has filed nothing and Bluewater has barely begun the permit application process. Indeed, no applications whatsoever have been filed with (1) the USACE Regulatory Division, (2) the CRMC, (3) RI DEM, or (4) the Town.

In November of 2017, Bluewater again submitted an opinion letter from Mr. Corrigan, which attests to the alleged timeline for the permitting process for RIFF's proposed docking facility. Mr. Corrigan's November 2017 letter stated that Bluewater "anticipates" that the USACE application would be complete by the end of November 2017.<sup>20</sup> Yet, the USACE application was not completed by the end of November 2017 nor has Bluewater even filed an application with the USACE Regulatory Division. In addition, Mr. Corrigan further represented to the Division that Bluewater would file applications with all other relevant regulatory agencies

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<sup>20</sup> See Letter from Kelley Drye & Warren LLP, dated November 20, 2017, at 1 ("By the end of November, we anticipate that the Corps of Engineers will have all the information it requires from Bluewater in order to make a decision to authorize the proposed project.") (Attached as Exhibit E.)

by the end of December 2017.<sup>21</sup> Despite these representations, no such applications have been filed.

The Division should disregard Mr. Corrigan's opinions.

*C. The one-year continuance granted by the Division for RIFF to satisfy Conditions Precedent should be vacated based on RIFF's misrepresentations to the Division.*

The Division's Order 22877 granting RIFF a one-year continuance to satisfy Conditions Precedent was based on misrepresentations by RIFF. RIFF represented to the Division that it had "worked diligently to ensure that it would satisfy all the requisite conditions by the Division's deadline" and that it sought a stay to satisfy the Conditions Precedent solely because of delays related to the ongoing appeal process.<sup>22</sup> As demonstrated in RIFF's responses to the Town's Data Requests, these representations were demonstrably false.

At that time, Interstate and the Town did not object to a one-year continuance, because Interstate and the Town relied on RIFF's representations. However, RIFF's responses to the Town's Data Requests reveal the truth. As discussed above, RIFF and Bluewater took almost no action from September 2016 to September 2017 to satisfy the Division's requirement that RIFF demonstrate that it has access to suitable docking facilities in Old Harbor. RIFF then exacerbated the situation by obscuring its inaction in its motion for an open-ended stay of the Division's deadline to satisfy Conditions Precedent.

In its motion for an open-ended stay of the Conditions Precedent, RIFF withheld from the Division (and the parties) the full story behind RIFF's need for a continuance. In fact, RIFF concealed the facts surrounding its inaction until the Town conducted additional discovery, as permitted by the Division.

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<sup>21</sup> *Id.* at 2. ("Bluewater anticipates filing the requisite submissions with the relevant regulatory agencies by the end of the calendar year.")

<sup>22</sup> *Id.*

Had the truth of the matter been revealed in RIFF's motion to stay or otherwise made clear by RIFF prior to the Town's Data Requests, the Town and Interstate would have objected to RIFF's request for a continuance. Similarly, if the Division been aware of RIFF's inaction earlier, the Division may very well have determined there was insufficient cause to support RIFF's request for a continuance to satisfy the Conditions Precedent.

### III. CONCLUSION

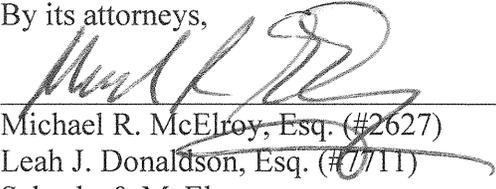
It has now become absolutely clear that neither Bluewater nor RIFF have made any real attempt to secure permits from USACE, CRMC, RI DEM, or the Town for the proposed docking facility in Old Harbor. The inaction has stretched on for over two years. It is time to put an end to this charade and close this matter.

WHEREFORE, the Interstate and the Town respectfully request that the Division vacate Order No. 22877 granting RIFF a one-year continuance to satisfy Conditions Precedent contained in Order No. 22548, and grant such other and further relief as the Division deems necessary and just.

Respectfully submitted,

INTERSTATE NAVIGATION COMPANY

By its attorneys,

  
Michael R. McElroy, Esq. (#2627)

Leah J. Donaldson, Esq. (#711)

Schacht & McElroy

21 Dryden Lane

P.O. Box 6721

Providence RI 02940-6721

Phone: (401) 351-4100

Fax: (401) 421-5696

Michael@McElroyLawOffice.com

Leah@McElroyLawOffice.com

Dated: January 2, 2018

TOWN OF NEW SHOREHAM

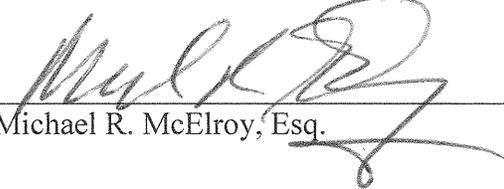
By its solicitor,

  
Katherine A. Merolla, Esq. (#2344)  
Kent Office Building  
469 Centerville Road, Suite 206  
Warwick, RI 02886  
Phone: (401) 739-2900, ext. 304  
kmerolla@merollalaw.com

Dated: January 2, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that, on January 2, 2018, I served this document via e-mail on the individuals listed on the service list for this docket.

  
Michael R. McElroy, Esq.

# Exhibit A

Letter from Kelley Drye & Warren LLP

Dated November 12, 2015

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**WASHINGTON HARBOUR, SUITE 400**

**3050 K STREET, NW**

**WASHINGTON, DC 20007**

**(202) 342-8400**

NEW YORK, NY  
LOS ANGELES, CA  
CHICAGO, IL  
STAMFORD, CT  
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICE  
MUMBAI, INDIA

FACSIMILE

(202) 342-8451

[www.kelleydrye.com](http://www.kelleydrye.com)

JOSEPH W. CORRIGAN

DIRECT LINE: (202) 342-8577

EMAIL: [jcorrigan@kelleydrye.com](mailto:jcorrigan@kelleydrye.com)

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.<sup>1</sup>

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.

<sup>1</sup> 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.

Block Island Harbor of Refuge, RI		
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](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.<sup>2</sup> 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;

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<sup>2</sup> 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,



Joseph Corrigan, Senior Advisor  
David Frulla, Partner  
KELLEY DRYE & WARREN LLP  
Washington Harbour, Suite 400  
3050 K Street, NW  
Washington, DC 20007-5108  
(202) 342-8577  
(202) 342-8451 (Fax)  
jcorrigan@kelleydrye.com  
dfrulla@kelleydrye.com

# Exhibit B

Affidavit of Charles A. Donadio, Jr.

Dated November 2015

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;

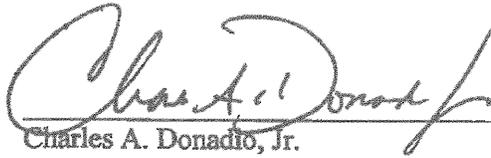
3. That in its September 11, 2015 Affid. RIFF provided an affidavit of Bluewater's Principal Member attesting to Bluewater's intent to construct such a facility and the steps Bluewater has taken in furtherance of that intent;

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").



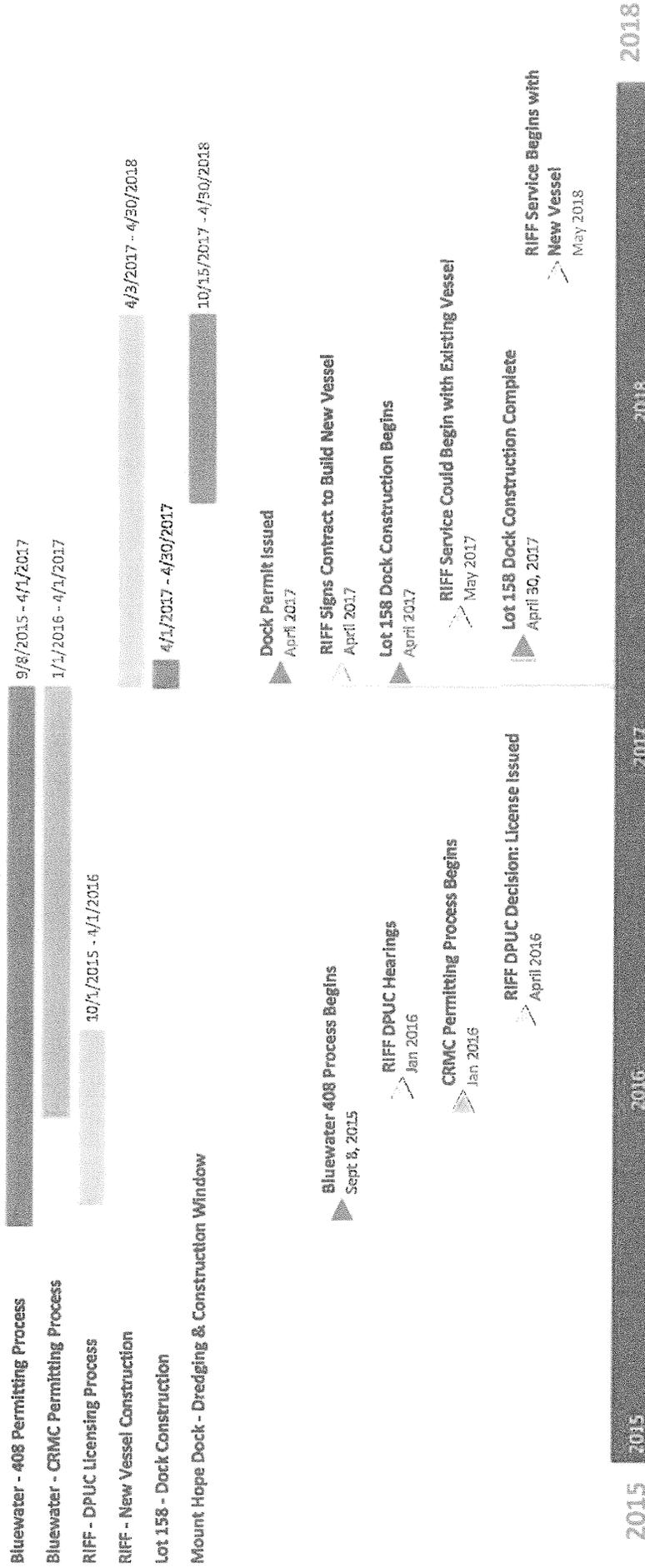
Charles A. Donadio, Jr.  
President  
Rhode Island Fast Ferry, Inc.

Subscribed and sworn to in \_\_\_\_\_, Rhode Island, on the \_\_\_ day of November, 2015.

\_\_\_\_\_  
Notary Public

## **EXHIBIT A**

# RHODE ISLAND FAST FERRY TIMELINE



2015 2016 2017 2018

# Exhibit C

Letter from USACE to Paul Filippi

Dated November 28, 2016

DEPARTMENT OF THE ARMY  
US ARMY CORPS OF ENGINEERS  
NEW ENGLAND DISTRICT  
696 VIRGINIA ROAD  
CONCORD MA 01742-2751

November 28, 2016

Programs & Project Management Division  
Civil Works / IIS Project Management Branch

Mr. Paul Filippi  
Bluewater LLC  
PO Box 1818  
42 Water Street  
Block Island, Rhode Island 02807

Dear Mr. Filippi:

I am writing to acknowledge receipt of your Section 408 permission request to construct and use two docks at the Block Island Harbor of Refuge Federal navigation project (FNP) and to request additional information regarding your proposal.

In your letter you indicated that "...the project (FNP) does not have a non-federal project sponsor, as that term is used in the section 408 process." However, that information is inaccurate. On August 12, 1970 the Town of New Shoreham entered into an agreement with the Federal Government relative to the east wharf and bulkhead located on the east side of the FNP's inner basin (see attached).

The subject agreement establishes responsibilities for both parties regarding the east wharf and bulkhead, and establishes the Town of New Shoreham as the non-federal sponsor (NFS) for that feature of the FNP. Additionally, your submitted proposal involves access over the referenced east wharf for which the town is the NFS. As such, in accordance with EC 1165-2-216 parts 6.d and 7.c(2)(b)v, your written request for Section 408 permission must also include a written statement from the Town of New Shoreham endorsing the proposed project alteration.

The New England District of the US Army Corps of Engineers (Corps) will not initiate review of your proposed project alteration until endorsement from the town of New Shoreham is provided. Once provided, the Corps will establish an Agency Technical Review (ATR) team to initiate review of your proposal.

Please feel free to contact me if you have any questions regarding this matter. I can be reached at (978) 318-8586, or by email at [michael.e.walsh@usace.army.mil](mailto:michael.e.walsh@usace.army.mil).

Sincerely,



Michael E. Walsh, P.E., PMP  
Project Manager

# Exhibit D

Letter from USACE to Joseph W. Corrigan

Dated June 22, 2017



DEPARTMENT OF THE ARMY  
US ARMY CORPS OF ENGINEERS  
NEW ENGLAND DISTRICT  
696 VIRGINIA ROAD  
CONCORD MA 01742-2751

June 22, 2017

Programs & Project Management Division  
Civil Works / IIS Project Management Branch

Mr. Joseph W. Corrigan  
Kelley, Drye & Warren, LLP  
Washington Harbor, Suite 400  
3050 K Street, NW.  
Washington, DC 20007

RE: Bluewater LLC request for Section 408 permission to alter the Federal Navigation Project (FNP) at Block Island Harbor of Refuge, Block Island, RI

Dear Mr. Corrigan:

I am writing to acknowledge receipt of your May 15, 2017 letter and documentation in support of the Bluewater, LLC proposal and Section 408 permission request to alter the at the Block Island Harbor of Refuge FNP. The proposed structures will occupy portions of the FNP.

In accordance with guidance contained in EC 1165-2-216 Part 7.c.3.c, a decision on a Section 408 request is considered a Federal action and therefore is subject to the National Environmental Policy Act (NEPA). Additionally, it has been determined that the proposed alterations will require evaluation and separate permitting by the Corps' Regulatory Division pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The subject Section 408 evaluation cannot be completed without the required NEPA coordination, which must also be conducted by the District's Regulatory Division. Therefore, in order for us to continue evaluating your Section 408 request, we require that an application be submitted to the Corps' Regulatory Division.

If you have any questions regarding this matter, please feel free to contact Mr. Michael Walsh, the Project Manager, who may be reached at (978) 318-8586, or by email at [michael.e.walsh@usace.army.mil](mailto:michael.e.walsh@usace.army.mil).

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy Gendron", is written over the typed name.

Wendy Gendron  
Chief, Civil / IIS Branch

Copy Furnished: see attached sheet

Copy Furnished:

Mr. Paul Filippi  
Bluewater, LLC  
PO Box 1818  
42 Water Street  
Block Island, Rhode Island 02807

# Exhibit E

Letter from Kelley Drye & Warren LLP

Dated November 20, 2017

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**WASHINGTON HARBOUR, SUITE 400**

**3050 K STREET, NW**

**WASHINGTON, DC 20007**

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

NEW YORK, NY  
LOS ANGELES, CA  
HOUSTON, TX  
AUSTIN, TX  
CHICAGO, IL  
PARSIPPANY, NJ  
STAMFORD, CT  
BRUSSELS, BELGIUM

JOSEPH CORRIGAN  
DIRECT LINE: (202) 342-8577  
JCORRIGAN@KELLEYDRYE.COM

AFFILIATE OFFICE  
MUMBAI, INDIA

November 20, 2017

**BY FEDEX**

Charles A. Donadio, Jr.  
Rhode Island Fast Ferry, Inc.  
Quonset Point  
1347 Roger Williams Way  
North Kingstown, RI 02852

Re: RIFF Application for CPCN D-13-51

Dear Mr. Donadio,

Kelley Drye & Warren LLP is assisting Bluewater, LLC in obtaining a permit from the U.S. Army Corps of Engineers ("Corps of Engineers") pursuant to 33 U.S.C. § 408 ("Section 408") for its proposed project in Old Harbor, Block Island. Specifically, Bluewater is seeking to construct a dock for a fast ferry service that Rhode Island Fast Ferry will be running from its terminal in Quonset Point, North Kingstown to Old Harbor, Block Island. The Section 408 permit from the Corps of Engineers will allow Bluewater to "occupy" a portion of the federal project at Block Island, Rhode Island. By the end of November, we anticipate that the Corps of Engineers will have all the information it requires from Bluewater in order to make a decision to authorize the proposed project.

The Corps of Engineers guidelines for Section 408 permissions outline a multistep process. Bluewater is nearing the end of step three of what we anticipate will be a four-step process. Because of the history of Old Harbor and the relatively minimal impact on the federal project, we anticipate that the District has the authority to make a decision without review by higher headquarters. Although the Corps of Engineers' regulations do not establish a timeline for a decision on the Section 408 permit, we anticipate that it will reach a decision before spring.

Concurrently, Bluewater is requesting the state and federal permits required to complete the proposed project, including permissions under Section 404 of the Clean Water Act, 33 U.S.C.

KELLEY DRYE & WARREN LLP

Charles A. Donadio, Jr.  
November 20, 2017  
Page Two

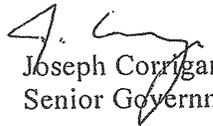
§ 1344, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1413. While the Corps typically decides whether to grant a Section 408 application first, Bluewater is requesting the federal and state permits in order to expedite the regulatory process. Bluewater anticipates filing the requisite submissions with the relevant regulatory agencies by the end of the calendar year.

Sincerely yours,

KELLEY DRYE & WARREN LLP



David Frulla  
Partner



Joseph Corrigan  
Senior Government Contracts Advisor