



Surface Transportation Board

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 U.S. Department of Transportation
 



SHAINES & McEACHERN, PA
Attorneys at Law

236386
FD 35853

August 1, 2014

ENTERED
Office of Proceedings
August 4, 2014
Part of
Public Record

VIA FEDEX

Cynthia T. Brown, Chief
Section of Administration / Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: SEA-3, Inc. v. City of Portsmouth, New Hampshire
Emergency Petition for Declaratory Order

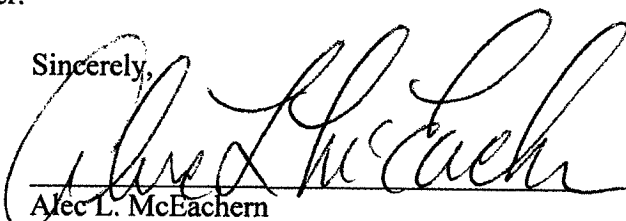
Dear Ms. Brown:

Enclosed for filing are an original and ten copies of an Emergency Petition for Declaratory Order dated August 1, 2014, along with 3 compact discs. A check in the amount of \$1,400.00 is also enclosed for the filing fee.

I have also enclosed an extra copy of the Petition and this transmittal letter and request that you please date stamp these items to show receipt of this filing, indicate the assigned docket number, and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions regarding this filing, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,


Alec L. McEachern
Attorney for SEA-3, Inc.

FILED
August 4, 2014
SURFACE
TRANSPORTATION BOARD

Enclosures

cc: SEA-3, Inc.
City of Portsmouth

FEE RECEIVED
August 4, 2014
SURFACE
TRANSPORTATION BOARD

282 Corporate Drive, P.O. Box 360
Portsmouth, New Hampshire 03802-0360
Telephone: 603/436-3110, Fax 603/436-2993

SEA-3, Inc. 000001

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. _____

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

**EMERGENCY PETITION
FOR DECLARATORY ORDER**

Communications with respect to this
document should be addressed to:

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*Counsel for the Petitioner
SEA-3, Inc.*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. _____

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

EMERGENCY PETITION FOR DECLARATORY ORDER

SEA-3, Inc. ("SEA-3"), petitions for an emergency declaratory order that the City of Portsmouth, New Hampshire's attempts to deny, restrict and/or regulate SEA-3's access to common carrier rail service under state and local law are preempted by the Interstate Commerce Commission Termination Act ("ICCTA") (codified in part at 49 U. S. C. §§ 10101-16106). This action is brought pursuant to 5 U. S. C. § 554 and 49 U. S. C. § 721.

INTRODUCTION

SEA-3 owns and operates a propane storage and distribution terminal (the "Facility") in the Town of Newington, New Hampshire ("Newington") that has been in continuous operation since 1975. The Facility has a storage capacity of 560,000 barrels and is one of only two such facilities in New England and the only one with rail access. SEA-3 receives propane (a/k/a "LPG") at the Facility by ship and rail car, with the majority arriving by ship. The Facility has just 3 rail berths, allowing it to offload 6 rail cars per day. Rail service is provided by a common

carrier over the Newington Branch, a rail line that travels through the City of Portsmouth, New Hampshire (“Portsmouth”) to and from the Facility.

In November 2013, SEA-3 applied to the Newington Planning Board (the “Planning Board”) for site approval to add five additional rail berths and associated offloading equipment at its Facility. This additional capacity will allow SEA-3 to receive the majority of its propane requirements by rail from domestic sources; this is essential if SEA-3 is to continue supplying the New England market because it is no longer economically viable to import foreign propane by ship due to changes in world energy markets.

The issue in this case is whether Portsmouth can deny or obstruct SEA-3’s access to common carrier rail service under local and state law based on its opposition to increased rail traffic. Portsmouth opposed SEA-3’s Planning Board application on the grounds that it would increase rail traffic through Portsmouth, giving no other justification for its opposition.

After seven months of hearings, the Planning Board unanimously approved SEA-3’s application over Portsmouth’s objection, acknowledging that it, the Planning Board, did not have jurisdiction to regulate rail traffic. Portsmouth then appealed the Planning Board’s Decision to the New Hampshire Superior Court and Newington’s Zoning Board of Appeals (“ZBA”), alleging that it will be injured by the increase in rail traffic and asking that the Planning Board’s Decision be overturned or, in the alternative, that a study be required as a condition of approval.

SEA-3 seeks a declaratory order that Portsmouth’s requested remedies are preempted by federal law. SEA-3 seeks this ruling on an emergency basis because Portsmouth’s pending ZBA appeal is due to be heard on August 25, 2014, and could result in the denial of SEA-3’s federally conferred right to common carrier service. Any delay or denial of service is likely to result in hardship for the nearly 250,000 New England households that heat with propane, as indicated by

a Declaration of Emergency issued by the State of New Hampshire on December 27, 2013, which specifically cited the absence of propane at SEA-3's Facility as a cause of the emergency.

STATEMENT OF FACTS

The Parties.

SEA-3 is a Texas corporation with an address of 1111 Bagby, Suite 2510, Houston, Texas 77002. SEA-3 is the owner of real estate located at 190 Shattuck Way, Newington, NH 03801.

Portsmouth is a municipal corporation under the laws of the State of New Hampshire having an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801.

The Facility.

SEA-3 has owned and operated the Facility at 190 Shattuck Way in Newington since 1975. The Facility contains two primary refrigerated storage tanks having a total storage capacity of 560,000 barrels. The only other propane storage facility of similar capacity in New England is the TEPPCO Terminal in Providence, Rhode Island, which lacks rail access.

Historically, SEA-3's Facility has received and distributed approximately 174 Million gallons (4,142,857 barrels) of LPG per year to the New England market, supplying approximately forty percent (40%) of New England's propane needs. The majority of this product has come from international sources via 12-13 ship deliveries per year, with a smaller amount of domestic propane arriving by rail over the Newington Branch.

The Newington Branch is the only rail line serving the Facility and it is owned by the Boston and Maine Corporation and Springfield Terminal Railway Company, d/b/a Pan Am

Railways (“Pan Am”). Pan Am is a class II rail carrier subject to the jurisdiction of the Surface Transportation Board.

SEA-3 stores propane in its primary storage tanks for sale to local New England distributors, who send their trucks to the Facility for loading at the Facility’s truck loading rack.

Due to recent market changes, propane from international sources has become too expensive to be sold in the United States. As a result, New England now relies on domestic propane to meet its needs, which must be transported to New England by rail or truck.

The Facility currently contains 3 rail berths. Each berth has the capacity to offload 2 rail cars simultaneously for a total offload capacity of six cars per day. This rail capacity is insufficient to meet current market demands.

The Newington Planning Board.

On November 5, 2013, SEA-3 applied to the Planning Board for site plan approval to increase its rail capacity by constructing five new rail unloading berths along with associated equipment that will allow it to receive and store the propane in its refrigerated storage tanks. Each new berth will offload 2 cars at a time, giving the Facility a total offload capacity of 16 rail cars per day. With this increased capacity, the Facility could receive up to 164 Million gallons of propane per year by rail at maximum utilization.

With its increased rail capacity, SEA-3 will continue to supply the New England market and will also be able to export 1-2 ships of excess propane during the summer months, when local demand drops and the tanks would otherwise reach capacity unless product is sold.

SEA-3’s planned improvements will not change the Facility’s truck loading rack or its primary storage capacity. If anything, the Facility’s truck traffic will decrease as average annual volume will decrease and a portion of that reduced volume will now be exported by ship during

the summer months. Ship traffic to SEA-3's Facility will also decrease from 12-13 ships per year to 1-2.

Following its receipt of SEA-3's application, the Planning Board notified the other municipalities located on the Newington Branch (Portsmouth, Greenland, Stratham and Newfields) pursuant to N.H.R.S.A. § 36:54, which provides for notice to potentially affected communities.

Portsmouth's initial response to the Notice was to advise the Planning Board of its concern regarding the potential impacts of increased rail operations upon Portsmouth in a letter stating:

The potential impacts of this project on the City of Portsmouth relate to the possible storage of rail cars at the rail yard adjacent to North Mill Pond and the increased frequency of rail transport through the City and in particular through the downtown area.

The Portsmouth rail yard abuts the dense McDonough Street neighborhood and faces the Creek and Christian Shore neighborhoods across North Mill Pond. In past years, nighttime idling of locomotives in the yard was a significant problem due to the noise impacts on these neighborhoods. The City is strongly opposed to any change in railroad operations that would include nighttime idling in the rail yard. In addition, the City is opposed to storage of LPG tank cars in the same yard because of the proximity to the McDonough Street neighborhood.

The rail line crosses Maplewood Avenue and Market Street at grade in downtown Portsmouth. These two crossings are currently adequate for the small volume of rail traffic on the line. We understand that while the proposed project will increase the number of tank cars per train, it will not necessarily increase the number of trains passing through the City on a daily or weekly basis. If the frequency of trains were to increase, these at-grade crossings should be evaluated for improvements.

We also understand that the railroad does not anticipate increasing the speed of trains in the City. Nonetheless, we have concerns about the condition of the tracks, and particularly of the bridge over the Route 1 Bypass, and request that the railroad evaluate these conditions and their acceptability for increased usage and potential increases in speed.

See Letter of Rick Taintor, Planning Director, dated December 9, 2014, attached hereto as Exhibit A.

On February 10, 2014, Portsmouth again advised the Planning Board of its concerns, which were again limited to rail operations, stating:

The City is primarily concerned about the public safety implications of increased rail traffic carrying hazardous materials close to neighborhoods and business areas. There are two components to this issue. First we are concerned that this rail corridor has not been maintained adequately to support the level and type of rail use proposed for this project, as reflected by the current limitations on travel speed. Given the lack of rail traffic volume on the corridor to date, it is understandable that the corridor has not been maintained to a higher level. However, the proposed increase in volume of rail traffic combined with the hazardous nature of the cargo warrants a higher standard of maintenance.

The second aspect of our safety concern has to do with the equipment that will be used to transport LPG through the City. It is our understanding that the majority of tank cars carrying propane are not built to the latest industry safety standards.

See Letter of Robert Lister, Mayor, dated February 10, 2014, attached hereto as Exhibit B (emphasis added).

On February 12, 2014, Portsmouth held a staff meeting with representatives from the other communities located on the Newington Branch and the State of New Hampshire. At this meeting, the only issue discussed was the proposed increased rail service through their communities. See Staff Meeting Summary, dated February 12, 2014, attached hereto as Exhibit C.

On February 18, 2014, Portsmouth wrote to U. S. Senator Jeanne Shaheen, asking the Senator to request that a representative of the Federal Railroad Administration appear at the Planning Board to answer questions. In its letter, Portsmouth stated that it was not concerned with the site itself but with the impact of increased rail activity:

As you know the Town of Newington has an application for expansion of the SEA-3 liquefied petroleum gas LPG [sic] at 190 Shattuck Way in Newington. **The City has concerns about the proposed terminal expansion not due to the site plan itself but to the operational changes that will be implemented as a result of the site improvements.**

It is our understanding that the upgraded facility will be receiving propane deliveries by rail 6 days per week, with each delivery consisting of up to 16 rail cars. Each rail trip to or from the Sea-3 terminal will require those trains with tank cars to travel through Portsmouth City streets, six (6) underpass or overpass crossings in the City as well as a number of private property drive crossings. It goes without saying that the safety of the Citizens of Portsmouth and our infrastructure facilities are paramount.

See Letter of Robert Lister, Mayor, dated February 18, 2014, attached hereto as Exhibit D (emphasis added).

On March 6, 2014, Portsmouth stated in a letter to the Planning Board that, “[t]he City of **Portsmouth has concerns with the operational changes specific to rail operations** that will be implemented as a result of the site improvements proposed by Sea-3 [sic][Emphasis added].”

See Letter of Robert Lister, Mayor, dated March 6, 2014, attached hereto as Exhibit E.

On April 9, 2014, Portsmouth advised the Planning Board that:

As you are aware, **the residents of the City of Portsmouth have expressed abundant concern regarding the impact of the SEA-3 project on the public health, safety, welfare and the environment as a result of increased rail traffic through Portsmouth.** On Monday April 7, 2014, the City Council voted unanimously to oppose the approval of this project. As a project that has been designated a project of regional impact, the City Council felt that it was important to go on record in an official capacity to voice its continued concern regarding this project.

In the event that the Newington Planning Board approves the project over the City’s objection, the City requests that the applicant be required to provide a comprehensive safety and environmental plan. **Such a plan would identify risks as well as needed improvements for the purpose of protecting the citizens of Portsmouth from the exponentially increased hazards that will exist as a result of the rail transportation of propane through the heart of the City and along residential neighborhoods.**

See Letter of Robert J. Lister, Mayor, dated April 9, 2014, attached hereto as Exhibit F (emphasis added).

On May 19, 2014, the Planning Board unanimously voted to approve SEA-3's application, supporting its decision with 54 separate findings of fact (hereinafter the "Approval"). A copy of the Approval is attached hereto as Exhibit G.

Portsmouth's Appeals.

On June 16, 2014, Portsmouth signed a Petition that it filed in the New Hampshire Superior Court (The City of Portsmouth v. Newington Planning Board, Rockingham Co. Super. C. Docket No. 218-2014-CV-00654), seeking to overturn the Approval or in the alternative, require a study of the rail impacts (hereinafter "Superior Court Petition"). See Superior Court Petition, attached hereto as Exhibit H.

Also on June 16, 2014, Portsmouth signed an Appeal that it filed with the Newington Zoning Board of Adjustment (ZBA) seeking to overturn the Approval or have it remanded to the Planning Board for further proceedings (hereinafter "ZBA Appeal"). See ZBA Appeal, attached hereto as Exhibit I.¹

Using identical language in its Superior Court Petition and ZBA Appeal, Portsmouth seeks to challenge the Planning Board's Approval, on all grounds, based on its claim of injury caused by rail operations:

38. Proximity:

The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and

¹ N.H.R.S.A. § 677:15, I-a(a) requires that any appeal issue from a Planning Board decision that involves the interpretation of a Town's zoning ordinance must first be resolved by the Town's Zoning Board of Adjustment. All other issues are appealable direct to the Superior Court. In instances such as this, where dual appeals are filed, the Superior Court action is stayed pending resolution of the ZBA appeal. If the ZBA's decision is then appealed, the two appeals will be consolidated in the Superior Court.

Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. **Any significant logistical issues related to bringing materials into the SEA-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.**

39. Type of Change of Use:

The type of change of use requested by Sea-3 [sic] is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conduction [sic] operations or unreasonably burden interstate commerce, **its decision to allow Sea-3's [sic] expansion has caused an impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail through the City.**

40. Immediate Impact:

The impact of Sea-3's [sic] expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of firefighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3 [sic]. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. **In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.**

See Ex. H at ¶¶ 38-40; Ex. I at ¶¶ 38-40 (emphasis added).

On June 18, 2014, Portsmouth sent a letter to the Governor of New Hampshire, in which it reiterated its concerns regarding the increased rail traffic through Portsmouth, stating:

While the Newington Planning Board performed a thoughtful and deliberate review of this application, there was reluctance on the part of the Planning Board to address the significant impacts on safety this project places on the abutting communities. During the public hearing process, **the City specifically requested**

that Newington require a safety/hazard assessment to identify the risks and hazards associated with the transporting LPG through the City and other affected communities. Unfortunately, no such stipulation was required of the applicant and the City has appealed the Newington Planning Board's approval of Sea-3's expansion to compel such study.

See Letter of Robert J. Lister, Mayor, dated June 18, 2014, attached hereto as Exhibit J (emphasis added).

A Hearing on Portsmouth's Appeal to the Newington Zoning Board of Adjustment is currently scheduled for August 25, 2014, at which time the ZBA will rule on Portsmouth's request that it overturn the Planning Board's Decision based on Portsmouth's claim that it will be injured by the additional rail traffic.

LEGAL ARGUMENT

As repeatedly confirmed by its statements to the Planning Board and its public statements to New Hampshire's elected officials, Portsmouth's sole objective is to block LPG rail car service from travelling through Portsmouth. As discussed below, any local or state remedy used to achieve this objective, including the requirement of a study or the instigation of non-railroad claims on appeal, to avoid STB jurisdiction, is preempted by federal law.

Pursuant to 49 U.S.C. § 11101, SEA-3 has a legal right to receive common carrier rail service, which entitles it to receive LPG rail cars from Pan Am over the Newington Branch. The Interstate Commerce Act expressly states that the jurisdiction of the Surface Transportation Board over "transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . is exclusive." 49 U.S.C. § 10501(b) (hereinafter "§ 10501(b)"). Upon its enactment, ICCTA:

broadened the express preemption provision of the Interstate Commerce Act to the point that "[i]t is difficult to imagine a broader statement of Congress' intent

to preempt state regulatory authority over railroad operations.” CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N. D. Ga. 1996). Section 10501(b) gives the Board exclusive jurisdiction over ‘transportation by rail carriers,’ and the term ‘transportation’ is defined by our statute, at 49 U. S. C. 10102(9), to embrace all the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad’s traffic should be routed is preempted.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005).

In interpreting the reach of 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g. railroad rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements including building permits, zoning ordinances, and environmental and land use permitting requirements are preempted.

Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declar. Order, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013).

Based on § 10501(b)’s broad reach, any state or local law that allows a non-federal entity to restrict or prohibit a federal rail carrier’s operations is preempted, regardless of whether the state or local law is expressly directed at the carrier’s operations. See Norfolk Southern Ry Co. v. City of Alexandria, 608 F.3d 150, 158 (2010) (ruling that a city ordinance regulating third party truckers travelling to Norfolk Southern’s transloading facility to pick up ethanol was preempted as an impermissible attempt to regulate transloading operations at the facility itself) (citing Green Mtn. R. R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005)).

Any attempt to have the Planning Board’s Approval overturned based on its refusal to regulate Pan Am’s transportation of LPG rail cars is plainly preempted by § 10501(b).

Portsmouth's alternative request that the Planning Board be compelled to require a study from SEA-3 on railroad impacts as a condition of approval is likewise preempted by § 10501(b) as a *per se* impermissible pre-clearance requirement. See Green Mtn. R. R. Corp. 404 F.3d at 642-43; Norfolk Southern Ry Co., 608 F. 3d at 158; CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at p. 3 (S.T.B. May 3, 2005).

Over the course of Portsmouth's participation in the public hearings before the Planning Board, it repeatedly stated that it was concerned with the effect of LPG rail traffic upon Portsmouth's citizens. Portsmouth made no other claim and in fact it publicly disavowed any interest in regulating the site itself, as stated in its letter to United States Senator Shaheen. See Ex. D. Furthermore, after Portsmouth filed its Superior Court Petition and ZBA Appeal, it publicly stated to New Hampshire's Governor that its purpose in appealing the Planning Board's Decision was to compel a study of the risks and hazards of transporting LPG through the City. See Ex. J.

Having publicly admitted that its purpose in appealing the Planning Board's Approval is to impose a *per se* impermissible preclearance requirement on rail operations, see Ex. J, Portsmouth should not be allowed to indirectly regulate rail operations by seeking to overturn the Planning Board's Approval on non-railroad issues, particularly when it failed to raise these issues itself at the Planning Board and publicly stated that it had no issues with the site plan. See Ex. D. Given Portsmouth's numerous statements of intent, the Board should not allow Portsmouth to make an end run around federal preemption.

Under New Hampshire law, Portsmouth is required to establish that it has legal standing in order to challenge the Planning Board's Approval at the Superior Court and at the ZBA. See Ex. H ¶¶ 32-48; Ex. I ¶¶ 32-48. To have standing under New Hampshire law, Portsmouth must

prove, among other factors, the immediacy of its claimed injury. See Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2010); Joyce v. Town of Weare, 156 N.H. 526 (2007) (standing will not be given to those who allege a speculative injury).

As set forth in Portsmouth's Superior Court Petition and ZBA Appeal, Portsmouth alleges that it will be injured by increased LPG rail car traffic in Portsmouth:

40. Immediate Impact:

The impact of Sea-3's [sic] expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of firefighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3 [sic]. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

See Ex. H ¶ 40; Ex. I ¶ 40 (emphasis added).

Portsmouth alleges in its Superior Court Petition and ZBA Appeal that it will be immediately impacted by the Planning Board's Approval because railroad traffic will increase, causing it to spend money to upgrade crossings and devaluing its tax base.² On this basis, Portsmouth claims standing to proceed on all of its Superior Court Petition and ZBA Appeal issues. SEA-3 submits that any state or local proceeding that seeks a remedy for injuries

² The claimed immediate impacts from fire assistance and supplying water to the site already exist. Simply changing the method by which propane is delivered to the site will have no impact on these existing obligations.

allegedly caused by a federal carrier's railroad operations is preempted by § 10501(b), regardless of whether the specific claims are directly related to railroad operations.

As evident from the forgoing, the New Hampshire Superior Court and Newington ZBA are not the proper forums for resolving Portsmouth's concerns with LPG rail traffic:

[A]ny permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 7 (S.T.B. May 3, 2005). As noted above, if Portsmouth has any safety concerns regarding the Newington Branch rail line, it must address those concerns to the Federal Railroad Administration which is solely responsible for the safety of the Newington Branch rail line under the Federal Railroad Safety Act (“FRSA”).

Basis for Emergency Relief.

SEA-3 asks that this Board consider its request on an emergency basis because state and local action to overturn the Planning Board's Approval is imminent and may result in significant delay to the completion of SEA-3's proposed improvements, leading to future fuel shortages in New England.

According to the U.S. Census Bureau's 2009 American Community Survey, approximately 246,499 homes used propane as their primary heat source.³

³ As reported by Warren Wilczewski and Michael Sloan on page 97 of their November 2011 Report titled, Propane Industry Impact on U. S. and State Economies, prepared for the Propane Education and Research Council, portions attached hereto as Exhibit K.

As the only primary storage tank facility in New England with rail access, the Facility plays a critical role in the New England market.

The presence of a primary storage tank facility allows propane to be stockpiled and released during peak-demand, cold-weather months, thereby stabilizing the local propane market and securing a critical energy supply for the New England region.

For decades, New England's propane demand has been met with propane obtained from international sources such as the North Sea, North Africa, the Middle East and Venezuela, brought to New England by ship. In recent years however, international propane prices have increased while at the same time U. S. propane prices have sharply decreased, due to increased supply as the result of new drilling techniques. As a result, domestically-produced propane is now substantially cheaper than internationally-produced propane.

Due to this price difference, it is no longer economically viable to import propane to New England via ship and SEA-3's distribution figures have dropped as a result, as shown by the below table, which sets forth the number of truck transports from SEA-3's Facility on an annual basis as well as the number of truck transports per day for the busiest month of the year, for the period 2009-2013:

Calendar Year	Total Annual Tank Truck Transport Count	Average Daily Tank Truck Transport Count For Peak Month (January)
2009	17,287	158
2010	14,710	133
2011	8,227	105
2012	2,839	40
2013	436	8

With New England's propane primary storage tank facilities now virtually dormant, the region has been forced to rely on rail and truck shipments to satisfy demand on an as-needed

basis. As a result, 75% of all LPG now comes into New England by rail from various production facilities throughout the U. S. and Canada with the remaining LPG being trucked into New England, primarily from the terminus of the TEPPCO pipeline in Selkirk, New York.

The effect of this market change has been to eliminate SEA-3's ability to stockpile propane. As a result, retail propane distributors now face shortages during the critical winter heating season due to supply and logistical bottlenecks as they all compete for the delivery of product at the same peak-demand periods.

As a direct result of these conditions, the New Hampshire Department of Safety declared an emergency last winter on December 27, 2013, allowing interstate truck drivers carrying propane to exceed the hours of service regulations set forth in the Federal Motor Carrier Regulations during the period of the emergency. In declaring this emergency, the New Hampshire Department of Safety specifically cited the shortage of propane at SEA-3's Facility.

As stated in the Department's Declaration of Emergency Notice:

Pursuant to 49 CFR Section 390.23 and New Hampshire RSA 266:72-a, the New Hampshire Department of Safety declares that an emergency exists pertaining to the delivery of propane, gasoline, diesel, and fuel oil to distributors, residential and business establishments within the State of New Hampshire.

The emergency exemption is issued in connection with anticipated emergency conditions from a shortage of propane at Sea-3 in Portsmouth [sic], two major winter storms in a row, and a period of sub-zero temperatures, all of which have resulted in hazardous driving conditions and extra demands on fuel supplies. It is deemed that a declaration of emergency is required to ensure the continuation of these essential services to both residential and commercial establishments and governmental buildings within the State.

See Declaration of Emergency Notice (Title 49 CFR 390.23), dated December 27, 2013, attached hereto as Exhibit J (emphasis added). The conditions that created the propane shortage at SEA-3's Facility last winter will remain unless the Facility's rail capacity is increased.

The Facility's current rail capacity is too small to meet market demand. With just three unloading berths, the Facility can only receive six rail cars per day, or 198,000 gallons, enough to fill just 18 tank trucks per day, falling far short of normal winter market demand. The below table illustrates the amounts involved in both gallons and barrels (42 gallons = 1 barrel):

Unit	Capacity in Gallons	Capacity in Barrels
Tank Truck	11,000 gallons	262 barrels
Rail Car	33,000 gallons	786 barrels
6 Rail Cars	198,000 gallons	4,714 barrels
16 Rail Cars	528,000 gallons	12,571 barrels
Sea-3 Facility's Primary Storage Tanks	23,520,000 gallons	560,000 barrels

Based on its current rail capacity of six cars per day, it would take Sea-3 one hundred and nineteen (119) receiving days to fill its Primary Storage Tanks, assuming no distribution of product. This offload capacity is inadequate to build and maintain a stockpile going into the critical winter heating season. In order for consumers to benefit from the stabilizing effect of Sea-3's Primary Storage Tank Facility, and avoid future fuel emergencies, Sea-3 must be allowed to increase its railcar off-loading capacity.

Any significant delay in proceeding with SEA-3's proposed improvements at this point in time will likely push the project completion date beyond the 2015-2016 winter heating season, meaning that New England's propane consumers will have to go at least two more winters without a fully operational primary storage facility in the region.

CONCLUSION AND REQUESTED RELIEF

As made clear by Portsmouth's public statements and actions, its sole objective in filing its Superior Court Petition and ZBA Appeal is to block LPG rail traffic from travelling through Portsmouth. As made clear by the Board in CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005), any local or state attempt to direct

railroad traffic is preempted. Also preempted are any indirect attempts to regulate rail traffic by imposing pre-clearance requirements such as a study or by raising non-railroad claims in an effort to regulate rail operations without triggering federal preemption. Any state or local remedy that is sought as a means to regulate railroad operations is preempted.

Based on the Board's broad authority under 5 U.S.C. § 554 and 49 U.S.C. § 721(a) to issue a declaratory order to eliminate a controversy or remove uncertainty, SEA-3 requests that the Board promptly issue an order:

- A. Declaring that all claims made in Portsmouth's Superior Court Petition and ZBA Appeal are preempted by § 10501(b) ; or, in the alternative
- B. Declaring that all claims made in Portsmouth's Superior Court Petition and ZBA Appeal which are derived from or in any way dependent upon an allegation that Portsmouth will be adversely affected as the result of rail transportation are preempted by § 10501(b); and
- C. Granting such further relief as the Board deems proper.

Respectfully submitted,



Alec L. McEachern
Shaines & McEachern, P. A.
282 Corporate Drive, Unit 2
Portsmouth, NH 03801
(603) 436-3110

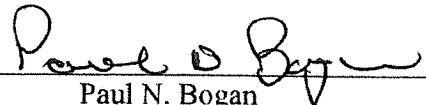
Counsel for Petitioner SEA-3, Inc.

Dated: August 1, 2014

VERIFICATION

I, Paul N. Bogan, declare under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this pleading.

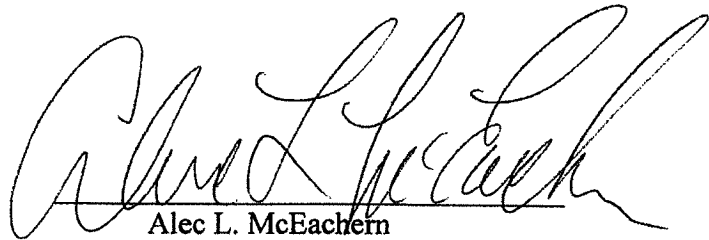
Executed on July 31, 2014.


Paul N. Bogan

STATEMENT REGARDING SERVICE

I hereby certify that on this 1 day of August, 2014, I have served the Defendant in this proceeding with this document by United States Mail as follows:

Robert P. Sullivan, City Attorney
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

A handwritten signature in black ink, appearing to read "Alec L. McEachern", written over a horizontal line.

Alec L. McEachern

Counsel for Petitioner SEA-3, Inc.

Exhibit A



CITY OF PORTSMOUTH

Community Development Department
(603) 610-7232

Planning Department
(603) 610-7216

December 9, 2013

Newington Planning Board
Town Hall
205 Nimble Hill Road
Newington, NH 03801

RE: Sea-3 Terminal, 190 Shattuck Way, Newington

Dear Planning Board Members:

Thank you for designating the proposed Sea-3 terminal expansion project as a Development of Regional Impact and according the City of Portsmouth the status of an abutter in the Site Plan Review process. The potential impacts of this project on the City of Portsmouth relate to the possible storage of rail cars at the rail yard adjacent to North Mill Pond and the increased frequency of rail transport through the City and in particular through the downtown area.

The Portsmouth rail yard abuts the dense McDonough Street neighborhood and faces the Creek and Christian Shore neighborhoods across North Mill Pond. In past years, nighttime idling of locomotives in the yard was a significant problem due to the noise impacts on these neighborhoods. The City is strongly opposed to any change in railroad operations that would include nighttime idling in the rail yard. In addition, the City is opposed to storage of LPG tank cars in the same yard because of the proximity to the McDonough Street neighborhood.

The rail line crosses Maplewood Avenue and Market Street at grade in downtown Portsmouth. These two crossings are currently adequate for the small volume of rail traffic on the line. We understand that while the proposed project will increase the number of tank cars per train, it will not necessarily increase the number of trains passing through the City on a daily or weekly basis. If the frequency of trains were to increase, these at-grade crossings should be evaluated for improvements.

We also understand that the railroad does not anticipate increasing the speed of trains in the City. Nonetheless, we have concerns about the condition of the tracks, and particularly of the bridge over the Route 1 Bypass, and request that the railroad evaluate these conditions and their acceptability for increased usage and potential increases in speed.

We request that the Board include the following conditions in its approval of a site plan for this project:

1. Locomotives shall not be permitted to idle for extended periods of time in the evening or in the rail yard adjacent to North Mill Pond.
2. LPG tank cars shall not be stored in the rail yard adjacent to North Mill Pond.
3. The railroad company shall provide the City of Portsmouth with an evaluation of the conditions of the tracks in Portsmouth, with particular attention to the rail bridge over the Route 1 Bypass.
4. If the frequency of rail trips through downtown Portsmouth increases from its current level, the railroad company shall work with the City of Portsmouth to evaluate the need for improvements to the crossings at Maplewood Avenue and Market Street.

Thank you for your consideration of the above concerns and issues. Please feel free to contact me if you have any questions.

Sincerely,



Rick Taintor
Planning Director

copy: John P. Bohenko, City Manager
David S. Allen, Deputy City Manager
John Ricci, Chair, Planning Board

Exhibit B



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

Robert J. Lister
Mayor

February 10, 2014

Denis Hebert, Chair
Newington Planning Board
205 Nimble Hill Road
Newington, NH 03801

Subject: Sea-3 Expansion Proposal at 190 Shattuck Way

Dear Planning Board Members:

Thank you for including the City of Portsmouth as an abutter in the land use review process now before you by Sea-3 of 190 Shattuck Way. Their proposal to reconfigure their terminal in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail and export of same via ocean-going ships has been the subject of a great deal of interest and concern by the Portsmouth City Council and residents of the City.

We appreciate the determination by the Newington Planning Board that this project has potential regional impacts beyond Newington's municipal boundaries and the rights that have been granted to the City of Portsmouth as abutters in this process. The City has created a webpage to provide information about the process (<http://cityofportsmouth.com/Sea-3.html>) and City Manager, John P. Bohenko has designated the City's Environmental Planner, Peter Britz to coordinate the City's interest in this project.

The City is primarily concerned about the public safety implications of increased rail traffic carrying hazardous materials close to neighborhoods and business areas. There are two components to this issue. First, we are concerned that this rail corridor has not been maintained adequately to support the level and type of rail use proposed for this project, as reflected by the current limitations on travel speed. Given the lack of rail traffic volume on the corridor to date, it is understandable that the corridor has not been maintained to a higher level. However, the proposed increase in volume of rail traffic combined with the hazardous nature of the cargo warrants a higher standard of maintenance.

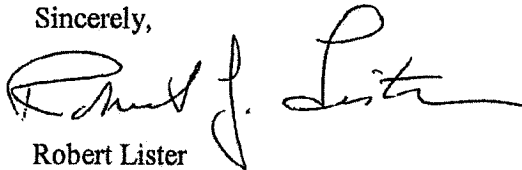
The second aspect of our safety concern has to do with the equipment that will be used to transport LPG through the City. It is our understanding that the majority of tank cars carrying propane are not built to the latest industry safety standards.

February 10, 2014
Page 2

We understand that the land use review process is typically focused on the site and immediate surroundings rather than on impacts to other communities, and we also understand the federal preemption of local oversight with respect to railroads. To that end, as you know, Portsmouth and the communities in the region including Newington, have requested assistance from both the Federal Rail Administration and the New Hampshire Department of Transportation. However, we request that the Newington Planning Board do all it can within its authority to ensure that the rail operations necessary for the proposed expansion of the Sea-3 terminal does not threaten public safety.

We are pleased to be working together with the Town of Newington, in addition to the other towns along the rail corridor and the State and Federal Agencies to craft a solution that will meet the needs of the applicant while not compromising the safety of those living and working in the corridor. If you have any questions or need additional information please do not hesitate to contact Peter Britz, Environmental Planner/Sustainability Coordinator for the City at (603) 610-7215 or plbritz@cityofportsmouth.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Lister". The signature is fluid and cursive, with a large initial "R" and "L".

Robert Lister
Mayor of Portsmouth

Exhibit C

Staff Meeting with Town Administrators and NH DOT

Date: February 12, 2014
TIME: 10:00 AM
PLACE: CITY MANAGER'S CONFERENCE ROOM

Staff meeting summary:

A meeting was called by Portsmouth City Manger, John P. Bohenko on February 12, 2014 at 10am in Portsmouth City Hall. In attendance representing municipal interests were: For the City of Portsmouth John P. Bohenko, City Manager, David Allen Deputy City Manager, Rick Taintor, Planning Director, and Peter Britz, Environmental Planner; Town Administrators Paul Deschaine for the Town of Stratham and Karen Anderson for the Town of Greenland; and Tom Morgan, Town Planner for the Town of Newington;. Also in attendance were Melodie Esterberg, Chief of Design Services, Bureau of Highway Design and John H. Robinson, Railroad Inspector/Investigator, both from the New Hampshire Department of transportation. Representatives from the Town of Newfields were invited but were unable to attend this meeting.

This meeting was called by Portsmouth City Manger, Bohenko to bring representatives of these communities together as they all have concerns with a proposal to expand the Sea-3 propane terminal in Newington which will increase rail traffic from Rockingham Junction in Newfields to the Sea-3 facility along the Piscataqua River in Newington. Residents in all the communities have expressed concern over the potential for increased rail service.

The concern expressed by all the communities is safety of the rail service proposed. The Town of Newington's Planning Board has been requesting inspection and safety records for the rail corridor from the Rockingham Junction to the Sea-3 site in Newington.

John Robinson gave a description of what is involved with track inspections and some details about the requirements:

Track safety standards establish 9 classes of track (Class 1 to Class 9) plus a category know as "Excepted Track". The difference in class is based on standards for track structure, geometry, and inspection frequency. Each class has a maximum operating speed for freight and passenger trains. The higher the level of track the greater the allowable track speed and the more stringent the track safety standards. The railroad is the entity that determines class of track and the Federal Railroad Administration (FRA) holds them accountable to the standards for that class. Although John Robinson is a railroad inspector for NHDOT he is doing the inspection in conjunction with the FRA and enforcing FRA track safety standards. If through regular maintenance and inspection efforts by Pan Am Railways or through inspections by NHDOT or FRA it is discovered that a section of track fails to meet the specified federal standard, the railroad is required to make appropriate repairs to maintain that Class of Track designation or downgrade the track segment to a lower Class of Track to which the federal standards can be met. Class 1 track that is used only for freight must be inspected at least once per week by a person

the railroad has designated as a qualified inspector. Reports for these inspections must be kept by the railroad and made available to NHDOT or FRA upon request for one year after the inspection.

The Portsmouth and Newington lines which begin at Rockingham Junction and continue into Newington are classified as Class 1 with one exception. There is a segment of excepted track located in downtown Portsmouth from just east of Barberry Lane to Green Street, the majority of which is in the Portsmouth rail yard. Track classified as excepted is not allowed to carry more than 5 cars carrying hazardous cargo placards. Therefore it was noted that if the Sea-3 project were to go through today that section of track would need to be upgraded in order to allow passage of more than 5 tank cars full of LPG.

The FRA regulates the reporting of incidents such as derailments. Incidents which occur on the tracks must be reported if train accident results in damage of \$150,000 or more to railroad or non-railroad property. According to John Robinson's records there was no derailments reported since 2000 on the Portsmouth or Newington branch.

The Portsmouth Branch was inspected on October 13, 2013 with 14 defective conditions found. Follow-up occurred November 14th. (Follow-up means that defective conditions were corrected.)

The Newington Branch was inspected on November 14, 2013, two defective conditions were found with follow-up on December 17, 2013.

On January 31, 2014 both the Newington and Portsmouth branch were inspected by the FRA at the request of the Town of Greenland. There were three defects written on the Newington Branch and none on the Portsmouth Branch upon which they have thirty days to follow-up.

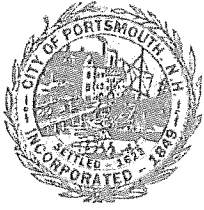
There was some discussion about the merits of asking Pan Am Railways to upgrade the tracks to a Class 2 line or just to have them insure that all tracks are safe and maintained to Class 1 standards, while Class 2 has more stringent safety requirements, trains are allowed to travel up to 25 mph. The consensus of the group seemed to be that the slower speeds were more desirable than an upgrade to allow speeds of 25mph.

Melodie Esterberg discussed the State's role in rail crossing maintenance and funding sources available under the Rail-highways crossing (Section 130) Program to upgrade these crossings. Ms. Esterberg stated that the rail crossings are inspected by NH DOT. A revised inspection program began about three years ago utilizing an assessment team and a comprehensive rating system. There are 4 crossings eligible for funding along the Portsmouth line and the program will pay 90% for upgrades to road crossings and 100% of the cost of protective devices would be covered by this program. DPW has begun coordinating with NHDOT to come up with a schedule for crossing upgrades at the eligible locations.

The Town of Greenland provided a letter which they wrote to NHDOT and FRA requesting track inspections. The City agreed to place this letter on its website. All present said they would share any future correspondence with their congressional delegation and try to share information as much as possible. It was agreed by all that communities present that assuring the tracks are safe was the number one priority for all the communities

Next steps for the communities was to attempt to get a meeting with Pan Am so that they could explain their expansion plans and the communities would be able to ask questions of them about any proposed rail upgrades to accommodate Sea-3.

Exhibit D



Robert J. Lister
Mayor

CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

February 18, 2014

The Honorable Jeanne Shaheen
U.S. Senator
1589 Elm St., Suite 3
Manchester, NH 03101

Dear Senator Shaheen:

As you may know the Town of Newington has an application for expansion of the Sea-3 liquefied petroleum gas LPG at 190 Shattuck Way in Newington. The City has concerns about the proposed terminal expansion not due to the site plan itself but to the operational changes that will be implemented as a result of the site improvements.

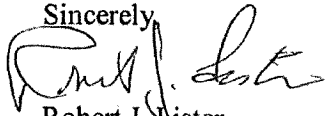
It is our understanding that the upgraded facility will be receiving propane deliveries by rail 6 days per week, with each delivery consisting of up to 16 rail cars. Each rail trip to or from the Sea-3 terminal will require those trains with tank cars to travel through Portsmouth neighborhoods, commercial areas and the downtown traversing six (6) at grade crossings of City streets, six (6) underpass or overpass crossings in the City as well as a number of private property drive crossings. It goes without saying that the safety of the Citizens of Portsmouth and our infrastructure facilities are paramount. The Newington Planning Board has asked for documentation from the applicant that this corridor has been inspected and is in fact safe according to the National Railroad Administration. Neither the applicant nor the Town of Newington have been able to get a response as to the safety of the rail.

By way of this letter, I am asking that your office formally request the Federal Rail Administration provide inspection records documenting the condition of the Pan Am railroad tracks from Newfields, NH junction to the Sea-3 site in Newington, NH. Additionally, given the potential regional impact of this project and the breadth of concerns raised by residents in the four communities this rail line traverses, we request that you ask the Federal Rail Administration to send a representative who can meet with the communities in our region to answer questions and provide information as to how the safety of the rail can be confirmed.

SEA-3, Inc. 000034

The City has created a webpage on our website <http://www.cityofportsmouth.com/Sea-3.html> to provide information as it becomes available and the City Manager has designated the City's Environmental Planner, Peter Britz the coordinator of this topic. If you have any questions or need additional information, please do not hesitate to contact Peter Britz at (603) 610-7215 or plbritz@cityofportsmouth.com.

Sincerely,



Robert J. Nister
Mayor of Portsmouth

RJL/jed

c.: Portsmouth City Council Members

Exhibit E



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

Robert J. Lister
Mayor
March 6, 2014

Newington Planning Board
Denis Hebert, Chairman
Newington Town Hall
205 Nimble Hill Road
Newington, NH 03801

Dear Mr. Hebert:

This letter is in reference to the proposed Sea-3 terminal expansion on your agenda for March 10, 2014. The City of Portsmouth has concerns with the operational changes specific to rail operations that will be implemented as a result of the site improvements proposed by Sea-3.

We have been copied by Attorney Christopher Cole representing a group of Portsmouth residents who have requested that the Newington Planning Board request that a comprehensive safety or security review of the full scope of the Sea-3 expansion proposal (or its external ramifications) and a comprehensive environmental impact analysis be conducted at the expense of the applicant before the Newington Planning Board makes a decision on this site review application. As Mayor of Portsmouth, I would support this request.

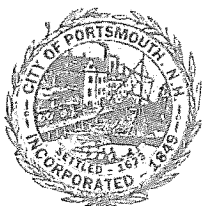
Thank you for your consideration on this matter.

Sincerely,

Robert Lister
Mayor of Portsmouth

c.: Portsmouth City Council
John P. Bohenko, Portsmouth City Manager
Tom Morgan, Newington Town Planner
Christopher Cole, Esquire

Exhibit F



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

Robert J. Lister
Mayor

April 9, 2014

Newington Planning Board
Denis Hebert, Chairman
Newington Town Hall
205 Nimble Hill Road
Newington, NH 03801

RE: Sea-3

Dear Mr. Hebert:

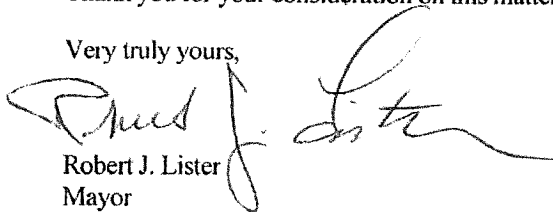
As you are aware, the residents of the City of Portsmouth have expressed abundant concern regarding the impact of the Sea-3 project on the public health, safety, welfare and the environment as a result of increased rail traffic through Portsmouth. On Monday April 7, 2014, the City Council voted unanimously to oppose the approval of this project. As a project that has been designated a project of regional impact, the City Council felt that it was important to go on record in an official capacity to voice its continued concern regarding this project.

In the event that the Newington Planning Board approves the project over the City's objection, the City requests that the applicant be required to provide a comprehensive safety and environmental plan. Such a plan would identify risks as well as needed improvements for the purpose of protecting the citizens of Portsmouth from the exponentially increased hazards that will exist as a result of the rail transportation of propane through the heart of the City and along residential neighborhoods.

While the City Council appreciates the collaborative relationship that it has shared with Newington over the years, the health, welfare and safety of our citizens is paramount.

Thank you for your consideration on this matter.

Very truly yours,

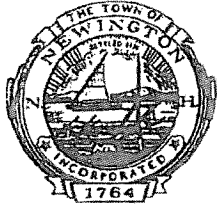


Robert J. Lister
Mayor

RJL/jed

c.: Portsmouth City Council
John P. Bohenko, Portsmouth City Manager
Tom Morgan, Newington Town Planner

Exhibit G



PLANNING
BOARD

The Town of Newington New Hampshire

Incorporated 1764

May 21, 2014

Paul Bogan, Vice President
Sea-3
190 Shattuck Way
Newington, NH 03801

RE: Proposed Terminal Expansion, 190 Shattuck Way,
Tax Map 14 Lot 2, and Map 20, Lot 13

Dear Mr Bogan:


On May 19, 2014, the Newington Planning Board voted to approve your proposal to reconfigure your terminal in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and to export same via ocean-going ships and via truck to customers in New England. The vote was subject to the following stipulations:

- 1) Trucks exiting the SEA-3 facility shall make a right hand turn only and shall travel north on Shattuck Way to the Spaulding Turnpike's Exit 4.
- 2) The SEA-3 facility shall be authorized to receive no more than 16 rail tank cars carrying LPG per day. Any proposal by SEA-3 to receive more than 16 tank cars carrying LPG per day shall require further site plan review and approval by the Newington Planning Board.
- 3) Any lease between SEA-3 and Pan Am (or their successors or assigns) on land leased to SEA-3 for the siting of the unloading racks and other improvements to be constructed and operated by SEA-3 on such leased land, shall contain a provision that SEA-3 shall remove all such improvements prior to any termination of the lease. The lease shall further provide that if SEA-3's operation is ever moved or discontinued, such improvements shall not be transferred to Pan Am. These required lease provisions shall be submitted to the Planning Board for review and approval by the Board and its legal counsel, and any proposal to amend such lease provisions shall require the pre-approval of the Planning Board.
- 4) The final design and plan shall meet the requirements of the N.H. Fire Code and the NFPA Code, per the opinion of the Newington Fire Chief and the Town's Fire Safety Consultants.

- 5) Several safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.
- 6) If, after the track has been upgraded to a Class II status, SEA-3 learns, or has reason to know, that the Class II track has degraded to a lower level of service, or there is a carrier mandated reduction in rail car deliveries to 5 cars or less, the Selectmen and the Planning Board shall be notified in writing by SEA-3 of this reduction in the level of service within seven (7) business days of receiving such information. This is to allow Newington officials to notify the proper authorities.

Should you have any questions on this matter, feel free to contact me, or Town Planner Tom Morgan, at 436-1252.

Yours truly,



Denis Hebert Chairman
Newington Planning Board

cc: Alec McEachern, Esq.
Cynthia Scarano, Pan Am Railways

**TOWN OF NEWINGTON
PLANNING BOARD FINDINGS AND CONDITIONS OF APPROVAL
SEA-3, INC. SITE PLAN APPROVAL
190 SHATTUCK WAY**

FINDINGS

1. The applicant's proposal seeks to improve the site's existing rail off-loading facilities for liquefied propane gas ("LPG") and add additional LPG rail off-loading facilities on its property and on property to be leased from Pan Am Railways.
2. The purpose of the proposed site improvements is to allow the applicant to continue its historical LPG distribution operations by increasing the capability to receive domestically sourced LPG, which is only available by railroad. The existing capacity to receive internationally sourced LPG from ocean vessels would be unchanged.
3. The Board finds that the shipment by rail of LPG via rail to the SEA-3 facility at 190 Shattuck Way has been occurring since 1995, consistent with the existing site plan approval that SEA-3 has obtained from the Planning Board.
4. If constructed, the proposed site improvements would not materially change operations on the site, which would continue to meet local propane gas distribution needs through its existing truck distribution facilities.
5. LPG is a combustibile, non-toxic gas that evaporates into the atmosphere upon discharge.
6. The applicant's site is manned 24 hours a day, 365 days a year, by personnel who are trained in emergency safety response procedures.
7. The Board finds that SEA-3 has a long history of facilitating and providing LPG fire safety training and incident response training to its personnel and to other public safety personnel, both in Newington and in the region. Further, that Mr. Bogans of SEA-3 has represented that these training opportunities would continue to be available to Newington's firefighters and public safety professionals, and to other communities in the region.

8. The applicant's site is regulated by the U.S. Department of Homeland Security, as overseen by the United States Coast Guard, and is required to comply with these agencies' regulations for security lighting, surveillance and fencing.

9. In his October 9, 2013 interoffice memorandum to the Planning Board, then Fire Chief, Dale Silva, stated with regard to the proposed site improvements that:

"In reference to SEA-3's request to expand their rail capability, we have been researching this a great deal. I met with N.H. Fire Marshal's office to discuss the operation with two Fire Marshals, we inspected the proposed site. In addition to fire protection, we are reviewing federal laws and how this may affect our neighboring communities. From a fire department view, I believe this is a positive for Newington, because it gives us the opportunity to update and increase fire protection systems that are already in place but outdated. The operation they are proposing is not dramatically different than their current operation.

Working with the Fire Marshal's office, we are also going to require a third party Fire Engineer review, but one that specializes in propane operations. The State is researching potential engineers for us.

Having said that, we recommend conditional approval in concept. If approved by the Newington Planning Board is to go forth, SEA-3 will have numerous requirements set by Newington Fire, with the assistance of the State Fire Marshal's office and an Independent Engineer."

10. The proposed site improvements will update and modernize the site's existing fire protection systems.

11. That Newington Fire Chief Head testified that his department has the resources that it needs to respond to an incident, whether it be a SEA-3 facility, or along the railroad tracks. Chief Head said that his department would continue to take advantage of any training that it may require and that the final plan designs would be reviewed and approved by his office, and by the N.H. State Fire Marshal's office.

12. That Ms. Scarano of Pan Am represented to the Board, on the issue of fire incident response training and safety, that Pan Am

often worked with the Federal Railroad Administration [FRA] to provide a day of training for local fire departments.

13. Chief Head stated that as to jurisdiction over incident response, his department handles Newington, and jurisdiction for incidents in Portsmouth or other communities lies with the Fire Chiefs in those communities. Each community can call upon neighboring communities for mutual aid, if such aid is advisable. He also indicated that there are emergency management plans that include evacuation plans which have been put in place by the State of New Hampshire for the seacoast region, should an event occur of such magnitude that the plan is activated.

14. It has been reported from several sources that Portsmouth Fire Chief Steven Achilles has stated that he currently has the resources and training necessary to respond to a LPG incident in Portsmouth related to the LPG rail traffic that currently travels through the City, and that the Portsmouth Fire Department's current resources and training are sufficient to meet the risks presented by the proposed increase in LPG traffic presented by this site plan application.

15. Based on its review of the proposed site plan, the Town's retained safety expert, SFC Engineering Partnership, Inc. ("SFC"), concluded in its January 29, 2014 report, "Overall the site plan appears to be in general compliance with NFPA 58 and 54. In terms of fire safety compliance, no significant problems have been found with this layout."

16. The applicant's Fire Safety Analysis determined that there is adequate water volume and pressure on site to service the proposed fire suppression system.

17. In its written review of the applicant's Fire Safety Analysis ["FSA"] dated April 9, 2014, SFC concluded, "This FSA document appears to be in general compliance with NFPA 58, and NFPA FSA manual. No significant problems have been found with the proposed system or the FSA at this point; however, the above listed detailed documentation should be submitted and reviewed prior to the issuance of a building permit and system commissioning."

18. The applicant has represented that the final design and construction of the site improvements would comply with NFPA 58 and 54.

19. The proposed site improvements would add a second means of emergency access to the site over the property of Pan Am Railways.
20. The proposed site improvements would maintain the site's existing vegetative buffers and add a 6-8' earthen berm at the southeastern corner of the site, within the existing fence line, where the site abuts a residential use.
21. The proposed site improvements will result in no change to the site's existing motor vehicle parking or truck distribution facilities.
22. Mr. Hazarvartian, P.E. of Transportation Engineering, Planning and Policy, performed a traffic assessment for the applicant and concluded that the proposed site plan would not alter the historic truck traffic volume which averaged 103 to 161 trucks per day, from 2002 to the present (excepting 2012 and 2013, which were substantially below these numbers due to market conditions).
23. Mr. Bogans testified that there are site constraints that limit the number of LPG rail cars that SEA-3 can receive to 16 rail car tankers with LPG per day, even with the site improvements proposed by this application. (3/24/14 PB mtg. minutes).
24. Mr. Grotenhuis, Senior P.E. of RSG, reviewed for the Planning Board the applicant's traffic assessment and concluded that the truck traffic volume would remain essentially the same, at 160 trucks on average per day. He further found that ongoing changes to the Spaulding Turnpike may alleviate some of the traffic down Woodbury Avenue and through Portsmouth.
25. Based on the evidence presented, the site plan proposal will not increase the truck traffic to and from the site.
26. The proposed site improvements will not change the site's existing distribution capacity or increase traffic impacts associated with existing uses on the site.
27. The motor vehicle area of the proposed site improvements is currently hard packed gravel and will remain hard packed gravel, with the exception of where the improvements are affixed to the ground.

28. The proposed site improvements will result in no adverse change to existing dust, erosion or run-off conditions.
29. The proposed site improvements will upgrade the existing storm drainage system.
30. The applicant has received Shoreland Impact Permit No. 2014-00105, a copy of which was provided to the Planning Department by e-mail dated March 24, 2014.
31. The applicant has received Alteration of Terrain Permit No. AoT-0695, a copy of which was provided to the Planning Department by e-mail dated March 24, 2014.
32. The proposed site improvements will not alter the existing security lighting, which was installed in accordance with a security lighting plan required and approved by the U.S. Department of Homeland Security.
33. In its April 21, 2014 letter to the Planning Board, Pan Am Railways confirmed in writing that it will lease a portion of its land to the applicant for a portion of the proposed site improvements, but advised the Board of its position that Pan Am Railways is not the applicant. It is not asking the Board for any approvals and it is not subject to the Town's land use regulations. Pan Am is assenting to this application to the extent that a portion of the improvements are located on property that it will lease to SEA-3.
34. John Robinson, the N.H. Railway Safety Inspector at the N.H. Department of Transportation, testified that he met with Portsmouth officials to discuss track inspection issues.
35. Mr. Robinson testified that Pan Am would only be able to move 5 tank cars at a time to the SEA-3 facility over the tracks north of Rockingham Junction while the tracks were in their current condition (3/24/14 PB mtg. minutes).
36. Mr. Robinson said that he (as N.H. DOT's representative) and the FRA over joint track inspections of the Portsmouth and Newington branch line.
37. Mr. Robinson testified that N.H. RSA Chapter 373 governs the process by which N.H. municipalities can request a change of safety protection at railroad-roadway crossings. This is a N.H. DOT administrative hearing process that would examine whether the safety protections at the crossing are adequate, and if not,

who would be responsible for the upgrades and how that cost would be allocated.

38. Mr. Robinson testified that federal law required annual, comprehensive bridge inspections by Pan Am to be in place with records, ratings, and results available to the N.H. DOT and to the FRA.

39. Ms. Scarano of Pam Am stated that Pan Am was currently working with the Town of Greenland to begin the process of examining road crossing safety protections and reiterated that Pan Am would work constructively with communities on road/rail crossing issues.

40. Ms. Scarano of Pan Am testified that if SEA-3's application is approved, Pam Am intends to replace approximately 10,000 ties from Rockingham Junction to the SEA-3 facility, and that it would upgrade its tracks Class II status along this section of the railway.

41. Mr. John Killoy, Track Safety Administrator for the New England region of the Federal Railroad Administration (FRA) testified that the FRA regulates rail safety and employee safety. He stated that the railroad owns and maintains the track to whatever standards it sets for its use, and that tracks would be inspected by the FRA, once an upgrade of track has been completed to a new track class. (3/10/14 PB mtg. minutes).

42. The Board finds that rail safety regulations and inspections lie solely with the Federal Government under the jurisdiction of the FRA and the State of New Hampshire, through N.H. DOT. The Planning Board has heard lengthy, detailed testimony from John Killoy of the FRA and John Robinson of N.H. DOT. Each reaffirmed the Board's understanding that exclusive jurisdiction over rail safety, inspections and operations lies with these governmental bodies and not with N.H. municipal planning boards.

43. While Pan Am has supplied the Board with important information, SEA-3, and not Pan Am, is the applicant before the Board.

44. The Board finds that there are existing safety studies which detail the safety protocols and procedures to be followed on the SEA-3 property in the event of a LPG incident.

45. Based upon the evidence before it, the Board finds that public safety will be enhanced by this application, as Pan Am declared it will upgrade its tracks to Class II status. This will have to be done in order to accommodate a proposed increase to 16 tank car deliveries per day of LPG to the SEA-3 site, above the present limit of 5 cars at a time.

46. Public safety will also be enhanced by the new, state-of-the-art safety improvements that are to be installed on-site as proposed by the applicant.

47. The Planning Board has conducted 7 public hearings on this application. The Board has encouraged and received substantial public input from neighboring communities and their residents, after having declared this project to be a proposed development that has a potential for regional impact per N.H. RSA 36:57.

48. While the Planning Board received and reviewed a report prepared by the Massachusetts Department of Transportation entitled, "Report on the Safety Impacts of Ethanol Transportation by Rail" dated March 29, 2013, the Board finds that the circumstances of this study are not related to this application, as the product being transported in Massachusetts is different (ethanol in Boston vs. LPG in N.H.). The Massachusetts Legislature adopted a law in 2012 that required the Massachusetts DOT to commission this study; there are Massachusetts state permits required to transport ethanol through Boston that are not pertinent to New Hampshire. Most importantly, the rail lines within the Massachusetts study area over which the ethanol would travel are owned by the MBTA, and not by private rail carriers such as Pan Am.

49. The Board expressly finds that the requirements of Newington Zoning Ordinance Article 5, Section 6 have been satisfied, that the contemplated use would constitute a development of sustained desirability and stability, that it would be in harmony with the character of the surrounding area, and consistent with the overall long range plans for the community, that it would not result in an over-intensive use of the land, that it would not result in undue traffic congestion or traffic hazards, and that the plans indicate that it would be adequately landscaped and otherwise promote the health, safety and welfare of the community.

50. The Board expressly finds that this proposed expansion of a long-standing use that is permitted in the Industrial Zone is consistent with the aim of Newington Zoning Ordinance Article V,

section 5, A, which anticipates that land zoned Industrial will be able to accommodate "expansion of existing industry...and to enhance economic development and employment opportunities."

51. The Board expressly finds, as is required by Newington Zoning Ordinance Article V, section 5, B that per the terms of this site plan application, "the proposed location, construction and operation will not injure present or prospective industrial development in the district, or the health and welfare of residential districts in the vicinity." The Board expressly finds that this application is precisely the type of business development and land use that the Industrial District is intended to protect and promote.

52. The Board expressly finds and recognizes that, in the aftermath of the recent economic recession, the importance of supporting business in the Industrial District, and promoting economic development and local employment, cannot be understated as an important purpose of this Industrial District.

53. That the Board finds that SEA-3 helps to provide a variety of energy sources to the N.H. seacoast area and the region, and to the extent that this approval will continue to allow SEA-3 to provide energy alternatives to local energy customers, Newington and the region benefit by having enhanced competition in the energy marketplace.

54. The proposed site improvements meet all applicable requirements of the Town of Newington's Site Plan Review Regulations.

CONDITIONS OF APPROVAL

1. Trucks exiting the SEA-3 facility shall make a right hand turn only and shall travel north on Shattuck Way to the Spaulding Turnpike's Exit 4.

2. The SEA-3 facility shall be authorized to receive no more than 16 rail tank cars carrying LPG per day. Any proposal by SEA-3 to receive more than 16 tank cars carrying LPG per day shall require further site plan review and approval by the Newington Planning Board.

3. Any lease between SEA-3 and Pan Am (or their successors or assigns) on land leased to SEA-3 for the siting of the unloading racks and other improvements to be constructed and operated by

SEA-3 on such leased land, shall contain a provision that SEA-3 shall remove all such improvements prior to any termination of the lease. The lease shall further provide that if SEA-3's operation is ever moved or discontinued, such improvements shall not be transferred to Pan Am. These required lease provisions shall be submitted to the Planning Board for review and approval by the Board and its legal counsel, and any proposal to amend such lease provisions shall require the pre-approval of the Planning Board.

4. The final design and plan shall meet the requirements of the N.H. Fire Code and the NFPA Code, per the opinion of the Newington Fire Chief and the Town's Fire Safety Consultants.

5. Several safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.

6. If, after the track has been upgraded to a Class II status, SEA-3 learns, or has reason to know, that the Class II track has degraded to a lower level of service, or there is a carrier mandated reduction in rail car deliveries to 5 cars or less, the Selectmen and the Planning Board shall be notified in writing by SEA-3 of this reduction in the level of service within seven (7) business days of receiving such information. This is to allow Newington officials to notify the proper authorities.

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Exhibit H

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

THE CITY OF PORTSMOUTH
1 Junkins Avenue
Portsmouth, New Hampshire 03801

v.

NEWINGTON PLANNING BOARD
205 Nimble Hill Road
Newington, New Hampshire 03801

PETITION FOR APPEAL OF THE TOWN ON NEWINGTON PLANNING BOARD'S DECISION PURSUANT TO RSA 677:15, I AND 677:15, I-a (a)

NOW COMES the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue and appeals a decision by the Town of Newington Planning Board pursuant to RSA 677:15, I and RSA 677:15 I-a (a) as follows:

PARTIES

1. The Petitioner/Appellant is the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801 ("City").
2. The Newington Planning Board is a local land use board established by the Town of Newington pursuant to RSA 673 ("Planning Board").

JURISDICTION AND VENUE

3. The Zoning Ordinance of the Town of Newington requires that the Planning Board review site plans pursuant to its Site Plan Review Regulations. (RSA 674.43, RSA 674.44, Town of Newington Site Plan Review Regulations, Section 1).
4. This Court has jurisdiction pursuant to RSA 677:15, I and RSA 677:15, I-a (a). Venue is proper pursuant to RSA 507:9.

BACKGROUND

5. Sea-3 Inc. ("Sea-3") owns two parcels of property located off Shattuck Way in Newington, New Hampshire. These two lots are divided and separated by the rail way owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways ("Pan Am").

6. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas ("LPG") by ship to distribute domestically by rail and truck.
7. The first parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 13 ("Lot 13"). This parcel is 7.02 acres located within both the General Industrial District ("I") and the Waterfront Industrial and Commercial District ("W"). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.
8. The second parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 2 ("Lot 2"). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District ("W"). Lot 2 contains a small building, 3 rail berths with pipelines to transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.
9. Sea-3 has submitted an application ("Application") for the Newington Planning Board's review and approval to reconfigure its property and construct improvements to convert its operation from one that imports foreign LPG for domestic distribution by rail and truck to one that primarily exports domestic LPG received by rail and truck to foreign markets by ship.
10. This change in use requires construction of new facilities on the site to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site for distribution to primarily foreign markets.
11. The improvements proposed by Sea-3 are located on three separate parcels, on Lots 13 and 2 as described above and on land owned by Pan Am that includes the railway and surrounding property that divides Lots 13 and 2. The proposed improvements are as follows:
 1. Lot 13: The installation of new piping to transport LPG to tanks located on Lot 13;
 2. Lot 2: The construction of three 90,000 gallon storage tanks, unloading compressors, pumps, condensers, dryers and heaters along with a machinery building for refrigeration equipment and the relocation of the flare tower; and
 3. Property owned by Pan Am: The construction of five rail unloading berths new rail sidings and new pipes to transport LPG from Lot 2 to the storage tanks on Lot 13.

12. Pan Am is not the Applicant and only after (7) seven public hearings was the site plan revised to list Pan Am as the owner of the property described above.
13. There is no lease between Pan Am and Sea-3 for the use of Pan Am's property described above.

PROCEDURAL HISTORY

14. In August of 2013, Sea-3 submitted preliminary site plans of the project to the Newington Town Planner.
15. By letter dated October 28, 2013, the Town of Greenland requested that the Sea-3 project be deemed a development of regional impact pursuant to RSA 36:54-58.
16. By letter dated October 30, 2013, Sea-3 challenged the determination by the Newington Town Planner that both Lots required variances from Article VI and Article XIII of the Newington Zoning Ordinance because the Lots did not have sufficient frontage on a public right of way and did not comply with minimum set backs.
17. On November 5, 2013, Sea-3 filed an Application for site plan review with the Newington Planning Board.
18. On November 6, 2013, Sea-3 filed an Administrative Appeal of the Town Planner's decision that variances were required and also filed for a variance requests for the frontage and set back issues raised by the Town Planner.
19. On November 25, 2013, the Zoning Board of Adjustment held a public hearing on Sea-3's administrative appeal and variance requests. The Zoning Board of Adjustment denied the administrative appeal but granted Sea-3's request for variances.
20. On December 9, 2014, the Town of Newington deemed the project a "development of regional impact" pursuant to RSA 36:55.
21. A "developments of regional impact" is a project that will impact neighboring communities for various reasons, including but not limited to the project's proximity to another communities border, the project's effect on the transportation network and its effect on anticipated emissions such as light, noise, smoke, odor or particles or proximity to aquifers or surface water that transcends municipal boarders. See RSA 36:55, II-V.
22. Notice was sent to the Rockingham Planning Commission and four affected communities, including the City of Portsmouth, the Town of Greenland, the Town of Statham and the Town of Newfields in order for the Commission and these affected communities to have appropriate notice in order to provide comment on the project to the Planning Board for its consideration. See RSA 36:54-58.

23. Public hearings were held on the Sea-3 project on December 9, 2014, February 10, 2014, March 10, 2014, March 24, 2014, April 14, 2014 and May 5, 2014.

24. The City of Portsmouth actively participated in these public hearings, including but not limited to the attendance, submission of written testimony, submission of letters and public comment by the following: Senator Martha Fuller Clark, Mayor, Robert Lister, Assistant Mayor, Jim Splaine, City Councilors Ester Kennedy, City Councilor Stephany Shaheen, City Councilor Jack Thorsen, City Officials, including City Manager John P. Bohenko, Deputy City Manager Dave Allen, Environmental and Sustainability Director Peter Britz, and numerous concerned citizens from Portsmouth, including but not limited to Rich DiPentima, Catherine DiPentima, Lewis Brown, Joe Calderola, Abdullah Alhamdan, Pat Ford, Beth Moreau, Bob Gibbons, Jean Heino, Richard Langan, John Sutherland, Jane Sutherland, David Rheume, and Lou Salomi. The City Council also voted unanimously not to support the project.

25. The City of Portsmouth, through those participants listed above, initially raised concerns about rail safety because Sea-3's proposal would increase the volume and speed of railcars transporting hazardous materials through its residential neighborhoods and through its downtown. This concern prompted United States Senators Jeanne Shaheen and Kelly Ayotte and Congresswoman Carol Shea-Porter to request the Federal Railroad Administration to inspect the tracks, and later to request a comprehensive safety study of the rails. In addition, the City met with Department of Transportation and officials from Pan Am on the issue of rail safety and created a website with pertinent documents regarding Sea-3's Application.

26. Through the public hearing process the City, through various participants, repeatedly raised its concerns about rail safety and requested that the Planning Board require rail safety reports and hire an expert to assess rail safety. However the Planning Board denied these requests due to its belief that federal preemption, pursuant to the Interstate Commerce Commission Termination Act, prohibited the Planning Board from addressing any site-related or site-specific issues that touched on the rails or "railway operations."

27. However, in addition to rail safety, the City, through those participants mentioned above, repeatedly and vociferously requested that the Planning Board require a comprehensive safety and/or security review of the full scope of Sea-3 proposal, including but not limited to a hazard identification and vulnerability assessment, an environmental risk assessment and an analysis of emergency response for the impacted communities, physical security assessments and incident /hazards response analysis. ("safety/hazard assessment").

28. Site Plan Review Regulations authorize the Planning Board to require "any other exhibits or data that the Planning Board may require in order to adequately evaluate the proposed development for site review." Section 8, (q), Town of Newington Site Plan Review Regulations.

29. The Planning Board uniformly denied all requests from the City for a safety/hazard assessments and granted Sea-3's site plan Application at its May 19, 2014 meeting, conditioning approval on receipt of an updated "safety plan" from its site plan approved in 1996 before a building permit will issue.

31. The City appeals the Planning Board's decision as unlawful and unreasonably for the reasons set forth below, but primarily because the Planning Board's failed and refused to require a safety/hazard assessment after repeated requests from the City before approving Sea-3's site plan.

STANDING

32. A non-abutter has standing to appeal a decision of a Planning Board if the Court finds, after a review of the facts, that the party has sufficient interest in the outcome. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541 (1979).

33. The Weeks Court lists certain factors that must be considered when evaluating whether a non-abutter has standing:

... Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case. The trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.

119 N.H. at 544-45.

34. The Court in Weeks also opined that the list of factors was not exhaustive and that Courts should consider "any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding." Weeks at 544-45.

35. In several recent cases, the Supreme Court has further discussed these factors established by Weeks in evaluating whether a non-abutter has standing to appeal, and has further defined what it means to be "directly affected". Golf Course Investors of New Hampshire v. Town of Jaffrey, 161 N.H. 675 (2011); Hannaford Brothers Co. v. Town of Bedford, 164 N.H. 764 (2013).

36. Participation in administrative hearings before land use boards, although not the only factor, is a major factor the Court will consider in determining whether a non-abutter has a direct, definite interest in the outcome and is a person directly affected. See Golf Course Investments at 684.

37. Standing will not be extended to all persons in the community who feel they are injured by a local administrator's decision (Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006)); or those who only have a generalized interest in the outcome of a decision of land use board (Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 451-52 (1995)); or those who allege a speculative injury (Joyce v. Town of Weare, 156 N.H. 526 (2007)); or to those whose only injury is potential economic loss due to business competition. See also Hannaford at 769.

38. Proximity:

The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. Any significant logistical issues relating to bringing materials into the Sea-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.

39. Type of Change of Use:

The type of change of use requested by Sea-3 is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conduction operations or unreasonably burden interstate commerce, its decision to allow Sea-3's expansion has caused an impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail throughout the City.

40. Immediate Impact:

The impact of Sea-3's expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of fire fighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

41. Participation in administrative hearings:

As previously stated, the City submitted written testimony, letters and provided thoughtful, well researched and pointed public comment during the seven public hearings. There were more citizens, elected officials and staff from the City than any other stakeholder or representatives of any other towns at most of these hearings.

42. Towns are not “isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries.” Britton V. Chester, 133 NH 434, 441 (1991).

43. Newington is not an isolated enclave. It must promote, and at least give meaningful consideration to, the general welfare of the City. Its failure to do so, and its unwillingness to order or provide for a safety/hazard assessment was a decision that clearly does not promote, but hinders – or at least largely and unreasonably ignores- the general welfare of the City. At the same time, Newington will receive a financial benefit from the tax revenue it receives from Sea-3, Newington is imposing a financial burden on the City to improve roads and to provide services of its first responders, all while it denies the City its request for a safety/hazard assessment of the project.

44. The City anticipates that its standing to bring suit will be challenged. This challenge will likely be based on the fact that the City became an abutter when it was given notice by the Town of Newington that the project of was development of regional impact because RSA 36:57 defined abutters “for the limited purpose of notice and providing comment”.

45. However, the Court must look at the statutory scheme as a whole, in that RSA 36 is the enabling legislation for the creation of the Regional Planning Commissions, which are “political subdivision of the state” as established in RSA 36:49-a and have only the authority expressly provided for in the statute, providing that “nothing in this subdivision shall be deemed to reduce or limit any of the powers, duties or obligations of planning boards in individual municipalities.” RSA 36:47.

46. The statutory scheme of RSA 36 was carefully drafted to create and empower these Commissions without granting them the ability to rest control from local land use boards. Thus, the limitation as an abutter for the limited purpose of notice and comment may apply to the Rockingham Regional Planning Commission, but not to the City of Portsmouth, as it has demonstrated above that it is a “person aggrieved” and a “person directly affected”.

47. The City of Portsmouth is a “person aggrieved” and “person directly affected” for the aforementioned reasons and it has a direct define interest in the outcome of the Planning Board’s decision to grant Sea-3’s Application and appeals the decision of the Newington Planning Board because it was unlawful and unreasonable.

PROCEDURAL ERRORS AND IRREGULARITIES

A. FAILURE TO COMPLY WITH REQUIREMENTS OF RSA 36

49. The only mention by the Planning Board regarding a safety/hazard assessment is in one of its conditions of approval dated May 19, 2014. The fifth condition provides as follows:

5. Several safety plans were adopted in conjunction with the original Sea-3 site plan approval. They shall be reviewed by Sea-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.”

50. The City, as an abutter, through its Mayor, Assistant Mayor, City Manager, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Department require a safety study/hazard assessment of the site and of this particular expansion and use intensification prior to approval of the site plan.

51. The Planning Board's condition of approval requires that Sea -3 update “safety plans” and submitted to “public officials (including the Newington Fire Chief) for its review and approval prior to the issuance of a building permit.”

52. The requirement that this safety plan be submitted directly to “public officials”, after site plan approval and outside the scope of any public hearing process violates the intent and purpose of (the site plan regulations themselves and) RSA 36, which requires Newington land use boards to give prompt, advance and effective notice to affected communities that the pending development proposal will have “regional impact,” in order to facilitate comment on the project before it is approved by the Newington Planning Board.

53. Review of updated “safety plans” – outside the public hearing process and the scrutiny of residents of the Town and abutters from other affected municipalities – denies the affected communities a meaningful opportunity to review, understand and comment on how these “updated safety plans” affect their communities. The Planning Board's post-approval “update” condition denies the City and others the opportunity to comment on these “safety plans,” in violation of RSA 36 and constitutes a procedural error. As such, the Planning Board's decision to approve the Application should be overturned.

54. Nothing in the record indicates that the current Planning Board or any of its members reviewed these original “safety plans” referenced in condition five. Sea-3's last site plan was in 1996 when they expanded their facilities. The Planning Board does not have the same members it did almost 20 years ago. And even if they did, federal

regulations regarding the transportation, handling and storage of LPG has changed as well as surrounding populations, abutters and transportation routes which would render the original safety plans outdated. It is also unclear from the condition what "plans" the Planning Board is referring to as, on information and belief, there are six different "plans" or reports in the 1996 site review file.

55. The Planning Board's approval of the site will increase truck and rail traffic throughout more than just the four affected communities that received notice. The scope of this project's impact was too narrowly defined and as such, other affected communities did not receive adequate notice in violation of RSA 36, and as such, the Planning Board's decision to approve the site plan was unlawful and unreasonable and should be overturned.

56. In addition to the Planning Board's violates the intent and purpose of RSA 36, the Planning Board's approval of a site plan without first reviewing a site/hazard assessment is in violation of Newington's Site Plan Regulations.

B. DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

57. The City was prejudiced and other abutters were prejudiced in the Planning Board's delay in declaring this a "development of regional impact."

58. A request that this project be deemed a "development of regional impact" was received by the Town on October 28, 2013 but the Town delayed until December 9, 2013 to declare the project a "development of regional impact"

59. RSA 36:56 provides that a "local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. **Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.**" Emphasis added.

60. The appeal and request for variances were filed on November 6, 2013 and noticed for Zoning Board of Adjustment hearing on November 25, 2013, at which time the appeal was denied and the request for variances was granted.

61. Abutters were not given notice of the hearing and were denied the ability to comment on the project.

62. Failure of the Town to give abutters notice of application for variance, after request received almost one month prior, was procedural error and as such, unreasonable and unlawful.

C. FAILURE TO ABIDE BY SITE PLAN REVIEW REGULATIONS

1. Public Health, Safety and Welfare

63. Planning Boards must abide by and properly apply their own site plan regulations. The Newington Site Plan Regulations explicitly require compliance “in all respects [with] any and all pertinent ordinances and regulations.” Town of Newington Site Plan Regulations, Section 2. The Site Plan Regulations expressly indicate that the purpose of site plan review “is to protect the public health, safety and welfare; ...[and] to avoid development which may result in negative environmental impacts.” Town of Newington Site Plan Regulations, Section 2. In fact, Section 19 of the Site Plan Regulations provides the Board with the ability to require the applicant to reimburse it and the Town for “administrative expenses and costs of special investigation and other matters,” including review by consulting engineers or other consultants to assess the environmental impact, hydrological impact ground water quality impact, traffic impact, or any other study deemed necessary by the Planning Board in order to make an informed decision. Town of Newington Site Plan Regulations, Section 19. As previously stated, the City, through its citizens, Mayor, Assistant Mayor and City Councilors, City Manager, City Staff and numerous citizens repeatedly requested that the Planning Board require and review safety study/hazard assessment. The Planning Board repeatedly denied all requests by the City (and individual citizens of the City of Portsmouth) to perform a meaningful and professional assessment of the safety and health consequences of the proposed expansion and intensification of the use of the property.

64. The Planning Board’s refusal to conduct, or direct the applicant to conduct or pay for a proper, meaningful, professional and up to date safety, health, welfare and environmental assessment of the potential impacts of the proposed expansion and intensification of the use of the property was unreasonable and unlawful. The Planning Board’s failure to require a proper safety, health, welfare and environmental impact assessment was a gross and unreasonable abuse of its discretion. Under the circumstances, the Planning Board was required to evaluate the site, and given the nature of the use of land requested, the increased distribution, storing and chilling of LPG, a hazardous material, it should have required and reviewed a safety plan/ hazard assessment before approving the site plan.

65. Specifically, the Town of Newington Site Plan Review Regulations provides:

Sites for non-residential development shall be reviewed so as to minimize traffic congestion, traffic hazards, unsightliness, annoyance to other nearby land uses, erosion and other effects detrimental to the abutter, the neighborhood, the environment of the Town. In order to attain these goals, the Planning Board shall determine that:

- e) loading
- h) light, glare, odor, noise
- i) street (access)

l) The public health, safety and welfare will be otherwise protected

66. The Planning Board could not determine that the public's health, safety and welfare would be protected if it never reviewed a safety study/hazard assessment before granting site plan approval. Any "update" to "safety reports" received after approval of the site plan could not support the Planning Board's finding prior to their receipt that the project would promote the health, welfare and safety of the public without first reviewing any such assessment.

67. In addition to the City, a safety/hazard assessment was recommended by the Newington Town Planner, who acknowledged abutters concerns on safety and recommended the name of firm to Planning Board. This recommendation was ignored.

68. The only safety/hazard report reviewed by the Planning Board was a "Study of the Safety Impacts of Ethanol Transportation by Rail through Boston, Cambridge, Chelsea, Everett, Somerville, & Revere" dated March 29, 2013, which was brought to the Board's attention by a private citizen in order to demonstrate that safety and health assessments were understood to be appropriate in these sorts of circumstances. The Planning Board ignored the study and the purpose for which it was offered, finding "the circumstances of this study are not related to this application". Minutes of Town of Newington, NH, Planning Board, May 19, 2014.

69. In addition to its authority under Section 19 of the Site Plan Regulations, the Planning Board had the power to require additional exhibits or data to assist in adequately evaluating the proposed development for site review. Town of Newington Site Plan Regulations, Section 8(q). The Board's failure to seek further data, and to require a professional assessment of this proposal was unlawful and unreasonable, and its decision should be overturned, and the matter remanded to the Planning Board with directions to conduct the study and seek relevant current data on the project with public comment.

70. "Municipalities do not exist solely to serve their own residents and thus their regulations should promote the general welfare, both inside and outside their boundaries." Britton, 134 N.H. at 441.

71. The failure to address safety, hazards and environmental concerns and concluding the project promoted the health safety and welfare of the public was unlawful and unreasonable. The decision of the Planning Board should be overturned, and the matter should be remanded back to the Planning Board with instructions from the Court to conduct or cause the Applicant to conduct a proper, professional and current assessment of the impacts of the proposed development, in accordance with the Newington Site Plan Regulations.

2. Loading, Street Access, Traffic

72. The Planning Board approved the site plan without receiving a traffic study. The Planning Board received a memorandum, not a traffic impact study, from the Applicant

that was reviewed by the Town's own expert, Dirk J. Grotenhuis, PE, LEED, AP. In a peer review memorandum dated April 10, 2014, the Planning Board's own expert concluded that Sea-3's memorandum was incomplete and affirmed this opinion during his comments at the April 14, 2014 Planning Board Meeting. See Minutes of Town of Newington, NH Planning Board, April 14, 2014. The Planning Board's finding in paragraph 24, inaccurately summarized Mr. Grotenhuis' opinion on the incompleteness of the memorandum and failed to address his concerns about the lack of information provided in the traffic memorandum submitted by the Sea-3.

73. A representative of Sea-3 at the public hearings represented that there would be no change in the number of trucks because it would only process 10 trucks per hour. The Town's own retained expert, however, drafted a memorandum to the Newington Town Planner, raising 11 unanswered questions and issues that were Mr. Grotenhuis indicated had not been adequately addressed by Sea-3, including, but not limited to: (i) the inability to assess effects on the adjacent highway because there was no information on peak hour trips; (ii) the potential for queuing or congestion at the entrance or adjacent intersections and queuing on site; (iii) the fact that there was no information regarding the difference between off loading from ships versus rails and that no data was provided relating to public highway safety records (vehicle crashes) or the occurrence and location of vehicle crashes on nearby roads and intersections. The Board's failure to address these questions and shortcomings, or require the applicant to address them, was unreasonable and unlawful.

74. The proposed expansion would transform the facility from a seasonal facility to a year round operation, impacting traffic during the summer months and there was no analysis provided by Sea-3 regarding how this change in use would affect traffic.

75. Planning board decisions must be based on more than mere opinions. Smith v. Town of Wolfeboro, 136 N.H. 337, 344 (1992).

76. While a municipal body "is entitled to rely, in part, upon its own judgment and experience when reviewing applications for various land uses, its decision... must be based upon more than the mere personal opinion of its members." Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003).

77. The Planning Board may not base its decision solely on its opinion, ignoring its own expert recommendations, relevant questions, and concerns. Failing to address their own expert's concerns regarding incomplete information regarding the potential impact of the project on traffic was unreasonable and unlawful. On this basis, the decision of the Planning Board should be overturned and the matter should be remanded back to the Planning Board with instructions from the Court to address the traffic issues raised by Mr. Grotenhuis, as required by the Site Plan Regulations.

3. **Failure to Address the Issue of Odor of Hazardous Materials/Substances**

78. Federal safety regulations differ when transporting, handling and storing nonodorized rather than odorized LPG. LPG is odorized in order for a leak to be detected. Unodorized LPG is impossible to detect without special sensors.

79. In discussing the issue of odorant in LPG, the Town of Newington's own expert engineer recommended that a condition of approval be that LPG was odorized.

80. The Planning Board ignored its own expert's recommendation and made no such condition of approval.

81. The Planning Board has authority to impose conditions reasonably related to the purpose set forth in the site regulations to promote safe and attractive development, even if those conditions not specifically mentioned in ordinance. Summa Humma Enterprises, LLC d/b/a MB Tractor v. Town of Tilton. 151 N.H. 75, 78-79 (2004).

82. No discussion of federal regulations regarding requirements of odorizing LPG was presented by Sea-3 to the Planning Board. Sea-3 indicated that it would be an odorless facility, thereby making LPG gas undetectable if it leaked. Failure of the Planning Board to inquire regarding federal regulations on required odorization of LPG was unreasonable and unlawful.

83. There was an assessment of the site performed by SFC Engineering Partners, Inc. for the benefit of the Town. In both its January, 2014 and April, 2014 report it required "details of any non-odorized LPG to be stored at the site" before a permit could be issued. These report indicate that the Planning Board's own expert and the Planning Board did not have adequate information regarding whether LPG would be unodorized at the site, and that information is critical to determine and assess the safety of the site and its impact on the public's health, welfare and safety and the Planning Board's approval of the site plan without adequate information regarding whether LPG would be odorized or non-odorized was unlawful and unreasonable and as such, the Planning Board's decision should be overturned.

84. No information regarding the properties of LPG gas was provided to the City after several requests, other than a reply from Planning Board members that "it evaporates". There was evidence submitted to the Planning Board that LPG is not lighter than air and goes to ground when it leaks, presenting a completely different risk to the public health and safety. Failure of the Planning Board to ascertain the properties of LPG and its potential risk to the public's health and safety prior to granting site plan approval was unlawful and unreasonable.

85. Condition 4 states that final design plans shall meet the requirements of the NH Fire Code and NFPA Code. Perhaps in other types of site review final plans are not required before a site plan is approved but when the Planning Board is charged with evaluating the project of this nature with inherent risk to public's health, safety and welfare, approving the site plan without critical information necessary to determine compliance with state and federal fire codes as required by the Newington Zoning

Ordinance, Article V, Section 6, D (3) a-c, was unlawful and unreasonable and the Planning Board's decision should be overturned.

4. **The Failure to Address Issues Relating to Light, Noise, Air and Water Quality**

86. The Planning Board did not evaluate whether the site would have an effect on air quality due to idling trucks and increase rail traffic. Sea-3 will operate 24 hours a day, 365 days a year, 7 days a week. Truck traffic will queue, start and stop, idle, increase rail traffic will increase and no evaluation regarding the cumulative impact from fumes from diesel engines, increase ship stack emissions, any emissions from flares was reviewed by the Planning Board's. The Planning Board's lack of review of impact on air quality was in violation of its site review regulations and was unlawful and unreasonable, and therefore the decision of the Planning Board should be overturned.

87. In addition to the impact on air quality, there was no information presented or any assessment of the noise due to idling trucks and increase rail traffic and noise from idling railcars, noise from flare on tanks, noise from ships or any noise from emergency generators. The Planning Board is required to assess noise in evaluating a site plan and its failure to do so was unreasonable and unlawful and therefore its decision should be overturned.

88. Because no information on peak hours of trucks was given and no assessment on the impact on light and glare was assessed in contravention of the site plan review regulations. Also, SFC Engineering Partners, Inc. never reviewed a site lighting plan. Approving a site plan without assessing the sites lighting plan and its impact is in violation of site plan review regulations and as such, the decision of the Planning Board was unlawful and unreasonable and should be overturned.

89. If public water is being used, and there is a catastrophic event at the site, no analysis was done regarding the adequacy of the water supply and how it would affect abutting communities. Failing to assess the site's impact on the water supply was unlawful and unreasonable and the decision of the Planning Board should be overturned.

5. **The Applicant's Failure to Demonstrate Its Right, Title and Interest in and to the Subject Property**

90. Throughout the review of the Application at seven (7) public hearings, the Applicant maintained that Pan Am was not an applicant, perhaps as part of a plan to ensure that Pan Am did not itself submit to local land use authority and retain the full leverage of its constant assertion of "federal preemption" of all such local regulation. Late in the hearing process, however, it was finally revealed that a portion of the proposed improvements to the site are located on land owned by Pan Am, not on land owned by the Applicant. The Applicant represented that it would have a lease with Pan Am in the future for the use of its land, but never represented that it had a lease for the

use of the property at the time of the Application and at the time of the decision of the Planning Board. Pan Am represented that the lease was being negotiated.

91. Newington Site Plan Review Regulations provide that Applications must be properly complete; site plans must show entire property and all facilities and name and address of owners of record. See Newington Site Plan Review Regulations, Section 7(a), (b) and (d).

92. Paragraph 19 of the Planning Board's findings indicate that the Applicant would add a second means of emergency access to the site over the property of Pan Am Railways. However, the Applicant may not add any additional access to the site over property it does not own, have an easement or have a lease.

93. Because the Applicant did not have right, title and interest to part of the land upon which site improvements and a second means of emergency access are to be located, the decision of the Planning Board to grant the Application was unlawful and unreasonable and should be overturned.

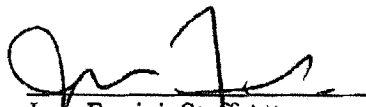
WHEREFORE, the City respectfully prays that this Court grant it the following relief:

A. That the decision of the Planning Board be overturned and the Application should be denied; or

B. In the alternative, that the Court remand this matter back to the Planning Board to comply with site plan review regulations which include, but are not limited to requiring a traffic study and a safety/hazard assessment be performed and reviewed by the Planning Board and by abutting communities after proper notice pursuant to RSA 36 for further public hearings on the Application; and

C. For such other and further relief as the Court may deem appropriate.

The City of Portsmouth
By and through its Attorney

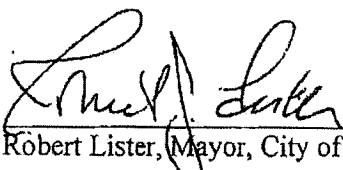


Jare Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

VERIFICATION

I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

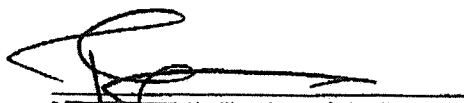
Dated: June 16, 2014



Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.



Notary Public/Justice of the Peace
Commission Expires 9/18/13

Exhibit I



CITY OF PORTSMOUTH

RECEIVED JUN 17 2014

LEGAL DEPARTMENT

Robert P. Sullivan, City Attorney – 603-610-7204 (Direct Dial)
Kathleen M. Dwyer, Assistant City Attorney – 603-427-1338 (Phone/Fax)
Suzanne M. Woodland, Assistant City Attorney – 603-610-7240 (Direct Dial)

Municipal Complex
1 Junkins Avenue
Portsmouth, NH 03801
(603) 431-2000
(603) 427-1577 (FAX)

June 17, 2014

HAND DELIVERED

Matt Morton, Chairman
Zoning Board of Adjustment
Town of Newington
205 Nimble Hill Road
Newington, NH 03801

**RE: City of Portsmouth v. Town of Newington Planning Board
Appeal of the Planning Board's decision to approve the
site plan of Sea-3 Inc. pursuant to RSA 675:5, III and
RSA 677:15, I-a (a)**

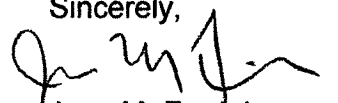
Dear Chairman Morton:

Enclosed please find an original and two copies of The City of Portsmouth's Appeal of the Decision of the Newington Planning Board to the Zoning Board of Adjustment pursuant to RSA 676:5,III and RSA 677:15, I-a (a). Copies of this document have been provided to both the Town Planner Tom Morgan and Town Administrator Martha Roy.

Please advise of the hearing date.

Thank you for your consideration.

Sincerely,



Jane M. Ferrini
Staff Attorney

enclosure

cc: John P. Bohenko, City Manager
Robert P. Sullivan, City Attorney
Tom Morgan, Town Planner (hand delivered)
Martha Roy, Town Administrator (hand delivered)
John Ratigan, Esq. (hand delivered - Attorney for Town of Newington)
Alec McEachern, Esq. (hand delivered - Attorney for Sea-3 Inc.)

h:\rps\litigation\sea 3\letters\ltr to zba

SEA-3, Inc. 000070

Town of Newington, New Hampshire
Application Form
 Zoning Board of Adjustment

<p style="text-align: center;"><i>Appellant</i></p> <p>Property Owner Name <u>City of Portsmouth</u> Address <u>1 Junkin Ave</u> <u>Portsmouth NH 03801</u> Telephone <u>603 610 7256</u> Fax <u>603 427 1577</u> Email <u>j.ferrini@cityofportsmouth.com</u></p>	<p>Applicant's Agent Name _____ Address _____ Telephone _____ Fax _____ Email _____</p>
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<p>Location of Property Address <u>Shattuck Way</u> Tax Map <u>20 Lot 13</u> Taxmap <u>20 Lot 2</u></p>	<p>Fee \$50</p>
---	---

Applicant's Request(s)
 (Check applicable requests)

- Variance from Article ____ in order to _____
- Special Exception to allow _____
- ~~Administrative~~ Appeal from the decision of Newington Planning Board
 on 5/19/14 (date) regarding site plan approval for Sea-3 Inc.
See attached.
- Equitable Waiver of Dimensional Requirements
- Rehearing

Property Owner's Consent

I have read Newington's land use regulations and will comply with all the requirements therein.

Jane M. Ferrini

 Signature(s) of all property owners & date signed
Jane M. Ferrini,
Staff Attorney
City of Portsmouth

STATE OF NEW HAMPSHIRE

THE CITY OF PORTSMOUTH'S APPEAL OF THE DECISION OF THE
NEWINGTON PLANNING BOARD TO APPROVE THE SITE PLAN OF SEA-3 INC.
PURSUANT TO RSA 676:5, III AND RSA 677:15, I-a (a)

PARTIES

1. The Petitioner is the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801.
2. The Newington Planning Board is a local land use board established by the Town of Newington pursuant to RSA 673.
3. The Town of Newington's Zoning Ordinance requires that the Planning Board review site plans under its Site Plan Review Regulations. No site plan will be approved until it complies in all respects to any and all pertinent zoning ordinances. (RSA 674.43, RSA 674.44, Town of Newington Site Plan Review Regulations, Section 1 and 2).
4. This City appeals the decision of the Planning Board pursuant to 676:5, III and 677:15, I-a (a) because it misapplied and misinterpreted the Newington Zoning Ordinance.

BACKGROUND

5. Sea-3 Inc. ("Sea-3") owns two parcels of property located off Shattuck Way in Newington, New Hampshire. These two lots are divided and separated by the rail way owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways ("Pan Am").
6. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas ("LPG") by ship to distribute domestically by rail and truck.
7. The first parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 13 ("Lot 13"). This parcel is 7.02 acres located within both the General Industrial District ("I") and the Waterfront Industrial and Commercial District ("W"). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.
8. The second parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 2 ("Lot 2"). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District ("W"). Lot 2 contains a small building, three (3) rail berths with

pipelines to transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.

9. Sea-3 has submitted an application (“Application”) for the Newington Planning Board’s review and approval to reconfigure its property and construct improvements to convert its operation from one that imports foreign LPG for domestic distribution by rail and truck to one that primarily exports domestic LPG received by rail and truck to foreign markets by ship.

10. This change in use requires construction of new facilities on the site to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site for distribution to primarily foreign markets.

11. The improvements proposed by Sea-3 are located on three separate parcels, on Lots 13 and 2 as described above and on land owned by the owner of the rail lines, Pan Am, which includes the railway and surrounding property that divides Lots 13 and 2. The proposed improvements are as follows:

1. Lot 13: The installation of new piping to transport LPG to tanks located on Lot 13;
2. Lot 2: The construction of three 90,000 gallon storage tanks, unloading compressors, pumps, condensers, dryers and heaters along with a machinery building for refrigeration equipment and the relocation of the flare tower; and
3. Property owned by Pan Am: The construction of five rail unloading berths new rail sidings and new pipes to transport LPG from Lot 2 to the storage tanks on Lot 13.

12. Pan Am is not the Applicant and only after seven (7) public hearings was the site plan Application presented to the Planning Board revised to list Pan Am as the owner of the property described above.

13. There is no lease between Pan Am and Sea-3 for the use of Pan Am’s property described above.

PROCEDURAL HISTORY

14. In August of 2013, Sea-3 submitted preliminary site plans of the project to the Newington Town Planner.

15. By letter dated October 28, 2013, the Town of Greenland requested that the Sea-3 project be deemed a “development of regional impact” pursuant to RSA 36:54-58.

16. By letter dated October 30, 2013, Sea-3 challenged the determination by the Newington Town Planner that both Lots required variances from Article VI and Article

XIII of the Newington Zoning Ordinance because the Lots did not have sufficient frontage on a public right of way and did not comply with minimum set backs.

17. On November 5, 2013, Sea-3 filed an Application for site plan review with the Newington Planning Board.

18. On November 6, 2013, Sea-3 filed an Administrative Appeal of the Town Planner's decision that variances were required and also filed for variance requests for the frontage and set back issues raised by the Newington Town Planner.

19. On November 25, 2013, the Zoning Board of Adjustment held a public hearing on Sea-3's administrative appeal and variance requests. The Zoning Board of Adjustment denied the administrative appeal but granted Sea-3's request for variances.

20. On December 9, 2014, the Town of Newington Planning Board deemed the project a "development of regional impact" pursuant to RSA 36:55.

21. A "development of regional impact" is a project that will impact neighboring communities for various reasons, including but not limited to the project's proximity to another community's border, the project's effect on the transportation network and its effect on anticipated emissions such as light, noise, smoke, odor or particles or proximity to aquifers or surface water that transcends municipal borders. See RSA 36:55, II-V.

22. Notice was sent to the Rockingham Planning Commission and four affected communities, including the City of Portsmouth, the Town of Greenland, the Town of Stratham and the Town of Newfields, in order for the Commission and these affected communities to have appropriate notice in order to provide comment on the project to the Planning Board for its consideration. See RSA 36:54-58.

23. Public hearings were held on the Sea-3 project on December 9, 2014, February 10, 2014, March 10, 2014, March 24, 2014, April 14, 2014 and May 5, 2014.

24. The City of Portsmouth actively participated in these public hearings, including but not limited to the attendance, submission of written testimony, submission of letters and public comment by the following: Senator Martha Fuller Clark, Mayor Robert Lister, Assistant Mayor Jim Splaine, City Councilors Ester Kennedy, City Councilor Stephany Shaheen, City Councilor Jack Thorsen, City Officials, including City Manager John P. Bohenko, Deputy City Manager Dave Allen, Environmental and Sustainability Director Peter Britz, and numerous concerned citizens from Portsmouth, including but not limited to Rich DiPentima, Catherine DiPentima, Lewis Brown, Joe Calderola, Abdullah Alhamdan, Pat Ford, Beth Moreau, Bob Gibbons, Jean Heino, Richard Langan, John Sutherland, Jane Sutherland, David Rheame, and Lou Salomi. The Portsmouth City Council also voted unanimously not to support the project.

25. The City of Portsmouth, through those participants listed above, initially raised concerns about rail safety because Sea-3's proposal would increase the volume and speed

of railcars transporting hazardous materials through its residential neighborhoods and through its downtown. This concern prompted United States Senators Jeanne Shaheen and Kelly Ayotte and Congresswoman Carol Shea-Porter to request the Federal Railroad Administration to inspect the tracks, and later to request a comprehensive safety study of the rails. In addition, the City met with Department of Transportation and officials from Pan Am on the issue of rail safety and created a website with pertinent documents regarding Sea-3's Application.

26. Through the public hearing process the City, through various participants, repeatedly raised its concerns about rail safety and requested that the Planning Board require rail safety reports and hire an expert to assess rail safety. However the Planning Board denied these requests due to its belief that federal preemption, pursuant to the Interstate Commerce Commission Termination Act, prohibited the Planning Board from addressing any site-related or site-specific issues that touched on the rails or "railway operations."

27. However, in addition to rail safety, the City, through those participants mentioned above, repeatedly and vociferously requested that the Planning Board require a comprehensive safety and/or security review of the full scope of Sea-3 proposal, including but not limited to a hazard identification and vulnerability assessment, an environmental risk assessment and an analysis of emergency response for the impacted communities, physical security assessments and incident /hazards response analysis. ("safety/hazard assessment").

28. Site Plan Review Regulations authorize the Planning Board to require "any other exhibits or data that the Planning Board may require in order to adequately evaluate the proposed development for site review." Section 8, (q), Town of Newington Site Plan Review Regulations.

29. The Planning Board uniformly denied all requests from the City for a safety/hazard assessment and granted Sea-3's site plan Application at its May 19, 2014 meeting, conditioning approval on receipt of an updated "safety plans" from Sea-3's prior site plan approval in 1996 before a building permit will issue.

30. The City has also appealed the Planning Board's decision to the Superior Court pursuant to RSA 677:15, I and RSA 677:15, I-a (a).for its failure to properly apply its site review regulations.

31. The City appeals the Planning Board's decision as unlawful and unreasonably because it misapplies and misinterprets the Town of Newington Zoning Ordinance as more fully set forth below.

STANDING

32. A non-abutter has standing to appeal a decision of a Planning Board if the Court finds, after a review of the facts, that the party has sufficient interest in the outcome. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541 (1979).

33. The Weeks Court lists certain factors that must be considered when evaluating whether a non-abutter has standing:

... Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case. The trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.

119 N.H. at 544-45.

34. The Court in Weeks also opined that the list of factors was not exhaustive and that Courts should consider "any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding." Weeks at 544-45.

35. In several recent cases, the Supreme Court has further discussed these factors established by Weeks in evaluating whether a non-abutter has standing to appeal, and has further defined what it means to be "directly affected". Golf Course Investors of New Hampshire v. Town of Jaffrey, 161 N.H. 675 (2011); Hannaford Brothers Co. v. Town of Bedford, 164 N.H. 764 (2013).

36. Participation in administrative hearings before land use boards, although not the only factor, is a major factor the Court will consider in determining whether a so-called non-abutter has a direct, definite interest in the outcome and is a person directly affected. See Golf Course Investments at 684.

37. Standing will not be extended to all persons in the community who feel they are injured by a local administrator's decision (Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006)); or those who only have a generalized interest in the outcome of a decision of land use board (Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 451-52 (1995)); or those who allege a speculative injury (Joyce v. Town of Weare, 156 N.H. 526 (2007)); or to those whose only injury is potential economic loss due to business competition. See also Hannaford at 769.

38. Proximity: The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and

Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. Any significant logistical issue relating to bringing materials into the Sea-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.

39. Type of Change of Use: The type of change of use requested by Sea-3 is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conducting operations or unreasonably burden interstate commerce, its decision to allow Sea-3's expansion will cause a material and substantial impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail throughout the City.

40. Immediate Impact: The impact of Sea-3's expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by the City and its taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of fire fighters and equipment, in the event of an incident at the site. The City taxpayers will pay for this burden but will not receive any of the tax benefit Newington receives from Sea-3. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a potentially substantial diminution in value of certain property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

41. Participation in administrative hearings: As previously stated, the City submitted written testimony, letters and provided thoughtful, well researched and pointed public comment during the seven public hearings. There were more citizens, elected officials and staff from the City than any other stakeholder or representatives of any other towns at most of these hearings.

42. Towns are not "isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries." Britton V. Chester, 133 NH 434, 441 (1991). This is particularly true where, as in this matter, the municipalities are closely connected by economic and resource concerns, and where the municipalities effectively share infrastructure and logistics.

43. Newington is not an isolated enclave. It must promote, and at least give meaningful consideration to, the general welfare of the City. Its failure to do so, and its unwillingness to order or provide for a safety/hazard assessment was a decision that clearly does not promote, but hinders – or at least largely and unreasonably ignores – the general welfare of the City. At the same time, Newington will receive a financial benefit from the tax revenue it receives from Sea-3, Newington is imposing a financial burden on the City to improve roads and to provide services of its first responders, all while it denies the City its request for a safety/hazard assessment of the project.

44. The City anticipates that its standing to bring suit will be challenged. This challenge will likely be based on the fact that the City became an abutter when it was given notice by the Town of Newington that the project of was development of regional impact because RSA 36:57 defined abutters “for the limited purpose of notice and providing comment”.

45. However, the Court must look at the statutory scheme as a whole, in that RSA 36 is the enabling legislation for the creation of the Regional Planning Commissions, which are “political subdivision of the state” as established in RSA 36:49-a and have only the authority expressly provided for in the statute, providing that “nothing in this subdivision shall be deemed to reduce or limit any of the powers, duties or obligations of planning boards in individual municipalities.” RSA 36:47.

46. The statutory scheme of RSA 36 was carefully drafted to create and empower these Commissions without granting them the ability to rest control from local land use boards. Thus, the limitation as an abutter for the limited purpose of notice and comment may apply to the Rockingham Regional Planning Commission, but not to the City of Portsmouth, as it has demonstrated above that it is a “person aggrieved” and a “person directly affected”.

47. The City of Portsmouth is a “person aggrieved” and “person directly affected” for the aforementioned reasons and it has a direct define interest in the outcome of the Planning Board’s decision to grant Sea-3’s Application and appeals the decision of the Newington Planning Board because it misapplied and misinterpreted its Zoning Ordinance.

THE PLANNING BOARD MISINTERPRETED AND MISAPPLIED THE NEWINGTON ZONING ORDINANCE

ZONING DISTRICT

48. No site plan will be approved until it complies in all respects to any and all pertinent ordinances and regulations. Town of Newington Site Plan Regulations, Section 2.

49. Article III, Section 1 of the Newington Zoning Ordinance divides the Town of Newington into different districts or zones and provides that “the boundaries of these districts are hereby established as shown on the Official Zoning Map. Said map is hereby made a part of this ordinance.”
50. Article III, Section 3 provides that “unless otherwise indicated, the district boundary lines are the nearest lot lines, the center lines of the streets or such lines extended, pier head or bulk head lines, or the town boundary lines.”
51. Zones districts must be described with certainty. Nottingham v. Harvey, 120 NH 889 (1980).
52. The fixing of zoning lines is a matter of legislative discretion and necessarily results in classifications of uses on either side of the line. Windham v. Alford, 129 NH 24, 31 (1986).
53. Each district has separately delineated “Description and Purpose”, uses permitted and uses prohibited and no district incorporates by reference the description and purpose, uses permitted and prohibited from any other district.
54. Article IV, Section 1 of the Town of Newington Zoning Ordinance, provides that “no structure shall be erected, constructed, reconstructed, moved or altered unless in conformity with all regulations herein specified for the district in which it is located. The omission of a use from the list of those allowed in a particular district constitutes prohibition of that use in that district.”
55. Lot 13 is in both the “I” and “W” district and Lot 2 is in the “W” district. The Town of Newington Zoning Map clearly bisects Lot 13 with one half of the lot closer to the railroad being in the “W” district and the other half located in the “I” district. The lot line passes through the smaller of the two LPG storage tanks on the lot.
56. Storage above or below the ground of any explosive or hazardous fluid (including waste), toxic or noxious matter, or material causing odor, dust, fire hazard, smoke, gas or fumes is a use prohibited in the General Industrial “I” Zone. Town of Newington Zoning Regulation, Article V, Section 5, C (3).
57. Storage and handling of above or below the ground of any material which is explosive, toxic, noxious, or capable of causing odor, dust, fire hazard, smoke, gas, or fumes shall be a permissible use in the Waterfront Commercial District when the use complies with the shipping, handling and storage requirements and regulations of the National Fire Protection Association Standards (NFPA), Department of Transportation (DOT) and Environmental Protection Agency (EPA). Town of Newington Zoning Regulations, Article V, Section 6, D (3) a-c.
58. LPG is explosive and a fire hazard. The storage tank partially located in the “I” zone is, therefore, not a permitted use under the current zoning ordinance, therefore, on

information and belief, this tank is either currently unlawful or was a pre-existing non-conforming use and no variance has been granted to allow this nonconforming use in the "I" District.

59. The Applicant did not request a variance for the tank in its present Application. Article XIII, Section 1 of the Zoning Ordinance expressly provides that "non-conforming uses and non-conforming structures shall not be enlarged, expanded or extended." Absent a variance or proof that the site proposal does not "enlarge, expand or extend" the existing non-conformity, the Applicant's operations currently run afoul of the Zoning Ordinance and the proposal simply exacerbates a non-conforming use, in violation of New Hampshire law.

60. Paragraph 50 of the Minutes of May 19, 2013, sets forth Findings whereby "[t]he Board expressly finds that this proposed expansion of a long-standing use that is permitted in the Industrial Zone is consistent with the aim of Newington Zoning Ordinance Article V, Section 5, A, which anticipates that land zoned Industrial will be able to accommodate "expansion of existing industry.. and to enhance economic development and employment opportunities."

61. However, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because storage and handling a gas that is explosive material and is a fire hazard and is not a permitted use in the General Industrial Zone, of which Lot 13 is a part.

62. Paragraph 51 of the Findings set forth in the Planning Board's minutes of May 19, 2014 states that "[t]he Board expressly finds, as is required by Newington Zoning Ordinance Article V, Section 5, B that per the terms of this site plan application, "the proposed location, construction and operation will not injure present or prospective industrial development in the district, or the health and welfare of residential districts in the vicinity". The Board expressly finds that this application is precisely the type of business development and land use that the Industrial District is intended to protect and promote."

63. Again, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because storage and handling of LPG, an explosive material that is a fire hazard, is a prohibited use in the General Industrial Zone.

64. Paragraph 52 of the Findings set forth in the Planning Board's minutes of May 19, 2014 states that "[t]he Board expressly finds and recognizes that, in the aftermath of the recent economic recession, the importance of supporting business in the Industrial District, and promoting economic development and local employment, cannot be understated as an important purpose of this Industrial District."

65. Yet again, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because the storage and handling of explosive material and material that is a fire hazard is a prohibited use in the General Industrial District.

66. The Planning Board's approval of the site plan was based on its reliance on a provision of the Zoning Ordinance that prohibits the proposed use at the site and as such, the Planning Board's decision was illegal and unreasonable and should be reversed.

67. Because the tank is a non-conforming and not a permitted use, at a minimum, the Applicant's request, involving the site's expansion to increase the delivery, storage and distribution of LPG, is an impermissible expansion of a non-conforming use. Because no variance was granted, the Planning Board misapplied the Zoning Ordinance, and as such, its decision to approve the site plan should be overturned.

PUBLIC HEALTH SAFETY AND WELFARE

68. Article 1 of the Town of Newington's Zoning Ordinance provides that the purpose of the zoning ordinance is to "promote the health, safety, morals, convenience and general welfare of the community" and Article 3 provides that the purpose of the ordinance is for "promoting the health, safety, morals, prosperity, convenience or general welfare."

69. The Planning Board misapplied and misinterpreted Article 1 and Article 3 of the Zoning Ordinance because it did not require and review a safety/hazard assessment prior to granting site plan approval.

70. The only mention by the Planning Board regarding a safety/hazard plan is in one of its conditions of approval dated May 19, 2014. The fifth condition provides as follows:

5. Several safety plans were adopted in conjunction with the original Sea-3 site plan approval. They shall be reviewed by Sea-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.

71. The City, through its Mayor, Assistant Mayor, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Board require a safety study/hazard assessment of the site prior to approval of the site plan.

72. The Planning Board's condition of approval requires that Sea -3 update "safety plans" submitted to "public officials (including the Newington Fire Chief) for its review and approval prior to the issuance of a building permit."

73. The requirement that this safety plan be submitted directly to "public officials", after site plan approval and outside the scope of any public hearing process violates the intent and purpose of RSA 36 that requires Newington to give prompt and effective notice to affected communities of "development of regional impact" in order to facilitate comment on the project.

74. Review of updated “safety plans” -outside public hearing process and the scrutiny of residents of the Town and abutters from other affected municipalities- denies the affected communities the opportunity to review, understand and comment on how these “updated safety plans” affect their communities. The Planning Board’s post-approval “update” condition denies the City and other the opportunity to comment on these “safety plans’ in violation of RSA 36 and constitutes a procedural error and also violates the Zoning Ordinance because approving a site plan without a safety/hazard assessment does not promote the health, safety and general welfare of the community, which in this case, includes the City, and as such, the Planning Board’s decision to approve the Application should be overturned.

75. Nothing in the record in the current proceeding indicates that the Planning Board or any of its members reviewed these original “safety plans” referenced in condition five. Sea-3’s last site plan was in 1996 when they expanded their facilities. The Planning Board does not have the same members it did almost 20 years ago. And even if they did, federal regulations regarding the transportation, handling and storage of LPG has changed, as have surrounding populations, abutters and transportation routes, rendering the original plans outdated. It is also unclear from the condition what “plans” the Planning Board is referring to as, on information and belief, there are six different “plans’ or reports in the 1996 site review file.

76. The Planning Board’s approval of a site plan without first reviewing a site/hazard assessment was a misapplication and misinterpretation of the Zoning Ordinance as it could not evaluate whether the site promoted the health welfare and safety of the public without first reviewing a site/hazard assessment.

77. Because the Planning Board misinterprets and misapplied the zoning ordinance, its decision should be reversed and the Application denied.

DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

78. The City was prejudiced and other abutters were prejudiced in the Zoning Board’s delay in declaring this a “development of regional impact”.

79. A request that this project be deemed a “development of regional impact” was received by the Town on October 28, 2013, but the Town delayed until December 9, 2013 to declare the project a development of regional impact.

80. RSA 36:56 provides that a “local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. **Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.**” RSA 36:56 (emphasis added).

81. The appeal and request for variance was filed on November 6, 2013 and noticed for Zoning Board of Adjustment hearing on November 25, 2013, at which time the appeal was denied and the request for variance was granted.

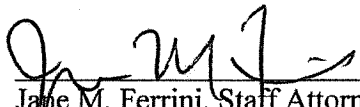
82. Abutters were not given notice of the hearing and were denied the ability to comment on the project.

83. Failure of the Town to give abutters notice of application for variance, after request received almost one month prior, was a procedural error and as such, unreasonable and unlawful.

CONCLUSION

84. For all the foregoing reasons, the Zoning Board of Adjustment should deny the approval of the site plan. In the alternative, the Zoning Board of Adjustment should remand the matter to the Planning Board for further proceedings consistent with the Town of Newington's Zoning Ordinance.


The City of Portsmouth
By and through its Attorney


Jane M. Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

CERTIFICATE OF SERVICE

I, the undersigned, Jane Ferrini, Attorney for the Appellants, the City of Portsmouth, hereby certify that on this 17 day of June, 2014, a true and correct copy of the foregoing Appeal was served upon the Town of Newington and hand delivery to the following counsel of record:

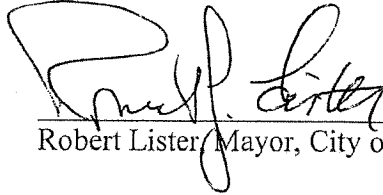
John Ratigan, Esquire
225 Water Street
Exeter N.H. 03833


Jane M. Ferrini

VERIFICATION

I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

Dated: June 16, 2014



Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.

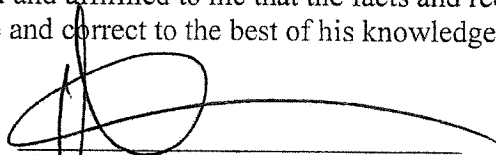
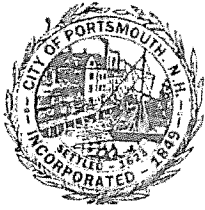

Notary Public/Justice of the Peace
Commission Expires 9/18/14

Exhibit J



Robert J. Lister
Mayor

CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7200
Fax (603) 427-1526

June 18, 2014

The Honorable Maggie Hassan
Office of the Governor
State House
107 North Main Street
Concord, NH 03301

Dear Governor Hassan:

As you may be aware, the Town of Newington has recently approved the expansion of Sea-3 Inc.'s facility that will increase the site's capacity to receive, store and distribute liquefied propane gas ("LPG") throughout the State. This is an issue of great concern for the City of Portsmouth because the proposed expansion will significantly increase the volume of LPG transported through residential neighborhoods and the heart of downtown Portsmouth. Due to the recent approval of the expansion of the Sea-3 LPG facility in Newington, the residents of the City of Portsmouth and our central business district will be traversed by 16 LPG tank cars per day over track that is typically used only once or twice a week. The condition of the tracks in Portsmouth, owned and operated by Pan Am, is listed by the Federal Railway Administration as "excepted" or "Class 1". These are the lowest two ratings for track conditions where Class 1 limits train speeds to 10 mph for freight and excepted track limits speeds to under 10mph and hazardous cargo to a maximum of 5 cars per train.

After abutting communities requested that the Planning Board declare this project a "development of regional impact", the City actively participated in the public hearing process. While the Newington Planning Board performed a thoughtful and deliberate review of this application, there was reluctance on the part of the Planning Board to address the significant impacts on safety this project places on the abutting communities. During the public hearing process, the City specifically requested that Newington require a safety/hazard assessment to identify the risks and hazards associated with the transporting LPG through the City and other affected communities. Unfortunately, no such stipulation was required of the applicant and the City has appealed the Newington Planning Board's approval of the Sea-3's expansion to compel such a study.

However, this safety issue is not just a local issue but is one of statewide concern because transportation of hazardous material is an issue of public health, safety and welfare. This letter is to request that the State, through the Department of Safety and Department of Transportation, perform a comprehensive safety and risk analysis regarding all aspects of the

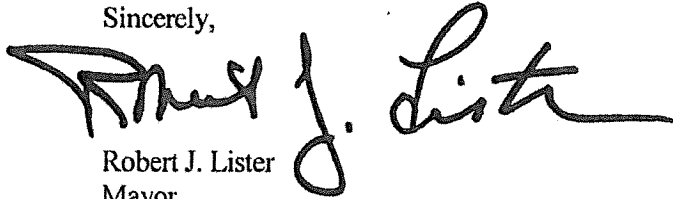
SEA-3, Inc. 000086

June 18, 2014

transportation of LPG throughout the State, which would include: hazard identification; vulnerability assessment; risk evaluation; environmental risk assessment; analysis of emergency response capabilities and a security assessment.

The City of Portsmouth looks forward to the opportunity to work with the State to address this important public safety issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Lister". The signature is fluid and cursive, with a large initial "R" and "L".

Robert J. Lister
Mayor

RJL/jed

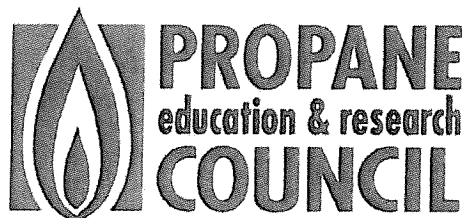
c.: Portsmouth City Council Members
Portsmouth Legislative Delegation

Exhibit K



Propane Industry Impact on U.S. and State Economies

Prepared for:



www.propanecouncil.org

November 2011

PREPARED FOR:

Roy W. Willis
President and Chief Executive Officer
Propane Education & Research Council
Suite 1075
1140 Connecticut Ave. NW
Washington, DC 20036

PREPARED BY:

ICF International, Inc.
9300 Lee Highway
Fairfax, Virginia 22031
Tel. (703) 218-2758

PRIMARY AUTHORS

This report documents the results of a study conducted for PERC by a team from ICF International. The effort was coordinated by Michael Sloan, Principal for ICF International.

The primary authors for the report include:

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Michael Sloan, ICF International – MSloan@icfi.com

DISCLAIMER

The authors and ICF International (ICF) have made every reasonable effort to ensure that the information presented in this report is based on the best available data. However, the ICF analysis relied on a variety of different data sources, with varying degrees of completeness, consistency and timeliness. As a result, the information presented in this study represents the best available estimate. Actual data may differ from the estimates provided in this report.

STUDY OF THE PROPANE INDUSTRY'S IMPACT ON U.S. AND STATE ECONOMIES

3.32 Odorized Propane's Impact on New Hampshire Economy

2009 Odorized Propane Sales Breakout
(Gallons) (% of State)

Residential	89,297,000	70.5%
Commercial	30,497,000	24.1%
Cylinder	2,687,000	2.1%
Internal Combustion	376,000	0.3%
Industrial	3,744,000	3.0%
Agricultural	125,000	0.1%
Total New Hampshire Odorized Propane Demand	126,726,000	100.0%
Total Propane-Heated Households	67,267	
Propane Share of New Hampshire Home Heating		13.28%

2009 Contribution to State Economy
(\$1,000)

Total Market Value of Odorized Propane Sold in New Hampshire (\$1,000)	\$285,924
Supply	\$0
Transportation, Storage, and Wholesale	\$4,650
Retail	\$156,055
Total Direct Value Added in New Hampshire	\$160,705
Indirect and Induced	\$241,239
Total Odorized Propane Industry Contribution to New Hampshire GDP	\$401,944

2009 Employment

Production	-
Transportation, Storage, and Wholesale	11
Retail	568
Direct New Hampshire Employment Related to Odorized Propane	579

2009 Labor Income
(\$1,000)

Production	\$0
Transportation, Storage, and Wholesale	\$685
Retail	\$31,620
Direct Labor Income in New Hampshire Odorized Propane Industry	\$32,305

2009 Odorized Propane Production
(Gallons) (% of U.S. Total)

Refineries	-	0.00%
Gas Processing Plants	-	0.00%
Total New Hampshire Odorized Propane Production	-	0.00%

SECTION 4: HOUSEHOLD HEATING FUELS, BY STATE AND DIVISION

ICF estimates county-level household space heating fuel based primarily on the U.S. Census Bureau's 2009 American Community Survey. This survey lists occupied households (anything from apartments in large residential high-rises to vans and boats) identified as a primary residence, and identifies the primary fuel used for space heating.

The annual ACS data release is limited to those geographies which meet the threshold of a minimum of 65,000 residents. The smaller counties are not reported each year. For these counties, the Census Bureau reports the data based on five years of partial data collection. ICF estimates household numbers for these counties for 2009 based on the Census Bureau's 5-year data set, projected forward to 2009.

Tables 20 and 21 below present the U.S. Census Bureau's estimates for household heating fuel by state and census division. *Appendix A, Primary Space Heating Fuels in U.S. Households, by State and County, 2009*, which includes data estimated by ICF at the county level for each state, is available under a separate cover. Census Bureau's definition of "Heating Fuels", while mostly self-explanatory, does come with the caveat that utility gas, though primarily natural gas (methane), may also include a small number of households which receive odorized propane through underground pipes. In addition, because the purpose of the survey is to determine the primary household heating fuel, numbers in the tables may understate the prevalence of certain fuels for secondary space heating, which in some part of the country constitute a large portion of total energy used for space heating.

Table 20: U.S. Household Heating Fuel, By Division

State	Total Occupied Households	Utility Gas	Bottled, Tank, or LP Gas	Electricity	Fuel Oil, Kerosene, etc.	Wood	Other / No Fuel (Coal or Coke, Solar, Other)
East North Central Division	17,853,414	12,916,754	1,233,548	2,792,599	346,301	392,058	172,154
East South Central Division	7,084,340	2,470,362	543,714	3,859,906	46,622	132,517	31,219
Middle Atlantic Division	15,259,350	8,766,704	463,375	1,896,452	3,598,298	283,427	251,094
Mountain Division	7,905,276	4,746,362	399,349	2,401,432	34,896	239,038	84,199
New England Division	5,511,097	1,970,745	246,499	631,209	2,411,642	197,924	53,078
Pacific Division	16,942,831	9,758,971	519,871	5,219,171	249,913	462,821	732,084
South Atlantic Division	22,224,884	5,726,753	1,013,987	14,148,105	835,966	308,866	191,207
West North Central Division	8,064,106	4,989,361	853,984	1,798,454	121,301	207,278	93,728
West South Central Division	12,770,931	5,228,318	572,413	6,742,998	13,107	131,172	82,923

Table 21: U.S. Household Heating Fuel, By State

State	Total Occupied Households	Utility Gas	Bottled, Tank, or LP Gas	Electricity	Fuel Oil, Kerosene, etc.	Wood	Other / No Fuel (Coal or Coke, Solar, Other)
Alabama	1,848,051	585,319	156,650	1,073,718	4,386	21,693	6,285
Alaska	236,597	115,946	3,344	22,569	77,765	13,751	3,222
Arizona	2,276,865	817,083	70,969	1,310,308	1,281	45,870	31,354
Arkansas	1,124,947	470,630	97,073	499,506	2,159	49,756	5,823
California	12,214,891	8,148,678	397,820	3,008,533	39,392	219,809	400,659
Colorado	1,910,146	1,438,473	97,714	313,428	2,357	38,725	19,449
Connecticut	1,326,329	416,704	37,020	199,796	639,292	23,987	9,530
Delaware	327,252	131,109	36,574	94,510	58,735	3,911	2,413
District of Columbia	249,280	155,847	3,682	79,896	7,073	119	2,663
Florida	6,987,647	319,252	92,744	6,429,648	20,943	15,780	109,280
Georgia	3,469,250	1,492,353	213,929	1,706,295	9,753	34,173	12,747
Hawaii	446,136	8,670	5,531	138,795	109	3,049	289,982
Idaho	558,466	286,405	30,812	180,108	13,607	41,232	6,302
Illinois	4,757,452	3,825,613	200,303	657,962	13,789	24,614	35,171
Indiana	2,477,548	1,546,835	190,730	634,685	30,364	53,561	21,373
Iowa	1,226,804	805,013	165,426	208,422	11,918	18,801	17,224
Kansas	1,104,976	771,405	88,613	215,458	1,251	21,652	6,597
Kentucky	1,694,197	683,931	117,115	814,408	21,890	43,216	13,637
Louisiana	1,688,027	648,445	47,204	972,920	1,109	13,087	5,262
Maine	544,855	24,414	35,298	25,521	388,831	62,467	8,324
Maryland	2,095,122	943,504	72,152	799,508	239,699	25,911	14,348

STUDY OF THE PROPANE INDUSTRY'S IMPACT ON U.S. AND STATE ECONOMIES

U.S. Household Heating Fuel, By State (CONTINUED)

State	Total Occupied Households	Utility Gas	Bottled, Tank, or LP Gas	Electricity	Fuel Oil, Kerosene, etc.	Wood	Other / No Fuel (Coal or Coke, Solar, Other)
Massachusetts	2,475,492	1,188,213	61,577	325,953	843,927	35,706	20,116
Michigan	3,819,736	2,966,895	339,327	278,240	71,976	120,410	42,888
Minnesota	2,085,767	1,414,585	211,473	294,332	71,666	55,479	38,232
Mississippi	1,095,026	357,279	152,842	561,530	1,713	18,354	3,308
Missouri	2,339,684	1,268,378	237,182	721,050	7,350	94,795	10,929
Montana	375,287	217,410	46,079	68,854	6,364	30,496	6,084
Nebraska	711,223	457,744	55,611	175,511	4,137	9,930	8,290
Nevada	965,715	616,738	32,475	290,199	7,386	12,702	6,215
New Hampshire	506,342	97,958	67,267	38,419	260,482	33,176	9,040
New Jersey	3,154,926	2,318,805	61,881	332,849	408,838	12,774	19,779
New Mexico	742,104	500,125	75,176	112,317	1,355	45,183	7,948
New York	7,187,555	3,914,867	223,115	615,279	2,165,896	140,672	127,726
North Carolina	3,646,095	927,972	334,066	2,080,834	206,352	79,970	16,901
North Dakota	279,014	115,000	39,179	103,443	13,625	1,458	6,309
Ohio	4,526,404	3,081,136	251,341	924,237	139,136	86,898	43,656
Oklahoma	1,430,019	807,300	115,116	458,214	747	30,724	17,918
Oregon	1,485,919	571,780	25,160	715,634	50,286	107,406	15,653
Pennsylvania	4,916,869	2,533,032	178,379	948,324	1,023,564	129,981	103,589
Rhode Island	406,343	206,115	6,509	31,037	155,388	5,214	2,080
South Carolina	1,730,232	425,890	93,863	1,150,871	36,931	17,251	5,426
South Dakota	316,638	157,236	56,500	80,238	11,354	5,163	6,147

Exhibit L

State of New Hampshire



JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

EARL M. SWEENEY
ASSISTANT COMMISSIONER

DEPARTMENT OF SAFETY

James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305

Tel: (603) 271-2791

Speech/Hearing Impaired

TDD Access Relay NH 1-800-735-2964

DECLARATION OF EMERGENCY NOTICE (Title 49 CFR 390.23)

Pursuant to 49 CFR Section 390.23 and New Hampshire RSA 266:72-a, the New Hampshire Department of Safety declares that an emergency exists pertaining to the delivery of propane, gasoline, diesel, and fuel oil to distributors, residential and business establishments within the State of New Hampshire.

The emergency exemption is issued in connection with anticipated emergency conditions from a shortage of propane at Sea-3 in Portsmouth, two major winter storms in a row, and a period of sub-zero temperatures, all of which have resulted in hazardous driving conditions and extra demands on fuel supplies. It is deemed that a declaration of emergency is required to ensure the continuation of these essential services to both residential and commercial establishments and government buildings within the State.

As a result of the emergency conditions, the following Declaration of Emergency is ordered:

1. Relief from the Hours of Service Regulations contained in 49 CFR 395.3 of the Federal Motor Carrier Regulations adopted pursuant to RSA 266:72-a, for motor carriers providing delivery of propane, gasoline, diesel, and fuel oil to distributors, homes, businesses and government buildings within the State of New Hampshire. The relief also applies to motor carriers engaged in the transportation of such products from terminal locations to local delivery companies.
2. No motor carrier operating under the terms of this declaration shall require or allow a fatigued or ill driver to operate a motor vehicle. A driver who informs a carrier that he or she needs immediate rest shall be given at least ten consecutive hours' off-duty before the driver is required to return to service.

3. Motor Carriers that have an Out of Service Order in effect cannot take advantage of the relief from regulations that this declaration provides under Title 49 CFR 390.23.
4. Nothing contained in this declaration shall be construed as an exemption from the Controlled Substances and Alcohol Use and Testing requirements, Commercial Driver's License requirements, Financial Responsibility requirements, Size and Weight requirements or any other portion of the regulations not specifically identified.
5. Drivers for motor carriers that operate under this Declaration of Emergency Notice must have a copy in their possession.
6. Consistent with Title 49 CFR Part 390.23, this Emergency Declaration has been extended through midnight on January 11, 2014.
7. Drivers who utilize this exemption may come back into compliance and restart the hours of service clock after taking 24 hours off-duty at the end of their period of extended hours.

Issued at 4:00pm on December 27, 2013.

Signed,



Earl M. Sweeney
Assistant Commissioner
New Hampshire Department of Safety



CITY OF PORTSMOUTH

LEGAL DEPARTMENT

Robert P. Sullivan, City Attorney – 603-610-7204 (Direct Dial)
Suzanne M. Woodland, Deputy City Attorney – 603-610-7240 (Direct Dial)
Kathleen M. Dwyer, Assistant City Attorney – 603-427-1338 (Phone/Fax)

August 19, 2014

VIA FEDEX

Cynthia T. Brown, Chief
Section of Administration/Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20024

236475
ENTERED
Office of Proceedings
August 20, 2014
Part of
Public Record

Re: Sea-3, Inc. v. City of Portsmouth, New Hampshire
City of Portsmouth Reply to Sea-3 Inc.'s Emergency Petition for Declaratory Order
Docket Number FD_35853_0

Dear Ms. Brown:

Enclosed for filing is the City of Portsmouth, New Hampshire's original Reply dated August 19, 2014 filed in response to Sea-3, Inc.'s Emergency Petition for Declaratory Order. The ten copies and 3 compact discs are also enclosed for this letter.

Please feel free to contact me if you have any questions regarding this filing.

Thank you for your assistance.

Sincerely,

Jane Ferrini
Staff Attorney
City of Portsmouth

Enclosures

cc: Robert P. Sullivan, City Attorney
John P. Bohenko, City Manager
Alec L. McEachern, Attorney for Sea-3, Inc.
Chris Cole, Esquire

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. FD_ 35853_0

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

**REPLY TO EMERGENCY PETITION
FOR DECLARATORY ORDER**

Communications with respect to this
Document should be addressed to:

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Portsmouth, New Hampshire 03801
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jferrini@cityofportsmouth.com

Staff Attorney for the Respondent
City of Portsmouth, New Hampshire

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. FD_35853_0

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

REPLY TO EMERGENCY PETITION FOR DECLARATORY ORDER

On August 4, 2014, Sea-3, Inc. ("Sea-3") filed an Emergency Petition for Declaratory Order against the City of Portsmouth, New Hampshire, ("City"), alleging that both of its appeals of the Town of Newington's Planning Board's approval of a site plan for expansion of Sea-3, Inc.'s facility to the Town of Newington Zoning Board of Adjustment and the New Hampshire Superior Court are an attempt to use state and local law to deny, restrict and/or regulate Sea-3's access to common carrier rail service, which would be preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). The City denies these allegations, objects to Sea-3's Emergency Petition for Declaratory Order and submits this Reply in support thereof.

BACKGROUND

This case involves rail service to two parcels of property owned by Sea-3 at its facility located in Newington, New Hampshire. Sea -3 receives, stores, chills and distributes Liquefied

Propane Gas (LPG) by rail, truck and ship domestically and abroad. Sea-3's facility is served by the common carrier for the rail line, Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am ("Pan Am"). The rail line servicing the site travels through four New Hampshire towns, Newfields, Stratham, Greenland and Portsmouth, before it bisects the two parcels of property owned by Sea-3, Inc. in Newington, New Hampshire. Sea-3 applied to the Newington Planning Board for site plan review to expand its facility to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site ("Application").

The City and the three other New Hampshire towns along the distribution route of the rail line received notice of Sea-3's Application because the expansion of the site was determined by the Town of Newington to be a "development of regional impact". Under New Hampshire law, land use boards must evaluate all projects to determine if they are a "development of regional impact" and give those affected communities notice in order to provide them with the opportunity to comment on the project. The criteria to determine whether a project is a "development of regional impact" is whether the project will impact neighboring communities for various reasons, including, but not limited to, the project's proximity to another community's border, the project's effect on the transportation network and its effect on anticipated emissions such as light, noise, smoke, odor or particles or proximity to aquifers or surface water that transcends municipal borders. N.H.R.S.A. § 36: 54-58.

The City received notice from the Town of Newington and actively participated in the public hearing process for this "development of regional impact". During the public hearing process, the City and the Newington Planning Board both initially recommended that a rail

safety report be conducted prior to approval of the site plan. The City's concerns regarding rail safety have been reproduced at length in Sea-3's Petition. The Planning Board's recommendation for information about rail safety or reports prior to approval of the site plan was not documented in Sea-3's Petition. See minutes of meeting as follows:

Chairman Hebert reiterated that he was asking Ms. Scarano with Pan Am and Mr. Bogan with Sea-3 to assist the Town in getting the FRA to meet with them. He said the citizens had a right to know the safety condition of the rails and the Town also needed to hear assurances from the FRA before a decision on the site could be made...

Chairman Hebert said the Board could not deny Pan Am's operations, but they could say they needed more safety information from the FRA before they approved sea-3's proposal for expansion.

See Town of Newington, NH Planning Board Meeting Minutes-, Monday, February 10, 2014, pages 4 and 5 attached and incorporated as Exhibit A.

Mr. Richardson read through "Uses Allowed" in the zoning ordinance and said a question of whether the use would create an over intensification of the area might be made in regards to the rails, but they would then be stepping outside their jurisdiction. Mr. Richardson said the Board had been told the rail standards would be upgraded, and they could accept that finding to satisfy the criteria, or request a study to prove it, but there would need to be a determination first.

Town Planner, Tom Morgan said he started out asking the same questions. He said in November 2013 the Board determined if the project would have a regional impact. Mr. Morgan said he thought a study could help determine what that impact might be and to come up with some non-binding recommendations that would assist the cost of upgrading crossings in surrounding communities, but he wasn't sure how the cost of upgrades could be attributed to the Sea-3 project.

See Town of Newington, NH Planning Board Meeting Minutes- Monday, May 5, 2014. at page 2 attached and incorporated as Exhibit B

However, after the Planning Board received an opinion letter from counsel from Pan Am, the Planning Board members refused to consider or require a rail safety report or any other safety or hazard evaluation of the site itself. See letter from Robert B. Culliford, Senior Vice President and General Counsel for Pan Am dated March 18, 2014 attached and incorporated as Exhibit C. Throughout the public hearing process and presently, the City,

outside the public hearing process on the Sea-3 Application, has pursued and continues to pursue independent inquiries regarding rail safety, including but not limited to reaching out to its Congressional and Senate delegations to request rail safety records, investigating the development of “quiet zones” in the City, having Pan Am appear at City Council meeting to answer questions about rail safety and urging the Governor of the State of New Hampshire to assess rail safety state-wide. None of these activities are subject to the jurisdiction of the Surface Transportation Board or are in any way unlawful or unreasonable. The City not only has the right to pursue this information regarding rail safety from any and all available resources but has a duty and obligation to its citizens to inquire about rail safety in order to protect their health, safety and welfare. None of these inquiries, moreover, are intended to impede or interfere with railway operations; rather, these inquiries and others are efforts to assess the consequences of increased rail traffic due to the proposed substantial intensification of the use of the Sea 3 facility – in the face of Sea 3’s, the Planning Board’s, and the railway’s apparent unwillingness to provide any such information.

The Newington Planning Board granted Sea-3’s Application and the City appealed this decision to the Town of Newington Zoning Board of Adjustment and the Rockingham County Superior Court on the grounds that it failed to abide by its own zoning ordinance and site plan review regulations, including but not limited to failing to require or review a safety/hazard study of the site. Sea-3 alleges that these appeals – that is, the totality of the allegations and arguments made in the two appeals – are subject to the jurisdiction of the Surface Transportation Board because Sea-3 alleges that the City is attempting to use state and local law to deny Sea-3 access to common carrier rail service, and as such, the appeals themselves,

or certain issues raised in these appeals, are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”).

Sea-3, a private corporation, filed this Emergency Petition for Declaratory Orders, and the City files this reply.

ARGUMENT

Sea-3 Lacks Standing

The Surface Transportation Board (“STB”) has exclusive jurisdiction over transportation by rail carrier. “[T]he regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law.” 49 U.S.C. § 10501(b) (2). The ICCTA defines both “rail carrier” and “transportation”.

“Rail Carrier” is defined by 49 U.S.C. § 10102(5) as “a person providing common carrier railroad transportation for compensation.” Sea-3 is not a rail carrier. Pan Am is a rail carrier. Sea-3 does not allege it is an agent of Pan Am, and Pan Am has neither brought itself or joined in this Petition. Therefore, because Sea-3 is not a rail carrier, the STB has no jurisdiction over this matter and this matter should be dismissed.

In the alternative, in the event that Sea-3 claims that the STB has exclusive jurisdiction, even though it is not certified as a rail carrier because its facility falls under the definition of “transportation” and “railroad”, the STB must review the definition of “transportation” and “railroad” under the ICCTA. The ICCTA defines “transportation” as:

A locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and ... services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property...” 49 U.S. C. §§ 10102(9) (A) (B).

Railroad is defined as “intermodal equipment used by or in connection with a railroad’ and “a switch, spur, track, terminal, terminal facility, and a freight depot, yard and ground, used or necessary for transportation”. 49 U.S.C. §§ 10102(6) (A) (C).

Sea-3’s assertion of the Board’s jurisdiction is similar to the misplaced argument of Hi-Tech Transportation, LLC in the federal district court in New Jersey. In Hi-Tech Transportation, LLC v. State of New Jersey Department of Environmental Protection, 382 F.3d 295 (3rd Cir. 2004), the State of New Jersey brought an administrative enforcement action against Hi-Tech, which operated a solid waste disposal facility there. Hi-Tech claimed that certain permit and licensing requirements imposed by the State’s regulatory scheme were preempted by the ICCTA, because its business involved transportation by railroad. Hi-Tech claimed that regulation of its business was, therefore, exclusively within the STB’s jurisdiction. Both the federal district court and the United States Court of Appeals for the Third Circuit disagreed.

As Sea-3 does here, Hi-Tech sought a declaration that New Jersey administrative rules and regulations were preempted and within the exclusive jurisdiction of the STB because its solid waste facility involved railway activity carried out under a license of trackage rights. Conceding that it was not certified as a rail carrier, Hi-Tech asserted that the STB still had exclusive jurisdiction because “its facility falls under the ICCTA’s definitions of ‘transportation’ and ‘railroad.’” 382 F.3d at 306. Because it fell under both definitions, Hi-Tech argued that “its facility is subject to the STB’s exclusive jurisdiction and, therefore, New Jersey’s [statute and administrative scheme] are preempted as applied to it.” The Third Circuit noted as follows:

Even if we assume *arguendo* that Hi Tech’s facility falls within the statutory definition of “transportation” and/or “railroad,” the facility still

satisfies only a part of the equation. The STB has exclusive jurisdiction over "*transportation by rail carrier.*" 49 U.S.C. §10501(a), (b) (emphasis added). However, the most cursory analysis of Hi Tech's operations reveals that its facility does not involve "*transportation by rail carrier.*" The most it involves is transportation "*to rail carrier.*" Trucks bring C & D debris from construction sites to Hi Tech's facility where the debris is dumped into Hi Tech's hoppers. Hi Tech then "*transloads,*" the C & D debris from its hoppers into rail cars owned and operated by CPR, the railroad. It is CPR that then *transports* the C & D debris "*by rail*" to out of state disposal facilities.

382 F.3d at 308. Similarly, Sea-3 is not a rail carrier; indeed, unlike Hi-Tech, Sea-3 does not even possess a license from a certified rail carrier. All it does is receive some of its products by a rail carrier, which is not an applicant before the local municipal board, not an appellant in the State Court litigation, and not a petitioner or applicant now before the STB. Sea-3, not Pan Am, built, owns, controls, insures and advertises its facility. Sea-3 is the sole applicant for the expansion and is solely responsible for all costs associated with the proposed expansion of the site. One aspect of Sea-3's expansion is to expand its rail skid offloading capacity. Currently Sea-3 has three rail skids located on one of its two parcels. It seeks to lease land from Pan Am to add five more. This fact, in and of itself, does not qualify its activity as "*transportation by rail carrier*", and therefore, the ICCTA does not apply and Sea-3 does not have standing to bring this Petition.

Sea-3's reliance on CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F. Supp. 1573, (N.D.Ga. 1996) seems to be misplaced. In that case, a group of rail carriers sought declaratory and injunctive relief against a state agency that was attempting, in the face of the ICCTA, to directly control the number of employees used by the rail carriers to staff railway agencies, by refusing to grant rail carrier requests to reduce the number of employees at certain railway locations. 944 F. Supp. at 1575-76. No authority in this case has attempted to direct railway operations in any such fashion. Again, the City's interest and desire (and the

interests and desires of other members of the public) was to obtain a study, in accordance with local land use regulation, that would illumine the consequences of the intensified use of a private industrial facility on municipal and regional health, safety and welfare. No request or allegation made by the City in either the zoning appeal or the Superior Court appeal even remotely suggests that the railway must operate in a certain way, with a certain number of employees, at a certain rail speed, or with a specific frequency. Sea-3 attempts to conflate the City's and its neighbors' interest in understanding the consequences of its actions and its expansion with railway operations in order to use ICCTA preemption to ward off legitimate inquiry and legitimate application of local site plan regulations.

Sea-3 is not alleging it is a railroad agency and again, lacks standing to bring this present action.

Sea-3's Misapprehends and Misinterprets City's Appeal and Request for Safety/Hazard Study

Sea-3 misinterprets and misconstrues the City's appeals, and does so perhaps deliberately. The City, in its zoning and Superior Court appeals, is not attempting to deprive Sea-3 of its federal right to receive common carrier rail service over the rail line. There is no conflict between the City's request for a safety/hazard study of the site and Sea-3 use of Pan Am railway for common carrier rail service under the ICCTA. The City is not using local site plan review regulations or zoning ordinance provisions to regulate interstate freight rail network in any way. The City is simply asking Newington to comply with its site review regulations and zoning ordinance as they apply to the site itself, not the rails. See The City of Portsmouth v. Newington Planning Board, Rockingham County Superior Court, Docket No. 218-2014-CV- 00654 attached and incorporated as Exhibit D.

The City's appeals are not an attempt to limit construction of railroad facilities, Sea-3's facilities or an attempt to limit Pan Am or Sea-3's ability to conduct any economic activities. The City alleges that the Planning Board did not comply with its site review regulations and zoning ordinance. The purpose of the City's appeal is to compel Newington's compliance with its own land use regulations. Both the zoning and site plan review regulations require the local land use board to assess whether the project promotes the health, safety and welfare of its residents. In order to carry out that mandate, the City argues, a safety/hazard study of the site, not the rails, is required for review by the Planning Board and that this study is subject to review and comment by the City in order to assess whether the project promotes the health safety and welfare of the residents of Newington and those other affected communities.

Sea-3's allegation that the City's appeal is a request for a rail safety study is not supported by the record. The following paragraphs define the safety/hazard study in the City's appeal to the Superior Court:

50. The City, as an abutter, through its Mayor, Assistant Mayor, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously **requested that the Planning Board require a safety study/hazard assessment of the site** and of this particular expansion and use intensification prior to approval of the site plan... (Emphasis added)

64. The Planning Board's refusal to conduct, or direct the applicant to conduct or pay for a proper, meaningful, professional and up to date safety, health, welfare and environmental assessment of the potential impacts of the proposed expansion and intensification of the use of the property was unreasonable and unlawful. The Planning Board's failure to require a proper safety, health, welfare and environmental impact assessment was a gross and unreasonably abuse of its discretion. Under the circumstances, **the Planning Board was required to evaluate the site**, and given the nature of the use of land requested, the increased distribution, storing and chilling of SPG, a hazardous material, it should have required and reviewed a safety plan/hazard assessment before approving the site plan.(Emphasis added)

See City's Superior Court Appeal attached and incorporated as Exhibit D.

Again, the reference to the safety/hazard study was clearly for the site, not the rails, and this definition was referenced throughout the Superior Court appeal and the appeal to the Zoning Board of Adjustment as follows:

27. **However, in addition to rail safety**, the City, through those participants mentioned above, repeatedly and vociferously requested that the Planning Board require a comprehensive safety and/or security review of the full scope of Sea-3 proposal, including but not limited to a hazard identification and vulnerability assessment, an environmental risk assessment and an analysis of emergency response for the impacted communities, physical security assessments and incident /hazards response analysis. (“safety/hazard assessment”).

71. The City, through its Mayor, Assistant Mayor, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Board require a **safety study/hazard assessment of the site** prior to approval of the site plan.

See City of Portsmouth’s Appeal of the Decision of the Newington Planning Board to Approve the Site Plan of Sea-3 Inc. Pursuant to RSA 676:5, III and RSA 677:15, I-a (a) attached and incorporated as Exhibit E.

To paraphrase Plato, a City is what it is because its citizens are what they are. The City is not just represented by its elected officials and City staff and their formal or public statements. It is also represented by its citizens who spoke out during the public hearing process to question the safety of the site and request further investigation. Attorney Christopher Cole represented several citizens at the public hearing process and stated their concern about the safety of the site:

neither he nor his clients were trying to regulate the rails, but they were trying to help the Town regulate this site because it had important safety implications. He asked to look at site-specific questions and didn’t think Federal law would agree that was the limit of the Planning Board’s power. He said they also wanted to ensure the site could handle the ingress and egress of traffic with propane...

See Town of Newington NH Planning Board Meeting Minutes dated March 10, 2014 at page 7 attached and incorporated as Exhibit F.

Sea-3's claim that the City's only concern is with the rails is inaccurate. The City is concerned with the site's safety and has every right to be so and to bring its present appeals.

The City's request for a safety/hazard study is not pre-clearance requirement

One of the conditions of the Planning Board's decision was for Sea-3 to update its "safety studies" from its 1996. Paragraph 5 of the Planning Board's decision states as follows:

Several safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.

See Decision of Planning Board dated May 21, 2014 attached and incorporated as Exhibit G.

An issue on appeal is the appropriateness of this review outside the public process and a request for clarification as to which study Sea-3 will be updating.

Sea-3 last expansion was in 1996. The project was deemed a "development of regional impact" and the City and the Rockingham Planning Commission requested that the Newington Planning Board hire an independent expert. See letters dated May 30, 1996 and May 31, 1996 attached and incorporated as Exhibit H and I. Sea-3 submitted several reports on safety. These reports include the following:

1. *SEA-3, Inc. Newington, New Hampshire. LPG Import Terminal, Hazard Modeling Study for Additional Tankage*, May, 1996, by Fluor Daniel, Inc. (20 pages) attached and incorporated as Exhibit J.
2. *Sea-3 Process Safety Management Manual*, July 15, 1996 (10 pages).
3. *Sea-3 Inc. Newington Marine Terminal, Initial Process Hazard Analysis, Final Report*, 6 October, 1995 by LGA Engineering (45 pages).
4. *Sea-3, Inc. Newington Marine Terminal Fire Safety Analysis, Draft Report*, July 1996 (17 Pages).
5. *Mooring Policy and Procedure Manual, Newington Propane (LPG) Terminal*, May 1993 (31 pages).
6. *Marine Safety Office, Portland Maine, Liquefied Petroleum Gas (LPG) Contingency Plan* (65 Pages).

The Town of Newington, under its then site plan regulations, required Sea-3 to pay for two consultants to review and comment on Sea-3's "safety/hazard report". These two experts were hired and completed their evaluations in less than one month. See Exhibits K, June 17, 1996 letter from James H. Stannard, Jr.; Exhibit L, *A Technical Review of the Proposed Additions to Sea-3's Newington Marine Terminal for the Planning Board of the Town of Newington, New Hampshire* by James H. Stannard, Jr. dated July 10, 1996; and Exhibit M, *Newington Planning Board Sea-3's Application for Additional LPG Storage Technical Review* dated July 10, 1996 by Henry Renfrew, all attached and incorporated hereto.. These consultants also assisted the Newington Planning Board in drafting the conditions of approval of the 1996 site plan. See attached Exhibit N, James H. Stannard, Jr.'s July 12, 1996 letter with comments on draft Planning Board findings, Exhibit O, Fax dated July 15, 1996 from James H. Stannard, Jr. and Henry Renfrew comment on proposed conditions as Exhibit P, all attached and incorporated hereto.

In 1996, the Newington Planning Board reviewed over 200 pages of safety/hazard reports, included in those reports were two evaluations by experts required by the Planning Board prior to approval of Sea-3's site plan. The costs associated with hiring these experts were paid by Sea-3. None of these reports were a rail safety study but were studies focused on the evaluation of the safety and potential hazards of the expansion of Sea-3's facility at the site. The City is appealing the Planning Board's decision, in part, because no such similar safety study of the site was done prior to approval of the site plan. In addition, the City is appealing the safety study post-approval outside of public comment and process.

Sea-3's allegation that the City's request for a safety/hazard study is for a rail safety study is not supported by its own safety studies submitted at its last site plan approval. Sea-3 is

also claiming that any such safety study is an unauthorized preclearance requirement. The prior studies were conducted and completed in one month. These prior studies were safety studies of the site, not rail safety studies. Unlike now, Sea-3 did not file a Petition with the STB or proper federal agency at the time alleging federal preemption in 1996. Sea-3's allegation that a safety/hazard study is a pre-clearance requirement is not supported by the City's Petition, the record of public hearings and Sea-3's own conduct at its last site plan review.

Legal Analysis

Cities and towns are able to exercise their police power over certain sites if the State and local regulation pass a two-part test: 1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads" New York Susquehanna and Western Railway Corporation v. Jackson, 500 F.3d 238 (3rd Cir. 2007). "[T]he touchstone is whether the state regulation imposes an unreasonably burden on railroading." Id. at 253. In certain cases, the exercise of local police power will not be allowed if the provisions are typically allowable but are subject to exclusive discretion or may cause unlimited delay to rail operations.

It bears emphasis that no request by the City and no allegation in either of the New Hampshire state appeals burdens a railway or a railway operation. The City's appeal is not about the City issuing a cease and desist order prohibiting rail traffic to warehouse because zoning prohibits use of land as freight yard. See Boston and Maine Corporation and Springfield Terminal Railroad Company, Finance Docket No. 35749 (S.T.B. July 19, 2013). The City's appeal does not require or seek a pre-construction preclearance environment permit. Green Mountain Railroad Corporation v. State of Vermont, 404 F.3d 638 (2nd Cir. 2005). The City's appeal does not involve an ordinance provision that requires a discretionary permit limiting the

number of trucks leaving Sea-3's facility or passing through the City. Norfolk Southern Railway Company v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010).

The City's appeals ask the Town of Newington, in a fundamental sense, to carry out the studies and safety evaluations of the Sea-3 proposal that it directed be done in 1996, in connection with a smaller and less substantial expansion of its operations. The City's appeals seeks the ability to review and comment on safety/hazard assessment, similar to one that was required and reviewed by the Newington Planning Board when Sea-3 expanded its facilities in 1996. Interstate commerce and railway operations are not burdened or delayed by the City's appeal, even if successful. Pan Am has voluntarily agreed to upgrade its tracks and is in the process of doing so. Sea-3 is a going concern and is currently conducting its business at its current facility. Mr. Bogan stated at public hearing that he "expected the project to take a year before it would be operational". See Town of Newington, Planning Board Meeting Minutes dated February 10, 2014 at page 5 attached and incorporated as Exhibit Q. The City is without sufficient information to comment on the business model and statistics quoted by Sea-3 in its Petition but does submit that an evaluation of the safety study in 1996 by the Town of Newington's two experts took less than one month. Any new safety/hazard study would not subject Sea-3 to an unreasonable delay and is not unreasonably burdensome, nor does it discriminate against railroads.

Conclusion and Request for Relief

Sea-3, Inc.'s allegation that the City's sole objective is to block LPG rail traffic from travelling through the City of Portsmouth is a misstatement and misinterpretation of the City's appeal to the Superior Court and Zoning Board of Appeal. The City's concerns about rail safety are legitimate and proper and not subject to the jurisdiction of the Surface

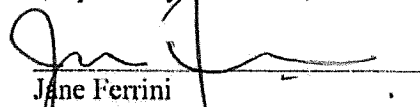
Transportation Board. Admittedly, Congress granted the STB broad authority over the rails. However, it was not the intent of Congress to stifle or prevent a municipality's separate and legitimate inquiry regarding rail safety by urging its representatives in the Senate and Congress and the Governor to request and review information and a potential study of rail safety. These legitimate inquiries are outside the appeal process and are not the subject matter of the City's appeal.

The claim that the City's request for a safety/hazard study of the site is a pre-clearance requirement is not true. The City is not raising non-railroad claims to regulate rail operations. The City is requesting a safety/hazard study of the site similar, to the studies that were performed the last time Sea-3 expanded the site in 1996. Sea-3's allegations that such a study is an impermissible pre-clearance requirement that regulates rail operations is without merit.

Sea-3 is not a rail carrier and the City is not requesting a pre-clearance requirement of rail operations. The City is not preventing the expansion but is simply trying to ensure that the expansion of the site is safe and complies with local zoning and site plan review regulations to protect the public health, safety and welfare. The City requests that the STB issue an order:

- A. Dismissing Sea-3's Emergency Petition for Declaratory Order for lack of standing;
- B. In the alternative, denying Sea-3's Petition for Declaratory Order because the City's appeals and request for review and comment on a safety/hazard study, similar to the one that was performed by Sea-3 at its last expansion, is not a regulation of rail operations and is not a impermissible pre-clearance requirement; and
- C. Granting such further relief as the Board deems proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jane Ferrini', written over a horizontal line.

Jane Ferrini
City of Portsmouth
Municipal Complex
1 Junkins Avenue
Portsmouth, NH 03801
(603) 610-7256

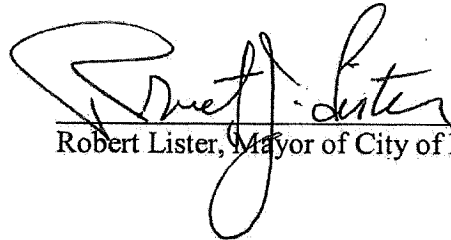
Staff Attorney for the City of Portsmouth

Dated: August 19, 2014

VERIFICATION


I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

Dated: August 19, 2014


Robert Lister, Mayor of City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.



Notary Public/Justice of the Peace
Commission Expires:

JANE M. FERRINI, NOTARY PUBLIC
MY COMMISSION EXPIRES NOVEMBER 9 2016

STATEMENT REGARDING SERVICE

I, hereby certify that on this 19th day of August, 2014, I have served the Petitioner in this proceeding with this document by United States Mail as follows:

Alec L. McEachern
Attorney for Sea-3, Inc.
282 Corporate Drive
P.O. Box 360
Portsmouth, New Hampshire 03802-0360



Jane Ferrini
Staff Attorney, City of Portsmouth

EXHIBIT A

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, February 10, 2014

Chairman Hebert reiterated that he was asking Ms. Scarano with Pan Am and Mr. Bogan with Sea-3 to assist the Town in getting the FRA to meet with them. He said the citizens had a right to know the safety condition of the rails and the Town also needed to hear assurances from the FRA before a decision on the site could be made. Ms. Scarano said the FRA did inspections and would act if there were any issues, including drug and alcohol issues and hours of service. She said they would provide correspondence. Chairman Hebert said they needed to see a face and Ms. Scarano said they were a Federal agency. Chairman Hebert said they would go through Federal representatives if necessary to get a response. Mr. Richardson asked if they could get a copy of the last inspection, and Chairman Hebert said they needed the findings as well as what was being done to improve conditions. Ms. Scarano said the inspection report was done by the FRA and was not Pan Am's document to provide.

Mr. Lewis Brown of Laurel Court said Portsmouth filed a Freedom of Information Act petition and the FRA had dodged the request. He suggested the proposal be put on hold until they received more information.

Ms. Jean Heino asked if Pan Am would be financially responsible in case of a disaster. Board member, Mr. Richardson said they could request a bond from Sea-3, Chairman Hebert said they couldn't ask Sea-3 to be financially responsible for Pan Am.

Mr. Gibbons said Seacoast Media received a response from that the FRA had a backlog of requests. He said he also read that Pan Am would not be responsible for any accidents. Ms. Scarano said the railroad carried a substantial amount of liability insurance.

Mr. Richard Langan asked if an environmental study needed to be done. Mr. Joe Calderola said he hadn't heard much about ground water recharge on the site plan. Chairman Hebert said this was a cursory review, and all of the information was not available yet, but they would get more information as they moved forward.

Ms. Laurie B, from Greenland said one of her concerns was that the tracks be improved to accommodate the increase in propane freight traffic. She asked if the trains would be running at a speed of 25 mph. Board member, Jack Pare said it sounded like they needed to do upgrades to travel at an increase speed, and Ms. Scarano acknowledged that they did. Ms. Scarano said the tracks were currently set up as a Class I for 10 mph, but they would be doing improvements to bring the rails up to a Class II that could go up to 25 mph, though they only intended to run them at 10 mph at this time.

Ms. Pat Ford of Spinnaker Point asked if there were be fewer trucks going out. Mr. Bogan said they used to send out 100-200 trucks a day when they were importing fuel, but this operation would only send out 50 trucks a day. Mr. DiPentima asked how they could verify a certain percentage would be shipped overseas, and Chairman Hebert said the Planning Board was not a regulatory commission.

Mr. Lou Salomi of Portsmouth asked what Sea-3's construction time table would be if approved. Mr. Bogan said they expected the project to take a year before it would be operational.

Town of Newington, NH PLANNING BOARD

Meeting Minutes – Monday, February 10, 2014

City Councilor Jack Thorsen asked what action they might take to pursue the use of freighters as an alternate to rails. Chairman Hebert said that would involve changing the Jones Act. Vice-Chair Hebert said that would also require a presidential signature. Mr. Bogan said they had looked into that alternative and were told they could get a short-term waiver, but they would also have to build a vessel in that time period, and they were not in that business. Mr. Thorsen said that was all the more reason to insist that the rails be safe.

Chairman Hebert said the Board could not deny Pan Am's operations, but they could say they needed more safety information from the FRA before they approved Sea-3's proposal for expansion. He said the FRA agreed to meet informally, but they said they wouldn't meet in public. He said the FRA was a servant of this country and they needed the FRA to meet in public for transparency so there would be no perception of behind door deals being made. Vice-Chair Marconi agreed with what Ms. Lamson said that a letter should be written to the congressional delegates to put pressure on the FRA to respond. Mr. Morgan said he had been working with Carol Shea-Porter's staff and Senator Shaheen to gain cooperation and they were preparing a letter to the FRA.

Chairman Hebert informed Sea-3 that they could voluntarily request an extension in writing until more information became available, or the Board of Selectmen or the Planning Board could vote for an extension. Mr. Bogan said he understood the concerns and they weren't avoiding the safety issue of a report from the FRA. Chairman Hebert said Mr. Bogan had been very cooperative with the Board.

Chairman Hebert continued the public hearing to March 10, 2014.

Justin Richardson asked if they would get comments on the project from the Fire Chief and Chairman Hebert said he would meet with the new Fire Chief himself. Mr. Stern said they might also need to review the standards with a qualified consultant.

3) Curb Cut Application: Request by **Victoria & Ben Auger** for a driveway off of **Swan Island Lane**, Tax Map 53, Lot 16.

This item was postponed to March 10, 2014 at the applicant's request.

4) Request for Comments pursuant to RSA 674:41 regarding a proposal by **Great Bay Marine, Inc.** to obtain a building permit to construct a residence off a private road, Tax Map 6, Lot 5.

No one appeared for this discussion so the Board moved on to the next item on the agenda.

5) Old Business: Request by **KWA, LLC** for an extension of site plan approval for office building development off **Shattuck Way**, Tax Map 7, Lot 2A.

John Chagnon, P.E., Ambit Engineering appeared before the Board requesting a two year extension for their application that was first approved in January 2010 and received an extension on December 2011.

EXHIBIT B

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, May 5, 2014

Board member, Justin Richardson said he wondered if a study would be helpful to accomplish the goals of the zoning ordinance and site plan regulations. He said he had trouble finding an appropriate role for a study. He said the public hearing already reviewed studies and it didn't seem like another study would be helpful and it would only be kicking the can further down the road.

Mr. Richardson read through "Uses Allowed" in the zoning ordinances and said a question of whether the use would create an over intensification of the area might be made in regards to the rails, but they would then be stepping outside of their jurisdiction. Mr. Richardson said the Board had been told the rail standards would be upgraded, and they could accept that finding to satisfy the criteria, or request a study to prove it, but there would need to be a determination first.

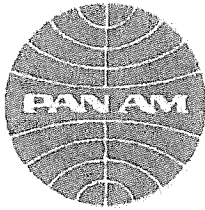
Town Planner, Tom Morgan said he started out asking the same questions. He said in November 2013 the Board determined if the project would have a regional impact. Mr. Morgan said he thought a study could help determine what that impact might be and to come up with some non-binding recommendations that would assist the communities that would be impacted. Mr. Richardson said he heard statements on the costs of upgrading crossings in surrounding communities, but he wasn't sure how the cost of the upgrades could be attributed to the Sea-3 project. Mr. Morgan said that was all the more reason to have a professional review. Chairman Hebert said a DOT and FRA representative had come before the Board to discuss their inspection process. He said the Federal government had set up a process so that towns could apply to the State and they would determine how to apportion a fair share of the cost. Mr. Richardson said there might be a need for a study, but it was challenging to define. Chairman Hebert said he didn't think the Board had the authority to ask the State to do a study on a crossing in another town. He said it was also a duplication of effort and cost to require a study that the State already did for free.

Mr. Pare said it might be useful as a part of their findings to include a copy of the RSA: 373 procedures that the town had to follow. He said they had heard from some towns, but not all, including Newfields. He said a letter to those towns that provided information and links to websites would be helpful to them.

Ms. Lamson said she thought an independent safety study was important for the regional impact consideration. Mr. Pare said something more than a paper study such as having the Rockingham Planning Commission or the UNH Complex Systems Group use their GIS capabilities and create a mapping system that would be available online to the surrounding fire departments for common coordinates would be more useful. He said right now they had text and he didn't think it would cost much for the applicant. Mr. Morgan said the study he envisioned would be broader than investigating rail crossings. He said he asked the director of the Rockingham Planning Commission if he would have any interest in administering such a study and was told he would need something specific. He said the Rockingham Planning Commission would be an appropriate agency to look at matters of concern outside of Newington.

Board member, Bernie Christopher said studies would be good except that the studies they already had were only political and didn't have any teeth to add more safety or anything. He said they were told that only the DOT and the FRA had authority

EXHIBIT C



PAN AM RAILWAYS

IRON HORSE PARK
NO. BILLERICA, MA 01862

LAW DEPARTMENT
(978) 663-1126

March 18, 2014

John J. Ratigan, Esq,
Donahue, Tucker & Ciandella, PLLC
225 Water Street
Exeter, NH 03833

Dear Attorney Ratigan:

Please accept this correspondence in response to your inquiry regarding the nature of the existing sidetrack located at the Sea-3 facility in Newington, New Hampshire and possible regulation of Pan Am's service to that side track. As a matter of both statute and case law, side tracks such as those located at the Sea-3 facility are subject to the exclusive jurisdiction of the United States Surface Transportation Board ("STB") pursuant to the Interstate Commerce Act ("ICA"). STB jurisdiction over transportation by rail carriers is established by 49 U.S.C. §10501 and is extremely broad, including jurisdiction over the construction, acquisition, operation, abandonment or discontinuance of side tracks, even if the tracks are located entirely in one state. *49 U.S.C. §10501(b)*. Moreover, "rail carrier" is defined as "...a person providing common carrier railroad transportation for compensation,..." and "railroad" includes "a switch, spur, track, terminal, terminal facility and a freight depot, yard or ground, used or necessary for transportation", while "transportation" is defined as, "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use", as well as services related to that movement.. *49 U.S.C. §10102(5), (6) & (9)*.

While there is a limited exception to STB jurisdiction for so-called "Private Tracks", that exception does not apply here because service to the Sea-3 facility will continue to be provided by Pan Am, which is a Class II rail carrier subject to the jurisdiction of the STB. Specifically, the STB has found, "Under the statute, the Board has jurisdiction over 'transportation by rail carrier'...and the term 'rail carrier' is defined as 'a person providing common carrier railroad transportation for compensation.' The agency's jurisdiction does not extend to private rail operations (those not operated for hire)...Private tracks constitute a narrow, limited category of rail operations...Operations over private tracks can be conducted by the shipper/owner itself, or the shipper/owner of the private track may arrange for a contractor to conduct operations over

the track. *B. Willis, C.P.A.—Petition for Declaratory Order*, STB Finance Docket 34013 (October 3, 2001).¹

With regard to the Sea-3 sidetrack, operations historically have been performed by a rail carrier subject to STB jurisdiction and not by a private contractor, and therefore the “Private Track” designation is not applicable and the STB retains jurisdiction. “In this proceeding, the Board has exclusive jurisdiction over the planned new track, and local regulation is preempted because the new track will be operated by rail carriers...as part of the interstate rail network. The fact that the track owner... is not itself a rail carrier is not relevant. And the fact that the new track is outside the Board’s licensing authority does not change this outcome.” *The New York City Economic Development Corporation—Petition for Declaratory Order*, STB Finance Docket No. 34429 (July 15, 2004). “Moreover, state and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations.” *Fletcher Granite Company, LLC—Petition for Declaratory Order*, STB Finance Docket No. 34020 (June 29, 2001).

Perhaps more importantly, however, the STB has recently held that whether or not the track at issue is Private Track is not determinative. Specifically, when the Town of Winchester, Massachusetts sought to regulate railroad operations on a side track owned by a customer, the STB found: “In interpreting the reach of §10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations...Applying these well-established preemption principles, we find that the Town’s actions here are preempted by §10501(b)” The STB also found that, “In any event, the dispute between the parties regarding the nature of the track immediately adjacent to the warehouse is not dispositive. Even if we assume this track is private track, this does not permit the Town to deprive Tighe of its federal right to receive common carrier rail service over the track.” *Boston and Maine Corp. and Springfield Terminal Rwy Co.—Petition for Declaratory Order*, STB Finance Docket No. 35749 (July 19, 2013). Interestingly, the STB also noted another recent decision regarding the scope of preemption pursuant to the ICA, citing a Fourth Circuit decision that found attempts to regulate interstate commerce indirectly by regulating truck traffic was also preempted by Section 10501(b), *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150 (4th Circuit, 2010). Perhaps most tellingly, the STB noted that:

“Otherwise, states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of regulations directed at shippers who would use the network, and thereby create the patchwork of conflicting local regulations that Congress sought to avoid in the Interstate Commerce Act.

¹ This exception to STB jurisdiction is also confused by the fact that the STB does not have licensing authority relating to the construction and operation of sidetracks. 49 U.S.C. §10906. In laymen’s terms, this means that no STB permit or license is required to construct or operate a sidetrack, but does not remove STB jurisdiction from the sidetrack.

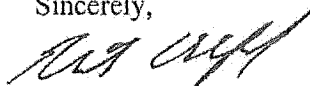
Furthermore, there is also a factual issue present here in the sense that Sea-3 has been receiving rail traffic at its existing siding for well over 30 years, and is not seeking to alter that siding in this proceeding before the Planning Board. Rather, additional trackage will be constructed on Pan Am's property to serve the expanded facility, further removing those new tracks from any Private Track designation.

As a final note, we are also concerned because the Planning Board has made repeated references to the proposed class of track and the possibility of conditioning Sea-3's use of rail to the condition of the track or other rail related issues. To be clear, any attempt to directly or indirectly regulate track speeds, track class or routing of propane would be preempted by the ICA and the Federal Railroad Safety Act ("FRSA").

While Pan Am appreciates the Planning Board's desire to address the safety of propane transportation and its belief that it may have some "police power" authority to do so, that authority is very narrow pursuant to the FRSA and the ICA. Specifically, the FRSA permits state regulation of railroad safety under certain circumstances, but this exception has been interpreted as being extremely limited in its application. In fact, courts have noted that "an essentially local safety hazard" is one that is not statewide in character and not capable of being addressed within national uniform standards. *Duluth, Winnipeg and Pacific Railway Company v. City of Orr*, 529 F.3d 794 (2008), *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (2005). In analyzing whether a condition meets this exception, courts have further found that such factors as: (a) proximity of buildings to railroad rights of way; (b) the location of propane tanks near the right of way; (c) the transportation of hazardous materials near the U.S. Capitol; and (d) the location of water bodies near the railroad tracks are all issues statewide in character and capable of being addressed by uniform national regulation. Furthermore, courts have also examined the other two prongs of the local regulation exception in the FRSA, noting that local governmental attempts to regulate track conditions and hazardous materials routing would also conflict with federal regulations and unduly burden interstate commerce. Accordingly, none of the conditions discussed to date by the Planning Board or any other municipality in this proceeding would meet the exception to preemption established by the FRSA. To be clear, therefore, while Pan Am is willing to voluntarily improve the existing track conditions should Sea-3 transport by rail sufficient volumes to support those improvements, the Planning Board does not have any jurisdiction to require such upgrades or the continued maintenance of them.

I trust that this information is responsive to your inquiry. In addition, Cyndi Scarano and I are available to meet with you this week to discuss this matter further, and I would ask that you propose some dates to meet with you in your offices if you feel that would be appropriate.

Sincerely,



Robert B. Culliford
Senior Vice President &
General Counsel

EXHIBIT D

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

THE CITY OF PORTSMOUTH
1 Junkins Avenue
Portsmouth, New Hampshire 03801

v.

NEWINGTON PLANNING BOARD
205 Nimble Hill Road
Newington, New Hampshire 03801

**PETITION FOR APPEAL OF THE TOWN ON NEWINGTON PLANNING
BOARD'S DECISION PURSUANT TO RSA 677:15, I AND 677:15, I-a (a)**

NOW COMES the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue and appeals a decision by the Town of Newington Planning Board pursuant to RSA 677:15, I and RSA 677:15 I-a (a) as follows:

PARTIES

1. The Petitioner/Appellant is the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801 ("City").
2. The Newington Planning Board is a local land use board established by the Town of Newington pursuant to RSA 673 ("Planning Board").

JURISDICTION AND VENUE

3. The Zoning Ordinance of the Town of Newington requires that the Planning Board review site plans pursuant to its Site Plan Review Regulations. (RSA 674.43, RSA 674.44, Town of Newington Site Plan Review Regulations, Section 1).
4. This Court has jurisdiction pursuant to RSA 677:15, I and RSA 677:15, I-a (a). Venue is proper pursuant to RSA 507:9.

BACKGROUND

5. Sea-3 Inc. ("Sea-3") owns two parcels of property located off Shattuck Way in Newington, New Hampshire. These two lots are divided and separated by the rail way owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways ("Pan Am").

6. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas (“LPG”) by ship to distribute domestically by rail and truck.
7. The first parcel is depicted on the Town of Newington’s Tax Map at Map 20, Lot 13 (“Lot 13”). This parcel is 7.02 acres located within both the General Industrial District (“I”) and the Waterfront Industrial and Commercial District (“W”). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.
8. The second parcel is depicted on the Town of Newington’s Tax Map at Map 20, Lot 2 (“Lot 2”). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District (“W”). Lot 2 contains a small building, 3 rail berths with pipelines to transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.
9. Sea-3 has submitted an application (“Application”) for the Newington Planning Board’s review and approval to reconfigure its property and construct improvements to convert its operation from one that imports foreign LPG for domestic distribution by rail and truck to one that primarily exports domestic LPG received by rail and truck to foreign markets by ship.
10. This change in use requires construction of new facilities on the site to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site for distribution to primarily foreign markets.
11. The improvements proposed by Sea-3 are located on three separate parcels, on Lots 13 and 2 as described above and on land owned by Pan Am that includes the railway and surrounding property that divides Lots 13 and 2. The proposed improvements are as follows:
 1. Lot 13: The installation of new piping to transport LPG to tanks located on Lot 13;
 2. Lot 2: The construction of three 90,000 gallon storage tanks, unloading compressors, pumps, condensers, dryers and heaters along with a machinery building for refrigeration equipment and the relocation of the flare tower; and
 3. Property owned by Pan Am: The construction of five rail unloading berths new rail sidings and new pipes to transport LPG from Lot 2 to the storage tanks on Lot 13.

12. Pan Am is not the Applicant and only after (7) seven public hearings was the site plan revised to list Pan Am as the owner of the property described above.

13. There is no lease between Pan Am and Sea-3 for the use of Pan Am's property described above.

PROCEDURAL HISTORY

14. In August of 2013, Sea-3 submitted preliminary site plans of the project to the Newington Town Planner.

15. By letter dated October 28, 2013, the Town of Greenland requested that the Sea-3 project be deemed a development of regional impact pursuant to RSA 36:54-58.

16. By letter dated October 30, 2013, Sea-3 challenged the determination by the Newington Town Planner that both Lots required variances from Article VI and Article XIII of the Newington Zoning Ordinance because the Lots did not have sufficient frontage on a public right of way and did not comply with minimum set backs.

17. On November 5, 2013, Sea-3 filed an Application for site plan review with the Newington Planning Board.

18. On November 6, 2013, Sea-3 filed an Administrative Appeal of the Town Planner's decision that variances were required and also filed for a variance requests for the frontage and set back issues raised by the Town Planner.

19. On November 25, 2013, the Zoning Board of Adjustment held a public hearing on Sea-3's administrative appeal and variance requests. The Zoning Board of Adjustment denied the administrative appeal but granted Sea-3's request for variances.

20. On December 9, 2014, the Town of Newington deemed the project a "development of regional impact" pursuant to RSA 36:55.

21. A "developments of regional impact" is a project that will impact neighboring communities for various reasons, including but not limited to the project's proximity to another communities border, the project's effect on the transportation network and its effect on anticipated emissions such as light, noise, smoke, odor or particles or proximity to aquifers or surface water that transcends municipal boarders. See RSA 36:55, II-V.

22. Notice was sent to the Rockingham Planning Commission and four affected communities, including the City of Portsmouth, the Town of Greenland, the Town of Statham and the Town of Newfields in order for the Commission and these affected communities to have appropriate notice in order to provide comment on the project to the Planning Board for its consideration. See RSA 36:54-58.

23. Public hearings were held on the Sea-3 project on December 9, 2014, February 10, 2014, March 10, 2014, March 24, 2014, April 14, 2014 and May 5, 2014.

24. The City of Portsmouth actively participated in these public hearings, including but not limited to the attendance, submission of written testimony, submission of letters and public comment by the following: Senator Martha Fuller Clark, Mayor, Robert Lister, Assistant Mayor, Jim Splaine, City Councilors Ester Kennedy, City Councilor Stephany Shaheen, City Councilor Jack Thorsen, City Officials, including City Manager John P. Bohenko, Deputy City Manager Dave Allen, Environmental and Sustainability Director Peter Britz, and numerous concerned citizens from Portsmouth, including but not limited to Rich DiPentima, Catherine DiPentima, Lewis Brown, Joe Calderola, Abdullah Alhamdan, Pat Ford, Beth Moreau, Bob Gibbons, Jean Heino, Richard Langan, John Sutherland, Jane Sutherland, David Rheahme, and Lou Salomi. The City Council also voted unanimously not to support the project.

25. The City of Portsmouth, through those participants listed above, initially raised concerns about rail safety because Sea-3's proposal would increase the volume and speed of railcars transporting hazardous materials through its residential neighborhoods and through its downtown. This concern prompted United States Senators Jeanne Shaheen and Kelly Ayotte and Congresswoman Carol Shea-Porter to request the Federal Railroad Administration to inspect the tracks, and later to request a comprehensive safety study of the rails. In addition, the City met with Department of Transportation and officials from Pan Am on the issue of rail safety and created a website with pertinent documents regarding Sea-3's Application.

26. Through the public hearing process the City, through various participants, repeatedly raised its concerns about rail safety and requested that the Planning Board require rail safety reports and hire an expert to assess rail safety. However the Planning Board denied these requests due to its belief that federal preemption, pursuant to the Interstate Commerce Commission Termination Act, prohibited the Planning Board from addressing any site-related or site-specific issues that touched on the rails or "railway operations."

27. However, in addition to rail safety, the City, through those participants mentioned above, repeatedly and vociferously requested that the Planning Board require a comprehensive safety and/or security review of the full scope of Sea-3 proposal, including but not limited to a hazard identification and vulnerability assessment, an environmental risk assessment and an analysis of emergency response for the impacted communities, physical security assessments and incident /hazards response analysis. ("safety/hazard assessment").

28. Site Plan Review Regulations authorize the Planning Board to require "any other exhibits or data that the Planning Board may require in order to adequately evaluate the proposed development for site review." Section 8, (q), Town of Newington Site Plan Review Regulations.

29. The Planning Board uniformly denied all requests from the City for a safety/hazard assessments and granted Sea-3's site plan Application at its May 19, 2014 meeting, conditioning approval on receipt of an updated "safety plan" from its site plan approved in 1996 before a building permit will issue.

31. The City appeals the Planning Board's decision as unlawful and unreasonably for the reasons set forth below, but primarily because the Planning Board's failed and refused to require a safety/hazard assessment after repeated requests from the City before approving Sea-3's site plan.

STANDING

32. A non-abutter has standing to appeal a decision of a Planning Board if the Court finds, after a review of the facts, that the party has sufficient interest in the outcome. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541 (1979).

33. The Weeks Court lists certain factors that must be considered when evaluating whether a non-abutter has standing:

... Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case. The trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.

119 N.H. at 544-45.

34. The Court in Weeks also opined that the list of factors was not exhaustive and that Courts should consider "any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding." Weeks at 544-45.

35. In several recent cases, the Supreme Court has further discussed these factors established by Weeks in evaluating whether a non-abutter has standing to appeal, and has further defined what it means to be "directly affected". Golf Course Investors of New Hampshire v. Town of Jaffrey, 161 N.H. 675 (2011); Hannaford Brothers Co. v. Town of Bedford, 164 N.H. 764 (2013).

36. Participation in administrative hearings before land use boards, although not the only factor, is a major factor the Court will consider in determining whether a non-abutter has a direct, definite interest in the outcome and is a person directly affected. See Golf Course Investments at 684.

37. Standing will not be extended to all persons in the community who feel they are injured by a local administrator's decision (Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006)); or those who only have a generalized interest in the outcome of a decision of land use board (Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 451-52 (1995)); or those who allege a speculative injury (Joyce v. Town of Weare, 156 N.H. 526 (2007)); or to those whose only injury is potential economic loss due to business competition. See also Hannaford at 769.

38. Proximity:

The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. Any significant logistical issues relating to bringing materials into the Sea-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.

39. Type of Change of Use:

The type of change of use requested by Sea-3 is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conduction operations or unreasonably burden interstate commerce, its decision to allow Sea-3's expansion has caused an impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail throughout the City.

40. Immediate Impact:

The impact of Sea-3's expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of fire fighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

41. Participation in administrative hearings:

As previously stated, the City submitted written testimony, letters and provided thoughtful, well researched and pointed public comment during the seven public hearings. There were more citizens, elected officials and staff from the City than any other stakeholder or representatives of any other towns at most of these hearings.

42. Towns are not “isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries.” Britton V. Chester, 133 NH 434, 441 (1991).

43. Newington is not an isolated enclave. It must promote, and at least give meaningful consideration to, the general welfare of the City. Its failure to do so, and its unwillingness to order or provide for a safety/hazard assessment was a decision that clearly does not promote, but hinders – or at least largely and unreasonably ignores- the general welfare of the City. At the same time, Newington will receive a financial benefit from the tax revenue it receives from Sea-3, Newington is imposing a financial burden on the City to improve roads and to provide services of its first responders, all while it denies the City its request for a safety/hazard assessment of the project.

44. The City anticipates that its standing to bring suit will be challenged. This challenge will likely be based on the fact that the City became an abutter when it was given notice by the Town of Newington that the project of was development of regional impact because RSA 36:57 defined abutters “for the limited purpose of notice and providing comment”.

45. However, the Court must look at the statutory scheme as a whole, in that RSA 36 is the enabling legislation for the creation of the Regional Planning Commissions, which are “political subdivision of the state” as established in RSA 36:49-a and have only the authority expressly provided for in the statute, providing that “nothing in this subdivision shall be deemed to reduce or limit any of the powers, duties or obligations of planning boards in individual municipalities.” RSA 36:47.

46. The statutory scheme of RSA 36 was carefully drafted to create and empower these Commissions without granting them the ability to rest control from local land use boards. Thus, the limitation as an abutter for the limited purpose of notice and comment may apply to the Rockingham Regional Planning Commission, but not to the City of Portsmouth, as it has demonstrated above that it is a “person aggrieved” and a “person directly affected”.

47. The City of Portsmouth is a “person aggrieved” and “person directly affected” for the aforementioned reasons and it has a direct define interest in the outcome of the Planning Board’s decision to grant Sea-3’s Application and appeals the decision of the Newington Planning Board because it was unlawful and unreasonable.

PROCEDURAL ERRORS AND IRREGULARITIES

A. FAILURE TO COMPLY WITH REQUIREMENTS OF RSA 36

49. The only mention by the Planning Board regarding a safety/hazard assessment is in one of its conditions of approval dated May 19, 2014. The fifth condition provides as follows:

5. Several safety plans were adopted in conjunction with the original Sea-3 site plan approval. They shall be reviewed by Sea-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.”

50. The City, as an abutter, through its Mayor, Assistant Mayor, City Manager, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Department require a safety study/hazard assessment of the site and of this particular expansion and use intensification prior to approval of the site plan.

51. The Planning Board’s condition of approval requires that Sea -3 update “safety plans” and submitted to “public officials (including the Newington Fire Chief) for its review and approval prior to the issuance of a building permit.”

52. The requirement that this safety plan be submitted directly to “public officials”, after site plan approval and outside the scope of any public hearing process violates the intent and purpose of (the site plan regulations themselves and) RSA 36, which requires Newington land use boards to give prompt, advance and effective notice to affected communities that the pending development proposal will have “regional impact,” in order to facilitate comment on the project before it is approved by the Newington Planning Board.

53. Review of updated “safety plans” – outside the public hearing process and the scrutiny of residents of the Town and abutters from other affected municipalities – denies the affected communities a meaningful opportunity to review, understand and comment on how these “updated safety plans” affect their communities. The Planning Board’s post-approval “update” condition denies the City and others the opportunity to comment on these “safety plans,” in violation of RSA 36 and constitutes a procedural error. As such, the Planning Board’s decision to approve the Application should be overturned.

54. Nothing in the record indicates that the current Planning Board or any of its members reviewed these original “safety plans” referenced in condition five. Sea-3’s last site plan was in 1996 when they expanded their facilities. The Planning Board does not have the same members it did almost 20 years ago. And even if they did, federal

regulations regarding the transportation, handling and storage of LPG has changed as well as surrounding populations, abutters and transportation routes which would render the original safety plans outdated. It is also unclear from the condition what "plans" the Planning Board is referring to as, on information and belief, there are six different "plans" or reports in the 1996 site review file.

55. The Planning Board's approval of the site will increase truck and rail traffic throughout more than just the four affected communities that received notice. The scope of this project's impact was too narrowly defined and as such, other affected communities did not receive adequate notice in violation of RSA 36, and as such, the Planning Board's decision to approve the site plan was unlawful and unreasonable and should be overturned.

56. In addition to the Planning Board's violates the intent and purpose of RSA 36, the Planning Board's approval of a site plan without first reviewing a site/hazard assessment is in violation of Newington's Site Plan Regulations.

B. DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

57. The City was prejudiced and other abutters were prejudiced in the Planning Board's delay in declaring this a "development of regional impact."

58. A request that this project be deemed a "development of regional impact" was received by the Town on October 28, 2013 but the Town delayed until December 9, 2013 to declare the project a "development of regional impact"

59. RSA 36:56 provides that a "local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. **Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.**" Emphasis added.

60. The appeal and request for variances were filed on November 6, 2013 and noticed for Zoning Board of Adjustment hearing on November 25, 2013, at which time the appeal was denied and the request for variances was granted.

61. Abutters were not given notice of the hearing and were denied the ability to comment on the project.

62. Failure of the Town to give abutters notice of application for variance, after request received almost one month prior, was procedural error and as such, unreasonable and unlawful.

C. FAILURE TO ABIDE BY SITE PLAN REVIEW REGULATIONS

1. Public Health, Safety and Welfare

63. Planning Boards must abide by and properly apply their own site plan regulations. The Newington Site Plan Regulations explicitly require compliance "in all respects [with] any and all pertinent ordinances and regulations." Town of Newington Site Plan Regulations, Section 2. The Site Plan Regulations expressly indicate that the purpose of site plan review "is to protect the public health, safety and welfare; ...[and] to avoid development which may result in negative environmental impacts." Town of Newington Site Plan Regulations, Section 2. In fact, Section 19 of the Site Plan Regulations provides the Board with the ability to require the applicant to reimburse it and the Town for "administrative expenses and costs of special investigation and other matters," including review by consulting engineers or other consultants to assess the environmental impact, hydrological impact ground water quality impact, traffic impact, or any other study deemed necessary by the Planning Board in order to make an informed decision. Town of Newington Site Plan Regulations, Section 19. As previously stated, the City, through its citizens, Mayor, Assistant Mayor and City Councilors, City Manager, City Staff and numerous citizens repeatedly requested that the Planning Board require and review safety study/hazard assessment. The Planning Board repeatedly denied all requests by the City (and individual citizens of the City of Portsmouth) to perform a meaningful and professional assessment of the safety and health consequences of the proposed expansion and intensification of the use of the property.

64. The Planning Board's refusal to conduct, or direct the applicant to conduct or pay for a proper, meaningful, professional and up to date safety, health, welfare and environmental assessment of the potential impacts of the proposed expansion and intensification of the use of the property was unreasonable and unlawful. The Planning Board's failure to require a proper safety, health, welfare and environmental impact assessment was a gross and unreasonable abuse of its discretion. Under the circumstances, the Planning Board was required to evaluate the site, and given the nature of the use of land requested, the increased distribution, storing and chilling of LPG, a hazardous material, it should have required and reviewed a safety plan/ hazard assessment before approving the site plan.

65. Specifically, the Town of Newington Site Plan Review Regulations provides:

Sites for non-residential development shall be reviewed so as to minimize traffic congestion, traffic hazards, unsightliness, annoyance to other nearby land uses, erosion and other effects detrimental to the abutter, the neighborhood, the environment of the Town. In order to attain these goals, the Planning Board shall determine that:

- e) loading
- h) light, glare, odor, noise
- i) street (access)

l) The public health, safety and welfare will be otherwise protected

66. The Planning Board could not determine that the public's health, safety and welfare would be protected if it never reviewed a safety study/hazard assessment before granting site plan approval. Any "update" to "safety reports" received after approval of the site plan could not support the Planning Board's finding prior to their receipt that the project would promote the health, welfare and safety of the public without first reviewing any such assessment.

67. In addition to the City, a safety/hazard assessment was recommended by the Newington Town Planner, who acknowledged abutters concerns on safety and recommended the name of firm to Planning Board. This recommendation was ignored.

68. The only safety/hazard report reviewed by the Planning Board was a "Study of the Safety Impacts of Ethanol Transportation by Rail through Boston, Cambridge, Chelsea, Everett, Somerville, & Revere" dated March 29, 2013, which was brought to the Board's attention by a private citizen in order to demonstrate that safety and health assessments were understood to be appropriate in these sorts of circumstances. The Planning Board ignored the study and the purpose for which it was offered, finding "the circumstances of this study are not related to this application". Minutes of Town of Newington, NH, Planning Board, May 19, 2014.

69. In addition to its authority under Section 19 of the Site Plan Regulations, the Planning Board had the power to require additional exhibits or data to assist in adequately evaluating the proposed development for site review. Town of Newington Site Plan Regulations, Section 8(q). The Board's failure to seek further data, and to require a professional assessment of this proposal was unlawful and unreasonable, and its decision should be overturned, and the matter remanded to the Planning Board with directions to conduct the study and seek relevant current data on the project with public comment.

70. "Municipalities do not exist solely to serve their own residents and thus their regulations should promote the general welfare, both inside and outside their boundaries." Britton, 134 N.H. at 441.

71. The failure to address safety, hazards and environmental concerns and concluding the project promoted the health safety and welfare of the public was unlawful and unreasonable. The decision of the Planning Board should be overturned, and the matter should be remanded back to the Planning Board with instructions from the Court to conduct or cause the Applicant to conduct a proper, professional and current assessment of the impacts of the proposed development, in accordance with the Newington Site Plan Regulations.

2. Loading, Street Access, Traffic

72. The Planning Board approved the site plan without receiving a traffic study. The Planning Board received a memorandum, not a traffic impact study, from the Applicant

that was reviewed by the Town's own expert, Dirk J. Grotenhuis, PE, LEED, AP. In a peer review memorandum dated April 10, 2014, the Planning Board's own expert concluded that Sea-3's memorandum was incomplete and affirmed this opinion during his comments at the April 14, 2014 Planning Board Meeting. See Minutes of Town of Newington, NH Planning Board, April 14, 2014. The Planning Board's finding in paragraph 24, inaccurately summarized Mr. Grotenhuis' opinion on the incompleteness of the memorandum and failed to address his concerns about the lack of information provided in the traffic memorandum submitted by the Sea-3.

73. A representative of Sea-3 at the public hearings represented that there would be no change in the number of trucks because it would only process 10 trucks per hour. The Town's own retained expert, however, drafted a memorandum to the Newington Town Planner, raising 11 unanswered questions and issues that were Mr. Grotenhuis indicated had not been adequately addressed by Sea-3, including, but not limited to: (i) the inability to assess effects on the adjacent highway because there was no information on peak hour trips; (ii) the potential for queuing or congestion at the entrance or adjacent intersections and queuing on site; (iii) the fact that there was no information regarding the difference between off loading from ships versus rails and that no data was provided relating to public highway safety records (vehicle crashes) or the occurrence and location of vehicle crashes on nearby roads and intersections. The Board's failure to address these questions and shortcomings, or require the applicant to address them, was unreasonable and unlawful.

74. The proposed expansion would transform the facility from a seasonal facility to a year round operation, impacting traffic during the summer months and there was no analysis provided by Sea-3 regarding how this change in use would affect traffic.

75. Planning board decisions must be based on more than mere opinions. Smith v. Town of Wolfeboro, 136 N.H. 337, 344 (1992).

76. While a municipal body "is entitled to rely, in part, upon its own judgment and experience when reviewing applications for various land uses, its decision...must be based upon more than the mere personal opinion of its members." Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003).

77. The Planning Board may not base its decision solely on its opinion, ignoring its own expert recommendations, relevant questions, and concerns. Failing to address their own expert's concerns regarding incomplete information regarding the potential impact of the project on traffic was unreasonable and unlawful. On this basis, the decision of the Planning Board should be overturned and the matter should be remanded back to the Planning Board with instructions from the Court to address the traffic issues raised by Mr. Grotenhuis, as required by the Site Plan Regulations.

3. Failure to Address the Issue of Odor of Hazardous Materials/Substances

78. Federal safety regulations differ when transporting, handling and storing nonodorized rather than odorized LPG. LPG is odorized in order for a leak to be detected. Unodorized LPG is impossible to detect without special sensors.

79. In discussing the issue of odorant in LPG, the Town of Newington's own expert engineer recommended that a condition of approval be that LPG was odorized.

80. The Planning Board ignored its own expert's recommendation and made no such condition of approval.

81. The Planning Board has authority to impose conditions reasonably related to the purpose set forth in the site regulations to promote safe and attractive development, even if those conditions not specifically mentioned in ordinance. Summa Humma Enterprises, LLC d/b/a MB Tractor v. Town of Tilton. 151 N.H. 75, 78-79 (2004).

82. No discussion of federal regulations regarding requirements of odorizing LPG was presented by Sea-3 to the Planning Board. Sea-3 indicated that it would be an odorless facility, thereby making LPG gas undetectable if it leaked. Failure of the Planning Board to inquire regarding federal regulations on required odorization of LPG was unreasonable and unlawful.

83. There was an assessment of the site performed by SFC Engineering Partners, Inc. for the benefit of the Town. In both its January, 2014 and April, 2014 report it required "details of any non-odorized LPG to be stored at the site" before a permit could be issued. These report indicate that the Planning Board's own expert and the Planning Board did not have adequate information regarding whether LPG would be unodorized at the site, and that information is critical to determine and assess the safety of the site and its impact on the public's health, welfare and safety and the Planning Board's approval of the site plan without adequate information regarding whether LPG would be odorized or non-odorized was unlawful and unreasonable and as such, the Planning Board's decision should be overturned.

84. No information regarding the properties of LPG gas was provided to the City after several requests, other than a reply from Planning Board members that "it evaporates". There was evidence submitted to the Planning Board that LPG is not lighter than air and goes to ground when it leaks, presenting a completely different risk to the public health and safety. Failure of the Planning Board to ascertain the properties of LPG and its potential risk to the public's health and safety prior to granting site plan approval was unlawful and unreasonable.

85. Condition 4 states that final design plans shall meet the requirements of the NH Fire Code and NFPA Code. Perhaps in other types of site review final plans are not required before a site plan is approved but when the Planning Board is charged with evaluating the project of this nature with inherent risk to public's health, safety and welfare, approving the site plan without critical information necessary to determine compliance with state and federal fire codes as required by the Newington Zoning

Ordinance, Article V, Section 6, D (3) a-c, was unlawful and unreasonable and the Planning Board's decision should be overturned.

4. **The Failure to Address Issues Relating to Light, Noise, Air and Water Quality**

86. The Planning Board did not evaluate whether the site would have an effect on air quality due to idling trucks and increase rail traffic. Sea-3 will operate 24 hours a day, 365 days a year, 7 days a week. Truck traffic will queue, start and stop, idle, increase rail traffic will increase and no evaluation regarding the cumulative impact from fumes from diesel engines, increase ship stack emissions, any emissions from flares was reviewed by the Planning Board's. The Planning Board's lack of review of impact on air quality was in violation of its site review regulations and was unlawful and unreasonable, and therefore the decision of the Planning Board should be overturned.

87. In addition to the impact on air quality, there was no information presented or any assessment of the noise due to idling trucks and increase rail traffic and noise from idling railcars, noise from flare on tanks, noise from ships or any noise from emergency generators. The Planning Board is required to assess noise in evaluating a site plan and its failure to do so was unreasonable and unlawful and therefore its decision should be overturned.

88. Because no information on peak hours of trucks was given and no assessment on the impact on light and glare was assessed in contravention of the site plan review regulations. Also, SFC Engineering Partners, Inc. never reviewed a site lighting plan. Approving a site plan without assessing the sites lighting plan and its impact is in violation of site plan review regulations and as such, the decision of the Planning Board was unlawful and unreasonable and should be overturned.

89. If public water is being used, and there is a catastrophic event at the site, no analysis was done regarding the adequacy of the water supply and how it would affect abutting communities. Failing to assess the site's impact on the water supply was unlawful and unreasonable and the decision of the Planning Board should be overturned.

5. **The Applicant's Failure to Demonstrate Its Right, Title and Interest in and to the Subject Property**

90. Throughout the review of the Application at seven (7) public hearings, the Applicant maintained that Pan Am was not an applicant, perhaps as part of a plan to ensure that Pan Am did not itself submit to local land use authority and retain the full leverage of its constant assertion of "federal preemption" of all such local regulation. Late in the hearing process, however, it was finally revealed that a portion of the proposed improvements to the site are located on land owned by Pan Am, not on land owned by the Applicant. The Applicant represented that it would have a lease with Pan Am in the future for the use of its land, but never represented that it had a lease for the

use of the property at the time of the Application and at the time of the decision of the Planning Board. Pan Am represented that the lease was being negotiated.

91. Newington Site Plan Review Regulations provide that Applications must be properly complete; site plans must show entire property and all facilities and name and address of owners of record. See Newington Site Plan Review Regulations, Section 7(a), (b) and (d).

92. Paragraph 19 of the Planning Board's findings indicate that the Applicant would add a second means of emergency access to the site over the property of Pan Am Railways. However, the Applicant may not add any additional access to the site over property it does not own, have an easement or have a lease.

93. Because the Applicant did not have right, title and interest to part of the land upon which site improvements and a second means of emergency access are to be located, the decision of the Planning Board to grant the Application was unlawful and unreasonable and should be overturned.

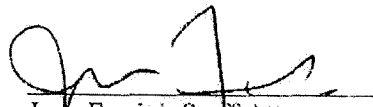
WHEREFORE, the City respectfully prays that this Court grant it the following relief:

A. That the decision of the Planning Board be overturned and the Application should be denied; or

B. In the alternative, that the Court remand this matter back to the Planning Board to comply with site plan review regulations which include, but are not limited to requiring a traffic study and a safety/hazard assessment be performed and reviewed by the Planning Board and by abutting communities after proper notice pursuant to RSA 36 for further public hearings on the Application; and

C. For such other and further relief as the Court may deem appropriate.

The City of Portsmouth
By and through its Attorney

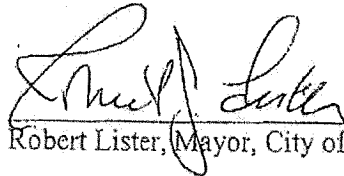


Jarle Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

VERIFICATION

I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

Dated: June 16, 2014


Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.

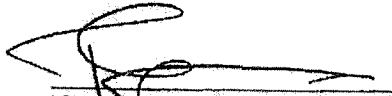

~~Notary Public/Justice of the Peace~~
Commission Expires 9/18/14

EXHIBIT E

Town of Newington, New Hampshire

Application Form

Zoning Board of Adjustment

Appellant		Applicant's Agent	
Property Owner			
Name	City of Portsmouth	Name	_____
Address	1 Junkin Ave Portsmouth NH 03801	Address	_____
Telephone	603 610 7256	Telephone	_____
Fax	603 427 1577	Fax	_____
Email	jferrini@cityofportsmouth.com	Email	_____

Location of Property	Fee
Address <u>Shattuck Way</u>	\$50
Tax Map <u>20 Lot 13</u>	
Tax Map <u>20 Lot 2</u>	

Applicant's Request(s)

(Check applicable requests)

- Variance from Article _____ in order to _____
- Special Exception to allow _____
- ~~Administrative Appeal~~ Appeal from the decision of Newington Planning Board on 5/19/14 (date) regarding site plan approval for Sea-3 Inc.
See attached.
- Equitable Waiver of Dimensional Requirements
- Rehearing

Property Owner's Consent

I have read Newington's land use regulations and will comply with all the requirements therein.

Jane M. Ferrini
 Signature(s) of all property owners & date signed
 Jane M. Ferrini,
 Staff Attorney
 City of Portsmouth

STATE OF NEW HAMPSHIRE

THE CITY OF PORTSMOUTH'S APPEAL OF THE DECISION OF THE
NEWINGTON PLANNING BOARD TO APPROVE THE SITE PLAN OF SEA-3 INC.
PURSUANT TO RSA 676:5, III AND RSA 677:15, I-a (a)

PARTIES

1. The Petitioner is the City of Portsmouth, a municipal corporation with an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801.
2. The Newington Planning Board is a local land use board established by the Town of Newington pursuant to RSA 673.
3. The Town of Newington's Zoning Ordinance requires that the Planning Board review site plans under its Site Plan Review Regulations. No site plan will be approved until it complies in all respects to any and all pertinent zoning ordinances. (RSA 674.43, RSA 674.44, Town of Newington Site Plan Review Regulations, Section 1 and 2).
4. This City appeals the decision of the Planning Board pursuant to 676:5, III and 677:15, I-a (a) because it misapplied and misinterpreted the Newington Zoning Ordinance.

BACKGROUND

5. Sea-3 Inc. ("Sea-3") owns two parcels of property located off Shattuck Way in Newington, New Hampshire. These two lots are divided and separated by the rail way owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways ("Pan Am").
6. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas ("LPG") by ship to distribute domestically by rail and truck.
7. The first parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 13 ("Lot 13"). This parcel is 7.02 acres located within both the General Industrial District ("I") and the Waterfront Industrial and Commercial District ("W"). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.
8. The second parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 2 ("Lot 2"). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District ("W"). Lot 2 contains a small building, three (3) rail berths with

pipelines to transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.

9. Sea-3 has submitted an application (“Application”) for the Newington Planning Board’s review and approval to reconfigure its property and construct improvements to convert its operation from one that imports foreign LPG for domestic distribution by rail and truck to one that primarily exports domestic LPG received by rail and truck to foreign markets by ship.

10. This change in use requires construction of new facilities on the site to accommodate a substantial increase in volume of LPG that will be received, stored, chilled and distributed from the site for distribution to primarily foreign markets.

11. The improvements proposed by Sea-3 are located on three separate parcels, on Lots 13 and 2 as described above and on land owned by the owner of the rail lines, Pan Am, which includes the railway and surrounding property that divides Lots 13 and 2. The proposed improvements are as follows:

1. Lot 13: The installation of new piping to transport LPG to tanks located on Lot 13;
2. Lot 2: The construction of three 90,000 gallon storage tanks, unloading compressors, pumps, condensers, dryers and heaters along with a machinery building for refrigeration equipment and the relocation of the flare tower; and
3. Property owned by Pan Am: The construction of five rail unloading berths new rail sidings and new pipes to transport LPG from Lot 2 to the storage tanks on Lot 13.

12. Pan Am is not the Applicant and only after seven (7) public hearings was the site plan Application presented to the Planning Board revised to list Pan Am as the owner of the property described above.

13. There is no lease between Pan Am and Sea-3 for the use of Pan Am’s property described above.

PROCEDURAL HISTORY

14. In August of 2013, Sea-3 submitted preliminary site plans of the project to the Newington Town Planner.

15. By letter dated October 28, 2013, the Town of Greenland requested that the Sea-3 project be deemed a “development of regional impact” pursuant to RSA 36:54-58.

16. By letter dated October 30, 2013, Sea-3 challenged the determination by the Newington Town Planner that both Lots required variances from Article VI and Article

XIII of the Newington Zoning Ordinance because the Lots did not have sufficient frontage on a public right of way and did not comply with minimum set backs.

17. On November 5, 2013, Sea-3 filed an Application for site plan review with the Newington Planning Board.

18. On November 6, 2013, Sea-3 filed an Administrative Appeal of the Town Planner's decision that variances were required and also filed for variance requests for the frontage and set back issues raised by the Newington Town Planner.

19. On November 25, 2013, the Zoning Board of Adjustment held a public hearing on Sea-3's administrative appeal and variance requests. The Zoning Board of Adjustment denied the administrative appeal but granted Sea-3's request for variances.

20. On December 9, 2014, the Town of Newington Planning Board deemed the project a "development of regional impact" pursuant to RSA 36:55.

21. A "development of regional impact" is a project that will impact neighboring communities for various reasons, including but not limited to the project's proximity to another community's border, the project's effect on the transportation network and its effect on anticipated emissions such as light, noise, smoke, odor or particles or proximity to aquifers or surface water that transcends municipal boarders. See RSA 36:55, II-V.

22. Notice was sent to the Rockingham Planning Commission and four affected communities, including the City of Portsmouth, the Town of Greenland, the Town of Stratham and the Town of Newfields, in order for the Commission and these affected communities to have appropriate notice in order to provide comment on the project to the Planning Board for its consideration. See RSA 36:54-58.

23. Public hearings were held on the Sea-3 project on December 9, 2014, February 10, 2014, March 10, 2014, March 24, 2014, April 14, 2014 and May 5, 2014.

24. The City of Portsmouth actively participated in these public hearings, including but not limited to the attendance, submission of written testimony, submission of letters and public comment by the following: Senator Martha Fuller Clark, Mayor Robert Lister, Assistant Mayor Jim Splaine, City Councilors Ester Kennedy, City Councilor Stephany Shaheen, City Councilor Jack Thorsen, City Officials, including City Manager John P. Bohenko, Deputy City Manager Dave Allen, Environmental and Sustainability Director Peter Britz, and numerous concerned citizens from Portsmouth, including but not limited to Rich DiPentima, Catherine DiPentima, Lewis Brown, Joe Calderola, Abdullah Alhamdan, Pat Ford, Beth Moreau, Bob Gibbons, Jean Heino, Richard Langan, John Sutherland, Jane Sutherland, David Rheaume, and Lou Salomi. The Portsmouth City Council also voted unanimously not to support the project.

25. The City of Portsmouth, through those participants listed above, initially raised concerns about rail safety because Sea-3's proposal would increase the volume and speed

of railcars transporting hazardous materials through its residential neighborhoods and through its downtown. This concern prompted United States Senators Jeanne Shaheen and Kelly Ayotte and Congresswoman Carol Shea-Porter to request the Federal Railroad Administration to inspect the tracks, and later to request a comprehensive safety study of the rails. In addition, the City met with Department of Transportation and officials from Pan Am on the issue of rail safety and created a website with pertinent documents regarding Sea-3's Application.

26. Through the public hearing process the City, through various participants, repeatedly raised its concerns about rail safety and requested that the Planning Board require rail safety reports and hire an expert to assess rail safety. However the Planning Board denied these requests due to its belief that federal preemption, pursuant to the Interstate Commerce Commission Termination Act, prohibited the Planning Board from addressing any site-related or site-specific issues that touched on the rails or "railway operations."

27. However, in addition to rail safety, the City, through those participants mentioned above, repeatedly and vociferously requested that the Planning Board require a comprehensive safety and/or security review of the full scope of Sea-3 proposal, including but not limited to a hazard identification and vulnerability assessment, an environmental risk assessment and an analysis of emergency response for the impacted communities, physical security assessments and incident /hazards response analysis. ("safety/hazard assessment").

28. Site Plan Review Regulations authorize the Planning Board to require "any other exhibits or data that the Planning Board may require in order to adequately evaluate the proposed development for site review." Section 8, (q), Town of Newington Site Plan Review Regulations.

29. The Planning Board uniformly denied all requests from the City for a safety/hazard assessment and granted Sea-3's site plan Application at its May 19, 2014 meeting, conditioning approval on receipt of an updated "safety plans" from Sea-3's prior site plan approval in 1996 before a building permit will issue.

30. The City has also appealed the Planning Board's decision to the Superior Court pursuant to RSA 677:15, I and RSA 677:15, I-a (a). for its failure to properly apply its site review regulations.

31. The City appeals the Planning Board's decision as unlawful and unreasonably because it misapplies and misinterprets the Town of Newington Zoning Ordinance as more fully set forth below.

STANDING

32. A non-abutter has standing to appeal a decision of a Planning Board if the Court finds, after a review of the facts, that the party has sufficient interest in the outcome. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541 (1979).

33. The Weeks Court lists certain factors that must be considered when evaluating whether a non-abutter has standing:

... Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case. The trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.

119 N.H. at 544-45.

34. The Court in Weeks also opined that the list of factors was not exhaustive and that Courts should consider "any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding." Weeks at 544-45.

35. In several recent cases, the Supreme Court has further discussed these factors established by Weeks in evaluating whether a non-abutter has standing to appeal, and has further defined what it means to be "directly affected". Golf Course Investors of New Hampshire v. Town of Jaffrey, 161 N.H. 675 (2011); Hannaford Brothers Co. v. Town of Bedford, 164 N.H. 764 (2013).

36. Participation in administrative hearings before land use boards, although not the only factor, is a major factor the Court will consider in determining whether a so-called non-abutter has a direct, definite interest in the outcome and is a person directly affected. See Golf Course Investments at 684.

37. Standing will not be extended to all persons in the community who feel they are injured by a local administrator's decision (Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006)); or those who only have a generalized interest in the outcome of a decision of land use board (Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 451-52 (1995)); or those who allege a speculative injury (Joyce v. Town of Weare, 156 N.H. 526 (2007)); or to those whose only injury is potential economic loss due to business competition. See also Hannaford at 769.

38. Proximity: The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and

Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. Any significant logistical issue relating to bringing materials into the Sea-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.

39. Type of Change of Use: The type of change of use requested by Sea-3 is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conducting operations or unreasonably burden interstate commerce, its decision to allow Sea-3's expansion will cause a material and substantial impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail throughout the City.

40. Immediate Impact: The impact of Sea-3's expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by the City and its taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of fire fighters and equipment, in the event of an incident at the site. The City taxpayers will pay for this burden but will not receive any of the tax benefit Newington receives from Sea-3. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a potentially substantial diminution in value of certain property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

41. Participation in administrative hearings: As previously stated, the City submitted written testimony, letters and provided thoughtful, well researched and pointed public comment during the seven public hearings. There were more citizens, elected officials and staff from the City than any other stakeholder or representatives of any other towns at most of these hearings.

42. Towns are not "isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries." Britton V. Chester, 133 NH 434, 441 (1991). This is particularly true where, as in this matter, the municipalities are closely connected by economic and resource concerns, and where the municipalities effectively share infrastructure and logistics.

43. Newington is not an isolated enclave. It must promote, and at least give meaningful consideration to, the general welfare of the City. Its failure to do so, and its unwillingness to order or provide for a safety/hazard assessment was a decision that clearly does not promote, but hinders – or at least largely and unreasonably ignores – the general welfare of the City. At the same time, Newington will receive a financial benefit from the tax revenue it receives from Sea-3, Newington is imposing a financial burden on the City to improve roads and to provide services of its first responders, all while it denies the City its request for a safety/hazard assessment of the project.

44. The City anticipates that its standing to bring suit will be challenged. This challenge will likely be based on the fact that the City became an abutter when it was given notice by the Town of Newington that the project of was development of regional impact because RSA 36:57 defined abutters “for the limited purpose of notice and providing comment”.

45. However, the Court must look at the statutory scheme as a whole, in that RSA 36 is the enabling legislation for the creation of the Regional Planning Commissions, which are “political subdivision of the state” as established in RSA 36:49-a and have only the authority expressly provided for in the statue, providing that “nothing in this subdivision shall be deemed to reduce or limit any of the powers, duties or obligations of planning boards in individual municipalities.” RSA 36:47.

46. The statutory scheme of RSA 36 was carefully drafted to create and empower these Commissions without granting them the ability to rest control from local land use boards. Thus, the limitation as an abutter for the limited purpose of notice and comment may apply to the Rockingham Regional Planning Commission, but not to the City of Portsmouth, as it has demonstrated above that it is a “person aggrieved” and a “person directly affected”.

47. The City of Portsmouth is a “person aggrieved” and “person directly affected” for the aforementioned reasons and it has a direct define interest in the outcome of the Planning Board’s decision to grant Sea-3’s Application and appeals the decision of the Newington Planning Board because it misapplied and misinterpreted its Zoning Ordinance.

THE PLANNING BOARD MISINTERPRETED AND MISAPPLIED THE NEWINGTON ZONING ORDINANCE

ZONING DISTRICT

48. No site plan will be approved until it complies in all respects to any and all pertinent ordinances and regulations. Town of Newington Site Plan Regulations, Section 2.

49. Article III, Section 1 of the Newington Zoning Ordinance divides the Town of Newington into different districts or zones and provides that “the boundaries of these districts are hereby established as shown on the Official Zoning Map. Said map is hereby made a part of this ordinance.”

50. Article III, Section 3 provides that “unless otherwise indicated, the district boundary lines are the nearest lot lines, the center lines of the streets or such lines extended, pier head or bulk head lines, or the town boundary lines.”

51. Zones districts must be described with certainty. Nottingham v. Harvey, 120 NH 889 (1980).

52. The fixing of zoning lines is a matter of legislative discretion and necessarily results in classifications of uses on either side of the line. Windham v. Alford, 129 NH 24, 31 (1986).

53. Each district has separately delineated “Description and Purpose”, uses permitted and uses prohibited and no district incorporates by reference the description and purpose, uses permitted and prohibited from any other district.

54. Article IV, Section 1 of the Town of Newington Zoning Ordinance, provides that “no structure shall be erected, constructed, reconstructed, moved or altered unless in conformity with all regulations herein specified for the district in which it is located. The omission of a use from the list of those allowed in a particular district constitutes prohibition of that use in that district.”

55. Lot 13 is in both the “I” and “W” district and Lot 2 is in the “W” district. The Town of Newington Zoning Map clearly bisects Lot 13 with one half of the lot closer to the railroad being in the “W” district and the other half located in the “I” district. The lot line passes through the smaller of the two LPG storage tanks on the lot.

56. Storage above or below the ground of any explosive or hazardous fluid (including waste), toxic or noxious matter, or material causing odor, dust, fire hazard, smoke, gas or fumes is a use prohibited in the General Industrial “I” Zone. Town of Newington Zoning Regulation, Article V, Section 5, C (3).

57. Storage and handling of above or below the ground of any material which is explosive, toxic, noxious, or capable of causing odor, dust, fire hazard, smoke, gas, or fumes shall be a permissible use in the Waterfront Commercial District when the use complies with the shipping, handling and storage requirements and regulations of the National Fire Protection Association Standards (NFPA), Department of Transportation (DOT) and Environmental Protection Agency (EPA). Town of Newington Zoning Regulations, Article V, Section 6, D (3) a-c.

58. LPG is explosive and a fire hazard. The storage tank partially located in the “I” zone is, therefore, not a permitted use under the current zoning ordinance, therefore, on

information and belief, this tank is either currently unlawful or was a pre-existing non-conforming use and no variance has been granted to allow this nonconforming use in the "I" District.

59. The Applicant did not request a variance for the tank in its present Application. Article XIII, Section 1 of the Zoning Ordinance expressly provides that "non-conforming uses and non-conforming structures shall not be enlarged, expanded or extended." Absent a variance or proof that the site proposal does not "enlarge, expand or extend" the existing non-conformity, the Applicant's operations currently run afoul of the Zoning Ordinance and the proposal simply exacerbates a non-conforming use, in violation of New Hampshire law.

60. Paragraph 50 of the Minutes of May 19, 2013, sets forth Findings whereby "[t]he Board expressly finds that this proposed expansion of a long-standing use that is permitted in the Industrial Zone is consistent with the aim of Newington Zoning Ordinance Article V, Section 5, A, which anticipates that land zoned Industrial will be able to accommodate "expansion of existing industry.. and to enhance economic development and employment opportunities."

61. However, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because storage and handling a gas that is explosive material and is a fire hazard and is not a permitted use in the General Industrial Zone, of which Lot 13 is a part.

62. Paragraph 51 of the Findings set forth in the Planning Board's minutes of May 19, 2014 states that "[t]he Board expressly finds, as is required by Newington Zoning Ordinance Article V, Section 5, B that per the terms of this site plan application, "the proposed location, construction and operation will not injure present or prospective industrial development in the district, or the health and welfare of residential districts in the vicinity". The Board expressly finds that this application is precisely the type of business development and land use that the Industrial District is intended to protect and promote."

63. Again, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because storage and handling of LPG, an explosive material that is a fire hazard, is a prohibited use in the General Industrial Zone.

64. Paragraph 52 of the Findings set forth in the Planning Board's minutes of May 19, 2014 states that "[t]he Board expressly finds and recognizes that, in the aftermath of the recent economic recession, the importance of supporting business in the Industrial District, and promoting economic development and local employment, cannot be understated as an important purpose of this Industrial District."

65. Yet again, the Planning Board misinterprets and misapplies the Town of Newington's Zoning Ordinance because the storage and handling of explosive material and material that is a fire hazard is a prohibited use in the General Industrial District.

66. The Planning Board's approval of the site plan was based on its reliance on a provision of the Zoning Ordinance that prohibits the proposed use at the site and as such, the Planning Board's decision was illegal and unreasonable and should be reversed.

67. Because the tank is a non-conforming and not a permitted use, at a minimum, the Applicant's request, involving the site's expansion to increase the delivery, storage and distribution of LPG, is an impermissible expansion of a non-conforming use. Because no variance was granted, the Planning Board misapplied the Zoning Ordinance, and as such, its decision to approve the site plan should be overturned.

PUBLIC HEALTH SAFETY AND WELFARE

68. Article 1 of the Town of Newington's Zoning Ordinance provides that the purpose of the zoning ordinance is to "promote the health, safety, morals, convenience and general welfare of the community" and Article 3 provides that the purpose of the ordinance is for "promoting the health, safety, morals, prosperity, convenience or general welfare."

69. The Planning Board misapplied and misinterpreted Article 1 and Article 3 of the Zoning Ordinance because it did not require and review a safety/hazard assessment prior to granting site plan approval.

70. The only mention by the Planning Board regarding a safety/hazard plan is in one of its conditions of approval dated May 19, 2014. The fifth condition provides as follows:

5. Several safety plans were adopted in conjunction with the original Sea-3 site plan approval. They shall be reviewed by Sea-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.

71. The City, through its Mayor, Assistant Mayor, City Councilors, City Manager, City Staff and citizens, as evidenced in the record, repeatedly and vociferously requested that the Planning Board require a safety study/hazard assessment of the site prior to approval of the site plan.

72. The Planning Board's condition of approval requires that Sea -3 update "safety plans" submitted to "public officials (including the Newington Fire Chief) for its review and approval prior to the issuance of a building permit."

73. The requirement that this safety plan be submitted directly to "public officials", after site plan approval and outside the scope of any public hearing process violates the intent and purpose of RSA 36 that requires Newington to give prompt and effective notice to affected communities of "development of regional impact" in order to facilitate comment on the project.

74. Review of updated “safety plans” -outside public hearing process and the scrutiny of residents of the Town and abutters from other affected municipalities- denies the affected communities the opportunity to review, understand and comment on how these “updated safety plans” affect their communities. The Planning Board’s post-approval “update” condition denies the City and other the opportunity to comment on these “safety plans” in violation of RSA 36 and constitutes a procedural error and also violates the Zoning Ordinance because approving a site plan without a safety/hazard assessment does not promote the health, safety and general welfare of the community, which in this case, includes the City, and as such, the Planning Board’s decision to approve the Application should be overturned.

75. Nothing in the record in the current proceeding indicates that the Planning Board or any of its members reviewed these original “safety plans” referenced in condition five. Sea-3’s last site plan was in 1996 when they expanded their facilities. The Planning Board does not have the same members it did almost 20 years ago. And even if they did, federal regulations regarding the transportation, handling and storage of LPG has changed, as have surrounding populations, abutters and transportation routes, rendering the original plans outdated. It is also unclear from the condition what “plans” the Planning Board is referring to as, on information and belief, there are six different “plans” or reports in the 1996 site review file.

76. The Planning Board’s approval of a site plan without first reviewing a site/hazard assessment was a misapplication and misinterpretation of the Zoning Ordinance as it could not evaluate whether the site promoted the health welfare and safety of the public without first reviewing a site/hazard assessment.

77. Because the Planning Board misinterprets and misapplied the zoning ordinance, its decision should be reversed and the Application denied.

DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

78. The City was prejudiced and other abutters were prejudiced in the Zoning Board’s delay in declaring this a “development of regional impact”.

79. A request that this project be deemed a “development of regional impact” was received by the Town on October 28, 2013, but the Town delayed until December 9, 2013 to declare the project a development of regional impact.

80. RSA 36:56 provides that a “local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. **Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.**” RSA 36:56 (emphasis added).

81. The appeal and request for variance was filed on November 6, 2013 and noticed for Zoning Board of Adjustment hearing on November 25, 2013, at which time the appeal was denied and the request for variance was granted.

82. Abutters were not given notice of the hearing and were denied the ability to comment on the project.

83. Failure of the Town to give abutters notice of application for variance, after request received almost one month prior, was a procedural error and as such, unreasonable and unlawful.

CONCLUSION

84. For all the foregoing reasons, the Zoning Board of Adjustment should deny the approval of the site plan. In the alternative, the Zoning Board of Adjustment should remand the matter to the Planning Board for further proceedings consistent with the Town of Newington's Zoning Ordinance.

The City of Portsmouth
By and through its Attorney

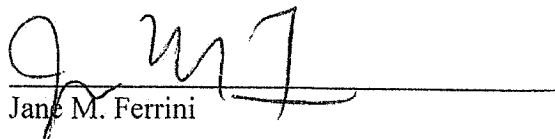


Jane M. Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

CERTIFICATE OF SERVICE

I, the undersigned, Jane Ferrini, Attorney for the Appellants, the City of Portsmouth, hereby certify that on this 17 day of June, 2014, a true and correct copy of the foregoing Appeal was served upon the Town of Newington and hand delivery to the following counsel of record:

John Ratigan, Esquire
225 Water Street
Exeter N.H. 03833

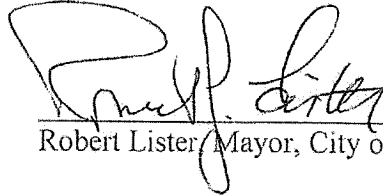


Jane M. Ferrini

VERIFICATION

I, Robert Lister, Mayor of the City of Portsmouth, being first duly sworn according to law, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

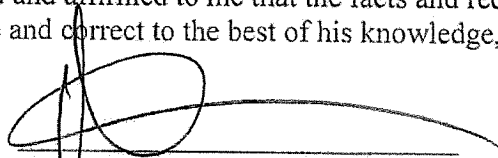
Dated: June 16, 2014



Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

Personally appeared the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of his knowledge, information, and belief.



Notary Public/Justice of the Peace
Commission Expires 9/18/14

EXHIBIT F

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, March 10, 2014

only recourse they would have to protect the public's safety would be to deny the application. Attorney McEachern said it would be illegal to do so because the town did not have the authority to regulate railroad operations. He said they could only enforce their zoning in respect to Sea-3's property, and could not deny the application based on the railroad lines, which was under Federal jurisdiction only. Mr. Richardson said some of the cases ruled that towns were in their authority to deny an application when it did not comply with the zoning ordinance when considering the health, safety and welfare of the public. Mr. Richardson asked if they were to accept that there was a capital improvements plan to upgrade the railroad without any documentation. Attorney McEachern said they had to rely on Federal law in respect to their jurisdiction of the railroad.

Chairman Hebert said he understood what Attorney McEachern was saying in regards to Federal jurisdiction of the railroad lines, but asked if Sea-3 if they would be willing to tell Pan Am they would not accept LPG delivery by rail unless they brought the railroad lines up to safe standards. Attorney McEachern replied that they were suggesting another party besides the FRA regulate the rails and that was illegal.

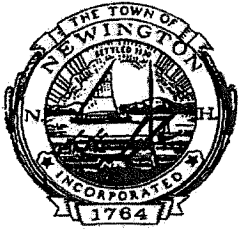
Ms. Susan Parker of 23 Bayridge Road in Greenland asked if an environmental study be done and what the change of classification might do to the environment. Mr. Killoy said the railroad owned the tracks and it was in their interest to make the tracks stable. Ms. Parker said as a former executive for the Department of Labor she knew how regulations change over time based on new science. She said she thought she heard Mr. Killoy say senators had to go through the same process to obtain information from the Freedom of Information Act just as citizens did. Mr. Killoy said senators couldn't release information without going through the process. Ms. Parker said her experience was that if a Senator Harkin sent a letter, an answer would be expected.

Attorney Chris Cole, a representative for several citizens of Portsmouth said neither he nor his clients were trying to regulate the rails, but they were trying to help the Town regulate this site because it had important safety implications. He asked to look at site-specific questions and didn't think Federal law would agree that was the limit of the Planning Board's power. He said they also wanted to ensure the site could handle the ingress and egress of traffic with propane. Attorney Cole referred to his letter requesting a comprehensive study for the 20 million gallons of propane they were bringing in annually. Chairman Hebert said he planned on asking Pan Am those questions later as they progressed through the review of the proposal.

Mr. Lou Salomi of Spinnaker Way asked what it would take to get the rails to Class II and who would decide if the speed would stay at 10 mph or if it could go up to 25 mph. Mr. Salomi read from a study that said out of 40,000 incidents, there was no loss of product when the train's speed was less than 5 mph, but even at 10mph there was a great risk of damages.

Chairman Hebert asked Pan Am for clarification on whether they were only keeping their speeds at 10mph prior to an upgrade and when they would be upgrading. Ms. Scarano said Pan Am was there to answer questions, but repeated that they were

EXHIBIT G



PLANNING
BOARD

The Town of Newington New Hampshire

Incorporated 1764

May 21, 2014

Paul Bogan, Vice President
Sea-3
190 Shattuck Way
Newington, NH 03801

RE: Proposed Terminal Expansion, 190 Shattuck Way,
Tax Map 14 Lot 2, and Map 20, Lot 13

Dear Mr Bogan:

On May 19, 2014, the Newington Planning Board voted to approve your proposal to reconfigure your terminal in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and to export same via ocean-going ships and via truck to customers in New England. The vote was subject to the following stipulations:

- 1) Trucks exiting the SEA-3 facility shall make a right hand turn only and shall travel north on Shattuck Way to the Spaulding Turnpike's Exit 4.
- 2) The SEA-3 facility shall be authorized to receive no more than 16 rail tank cars carrying LPG per day. Any proposal by SEA-3 to receive more than 16 tank cars carrying LPG per day shall require further site plan review and approval by the Newington Planning Board.
- 3) Any lease between SEA-3 and Pan Am (or their successors or assigns) on land leased to SEA-3 for the siting of the unloading racks and other improvements to be constructed and operated by SEA-3 on such leased land, shall contain a provision that SEA-3 shall remove all such improvements prior to any termination of the lease. The lease shall further provide that if SEA-3's operation is ever moved or discontinued, such improvements shall not be transferred to Pan Am. These required lease provisions shall be submitted to the Planning Board for review and approval by the Board and its legal counsel, and any proposal to amend such lease provisions shall require the pre-approval of the Planning Board.
- 4) The final design and plan shall meet the requirements of the N.H. Fire Code and the NFPA Code, per the opinion of the Newington Fire Chief and the Town's Fire Safety Consultants.

- 5) Several safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.
- 6) If, after the track has been upgraded to a Class II status, SEA-3 learns, or has reason to know, that the Class II track has degraded to a lower level of service, or there is a carrier mandated reduction in rail car deliveries to 5 cars or less, the Selectmen and the Planning Board shall be notified in writing by SEA-3 of this reduction in the level of service within seven (7) business days of receiving such information. This is to allow Newington officials to notify the proper authorities.

Should you have any questions on this matter, feel free to contact me, or Town Planner Tom Morgan, at 436-1252.

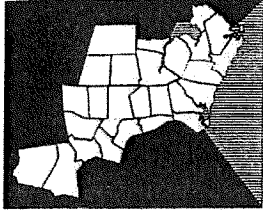
Yours truly,



Denis Hebert Chairman
Newington Planning Board

cc: Alec McEachern, Esq.
Cynthia Scarano, Pan Am Railways

EXHIBIT H



Rockingham Planning Commission

121 Water Street, Exeter, N.H. 03833
603-778-0885 Fax 603-778-9183

May 30, 1996

Mr. Marlon S. Frink, Chairman
Newington Planning Board
205 Nimble Hill Road
Newington, N.H. 03801

Dear Mr. Frink:

This letter is in response to the abutters notice that the Rockingham Planning Commission (RPC) received regarding the site plan for Sea 3, Inc. to construct an 187,000 cubic foot refrigerated propane storage tank, located at 103 Old Dover Road in Newington.

A meeting of the RPC's Developments of Regional Impact Committee was held on May 29, 1996 to review the proposal. The Committee is composed of RPC Commissioners and RPC staff planners. The Committee reviewed a copy of the site plan (revision date March 8, 1996), prepared by Fluor Daniel and the minutes of the Newington Planning Board meeting of May 2, 1996. Based on their review, the Committee feels that the proposal could have a potentially serious regional impact in the area of public safety due to the intensification of an existing potential hazard. The Committee feels that the safety issues need to be addressed by the appropriate state and local public safety agencies. From a regional perspective, we fully support the Planning Board's hiring of an independent expert to review the proposal.

Thank you for the opportunity to provide input on the proposed development.

Sincerely,

Steven L. Bird
Assistant Director

/sb

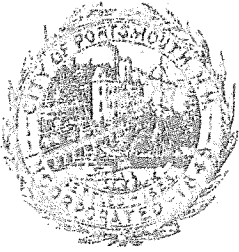
cc: Barbara Hill and Christopher Cross, RPC Commissioners - Newington
Martha Fuller Clark, David Holden, David Allen, Kevin Lafond, and Ken Smith, RPC Commission-
ers - Portsmouth
Arthur Parrott, Portsmouth Planning Board Chairman
RPC Developments of Regional Impact Committee Members

D:\RPC\COMMISSION\REGIMPAC\NEWING66.LET

Atkinson • Brentwood • Danville • East Kingston • Epping • Exeter • Fremont • Greenland • Hampstead • Hampton • Hampton Falls • Kensington • Kingston • New Castle
Newfields • Newington • Newton • North Hampton • Plaistow • Portsmouth • Rye • Salem • Sandown • Seabrook • South Hampton • Stratham • Windham

City of Portsmouth - 000068

EXHIBIT I



CITY OF PORTSMOUTH

Municipal Complex, P.O. Box 628
Portsmouth, New Hampshire 03802-0628
(603) 431-2000 Fax (603) 427-1526

May 31, 1996

Marlon S. Frink, Chairman
Newington Planning Board
205 Nimble Hill Road
Newington NH 03801

Re: Regional Impact Notice relative to proposed expansion of Sea-3's site by the construction of an additional 187,000 barrel refrigerated tank

Dear Mr. Frink:

On behalf of the Portsmouth Planning Board, I have had an opportunity with the Acting Planning Director, David Holden, to review particulars in regards to the above proposed expansion. Given that the town's public hearing on this request will occur prior to the Portsmouth Planning Board meeting for the month of June, I am offering the following comments in an attempt to address what may be a regional impact.

The expansion of this use does contain the potential for a regional impact in the area of public safety. It is proper for this issue to be identified and to be addressed. This use, if properly assessed, should prove to be a benefit to the region in meeting existing and future energy needs. However, public safety is an area that should be considered to the degree necessary.

Therefore, we urge the Newington Planning Board to seek additional expertise in the review of this proposal so that public safety issues can be properly addressed. I would like to thank the Board for this opportunity to provide input on this request.

Yours truly,

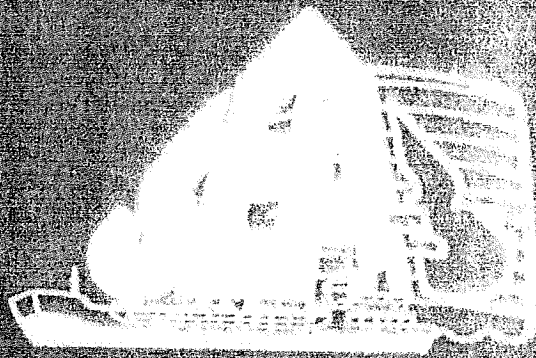
Arthur E. Parrott, Chairman
Planning Board

David M. Holden, Acting Planning Director

aep/dmh/bbd

cc: James A. McSweeney, City Manager
Honorable Mayor and Members of the City Council
Randal P. Sage, Chief, Fire Department
Planning Board

EXHIBIT J



SEA-3, Inc.
Newington, New Hampshire

LPG Import Terminal

***Hazard Modeling Study
for Additional Tankage***

May 1996



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APPENDIX A - Fire Control Systems and New Tank Position Drawing

1.0 INTRODUCTION

Sea-3, Inc. has initiated a project to expand the storage capacity at their LPG Terminal in Newington, New Hampshire. The project will involve the installation of a second LPG tank. The Newington Planning Board requested the execution and presentation of a *hazard modeling study* as a part of the permitting procedure. The goal of the hazard modeling study is to obtain a measure of the overall risk associated with the new tank and associated equipment, and to identify all elements and considerations which need to be applied to the detailed engineering in order to assure an acceptable risk level.

The hazard modeling effort was undertaken by the Process Safety and Reliability Group in Fluor Daniel's Houston Office. The study methodology was formulated with the intention of producing a useful, understandable study which meets the objective stated above. The technical approach employed in the study utilizes standard techniques which are currently recognized by the Process Safety industry.

In October of 1995, a Process Hazards Analysis (PHA) was performed on the existing tank and associated systems. The Occupational Safety and Health Administration (OSHA), requires operating facilities to conduct PHA as a means for hazard identification. PHA seeks to discover possible deviations from normal operation or design intention. In all cases, the cause of a deviation is examined, along with the associated consequences. Existing safeguards are documented, and, based on the PHA team's perception of the risk associated with the identified hazard, recommendations are made.

Thus, the PHA identified existing hazards and a number of potential loss-of-containment scenarios. Accordingly, the findings of the PHA were used as a starting point for the hazard modeling study. The modeling effort concentrates on a number of identified loss-of-containment scenarios, based in part on issues raised and discussed during the PHA. Each of the scenarios was computer-simulated to determine the extent of the resulting hazard zone as well as to obtain an estimate of the associated probability of occurrence.

The pages which follow provide the technical details underlying the preparation and development of the hazard modeling study.

2.0 FUNDAMENTALS OF HAZARD MODELING

2.1 Basic Terms

A *hazard* is formally defined as any condition which has the potential to result in human injury or equipment damage. Associated with every hazard is a certain amount of *risk*, where risk is a measure of projected loss expressed in terms of both the magnitude and likelihood of the expected damage. *Hazard modeling*, or *hazard evaluation*, is an attempt to obtain some measure of the risk associated with an identified hazard, generally in quantitative terms.

Thus, hazard evaluation involves two components: *consequence analysis* and *probability analysis*.

2.2 Introduction to Consequence Analysis

Consequence analysis involves the simulation of postulated accident scenarios to determine the potential effects on nearby population, equipment, or the environment. In general, the simulation is performed with the aid of computer software programs.

Consequence modeling generally involves the use of at least two distinct types of models, viz., *source term models* and *vapor dispersion models*. Source term models, often referred to as *discharge* or *outflow* models, are used to characterize the state of the material immediately upon release. As such, source term models calculate the release rate, liquid fraction, expanded temperature, and other conditions based on input such as process conditions, hole size, material properties, etc.

Dispersion models use the source term output as a starting point. Based on atmospheric conditions, it is then possible to determine the concentration-distance profile of the released vapor as it travels. In this manner, the dispersion model can be used to predict the *hazard zone*, i.e., the area within which the concentration is high enough that the flammable or toxic properties of the vapor cloud are considered significant.

Other models which may be used in a consequence analysis include: thermal radiation models which, for example, can be used to calculate the effects resulting from a liquid pool fire; explosion models, which compute the associated overpressure wave resulting from an explosion; and toxic impact models which help determine the effects of toxic vapor clouds on potential receptors.

The results of a consequence model for any given release case can be expressed in many different formats. Some of the most common include: the size of the hazard zone, or

cloud footprint, which is an indication of area potentially impacted; the number of people potentially exposed; and the monetary cost associated with equipment damage or lost production.

2.3 Probability Concepts

The definition of *probability* is fairly intuitive, but actually several meanings exist, and the distinctions are of some practical importance. Three useful definitions are:

- Equal Likelihood - If a situation has n equally likely and mutually exclusive outcomes and if n_A of these outcomes are event A , then the probability, $P(A)$, of event A is:

$$P(A) = \frac{n_A}{n}$$

This probability can be calculated *a priori* and without doing experiments. A good example is the toss of an unbiased die, which has six equally likely outcomes. The probability of throwing any individual number is 1/6.

- Relative Frequency - If an experiment is performed n times and if event A occurs on n_A of these occasions, then the probability, $P(A)$, of event A is:

$$P(A) = \lim_{n \rightarrow \infty} \frac{n_A}{n}$$

This definition of probability is the most widely used in engineering. In particular, it is this definition which is implied in the estimation of failure probability from field failure data.

- Personal Probability - This definition relates probability to a degree of belief. It is a numerical measure of the belief which a person has that an event will occur. A good example of this is a meteorologist's claim of, "70% chance of rain tomorrow." Personal probability is sometimes referred to as Bayesian probability.

Regardless of which definition is implied, a probability is a dimensionless number between 0 and 1. Related to probability is *frequency*, which is a measure of how often an event occurs over time. A frequency can be greater than 1 and must have units of time^{-1} . Examples of frequencies are: 6.4×10^{-4} per year, 3.1 per million hours, 3 per day.

The inverse of frequency is *recurrence period*, which indicates the expected length of time before a failure. Thus, an event with a frequency of 1.0×10^{-2} /year would be expected to occur approximately once every 100 years. Thus, for this event, the recurrence period, or *Mean Time Between Failures (MTBF)* is 100 years. Noteworthy is the fact that a high MTBF is indicative of high reliability.

A more general term is *likelihood*, which is often used to speak of probability or frequency interchangeably.

2.4 Introduction to Probability Analysis

Probability analysis is concerned with the calculation of the likelihood of identified accident scenarios. In general, this is based on some collection of failure data, although in some cases an estimate may be developed based solely on the basis of engineering judgement.

When dealing with complex failures or multiple-failure scenarios, an accurate analysis of event likelihood requires a *systems engineering* approach. A *system* is a composite set of devices, or subsystems. Each individual component or failure mode contributes in some way to the likelihood that the system will perform its required function. Accordingly, systems analysis requires a profound understanding of the logical relationships between the various failures and the various components which make up the system.

2.4.1 Basic Probability Relations

The following mathematical relations are fundamental to probability analysis and are integral to the systems approach.

Consider an event A , which has a probability of occurrence P_A . The event that A does *not* occur, $\sim A$, has a probability of $P_{\sim A}$ as given below:

$$P_{\sim A} = 1 - P_A$$

This relation is simply a consequence of the fact that events A and $\sim A$ are *mutually exclusive*, i.e., both cannot occur simultaneously, and they are *exhaustive*, i.e., they represent the entire range of possible outcomes and so their probabilities sum to 1 (i.e., 100%).

Thus, if event A represents system success, then event $\sim A$ represents system failure and:

$$P_{failure} = 1 - P_{success}$$

For any two *independent* events A and B , with probabilities P_A and P_B respectively, the probability that A and B both occur is the *intersection* of sets A and B as given below:

$$P_{A \text{ and } B} = P(A \cap B) = P_A \times P_B$$

For any number of *independent* events A, B, \dots, N with probabilities P_A, P_B, \dots, P_N respectively, the probability of all events occurring simultaneously is:

$$P_{all} = P\left(\bigcap_{i=A}^N P_i\right) = P_A \times P_B \times \dots \times P_N$$

Thus, for any number of independent *necessary events*, i.e., events which are required to satisfy a secondary condition, the probability of the secondary condition is calculated by multiplying the probabilities of the necessary events.

For the same two events A and B , the probability that at least one of them occurs is the *union* of sets A and B and is given as follows:

$$P_{A \text{ or } B} = P(A \cup B) = P_A + P_B - (P_A \times P_B)$$

The product $P_A \times P_B$ is subtracted to avoid "double-counting" the intersection. For small values of P_A and P_B , this product is negligibly small and the union can be calculated simply as the sum of P_A and P_B .

For independent events A through N , the probability of at least one occurring is given as follows:

Very often the probabilities considered are small enough that the higher order terms can

$$P_{\geq 1} = P\left(\bigcup_{i=A}^N P_i\right) = P_A + P_B + \dots + P_N - (P_A \times P_B) - (P_A \times P_C) - \dots - (P_{N-1} \times P_N) \\ + (P_A \times P_B \times P_C) + (P_A \times P_B \times P_D) + \dots \\ (P_{N-2} \times P_{N-1} \times P_N) + \dots (-1)^{n-1} (P_A \times P_B \times \dots \times P_N)$$

be neglected and the above equation reduces to:

$$P_{\geq 1} = P\left(\bigcup_{i=A}^N P_i\right) = P_A + P_B + \dots + P_N$$

Thus, for any number of independent *sufficient events*, i.e., those events where only one is required to satisfy a secondary condition, the probability of the secondary condition can be calculated by adding the probabilities of the sufficient events (given that the probabilities involved are small).

3.0 METHOD

3.1 General Approach

At the core of this hazard modeling study is a set of specified incident cases. Each incident represents a separate loss-of-containment scenario which may pose some degree of risk to exposed individuals. The list of cases is by no means exhaustive, but the selected cases are intended to be representative of a range of event types which could occur.

Each incident case was simulated to determine the potential effects if the incident were to happen. This was done using a state-of-the-art computer simulation program. The software uses fundamental equations of chemistry, physics, and thermodynamics to accurately model the behavior of hypothetical releases.

In addition to this analysis of consequences, the likelihood of each case was estimated. Toward this end, a survey of relevant data on equipment failures was conducted. The data survey was designed to identify and utilize available data which were most relevant to the Sea-3 facility.

3.2 Definition of Failure Cases

The release cases were selected based on engineering judgement and with reference to the recently conducted Process Hazards Analysis (PHA) study. The PHA utilized the "What-if" technique, which is a standard method for hazard identification and is one of the techniques specifically listed in the U. S. OSHA 1910.119 regulation.

One of the first steps in the hazard modeling study was a review of the PHA report. All cases where the PHA identified a possibility of loss-of-containment were highlighted and considered as candidates to be modeled. Following this, a meeting was conducted with members of the PHA team to discuss the candidates and make further suggestions.

Based on this selection process, the cases listed in Table 1 were determined to be a representative group.

3.3 Description of Failure Cases

The case descriptions given in Table 1 provide a concise characterization of each case and are relatively self-explanatory. Provided below are more detailed descriptions, which explain some of the assumptions and specificities which had to be conceived in order to develop a model for each case.

Table 1 List of Incident Cases

Case #	Case Description
1	Failure of a pump seal on one of the cold product pumps
2	Failure of the 2" line on the cold pump discharge piping
3	Failure in the 12" expansion joint on the suction side of the cold product pumps
4	Failure in the expansion joint in the area of the 16" fill line on the LPG tank
5	Instantaneous release of entire tank inventory

Pump Seal Leak

A typical event which can be expected to happen during the lifetime of any petroleum, chemical, or petrochemical facility is the failure of a mechanical seal on a pump. Typically, this event will have insignificant consequences. The only effect worthy of consideration is the relatively unlikely event that the released propane is ignited immediately and a jet fire ensues, producing a small ellipse of thermal radiation effects. With this in mind, this case was conservatively modeled as a ¼" leak with immediate ignition.

Downstream Pump Discharge Line Break

A loss-of-containment event which is more significant than a pump seal leak is a rupture of the pump discharge pipe. The case is modeled as a rupture of a 2" pipe, i.e., one of the branch lines associated with the pump discharge. The pressure driving the release is taken to be the pump discharge pressure.

Expansion Joint Failure on Pump Suction Line

With regard to larger loss-of-containment scenarios, the most credible leak sites are the expansion joints within the system. With this in mind, the third case was taken to be a failure of the 12" expansion joint on the suction side of the product pumps. This is modeled as having an equivalent hole diameter equal to 25% of the pipe diameter. Thus, it is modeled as a 3" hole at the normal operating pressure of the pump suction line.

Expansion Joint Failure on Tank Fill Line

Another event included in the analysis was a failure of the expansion joint on the 16" tank fill line. This line only contains propane during a filling operation, so the failure was modeled as occurring during such time. As above, the case is modeled as a significant crack in the joint, equal to 25% of the pipe diameter. Thus, the case is modeled as a 4" hole in the fill line at the operating pressure during a filling operation.

Instantaneous Release of Tank Inventory

Although no cases were identified for such an event anywhere in the world, this case is included solely at the request of the Newington Planning Board and for hypothetical reasons only. The case is modeled as an instantaneous release of 15,000 metric tons of refrigerated propane into the existing diked containment area.

4.0 CONSEQUENCE ANALYSIS

4.1 Input Data

The analysis of the consequences of a simulated release requires a considerable amount of data describing the release and the surrounding area. General types of input data include:

- Release conditions
- Meteorological conditions
- Other ambient/geological conditions
- Material properties

The material properties needed to model the cases are built into the software program. For modeling purposes, the releases were treated as pure propane.

4.1.1 Release Conditions

Release conditions include process conditions, such as pressure and temperature, and also other features which describe the release, such as hole size and release inventory. The process conditions were provided by Sea-3 personnel. Line sizes, valve locations, and other necessary inputs were obtained by a review of relevant Piping and Instrumentation Diagrams (P&IDs) obtained from Sea-3 personnel and projected to exist with the new installation.

The more important input data describing each case are given in Table 2.

4.1.2 Weather Conditions

In order to characterize the behavior of the vapor cloud upon release, it was also necessary to obtain data describing the typical and worst-case weather conditions in the area around the terminal. The most important of these data are wind speed and atmospheric stability.

Wind direction was not considered to be a critical piece of input. Despite the existence of a predominant wind direction, it is certainly the case that the wind blows toward each different direction (with greater or lesser probabilities) on different days throughout the year. Thus, hazard distances were calculated without regard to wind direction.

Table 2 Input Data for Each Case

Case #	Case Description	Process Conditions		Hole Diameter (in)	Comments
		Temp. (°F)	Press. (psig)		
1	Failure of a pump seal on one of the cold product pumps	-42	125	¼	
2	Failure of the 2" line on the cold pump discharge piping	-42	125	2	
3	Failure in the 12" expansion joint on the suction side of the cold product pumps	-42	21	3	Liquid head pressure for maximum liquid level of 95 ft
4	Failure in the expansion joint in the area of the 16" fill line on the LPG tank	-42	50	4	
5	Instantaneous release of entire tank inventory	-42	0	--	Maximum inventory of 15,000 tons

It was decided to use the following two weather categories to represent the range of conditions which could occur:

- Pasquill Stability Class *D* - 10 mph
- Pasquill Stability Class *F* - 3 mph

Pasquill stability categories range from *A* to *G*, with class *A* representing the least stable atmosphere. Class *D* is representative of neutral conditions (typical clear, daytime conditions) and stability class *F* indicates stable conditions. Typically, dispersion distances are greatest for stable air, at low wind speeds, i.e., the hazard zone tends to decrease with increasing wind velocity.

4.1.3 Other Ambient Conditions

Other ambient conditions which affect the case modeling is as follows:

- Ambient Temperature - 80°F
- Relative Humidity - 70%
- Surrounding Terrain - Open countryside; some hills

4.2 PHAST Software

The consequence analysis was carried out using PHAST (Process Hazards Analysis Software Tool), which is a state-of-the-art software package for conducting such studies. PHAST allows engineers to examine the progress of a potential incident from initial release, through the formation of a cloud and/or pool, to its dispersion. The program automatically applies the correct entrainment and dispersion models as the conditions change. PHAST integrates these models such that the transition from one behavior pattern to another is smooth and continuous.

For operating plants, PHAST can help to identify the major sources of hazard from releases of toxic or flammable materials. Action can then be taken to reduce the hazard and/or to establish emergency procedures.

The program's results are presented in tables which show the concentrations and flammable effects against distance for a range of weather conditions and wind speeds.

Hazardous Releases

The consequences of a release from process equipment or pipework vary depending on such factors as physical properties of the chemical, its toxicity or flammability, weather

conditions and mitigation factors. The effects may impact plant personnel or inhabitants of surrounding houses. Buildings both onsite and offsite may be damaged.

When using PHAST, the engineer defines the release scenario by specifying the equipment involved. This could be, for example, the rupture of a vapor line from a pressurized storage tank. From the material released, line size and tank information, PHAST estimates the discharge and dispersion rates to calculate the ground level concentrations along the path of the release. Blast and radiation effects are also calculated for flammable materials.

Discharge

Pipe and tank leaks and ruptures, relief valve venting, reactor runaway and tank explosions are some of the causes of a hazardous release. The volume of material and its release rate are key factors in determining the effects.

PHAST calculates the release rate and velocity for the conditions specified by the user. The release may be liquid, vapor or mixed phase from an atmospheric, pressurized or cryogenic tank.

The catastrophic failure of a tank is modeled by PHAST as an instantaneous release whereas a leak or rupture releases material over a period of time. The release rate may be affected by heat from an external fire or from an internal reaction.

Dispersion

When a vapor or volatile liquid is released, it forms a cloud which may, or may not, be visible. The cloud is carried downwind as vapor and as suspended liquid droplets and is dispersed by mixing with air until the concentration falls to a safe level. PHAST automatically determines the quantity of droplets in the cloud and also calculates the distance to pre-defined concentrations.

The cloud initially expands rapidly because of the energy of the material until the pressure drops to atmospheric. A heavy cloud spreads over the ground and air is entrained due to the momentum of the release. The turbulence of the cloud assists uniform mixing.

As concentration drops, atmospheric turbulence becomes the main mixing mechanism and a concentration profile develops across the cloud. PHAST predicts which phenomena manifest themselves, the sequence in which they occur and calculates all related parameters.

The main factors in determining the relevant phenomena are:

- Cloud Density
- Height and Direction of Release
- Discharge Velocity
- Storage Temperature
- Ground Conditions
- Weather

4.3 Hazardous Effects Considered

A number of distinct hazardous effects were considered in this analysis and are discussed in turn below.

Jet Fire

A jet fire results when a high-momentum release ignites very close to the source of ignition. The result is a jet of ignited material oriented in the direction of the release which presents an elliptical footprint of thermal radiation effects, where the edges of the ellipse represent the thermal radiation endpoint criterion. The hazard distance is reported as the distance to the downwind edge of the ellipse. This conservatively assumes that there are no obstacles in the path of the jet.

Pool Fire

A pool fire results when a liquid spill of flammable material is ignited. Radiation effects can be felt downwind of the pool. The hazard distance is reported as the distance to a set radiation level.

Flash Fire

A flash fire occurs when a dispersing cloud of flammable vapor encounters an ignition source at some distance downwind from the release point. The result is a short-lived flame which "flashes back" toward the source of the release. In a flash fire, the flame speed is low enough (ca. 14 ft/s) such that no overpressure wave is produced. The effect distance for a flash fire is given as the dispersion distance to the LFL (Lower Flammable Limit), since this is the farthest point downwind at which ignition could occur.

Vapor Cloud Explosion

A vapor cloud explosion originates similarly to a flash fire. The difference is that the

flame speed approaches sonic velocity, thereby producing an overpressure wave, which will potentially result in a circle of blast damage. This analysis conservatively assumes that the blast circle will be centered about the ignition source. Thus, the maximum hazard distance can be considered as the dispersion distance to the LFL plus the blast radius, since this is the farthest distance downwind at which the blast damage will be realized.

4.4 Endpoint Criteria

As a released vapor cloud travels downwind, it becomes less and less concentrated, eventually reaching a point where it is no longer considered hazardous. A dispersion model produces a concentration vs. distance profile for the release and can produce results down to very low concentrations. Generally, the results of the calculation are reported at a specific point of interest. The conditions at which the models are commanded to stop are referred to as the *endpoint criteria*. The results of a dispersion model are often given as the distance at which this endpoint is reached.

Propane, like other flammable materials, has *flammable range* of concentrations where a mixture of flammable gas and air can be ignited. The flammable range is bounded by the *limits of flammability*, viz., the *Upper Flammable Limit (UFL)* and the *Lower Flammable Limit (LFL)*. At concentrations above the UFL the cloud is too rich to support ignition; below the LFL the mixture is too lean. Thus, after a cloud of flammable material has dispersed below its LFL concentration, it is no longer capable of supporting ignition and may therefore be considered non-hazardous.

Thus, for purposes of this study, the hazard distance for vapor dispersion effects is defined as the distance to the LFL of propane, or 2.15% by volume propane to air. Similarly, for other effects, the hazard zone is taken as the distance to a suitable endpoint criterion. Since all wind directions must be considered, the hazard zone may be thought of as a circle, centered about the point of release, with a radius equal to the hazard distance. This is illustrated in Figure 1.

It then remains to define the endpoints for the various types of hazardous effects. These are given in Table 3.

Figure 1 Illustration of Hazard Zone

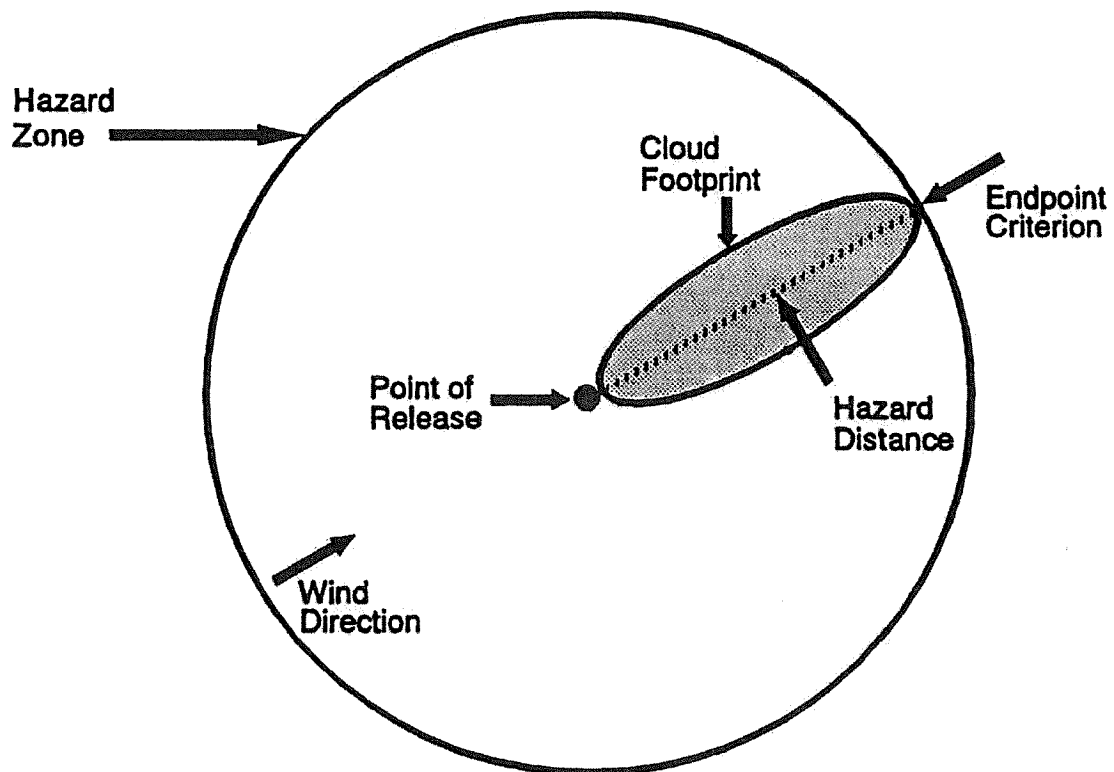


Table 3 Endpoint Criteria for Flammable Effects

Flammable Effect	Endpoint Criterion	Comments
Thermal Radiation	4000 BTU/ft ²	Pain threshold reached in 4 seconds; significant chance of injury/fatality for extended exposure
Vapor Dispersion	Lower Flammable Limit (LFL) concentration	Concentration reported as measured along cloud centerline
Overpressure	Overpressure level of 5 psig (i.e., 5 psi greater than atmospheric pressure)	Major damage to buildings and process equipment; significant chance of injury/fatality for individuals inside exposed buildings

4.5 Consequence Modeling Results

Table 4 summarizes the results of the consequence models for each case. The results in the table are for the weather condition giving the largest hazard zone for each particular case. Typically, this is the high wind speed condition (Class D Stability) for thermal radiation effects, and the Class F stability case for dispersion and overpressure effects.

Table 4 Consequence Modeling Results

Case #	Case Description	Hazard Distance (ft)			
		Jet Fire Radiation	Pool Fire Radiation	Vapor Dispersion	Overpressure
1	Pump Seal Leak	90	-	72	-
2	Pump Discharge Line Failure	-	-	233	87
3	Failure of 12" Expansion Joint	-	256	640	186
4	Failure of 16" Expansion Joint	-	337	955	245
5	Instantaneous Release	-	839	7746	1615

Note: Two weather conditions were considered for each case -

- Class D Stability @ 10 miles per hour
- Class F Stability @ 3 miles per hour

5.0 PROBABILITY ANALYSIS

The probability analysis focussed on calculating the *initiating event* frequencies for the seven selected cases. This was accomplished by the use of available data on equipment failures, historical experience at the Sea-3 facility, and recognized techniques for failure data analysis.

5.1 Applicability of Data

There are a number of sources for equipment reliability and failure rate data. It is essential to determine the applicability of a particular source for a given use. Failure rates will differ for equipment operating in dissimilar services and environments. Furthermore, the rates quoted by the various sources may be inconsistent for reasons pertaining solely to the method of data collection. Accordingly, in most cases, it is necessary to conduct a thorough search through the various sources to find the most useful data for a given application.

To be useful the data applied must meet two important criteria:

- the data must be relevant to the industrial application under consideration
- the data base must be extensive, so that the data obtained have statistical significance

The data selected for use in this study are thought to be representative of the equipment reliability which can be expected at the Sea-3 facility.

5.2 Application of Data

Case 1 - Pump Seal Leak

As documented in the PHA report, Sea-3's experience at their facility indicates that a pump seal can be expected to leak on the average of once per year. This is roughly representative of industry experience as a whole with regard to mechanical seal failure. Note that this is the frequency of a seal leak only; the frequency of a seal fire must include the conditional probability of ignition and will therefore be significantly lower. *No seal fires (or other fires) have ever occurred at the Sea-3 facility.*

Case 2 - Pump Discharge Line Failure

The data for pipe failures was taken from the WASH-1400 data base. WASH-1400 was

a landmark risk assessment in the nuclear industry, and the data generated for that study have been used in subsequent risk assessments in various industries. WASH-1400 gives a range of values for pipe failures. For pipe diameters less than 3", the most conservative estimate is a rupture frequency of 3×10^{-8} per hour, which equates to 2.6×10^{-4} per year. This equates to one event every 3846 years. *No such events have ever occurred at the Sea-3 facility.*

Case 3 - Failure of 12" Expansion Joint

The WASH-1400 data gives a frequency of 3×10^{-7} per hour for expansion joints. Converting the units to a yearly frequency results in an estimate of 2.6×10^{-3} per year. This value compares well with data found from other sources, e.g., Green and Bourne. This equates to one event every 385 years. *No such events have ever occurred at the Sea-3 facility.*

Case 4 - Failure of 16" Expansion Joint

It is likely that this case would have a frequency somewhat lower than Case 3, since the size of the event is somewhat larger. However, no data were found which present expansion joint failure rates in relation to the size of the associated pipework. Accordingly, this case was conservatively assumed to have the same frequency as the previous case, or 2.6×10^{-3} per year (one event per 385 years). *No such events have ever occurred at the Sea-3 facility.*

Case 5 - Instantaneous Release

No data were found for this case. That is, no instances were identified where a tank of similar construction, in similar service, suffered this type of accident. Failure rates for *pressurized* tanks are in the range of $1 / 10,000$ per year to $1 / 1,000,000$ per year. It is likely that the failure rate for this *refrigerated* tank would be one to two orders of magnitude lower than this. *No such events have ever occurred at the Sea-3 facility.*

5.3 Summary of Event Likelihoods

Table 5 presents the initiating event likelihoods for each case.

Table 5 Initiating Event Frequencies

Case #	Case Description	Initiating Event Frequency (/year)
1	Pump Seal Leak	1
2	Pump Discharge Line Failure	1 / 3846
3	Failure of 12" Expansion Joint	1 / 385
4	Failure of 16" Expansion Joint	1 / 385
5	Instantaneous Release	No instances were identified where a tank of similar construction, in similar service, suffered this type of accident. Failure rates for <i>pressurized</i> tanks are in the range of 1 / 10,000 to 1 / 1,000,000 per year. It is likely that the failure rate for this <i>refrigerated</i> tank would be one to two orders of magnitude lower than this.

6.0 STUDY BASIS / ASSUMPTIONS

Of necessity, a number of estimations and approximations have been made throughout the course of this study. Furthermore, there are a number of sources of uncertainty associated with some of the input data which were used as a basis for the risk calculations. However, this in no way detracts from the usefulness of the numbers generated. It is important to understand the sources of uncertainty and the effect of each on the final results of the study.

In general, the various assumptions upon which the study is based have been noted throughout the text. The following list summarizes the more important general assumptions, introduces and explains some of the more specific assumptions, and describes the nature of the uncertainty introduced by each.

- The estimates and assumptions made throughout the course of this analysis were based on the best judgement of the analyst. However, when dealing with safety issues, it is advisable wherever necessary to err on the side of conservatism. By definition, an estimate or assumption which is conservative is one which would tend to *overpredict* the associated risk, i.e., it is somewhat pessimistic. Thus, throughout the study, when faced with a choice of two reasonable approaches or assumptions, the more conservative alternative was selected.
- Throughout the course of the probability analysis, a considerable amount of historical data was used. While the data employed in this study are thought to be the best available, the statistical uncertainties associated with this type of information are unavoidable.
- As with any consequence analysis, the number of different discretely identifiable loss-of-containment scenarios is considerable. As is often the case, it was necessary to select a small number of release scenarios to serve as a representative set. Effectively, each case represents a range of scenarios of similar type. Thus, a set of process conditions used to model a particular release actually represents a range of conditions at which that release might actually occur. The implicit assumption here is that the consequences do not vary dramatically across this range of conditions. The various cases were selected and modeled in such a fashion that this assumption is thought to be correct.
- The LPG in the tank at the Sea-3 facility is 94-98% propane. For purposes of the consequence analysis, the cases were modeled as releases of pure propane. Since the remaining components in the LPG have properties similar to propane, so this approximation will have an insignificant effect on the case results.

- Some of the input to the consequence models regards information which changes slightly throughout the year. That is, seasonal effects have an impact on the weather conditions, ground temperature, and even the operating pressures used to model the cases. The ambient temperature was estimated based on the expected value for a summer day. This is a conservative approximation, since the operating pressures are highest during the summer months. Thus, the results calculated for this study are somewhat conservative for events which occur during other times of the year.

7.0 CONCLUSIONS

This analysis has served to simulate some loss-of-containment scenarios and estimate the associated frequency and consequences, which in combination, represent the risk associated with the facility. The judgement as to what constitutes a tolerable risk is, of course, a very subjective one. The analysis performed here and the results generated serve as a useful tool in arriving at such a judgement.

Several useful means exist for evaluating risk acceptability, including:

- Comparison of risk to the associated *benefits* gained
- Comparison of *cost* of reducing risks against the benefits and disadvantages from accepting them
- Comparison of *alternatives* for achieving the same objective
- Comparison with *unrelated* risks (e.g., other industries)
- Comparison with *natural* or background risk levels (e.g., earthquakes, hurricanes)

With these considerations in mind, the following conclusions are offered:

- Based on the results of this analysis, it is considered that the risk associated with the Sea-3 facility is neither clearly intolerable nor clearly negligible. That is, no cases were identified which posed an inordinate amount of risk to residents in the nearby community. However, neither are the risks so low as to be considered trivial. As with all chemical or petroleum facilities, a certain amount of risk exists. Of course, a facility with zero-risk is unachievable; the goal is to control the hazards in such a manner that the risk is considered to be As Low As Reasonably Practicable (ALARP).
- *The incremental increase in risk associated with the addition of the new LPG tank appears to be minimal. The reason for this is that no new hazards are being introduced to the facility. No new chemicals or new equipment types are being added. Furthermore, the volume of the additional tank is less than that of the existing tank. Thus, the consequences of the worst-case accident will not increase. Moreover, when considering the level of existing risk (which must also include the risk posed by other industrial facilities in the area), it is considered that the presence of a second LPG tank in the Sea-3 facility will not perceptibly increase the risk to individuals in the local community.*

- Of the cases modeled, the greatest risk appears to be that associated with the expansion joint failures. The predicted likelihood of such a failure is somewhat higher than associated with, for example, a pump discharge line rupture, while the associated consequence are also higher. Thus, if measures for risk mitigation are to be adopted, they should be directed in the first instance at these events.
- A number of safety features are planned at the Sea-3 facility to mitigate a loss-of-containment if it were to occur. Two features in particular are a sub-impounding basin and a water spray mitigation system. The sub-impounding basin will help to contain spilled liquid, thereby reducing both pool fire effects and also the vapor dispersion resulting from evaporation of the liquid pool. A high-intensity water spray directed at a released vapor cloud will help to entrain air and cause dispersion of the cloud thereby reducing concentrations and hence the resulting hazard zone. A second benefit of the water spray is that it can be used to cool tanks and other equipment when necessary.

The consequence models indicated that for the cases considered in this study, there are two mechanisms by which LPG vapor results. The first is the initial, vapor *flash* upon release. That is, when the propane goes from its operating temperature and pressure to ambient temperature and atmospheric pressure, a certain percentage of the propane immediately vaporizes. Some of the propane that does not flash immediately remains suspended in the cloud while the rest falls to the ground and forms a liquid pool. The second mechanism for generating propane vapor is evaporation from the liquid pool.

In all cases, the consequence models indicated that the more important mechanism for vapor generation is the initial flash. That is, the resulting hazard zones are primarily due to the amount of vapor that is generated immediately upon release; by comparison, the hazard posed by pool evaporation is much less important.

This leads to the conclusion that the water spray mitigation (away from the area of the sub-impounding basin) is the more critical event reduction measure, and should be seen as the first line of defense. While the sub-impounding basin is a very useful safety feature for reducing the hazard posed by a liquid pool, its benefit will be most evident when the water spray system can succeed in reducing the concentration in the cloud produced by the initial flash.

- In reviewing the intermediate results of the consequence models, the benefits of refrigerated LPG versus pressurized LPG are evident. For example, for the case of an instantaneous release of refrigerated propane, fully 93.6% of the mass in the tank "rains out", i.e., falls to the ground and forms a liquid pool. That is,

less than 4% of the mass in the tank participates in the initial flash to the vapor state, whereas with pressurized LPG, the flash fraction would be much higher, approaching 100% depending upon the temperature in the tank. Since the size of the cloud footprint is a function of the mass in the vapor cloud, full refrigeration of the tank *significantly reduces* the size of the cloud footprint and therefore the associated hazard.

8.0 SUMMARY

Fluor Daniel, Inc. has been requested by Sea-3, Inc. to conduct a hazard modeling study in support of its application to install a second refrigerated tank at its terminal site in Newington, New Hampshire. The analysis, which is being required by the Newington Planning Board, utilizes a standard technical approach and state-of-the-art computer software to model hypothetical propane release cases and evaluate their associated risk.

Risk, by definition, is a measure of loss expressed in terms of both the magnitude and likelihood of the expected damage. Accordingly, the hazard modeling study included an analysis of the consequences of potential releases as well as the probability that such releases will actually occur. The analysis was based on a total of five simulated events, as identified by a Process Hazards Analysis (PHA) study, performed in accordance with Occupational Safety and Health Administration (OSHA) regulations by Sea-3 and LGA Engineering.

The Newington Planning Board requested the development of a worst-case scenario whereby the proposed tank would hypothetically rupture by some extreme means and its full capacity released. No data were found for this case, i.e., no instances were identified where a tank of similar construction and in similar service suffered this type of accident anywhere in the world. Failure rates for *pressurized* tanks have a failure rate in the range of one in ten thousand years (1 / 10,000 years) to one in one million years (1 / 1,000,000 years). It is likely that the failure rate for this *refrigerated* tank would be one to two orders of magnitude less frequent than this, i.e., one in one hundred thousand years (1 / 100,000 years) to one in one hundred million (1 / 100,000,000 years).

The results of the study were presented in terms of hazard distance and event likelihood. A summary of the vapor dispersion distance and initiating event frequencies is presented in Table 6.

Based on the results of the study, it is considered that no drastic measures or major additional capital expenditures for risk mitigation are warranted. Moreover, when considering the level of background risk due to existing facilities in the area, it is considered that the proposed addition of the new tank and associated equipment does not appreciably impact the overall risk levels currently present in the area.

Table 6 Summary of Results

Case #	Case Description	Dispersion Distance to LFL* (ft)	Initiating Event Frequency (/year)
1	Failure of a pump seal on one of the cold product pumps	72	1
2	Failure of the 2" line on the cold pump discharge piping	233	1 / 3846
3	Failure in the 12" expansion joint on the suction side of the cold product pumps	640	1 / 385
4	Failure in the expansion joint in the area of the 16" fill line on the LPG tank	955	1 / 385
5	Instantaneous release of entire tank inventory	7746	Reference page 27 paragraph 3

* Lower Flammable Limit concentration (see page 15)

9.0 REFERENCES

During the course of the analysis, a number of literature sources were consulted. These are listed below.

- (1) Center for Chemical Process Safety (CCPS), *Guidelines for Chemical Process Quantitative Risk Analysis*, American Institute of Chemical Engineers, New York, N.Y., 1989.
- (2) DNV Technica, Inc., *PHAST User Manual*, Temecula, CA., 1992.
- (3) Federal Emergency Management Agency (FEMA), U. S. Department of Transportation (DOT), U. S. Environmental Protection Agency (EPA), *Handbook of Chemical Hazard Analysis Procedures*, Washington, D. C., 1988.
- (4) Green and Bourne, *Reliability Technology*, Wiley, 1972.
- (5) Lees, Frank P., *Loss Prevention in the Process Industries*, 2 Volumes, Butterworths, London, U.K., 1980.
- (6) WASH-1400 (NUREG 75/014), *Reactor Safety Study*, Appendices III and IV, 1975.

NOTICE

This study has been prepared by Fluor Daniel, Inc. for the specific purpose of obtaining a measure of overall risk to the community that may be associated with the installation of a second LPG tank at Sea-3's LPG Terminal in Newington, NH. This study was done in accordance with generally accepted engineering practices and using data developed by Fluor Daniel, Inc., Sea-3, Inc., and those organizations referenced in the study. No other warranty, expressed or implied is made.

APPENDIX A

Fire Control System and New Tank Position Drawing

EXHIBIT K

STANNARD & COMPANY**ENGINEERS**

P.O. BOX 175, BASKING RIDGE, NJ 07920 (908) 766-7300, FAX (908) 766-7301

June 17, 1996

Mr. Marlon S. Frink, Chairman
Newington Planning Board
Town of Newington, NH

VIA FAX

Dear Mr. Frink:

It was a pleasure to make your acquaintance over the phone on Saturday evening. You asked that I provide you with a few thoughts regarding the permitting process for the new Sea-3 refrigerated propane tank.

First, I would comment that the *Safety Standards and Procedures Manual*, the *Contingency Plan*, the *Mooring Policy and Procedure Manual* and the *Material Safety Data Sheet Handbook* that have been prepared and submitted by Sea-3 are all excellent and in keeping with the dedication toward safety that seems to be a hallmark of the Sea-3 organization. Likewise, the U.S. Coast Guard's *Contingency Plan* appears to be complete and well thought out.

The Quality Assurance manuals of both CBI and Pitt-Des Moines are well-prepared policy statements regarding the design, procurement and inspection policies of each of those companies however neither one of them specifically addresses a refrigerated propane tank that is to be designed, fabricated and tested in accordance with NFPA 58 and API 620. Those issues, of course, belong in the specifications and the contract between the purchaser and the builder and would not be included in such a general policy statement.

The *Hazard Modeling Study for Additional Tankage* that was prepared by Flour Daniel, in my mind, is less than adequate in that it is based upon the WASH-1400 data base that even the NRC has long ago discredited. I believe that the numbers that have been generated in this particular study may overstate the risk by several orders of magnitude. Furthermore, after determining the risk of the initiating event, there is no mention of any mitigating measures that could prevent or deter the escalation of that initiating event into a major event. Those mitigating measures

Mr. Marlon S. Frink, Chairman
Newington Planning Board

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will assure a safe operation.

The one drawing entitled *Fire Control Systems & New Tank Position* is quite interesting, but it lacks the specific details that are necessary to judge the technical adequacy of either the fire control systems or the tank itself. I realize that the final design drawings have not been completed and ready for release. However I am of the opinion that conceptual P&IDs illustrating the interconnection of the new and old piping, as well as the basic control logic should have been included in their submittal to you.

Chapters 9 and 10 of NFPA 58 specifically address the concerns that must be addressed at the Sea-3 facility. In addition, there are other provisions elsewhere in NFPA 58 that are germane to the overall facility. The transfer operations addressed in Chapter 10 are already in place and should not be a subject of the current permitting process. However, Chapter 9 is totally pertinent to the proposed added tank and selected portions of Chapter 3 will clearly involve the piping tie-ins and boil-off refrigeration modifications.

Among the applicable portions of the standard are provisions that adopt, by reference, both ASME B31.3, *Chemical Plant and Refinery Piping*, and API 620, *Design and Construction of Large, Welded, Low-Pressure Storage Tanks*.

3-2.3.1—All metallic LP-Gas piping shall be designed and installed in accordance with ASME B31.3, Chemical Plant and Petroleum Refinery Piping. All welding and brazing of metallic piping shall be in accordance with ASME Boiler and Pressure Vessel Code, Section IX.

9-1.6—All piping that is part of a refrigerated LP-Gas container shall be in accordance with ASME B31.3, Chemical Plant and Refinery Piping. This container piping shall include all piping internal to the container, within the insulation spaces, and external piping attached or connected to the container up to the first circumferential external joint of the piping. Inert gas purge systems wholly within the insulation spaces are exempt from this provision.

9-1.1.2—For pressures below 15 psi (103 kPa), API 620, Design and Construction of Large, Welded, Low-Pressure Storage Tanks, including Appendix R, shall apply.

Both Section IX of the ASME *Boiler and Pressure Vessel Code* and ASME B31.3 have specific requirements dealing with inspection and the qualification of inspectors. In addition, NFPA 58 specifically addresses the subject of inspection of refrigerated containers during construction and prior to commissioning in 9-1.9:

9-1.9—Inspection of Refrigerated LP-Gas Containers.

9-1.9.1—During construction and prior to the initial operation or commissioning, each refrigerated LP-Gas container shall be inspected or tested in accordance with the provisions of this standard and other applicable referenced codes and standards. Such inspections or tests shall be adequate to assure compliance with the design, material specifications, fabrication methods, and quality required by this and the referenced standards.

9-1.9.2—The inspections or tests required by 9-1.9.1 shall be the responsibility of the operator who shall be permitted to delegate any part of those inspections to his or her own employees, to a third party engineering or scientific organization, or to a recognized insurance or inspection company. Each inspector shall be qualified in accordance with the code or standard that is applicable to the test or inspection being performed.

Mr. Marlon S. Frink, Chairman
Newington Planning Board

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Furthermore, API 620 is very specific in its qualification of inspectors and it clearly requires that the inspectors shall be employed by the purchaser or an organization regularly engaged in making inspections. I believe that you have had some verbal assurances that the provisions of the applicable codes will be strictly adhered to. However, I do believe that those assurances should be reduced to writing in the permitting process.

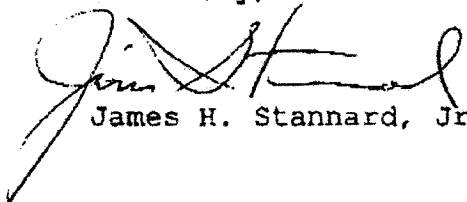
NFPA 58 also addresses the subject of geotechnic and seismic qualification of the site. Those items should have been considered prior to any design or construction and the reports should be available at this time for evaluation.

NFPA 58, in section 3-10 requires the preparation of a fire safety analysis as well as incident planning that has been coordinated with the emergency handling agencies. I believe that Sea-3's Contingency Plan is evidence of such coordination and planning in the past. However I also believe that a fire safety analysis is in order at this time. Furthermore, I believe that such a fire safety analysis would serve a more useful purpose than the Hazard Modeling Study that was submitted.

I do not believe that an agency, such as the Newington Planning Board, should be involved with the business decisions of an applicant. However, I do believe that permitting agency should be provided with documentation that will permit the agency to act responsibly. Furthermore, I do not know whether or not the State of New Hampshire has adopted NFPA 58. If not, I would recommend that the Planning Board specifically include compliance with NFPA 58 as a condition of any permit.

My past experience with Sea-3 has given me considerable confidence that they intend to construct a safe facility that is in full compliance with all the applicable codes. However, I do believe that those intentions should be fully documented as a part of their application.

Sincerely,



James H. Stannard, Jr.

EXHIBIT L

A TECHNICAL REVIEW
OF THE PROPOSED ADDITIONS
TO
SEA-3'S
NEWINGTON MARINE TERMINAL
FOR THE PLANNING BOARD
OF THE
TOWN OF NEWINGTON, NEW HAMPSHIRE

by

JAMES H. STANNARD, JR

July 10, 1996

Stannard & Company
Basking Ridge, New Jersey

BACKGROUND

Sea-3, Inc. owns and operates the Newington Marine Terminal in Newington, New Hampshire (Port of Portsmouth) for the purposes of importing, storing and reselling propane. The terminal is located on the Piscataqua River and shares a pier with the adjacent tank farm that receives, stores and distributes refined petroleum products. In addition to the tank farm, there are several other nearby industrial operations along the river in the same vicinity that could be best described as an industrial area.

The terminal receives fully refrigerated propane (at -44° F) by ship and it is also equipped to receive propane at ambient temperature by rail. The propane is currently stored as a refrigerated product in a single 400,000 barrel (63,600 m³) externally insulated container. The resale, or distribution, of the product is at ambient temperature, in "over-the-road" propane transport vehicles that are owned and operated by others. It is possible to load railcars in the same siding used for the potential receipt of product. However, there have been few receipts or deliveries by rail in the past and it would appear that few, if any, are contemplated in the future. The terminal has been in continuous operation since 1975 with an unblemished safety record. During that period, there have been several hundred shiploads of propane that have passed through the terminal without a significant incident.

In recent years, a number of new refrigerated gas ships have entered the trade and those ships have a larger capacity than the ships in service when the terminal was constructed. Many of the newer ships have a cargo capacity that almost equals the total capacity of the present storage container at the terminal. The economics of a marine terminal, such as Sea-3's, dictate that the terminal be capable of receiving a full ship load with each delivery. In order to make room for a full load, it has often been necessary for the operators of the terminal to essentially deplete their entire inventory before each ship's arrival. Considering the uncertainty of the weather and the day to day availability of ships,

such a policy has caused a near complete shutdown of the terminal sales upon several occasions because of the lack of supply.

In order to eliminate the probability of future supply shortfalls, the management of Sea-3 has decided to add the additional refrigerated storage container that was envisioned at the time of the original plant design. That second tank, which was shown as a "future tank" on the drawings submitted to the Town of Newington in 1974 as a part of the initial permitting process, will provide the necessary cushion after the inventory has been drawn down to accommodate a full shipload of product.

Sea-3 has retained Fluor Daniel, Inc. to act as the project manager for the proposed addition. Fluor Daniel's initial assignment was to prepare the preliminary design concept, bid specifications and permitting documents as the first step in making that additional storage space available. Sea-3 has applied to the Town of Newington's Planning Board for the approval of those plans and permission to proceed with the project with the issuance of a building permit. In turn, the Planning Board has retained this writer and Mr. Henry L. Renfrew as experts to review those plans and to advise the Board as it deliberates the merits of the project. This report will attempt to address the technical issues as they relate to public safety and to review the present conceptual plans with respect to compliance with relevant codes and standards.

Mr. Renfrew and I have met several times with Mr. Paul Bogan, Sea-3's Terminal Manager, and Mr. George King of Fluor Daniels who have provided us with additional drawings and documents that were not available at the time of the public meeting on June 20. In addition, both of us have had the opportunity to examine specific items of equipment in the facility and to review relevant records that are kept at the terminal.

EXISTING FACILITY

The Newington Marine Terminal was constructed during the period 1974-75 and was commissioned in 1975. While the design of portions of the facility conformed to the then relevant requirements of the 1972 edition of the National Fire Protection Association's (NFPA) standard NFPA 58 *Standard for the Storage and Handling of Liquefied Petroleum Gases*, the terminal was sited, designed and constructed to comply with the American Petroleum Institute's (API) 1970 edition of API 2510, *The Design and Construction of Liquefied Petroleum Gas Installations at Marine and Pipeline Terminals, Natural Gas Processing Plants, Refineries and Tank Farms*, which was the recognized compliance document at that time.¹ The storage container was designed, built, inspected and tested by the Pittsburgh-DesMoines Steel Company (now Pitt-DesMoines Corp.) in compliance with the then recommended rules API 620 *Recommended Rules for Design and Construction of Large, Welded, Low-Pressure Storage Tanks*.

The existing storage container has a capacity of 400,000 bbls, (16,800,000 gallons or 63,600 m³). It is of a single wall, welded construction that utilizes low temperature steel, in accordance with API 620 Appendix R, surrounded by a composite wood and aluminum foil insulation system. The tank was erected upon a reinforced concrete ringwall and its foundation incorporates an electrically powered heating system to prevent the formation of a frost lens that could damage the tank. Its design maximum working pressure is 1.8 psig. The design boiloff rate for the insulated container is only 4,214 lb/hr. or 0.12 %/Day.

The design of both the vapor and liquid handling systems are such that there should be no venting of propane to the atmosphere as the result of any normal, and most

¹The National Fire Protection Association's standard NFPA 58, *Standard for the Storage and Handling of Liquefied Petroleum Gases*, did not include marine terminals within its scope until the 1989 edition, and that coverage was deferred to the API 2510 standard prior to that edition.

abnormal, operations of the facility. All process relief valves, hydrostatic relief valves and drains are directed into a closed vent collection system that terminates at the flare. All excess vapor that is generated through normal boiloff, barometric pressure changes, pump recirculation or displacement during transfer is reliquefied with the cold liquid returned to storage. All normal transfer operations from either ships or railcars include the use of a vapor return line which precludes the need to vent vapor during the transfer operation.

The reliquefaction system is generously sized to accommodate vapor generation from all of those sources, even when they occur simultaneously. If the reliquefaction system should prove to be incapable of handling the total vapor generation either because of equipment problems or because the total vapor generation volume simply overwhelms its capacity; the total vapor stream, or a portion of the stream, will be diverted to the flare. The flare is sized to accommodate and safely dispose of any and all excess vapor generation of the entire facility. The flare pilot remains lit at all times so it can safely dispose of any potential excess release of vapor generated for any reason throughout the facility. The transfer of propane to the transports is into the vapor space of the transport so as to also prevent either a vapor return or atmospheric venting.

In addition to those redundant vapor handling systems that control the pressure within the main storage container, the tank is also provided with four emergency relief valves discharging directly to the atmosphere. Those relief valves, which have been sized for fire exposure plus all other normal sources of vapor generation within the container, such as pump recirculation, in accordance with API 2000 *Venting Atmospheric and Low-Pressure Storage Tanks*, provide a third level of redundancy against tank over-pressuring. It should be noted that an unimpeded, vertical jet of light hydrocarbon gases, such as propane, will be diluted below the lower flammable limit (LFL) within a very short distance.

Therefore, the operation of the emergency relief valves will not create any additional hazards.²

There are three submerged liquid connections into the storage container (*i.e.*, they enter the container below the liquid level). All three of those lines are arranged or valved so as to prevent an uncontrolled flow of liquid from the tank in the event of a piping or equipment failure. This is consistent with the concept of *product control*, or retention, that has been promoted through many added requirements contained in the last several editions of NFPA 58

The smaller one of the three connections, which is a 3" IPS, is intended for use only when the tank is to be completely emptied and to be taken out of service. That connection also provides a small tap for the liquid side of a differential pressure transmitter (ΔP), which is one of the several liquid level gauges measuring the liquid content of the tank. That 3" pipe has been provide with a blind flange on its outlet valve so as to prevent an accidental spill from that point. That blind flange will only be removed to permit the final drainage of the last few inches of propane when the tank is being taken out of service. Therefore that relatively small penetration, which will be supervised when used, should present no threat as the source of a spill.

There is one 14" connection that enters the tank horizontally through the wall of the vessel. That connection is the "fill line", serving the ship unloading line and the return from the reliquefaction system. The direction of flow in that line is always into the tank. A check valve has been provided next to the manual valve which is adjacent to the tank penetration. In addition to the check valve and manual valve, there are also pneumatically operated fail-safe valves in that line that can shutoff the line in an emergency.

²See Appendix A-6.1.1 NFPA 59 *Standard for the Storage and Handling of Liquefied Petroleum Gases at Utility Gas Plants*, 1995 edition.

The 12" "liquid withdrawal line", which penetrates the floor of the container is equipped with a manual valve followed, almost immediately, by a pneumatically operated fail-safe valve. All of the pneumatically operated valves in the liquid lines that were mentioned above, are of a fail-safe design, are a part of the plant emergency shutdown system (ESD), can be closed locally or remotely and they will automatically close if they are exposed to the heat of a fire. Also, there are automatic emergency shutdown (ESD) valves located ahead of the hoses at the dock area as well as similar valves at all of the transfer stations.

With the combination of the automated tank valves and transfer valves, the maximum credible liquid spill within the facility should be less than the liquid inventory within the piping systems. From a more practical point of view, the maximum spill would be limited to the inventory within a piping subsystem, such as the ship liquid line, which is not interconnected with the truck loading system and the reliquefaction. Furthermore, because of the redundancy that has been incorporated into the systems, a major spill would require the simultaneous failure of two or more independent devices to even initiate such an event.

In addition to the many accident, or initiating incident, avoidance features that have been incorporated into the design of the facility, the plant has been well equipped with numerous *fire protection* systems including emergency shutdown systems that may be initiated either automatically or manually at numerous locations throughout the facility. The fire protection systems include fire detection, combustible gas detection and automatic water spray systems on buildings or equipment that could be adversely affected by fire exposure. Many of those systems, as well as basic plant equipment, have been voluntarily up-graded over the years as a result of code changes, operating experience, recommendations resulting from the periodic safety audits by outside consultants and finally the recommendations of the Hazard Analysis Team who prepared the *Initial Process Hazard Analysis* (IPHA). Furthermore, the plant personnel have been well trained in their normal

duties as well as emergency procedures and they are required to immediately report any observed equipment or procedural deficiencies.

PROPOSED ADDITIONAL TANK AND ACCESSORIES

As indicated above, Sea-3 is seeking permission to install the second storage container that was originally contemplated at the Newington Marine Terminal. That second container will have a net capacity of 160,000 bbls (6,720,000 gallons or 25,440 m³). Sea-3 has agreed that the new container, its associated piping and modified reliquefaction equipment will comply with the 1995 edition of NFPA 58 and the 1990 edition of API 620, which is adopted by reference in NFPA 58 and is now a standard that has been retitled as, *Design and Construction of Large, Welded, Low-Pressure Storage Tanks*. (It might be noted that there have been significant additions to NFPA 58 during the last two decades, including separate chapters devoted to refrigerated storage, marine terminals and the concept of *product control* or retention during emergencies.) Since the additional storage capacity will have virtually no effect upon the throughput of the facility there will be no necessity to alter either the receiving or delivery transfer systems.

A soils investigation of the proposed tank site has been completed, as required by NFPA 58, and it has been determined that the location within the present dike area is suitable and that the foundation design will be based upon the soils engineer's report. It has also been determined that only a slight improvement to the existing dike will be required to achieve the capacity requirements of NFPA 58 when the volumetric displacement of the new tank is considered. The proposed location of the second container will also comply with the clearance distances and other siting criteria of NFPA 58 and will not place any of the existing equipment or piping out of compliance with the original siting criteria. However an unresolved issue with respect to the clearance distances, as required by the later editions of NFPA 58, between the existing dike and an adjacent property line may require some action by either the Board or the Fire Chief.

At the request of the Newington Planning Board, Sea-3 and Fluor Daniel prepared a *hazard modeling study*, which has already been presented to the Board. The writer is of the opinion that the study greatly overstates many of the risks because of the use of an inappropriate data base and the failure to recognize equipment designed to mitigate an initiating event. However, that study could be the basis for the fire safety analysis presently being undertaken by Sea-3 and Fluor Daniel as mandated by NFPA 58 in section 3-10.2.3. It should be evident that the NFPA Technical Committee was thinking of the conventional ambient temperature, pressurized storage of propane when they drafted the language for the requirements for the fire safety analysis. However the concept of, *product control* as expressed in the second paragraph of 3-10.2.3, is quite appropriate for a refrigerated storage container.

"The first consideration in any such analysis shall be an evaluation of the total product control system including emergency internal and shutoff valves having remote and thermal shutoff capability and pull away protection."

Sea-3 has provided preliminary flow diagrams detailing the proposed piping modifications, including the connections and valving of the new tank. Those drawings, which will be the basis for the final engineering drawings, also indicate Sea-3's plans to upgrade the existing tank (TK-01) after the second tank is in service. Not only do those drawings indicate that Sea-3 intends to duplicate the product control valves that were installed with the first tank, but they also are planning to provide remotely operable internal valves on the active liquid lines, a check valve on the penetration of the overhead cool-down line and fail-safe pneumatic operators on the vapor valves that are on the roof of the tank. Furthermore those same drawings reveal that Sea-3 intends, as an additional safety measure, to retrofit the present tank with internal valves as well as the valve operators and a check valve on the top entry lines after the second tank is in service and when there is an available time "window" to take the original tank out of service.

The flow diagrams, coupled with the plot plan, clearly indicate that the interconnection of the piping of the original and new tanks will be very simple and all in the vicinity of the existing product transfer pumps. Essentially, the concept is to make the two tanks operate as one. The second tank will be of the same vertical height and on the same elevation so that there can be no gravitational overfilling of either tank. It will be possible to separate the tanks, if required for operation or maintenance reasons. For example, the two tanks will be separated during the time that the retrofit of the old tank takes place and the tank has been purged to permit entry and hot-work inside. The normal operation will be to have the withdrawal lines of both tanks always open to a common manifold and the boil-off and vapor transfer lines always interconnected and open.

The flow diagrams also indicate that the flare system and the reliquefaction system will be upgraded to accommodate the additional vapor generation that may result with the installation of the new tank. In addition, the fire water system will be extended into the impounding area to permit the installation of two remotely controlled water monitors. Those two monitors will be located so as to permit the application of either solid streams, spray or fog onto the surface of either tank or onto the piping and pumps located between the two tanks.

The plot plan indicates that the second tank will block the line-of-sight observation of the tank valves and product pump area from the control room. In order to compensate for that loss, the plans also call for the addition of closed circuit TV cameras (CCTV) to permit the operators to have a continuous and unobstructed view of that area. It might be noted that the *hazard modeling study* mentions that gland leaks from the transfer pumps are not uncommon, though easily controlled. For that reason alone, the addition of the CCTV is an important part of the proposed modification.

Both NFPA 58 and API 620 contain specific language that requires the owner to be responsible for the testing and inspection, as well as specifying the qualifications of the

inspection personnel. Sea-3 has designated Fluor Daniels, in their role as project manager, as the owner's inspection agency of both the facility and the tank during construction and prior to placing the facility in operation. That inspection and testing, which may take the form of auditing the contractor's inspection, will be in addition to that normally performed by the contractor. Furthermore, Sea-3 has agreed to retain an independent fire safety engineering consultant to oversee all phases of the construction so as to assure safe procedures during the construction phase of the project. That consultant will be given full authority to monitor the entire project for potentially unsafe conditions and to stop or curtail any activity, by either Sea-3 or the contractor, which he may deem to be unsafe or imprudent.

CONCLUSIONS

After a thorough review of the presently available documents and after several site visits, the writer is satisfied that the proposed additions to the Newington Marine Terminal have been given proper consideration with regards to both on-site personnel and public safety. The proposed changes and additions do not compromise the codes or standards under which the plant was original designed and constructed and will not create any new risks or significantly increase even the perceived existing risks to the Town of Newington.

A refrigerated propane tank is not subject to the *Boiling Liquid Expanding Vapor Explosion* (BLEVE) that has become the perceived nemesis of the Fire Services. Likewise, the catastrophic failure of a refrigerated container that has been designed, constructed, inspected, tested and utilizing the material specified in API 620 is most improbable. The combination of the design criteria and metallurgical properties specified by API 620, if verified by inspection and good quality control, will produce a container that remains ductile at its design temperature, which means that an obvious and observable leak would develop long before a "brittle" failure could occur.

If such a container were to become involved in an engulfing fire, the results might be spectacular but they would not have a major impact upon the surrounding neighborhood. The boiling liquid within the container would act as a heat sink that would prevent the overheating and failure of the shell below the liquid level, thereby preventing the uncontrolled or catastrophic release of the tanks remaining contents.

The combination of good design and construction coupled with the exemplary operations and maintenance practices should minimize the probability of any incident occurring that could escalate to significant proportions. Furthermore, the product control, or retention, capabilities that have been incorporated into the plant design philosophy should limit the magnitude of any incident that might occur. With the later addition of the internal valves and valve operators on the original tank, the concept of product control will be complete.

The writer has not seen a final version of the fire safety analysis that is being prepared by Sea-3 and Fluor Daniels. However, the writer is satisfied that no serious hazard exists and that the safety systems and fire protection systems, including *fire prevention systems*, are quite sufficient, with the possible exception of some additional combustible gas detection systems in the vicinity of the three transfer pumps.

It was noted earlier that one unresolved code compliance issue remains. When the facility was permitted and constructed in the mid 70's, the recognized code document was the APU stand API 2510. While that standard included impoundment as a requirement, it specified clearance distances from the wall of the container. Since that time, the API standard has been replaced by the NFPA standard as the code of compliance. The NFPA standard contains the following provision:

"9-3.3—The edge of a dike, impoundment, or drainage system intended for a refrigerated LP-Gas container shall be 100 ft (31 m) or more from a property line that can be built upon, a public way, or a navigable waterway."

The plot plan, as submitted in 1974 and the most recent plot plan, clearly indicate that the top of the dike along the southern boundary of the property is only about 80' from the property line and is considerably closer along the northern boundary. It could be argued that the property to the north is a tank farm and the property line could not be built upon. However the property to the south belongs to one of the industrial neighbors who probably will not, but could, encroach as close as 20' from the property line.

It is the writer's opinion that the facility was in compliance with the API 2510 standard when it was built and that the additional tank and its accessories will not add a significant risk to its immediate neighbors, let alone the Town of Newington. On that basis, I believe that it would be appropriate to consider the location of the second tank as being "grandfathered" under the original building permit that was issued in 1974. I believe that such a decision would be consistent with the intent of the retroactivity clause in NFPA 58, which reads:

"1-1.5-Retroactivity.—The provisions of this standard are considered necessary to provide a reasonable level of protection from loss of life and property from fire and explosion. They reflect situations and the state of the art prevalent at the time the standard was issued.

Unless otherwise noted, it is not intended that the provisions of this document be applied to facilities, equipment, appliances, structures, or installations that were in existence or approved for construction or installation prior to the effective date of the document, except in those cases where it is determined by the authority having jurisdiction that the existing situation involves a distinct hazard to life or adjacent property. Equipment and appliances include stocks in manufacturers' storage, distribution warehouses, and dealers' storage and showrooms in compliance with the provisions of this standard in effect at the time of manufacture."

RECOMMENDATIONS

It is my recommendation that either the Newington Fire Chief or the Planning Board, acting as the *Authority Having Jurisdiction* as defined by NFPA, waive the requirements of NFPA 58, section 9-3.3 with regards to the clearance distance from a "property line that can be built upon on the basis that the concept of the second tank was approved in the original building permit in 1974 and that the additional tank creates no new or additional risks to either the general public or Sea-3's immediate neighbors. NFPA's definition of the Authority Having Jurisdiction reads:

Authority Having Jurisdiction.—The organization, office, or individual responsible for approving equipment, an installation, or a procedure.

NOTE:—The phrase "authority having jurisdiction" is used in NFPA documents in a broad manner, since jurisdictions and approval agencies vary, as do their responsibilities. Where public safety is primary, the authority having jurisdiction may be a federal, state, local, or other regional department or individual such as a fire chief; fire marshal; chief of a fire prevention bureau, labor department, or health department; building official; electrical inspector; or others having statutory authority. For insurance purposes, an insurance inspection department, rating bureau, or other insurance company representative may be the authority having jurisdiction. In many circumstances, the property owner or his or her designated agent assumes the role of the authority having jurisdiction; at government installations, the commanding officer or departmental official may be the authority having jurisdiction.

On the basis of the information that has been made available to me and the inspections that I have made, it is my recommendation that the Planning Board of the Town of Newington approve the plans and submissions of Sea-3, Inc with respect to the planned additions at the Newington Marine Terminal with the following conditions

1. That Sea-3's inspection agency, which will most likely be Fluor Daniels, submit to the Planning Board prior to the cooldown of the new tank an affidavit that the design, construction, inspection and tests of the facility have been in conformance with the applicable codes and standards. If there have been any deviations from those codes or standards, such deviations shall be noted and explained.

2. That Sea-3 provide some additional combustible gas detectors, possibly of the optical type if they prove acceptable to Sea-3 from a reliability standpoint and appropriate for the location.

It is also my recommendation that Sea-3 pursue their planned up-grade of the existing tank, which will add significantly to the safety of the facility. That up-grade includes the installation of the internal valves and equipping the valves at the top of the tank with either operators or check valves as appropriate. It should be understood by the Planning Board that such an endeavor is a major undertaking that will require careful planning, taking the tank out of service for several months and possibly curtailing the throughput of the terminal during that period. Therefore it would be inappropriate to establish either a start or completion date at this time.

EXHIBIT M

HENRY RENFREW

Compliance and Response Management, Inc.

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NEWINGTON PLANNING BOARD

SEA-3'S APPLICATION FOR ADDITIONAL LPG STORAGE

TECHNICAL REVIEW

July 10, 1996

BACKGROUND INFORMATION

On June 10, 1996, the Town of Newington New Hampshire Planning Board requested technical assistance in its review of Sea-3's application for additional storage of refrigerated Liquefied Petroleum Gas (propane) at Sea-3's facility on a private road off Old Dover Road. The scope of work requested was a review and evaluation of the adequacy of:

- emergency response and contingency planning;
- fire protection, monitoring and response systems;
- leakage monitoring systems;
- plant security, communications and emergency notification systems; and

recommending procedural enhancements that would provide an additional margin of safety to firefighters, emergency response personnel, and the general public.

The board also hired Mr. James Stannard to review compliance with the National Fire Protection (NFPA) Standard 58 entitled Storage and Handling of Liquefied Petroleum Gases, other applicable NFPA and American Petroleum Institute (API) standards; and determine if proposed new tank storage and piping, segregation via dike, proposed water spray cannons and alternatives are adequate; and recommend enhancements to provide additional margins of safety.

OVERVIEW OF THIS REPORT

This facility has been in continuous operation since 1975. For over 20 years, Sea-3 has demonstrated a commitment to safety. Operating, safety, and fire protection equipment has been effectively maintained and upgraded through a detailed preventive maintenance program. Process operations and emergency response procedures have been under continuous review and updated. Incidents or problems have been evaluated with new safer equipment being installed and procedures updated. The facility has an excellent safety record.

The existing bulk refrigerated storage tank and other operating and safety equipment have been installed in accordance with existing codes and the manufacturer's installation procedures.

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Sea-3 Proposed Additional Storage

The proposed new additional bulk storage and safety equipment and safeguards will insure system integrity and safety. The next twenty (20) years of operations should mirror Sea-3's safety record for the last twenty (20) years.

There are three code compliance issues that Sea-3 is in the process of complying with. Two issues involving compliance with state regulations are still being developed by Sea-3.

- Fire Safety Analysis (required by NFPA 58) is required by section 3-10 for the facility and Mr. Bogan is working with Fire Chief Wahl to develop it.
- The available Water supply for the deluge system is being evaluated in accordance with NFPA 15 Dated 1990 Standard for Water Spray Fixed Systems for Fire Protection. Mr. Bogan is contacting a Fire Protection Engineering firm to confirm compliance with NFPA 15 and going to submit the information to the Fire Chief.

One issue involving compliance with federal OSHA regulation is being developed by Sea-3.

- OSHA Process Safety Management (PSM) Standard 1910.119 is being developed by Sea-3 with technical assistance from LGA Engineering of Hanover Massachusetts.

SEA-3 - STATEMENT ON SAFETY, OPERATIONS AND FIRE PROTECTION

The following statement summarizes Sea-3's commitment to safety, operations and fire protection at the facility. The statement was taken from their draft Fire Safety Analysis which is being prepared at this time. A final copy will be available for review by the Planning Board upon completion.

The goal of Sea-3, Inc. is to limit the overall risk to the surrounding industries and communities to as low a level as good engineering and process management will allow. The Sea-3, Inc. facility, through its management and concern for safety, has continually strived for a zero accident policy. The facility was designed and updated over the last twenty years to incorporate the latest in fire detection and prevention equipment. Maintenance of existing equipment and systems has always been a high priority and has resulted in Sea-3 maintaining a safe and efficient operation over the last twenty years. This attitude and engineering will follow through to the new construction.

IMPORTANCE OF THE SEA-3 FACILITY / PROPOSED ADDITIONAL STORAGE

The safety of continuous operations of the facility is important. Sea-3 supplies propane to wholesale and retail propane companies (dealers) located throughout New England. It has been estimated that Sea-3 supplies to these dealers 40% of the propane used by over one million households (1 out of every 16 in New England) and numerous industrial locations. Any interruptions of operations during peak winter months can create a serious heating fuel shortage throughout New England.

For several years, Sea-3 has been operating under difficult circumstances. Because ships delivering product have increased in size, Sea-3 has been required to reduce its inventory on hand to accommodate the capacity of the arriving ships. Any delay in

Sea-3 Proposed Additional Storage

arrival, during peak demand periods, can consume the remaining on hand inventory before arrival of the new product. Last year for example, Sea-3 ran out of product four (4) times due to scheduling problems and delays in ship arrivals. These conditions create a variety of potential safety problems including:

- off loading product from a ship "under pressure" to get the product to the dealers ASAP; and
- on-site traffic and local road congestion after "out of product period".

The proposed new storage tank will help to eliminate these two (2) potential safety problems. The proposed additional storage will allow the facility to continue delivery of product to dealers without any interruptions with the existing tank basically empty awaiting delivery of product via ship. The traffic into the facility should be more spread out and prevent a crisis backed up of transports waiting to load.

STATE ADOPTED SAFETY STANDARDS

The State of New Hampshire has adopted the NFPA 58 Standard entitled Storage and Handling of Liquefied Petroleum Gases dated 1989. NFPA 58 addresses the design, construction, installation and operation of the proposed new storage tank (Chapter 8 has this specific requirements for the installation of Refrigerated LPG storage.) In Chapter 9 Referenced Publications and considered part of the requirements of NFPA 58, is NFPA 15 Standard for Water Spray Fixed Systems for Fire Protection dated 1985. Fixed water spray systems at the facility include protection of the day tank, loading rack and building with deluge water systems covered by this standard. NFPA 15 covers the design, installation, maintenance, and testing of water spray fixed systems for fire protection.

The State of New Hampshire is in the process of adopting current additions of these standards as state requirements: NFPA 58 1995 and NFPA 15 1990.

Since 1989, NFPA 58 was updated in 1992 and in 1995. In the 1992 edition, the chapter dealing with refrigerated storage was completely rewritten. In the 1995 edition, major changes to the chapter dealing with Marine Shipping and Receiving were made to conform to US Coast Guard regulations.

The State of New Hampshire is in the process of adopting the 1993 edition of the NFPA 72 Standard for the Installation, Maintenance, and Use of Protective Signaling Systems. This standard deals with the application, installation, performance, and maintenance of local, auxiliary, remote station, proprietary, and emergency voice/alarm protective signaling systems, and combinations thereof and their components.

The Authority Having Jurisdiction for public safety issues in these standards is Newington Fire Chief/Fire Marshal Larry Wahl. Technically, only the state adopted editions of these applicable standards can be required by the Fire Chief/Fire Marshal. The Planning Board can assist the Fire Chief/Fire Marshal in ensuring that the most current editions are used for the design, installation of new equipment. See Recommendations to Enhance Safety section of this report.

Sea-3 Proposed Additional Storage

EMERGENCY RESPONSE AND CONTINGENCY PLANNING

Sea-3 Personnel Emergency Response Training and Preparedness

Mr. Lawrence Heffron, Senior Vice President of Sea-3 is a member of the State of New Hampshire Hazardous Material Transportation Advisory Board which provides guidelines and recommendations on legislation dealing with hazardous materials. Mr. Heffron has been associated with Sea-3 for over 20 years.

Mr. Paul Bogan, Terminal Manager, has been employed at the facility for over 20 years. He has for six years been a member of the NFPA Technical Committee for Liquefied Petroleum Gases responsible for writing NFPA 58. He is Chairman of the Propane Gas Association of New England (PGANE) Emergency Response Committee. The committee is responsible for developing and maintaining a PGANE Propane Emergency Response Plan. The plan has been distributed to all fire department throughout New England. The Committee annually offers a three day hands on propane fire training course for the industry and emergency responders at the Massachusetts Fire Academy. He is one of the instructor for the three day course. In 1989, Mr. Paul Bogan attended a three day fire fighter training course at Texas A & M University which includes training on how to handle large scale LPG (propane) and flammable cryogenic liquid incidents. Based on his training and experience, he is a hazardous material specialist. A Haz Mat Specialist (in this case) is a person with extensive knowledge of the hazards of propane and emergency response procedures.

The employees of Sea-3 receive continuous emergency response training. There are 14 employees and no one new has been hired for over 6 years. Two of the senior employees are Haz Mat Techicians (emergency responders expected to use specialized chemical-protective clothing and specialized control equipment) Every other year, all employees attend the 2 day propane training course a the Massachusetts Fire Academy. New Employees receive two weeks of initial training and orientation.

Newington Fire Department Emergency Response Training and Preparedness

Newington Fire Chief Larry Wahl has been the chief of the department since 1981 (15 years). He has been a firefighter for over thirty (30) years and a member of the Newington Fire Department for over 23 years. He is a member of the State of New Hampshire Hazardous Material Transportation Advisory Board and sub chair of the Water Transportation Committee. This board provides guidelines and recommendations on legislation dealing with hazardous materials. He is also a member of the Port Safety Forum which meets quarterly with the Captain of the Port.

In 1989 - Fire Chief Wahl attended a three day fire fighter training course at Texas A & M University which included training in handling large scale LPG (propane) and flammable cryogenic liquid incidents.

He has responded to prior incidents and inspected the facility on several occasions and participated in several drills and a drafting water from the river training sessions. Chief Wahl is also the town Fire Marshal and responsible for code complaine in addition to fire suppression issues.

Sea-3 Proposed Additional Storage

Since 1995, 15 Newington firefighters received specific training dealing with hazardous material related incidents and emergencies. Five (5) received initial "awareness", eight (8) operational" and two (2) Haz Mat Technician hazardous material training.

Operational training is designed to help firefighters during initial response in a defensive fashion to control the release from a safe distance and keep it from spreading and protecting nearby persons, the environment, or property from the effects of the release. Hazardous materials technicians training is for emergency responders expected to use specialized chemical-protective clothing and specialized control equipment.

In 1991 seven (7), 1992 two (2), and 1995 one (1) Newington firefighters received training in Incident Command Systems (ICS) which is critical to managing a major hazardous material emergency. ICS training identifies how to establish and enforce scene control including control zones, emergency decontamination, evacuations/in-place protection and communications based on standard operating procedures and local emergency response plans.

Sea-3 Emergency Management and Contingency Plan

Sea-3's Contingency Plan was last updated in June 1987. In the event of a fire at the facility, the Newington Fire Department is notified automatically via signal alarm panel system. Depending on the location, specific valves and equipment are automatically shutdown and in some areas with fixed water spray systems activate prior to notification of the Fire Department.

The response to fire conditions at the facility are not spelled out in the plan. They are in the Sea-3 Interlock schedule which is a cause and effect diagram attached to this report.

Upon arrival of the fire chief, Sea-3's plan clearly places the Fire Chief in charge or the Fire Office in Charge. Sea-3 has prepared a small booklet version of their contingency plan for area emergency responders. During meetings with Chief Wahl and Mr. Bogan, the chief informed Mr. Bogan that the plan and booklet version phone numbers will have to be changed because the State of New Hampshire has enhanced 911 effective July 5, 1995

Town of Newington Emergency Management Plan

The Town of Newington is required by federal and state laws to have a town Emergency Management organization and plan. The current Emergency Management (EM) Plan was written in March 1995 by Eliza Smith, EM Director. On May 25, 1995, Fire Chief Wahl made a minor revision to one section. The plan was approved by the Newington Board on September 29, 1995. The EM Plan is over 70 pages long with function specific responsibilities for town departments outlined in the plan.

In developing the plan, page two (2) states that Hazardous Materials Accidents were the first priority for consideration. There are 14 other categories included man-made and natural disasters and emergencies.

Sea-3 Proposed Additional Storage

Part II Section H of the Newington EM Plan addresses evacuations. The Fire Department will provide recommendations on areas to be evacuated, assist in traffic control, provide post-evacuation fire surveillance and assist in rescue operations. The Board of Selectman will assume over-all direction and control of the evacuation procedures and make the necessary evaluations and recommendations to protect the lives of the citizens. The EM Director, Police and Highway Departments also have important responsibilities during any evacuations.

In the event of a major fire or emergency at this facility, when in the judgement of the Board of Selectman, The State of New Hampshire Emergency Management Plan can be activated for further assistance.

The Town of Newington Plan was recently tested using a plane crash at Pease with several town departments participating in the drill.

FIRE PROTECTION, MONITORING AND RESPONSE SYSTEMS

Sea-3 has multiple levels of fire protection, monitoring and response systems in place throughout the facility. These levels include hand held fire extinguishers, stationary extinguishers, UV and CV detectors, manual pull fire boxes, water deluge systems and automatic shutdown of equipment. Here is an example of the different types of detection, fire protection equipment and systems and shut down activities at one particular location.

Truck Loading Rack Equipment and Systems.

Hand Held	Dry Chemical 30 # Lb	Hand Held 30 pound
Stationary Units	Dry Chemical 2,000 Lb	Gate Motor
Stationary Units	Dry Chemical 2,000 Lb	Front of Day Tank
UV Detectors	Group #02	#07,#08,#09,#10,#11,#12,#13,#14,#15,#16,#17,#18
Fire alarm Pull Box #2	Exit Gate	By Maintenance Bldg.
Fire alarm Pull Box #2	Entrance Gate	Truck Entrance
C.V. Detectors	Group #02-(4 units)	#05,#06,#07,#08
	Group #03-(4 units)	#09,#10,#11,#12
	Group #04-(4 units)	#13,#14,#15,#16
Water Deluge System	Two zones	each approx. half rack
System Shutdown	Pumps and valves	for product flow

The following portion of this report will list the type of equipment and their locations at the facility for immediate extinguishment of a fire.

Listed below are numbered locations on Hand held Extinguishers.

20 Pound Hand Held Fire Extinguisher

(24) Dry Chemical Rail Skid Top Stairs D Skid

Sea-3 Proposed Additional Storage

(25) Dry Chemical	Raid Skid	Top Stairs B Skid
(25) Dry Chemical	Raid Skid	Top Stairs C Skid
(37) Dry Chemical	Pickup	Rear Bed

30 Pound Hand Held Fire Extinguisher

(01) Dry Chemical	Waiting Room	Beside Front Door
(02) Dry Chemical	Boiler Room	By Transformer
(03) Dry Chemical	Compressor Room	By Personnel Door
(04) Dry Chemical	Maintenance Building	By Roll Door
(05) Dry Chemical	Not Used	
(06) Dry Chemical	Not Used	
(07) Dry Chemical	Maintenance Building	Front Personnel Door
(08) Dry Chemical	Truck Rack	Column Skid C
(09) Dry Chemical	Compressor Room	Front Personnel Door
(10) Dry Chemical	Main Yard	Entrance Truck Skid E
(11) Dry Chemical	Day Tank	Cement Column
(12) Dry Chemical	Boiler Room #2	Front Roll Door
(13) Dry Chemical	Boiler Room #2	Front Door
(14) Dry Chemical	Rail Skid	Riverside Tarstrip
(15) Dry Chemical	Raid Skid	Fence Dike Side

Listed below are numbered locations on Wheeled Fire Extinguishers.

Wheeled Fire Extinguishers

Dry Chemical	Dock	Downstream
Dry Chemical	Dock	Upstream
Dry Chemical	Boiler Room Rear	By Transformer
Dry Chemical	Rails	Tarstrip - Riverside
Dry Chemical	Storage Tank 01	Front of Cold Pumps

Listed below are numbered locations on stationary fixed extinguisher systems..

Stationary Units

Dry Chemical 2,000 Lb	Main Building Rear	Near Storage Shed
Dry Chemical 2,000 Lb	Main Yard Entrance	Gate Motor
Dry Chemical 2,000 Lb	Main Yard	Front of Day Tank
Dry Chemical 2,000 Lb	Rails	Front of Shack

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CO2(17)	Compress Room	Front Door
CO2(18)	Maintenance Room	Outside By Window
CO2(28)	Boiler Room	Outside Rear Door
ABC(06) Dry Chemical	Maintenance Room	Inside Front Door
ABC(29) Dry Chemical	Compressor Room	By Exhaust Fan
ABC(30) Dry Chemical	Boiler Room	Center Column
Halon(16)	Motor Control Center	Entrance
Halon(17)	Control Room	Rear Door

Fixed Halon Systems

Halon(35)	Motor Control Center	Rear Boiler Room
Halon(36)	Main Control Panel	Inside MCP
Halon(40)	Compressor Room	By Entrance

The following portion of this report will list the type of detectors and their locations at the facility for immediate detection of fire conditions.

Listed below are group locations of Ultra Violet (UV) Flame detectors and the assigned number of the detector. If one of these detectors activate, the alarm panel sounds in the main office and the person on duty has 12 seconds to observe the conditions by visual or remote TV monitors. At the 13 second of the alarm, automatic shutdown procedures occur and a 120 second delay notification to the Fire Department starts. If during the 120 second period the situation is controlled and minor, the person on duty can stop the scheduled notification to the fire department.

U.V. Detectors

Group #01	Day Tank	#01, #02
Group #02	Truck Loading Area	#07,#08,#09,#10,#11,#12,#13,#14,#15,#16,#17,#18
Group #03	Behind Main Bldg.	#19,#21,#22
Group #04	Storage Tank 01	#25,#26
Group #05	Rail Loading Area	#31,#32,#33,#34,#35,#36
Group #06	Water Loading Dock	#37

PREVENTATIVE MAINTENANCE SYSTEM

The chart format below, will summarize the PMS on various safety related items. During my inspections of the facility, it was apparent there is a supervised active PMS program in place.

Safety Equipment

Sea-3 Proposed Additional Storage

Monthly	Inspect Fire Extinguishers	Stationary & Wheeled Halon Seal & Green Band CO2 Weigh ABC Seal & Green Band
	Inventory	Available Hose
	Test & Calibrate	UV Detectors CV Detectors Halon System (MCC)
Quarterly	Check & Inspect	Pull Stations
Semi-Annual	Test (Water Flow)	Deluge System
	Random Test /Setting	Dry Chemical Extinguishers
	Test Alarm	Halon System
Annual	Notification System	Fire Department
	Hydrostatically Test	Fire Hose (125 Lbs pressure)
	Flush With Water	Fire Hydrants
	Test & Calibrate	Shutdowns & Alarms.

Loading Area

Quarterly	Lubricate	Swivel Joints- Loading Skids
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Odorant System

Daily	Inspect	Odorant System
Weekly	Inspection	Leakage
Monthly	Refill Pump Oil	bottles

LEAKAGE MONITORING SYSTEMS

The facility leaking monitoring system consists of 43 combustible gas vapor (CV) detectors in groups, usually of 4 units. This system is designed to detect unignited gas. If a detector(s) activates, the main alarm panel indicates via light and horn a problem. The CV alarm system is not tied into automatic fire department notification.

C.V. Detectors 13 Groups/Total of 42 Detectors

Group #01-(4 units)	Day Tank	#01,#02,#03,#04
Group #02-(4 units)	Truck Loading Area 1	#05,#06,#07,#08
Group #03-(4 units)	Truck Loading Area 2	#09,#10,#11,#12
Group #04-(4 units)	Truck Loading Area 3	#13,#14,#15,#16

Sea-3 Proposed Additional Storage

Group #05-(4 units)	Compressor Room	#17,#18,#19,#20
Group #06-(4 units)	Boiler Room #1	#21,#22,#23,#24
Group #07-(4 units)	Boiler Room #2	#25,#26,#27,#28
Group #08-(4 units)	Storage Tank 01	#29,#30,#31,#32
Group #09-(4 units)	Rail Loading Area 1	#33,#34,#35,#36
Group #10-(3 units)	Rail Loading Area 2	#37,#38,#39
Group #11-(1 unit)	Flare Area	#41
Group #12-(1 unit)	Office Main Panel	#45
Group #13-(1 unit)	Fire Pump	#46

PLANT SECURITY, COMMUNICATIONS AND EMERGENCY NOTIFICATION SYSTEMS.

Sea-3 - Security / Unauthorized Entry / Trespass Features

The facility is located on a private road with little or no public traffic. Signs at the entrance indicate it is a private road. The facility perimeter is surrounded by a 6 foot chain link fence with 3 strands of bobwire pointing out. During darkness, most of the facility is illuminated by lights activated by photoelectric cells. All gates into the facility are normally locked except the truck entrance and exit gates in full view of the main office. During the evenings, weekends and slow traffic periods, the truck entrance and exit gates are also locked. Visitor parking is located outside the fence in full view of the main office.

Sea-3's Safety Standards and Procedures Manual states that entry is limited to authorized person having legitimate reasons for entering and terminal personnel on duty are responsible for enforcement of these restrictions. Furthermore, terminal personnel are instructed to be especially watchful for unauthorized entry during unloading of product from a ship. During offloading, several gates must be open for emergency response and a guard is posted for security during offloading. Procedures are in place for a security alert, potential security threat and imminent security breach at the facility which are coordinated with federal, state and local enforcement and public safety officials.

The facility is manned 24 hours a day by at least two persons on duty. During darkness, personnel on duty are required to perform several security checks and make a complete trip around the dike. There is an in plant hard wired 2 way intercom system and portable radios are also used in outside work areas.

Two TV monitors are in place to view the upper loading rack and lower rail loading and flare areas. These monitors are in continuous view of the employees on duty in the main office area. There is a quick dial number on phones in the office to contact the Newington fire/police emergency dispatch center during the day and the Rockingham Sheriff's office at night.

Communications

Sea-3 Proposed Additional Storage

There are two basic in-plant systems. One is a hardwire two way communication voice system with intercoms located at the main office, maintenance office, truck and rail loading racks. There is also several portable radios in use at all times by employees. In the event of an emergency involving the fire department, portable radio(s) are given to the Fire Chief or Office in Charge to monitor and maintain direct communications with plant employees.

Emergency Notification Systems.

In a fire, the alarm system for the facility will automatically activate with a light and audible alarm in the main office. After 12 second, if not shutoff, system shutdown turn off various pumps and close several valves automatically. After the initial 12 second, the Fire Department is notified 120 seconds later automatically. There is also six (6) manual fire pull boxes at various locations and audible outside alarms also. Basically each of the 6 locations have three different colored boxes - (1) Fire (2) Fixed Water Spray and (3) System Shutdown.

Fire Alarm Manual Pull Boxes

#1	Office Building	Back
#2	Exit Gate	By Maintenance Bldg.
#3	Entrance Gate	Truck Entrance
#4	Removed	
#5	Rail Area	By Bowl Dike
#6	Flare Area	

Recommendations to Enhance Safety

During meetings with Mr. Bogan and Chief Wahl three regulation/code compliance issues were discussed at length. I informed Mr. Bogan that in my opinion compliance with (1) OSHA Process Safety Management (PSM) Standard 1910.119, Fire Safety Analysis of existing conditions at Sea-3 as required by NFPA 58 section 3-10 and (3) availability of water (which is a subpart of section 3-10) and compliance with NFPA 15 Standard for Water Spray Fixed Systems for Fire Protection was necessary to adequately review and evaluate the safety of the facility with additional storage being added.

Mr. Bogan provided me with a copy of a Process Hazard Analysis (PHA) which meets one portions of the requirements of the OSHA PSM. The PHA identifies and evaluates potential accidents and makes recommendations for procedural and/or equipment changes. The PHA report provided excellent vital information about the accident potentials at the facility. A copy of this PHA has been furnished to the Planning Board.

I recommended to Mr. Bogan that Sea-3 consider a detailed review of the PSM Standard requirements and to include the additional storage in its review. Mr. Bogan agreed and contact LGA Engineering (the company that prepared the PHA). I also informed him that documentation of compliance with OSHA PSM was not necessary at this time. Sea-3 should be in full compliance with the standard at the time the new storage is place in operation.

Sea-3 Proposed Additional Storage

Since NFPA 58 Section 3-10 requires a Fire Safety Analysis (FSA) and coordinating the analysis with the Fire Chief, I recommended that one be prepared in writing. Mr. Bogan and the fire chief were furnished with a draft outline. I have reviewed the initial draft of this document which Mr. Bogan and the Fire Chief except to have completed this month.

Regarding the availability of water, the last testing of the water supply to the facility was done in 1990. Since that time there has been increased sizing in mains in Newington. At this time there is insufficient information available. Mr. Bogan agreed to contact a fire protection engineering firm and have the availability of water and nozzle sizes etc. evaluated in accordance with NFPA 15 which is adopted by reference in NFPA 58. since this has a direct effect on fire department operations, I recommended that the Fire Chief participate in the evaluation and that the results be forwarded to him.

Based on Mr. Bogan's response to these issues, I believe that Sea-3 will fully comply with any system requirements developed as a result of the work underway on the PSM, FSA and evaluation of compliance with NFPA 15. Furthermore, the Fire Chief is participating fully in the FSA and NFPA 15 issues and is the Authority Having Jurisdiction. If any conflicts arise, the New Hampshire State Fire Marshal can participate given his regulatory authority over these issues.

The follow portion of this report contains five items the Planning Board consider adding as conditions to permitting.

Since the State of New Hampshire is in the process of adopting newer editions of NFPA standards dealing with the installation of the refrigerated LPG storage tank, water spray protection system and emergency alarm systems, the Planning Board should require compliance with these newer standards addressing these important safety issues. The Fire Chief/Fire Marshal can only technically require and enforce the current state adopted editions.

- #1 Sea-3 shall comply with the applicable requirements/section of NFPA 58 1995 for the installation of the additional storage tank and associated piping.
- #2 Sea-3 shall comply with the requirements of NFPA 15 Standard for Water Spray Fixed Systems for Fire Protection Dated 1990 for any modifications to the existing fixed water spray systems.
- #3 Sea-3 shall upgrade the existing protective signal alarm system to comply with the requirements of NFPA 72 Standard for the Installation, Maintenance and Use of Protective Signaling Systems prior to operation of the proposed additional refrigerated LPG storage tank.

These recommendations were discussed with Mr. Bogan and the Newington Fire Chief. The cost of compliance with NFPA 15 and 72 can range from \$5,000 to \$8,000 dollars.

On July 9, 1996, at a meeting with Fire Chief Wahl and Sea-3 Manager Paul Bogan, during discussions concerning the availability of city water to the facility, Chief Wahl identified the following problems.

In April 1996 there was a break in the 10 inch main water line on the private road just above Sea-3's connection to the line. When Portsmouth Water Department personnel attempted to repair the line by isolating the line from the supply water line on Old Dover

Sea-3 Proposed Additional Storage

Road, it was discovered that the water curb box (to shut off and isolated the line on the private road was missing). The cause of the missing shut off curb box was apparently due to rebuilding of the private road a few years ago. Because the water curb box was missing, other downstream water curb boxes had to be used which resulted in several other businesses water supplies being shut off until the repair to the water line was completed. This missing curb box created an hazard (no water for sprinkler systems) at several businesses not on the private road.

Further examination of the existing main water line revealed that up stream of Sea-3's connection, there is no isolation valves on the main. With no isolation valves in place, water to Sea-3 has to be turned off. If these isolation valves were in place and shut after the April 96 break, Sea-3 and all the other facilities could of maintained water supply via the loop of the main line shared by ABB and Georgia Pacific.

Chief Wahl and I agreed that adding two isolation valves on the main would enhance safety and help to ensure the safety of Sea-3. Furthermore, Sea-3 and the other businesses serviced by the water main have a responsibility to replace the curb box.

- #4 Sea-3 assume responsibility to ensure that the missing water curb box isolating the water main on the private road from the main on Old Dover Road be replaced by October 31, 1966.

(All businesses using water on this main have a responsibility to ensure replacement or the parties responsible for paving the private road. Sea-3 will coordinate this effort and ensure replacement.)

- #5 Sea-3 arrange with the Portsmouth Water Department to have one isolation valves added upstream of the facilities connection and another down stream of the connection by the blue building of ABB Combustion Engineering.

These recommendations were discussed with Mr. Bogan and he estimated the cost of installation approximately \$10,000 to \$15,000 dollars.

EXHIBIT N

STANNARD & COMPANY

ENGINEERS

P.O. BOX 175, BASKING RIDGE, NJ 07920 (908) 766-7300, FAX (908) 766-7301

July 12, 1996

Mr. Thomas J. Morgan, Town Planner
The Town of Newington
205 Nimble Hill Road
Newington, NH 03801

Dear Tom:

I have reviewed your FAX regarding the Proposed Conditions of Approval for Sea-3's new propane tank and I have the following comments:

With respect to item (6) dealing with the combustible gas detectors, I wish to apologize for leaving out an important phrase in my recommendations. On page 9, of my report, I mentioned the gland leaks in the transfer pumps with respect to the addition of the CCTV. However, I also had intended to make the application of my recommendation regarding the combustible gas detectors applicable to only the transfer pump location. I do not believe that additional detectors, other than those already specified by Sea-3 in their FSA are necessary as they are more of a process tool than a reliable emergency detection device. Furthermore, I do not believe that you should put the Fire Chief in the position of designing Sea-3's facility.

My intent of suggesting the possibility of utilizing the optical type detectors was the hope of achieving a broader area of surveillance than the present diffusion type heads provide. I also wanted to leave the decision as to the type of unit up to Sea-3 because the optical type may prove to be inappropriate for that particular service. I might add, that my only exposure to the optical type units has been through advertisements and none of my clients have tried them. Therefore, I would not feel comfortable in specifying them.

With those thoughts in mind, I would recommend that item (6) be revised to incorporate my second requirement with the addition of the area of the transfer pumps. That provision would then read:

That Sea-3 provide some additional combustible gas detectors to monitor the three transfer pumps, possibly of the optical type if they prove acceptable to Sea-3 from a reliability standpoint and appropriate for the location.

With respect to Item (7), I believe that this requirement of the submission of an as-built plan should be limited to a site

Mr. Thomas J. Morgan, Town Planner
The Town of Newington

July 12, 1996
Page 2

plan, and possibly a P&ID if the Fire Chief and Mr. Bogan decide that such information could be valuable to the Fire Department. A complete set of plans for the facility could easily amount to several hundred drawings that would mean nothing to the Town.

I am not sure what was intended with Item(8), as there will be a myriad of reports generated by the owner, Fluor Daniels, the contractor, local, state and Federal agencies, *ad infinitum*, in the course of the project. I really believe that the provisions of Item (5) should prove adequate for the Board and the Fire Chief. Therefore, I would recommend that Item (8) be deleted.

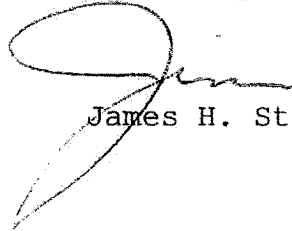
I would also suggest that the first sentence of Item (10) be changed to read:

In addition to the above conditions, Sea-3 shall comply with all of their stated commitments included under part 9.0 PROPOSED OPERATING SYSTEMS SAFETY EQUIPMENT AND SAFEGUARDS in the "Sea-3, Inc. Newington Marine Terminal Fire Safety Analysis" (FSA) draft report dated July 1996.

That addition would not only make the requirement more explicit, but would also prevent any future arguments regarding the intent of either Sea-3 or the Planning Board. I do believe that section 9.0 of the FSA adequately covers the items that Mr. Bogan addressed at the July 10 meeting.

It has certainly been a pleasure to work with the Planning Board and I would be more than happy to review any final language before it is adopted or to review any material submitted to the Board or the Fire Chief by either Sea-3 or Fluor Daniels.

Sincerely,



James H. Stannard, Jr.

EXHIBIT O

FAX TRANSMISSION

STANNARD & COMPANY
P.O. BOX 175
BASKING RIDGE, NJ 07920-0175
(908) 766-7300
FAX: (908) 766-7301

To: TOM MORGAN **Date:** July 15, 1996
Fax #: (603) 436-7188 **Pages:** 1, including this cover sheet.
From: JIM STANNARD
Subject: Sea-3 Conditions

COMMENTS:

In my response of Friday, I neglected to mention that the waiver by the Planning Board and Chief Wahl of the clearance distances, as specified in NFPA 58, should be mentioned in any resolution to be voted on by the Planning Board. The NFPA wording is:

"9-3.3—The edge of a dike, impoundment, or drainage system intended for a refrigerated LP-Gas container shall be 100 ft (31 m) or more from a property line that can be built upon, a public way, or a navigable waterway."

It was agreed, at the meeting, that the waiver would be on the basis of retroactivity and the fact that the set-back requirements that are already in place will provide more than the 100 ft. Clearance distance.

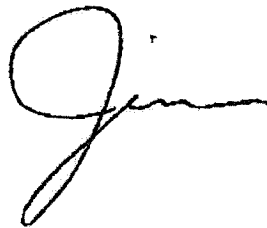


EXHIBIT P

HENRY RENFREW

Compliance and Response Management, Inc.
Phone (203) 276-1919 Fax (203) 620-0071

July 16, 1996

Mr. Marlon S. Frink, Chairman
Newington Planning Board
Town Hall
Newington, NH 03801

Re: Conditions of Approval - Sea-3's proposed LPG Tank

Dear Mr. Frink:

I have finished my review of the proposed conditions for approval of Sea-3's proposed new additional storage and have the following general comments.

- #1 Several of the conditions need a specific dates of compliance or implementation.
- #2 Some of the conditions are very board in nature and need further clarification.

Comments on each proposed condition:

- #1** Sea-3 shall comply with the applicable requirements of NFPA 58 (1995 edition) for the installation of the additional storage tank and associated piping.

Recommended Change:

- #1 Sea-3 shall comply with the applicable requirements of NFPA 58 (1995 edition) for the installation of the additional storage tank and associated piping. **Section 9-3.3 of NFPA 58 1995 requiring 100 feet of separation from the edge of the dike to the property line that can be built upon, a public way, or a navigable waterway is non applicable. The existing dike is acceptable under Section 1-1.5 Retroactivity and considered grandfathered.**

Comments: The grandfathering of the dike need to be added. NFPA 58 1995 Section 1-1.5 Retroactivity addresses this issue and is included below for your review.

1-1.5 Retroactivity.

The provisions of this standard are considered necessary to provide a reasonable level of protection from loss of life and property from fire and explosion. They reflect situations and the state of the art prevalent at the time the standard was issued. Unless otherwise noted, it is not intended that the provisions of this document be applied to facilities, equipment, appliances, structures, or installations that were in existence or approved for construction or installation prior to the effective date of the document, except in those cases where it is determined by the authority having jurisdiction that the existing situation involves a distinct hazard to life or adjacent property.

1842 Meriden-Waterbury Road PO Box 794 Milldale, CT 06467-0794

Newington Sea-3 Project

Equipment and appliances include stocks in manufacturers' storage, distribution warehouses, and dealers' storage and showrooms in compliance with the provisions of this standard in effect at the time of manufacture.

- #2** *Sea-3 shall comply with the requirements of NFPA 15 (1990 Edition) for any modifications to the existing fixed water spray systems;*

Recommended Change:

- #2** *Sea-3 shall comply with the requirements of NFPA 15 (1990 Edition) for any modifications to the existing fixed water spray systems and NFPA 25 (1995 Edition) for the inspection, testing and maintenance of the fixed water spray system prior to the erection of the new tank.*

Comments: *The phrase prior to the erection of the new tank is a specific reference point in construction. It means the before the side wall of the proposed tank are added vertically to the foundation, the fixed water spray system must be in compliance with NFPA 15 and 25. It is important that the systems to protect the equipment is up to date because of the potential hazards of construction activities.*

The reason to add NFPA 25. NFPA 15 is entitled Standard for Water Spray Fixed Systems for Fire Protection and dated 1990. The NFPA recently developed the first edition of a new standard NFPA 25 1995 entitled Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems which addresses maintaining the Water Spray Fixed Systems at the Sea-3 facility. NFPA 25 provides instruction on how to conduct inspection, test, and maintenance activities. It also stipulates how often such activities are required to be completed. Requirements are provided for impairment procedures, notification processes, and system restoration. This type of information, where incorporated into a building maintenance program, enhances the demonstrated favorable experience of all water-based fire protection systems. Chapter 7 of NFPA 25 1995 in section 7-1.1 states This chapter provides the minimum requirements for the routine inspection, testing, and maintenance of water spray protection from fixed nozzle systems only.... Furthermore section 7-1.2 states NFPA 15, Standard for Water Spray Fixed Systems for Fire Protection, shall be consulted to determine the requirements for design and installation, including acceptance testing.

- #3** *Sea-3 shall upgrade the existing protective signal alarm system to comply with the requirements of NFPA 72 prior to operation of the proposed additional refrigerated LPG storage tank*

Recommended Change:

- #3** *Sea-3 shall upgrade the existing protective signal alarm system to comply with the requirements of NFPA 72 acceptable to the Newington Fire Chief prior to operation of the proposed additional refrigerated LPG storage tank*

Newington Sea-3 Project

Comments: My original proposal did not include the phrase acceptable to the Newington Fire Chief. That is because within the standard the fire chief works with Sea-3 to ensure compliance. Adding the phrase makes sure that the alarm system is not just built and completed but clearly acceptable to fire chief prior to operation of the storage tank. It must be finished and public emergency response satisfied of the alarm system operations.

- #4** Sea-3 shall arrange with Portsmouth Water Works to have one isolation valve added upstream of the facility's connection and another downstream of the connection by Combustion Engineering's blue building.

Recommended Change:

- #4** Sea-3 shall arrange with Portsmouth Water Works to have one isolation valve added upstream of the facility's connection and another downstream of the connection by Combustion Engineering's blue building **prior to the erection of the new tank.**

Comments: The phrase prior to the erection of the new tank is a specific reference point in construction. It means the before the side wall of the proposed tank are added vertically to the foundation, the isolation valves must be in place. It is important that the water supply system is protected by these isolation valves because of the potential hazards of construction activities on scene during erection of the new tank.

- #5** Recommend proposed language.

- #6** Sea-3 shall install additional combustible gas detectors at locations acceptable to the Newington Fire Chief.

Recommended Change:

- ~~**#6** Sea-3 shall install additional combustible gas detectors at locations acceptable to the Newington Fire Chief.~~

Comments: I would recommend deletion of this condition. Sea-3 has clearly indicated that additional detectors will be located between the new and old tank in plans and several other references including condition #10. As far as locating the detectors, that is based on the manufacturers recommendation.

- #7** Agree with Mr. Stannard's comments. How broad this is needs to be clarified.

Newington Sea-3 Project

- #8** It is not clear to me what the Planning Board has in mind. Reports? That could be hundreds.
- #9** Agree with proposed condition. Of concerns to me is if the board desires to add a time period here as to when the retrofit needs to be done. I do not think one should be imposed. If asked my opinion as to the earliest they could retrofit and maintain operations and safety, I would say 7-10 year from now.
- #10** I agree with Mr. Stannard's recommendation to limit compliance to Part 9.0 Proposed Operating System Safety Equipment and Safeguards of the draft Fire Safety Analysis dated July 1996.

I believe these conditions will improve and maintain the effectiveness of plant fire protection and safety monitoring systems; plant and public emergency planning, operations and response; and provide an additional margin of safety to firefighters, emergency response personnel, and the general public.

In closing, I wish to add that Sea-3 has operated safely for over 20 years and these conditions will help ensure another 20 years of safe operation of the facility.

Yours truly,



Henry Renfrew

EXHIBIT Q

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, February 10, 2014

City Councilor Jack Thorsen asked what action they might take to pursue the use of freighters as an alternate to rails. Chairman Hebert said that would involve changing the Jones Act. Vice-Chair Hebert said that would also require a presidential signature. Mr. Bogan said they had looked into that alternative and were told they could get a short-term waiver, but they would also have to build a vessel in that time period, and they were not in that business. Mr. Thorsen said that was all the more reason to insist that the rails be safe.

Chairman Hebert said the Board could not deny Pan Am's operations, but they could say they needed more safety information from the FRA before they approved Sea-3's proposal for expansion. He said the FRA agreed to meet informally, but they said they wouldn't meet in public. He said the FRA was a servant of this country and they needed the FRA to meet in public for transparency so there would be no perception of behind door deals being made. Vice-Chair Marconi agreed with what Ms. Lamson said that a letter should be written to the congressional delegates to put pressure on the FRA to respond. Mr. Morgan said he had been working with Carol Shea-Porter's staff and Senator Shaheen to gain cooperation and they were preparing a letter to the FRA.

Chairman Hebert informed Sea-3 that they could voluntarily request an extension in writing until more information became available, or the Board of Selectmen or the Planning Board could vote for an extension. Mr. Bogan said he understood the concerns and they weren't avoiding the safety issue of a report from the FRA. Chairman Hebert said Mr. Bogan had been very cooperative with the Board.

Chairman Hebert continued the public hearing to March 10, 2014.

Justin Richardson asked if they would get comments on the project from the Fire Chief and Chairman Hebert said he would meet with the new Fire Chief himself. Mr. Stern said they might also need to review the standards with a qualified consultant.

3) Curb Cut Application: Request by **Victoria & Ben Auger** for a driveway off of **Swan Island Lane**, Tax Map 53, Lot 16.

This item was postponed to March 10, 2014 at the applicant's request.

4) Request for Comments pursuant to RSA 674:41 regarding a proposal by **Great Bay Marine, Inc.** to obtain a building permit to construct a residence off a private road, Tax Map 6, Lot 5.

No one appeared for this discussion so the Board moved on to the next item on the agenda.

5) Old Business: Request by **KWA, LLC** for an extension of site plan approval for office building development off **Shattuck Way**, Tax Map 7, Lot 2A.

John Chagnon, P.E., Ambit Engineering appeared before the Board requesting a two year extension for their application that was first approved in January 2010 and received an extension on December 2011.

236496

ENTERED
Office of Proceedings
August 22, 2014
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35853-0

**SEA-3, INC. –EMERGENCY PETITION
FOR DECLARATORY ORDER**

**PETITION OF BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY FOR LEAVE
TO INTERVENE IN SUPPORT OF THE EMERGENCY PETITION FOR
DECLARATORY ORDER FILED BY SEA-3, INC. AND FOR LEAVE TO FILE MORE
SUBSTANTIVE ARGUMENTS AT A LATER DATE**

**Robert B. Culliford
Pan Am Railways
1700 Iron Horse Park
North Billerica, MA 01862**

*Counsel for Boston and Maine
Corporation/Springfield Terminal Railway
Company*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35853

**SEA-3, INC. –EMERGENCY PETITION
FOR DECLARATORY ORDER**

**PETITION OF BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY FOR LEAVE
TO INTERVENE IN SUPPORT OF THE EMERGENCY PETITION FOR
DECLARATORY ORDER FILED BY SEA-3, INC. AND FOR LEAVE TO FILE MORE
SUBSTANTIVE ARGUMENTS AT A LATER DATE**

Pursuant to 49 C.F.R. § 1112.4, the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively “Pan Am”) submit this Petition for Leave to Intervene in Support of the Emergency Petition for Declaratory Order filed by Sea-3, Inc. (“Sea-3”) on August 4, 2014 (the “Petition”) and for Leave to File More Substantive Arguments at a Later Date. Though this proceeding has not yet been set for modified procedure, Pan Am believes that this request is appropriate given the substantial interest of Pan Am in its outcome, which could affect the ability of Pan Am to provide rail transportation service to multiple customers on the Portsmouth and Newington Branches. Moreover, Pan Am’s request for leave to intervene will not unduly disrupt the schedule for filing any verified statements, as no such schedule has yet been established, nor will Pan Am’s request unduly broaden the issues raised by the Petition.

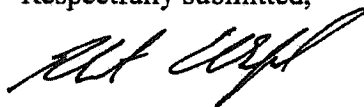
Rather, Pan Am submits that its involvement in this proceeding will focus and clarify the actual issues present, and further explain why Board involvement is necessary to resolve the issues.

While Pan Am seeks leave to intervene in support of the Petition, Pan Am notes that the Reply to Emergency Petition for Declaratory Order dated August 19, 2014 (the "Reply") by the City of Portsmouth ("Portsmouth") seems to substantially narrow the issues present in this proceeding. In response, Sea-3, Portsmouth and Pan Am have begun discussions towards a possible resolution of this matter.

Consequently, Pan Am files this Petition to Intervene for a number of reasons: (a) to preserve Pan Am's rights to participate in the ongoing proceeding; (b) to notify the Board that all parties are in discussions toward a mutually acceptable resolution; and (c) to request that Pan Am be permitted to submit more substantive arguments should ongoing discussions not be successful.

Therefore, Pan Am respectfully requests that it be permitted to intervene, and also requests leave to file more substantive comments, if necessary, within two weeks of today. Sea-3 and Portsmouth both assent to Pan Am's Petition.

Respectfully submitted,



Robert B. Culliford
Pan Am Railways
1700 Iron Horse Park
North Billerica, MA 01861
(978) 663-1126
rculliford@panam.com

*Counsel for Boston and Maine Corp./ Springfield
Terminal Railway Co.*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2014, I served a copy of the foregoing Petition of Boston and Maine Corporation and Springfield Terminal for Leave to Intervene in Support of the Emergency Petition for Declaratory Order Filed by Sea-3, Inc. and for Leave to File More Substantive Arguments at a Later Date upon all parties of record in this proceeding by electronic mail and first class mail, postage prepaid.


Robert B. Culliford

236596

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
September 5, 2014
Part of
Public Record**

Docket No. FD 38853-0

**SEA-3, INC. –EMERGENCY PETITION
FOR DECLARATORY ORDER**

MOTION FOR EXTENSION OF TIME

**Robert B. Culliford
Boston and Maine Corporation/
Springfield Terminal Railway Company
1700 Iron Horse Park
North Billerica, MA 01862**

September 5, 2014

***Counsel for Boston and Maine
Corporation/Springfield Terminal Railway
Company***

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35853-0

**SEA-3, INC. –EMERGENCY PETITION
FOR DECLARATORY ORDER**

MOTION FOR EXTENSION OF TIME

On August 22, 2014, the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively “Pan Am”) submitted a Petition for Leave to Intervene in Support of the Emergency Petition for Declaratory Order filed by Sea-3, Inc. (“Sea-3”) on August 4, 2014 and for Leave to File More Substantive Arguments at a Later Date (the “Petition”), which was granted by the Board on August 29, 2014. Since Pan Am’s filing of the Petition, Sea-3 and the City of Portsmouth (“Portsmouth”) have engaged in discussions regarding a possible resolution of this matter, and on September 4, 2014 Portsmouth presented Sea-3 with a written proposal. Sea-3 is currently reviewing that proposal and is not yet in a position to comment on its terms, though further discussions are likely. Therefore, Pan Am respectfully requests that it be granted an extension of time in which to file more substantive

arguments, if necessary, until September 30, 2014. Both Sea-3 and Portsmouth assent to this motion.

Respectfully submitted,



Robert B. Culliford
Pan Am Railways
1700 Iron Horse Park
North Billerica, MA 01861
(978) 663-1126
rculliford@panam.com

September 5, 2014

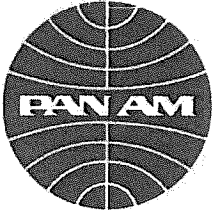
*Counsel for Boston and Maine Corp./ Springfield
Terminal Railway Co.*

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2014, I served a copy of the foregoing Motion for Extension of Time upon all parties of record in this proceeding by electronic mail and first class mail, postage prepaid.


Robert B. Culliford

236761



PAN AM RAILWAYS
1700 IRON HORSE PARK
NO. BILLERICA, MA 01862

ENTERED
Office of Proceedings
September 30, 2014
Part of
Public Record

September 30, 2014

Cynthia T. Brown, Chief
Section of Administration/Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20024

Re: Sea-3, Inc. v. City of Portsmouth, New Hampshire
Substantive Comments of Boston and Maine Corporation and Springfield Terminal
Railway Co. in support of the Emergency Petition for Declaratory Order
Docket Number FD 35853


Dear Ms. Brown:

Enclosed for electronic filing is Boston and Maine Corporation and Springfield Terminal
Railway Company's original Substantive Comments dated September 30, 2014 in support of
Sea-3, Inc.'s Emergency Petition for Declaratory Order.

Please feel free to contact me if you have any questions regarding this filing.

Thank you for your assistance.

Sincerely,



Robert B. Culliford
Counsel for Boston and Maine Corporation/
Springfield Terminal Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35853

**SEA-3, INC. -EMERGENCY PETITION
FOR DECLARATORY ORDER**

**SUBSTANTIVE COMMENTS OF BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY IN SUPPORT OF THE
EMERGENCY PETITION FOR DECLARATORY ORDER FILED BY SEA-3, INC.**

**Robert B. Culliford
Boston and Maine Corporation/
Springfield Terminal Railway Company
1700 Iron Horse Park
North Billerica, MA 01862**

*Counsel for Boston and Maine
Corporation/Springfield Terminal Railway
Company*

Dated: September 30, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35853

**SEA-3, INC. –EMERGENCY PETITION
FOR DECLARATORY ORDER**

**SUBSTANTIVE COMMENTS OF BOSTON AND MAINE CORPORATION &
SPRINGFIELD TERMINAL RAILWAY COMPANY IN SUPPORT OF THE
EMERGENCY PETITION FOR DECLARATORY ORDER FILED BY SEA-3, INC.**

I. INTRODUCTION

On August 4, 2014, Sea-3, Inc. (“Sea-3”) filed an Emergency Petition for Declaratory Order (the “Petition”) and the City of Portsmouth (“Portsmouth”) filed its reply to the Petition on August 20, 2014 (the “Reply”). The Boston and Maine Corporation and Springfield Terminal Railway Company (collectively “Pan Am”) subsequently moved to intervene in the proceeding on August 22, 2014 and to permit Pan Am until September 5, 2014 to file substantive comments to allow settlement discussions between Sea-3 and Portsmouth to occur. Given the nature of these discussions, on September 5, 2014, Pan Am requested another extension of time until September 30, 2014 in which to file substantive comments. The Petition to Intervene and each

request for an extension of time were allowed by the Board on August 29 and September 8, 2014, respectively.

Since settlement discussions between Sea-3 and Portsmouth have not reached a resolution, Pan Am now submits its substantive comments in support of the Petition.

II. FACTUAL BACKGROUND

As Sea-3's Petition explains in detail, throughout the course of multiple Newington Planning Board public hearings and other meetings relating to Sea-3's application for a permit to expand its facility in Newington, New Hampshire, Portsmouth continuously raised objections focused solely on the increase in rail service on the Portsmouth and Newington Branch lines of Pan Am located in Newfields, Greenland, Stratham, Portsmouth and Newington, New Hampshire. Petition at 4. As the correspondence cited by Sea-3's Petition makes clear, Portsmouth initially claimed to have no concerns with the expansion of the Sea-3 facility, and was instead concerned with the impact of increased rail service through Portsmouth. Pet. at 7. Furthermore, the Petition also clearly shows that the relief sought by Portsmouth from the Newington Zoning Board of Adjustment and the State of New Hampshire Superior Court reiterated these concerns. Pet. at 10.

Of course, in response to the filing of Sea-3's Petition Portsmouth now claims that it has no interest in regulating rail service provided by Pan Am, and simply seeks determination of matters relating solely to the permit issued to Sea-3's facility. Reply at 17. Leaving aside the fact that the behavior of Portsmouth *prior* to Newington Planning Board approval of the Sea-3 expansion is completely at odds with the new position taken by Portsmouth in its Reply, Portsmouth is in fact attempting to regulate rail transportation by Pan Am by unnecessarily

delaying the expansion of Sea-3's facility through questionable litigation¹. In fact, the longer it can delay the expansion of the Sea-3 facility, the longer Portsmouth can attempt to delay an increase in rail service by Pan Am to that facility². As a result, Portsmouth's efforts to litigate state law zoning requirements, which serve only to frustrate and delay the ability of Pan Am to increase transportation by rail to Sea-3, is a thinly veiled pretext to regulate transportation by rail carrier and is preempted by 49 U.S.C. § 10501(b) (2014).

Furthermore, while Pan Am has not applied for any permits from Newington, Portsmouth or other surrounding communities in relation to Sea-3's proposed increase in rail service, Pan Am has provided substantial information throughout the permitting process and attended all public meetings of the Newington Planning Board to supplement that information. Pan Am has also separately met with representatives from Portsmouth and other surrounding communities on several occasions to address their concerns, while also soliciting input from the Federal Railroad Administration ("FRA") and the New Hampshire Department of Transportation ("NHDOT") regarding potential rail impacts resulting from the Sea-3 expansion. Throughout this process, Pan Am has explained that rail service on the Portsmouth and Newington Branches has been ongoing for decades and continues to this day, with at least four active customers in Newington. The only change to these operations will be an increase in service from approximately twice a week to potentially six days per week if Sea-3's expansion occurs and Sea-3 utilizes rail service as expected. Notwithstanding these efforts by Pan Am to provide substantial information to all interested parties, Portsmouth remains adamantly opposed to the expansion of the Sea-3 facility.

¹ On September 15, 2014, the Newington Zoning Board of Adjustment ("ZBA") held a hearing regarding Portsmouth's appeal to that body, and denied all of Portsmouth's claims raised to the ZBA. See attached Exhibit A.
² To be clear, Pan Am continues to provide rail service to customers in Newington, and will continue to do so based on their needs. The issue here is the regulation—through a permit sought by a customer—of an increase in rail service to Newington.

As Portsmouth itself has shown, however, this opposition is not driven by Sea-3's expansion, but rather by the proposed increase in rail service.

Nevertheless, Pan Am has also done significantly more than simply provide information to Portsmouth and other entities. Rather, recognizing that the Portsmouth and Newington Branches have historically been light density lines, Pan Am also acknowledged that an increase in traffic would require upgrades to the track structure. In response, Pan Am initially sought to determine an appropriate scope of work to implement such upgrades, and undertook the following measures to do so:

- Pan Am hired a private rail inspection service to identify any rails that may be defective and require replacement;
- Pan Am has also utilized geometry test vehicles to identify segments of track that are in need of alignment;
- Pan Am also accompanied FRA and NHDOT track inspectors on four walking inspections of the Portsmouth and Newington Branch to further identify possible areas of concern and correct any defects found; and
- Pan Am has also worked with FRA to conduct bridge inspections, which found no structural issues in need of repair to support increased service.

Utilizing the information obtained from these various inspections, Pan Am has also developed a work plan to improve the condition of the Portsmouth and Newington Branches from a marginal FRA Class One to FRA Class Two. Despite Portsmouth's protests, this work has already begun, with over 5,000 new crossties installed, the placement of over 40 carloads of new ballast, and the replacement of worn rails. Should Sea-3 obtain its final permits and utilize

rail service at the expected levels, completion of work to bring these branch lines to FRA Class Two will be finalized in the summer of 2015.

In addition, both FRA and NHDOT attended Planning Board and other meetings with neighboring municipalities to address any questions regarding rail safety, and in each instance the agencies confirmed that the condition of the Portsmouth and Newington branches will be more than adequate to safely handle any increase in rail traffic. See Exhibits B, C & D. Finally, Pan Am has also met with emergency responders from Newington, Portsmouth and other neighboring municipalities, offering to continue Pan Am's historical practice of participating in joint training exercises in preparation for a potential rail related incident. Those emergency responders have not expressed significant concerns with their ability to respond in the unlikely event that an incident should occur due to increased rail traffic. Finally, Pan Am has also offered to meet with NHDOT and municipal departments regarding current and future at-grade crossing design to determine what, if any, upgrades may be necessary in response to increased rail traffic. To date, it does not appear that any upgrades will be necessary.³ Additionally, the New Hampshire House of Representatives have recently proposed a bill to establish a committee to study rail safety in New Hampshire, among other transportation modes.

To summarize, throughout the permitting process, Pan Am, FRA, NHDOT and emergency responders have reviewed the potential impact of an increase in rail service. As a result of these reviews, each agency has informed the Planning Board, Portsmouth and other

³ Despite being informed by NHDOT that significant crossing upgrades will not be necessary, Portsmouth continues to insist that an increase in rail service will require \$2.4 million in crossing improvements. That is simply incorrect. A letter similar to that attached hereto as Exhibit E was also provided to Portsmouth, which at Page Two makes it clear that NHDOT does not see the need for substantial upgrades to at grade crossings.

neighboring municipalities that no significant safety concerns exist. Furthermore, the Legislature is also independently proposing a committee to study rail safety.

Notwithstanding: (a) the substantial amount of information that has already been provided—and will be provided—in relation to rail service on the Portsmouth and Newington branches; and (b) the voluntary upgrade of these lines by Pan Am, Portsmouth continues to contest Sea-3's ability to expand as a pretext to regulate Pan Am's rail carrier transportation.

III. ARGUMENT

Pursuant to 49 U.S.C. § 10501(b), two categories of state and local regulation of transportation by rail carriers are preempted: (a) permitting or preclearance requirements that could be used to deny a railroad the right to conduct rail operations; and (b) attempts to intrude into matters that are regulated by the Surface Transportation Board (the "STB"). *Buddy & Holly Hatcher—Petition for Declaratory Order*, FD 35581 (S.T.B. Sept. 21, 2012). In this matter, Portsmouth is attempting both types of regulation by trying to delay and/or unduly interfere with the ability of Pan Am to increase rail service under the guise of state and local zoning laws applicable to the Sea-3 expansion, while also unreasonably delaying an increase in Pan Am's rail service to Sea-3.

But even if those statutes were found to be applicable, it appears that Ayer is simply using them as a pretext to do what Congress has expressly precluded: interfere with interstate commerce by imposing a local permitting or environmental process as a prerequisite to the railroad's ability to conduct its operations. The Town insists that there is a potentially significant water quality problem that needs to be addressed here. But as Guilford notes, an expert agency, the Massachusetts Department of Environmental Protection, recently concluded that, with the mitigation system proposed by Guilford, the new facility poses no threat to the local water supply.

Joint Petition for Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA., FD 33971 (S.T.B. May 1, 2001).

The facts of the instant dispute are almost identical to those in *Ayer*, with Portsmouth claiming that an increase in rail traffic due to the expansion of Sea-3 would pose safety, environmental and quality of life risks for the City's residents. Pet. at 9. As in *Ayer*, however, FRA, NHDOT and Portsmouth and Newington emergency responders have raised no concerns with an increase in rail service, particularly in light of the improvements that Pan Am is voluntarily making to the rail lines serving Newington. Nevertheless, Portsmouth is actively seeking to regulate transportation by rail carrier and is inappropriately delaying the increase in rail service by delaying Sea-3's ability to expand its operations. This is not only the use of permitting or preclearance requirements to interfere with railroad operations, it is also a direct attempt to intrude into matters that are directly regulated by the Board by preventing Pan Am from increasing service to its customer. Such pretextual behavior by Portsmouth is preempted and cannot be allowed to continue.

Notwithstanding the unwarranted interference that Portsmouth is causing to Sea-3's approved expansion of its facility and increased rail service, Portsmouth also scrupulously avoids providing any details of what it truly seeks through its state law causes of action. Nevertheless, it is easy to foresee that Portsmouth will also attempt to utilize the results of any litigation to impose impermissible restrictions on Sea-3's ability to utilize, and Pan Am's ability to provide, transportation by rail carrier, which is impermissible. *Boston and Maine Corp. & Springfield Terminal Railway Co.—Petition for Declaratory Order*, FD 35749 (S.T.B. July 19, 2013). Indeed, the key distinction between the present dispute and *Ayer* is that Portsmouth is seeking to

regulate matters directly regulated by the STB, as opposed to an ancillary facility not subject to STB licensing authority. In those instances where state or local regulation impedes into those areas directly regulated by the STB, the act of regulation itself is preempted. *CSX Transp., Inc.—Petition for Declaratory Order*, FD 34662 (S.T.B. July 7, 2005).

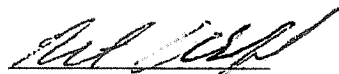
The Petition is also factually distinct from other efforts by non-rail carriers to utilize STB jurisdiction to evade state and local regulation. *Florida East Coast Ry. Co., v. City of West Palm Beach*, 110 F. Supp. 2d 1367 (2000). Here, Sea-3 has voluntarily participated in the permitting process through its application to the Planning Board and other municipal and state agencies. Indeed, if not for the heightened scrutiny applied to Sea-3's application due to the issue of increased rail service, Sea-3 would have no need to seek the assistance of the STB. Instead, Portsmouth's opposition to increased rail service, and its use of state and local zoning laws to impede that service, have unnecessarily delayed Sea-3's ability to expand, and forced Sea-3 to seek a determination from the Board that Portsmouth's action are preempted to avoid continued delay and expense of litigation.

IV. CONCLUSION AND REQUESTED RELIEF

In closing, the only question that is relevant to the Board's analysis of this matter is whether Portsmouth would have filed its two appeals absent a potential increase in rail traffic. Given the substantial opposition to this issue by Portsmouth throughout Newington Planning Board deliberations regarding Sea-3's expansion, the answer to that question is clearly in the negative. Therefore, Pan Am respectfully requests that the Board issue an order:

- (1) Declaring that Portsmouth's efforts to utilize state and local zoning to delay and/or unreasonably interfere with Pan Am's operation of rail carrier transportation are preempted;
- (2) Declaring the Zoning Board of Adjustment Appeal and the Superior Court appeal seek to utilize state and local legal remedies to regulate Pan Am's operation of rail carrier transportation are preempted; and
- (3) Granting such further relief as the Board may deem proper.

Respectfully submitted,



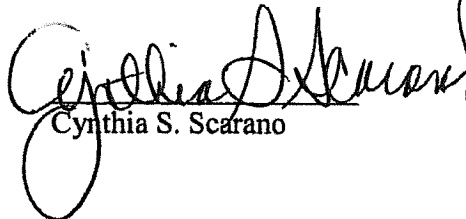
Robert B. Culliford
Pan Am Railways
1700 Iron Horse Park
North Billerica, MA 01862
(978) 663-1126

*Counsel for Intervenors Boston and Maine
Corporation and Springfield Terminal Railway
Company*

Dated: September 30, 2014

VERIFICATION

I, Cynthia S. Scarano, Executive Vice President of Boston and Maine Corporation and Springfield Terminal Railway Company, depose and say that all of the facts and allegations set forth in this document, to the extent based on my personal knowledge, are true and correct to the best of my knowledge, information and belief.

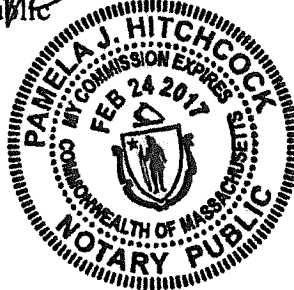

Cynthia S. Scarano

Dated: September 30, 2014

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Personally appeared before me the aforementioned and affirmed to me that the facts and recitals set forth in the foregoing document are true and correct to the best of her knowledge, information and belief,


Notary Public



CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2014, I served a copy of the foregoing Substantive Comments of Boston and Maine Corporation and Springfield Terminal Railway Company in Support of the Emergency Petition for Declaratory Order Filed by Sea-3, Inc. and to Hold This Matter in Abeyance upon all parties of record in this proceeding by electronic mail and first class mail, postage prepaid.


Robert B. Culliford

EXHIBIT A

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

- Call to Order:** Chairman Matt Morton called the September 15, 2014 meeting at 6:30 PM.
- Present:** Matt Morton, Chair; Ted Connors; Ralph Estes; Jim Weiner and Jane Kendall, Recorder and Martha Roy, Town Administrator
- Absent:** John Frink
- Public Guests:** Newington Town Counsel, Attorney Walter Mitchell; City of Portsmouth Attorney Jane Ferrini; City of Portsmouth Attorney, Robert Sullivan; Portsmouth Deputy Manager, David Allen; City of Portsmouth Mayor Robert Lister and Councilor Ester Kennedy; Attorney Alec McEachren; Paul Bogan with Sea-3; Steve Haight of Haight Engineering; Pan Am Counsel, Robert Culliford; Attorney John Ratigan; Denis Hebert; Bernie Christopher; Chris Cross; Mike Marconi; Jack Pare; Justin Richardson; Rick Stern; Newington resident, Edna Mosher; Bill and Sandy Sweeney; Portsmouth Residents, Richard Dipentimo and Lou Salomi

Public Hearings: The City of Portsmouth's appeal of the Newington Planning Board's decision to approve the **Sea-3** site plan for property located at **190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2.**

Chairman Morton informed the public that the City of Portsmouth and Sea-3 were not able to come to an agreement in a private meeting so they were going to continue with their appeal that was postponed on August 25, 2014. He also announced that the Board was short one member, and that all four members present would be voting. He asked the City of Portsmouth and Sea-3 if they were willing to go forward with the hearing without five voting members. Attorney Alec McEachren, representing Sea-3 said they wanted to go forward with the appeal and Portsmouth City Attorney, Jane Ferrini also agreed to go forward with the appeal.

Town counsel, Attorney Walter Mitchell recommend that the Board determine whether they had jurisdiction over one or more of the appeal issues before they proceeded with discussing the merits of the appeal. He said the only jurisdiction the Board had was on the interpretation, construction and application of the zoning ordinance. He said he would provide his interpretation of the appeal document and the relationship between the questions and application of the zoning ordinance and recommended that the Board then listen to responses from the City of Portsmouth's attorney and Sea-3's attorney on each issue before making a decision.

Attorney Mitchell said there were three questions raised in the appeal and the first question was regarding the non-conforming use of the existing tanks on Lot 13 and

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Lot 2 where the zoning line passed through. He said the tanks contained hazardous materials that were not permitted by the current zoning ordinance and the appellant claimed that the expansion of the non-conforming use was therefore prohibited. He said it was a proper question and Board members should speak up if they disagreed or they would go onto the next question. All the Board members concurred that the question was valid.

Attorney Mitchell said the second question on page 10 of the appeal had two parts with the first being that the Planning Board did not require and review a new safety hazard assessment. He said the second was that the Planning Board required that an update to a safety assessment that was done 15-20 years ago be submitted to the appropriate officials, but it would not be available for public review and comment. He said the question was whether this complaint had anything to do with the interpretation, construction or application of the zoning ordinance. He said the argument was that there was an effort to pull that complaint under the language of Article 1 and Section 3 of Article 1 of the zoning ordinance regarding promoting the health, safety and general welfare of the community. He said the theory in the appeal was that those goals couldn't be satisfied if the Planning Board declined to require safety assessments. He recommended that appeal was outside the Board's jurisdiction because it was outside the meaning of the statute, which would subject all Planning Board decisions to ZBA appeals.

Attorney Ferrini disagreed with Attorney Mitchell's characterization of Article 1 and Article 3 of the zoning ordinance was not properly before the Board. She said the fundamental premise of all zoning was to protect public health, safety and welfare and even though the articles were broadly written, the specific application in the appeal was a safety study. Attorney Ferrini said the first issue was whether the Planning Board appropriately denied the numerous requests for safety studies. She said the Planning Board denied the requests, concluding that they complied with the zoning ordinance and that their approval of the application would be a benefit to the public. She said paragraph 5 of the decision stated that studies had been done previously and that they would be updated and given to the appropriate officials in Newington. She said she asked for the original file from 1975 on three occasions and was told that it was missing so it would be impossible for the Planning Board to review it for updates. She said there were six separate, all encompassing studies done by Sea-3 in 1995 that totaled 200 pages. She said the Planning Board also required additional studies in 1995 and recommendations by two experts were part of the Planning Department's approval at that time. Attorney Ferrini stated that any analysis of those 200 pages outside of a public hearing process would not be appropriate and those studies should have been reviewed as part of the determination of whether the project was compliant with the zoning ordinance and the public's health, safety and welfare. She said she was surprised that there was such resistance to a review of safety studies in 2014 that would include climate, marine safety, and evacuation in the event of a catastrophic event and believed it would be appropriate.

Chairman Morton asked Attorney Ferrini if she had a copy of the 1995 studies and she said she did.

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Attorney McEachren said he agreed with Attorney Mitchell they would be opening a Pandora's box if the Board went along with the City of Portsmouth on this point. He said the zoning ordinance was intended as a guide and their questions went back to the purpose of the zoning ordinance. He said counsel for Portsmouth was not pointing to any provision that said a safety study was required in every instance. He said there were extensive studies in 1996 for the second expansion. He said the fire chief also had an opportunity to tell the Planning Board if he didn't approve of the application.

Attorney McEachren referenced the Supreme Court's Atwater decision that said anyone that disagreed with a Planning Board decision needed to appeal within 30 days and not wait for the final decision and therefore, the appeal had not been timely filed and was not properly before the Board.

Attorney McEachren said the site already had three rail loading berths and the Planning Board had approved five. He said the City of Portsmouth was approaching the application as if it was a new project, but it was actually an expansion of an existing rail facility. He said it would be appropriate that existing studies be referenced instead of doing everything over from scratch.

Mr. Paul Bogan, Vice President of Operations for Sea-3 said to the best of his knowledge of the six studies that were quoted, the Planning Board only requested one study that had to do with the construction of the additional tank. He said the others were from the EPA, the Coast Guard, and OSHA.

Board member, Jim Weiner asked Portsmouth's counsel why they had not requested an appeal within 30 days and Attorney Ferrini said she didn't attend May 5, 2014 meeting, but did attend the May 9, 2014 meeting where there was a straw vote and a lot of discussion. She said deliberation occurred on May 19, 2014 and the Board's alternate member raised an issue of a rail study. She said that decision was not closed and it was the City's position that there was still an open issue and the request for an appeal was not untimely.

Attorney John Ratigan, representative for the Planning Board invited them to read the May 5, 2014 meeting minutes. He said the decision was the decision and it was not jurisdictional because the appeal was not filed within 30 days of May 19, 2014, but was filed on June 17, 2014. Attorney Mitchell said the timing issue raised by Attorney McEachren may or may not have merit, but it was something no one heard prior to the meeting to review closer so he recommended that the Board not take any action on that request. He said those issues could be argued later if the issue went to court, but right now the Board needed to decide if there was any jurisdiction to hear matters on the second appeal.

Board member, Ralph Estes added that their bylaws were about land use and there was nothing there about studies.

Mr. Justin Richardson of 32 Old Post Road and Planning Board member said he thought Section 5 of the zoning ordinance for both the Industrial and Waterfront districts said the building inspector would issue a permit upon findings of the Planning Board. He said the Planning Board wrestled with whether the language required a safety study and it was determined that they were only required to make a finding.

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Ted Connors moved that the Board had no jurisdiction on the second appeal. Jim Weiner seconded the motion and all were in favor.

Attorney Ferrini said their question was not just in regards to the purpose and timing of a safety study, but the second piece was that the outcome of the study would be outside of the public hearing process. Mr. Mitchell said the motion were only in response to the subject matter and had nothing to do with timeliness.

Attorney Mitchell said the third issue of the appeal claimed that the City and other abutters were prejudiced in the Board's delay in declaring the application a development of regional impact and also that abutters were not given notice in error before the variance proceedings at the end of 2013. He said he didn't believe that had anything to do with the Planning Board's decision and recommended that the Board find no jurisdiction in the matter.

Chairman Morton said he recalled discussing the matter with the Town planner and recalled that all commercial abutters were notified, but some individual homes were not actual abutters to Sea-3 so he didn't think that complaint was valid. Attorney Mitchell said the Planning Board was not mentioned anywhere in that item.

Attorney Ferrini said the issue on notice was that the Planning Board received information relative to a regional impact, and the Town of Greenland wrote to the Town planner on October 28, 2013 requesting that the project be deemed one of regional impact so the issue was not the notice of abutters, but that none of the surrounding communities received a regional impact notice so they couldn't fully participate in the hearings.

Attorney McEachren said the statute said the Board had jurisdiction on the construction and application of the zoning ordinance and this question did not relate to the zoning ordinance.

Jim Weiner moved that item 3 failed and was outside of the jurisdiction of the Board. Ralph Estes seconded and all were in favor.

Chairman Morton said the appellant could now address the first issue of the appeal.

Attorney Ferrini said the industrial and waterfront district bisected the tank that was owned by the railroad and hazardous and explosive materials were prohibited in the general industrial "I" zone, stating that LPG propane in any form would fit that description. She said the files were missing so there was no way to know the details of the findings for the original site construction in 1975, but the Planning Board findings said the expansion was consistent with a long standing use in the industrial zone, despite the use not being permitted. She said the May 19, 2014 minutes again referred to uses permitted in the industrial zone, which it said was intended to promote economic development and employment opportunities. She went on to read paragraph 51 of the minutes that said that the terms of the site plan application, the proposed location, construction and operation would not injure present or prospective development in the district or the health and welfare of resident districts in the vicinity. She said the Board

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found that this application was the type of business development that land use in the industrial district intended to protect and promote. She reiterated that the use was not appropriate for the "I" district and could be an exception in the waterfront district so long as they complied with the EPA.

Chairman Morton commented that the use had been in operation since 1975 and Attorney Ferrini said if it was a non-conforming use, then it was an expansion of that use and an intensification, which could not have a negative impact on its neighbors. She said she understood that the jurisdiction of the rails were addressed, but the City of Portsmouth was saying it put a strain on shared transportation routes, rivers, rails and roads.

Mr. Estes asked if the City of Portsmouth was asking for the removal of the operation and Attorney Ferrini said they wanted a safety study on the issues raised and the ZBA had the authority to remand back to the Planning Board for a study.

Mr. Weiner said the existing tanks were there, the proposal was for an expansion with three new tanks on the water district side that met the requirements of that district and nothing had changed on the industrial side. Attorney Ferrini said she believed the rail and truck transportation would increase on the industrial side.

Attorney McEachren said all improvements proposed would take place in the waterfront district where it was allowed. He said there would be no changes to the tank in the industrial area.

Mr. Steve Haight of Haight Engineering agreed that there would be no improvements in the industrial section of the site and showed the plan where the zoning line bisected the smaller tank and the new tanks would be placed in the waterfront. He said the Town's transportation expert concluded that there would be no change to in the volume of trucking from the original approval because the site could not support an increase. He said the majority of LPG supply had previously been received by ship from international sources and the proposal was to increase the rail delivery capacity. He said the site had been in operation for nearly 40 years without incident.

Mr. Weiner asked if the expansion would create additional shipping exports and Attorney McEachren said they had received 180 million gallons of LPG from 12-13 ships a year, but under the new delivery configuration by rail they would probably only export one to two ships during the summer.

Mr. Estes asked if this project would alleviate the shortage of propane the region experienced last year and Attorney McEachren said the regional demand was growing at 8% per year. He said there was a declaration of emergency declared by the Department of Safety that referenced their site last year. He said the international prices were above the domestic prices and rail was the way to bring it in. He said 75% of the propane coming into New England came by rail.

Attorney Mitchell asked if there was an acknowledgement that the LPG product Sea-3 handled was an explosive and hazardous material as described under Article 5, Section 5C of the ordinance. Attorney McEachren agreed that it was flammable material as referenced under that section of the ordinance. Attorney Mitchell said the City of Portsmouth's attorney was suggesting that the Planning Board said something contrary that was not consistent with the ordinance. Attorney McEachren said it was a non-

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conforming use. Attorney Mitchell inquired if the City of Portsmouth had suggested that this was an illegal non-conforming use and Attorney McEachren said they had not. Attorney Mitchell asked if it was an extension of a non-conforming use and Attorney McEachren said there were no changes to the tank in the industrial district and there would be no difference in how the propane would be distributed by truck from the site.

Portsmouth resident, Richard Dipentima said there was an intensification of the use of the existing tanks in the "I" zone that was inconsistent with the zoning ordinance. He said Sea-3 had received most of their product by ship with only a few rail cars and now they were proposing to receive 16 rail cars six days a week throughout the year.

Planning Board member, Justin Richardson said he made the motion on the Planning Board's decision and the Planning Board looked at each criteria in the zoning ordinance phrase by phrase when they made their findings. He said they were concerned that there might be an increase in traffic, but noted that the truck deliveries would be limited due to the capacity to load.

Mr. Bogan said they previously used only a small number of rail cars, but it was not their primary means of transportation because rail transportation was expensive. He said they used to have more truck distribution, but international prices went up and put them out of business over the last couple of years and now they were proposing a change to their business with rail deliveries so that their truck deliveries would return to the same number as before when business was doing better. He said they could only put out 48 trucks with 16 rail car deliveries a day and the traffic study said the roads could handle that amount of traffic.

Attorney Ferrini commented that Sea-3 was a subsidiary, which could absorb losses. She said she was not convinced that Sea-3's expansion would solely serve domestic shortages because the Planning Board minutes gave testimony from an attorney in Maine that said they could make more money exporting to foreign sources than they could by providing to the domestic market.

Denis Hebert, Chairman for the Planning Board agreed that they never approved an increase of truck traffic beyond their current loading capacity, but it would increase from slow years to busy years.

Mr. Weiner asked if Attorney Ferrini wanted to comment on the traffic issue and Attorney Ferrini said the use seemed quiet over the last couple of years and the new change would increase the traffic and that would be an intensification of use.

Attorney Ratigan said he had presented a memo to the Board to address the issue, which agreed that the Town's traffic engineer confirmed the number of trucks and the City had not presented any evidence to contradict those findings. He said the number of ships had been a permitted use for a long time and would be changing from 12-13 to one or two in the summer.

Attorney Mitchell said the claim was that the LPG storage tank was not allowed in the industrial zone and boats and trucks had nothing to do with the issue. He said Attorney McEachren acknowledged that it was a non-conforming use that had apparently been grand fathered so the only issue in the appeal was if the plans would result in an enlargement, extension, or expansion of LPG storage in the tank that was partly in the industrial zone which was prohibited in the ordinance.

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Discussion ensued on the wording of the motion. Attorney Mitchell recommended that Attorney McEachren admitted that the storage of an explosive substance was not permitted in the Industrial zone, but was grand fathered. He said the question was whether there was an expansion in that zone. Chairman Morton commented that they hadn't expanded the tank.

Jim Weiner moved that there was no proposed expansion of the LPG storage in the industrial zone. Ralph Estes seconded the motion and all were in favor.

Mr. Lou Salomi of 142 Spinnaker Way said he thought a representative of Sea-3 had said earlier in the meeting that there would be a safety or environmental study of the study that was done 18 years prior and he wondered who would purchase a product that had a safety study that had been done 18 years ago.

Adjournment: *Ted Connors motioned to adjourn, and Ralph Estes seconded. All were in favor, and the meeting adjourned at 7:47 p.m.*

Respectfully
Submitted by: Jane K. Kendall, Recording Secretary

EXHIBIT B

Town of Newington, NH

PLANNING BOARD

Meeting Minutes – Monday, March 24, 2014

- Call to Order:** Chair Denis Hebert called the March 24, 2014 meeting to order at 6:35 p.m.
- Present:** Vice Chair, Mike Marconi; Bernie Christopher; Christopher Cross; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectman Representative, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Public Guests:** Attorney Christopher Cole; Attorney Alec McEachern; Attorney John Ratigan; Paul Bogan, Sea-3 Vice President of Operations; Cynthia Scarano, Pan Am Executive Vice President; Robert Culliford, Pan Am Senior Vice President and General Counsel; John Robinson, NH DOT Rail Inspections; Philip Sherman, P.E., Fire Protection Engineering and Building Code Consulting; Kim Eric Hazarvartian, P.E., Transportation Engineering, Planning and Policy; Newington Fire Chief, Andrew Head; Steven Haight, Haight Engineering; David Allen, Deputy City Manager for Portsmouth; Peter Britz, Environmental and Sustainability Planner for Portsmouth; Senator Martha Fuller Clark; Portsmouth Residents: Catherine and Richard DiPentima; Pat Ford; Bob Gibbons; Jane Sutherland; Newington Residents; Mr. Paul Bagley; Jack O'Reilly; Bill Sweeney; Greenland Resident: Laura Bygero; Jeff McMenemy with the "Portsmouth Herald"

A) Proposal by Sea-3 to reconfigure its terminal at 190 Shattuck Way (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

Alternate Board member, Peggy Lamson opened the meeting by thanking Mr. Rich DiPentima and his wife, Catherine of Portsmouth for all their research that they shared.

Mr. Dave Allen, Deputy City Manager for Portsmouth read Portsmouth City Manager, John Bohenko's email to Newington Town Planner, Tom Morgan regarding a preliminary inventory on the condition of rail infrastructure in Portsmouth, which would cost approximately \$2,400,000 for upgrades. He also pointed out that there was over a mile and a half of excepted track, which was the lowest condition grade of track, running through the most densely populated sections of the City.

A) Track Inspection – Report by John Robinson, of NH DOT

Chairman Hebert introduced Mr. John Robinson, railroad safety inspector for the NH Department of Transportation Rail and Transit Bureau. Mr. Robinson mentioned that he had recently discussed track inspections with the City of Portsmouth.

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Mr. Leonard Schwab of 59 Great Bay Drive in Greenland asked Mr. Robinson to address a report that was published in the "Portsmouth Herald" regarding the removal of I.D. tags from the crossties. Mr. Robinson said date nails were something that had been used in the past to monitor the manufacturers and lifespan when rail ties were changed more frequently, but had been phased out and were not required by the FRA. Mr. Robinson couldn't say why they were removed, but they were a popular item with rail fans and were often pillaged. He said a seasoned rail person would be able to tell the age of railroad ties, however.

Mr. Schwab asked Mr. Robinson how he assessed the percentage of ties that were punky or rotten on a 15 mile run. Mr. Robinson said there were between 3,000 and 3,200 railroad ties per mile and Federal regulations were written to address 39 feet at a time. He said in Class I classification eight non-defective crossties in 39 feet were required. He said the location of the ties had to be effectively distributed to support the track, for instance, out of twenty-five ties on a Class I railroad track, five had to be classified as non-defective. Mr. Schwab asked Mr. Robinson if that would mean 20 ties could be defective and Mr. Robinson confirmed that was correct. Mr. Robinson stated that a certain amount of deflection was engineered into tracks to prevent steel failure. Mr. Schwab said he could appreciate the engineering, but it was hard to feel comfortable with those figures.

Mr. Bob Gibbons of 135 Spinnaker Way said the report said he inspected 21 segments and asked if the 39 feet was a segment. Mr. Robinson said the track inspection was done by units and different appliances were considered units. Mr. Gibbons asked if the inspection was from Rockingham Junction to Newington and Mr. Robinson said it was. Mr. Gibbons said there was no mention in the report of excepted track in downtown Portsmouth and Mr. Robinson said they looked at it, but only certain regulations applied. Mr. Gibbons asked how the track in its current condition would handle the proposed propane tanker traffic. Mr. Robinson stated that excepted tracks were available to transport hazardous materials with no more than five cars, but not passenger service. Mr. Gibbons said the proposal was for sixteen cars. Mr. Robinson said that was correct and it would create an operational challenge for the railroad.

Mr. Gibbons asked what it would take to build the tracks back up to Class I standards and Mr. Robinson said generally the replacement of ties, leveling and aligning the track better. Mr. Gibbons asked if it would require a substantial upgrade and Mr. Robinson didn't think so as the difference between excepted tracks and Class I was nominal.

Mr. Rich DiPentima of 16 Dunlin Way said Sea-3's proposal was for twelve to sixteen cars a day. Mr. Robinson stated that Pan Am would only be able to move five cars a day with the tracks in their current condition. Mr. DiPentima asked where the cars would stay and Mr. Robinson said they could resort to leaving the cars at Rockingham Junction, bringing five cars at a time or they could leave some of the cars at the beginning of Portsmouth rail yard, but they could not have more than five cars at a time on an excepted track. Mr. DiPentima said the cars would be unprotected and unguarded. Mr. Robinson said that was correct if the tracks were not upgraded.

Mr. DiPentima read from the Newington Master Plan that stated the railroad tracks in town were not up to par. Chairman Hebert responded that the tracks appeared to be in poor condition, but it was not a qualified statement as Newington had no railroad inspector giving that information.

Mr. DiPentima asked about the safety of track defects and Mr. Robinson said a certain number of defects were not outside the realm of other Class I tracks and they were considered safe.

Ms. Catherine DiPentima of 16 Dunlin Way asked if the six months between inspections was the typical period of time between inspections, saying it seemed like a long time. Mr.

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Robinson agreed that it did. Ms. DiPentima said she lived 100 feet from the tracks and they looked in terrible condition. Mr. Robinson said his focus had revolved around the Down Easter passenger service over the past 10 years and freight lines in this area were standard to low. He said the DOT and the Federal Railroad Association (FRA) did joint inspections, and he had recently mentioned to the FRA inspector that it was time to focus on other lines now that the Down Easter was squared away with the Portsmouth and Newington branch being front and center. He said they walked three miles of track in 2012 and the 32 defects found were promptly repaired within 30 days. Ms. DiPentima said a lot of propane could travel over the tracks in 30 days. Mr. Robinson said the railroads were on notice that they could still conduct business at the designated speeds, but they could not go beyond the 30 days to repair the defects and the inspectors could not go back for another inspection until the 30 days were up.

Ms. DiPentima asked if they reviewed the inspection reports that were released. Mr. Robinson said a "Portsmouth Herald" reporter that requested the reports from the Freedom of information Act sent him a couple of pages of the FRA summary document. He admitted that the document was very hard to follow. He stated that some defects were more severe than others.

Mr. Raymond Faulkner said he lived across the Piscataqua River from Sea-3 in Eliot, Maine and had worked for the U.S. Coast Guard and with environmental compliance for many years and was concerned with the safety of the LPG ships. Mr. Faulkner reminded everyone living close to the rails that Portsmouth had an active rail yard for 67 years. He said all transportation methods had some risk, but he didn't think Pan Am wanted any incidents on their watch.

Mr. Faulkner said there was a speed limit for the Portsmouth traffic circle yet people still went at different speeds. He said roads were in bad repair, the bridge over the Piscataqua was in poor condition, but it was still used. He said there were dangers at railroad crossings and no railroad crossing had a right of way for cars - there were yield signs that said, "Look, Listen and Live" and people had to take some responsibility for their own safety.

Mr. Bill Sweeney of 90 Patterson Lane said there were trees growing between the rails past Sea-3 and asked if there were plans for the trains to continue on that line. Mr. Robinson said the Newington branch ended at the Sprague, but was out of service and it would only be put into use by making the required repairs. Mr. Sweeney said many hunters walked those tracks. Mr. Sweeney asked if there were plans to put them back in use and Mr. Robinson said it was not a secured area.

Mr. Jack O'Reilly asked if there was adequate line of sight and stopping distance at the crossings and Mr. Robinson said trains have the right of way, there was little a train could do if someone crossed in front of it.

Ms. Pat Ford of 135 Spinnaker Way handed out a map of Pease Development and displayed the map with highlighted areas showing the existing rail lines going to Newington, and a proposed line that would return the train line to a former line through Pease. Ms. Ford said this alternate route could eliminate crossings in Greenland, running through downtown Portsmouth, Maplewood Avenue, Christian Shores, Dunlin Way, Atlantic Heights, Spinnaker Way and Osprey Landing, reducing the hazard of railcars going through their backyards and providing for access in case of emergency. Mr. Robinson said he started his position in 2000 and he was not familiar this plan and could not speak on Pan Am's business plan.

Chairman Hebert said the Master Plan discussed what could potentially be done if someone wanted to throw money at it, but the line never continued all the way through Pease and that would take quite a lot of money and time to complete. He said he liked that people

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were throwing ideas out and understood people were concerned with the track, but reminded them that it was not Pan Am that was before the Board.

Ms. Ford said there was a fund called the Railroad Rehabilitation Fund from the U.S. Department of Transportation under the FRA for loans to finance railroad infrastructure that would give public benefits for safety, the environment and economic development with loan terms and repayment periods at current interest rates. She added that Pan Am owned a subsidiary that manufactured railroad ties. Ms. Ford said she had no idea what the cost or time frame would be, but it seemed someone could come up with an alternative route through Pease to reduce the safety risk for residents and improve their business. She asked Pan Am if they would be willing to consider the feasibility. Ms. Cynthia Scarano, Pan Am Executive Vice President said that she didn't believe Pan Am owned that property through Pease any longer. Chairman Hebert said it probably always belonged to the U.S. government and now the State probably owned it. Alternate Board member, Peggy Lamson agreed that the rail was always part of the Federal government. She said continuing the line from Pease to the port was considered, but it was determined that it was not feasible because it was owned by the U.S. government and put away on the shelf. Chairman Hebert said the Master Plan listed a passenger service for consideration, but Pease Development Authority and the State and Federal Government would have to be on board with completing the line, and he didn't see that happening anytime soon. He said the Board had forty-five days to make a decision on the Sea-3 proposal and they probably couldn't even get on the PDA agenda in forty-five days.

Chairman Hebert asked Mr. Robinson who owned the railroad crossings and who was responsible for the costs according to RSA: 373 for municipalities. Mr. Robinson said RSA: 373 was probably the least clear RSA, but it did say that the railroad was responsible for the right of way, the maintenance of signage, signals, and tracks. As for road surface, the acid test was historic documentation on what came first, the railroad or the public way. He said the duty of the railroad was to provide suitable crossings for the public, but the railroad says they build railroad not roads. He said as part of a hearing process, a town official could petition the transportation commissioner for a change of protection. Mr. Robinson would testify on road traffic, number of trains and speed of trains, and the commissioner would make a decision on who was responsible for upgrades and distribution of costs. Chairman Hebert said Route 33 was an example of a major highway with a crossing in front of Lowe's and he didn't know if there were enough signals there and they would need to have further discussions as time went on.

Mr. Jeff Barnum, Great Bay Piscataqua Water Keeper said the railroad was only as good as the bridges. He said there were crossings over waterways in Stratham, Pickering Brook, over Winnicut River in Greenland, and in Portsmouth. Mr. Barnum asked Mr. Robinson who did inspections, how often and where the reports were kept for the Planning Board to review before they passed judgment. Mr. Robinson said he was not a licensed engineer, but he made cursory inspections with railroad personnel. He said he did not do subterranean or underwater inspections himself. He said Federal law required that annual, comprehensive bridge inspection be in place with records, ratings and results of changes available to the FRA and himself. Mr. Barnum said he heard the Planning Board couldn't get a hold of the reports and asked if DOT could review the reports. Mr. Robinson said he would be privy to look at the records and numerical rating system, but it was not likely that a licensed engineer from DOT would do the inspections. Mr. Barnum asked if the Planning Board had to go to the FRA who would get that information from Pan Am. Mr. Robinson said that was correct.

Mr. Richardson said he read RSA: 373:3 and looked online for the DOT regulations for calculations and he couldn't find them. Mr. Robinson said RSA: 373 was listed under the Public Utilities Commission and up to 1985, the railroad went under Public Utilities oversight and then

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was given to DOT. Mr. Richardson asked how the Planning Board would determine cost to municipalities for the project and upgrades to crossings. Mr. Robinson said he thought the City of Portsmouth was exploring the Federal Section 130 Program that a lot safety upgrades and there would be a match with the City. He said the railroad often participates with construction forces for the installation or upgrade of signals at crossings.

Mr. Richardson said the Board was running out of statutory time to make a determination and asked the City of Portsmouth representatives if they would work out those costs, so not to throw a burden on the City's shoulders. Mr. Allen, Portsmouth's Deputy City Manager nodded that they would. Chairman Herbert said the process was new, but Pan Am mentioned they sometimes supplied labor if the towns supplied materials. He said after that the railroad owned and maintained it.

Chairman Hebert said like it or not how this was how the U.S. government set up the railroads and it was not within the Planning Board's purview to tell Pan Am what to do. He said it was they had to get engineering involved and trust the FRA guidelines and what DOT would do and it was in their best interest to begin that process as soon as possible. Ms. Scarano said they were meeting with town of Greenland to begin the process. She said towns and the railroad used to work separately, but they were now trying to sit down together to discuss what to do at crossings and how to proceed.

Chairman Hebert said every crossing needed to be assessed to determine what needed to be done, and to set priorities. He said he didn't know how much it would cost, but the Board was trying to make everything safer if this project was approved. He said the Board had to move away from the railroad, which was not in their purview and look at the site to consider if site changes were necessary. Mr. Robinson said he heard they might consider a third party inspector, but clarified that as the railroad safety inspector for the State, he was free to inspect private and industrial railroad tracks on a State level outside if they felt there was any reason for concern.

Mr. Mark Willis of 16 Caswell Drive in Greenland expressed concern that the railroad trestles were self-inspected and wanted to know why those reports were not available to all citizens. Mr. Robinson said rail bridges were private infrastructure going over public waters and that was why it had come under Federal scrutiny recently so he thought the records would be available through the Federal Freedom of Information Act. He said one of the problems with making inspection reports available to the public was they were open to interpretation that required a certain amount of expertise for proper understanding. He went on to say that a competent inspection would take training beyond his training and he was not an engineer. He said the reports were numerically rated, and if a situation were beyond his knowledge, he would refer to an engineer for his opinion to validate his concern. Mr. Robinson said a railroad employee accompanied a majority of the inspections. He said they were signing off and if he saw anything that was a peril, he would call the FRA immediately and impose an emergency order to stop operations on Federal order.

Mr. Richardson said he understood the railroad was under Federal jurisdiction and the Board couldn't tell the railroad what to do, but he wondered if the Board might be able to discuss the offsite costs and municipal share of highway improvements. Mr. Robinson said DOT could play the role of facilitator, but he never recalled the railroad offering to improve crossings because their top priority was not ride quality, although the railroad did want safe crossings. Mr. Robinson said the railroad owned their own tie company, but they were not road builders so they often referred to contractors. Mr. Richardson asked who would pay for widening the lane if it was necessary on the Maplewood Avenue crossing where major developments were being proposed. Mr. Robinson said DOT made decisions how costs would be allocated. He said after

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a new signal went in at the cost \$150,000 to \$200,000, the railroad had a continuing expense of \$5,000 per location per year to inspect and maintain that signal that the highway uses free of cost from there out. He said the railroad always starts contentiously, but they do want safety, as does the Town of Newington. He said they might like signals at every crossing in the State, but they could not engineer out poor judgment and complacency. He said if gates and bells malfunction, they operate in the most restrictive mode closing town roads. Mr. Richardson asked if signal requirements increased with Class II tracks and Mr. Robinson said the crossings, speed, and the number of trains were a determination, but signalization was not class specific to a class standard.

B) Fire Safety Analysis – Report by Philip Sherman

Mr. Philip Sherman, P.E., Fire Protection Engineering and Building Code Consulting said he reviewed the Sea-3 design against the New Hampshire fire code. He said there was a requirement for a fire safety analysis that was intended to include LPG release and fire to coordinate with local response to consider the safety of workers as well as the public. He said it was centered on product control to keep the product in the piping and equipment where it belonged to minimize hazards. He said an analysis of exposure to other properties, analysis of water supply and protection measures were also reviewed.

Mr. Sherman said Mr. Paul Bogan, Sea-3 Vice President of Operations sat on the board and they came to a meeting of the minds with some modifications to ensure sufficient water to support the installation, relocation of the hydrants as necessary, and fire access through Sprague and the rail right of way. Mr. Sherman said they looked at all the required setbacks at the site and adjacent structures off site and a decision was made to provide fixed water spray so someone at the control booth could press a button and everything could be sprayed and cooled, depending where the incident was.

Chairman Hebert asked Mr. Sherman if he was a P.E. and if he put his stamp on the plans. Mr. Sherman said he did put his P.E. stamp on the plans, and Chairman Hebert said another P.E. would review the plan before approval.

Board member, Jack Pare asked where the existing fire monitors would be relocated for flexible use. Mr. Sherman said the existing monitors were on a nozzle attached to hydrants. He said they were of some use in a fixed site, but of no use for multiple sites. He said that was part of what drove them to a fixed water spray system directed at the tanks. The hydrants would be used in conjunction with the fire dept. Mr. Pare asked if fire monitors would not be reutilized and Mr. Sherman said they would not.

Mr. Pare asked if the UV detectors detected flame or non-odorized vapor. Mr. Sherman said there were flame detectors. Mr. Pare asked if there were any sniffers and Mr. Sherman said there were not. Mr. Bogan said UV and gas detectors were already in place and they would duplicate that with state of the art equipment for the new construction.

Mr. Pare referred to increasing the number of LPG trained firefighters and asked about training firefighters in Newington and surrounding communities. Mr. Sherman said Newington had a small number of firefighters on duty so firefighters from surrounding areas would respond. He said they took a conservative view of available labor that included firefighters and first alarm people on duty. Mr. Bogan said they provided training in the past and would again for Newington, Portsmouth, Greenland and Stratham.

Mr. Pare asked if there were a train accident, would the training address that kind of effort. Mr. Bogan said yes, there was an emergency response plan to address off site incidents, which was on their website as well. Mr. Richardson asked what resources that Sea-3 had on

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site should an accident occur and what Sea-3's role would be. Mr. Bogan said Sea-3 had equipment and personnel available to go to the scene. Ms. Chairman Hebert asked Pan Am if they provided training to fire fighters to respond to an accident off site. Ms. Scarano said they often worked with the FRA to provide a day of training for local fire departments.

Chairman Hebert said there was a mutual aid agreement with different towns. He said there would be an on scene commander, which was usually the fire department head that would call for assistance with their apparatus and equipment to stabilize the scene. Newington Fire Chief, Andrew Head agreed. Chairman Hebert said hazardous and flammable materials like jet fuel or heating fuel could contaminate the soil and environment, but these responders would control propane that usually remained contained.

Chief Head said if something happened down the track off the Sea-3 site, they would be called to assist, but it would not be their responsibility and the railroad police would be there quickly to respond. Mr. Richardson said there had been an incident with an engine fire that Newfields or Newmarket responded to and had to burn for a while because the equipment was in the way and they couldn't put it out. He asked what the local fire departments would do to respond to a fire. Chief Head said they would have the party in charge of the equipment explain what the best way to put the fire out would be. He said they might use lots of water to keep a tank cool, or if necessary, allow the spill to vaporize or burn off depending on the circumstances. Ms. Lamson asked if it would be the Newington fire chief's responsibility to seek the assistance of Sea-3 if there was a disaster on the rail line once the tank filled with propane left Sea-3. Chief Head said they could look to Sea-3 for information, but their doing anything more would be a liability.

Chairman Hebert asked if the fire department had what it needed for training and equipment to respond. Chief Head said they were in the preliminary stages, but he thought they were all set. He said he hadn't seen the system yet, but there was only a short distance of track in Newington off the facility. He said if the proposal was passed, they would review the full plan, but everything in their area should be in place, along with the fire trucks. He said they would also seek any training available. Mr. Bogan said funding from the National Propane and Gas Association would pay for the training.

Mr. Pare noted that they listed the public water supply, but asked if it would be worthwhile to install a dry stand pipe for the nearby Piscataqua if there was not enough pressure. Mr. Sherman said the intent was to see if there was enough water and the intent of the flow test was to see if there was enough pressure. Chairman Hebert asked if the nearby salt water could be used. Chief Head said there was too much of a draft pull and it didn't work. Vice-Chair Marconi asked Mr. Bogan if the facility had a backup tank and Mr. Bogan said they did. Mr. DiPentima said there was a derailment of a propane tank car in near Woodbury Avenue and Market Street in August 2001 that fortunately didn't have any loss of product, but that might change at 25 miles per hour. He asked if they had written evacuation plans for the hotels, restaurants and shops within a one-mile radius in a catastrophic event of an LPG explosion that addressed how long it would take and where people would go. Chief Head said Newington was his jurisdiction and it would be up to Portsmouth to set up their own evacuation plans. Chief Head said two years ago they did drills with the State for evacuation for an incident at the Seabrook nuclear power plant. Mr. DiPentima said he helped write the Seabrook evacuation plan in the 1980's for a stationary site, but this was a mobile hazard going through densely populated areas and thought they needed plans in place for a catastrophic event of regional impact to prevent the loss of life and destruction of property. Chief Head said the State emergency management plans included evacuations with escape routes for the whole area, but he didn't know of any drills.

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Mr. Richardson said it was his understanding that part of the Clean Air Act was an emergency response plan for the Sea-3 facility that Newington participates in. Chief Head said they would receive a 911 and they would investigate any reports of leaks and recommend an evacuation of everyone in the area, including the malls with the assistance of the police department to get everyone on the highway. He said they were working on a phone tree system in conjunction with some of the other industrial facilities.

Chairman Hebert summed up by saying the fire chiefs from each town were responsible for emergency responses for their area and would call for assistance from other towns. He said it would be similar to the emergency response required for any incident involving an LPG tanker going down the highway. He said he was not trying to defend Sea-3 or Pan Am, but scenarios change, so they prepared with apparatus, equipment, personnel, and chains of command and practiced what they could on a regular basis. Chairman Hebert said the simulators used for putting out fires were all propane, which they could control better than oil fires, which were hazardous to the environment.

Mr. O'Reilly said the chief was co-director of the town's emergency plan, which included flooding, hurricanes, etc. and suggested they work with Sea-3 to include propane fires if they didn't already have that in place.

Mr. Richardson said there were requirements for separation distances and fencing in their plan and asked if there were any concerns with security. Mr. Bogan said that would be part of their upgrade with security, fencing, lighting, and surveillance. He said U.S. Homeland Security governed them and they would have to upgrade their plan if they went forward with the project.

Senator Martha Fuller Clark said the emergency response booklet to communities was developed in the 1980's and she wondered if it had been updated. Mr. Joe Rose, President of the Propane and Gas Association of New England said they updated their plan twice a year. He said the focus of the plan was to provide resources and tools for fire services that they might need to control situations should they occur. He said they had three day practice sessions with live fire and an actual rail car and rail car head with valves and fittings to teach fire fighters what would actually happen. Senator Clark asked who would address the plan for evacuation and Mr. Rose said that would be the local fire chief and the emergency management plan.

Board member, Chris Cross asked if the fire trucks were expected to drive over the railroad tracks for emergency access. Chief Head said Shaftmaster would have to lose some parking spaces for the trucks to fit and they were also concerned with where rails cars would be stored. Mr. Cross said driving over rails would be constraining and he thought a suitable secondary route would need to be available, plowed and maintained. Mr. Sherman said fire safety code required fire access roads before they could obtain a legal permit. Mr. Bogan said a second access would be built to code beside the tracks so trucks wouldn't have to go over ties.

Mr. Cross said the site plan for compressors, pumps and other facilities appeared to use overhead lines and he wondered if they might run underground. Mr. Bogan said Public Service lines were already running over them, and they could run future lines from the pole underground. He pointed out that fire codes from the Propane and Gas Association that would determine how many feet away electric lines would have to be from the equipment and that would be reviewed. Chief Head said the power lines to compressors would run underground.

C) Traffic Study – Report by TEEPP, LLC

Mr. Kim Hazarvartian, P.E., with Transportation Engineering, Planning and Policy reviewed his traffic assessment regarding truck traffic. He said the site had a waterside

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component with bulk transport vessels, the rail side, and the land side component with LPG transport trucks. Mr. Hazarvartian said the trucks left the site, went down Avery Avenue, down Shattuck Way and then split directions up the Spaulding Turnpike or down I-95. He said site modifications would not materially affect the trucking component, which would stay the same with a capacity of filling ten trucks per hour. Mr. Hazarvartian reviewed the truck transportation history from February 2002 to present with an average of 103 to 161 trucks per day for all years except 2012 and 2013 due to market conditions. He said the site changes would not increase those volumes, as the site capacity was limited to ten trucks an hour.

Mr. Richardson asked how many trucks could be on the site at once, and asked where trucks queuing at the gate would go. Mr. Bogan said they had five transport loading spots, but they had an agreement with Newington Energy to stack trucks if they were backing up on Avery road.

Mr. Hazarvartian said at ten trucks an hour in a sixteen hour day, there could be as many as 161 trucks. Discussion ensued whether it would be possible for more trucks to come in and out of the site. Mr. Bogan said they had to factor in the time for drivers to pull on and off the rack. He also said they didn't have capacity to store rail cars, so they would unload product and store it in tanks.

Chairman Hebert asked about ships. Mr. Bogan said they would fill local market contracts and demands in the winter months first and then they could export any remaining product in summer months.

Mr. Morgan asked if they had any idea where the customers were and the percentages of product going north and south. Mr. Bogan said he thought it might be an even distribution between, New Hampshire, Maine and Massachusetts. Mr. Morgan said they relied on historic data for truck trips, but the propane market was expanding and he thought it might be helpful to get some information on consumer trends. Mr. Rose said New England was the only place in the United States where the demand for propane was increasing at a rate of 8% over the last five years because customers were converting from oil for clean and cheaper propane. He said Sea-3 distribution was constrained by the reality of a twenty-four hour day with a maximum of 200 trucks a day at peak capacity.

Mr. Morgan wondered if they could increase more than one train per day to supply product for export if recent events in Ukraine created a bigger demand in Europe, and how that would affect traffic. Mr. Bogan said the capacity of their chilling, drying and storage equipment could only handle sixteen cars a day and they would have to expand, but he didn't believe there was room at their site for required setbacks. Mr. Rose said they would have to have space for extra rail cars. He said New England's propane supply was 75% dependent on rail, but 87 million gallons came in by ship this winter because rail cars were not available and couldn't keep up. He said most of the gas for Europe came in quicker and cheaper from North Africa, across the Mediterranean. Mr. DiPentima said he didn't see how they could meet the increasing demands of propane without increasing truck traffic beyond historic levels. Mr. Hazarvartian said the decrease in traffic in 2012 and 2013 was an anomaly and they were only returning the level of traffic that they had previously, not increasing it from that number. Ms. Laura Bygero of Greenland expressed concern that Sea-3 might expand as an exporter to foreign markets that would bring in more propane tankers over the rails and that Sea-3 would return to the Board at a later date with a request to expand their capacity. Mr. Bogan reiterated that they had to comply with fire and safety setback regulations and they couldn't expand beyond 16 tankers a day because of the size of the property.

Ms. Bygero said it was harder to build a gas pipeline than rail lines so the shortage of rails was a national issue that was being looked at to address the increase of supply coming out

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of fracking. Mr. Bogan said there was a difference between LPG and natural gas. Chairman Hebert asked if natural gas could be brought in and processed as Sea-3 for shipment, and Mr. Bogan said they could not be mixed and they were only doing LPG. Chairman Hebert said by law no board could restrict a business from making expansion proposals; they could only evaluate them fairly by law.

Mr. Richardson said he understood there was a limit to how much propane could be processed, but they couldn't use that as a stipulation for approval any more than they could require the railroad to upgrade to a Class II or limit the number of trains. Chairman Hebert said they couldn't regulate the rails, but they were reviewing the traffic study on the number of trucks going in and out of the facility, which had a limitation on how much product it could process due to the site limitations. Mr. Bogan again stated that the equipment could only handle 16 cars per day, unless there was a change in design and they were not doing that.

Mr. Mark Willis of Greenland said he was confused because the number of tankers and trucks reported was inconsistent. Chairman Hebert said the operation would be sending out the same average number of trucks a week depending on the demand as it had in the past. He added that the site had a limited capacity for processing and storage so there was a limited number of tankers that could come in as well. Ms. Scarano said there might be fewer tankers sent out some weeks, but those were the maximum numbers. Board member, Bernie Christopher asked Mr. Bogan to elaborate on what their storage capacity was. Mr. Bogan said they were bringing in 180 million gallons a year by ship and were proposing 16 tankers a day, but they would fall short during a peak year so additional product would be pumped out of the summer storage to make up difference during the heating season. He said eventually the tanks would be empty and then they would only operate on 16 tankers a day.

Mr. O'Reilly said it came down to economics – it was cheaper to buy domestic propane than importing foreign supply, so it was a matter of increased profit, but capacity was still capacity and that was not changing. Mr. Bogan said that was correct, that the expense of foreign supply had priced them out of the market over the last couple of years and this was an attempt to keep up the domestic supply at an affordable price.

Ms. Jane Sutherland of Dunlin Way said she thought the application was for export, not regional distribution. Chairman Hebert read Sea-3's application to reconfigure their LPG terminal to accommodate rail deliveries, truck shipments throughout New England *and* export via ocean going ships. Ms. Catherine DiPentima asked if there was a change of process if the application included export. Chairman Hebert said even if they were changing the method that they did business, it was still the same business with the same number of trucks going out so the Board could only look at changes to the site. Mr. Richardson said the zoning ordinance and site regulations applied to the site changes to accommodate the rail to plant changes, but the existing use for trucking LPG was approved in 1996 and it was in effect grandfathered as an existing, lawful use. He said the Board could only revoke approval if they were to expand beyond that 1996 agreement that would have to come back to the Board or Energy Board.

D) Emergency Response – Report by Fire Chief Andrew Head

Chairman Hebert said the fire safety details of an application were worked out with the Fire Chief and the State Fire Marshall. If issues were not addressed, the Planning Board backed the Fire Marshall up.

Mr. DiPentima said he read about the Pan Am incident that occurred recently in Westford, Massachusetts where propane tankers were teetering on a bridge and Pan Am didn't notify local officials. He said the only way it came to their attention was when the local Fire Chief

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drove by. Ms. Scarano said local fire and police were notified, but the town manager was not notified. Mr. DiPentima said he heard there was no Federal regulation to notify local officials. Ms. Scarano said that was true, but she was not going to have a disagreement with the town manager in the newspaper.

Board of Selectmen representative, Rick Stern asked Chief Head how many people a year they sent out for the propane safety training. Chief Head said they try to send out two in the spring and two in the fall, but everyone in the department went through the training two years ago. Mr. Stern asked if he had been to the training and Chief Head said he had not, but others in the department had.

Portsmouth Assistant Mayor, Mr. Jim Splaine said he was chair of the traffic safety commission in the late 70's when Sea-3 was starting and they were quite concerned with the rail track conditions at that time. The police chief and the fire chief at the time worked out an informal arrangement to receive notifications of the Sea-3 rail traffic, which they shared with local fire departments. He said it seemed quite useful to the planning and preparation for any emergency that might occur, and he wondered if Chief Head would find such an arrangement with Sea-3 and Pan Am agreeable. Chief Head said there were few rails that came into Newington, but they received lists of ships once a day, including propane shipment notices from the Coast Guard so he imagined a list from the railroad would be helpful.

Chairman Hebert said the Board couldn't regulate or restrict the railroad, but he thought it was reasonable for Pan Am to work out a schedule voluntarily out of consideration of the noise impact to the local community. Ms. Scarano said the railroad operated on an as needed basis that was not scheduled, but they did give as much information as possible on what was going over the rails to the fire department. Chairman Hebert said they had said they planned on upgrading and replacing 10,000 cross ties, and he was asking if they would set up a liaison with the community and voluntarily avoid noises such as running engines in the yard unnecessarily. Ms. Scarano said she personally took calls from the community and they wanted to do what they could. She said they had a safety person who would work with local fire departments, but they were not a scheduled service so they would not be willing to make an agreement at anytime. Chairman Hebert said there were some things about the railroad that were outdated and needed to be reviewed, but that was not within the Board's purview. However, he did think there were some things the railroad could do to keep a good community relationship going.

Ms. Bygero said as a Great Bay steward she was asked by their president to express their concern for the environment and supported a request by the Portsmouth community to request a comprehensive safety and environmental impact study. She said they would also like to ask Pan Am to release their bridge inspection reports. Ms. Scarano said the bridges were inspected all the time, but they did not release their findings publically. Ms. Sutherland said no one understood how they could do an objective and thorough study on their own equipment without a conflict of interest.

Attorney Ratigan said Federal law was clear that local government had no say over environmental regulations in regards to rail improvements. Chairman Hebert said the reason these powers were given to the railways that were built across the country a long time ago was that they weren't going to ask for permission from every town they went through and those Federal laws hadn't changed. He suggested the only way to change things was to ask representatives in Washington to change the laws. He said they had discussed it with legal counsel for many hours and the Board could not consider anything to do with the rails, not even on site, but he hoped Pan Am would cooperate voluntarily to mitigate the impact on the communities.

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Mr. DiPentima asked about the issues that affected the public health, safety and welfare. Attorney Ratigan said they listened to fire and traffic studies and the Board would review their finding with an independent consultant, but purview of the Board was limited to the Sea-3 site and they had no jurisdiction over the rails and rail traffic.

Chairman Hebert said cheap fuel could come through ship, but the Jones Act said they couldn't go from U.S. port to U.S. port unless it was piloted and crewed with a U.S. made ship and there were none. He said the Jones Act was another law with unintended consequences that was hurting the country. He said they could only go to their elicited officials to change laws. He said it had been an educational process for everyone.

Mr. Gibbons said there were many subjects that could not be discussed or disputed by the Planning Board, but there was an economic impact that will be thrown on all the abutting communities to protect citizens from increased traffic and speed hazards by building gateways across Maplewood Avenue and Market Street where there was high traffic. He said the expected time of travel would be in the early morning hours after bars let out, which would require an increase in safety considerations. Chairman Hebert said Pan Am worked with towns in the past to share costs, and Mr. Robinson said the State set up the process. He said unfortunately, there was more traffic as towns and cities grew. He said everyone liked the region and resources, and sometimes that meant that something like a railroad or a power line was proposed near people's homes in the interest of benefiting the larger community as a whole.

Senator Clark said she understood there were some difficulties with an alternate line, but asked if there was any way that Newington could reach out to the PDA to discuss a solution if it was practical and responsible to find an economic and safe solution to avoid dense residential and traffic areas. Chairman Hebert said they would ask those questions.

Mr. Richardson said they had been told that the lines would be upgraded to Class II and he thought it fair to say that these things would be done. He said the zoning ordinance called for determinations that they make sure projects were safe for neighborhoods. He said cases had been cited, and the idea that the Board could do nothing was something he would look into. Attorney McEachern said Pan Am said the lines would be upgraded to Class II, not the applicant. Ms. Scarano agreed that Pan Am came because they were asked to and they did not have an application before the Board.

Mr. DiPentima said this project had been declared as a development of regional impact and other towns had limited abutter status. He asked why the Planning Board couldn't ask the Portsmouth City Council and other planning boards to vote to see if they were in support or not. Chairman Hebert said there were near the end of the road regarding new information and the Board would need to make a decision soon and they could continue the discussion at the next meeting on Monday, April 14, 2014.

2) New Business: PSNH Transmission Lines

Chairman Hebert said the Town had just begun communicating with PSNH who was doing preliminary land surveys, borings, identifying types of soil in the river in consideration of replacing their distribution lines with transmission lines from Durham through Gundalow Landing to Hannah Lane. He said they were proposing going above ground by Hannah Lane and were told the town wouldn't accept the lines above ground. He said they were also looking at alternative routes. He said the schedule was for this and next year to be completed by 2015.

Mr. Paul Bagley of Hannah Lane said the right of way was already there and thought they could do whatever they wanted. Chairman Hebert said their right of way was for a distribution line and they might over burden their right of way with transmission lines, but he

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wasn't sure what the easement said. Attorney Ratigan said PSNH might talk to residents while they were doing their surveys about acquiring additional land to widen their right of way and it would be helpful to let the Planning Board know so they could negotiate with them. He said PSNH had the right, but they typically didn't like to use eminent domain. Mr. Bagley said it sounded like they were similar to the railroad, but he had a little hope that he would get compensation.

Chairman Hebert said there was legislation in the State to regulate above ground power lines. He said they tried to put language in that would require them to show why they couldn't go underground. Mr. Bagley said the lines had to be buried underground on the Frink farm because of air traffic, but Mrs. Abbott's lot was right in front of Hannah Lane. Chairman Hebert said the Abbott property on Hannah Lane could be in a good position because there was more land. Mr. Stern said needing more land could encourage them to bury the lines instead of buying the land.

Chairman Hebert said they were staying in contact and the Town wanted to be involved in the process of routes chosen. Mr. Bagley asked if there was a better route. Chairman Hebert said possibly on the other side of Arboretum Drive, or at the edge of Great Bay Wildlife Refuge. Mr. Richardson asked why would need to go near the refuge. Chairman Hebert said it was near the river following the boundary of the refuge. Ms. Lamson said she believed they were surveying beyond Welch's Cove and agreed that the refuge boundary could be a good spot.

Minutes: ***Mike Marconi motioned to approve the Planning Board Minutes for March 10, 2014 with changes. Ms. Lamson seconded the motion, and all members voted in favor.***

Discussion: Chairman Hebert recommended having a work session with Attorney Ratigan before the next meeting

Adjournment: ***Mike Marconi motioned to adjourn. Bernie Christopher seconded, and all were in favor. The meeting adjourned at 10:15 p.m.***

Next Meeting: Monday, April 7, 2014

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

EXHIBIT C

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- Call to Order:** Chair Denis Hebert called the March 10, 2014 meeting to order at 6:32 p.m.
- Present:** Vice Chair, Mike Marconi; Bernie Christopher; Jack Pare; Justin Richardson; Alternate Member, Peggy Lamson; Board of Selectman Representative, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner
- Public Guests:** Attorney Christopher Cole; Attorney Alec McEachern; Attorney John Ratigan; Paul Bogan, Sea-3 Vice President of Operations; Cynthia Scarano, Pan Am Executive Vice President; Robert Culliford, Pan Am Senior Vice President and General Counsel; Steven Haight, Haight Engineering; John Killoy, Federal Railroad Administration Representative; Nick Cricenti, SFC Engineering; John Bohenko, City Manager for Portsmouth; David Allen, Deputy City Manager for Portsmouth; Peter Britz, Environmental and Sustainability Planner for Portsmouth; Portsmouth City Councilors, Esther Kennedy and Stefany Shaheen; Senator Martha Fuller Clark; Portsmouth Residents: Joe Calderola; Catherine and Richard DiPentima; Pat Ford; Bob Gibbons; Jane Sutherland; Newington Residents; Nancy Cauvet; Jack O'Reilly; Melissa Prefontaine; Paul Reardon; Greenland Resident: Laura Bygero; Jeff McMenemy with the "Portsmouth Herald"; Doug LaRosa and Robert Stowell, Trittech Engineering; Attorney Dave Brown; Westinghouse Facility Manager, Fred Miller; David Choate with Choate International

1) Informal Discussion: Update by Seacoast Growers Association to run a farmers' market at the Crossings.

No one from Seacoast Growers Association appeared for this discussion.

2) Public Hearings:

A) Proposal by Sea-3 to reconfigure its terminal at 190 Shattuck Way (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships.

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Chairman Hebert opened up the hearing and welcomed guests, introducing Portsmouth City Manager, John Bohenko who read a letter from Portsmouth Mayor Robert Lister who was not in attendance.

Chairman Hebert asked Ms. Cynthia Scarano, Pan Am Executive Vice President if it was true that Pan Am Railways intended to upgrade their tracks from Class I to Class II, but still keep to 10 mph. Ms. Scarano said that was correct that they intended on replacing approximately 10,000 ties and a number of cross ties. She said they were planning on upgrading to Class II, which could go up to 25 mph, but they were committed to staying to 10 mph. Chairman Hebert asked if there would be any reason to change the speed, and Ms. Scarano stated that they would not at this point though regulations allowed them to go up to 25 mph. Alternate Board member, Ms. Peggy Lamson asked Ms. Scarano to elaborate on her remark. Ms. Scarano replied that they didn't see any reason to go up to 25 mph at this point, but they couldn't guarantee that they would never go up to 25 mph. Chairman Hebert asked if they would stick to 10 mph for propane. Ms. Scarano said they would, but repeated that the regulations allowed them to go up to 25 mph.

Board member, Justin Richardson asked which portion of the tracks they would be traveling at 10 mph. Ms. Scarano stated that they would travel 10 mph from Rockingham Junction in Newfields to the Sea-3 Plant in Newington.

Chairman Hebert introduced John Killoy, Federal Railroad Association (FRA) Employee and Track Safety Administrator for the New England Region. Mr. Killoy said the FRA regulates the railroad and their partners to improve their tracks and employee safety.

Mr. Rich DiPentima of 16 Dunlin Way said the National Transportation and Safety Board made the recommendation that the transportation of hazardous routes be expanded to avoid populated areas. He said they were increasing the transportation of 20 propane tanks to 3,700 a year on the same route and wondered if the increase was consist with national increases. Mr. DiPentima then asked if twelve cars carrying propane were not considered hazardous materials. Mr. Killoy said the reports were for crude oil, but these cars would be carrying propane. Mr. DiPentima pointed out that they would be going through people's back yards.

Mr. Jeff Barnum, Great Bay and Piscataqua Water Keep said he understood DOT or FRA had not inspected the bridges, and Pan Am's inspection records were only available from the FRA by request. He asked if the FRA had looked at the records. Mr. Killoy said each railroad was responsible for their own bridges and several people would review those records with the railroad.

Chairman Hebert asked if there was any plan to follow up with the inspection findings. Ms. Scarano said both the bridges and the tracks have inspection schedules that were audited by the FRA. Chairman Hebert said he was under the impression that the FRA did inspections with DOT. Ms. Scarano said Pan Am did the inspections on an annual basis. Chairman Hebert asked if Pan Am did inspections and provided reports or if the FRA did the inspections. Mr. Killoy replied that they only had a few inspectors, but they did look at the structure of the tracks.

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Mr. Richardson asked what it would take to upgrade the railroad track to a Class II status and if they submitted a capital improvement plan to the FRA for review or if it was an internal process. Mr. Richardson said he wanted it to be an approvable project, but he wanted to know how the process worked. Mr. Killoy said the railroad owns and maintains the track to whatever standards they set. Mr. Killoy said the tracks would be inspected after the upgrade was done. Mr. Richardson asked when the tracks would legally become Class II and if there was more than one way to upgrade. Mr. Killoy said it would all go together.

Chairman Hebert again asked at what point the tracks would switch from one class to the other and if Pan Am made that decision. Ms. Scarano said whatever they decided to do, they would have to meet the FRA's regulations. Chairman Hebert asked how they would know if they were at that level. Ms. Scarano stated that the tracks would be taken out of service or they would be fined if they didn't meet the FRA standards.

Chairman Hebert asked if they had a capital improvement plan and Ms. Scarano said they needed new ties and cross ties, but they would wait until they had the business before they made the upgrade.

Mr. Richardson asked who would pay for the upgrades and Ms. Scarano said they were privately owned and would pay for their own upgrades.

Mr. Richardson said a utility would have a rate agreement for improvements and asked if there would be a document to show the public a plan for what improvements would be made. Ms. Scarano stated that the last inspection was done in January and the track was not taken out of service. Mr. Richardson said it was his understanding that portions of the tracks were designated as "excepted". Ms. Scarano said cars could still travel on "excepted" tracks so they were meeting regulations. Mr. Richardson said they were being asked to take Pan Am's word even though there was no documentation. Ms. Scarano said the railroad was regulated and they didn't expect town officials to understand railroad design and engineering. Mr. Richardson said experts would clearly understand the operation best, but even utilities had to show plans for improvements, document details and show budgets for the municipalities they were in. Ms. Scarano said various plans were filed with the FRA, including drug testing, speeds, cars, analysis of town populations, etc. and the FRA could audit them. Mr. Richardson asked if they could see a copy and Ms. Scarano replied that they could provide a copy of the regulations that were required to obtain a Class II rail line status. Ms. Scarano said that report wouldn't be available because it was part of the track design. Mr. Richardson said there would always be a budget document, however. Board member, Bernie Christopher said he understood Pan Am was a private organization that didn't want to give out information, but he assumed they gave information to the FRA so wondered why the Town couldn't get that information from the FRA.

Chairman Hebert said it was his understanding that engineers went along the tracks and replaced bad ties as they were found. Mr. Killoy said someone marks the bad ties ahead of time and then someone is sent out to replace them, but no plans would be submitted because the rails were already there. Chairman Hebert said Pan Am went on record saying they would put in 10, 0000 ties and the FRA was supposed

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to enforce the maintenance or they would be shut down. Ms. Scarano said the railroads had to stay within the regulations and they would be subject to fines if they didn't comply. Mr. Killoy said Pan Am owned the track, but the FRA did the inspection and that information was available through the Freedom of Information Act by request through the 96 Form.

Ms. Lamson asked Mr. Barnum, the Great Bay and Piscataqua Water Keeper for his comments regarding the bridge near the Great Bay Discovery Center. Mr. Barnum said the bridge was a wooden structure in the middle of nowhere crossing over the Squamset River at the head of Great Bay. He said he hoped the Board would continue to ask questions until they could get reports and plans for the bridge inspections. He said his understanding from DOT was that Pan Am had bridge inspection reports that were only available to the FRA and he was hoping they could get copies of those reports for review. Mr. Killoy said the FRA would audit their bridge inspections. Ms. Lamson said it was an extremely sensitive area and they needed to be concerned for the estuary that went into the Great Bay water system. Mr. Killoy said the inspectors take their jobs seriously. Ms. Lamson said she took her job representing the Town of Newington seriously too. Mr. Barnum said the same inspection would be required for the bridge in Portsmouth near the State pier.

Mr. Matthew Nania of 18 Dunlin Way said he wanted a better understanding of the inspection process. He asked if they inspected the entire line or just a section, and asked how they could find deficiencies during their January inspection when the ties were covered by snow. Mr. Killoy replied that they don't expect any plans for repairs right after the January inspection when the tracks were covered with snow. He said the FRA inspectors typically make an appointment to go back after the snow melts in the month of May to look at ties that hold rails together. He said defects found during the inspections in January were repaired immediately, however.

Mr. Nania asked if the inspection recommendations were for the current standard. Mr. Killoy said it depended on the current class and if standards were not met, the class could be dropped down.

Ms. Laura Bygero from Greenland said the "Portsmouth Herald" asked the FRA for inspection records from Pan Am in December and wanted to know how responsive Pan Am had been. Mr. Killoy said those records could be obtained from Washington, DC through the Freedom of Information Act. Chairman Hebert said Newington had not submitted a request, but he understood that the "Portsmouth Herald" had. "Portsmouth Herald" representative, Jeff McMenemy said they had not yet heard back from the FRA. Ms. Bygero said letters had been sent to the senators asking for records to be released also. Mr. Killoy said the senators would have to go through the same procedures to request information as well. Chairman Hebert said he read the letter from the senators and didn't get the sense that they asked for safety records. Ms. Bygero asked if they would. Mr. Killoy said he would send Chairman Hebert the link and show him the process for requesting the information.

Ms. Catherine DiPentima of 16 Dunlin Way said everyone, Sea-3, Pan Am, and various representative from the cities and towns were saying they were concerned with safety and the Planning Board had an enormous responsibility for the expansion of

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potentially explosive materials given that Pan Am had five incidents in last the month. She said her house was less than 100 feet from the railroad tracks. She said she was concerned for her family's safety and didn't think she was unique, that others with homes, families and businesses were also concerned. She said with such environmentally sensitive, densely populated residential and commercial areas, there was no reason not to conduct comprehensive studies. Mr. Killoy said the FRA didn't get involved in environmental impact studies.

Ms. Scarano said many goods moved through the country without incident. She said they had no deadlines or plans for any environmental impact studies, but some inspections were done weekly. She said Class I tracks were inspected once a month and Class II tracks were inspected twice a week.

Mr. Joe Calderola of Dennett Street asked if there were any FRA regulations prohibiting the railroad from releasing inspection audits from Rockingham Junction to Sea-3 over the last five years. Mr. Killoy's information could be obtained by going through the proper channels, but they would have to be specific.

Mr. Calderola asked when they did the last audit of Pan Am's internal inspection reports. Mr. Killoy said he thought they did an audit two years ago, but he couldn't remember for certain. Ms. Scarano said Pan Am just completed a hazardous material, a drug and alcohol and dispatchers audit. Mr. Killoy said the track and equipment inspection was done last spring.

Mr. Calderola asked about the safety of the railroad crossings and the cause of a recent accident in Pennsylvania. Mr. Killoy said the crossings were set up for speed and a broken rail caused the accident in Pennsylvania. Mr. Killoy said Pan Am tests crossings, but the upgrades of approaches are from states & towns. Ms. Scarano said states and towns also pay for gates if they are on state and town roads. Mr. Killoy said the railroads sometime donate their labor.

Mr. Bob Gibbons of 135 Spinnaker Way asked Mr. Killoy if he was familiar with the local tracks. Mr. Killoy said he looked at map, but hadn't seen the tracks himself. Mr. Gibbons asked if he was familiar with where the area of "excepted" tracks was and what the limitations were. Mr. Killoy said he had seen the inspection reports and the track on a map, but had not seen the track himself. He said "excepted" tracks were different than Class I and a certain level of degradation was allowed. Mr. Gibbons said he had read that only five hazardous cars were allowed to travel at one time, but then he read a conflicting statement on the FRA website that said there could be a risk of derailment with this amount of hazardous material traveling through a populated area. Mr. Killoy said he thought he was referring to unitrains, but this was a Class I track and incidents were usually as a result of a wheel falling off. He went on to say that events were usually not very significant with propane transportation going about 10 mph. Mr. Gibbons said he thought that would depend how close and how many people were in relation to an incident involving hazardous materials. Mr. Killoy said he thought the tanks were very safe.

Mr. Gibbons asked what the time line was for repairs to the tracks and Mr. Killoy said the rails could be left as they are forever, but it would be in their best interest to upgrade them.

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Mr. Lou Brown of 65 Laurel Court said the existing tracks that passed by his house were grandfathered even though they were on wetlands. He said concerns with freeze thaw cycles would be taken under consideration if new tracks were built there now. Mr. Killoy said the railroads put ballasts under the rails to stabilize and keep them from sinking and heaving in the interest of running the cars smoothly. For clarification, Vice-Chair Marconi said the area was dry before Mariner's Village was built.

Mr. Alhamdan Abdallah of 12 Dunlin Way said he was concerned with safety because the tracks pass by his backyard and his work place in Newington too. He asked if the propane tanks were required to be odorized. Mr. Killoy said the FRA inspects the tanks for safety appliances and structural integrity. He said odorizing depended on the customer and the product, for instance the product would not be odorized if used in a spray can,

Chairman Hebert asked Mr. Paul Bogan, Sea-3 Vice President of Operations to elaborate. Mr. Bogan said their product at the terminal was deodorized. He said propane could be labeled as deodorized when shipped, or equipment could be installed to deodorize it once delivered, and they hadn't decided yet which they would do. Board member, Jack Pare asked why they didn't use an odorizing agent in the refrigeration process. Mr. Bogan replied they didn't use an odorizing agent because it would congeal and cause the system to malfunction.

Mr. Abdallah asked if the FRA inspected tanks and how they rated them for safety and compliance. Mr. Killoy said the customers owned the cars, not the railroad, which just moved them, but they were inspected and typical defects were brake shoes or hand holds. Ms. Scarano added that they would tag a tank found with a defect so it couldn't be moved. Mr. Abdallah asked if Pan Am made sure the tanks cars were compliant. Ms. Scarano said they only did a visual inspection of the outside of the cars or tanks, but rest of the inspection would be up to the person who leased or owned the car.

Mr. Richardson asked if they would agree to put a note on the site plan that the railroad would be upgraded to Class II standards within a given period of time. Ms. Scarano said the capital plan was to upgrade over the coming summer. She went on to say that Sea-3 could put whatever they wanted on the plan, but Pan Am had no control over Sea-3 and they has no control over Pan Am. Attorney Alec McEachern, representing Sea-3 said the issue was that Sea-3 had no authority over Pan Am and couldn't put a condition that the railroad line be upgraded to Class II.

Mr. Richardson said the Board had to consider the health, safety and welfare of the public when reviewing the ordinance and regulations. Attorney McEachern said there was a lot of case law on the issue of jurisdiction and the ability of Planning Boards to regulate the operation of the railroads beyond their jurisdiction. He said he submitted a four page legal memo in reply to Attorney Christopher Cole's letter to the Board that came down to the Town having jurisdiction over what happens on Sea-3's site after Pan Am delivers the product, but Federal law had exclusive jurisdiction over the rails that brought the product to and from the site. Mr. Richardson said he read the cases and thought it was a valid point that the Board had the authority to approve or deny uses on Sea-3's property depending on the hazards to the surrounding community. He said the

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only recourse they would have to protect the public's safety would be to deny the application. Attorney McEachern said it would be illegal to do so because the town did not have the authority to regulate railroad operations. He said they could only enforce their zoning in respect to Sea-3's property, and could not deny the application based on the railroad lines, which was under Federal jurisdiction only. Mr. Richardson said some of the cases ruled that towns were in their authority to deny an application when it did not comply with the zoning ordinance when considering the health, safety and welfare of the public. Mr. Richardson asked if they were to accept that there was a capital improvements plan to upgrade the railroad without any documentation. Attorney McEachern said they had to rely on Federal law in respect to their jurisdiction of the railroad.

Chairman Hebert said he understood what Attorney McEachern was saying in regards to Federal jurisdiction of the railroad lines, but asked if Sea-3 if they would be willing to tell Pan Am they would not accept LPG delivery by rail unless they brought the railroad lines up to safe standards. Attorney McEachern replied that they were suggesting another party besides the FRA regulate the rails and that was illegal.

Ms. Susan Parker of 23 Bayridge Road in Greenland asked if an environmental study be done and what the change of classification might do to the environment. Mr. Killoy said the railroad owned the tracks and it was in their interest to make the tracks stable. Ms. Parker said as a former executive for the Department of Labor she knew how regulations change over time based on new science. She said she thought she heard Mr. Killoy say senators had to go through the same process to obtain information from the Freedom of Information Act just as citizens did. Mr. Killoy said senators couldn't release information without going through the process. Ms. Parker said her experience was that if a Senator Harkin sent a letter, an answer would be expected.

Attorney Chris Cole, a representative for several citizens of Portsmouth said neither he nor his clients were trying to regulate the rails, but they were trying to help the Town regulate this site because it had important safety implications. He asked to look at site-specific questions and didn't think Federal law would agree that was the limit of the Planning Board's power. He said they also wanted to ensure the site could handle the ingress and egress of traffic with propane. Attorney Cole referred to his letter requesting a comprehensive study for the 20 million gallons of propane they were bringing in annually. Chairman Hebert said he planned on asking Pan Am those questions later as they progressed through the review of the proposal.

Mr. Lou Salomi of Spinnaker Way asked what it would take to get the rails to Class II and who would decide if the speed would stay at 10 mph or if it could go up to 25 mph. Mr. Salomi read from a study that said out of 40,000 incidents, there was no loss of product when the train's speed was less than 5 mph, but even at 10mph there was a great risk of damages.

Chairman Hebert asked Pan Am for clarification on whether they were only keeping their speeds at 10mph prior to an upgrade and when they would be upgrading. Ms. Scarano said Pan Am was there to answer questions, but repeated that they were

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not before the Board looking for approval. She went on to say their construction season ran to frost, and if Sea-3 told them their proposal for expansion was approved and they were ready for operation, they would complete their rail upgrade in four to six weeks.

Mr. Richardson said it was his understanding that a Class I rail standard couldn't meet Sea-3's requirements to bring in propane. Ms. Scarano it was correct that they would need to upgrade to meet Sea-3's requirements for a sixteen car train, but she pointed out that Pan Am didn't need approval of Sea-3's building permit to travel seven days a week as a common carrier if a customer called for a pick up and delivery.

Mr. Richardson said it was a conundrum because the regulations said they had to determine there would be no impact on the public safety, and yet they were told they can't regulate the railroad. He said he heard them say they were upgrading to a Class II, but they had no agreement to keep their commitment. Ms. Scarano said towns did not make determinations as shown in case law. Vice-Chair Marconi asked if it would be their determination when they went up to 25 mph once they upgraded to a Class II and Ms. Scarano said that was correct.

A resident from Tidewater Farm Road in Greenland asked if there was any intention of exporting and Mr. Bogan explained that their main focus would be for domestic sales, but they might do some exporting in the summer when demands in the New England region were lower so long as they fulfilled their contractual domestic commitments. Mr. Bogan said they were requesting the installation of three additional towers with a future projection of two, but they didn't know if they would ever do that. Chairman Hebert said they would have to return to the Board for any additional expansion.

Mr. Barnum asked if there were any insurance requirements for propane carriers and Mr. Killoy said there were not. Mr. Barnum asked who would carry the insurance to cover accidents and Ms. Scarano said Pan Am had a considerable amount of insurance and Class II would have more coverage than Class I. Mr. Barnum said he thought the Planning Board would like documentation. Chairman Hebert said he knew Sea-3 had insurance and wanted to know what kind of insurance Pan Am had in case of a catastrophic event. Mr. Culliford said they had a \$25,000,000 insurance policy and had significantly more, but they couldn't make a commitment because of market fluctuations. Attorney Ratigan said this was Sea-3's application, not Pan Am's application.

Mr. DiPentima asked Mr. Killoy to respond to his comment that there had been no accidents at 10 mph considering the American Railroad Institute's findings. Mr. Killoy said he wasn't familiar with that study, but he thought a derailment at 10 mph wouldn't be the same as at 40 mph. Mr. DiPentima said there was no ability to control when Pan Am went up to 25 mph and asked what kind of incident would happen at 25 mph. Mr. Killoy said tank car integrity was typically solid and accidents usually occurred when wheels fell off. Mr. DiPentima said he felt they were being told they wouldn't discuss the results of a catastrophic incident. Mr. Killoy said there could be a lot of variables, but Ms. Scarano said they would be staying at 10mph on a track that could handle 25 mph. Chairman Hebert said he knew the Federal government was reviewing railroad safety.

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Ms. Melissa Prefontaine of McIntyre Road, Newington said they had discussed management plan costs and asked if there was any plan for education for local resources such as the fire and police departments to prepare in case of an emergency and how would pay for that. Mr. Bogan said they provided education to local fire, police and emergency responders over the years in case of accidents at the terminal as well as on the road. He said the Propane Gas Association of New England put together an emergency response document and twice a year they had three days of intensive training with live fire at the NH Fire Academy and in Massachusetts. Mr. Bogan said they have had discussions with the fire chief from Rockingham Junction who has been training his people for the project.

Ms. Prefontaine asked how they would mitigate a spill and Mr. Bogan said they did a little bit of environmental training during the program. Mr. Bogan said propane is a noncontaminant gas. Chairman Hebert added that propane evaporates.

Chairman Hebert said the meeting would continue on March 24, 2014 when the State would come in with more information on inspections.

Dr. Kozinski of Health Harbor on Deer Street said she had a sense that they cared for their customers and as a business owner, she found good will to be paramount, but was not hearing from Pan Am that they were concerned for people's safety. She said they were only seemed to be following the letter of law with limited regulations. She said the rail cars ran 5-10 feet from her parked car and there was a concern for her patients and employees.

Ms. Scarano said she was sorry that she felt that way and pointed out that they were regulated by agencies that knew the design of tracks and bridges and they were going beyond the regulations that were required of them. She said they were making a commitment to go below speed limits on other rails as well. Mr. Killoy said it was true that the FRA regulated a minimum standard, but railroads typically went above that standard, which was in their best interest.

Mr. Jack O'Reilly of Fox Point Road, President of Board of Trustees of Great Bay Stewards that was dedicated to the preservation of Great Bay said they were concerned with the effects that potential accidents and spills might have on Great Bay. He said their board generated a letter that was hand-carried to both senators in Washington, DC. He said they also sent a letter to the FRA who responded with the names of NH contacts, Mr. O'Reilly said he read that a Class I track had a certain site line, and asked if the site line would be met if the tracks were upgraded to Class II and traveled faster at 25 mph. Mr. Killoy replied that towns had to clear brush from crossings, but he didn't think there were any site line requirements. Mr. O'Reilly said that might be, but it stood to reason that a train could only go so fast on a blind curb, and Mr. Killoy agreed.

Ms. Jane Sutherland of 8 Dunlin Way said she lived 100' from the track. She said they heard a lot about track safety, upgrades and regulations. She then shared statistics from an FRA report that listed 140% increase in total accidents by Pan Am in 2013, a 200% increase in track caused incidents, a 166% increase in derailments, and a 200% increase in accidents with reportable damage of over \$100,000. In the previous ten years there was an increase of over 2,400 cars carrying HAZMAT materials. She asked how that happened if all the cars were as safe as they were told, and the tracks

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were inspected regularly then how did that happened and if it raised any concern for the review process. Mr. Killoy said he was not familiar with those statistics, but he knew there were people in Washington, DC that reviewed the statistics. He added that the more materials that were moved, the greater the likelihood that more things would happen.

Portsmouth City Councilor, Esther Kennedy of 41 Pickering Avenue, Portsmouth said she spent a lot of time on the Piscataqua River and was concerned with how the FRA looked at the pilings that the tracks crossed. She also encouraged to the Planning Board to ask Sea-3 put a safety plan together for all the surrounding communities. She said Portsmouth had a fireboat and asked where that fit in. Mr. Bogan said the Propane Gas Association put together an emergency response plan to cover the entire New England area that was distributed to every fire department in New England. Mr. Bogan said it was on the propane gas website and available for any fire dept to bring up on their computer in their fire track. Ms. Kennedy said she was looking for them to support the training and asked the Planning Board to make the agreement as part of their documentation.

Ms. Pat Ford of 135 Spinnaker Way asked for clarification on why Sea-3 was increasing the number of cars they were bringing in and Mr. Bogan explained that they were changing their supply to domestic from foreign import due to domestic market changes. Mr. Bogan explained that they were attempting to supply propane to the New England area at a more reasonable price. In response to further questions as to what was driving the need for site expansion, Ms. Scarano explained that the product didn't need to be chilled when it came in by ship, but did when coming in by rail.

Chairman Hebert asked if Pan Am owned the tracks on Sea-3's property and Ms. Scarano said they did not. Chairman Hebert then asked if the tracks on Sea-3's property were under their regulation. Mr. Steve Haight, of Haight Engineering said Sea-3 owned the existing rail siding, but Pan Am owned everything else. Chairman Hebert asked if Pan Am was responsible for the rail lines as they entered and left the property. Mr. Culliford, Counsel for Pan Am said regardless of who owned the underlying property or where the sidetrack was, all side tracks were regulated under the exclusive jurisdiction of the Surface Transportation Board.

Town Counsel, Attorney John Ratigan said he understood in order to have Federal jurisdiction the rail traffic had to be done by a licensed carrier on a railway, and thought the control of the rail cars shifted to Sea-3 when it was on their property and they were not a licensed rail carrier. Mr. Culliford said that was correct, but the jurisdictional statutes covered transportation by rail car and over sidings, facilities, grounds, yards and tracks that were necessary for transportation and operation regardless of ownership. He said even though those operations did not have licensing for rail operations, the rail operation was still under Federal jurisdiction.

Attorney Ratigan asked if that was independent whether or not there was agreement on the shift of responsibility and Mr. Culliford said that was correct. Attorney Ratigan asked for a description of how that would occur on the site physically once the cars were decoupled, the product was managed and handled by Sea-3 and then the cars were recoupled. Mr. Culliford said Sea-3 had a right to use the side rail as a

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customer, but any attempt by a town to regulate Sea-3's ability to receive rail traffic with a cease and desist, then they would be out of their jurisdiction as was found in the case of the City of Winchester. Attorney Ratigan asked for a letter spelling out the basis for their exemption from town jurisdiction. Mr. Culliford said they already had in their reference to the City of Winchester decision and the customer had a right to request common carrier service by Federal law and any attempt to regulate would be a conflict. He said towns and states realized they couldn't regulate the rails so they had seen attempts to regulate end users, which still met the conclusion that railroads wouldn't exist anymore if they weren't allowed to service customers.

Vice-Chair Marconi asked how long it would take a train to stop at 10pm or 25 mph. Chairman Hebert said it would depend upon the mass Vice-Chair Marconi clarified the question by asking how long it would take to stop a sixteen car train. Ms. Scarano said she didn't know the answer, but was sure she could find it.

Chairman Hebert said was not sure they could satisfy everyone's desire, but he wanted to be sure everyone had a voice and that was why they invited a representative from the FRA to answer everyone's questions.

Chairman Hebert said it was important to bring in propane to the area, but they needed to do it safely. He said the propane would be delivered by another method like tractor trailer trucks if trains didn't do the deliveries and that would put twice as many propane trucks on the roads which would be a lot more unsafe. He said if they couldn't do it safely, then the Board wouldn't vote for it, so they needed more discussion. He said they also needed to resolve truck traffic coming out of Newington with the NH DOT and Sea-3 needed to supply data on where trucks parked, lined up and idled. He said he was very concerned with the condition of bridge crossings and wanted to hear DOT's response to that as well.

Chairman Hebert said he would check with fire chiefs to be sure the operation was as safe as possible and asked Pan Am if there was any training for fire fighters, as they exist. Ms. Scarano said they did classes for towns.

Mr. DiPentima said Section 2A of the site plan regulations said the Board could request safety studies and could ask the applicant for reimbursement. Chairman Hebert said that was correct except they couldn't do studies on the railroad tracks that were under Federal jurisdiction. Ms. DiPentima asked about reviewing the impact to the wetlands and Chairman Hebert said the Board had no authority over the environmental impact of an existing railroad that was under Federal jurisdiction as well, but the Board would look into whatever controls they did have.

Chairman Hebert announced that the public hearing would continue on March 24, 2014.

B) Proposal by Bruce C. Belanger for a 3-lot subdivision at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2.

This item was postponed until April 14, 2014.

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C) Proposal by the Estate of Paul J. Beane for a 3-lot subdivision at 233 Nimble Hill Road, Tax Map 17, Lot 4.

Mr. Doug LaRosa and Mr. Robert Stowell with Trittech Engineering appeared before the Board on behalf of the owners. Mr. Stowell presented changes to their plans to configure the lots with a common drive, which has since been reconsidered. Mr. Stowell presented a new plan showing new driveway plans.

Mr. Richardson asked if their new proposal met all the criteria for street construction. Mr. Morgan reminded the Board that they needed to determine if the application was substantially complete before proceeding further. He went on to remind the Board that it was determined at the last meeting that the applicant needed to supply a copy of the deed and a letter from utilities.

Mr. Morgan said he reviewed the subdivision file and believed the application to be mostly complete although he had a couple of concerns with the design such as the drainage analysis that was for a shared drive, but not a street that would cause more hot top. Mr. LaRosa said the drainage study had been upgraded.

Mr. Richardson asked Mr. Morgan what the requirements were for the line of site from the curb cut. Mr. Morgan said the requirements called for 100 feet. Mr. Richardson expressed concern over additional traffic issues on that section of Nimble Hill Road. Chairman Hebert said that was a serious concern that they needed to review carefully. He wondered if it made sense for the curb cut to come off Nimble Hill Road or if it could go through the Town Hall parking lot. Mr. Pare said that would be a problem because the parking lot was not built to the same standard as Town roads.

Further discussion ensued regarding the line of site. Mr. Richardson said he wouldn't mind accepting the application as substantially complete, but they needed a study on the speed, safe stopping distance, line of site, traffic, etc. Chairman Hebert said it was up to the applicant to show the Board a study with the line of sight and then the Town's engineering consultant would review the study.

Chairman Hebert said the applicant would need to restore the stonewall if it was removed for the curb cut. Mr. Morgan said this was one of the most pristine historic properties in Newington with one of the most impressive stonewalls. He said ordinarily applicants were encouraged to have informal discussions before the Board before scheduling public hearings and he regretted that they had not because he had a few design concerns, one of which was where the road ingress was presented. Mr. Stowell said the problem was that they couldn't meet the site distance requirement if they put the driveway in another place.

Chairman Hebert recommended a site walk and to have a wetlands expert review the property because it appeared that they were trying to squeeze a lot of development into a very wet lot. Mr. Morgan said West Environmental had reviewed the property before, but they needed to look at the plan. He said Mr. West reviewed the lot three years ago and said it could support two lots, but not three.

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Mr. LaRosa said the homes would be built on two knolls and there would be adequate drainage. Mr. Stowell said they did test pits highlighted the wetlands. Chairman Hebert said he understood subdivisions and land development was about a person making a living, but some of the land was marginal and he wanted to make sure developments were sustainable and livable.

Mr. Richardson said the statute said the Board had to vote to accept the application as substantially complete or not before going further. Chairman Hebert said they would normally have a work session prior to a public hearing. Mr. Pare said they had not received enough information and he was not comfortable in making a decision yet. Mr. Christopher said his main concern was with the site lines over the hump on Nimble Hill Road.

Mr. LaRosa and Mr. Stowell told the Board they had presented a subdivision plan with drainage, house placement, septic and wetlands and asked why they were being delayed. Chairman Hebert said a lot of paperwork had been done, but it had not been presented to the Board for review. Further discussion ensued whether the application was substantially complete, and how the Board should proceed. Mr. Richardson agreed that he didn't like the way the developer presented the application, and the Board could disapprove, but in a nutshell it looked substantially complete.

Chairman Hebert said they could continue the hearing next month after they did a site walk and had West Environmental and their engineering consultant review the plan. Mr. Richardson said the application was submitted on March 7, 2014 and they had to make a decision if the application was substantially complete before 30 days was up. Chairman Hebert said they still didn't have enough information to make a complete decision to approve the proposal however.

Rick Stern moved to accept the proposal by the Estate of Paul J. Beane for a 3-lot subdivision at 233 Nimble Hill Road, Tax Map 17, Lot 4 as substantially complete. Bernie Christopher seconded and all were in favor.

Chairman Hebert continued the public hearing to April 14, 2014.

3) Curb Cut Application: Request by Victoria & Ben Auger for a driveway off of Swan Island Lane, Tax Map 53, Lot 16.

Victoria and Ben Auger postponed this application for a later date.

4) Request for Comments pursuant to RSA 674:41 regarding a proposal by Great Bay Marine, Inc. to obtain a building permit to construct a residence off a private road, Tax Map 6, Lot 5.

Attorney Dave Brown appeared before the Board on behalf of Great Bay Marine President, Ellen Griffin to build on a vacant residential lot.

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Attorney Brown said they reviewed the history and did some title work so they could sell the lot. He said there was plenty of acreage and 500 ' frontage. He said it had been taxed as a buildable lot since 1973 and a subdivision plan with a private road was approved in 1977. He said the private road would have straight site lines and low traffic.

Chairman Hebert asked why the Board of Selectmen were involved. Attorney Brown said it was required by State statute. Mr. Morgan said the Board's function was to review and comment. Mr. Richardson asked if they should have gone to the Board of Selectmen first. Additional discussion ensued whether the road was a Class 6 road or not. Mr. Morgan said it had been determined to be a private road.

Chairman Hebert suggested Attorney Ratigan review the application for a correct interpretation with Mr. Richardson and then go ahead to the Board of Selectmen once everything was in place except the utilities and perk tests, the siting and well.

Mr. Richardson said at some point the fire chief would need to determine if a fire truck could gain access. Mr. Stern said he wasn't sure if that was required if it was a private road. Mr. Richardson said the statute said the applicant would have to waive emergency access if approved. Mr. Morgan said the applicant could tell the Board of Selectmen that the applicant had been paying taxes for many years. Mr. Richardson said Attorney Ratigan should explain further. Chairman Hebert suggested that a surface for a fire truck be able to gain access, and a turnaround would be a factor. Attorney Brown said the fire chief would need to look at the road. Mr. Richardson asked that they bring in the deed and the right of way agreement.

5) Preliminary Discussions:

A) Proposal by Westinghouse to place an office trailer at 25 Shattuck Way, Tax Map 19, Lot 14.

Westinghouse Facilities Manager, Fred Miller came before the Board requesting approval for an office trailer for office space for visiting foreign nationals outside of the main building. He said the building would be three feet off the main building facing Shattuck Way. He said they planned on having a small transformer, self-contained with a restroom with a water holding tank that would be pumped weekly. Vice-Chair Marconi said they wanted to make sure no one would be spending the night. Mr. Miller said no one would be spending the night, but someone might work at night.

Mr. Miller said it would be a standard William Scotsman trailer in use for a period of 24 months. Vice-Chair Marconi said the ordinance normally allow trailers beyond a year. Mr. Morgan recommended that the Board take no jurisdiction because the alternative would be to notify abutters.

Chairman Hebert said permits were based on square footage and asked if the building inspector was aware of the application and would charge accordingly. Vice-Chair Marconi said they also needed to inform the building inspector that they would be there for two years. Mr. Richardson said they could recommend that the building inspector allow a temporary use. Chairman Hebert said that was what take no jurisdiction meant. Mr. Stern said that could mean longer than 24 months. Mr. Morgan

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asked Mr. Miller if he would write the Board a letter that said the trailer would not remain on the site longer than 24 months, and Mr. Miller said he would.

Vice-Chair Marconi moved to take no jurisdiction on the proposal by Westinghouse to place an office trailer at 25 Shattuck Way, Tax Map 19, Lot 14. Bernie Christopher seconded and all were in favor of the motion.

B) Proposal by American Medical Response to garage ambulances in the old Neslab paint shop, now owned by 25 Nimble Hill Road LLC, Tax Map 12, Lot 16.

Mr. David Choate reminded the Board that New England Parts had purchased the building at 25 Nimble Hill Road from Thermo Fisher Scientific and Thermo had leased back 3,500 s.f. for their remaining operation. He said New England Parts ended up moving to another location and was now trying to lease out more space to another tenant, akin to the way Allard Park did to tenants.

Mr. Roland said they planned on using the space to house five to six ambulances and three to four wheelchair vans for their service which transported patients from one medical facility to another, 3-4 wheelchair vans. He said it was a 24 /7 operation of overnight services, primarily transported patients to Portsmouth Regional Hospital.

Mr. Morgan said he considered one of the permitted uses in the office district was storage.

Chairman Hebert asked if the vehicles would be stored inside. Mr. Roland said the State of NH required that all ambulances be housed inside, but the wheelchair vans might be housed outside. Chairman Hebert asked if they would use exhaust or ventilation systems and Mr. Roland said they were looking at both.

Mr. Richardson asked if they needed a variance and Chairman Hebert said they already received a variance when New England Parts Warehouse applied for the space.

Mr. Stern asked how long the shifts would be and Mr. Roland said there would be eight, ten and twelve hour shifts over 24 hours. Mr. Stern asked if anyone would be sleeping there and Mr. Roland said they would not.

Mr. Choate addressed the parking and presented a plan. Chairman Hebert said he would like to see something to scale to show how fire trucks could get in and out. Mr. Choate said the fire chief was there and he had no problems. Mr. Morgan passed out a letter from the fire chief.

Chairman Hebert asked that they put their plans together and work with Mr. Morgan. He said the earliest they could schedule a public hearing would be on April 7, 2014 at the earliest.

Minutes:

Vice-Chair Marconi moved to accept the minutes of February 24, 2014 as corrected. Rick Stern seconded and all were in favor.

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Adjournment: *Rick Stern motioned to adjourn. Bernie Christopher seconded, and all were in favor. The meeting adjourned at 10:35 p.m.*

Next Meeting: Monday, March 24, 2014

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

(The Board approved these minutes on March 24, 2014 with minor corrections.)

EXHIBIT D

Staff Meeting with Town Administrators and NH DOT

Date: February 12, 2014
TIME: 10:00 AM
PLACE: CITY MANAGER'S CONFERENCE ROOM

Staff meeting summary:

A meeting was called by Portsmouth City Manger, John P. Bohenko on February 12, 2014 at 10am in Portsmouth City Hall. In attendance representing municipal interests were: For the City of Portsmouth John P. Bohenko, City Manager, David Allen Deputy City Manager, Rick Taintor, Planning Director, and Peter Britz, Environmental Planner; Town Administrators Paul Deschaine for the Town of Stratham and Karen Anderson for the Town of Greenland; and Tom Morgan, Town Planner for the Town of Newington;. Also in attendance were Melodie Esterberg, Chief of Design Services, Bureau of Highway Design and John H. Robinson, Railroad Inspector/Investigator, both from the New Hampshire Department of transportation. Representatives from the Town of Newfields were invited but were unable to attend this meeting.

This meeting was called by Portsmouth City Manger, Bohenko to bring representatives of these communities together as they all have concerns with a proposal to expand the Sea-3 propane terminal in Newington which will increase rail traffic from Rockingham Junction in Newfields to the Sea-3 facility along the Piscataqua River in Newington. Residents in all the communities have expressed concern over the potential for increased rail service.

The concern expressed by all the communities is safety of the rail service proposed. The Town of Newington's Planning Board has been requesting inspection and safety records for the rail corridor from the Rockingham Junction to the Sea-3 site in Newington.

John Robinson gave a description of what is involved with track inspections and some details about the requirements:

Track safety standards establish 9 classes of track (Class 1 to Class 9) plus a category know as "Excepted Track". The difference in class is based on standards for track structure, geometry, and inspection frequency. Each class has a maximum operating speed for freight and passenger trains. The higher the level of track the greater the allowable track speed and the more stringent the track safety standards. The railroad is the entity that determines class of track and the Federal Railroad Administration (FRA) holds them accountable to the standards for that class. Although John Robinson is a railroad inspector for NHDOT he is doing the inspection in conjunction with the FRA and enforcing FRA track safety standards. If through regular maintenance and inspection efforts by Pan Am Railways or through inspections by NHDOT or FRA it is discovered that a section of track fails to meet the specified federal standard, the railroad is required to make appropriate repairs to maintain that Class of Track designation or downgrade the track segment to a lower Class of Track to which the federal standards can be met. Class 1 track that is used only for freight must be inspected at least once per week by a person

the railroad has designated as a qualified inspector. Reports for these inspections must be kept by the railroad and made available to NHDOT or FRA upon request for one year after the inspection.

The Portsmouth and Newington lines which begin at Rockingham Junction and continue into Newington are classified as Class 1 with one exception. There is a segment of excepted track located in downtown Portsmouth from just east of Barberry Lane to Green Street, the majority of which is in the Portsmouth rail yard. Track classified as excepted is not allowed to carry more than 5 cars carrying hazardous cargo placards. Therefore it was noted that if the Sea-3 project were to go through today that section of track would need to be upgraded in order to allow passage of more than 5 tank cars full of LPG.

The FRA regulates the reporting of incidents such as derailments. Incidents which occur on the tracks must be reported if train accident results in damage of \$150,000 or more to railroad or non-railroad property. According to John Robinson's records there was no derailments reported since 2000 on the Portsmouth or Newington branch.

The Portsmouth Branch was inspected on October 13, 2013 with 14 defective conditions found. Follow-up occurred November 14th. (Follow-up means that defective conditions were corrected.)

The Newington Branch was inspected on November 14, 2013, two defective conditions were found with follow-up on December 17, 2013.

On January 31, 2014 both the Newington and Portsmouth branch were inspected by the FRA at the request of the Town of Greenland. There were three defects written on the Newington Branch and none on the Portsmouth Branch upon which they have thirty days to follow-up.

There was some discussion about the merits of asking Pan Am Railways to upgrade the tracks to a Class 2 line or just to have them insure that all tracks are safe and maintained to Class 1 standards, while Class 2 has more stringent safety requirements, trains are allowed to travel up to 25 mph. The consensus of the group seemed to be that the slower speeds were more desirable than an upgrade to allow speeds of 25mph.

Melodie Esterberg discussed the State's role in rail crossing maintenance and funding sources available under the Rail-highways crossing (Section 130) Program to upgrade these crossings. Ms. Esterberg stated that the rail crossings are inspected by NH DOT. A revised inspection program began about three years ago utilizing an assessment team and a comprehensive rating system. There are 4 crossings eligible for funding along the Portsmouth line and the program will pay 90% for upgrades to road crossings and 100% of the cost of protective devices would be covered by this program. DPW has begun coordinating with NHDOT to come up with a schedule for crossing upgrades at the eligible locations.

The Town of Greenland provided a letter which they wrote to NHDOT and FRA requesting track inspections. The City agreed to place this letter on its website. All present said they would share any future correspondence with their congressional delegation and try to share information as much as possible. It was agreed by all that communities present that assuring the tracks are safe was the number one priority for all the communities

Next steps for the communities was to attempt to get a meeting with Pan Am so that they could explain their expansion plans and the communities would be able to ask questions of them about any proposed rail upgrades to accommodate Sea-3.

EXHIBIT E



THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION



CHRISTOPHER D. CLEMENT, SR.
COMMISSIONER

JEFF BRILLHART, P.E.
ASSISTANT COMMISSIONER

February 11, 2014

Vaughan Morgan, Chair
Greenland Board of Selectman
PO Box 100
Greenland, NH 03840-0100

RE: SEA-3 inquiries

Dear Mr. Morgan,

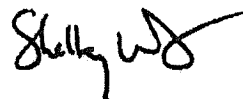
This letter should serve to summarize the Bureau of Rail & Transit's involvement in the proposed SEA-3 project that would involve utilization of Pan Am's privately owned Portsmouth and Newington Railroad Branches. While the Department acknowledges the concerns you expressed, our involvement and jurisdiction is limited with respect to a privately owned and maintained railroad such as Pan Am. Please find some pertinent information, below, that may address some of your concerns or inquiries.

- Inspections of the lines, which NHDOT conducts in conjunction with FRA, are limited to the present use of the lines
 - NHDOT inspector, accompanied by Pan Am staff, conducts a minimum of two inspections per year in a hi-rail vehicle
 - FRA staff, accompanied by Pan Am staff, conducts two inspections per year in a hi-rail vehicle
 - NHDOT inspector and FRA staff conduct (unaccompanied) annual walking inspections of the lines
 - These inspections are ideally conducted during periods of non-snow cover
 - Track inspections determine maximum safe speed and not the frequency or type of cargo
 - Most recent inspections:
 - January 31, 2014: FRA staff conducted an inspection of the Portsmouth and Newington Branches
 - Inspection of snow covered tracks can be somewhat limited in capacity
 - October 3, 2013: NHDOT's Railroad Inspector, John Robinson, inspected the Portsmouth Branch
 - November 14, 2013: NHDOT's Railroad Inspector, John Robinson, inspected the Newington Branch
 - Results of the aforementioned inspections are considered Federal records and must be requested, under the Freedom of Information Act, from the FRA Region I office:
 - Les Fiorenzo, FRA Regional Administrator, 55 Broadway Room 1077, Cambridge, MA 02142
- Safety concerns relative to signage, visibility, and other crossing-related items
 - NHDOT staff conducts other safety-related assessments of the crossings and signage as follows:
 - NHDOT conducts periodic crossing inspections of public-only crossings
 - October 2013: NHDOT inspector conducted a signage review of the crossings
 - January 2010: NHDOT inspector completed a crossing inspection program on behalf of NHDOT

- Noteworthy items for consideration:
 - Stop signs at the crossings are only as effective as the enforcement of motor vehicle law
 - The railroad (Pan Am) is only responsible for vegetation control within its own right-of-way, not the roadside or approach, which would fall upon the landowner, presumably the municipality, in which the crossing is located
- There are no specific requirements relative to the inspection of water crossings as all bridge spans are inspected and maintained in accordance with 49 CFR 237. Additionally, there are no operational restrictions placed on water crossings. A rudimentary observation of bridge structures is included during all track inspections.
- The proposed increase in rail traffic as a result of SEA-3 will not necessarily require crossing improvements as crossing safety requirements are predicated by a hazard index that includes train speed and roadway traffic volume, neither of which has been mentioned as changing.
- As a privately operated railroad, NHDOT has no jurisdiction over the commodities that Pan Am transports over the line. With respect to commodities that can be transported, Pan Am is subject to rules of the Surface Transportation Board.
- NHDOT has not placed any additional operational restriction on Pan Am. To our knowledge FRA has not placed any operational restrictions either, but we recommend that you confirm this with FRA.
- Pan Am is required to report derailments and accidents that meet an FRA-established monetary threshold. No reported derailments have occurred on this line.
- NHDOT and FRA are not involved in the insurance requirements of a private railroad.

The Department is committed to the provision of safe rail transportation, both passenger and freight, and will continue to support all efforts in accordance with Federal and State statutes. If you should have additional questions, please feel free to write me again.

Sincerely,



Shelley Winters
Administrator, Bureau of Rail & Transit

cc: Janet Lee, FRA Region I Office
Patrick Herlihy, NHDOT Division of Aeronautics, Rail & Transit
Melodie Esterberg, NHDOT Chief of Design Services
John Robinson, NHDOT Railroad Inspector

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

237559

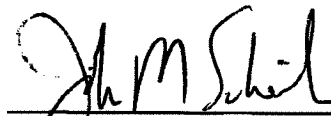
STB FINANCE DOCKET 35853

ENTERED
Office of Proceedings
January 20, 2015
Part of
Public Record

**SEA-3, INC v. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER**

**MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR LEAVE TO FILE COMMENTS AS AMICUS CURIAE**

Norfolk Southern Railway Company ("NS") respectfully moves for leave to file the accompanying comments as *amicus curiae* in support of Sea-3, Inc. In support of this Motion, NS submits that it is a rail carrier that participates in the transportation of freight for Sea-3. NS further submits that the preemption issue presented is not difficult to decide but that this case reflects a trend of localities attempting to regulate the rail customer in an effort to evade preemption under 49 U.S.C. 10501. The statute as well as Board and court precedent are clear, however, that such efforts are still preempted.



**John M. Scheib
Greg E. Summy
Maquiling Parkerson
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Co.***

Dated: January 20, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET 35853

**SEA-3, INC v. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER**

**COMMENTS OF AMICUS CURIAE
NORFOLK SOUTHERN RAILWAY COMPANY**

**John M. Scheib
Greg E. Summy
Maquiling Parkerson
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Co.***

Dated: January 20, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET 35853

**SEA-3, INC v. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER**

**COMMENTS OF AMICUS CURIAE
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“NS”) hereby submits these amicus comments in this proceeding in support of Sea-3, Inc. The City of Portsmouth, New Hampshire, is attempting to regulate rail commerce, and that attempt is preempted by 49 U.S.C. 10501. NS has an interest in this case because Sea-3 is an existing customer of NS. Further, NS submits these comments to highlight the fact that attempts to regulate the flow of commerce on rail and to regulate rail operations at shipper facilities is en vogue in localities. They are equally preempted under the long-standing law and precedent that are designed to protect rail commerce and the unreasonable interference by localities with interstate commerce.

In a recent decision, the Board succinctly summarized the concepts related to preemption under Section 10501.

The Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes.” The preemption provision of the Act, as broadened by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, expressly provides that the jurisdiction of the Board over

“transportation by rail carriers” is “exclusive.” The statute defines “transportation” expansively to encompass “a locomotive, car, . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail” as well as “services relating to that movement.” Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. Section 10501(b) expressly provides that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.

The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting § 10501(b).

When examining state or local action affecting rail transportation, preemption under § 10501(b) may be categorical or “as applied.” It also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.

Other state or local actions may be preempted “as applied”—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case.

U.S. Environmental Protection Agency—Petition for Declaratory Order, STB Finance Docket 35803 (Dec. 30, 2014) (citations omitted).

The concepts summarized in this decision are now firmly-rooted to protect the flow of interstate commerce by rail. As a result, municipalities and localities have attempted to circumvent the breadth of Section 10501 by attempting to regulate rail transportation indirectly by applying regulations to shippers and shipper facilities. The Board and courts have wisely recognized that such attempts are also preempted.

For example, the Board has recently addressed the attempts by cities to evade preemption through the application of regulations to the shipper rather than directly on

the railroad. In *Boston and Maine Corp. and Springfield Terminal Ry. Co. –Petition for Declaratory Order*, the Board declared that the contested municipal zoning ordinance that was being applied to the shipper facility was preempted because it seeks to constrain the provision of common carrier service.

In any event, the dispute between the parties regarding the nature of the track immediately adjacent to the warehouse is not dispositive. Even if we assume this track is private track (which we need not decide here), this does not permit the Town to deprive Tighe of its federal right to receive common carrier rail service over the track. As previously noted, Tighe has rights provided by federal law to ask for and receive common carrier rail service from Pan Am, a rail carrier providing service subject to the Board's jurisdiction. Thus, even if we construed the Town's action narrowly as directed solely at Tighe, and solely at a short piece of allegedly private track located adjacent to the warehouse, there remains a fundamental conflict between the Town's regulation and the rights of Tighe and Pan Am to request and provide, respectively, common carrier rail service under the Interstate Commerce Act. That conflict must be resolved in favor of federal law. Otherwise, states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network, and thereby create the patchwork of conflicting local regulations that Congress sought to avoid in the Interstate Commerce Act.

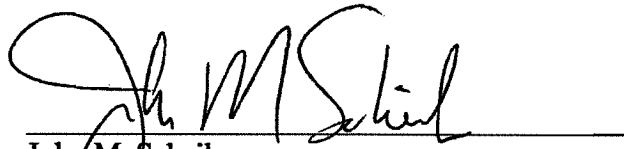
Boston and Maine Corp. and Springfield Terminal Ry. Co. –Petition for Declaratory Order, STB Finance Docket 35749 (July 19, 2013) (citations omitted). The local ordinance in the *Boston and Maine* case was designed to prevent rail traffic to the shipper warehouse altogether. In this case, Portsmouth is attempting to use local regulations to limit the amount of rail traffic. Allowing Portsmouth to seek regulation of railroad operations under the cover of local laws is contrary to the correct rationale in *Boston and Maine* that local regulation cannot impede common carrier rail service – whether provided over private track or at a privately-owned shipper facility.

The proper scope of preemption under Section 10501 has been similarly resolved by federal courts to prevent indirect local regulation of freight rail transportation. In

Norfolk S. Ry. v. City of Alexandria, the City attempted to evade the scope of the federal preemption statute by regulating the trucks that would use the rail carrier's transload facility. 608 F.3d 150, 158-60 (4th Cir. 2010). The court held otherwise. Specifically, the court held that the city cannot seek to regulate interstate commerce indirectly by regulating trucks that would use the carrier's transload facility.

In sum, the courts and the Board have seen the developing trend and steadfastly held that preemption under Section 10501 still applies. The attempt by the City to use land use or other restrictions to prevent the development of additional rail infrastructure – track and unloading spots – at Sea-3 is a clear attempt by a locality to regulate facilities related to the movement of property by rail and to prevent the provision of expanded rail service related to the movement of that property by rail. Thus, the application of law to the facts in this case is really rather straightforward. “State or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.” *U.S. Environmental Protection Agency—Petition for Declaratory Order*, STB Finance Docket 35803 (Dec. 30, 2014) (citations omitted). States and localities cannot interfere – directly or indirectly -- with freight rail transportation. NS respectfully submits that the attempts by the City of Portsmouth to indirectly regulate rail transportation are preempted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a horizontal line.

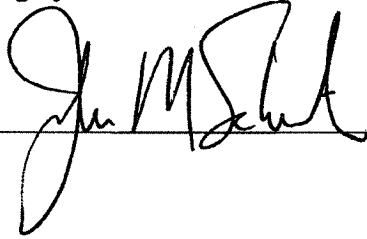
John M. Scheib
Greg E. Summy
Maquiling Parkerson
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Co.

Dated: January 20, 2015

Certificate of Service

I hereby certify that on this 20th day of January 2015 I caused a copy of the foregoing **“Motion of Norfolk Southern Railway Company for Leave to File Comments as Amicus Curiae”** and the **“Comments of Amicus Curiae Norfolk Southern Railway Company”** to be served electronically upon all parties on the service list for this proceeding by first class mail or more expeditious method of delivery.



237724

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
February 10, 2015
Part of
Public Record


STB FINANCE DOCKET 35853

SEA-3, INC. V. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER

MOTION OF PROPANE GAS ASSOCIATION OF NEW ENGLAND
FOR LEAVE TO FILE COMMENTS AS AMICUS CURIAE

Propane Gas Association of New England ("PGANE") moves for leave to file the accompanying comments as *amicus curiae* in support of SEA-3, Inc. In support of this Motion, PGANE submits that it is a trade association representing nearly 675 members who sell propane or propane related appliances and equipment in six New England states. PGANE further submits that attempts by the City of Portsmouth to limit transportation of liquefied propane gas over railroad tracks within the city is preempted by 49 U.S.C. § 10501, which gives the Surface Transportation Board exclusive jurisdiction over transportation by rail carriers and expressly preempts state law remedies. SEA-3 consents to the relief sought by this Motion. Despite a good faith effort, PGANE was unable to obtain the consent of the City of Portsmouth.

Dated: 2/10, 2015


Jonathan S. Springer, Esq.
Springer Law Office, PLLC
118 Maplewood Avenue, Suite C-1
Portsmouth, NH 03801

*Counsel to Propane Gas Association of New
England*

CERTIFICATE OF SERVICE

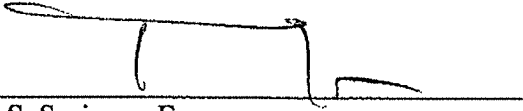
I hereby certify that on this 10 day of February, 2015, I have served the Motion for Leave to File Comments as Amicus Curiae, by United States Mail, to the following parties.

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Pan Am Railways
1700 Iron Horse Park
North Billerica, MA 01861

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City of Portsmouth
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Portsmouth, NH 03801

Alec L. McEachern
Shaines & McEachern, P.A.
P.O. Box 360
Portsmouth, NH 03802-0360

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241



Jonathan S. Springer, Esq.

*Counsel to Propane Gas Association of New
England*

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35853

SEA-3, INC. V. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER

COMMENTS OF AMICUS CURIAE
PROPANE GAS ASSOCIATION OF NEW ENGLAND

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*Counsel to Propane Gas Association of New
England*

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35853

SEA-3, INC. V. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER

COMMENTS OF AMICUS CURIAE
PROPANE GAS ASSOCIATION OF NEW ENGLAND

I. STATEMENT OF FACTS.

Propane Gas Association of New England (“PGANE”) is a not-for-profit trade association representing nearly 675 members who sell propane or propane related appliances and equipment in all six New England states. PGANE’s members include nearly 450 company locations involved in the storage, distribution, retail sale and delivery of propane to residential and business customers throughout New England. For these reasons PGANE and its members have a vital interest in this proceeding.

Propane has been an important fuel and energy source for New England for many years. Propane is non-toxic, and is not damaging to soil or water ecosystems. As a clean burning fuel source, propane plays a key role in minimizing the contribution of greenhouse gases to the environment.

According to PGANE’s statistics, nearly 1.25 million homes and businesses in New Hampshire use propane which is almost 20% of the total homes and businesses in the region. The propane supply in New England comes either by truck from New York, by rail or by ship

from foreign countries. (The Jones Act of 1912 prohibits moving goods from one American port to another unless the ship is built, crewed and flagged in the United States; no such ship currently exists to PGANE's knowledge.) Therefore, imported propane comes from Northwest Europe or Northern Africa to the United States. In the winter of 2013-2014, the United States imported approximately 87 million gallons. The use of propane is growing steadily due to its ecological advantages as stated above and because of its affordability.

There are only two facilities in New England with any significant propane storage capabilities: one is in Providence, RI which has a capacity of 17 million gallons and the other is the SEA-3 facility in Newington, NH (with a capacity of 28 million gallons). Historically, approximately one-third of all propane sold in New England has been sold at the SEA-3 facility, due to its strategic location serving Maine, New Hampshire, Massachusetts and Vermont.

As stated in SEA-3's Emergency Petition for Declaratory Order ("the Petition") submitted to the Surface Transportation Board, the SEA-3 facility currently contains three rail berths but this rail capacity is insufficient to the current market demands. See Petition, at page 6. SEA-3 applied to the Town of Newington's Planning Board for site plan approval in order to increase the rail capacity by constructing five new rail unloading berths. Id. On May 19, 2014, after an extensive planning board process, the Newington Planning Board unanimously voted to approve SEA-3's application. Petition at page 10 and Exhibit G. The City of Portsmouth appealed that decision both at the municipal level and in the New Hampshire state court system. As is well-documented in the Petition, "Portsmouth's sole objective is to block LPG rail car service from traveling through Portsmouth." Petition at page 12.

II. STATEMENT OF LAW.

The Interstate Commerce Act (“the Act”) vests jurisdiction of railroad matters exclusively in the Surface Transportation Board (“Board”) and expressly preempts state and local remedies, 49 U.S.C. § 10501(b) (“§ 10501(b”). “The Interstate Commerce Act is ‘among the most pervasive and comprehensive of federal regulatory schemes.’ Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), expressly provides that the jurisdiction of the Board over ‘transportation by rail carriers’ is ‘exclusive.’ 49 U.S.C. § 10501(b). . . . Section 10501(b) expressly provides that ‘the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.’ Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” Boston and Maine Corporation and Springfield Terminal Railroad Company - Petition for Declar. Order, Finance Docket No. 35749 at 3 (S.T.B. July 9, 2013).

It is important to note that the Act defines “transportation” extremely broadly in order to accomplish the Act’s goals; the term “transportation” includes “a locomotive, car . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail” as well as “services relating to that movement.” Further, the Act defines “railroad” broadly as well, to include a switch, spur, track, terminal, terminal facility, freight depot, yard or ground, used or necessary for transportation. US Environmental Protection Agency – Petition for Declaratory Order, Finance Docket No. 35803 (S.T.B. December 30, 2014). Therefore, the Act covers the expansion of SEA-3’s terminal in Newington.

State and local attempts at regulating railroad operations are defined as either “categorical” or “as applied”. Regardless of how they are defined, each is prohibited. Categorical actions are attempts by a state or locality to impose requirements that “could, by their nature, deny a rail carrier’s ability to conduct rail operations”. *Id.* at 7. These actions take the form of either permitting requirements or preclearance requirements, such as building permits, environmental permits, or zoning ordinances. Green Mtn. R. R. Corp. v. Vermont, 404 F.3d 638, 642-643; CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 3 (S.T.B. May 3, 2005). “As applied” actions are state and local laws or regulations of general applicability, that when applied to rail operations, unreasonably burden or interfere with rail operations. N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)

It is clear that the purpose of the Act and the decisions regarding implementation of the Act have one overriding goal: to protect the flow of interstate commerce by rail, and to avoid and prevent local regulation – whether direct or indirect – of interstate rail commerce. In this case, the City of Portsmouth by its appeal of the Newington approval is seeking to interfere with that goal. Portsmouth attempts to block SEA-3’s transportation of LPG across tracks within the City of Portsmouth by (1) seeking to overturn the decision of Planning Board or, (2) by requiring a study of the risks and hazards of transporting LPG through Portsmouth. See Petition, at Exhibit H.

As to the former, Portsmouth indicated that its objections to the approval did not relate to the “site plan itself but to the operational changes that will be implemented as a result of the site improvements.” *Id.* at 6. In short, Portsmouth is seeking to block the transportation of LPG over the rails contained within the city. This effort is expressly and unequivocally preempted under § 10501 (b), for the reasons stated above. In CSX Transportation, Inc. – Petition for

Declar. Order, Finance Docket No. 34662 at 1 (S.T.B. May 3, 2005), the Board declared that “in enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad’s traffic should be routed”.

Portsmouth’s alternative ground for seeking to control railroad operations is also preempted. By asking for a study of the risks and hazards of transporting propane, the City is seeking an impermissible preclearance requirement that, for the reasons stated above, the Board and federal courts have long held are preempted. See Joint Petition for Declaratory Order - Boston & Maine Corporation and Town of Ayer, MA, Finance Docket No. 33971, May 1, 2001, aff’d by B & M Corp. v. Town of Ayer, 191 F.Supp 2d 257 (D. Mass. 2002).

It is important to note that Portsmouth is not even the host or operative municipality. In this case, that honor goes to the Town of Newington. Newington is where the SEA-3 facility is located, and it is Newington’s Planning Board which approved the site plan submitted by SEA-3. Portsmouth, which abuts Newington, is merely one of many New Hampshire municipalities through which the railroad runs in order to reach Newington. Portsmouth’s position, if adopted, would mean that not just a “host municipality” such as Newington, but all municipalities through which the railroad runs, could seek to deny a rail carrier’s ability to conduct rail operations or otherwise interfere with interstate commerce. Portsmouth’s position would significantly expand the patchwork of conflicting local regulation over rail operations that Congress sought to eliminate by enacting and enforcing the Interstate Commerce Act. Norfolk S. Ry. – Petition for Declar. Order, Finance Docket No. 35701, at 6 and n. 14 (S.T.B. Nov. 4, 2013).

The well-established preemption principles of § 10501(b) apply in this case and Portsmouth's efforts to intrude upon the exclusive jurisdiction of the Board and to apply state and local remedies must fail and should be rejected by this Board.

Respectfully submitted,



Jonathan S. Springer, Esq.
Springer Law Office, PLLC
118 Maplewood Avenue, Suite C-1
Portsmouth, NH 03801

Counsel to Propane Gas Association of New England

Dated: February 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of February, 2015, I have served the Comments of Amicus Curiae, Propane Gas Association of New England, by United States Mail, to the following parties.

Robert B. Guilford
Pan Am Railways
1700 Iron Horse Park
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237738

February 12, 2015

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
February 12, 2015
Part of
Public Record

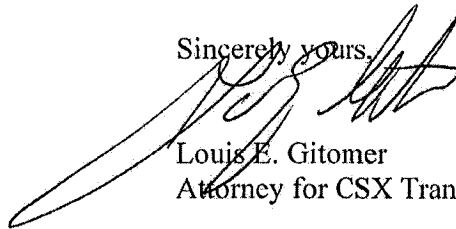
Re: **Docket No. FD 35853, SEA-3 – Emergency Petition for Declaratory Order**

Dear Ms. Brown:

CSX Transportation, Inc. is e-filing the attached Petition to Intervene and Comments in support of SEA-3, Inc.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35853

SEA-3, INC. —EMERGENCY PETITION FOR DECLARATORY ORDER

CSX TRANSPORTATION, INC. – PETITION TO INTERVENE AND COMMENTS IN
SUPPORT

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Attorneys for: CSX TRANSPORTATION, INC.

Dated: February 12, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35853

SEA-3, INC. —EMERGENCY PETITION FOR DECLARATORY ORDER

CSX TRANSPORTATION, INC. – PETITION TO INTERVENE AND COMMENTS IN
SUPPORT

CSX Transportation, Inc. (“CSXT”) petitions the Surface Transportation Board (the “Board”) for leave to intervene under 49 CFR 1112.4 in support of the Emergency Petition for Declaratory Order (the “Petition”) filed by SEA-3, Inc. (“SEA-3”) on August 4, 2014.

BACKGROUND

SEA-3 owns and operates a propane storage and distribution terminal in the Town of Newington, NH (the “Facility”). The Facility is directly served by The Boston and Maine Corporation and Springfield Terminal Railway Company (collectively “Pan Am”). The Facility can unload six rail cars a day. Petition at 3.

SEA-3 applied to the Newington Planning Board (the “Planning Board”) for the construction of five additional rail berths and two rail tracks to serve the berths as well as unloading equipment on land owned by Pan Am adjacent to the Facility.¹ Petition at 41 and 47. The five berths will be constructed between the two new tracks. SEA-3 wants to increase the capacity of the Facility to be able to unload 16 rail cars per day, an increase of 10 rail cars that will be facilitated by the construction of the five additional berths and two tracks. Petition at 4.

¹ Pan Am owns the land where the new tracks will be constructed (Petition at 41 and 47). Pan Am will lease the land to SEA-3 (Petition at 47).

By Findings issued on May 21, 2014, the Planning Board approved the proposal subject to certain conditions. Petition, Exhibit G, Page 41.

The City of Portsmouth, New Hampshire (“Portsmouth”) opposed the application because of the increased traffic that would move through Portsmouth over Pan Am that was to be delivered to the Facility. Petition pages 34, 37 and 39. Portsmouth appealed the Planning Board’s approval to both the New Hampshire Superior Court (the “Court”) and Newington’s Zoning Board of Appeals (the “ZBA”). Petition at 4. The ZBA upheld the Planning Board and Portsmouth has appealed that decision to the Court. The appeals to the Court have stayed the effectiveness of the Planning Board’s approval, delaying the expansion of the Facility until the conclusion of the appeal, at an unknown time in the future. SEA-3’s application was filed on November 5, 2013 and approved on May 21, 2014. The appeals filed by Portsmouth on June 16, 2014 have delayed construction and will continue to delay (or perhaps even prevent) construction until acted on by the Court, which will delay the project indefinitely.

SEA-3 filed the Petition with the Board to end the delay caused by Portsmouth’s appeals, which seek to both indirectly and directly interfere with railroad operations.

CSXT’S PETITION FOR LEAVE TO INTERVENE

Pursuant to 49 CFR 1112.4, CSXT seeks leave to intervene and comment briefly in support of SEA-3.

CSXT’s interest in this proceeding arises from its interchange of propane traffic with Pan Am for delivery to SEA-3 and the future traffic growth that is being delayed. As the Board has not issued a schedule, CSXT’s intervention will not disrupt the schedule. 49 CFR 1112.4(a)(1). CSXT will not broaden the issues raised in this proceeding, because CSXT will only address the preemption issue raised by the parties to the proceeding involving the expansion of SEA-3’s

Facility.

CSXT has demonstrated that its intervention complies with the Board's rules and respectfully requests the Board to grant intervention in this proceeding.

CSXT COMMENTS

CSXT interchanges propane traffic with Pan Am. Pan Am delivers the propane to the existing tracks at the SEA-3 Facility in Newington, NH for (1) unloading and ultimately distribution by truck in New England for residential and commercial heating or (2) intermodal transloading by SEA-3 to ship for export. With the cost advantage of propane produced in the United States, CSXT expects significant growth in the handling of propane for local delivery and export through the Facility. CSXT seeks to handle the increased propane traffic efficiently and without interference over its lines and in interchange with Pan Am for Pan Am to deliver to the existing and new tracks at the SEA-3 Facility. However, SEA-3 does not have the capacity at its Newington Facility to handle an increase in propane traffic. Petition at 6. Portsmouth's appeals are delaying construction of the infrastructure necessary to increase the transportation of propane to the Facility.

In order to handle the growth in propane traffic, SEA-3 sought and obtained approval from the Newington Planning Board for the construction of five additional rail berths and two rail tracks that would increase the capacity of the Facility to 16 propane cars per day. Petition at 6. Dissatisfied with the approval of the construction, Portsmouth appealed to both the Court and ZBA. Petition at 4. Portsmouth's appeal to the ZBA was denied and Portsmouth then appealed that ruling to the Court. Portsmouth's actions have now caused over eight months of delay.

Portsmouth is seeking to prevent the construction of the additional five berths and two tracks at the SEA-3 Facility to prevent increased rail traffic through Portsmouth. Petition pages

34, 37, and 39. Portsmouth is in essence seeking to use the zoning process to improperly regulate the volume of traffic moving through Portsmouth. Regulation of the use of a railroad line through the zoning process is one of the most invasive forms of regulation and is clearly preempted under 49 U.S.C. §10501(b). Portsmouth’s position is similar to the position of the Town of Winchester, MA, which sought to ban certain freight rail transportation conducted by Pan Am through its zoning regulations.² There, the Board concluded that “Pan Am is a rail carrier conducting freight rail transportation over these tracks, and Tighe has rights provided by federal law to ask for and receive common carrier rail service.” *Id.* 4-5. The actions taken by Portsmouth are interfering with the movement of the propane cars over the tracks of CSXT and Pan Am. Delivery of those cars to the SEA-3 Facility by Pan Am is transportation by or under the auspices of a rail carrier. The nature of the propane is not changed, merely the mode of transportation from rail to truck or ship.

The Board has stated that:

the term “transportation” is broadly defined in the Interstate Commerce Act to encompass the facilities used for and services related to the movement of property by rail, expressly including receipt, delivery, transfer in transit, storage, and handling of property. 49 U.S.C. § 10102(9). Citing this language, the Board has explained that, generally, “intermodal transloading operations . . . are part of rail transportation that would come within the Board’s jurisdiction.” *New England Transrail—Construction, Acquis. & Operation Exemption—in Wilmington & Woburn, Mass. (NE Transrail)*, FD 34797, slip op. at 6 (STB served July 10, 2007). The Board has distinguished these types of loading and unloading operations from “manufacturing and commercial transactions that occur on the property owned by a railroad that are not part of or integral to the provision of rail service,” which are not embraced within the term “transportation.” *Id.* at 10. Activities constitute manufacturing or commercial transactions if they change the nature or physical composition of the commodity being transported.

² *Boston and Maine Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order*, Docket No. FD 35749 (served October 31, 2013).

Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba—Petition for Declaratory Order, Docket No. FD 35652 (served December 5, 2014), slip op. at 5-6.

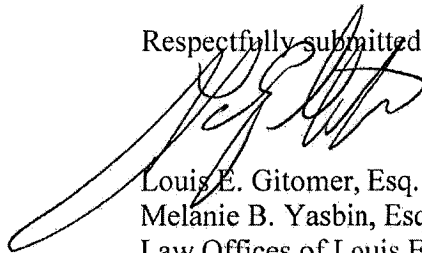
In this proceeding, SEA-3 has demonstrated that there is a demand for increased rail traffic requiring the construction of the five new rail berths and two new tracks at its Facility. The new tracks will be used by Pan Am for delivery. In addition, the new tracks will facilitate operations over existing railroads, in particular Pan Am and CSXT. Without the new tracks, CSXT and Pan Am will be required to either (1) forego the additional traffic, which will not foster sound economic conditions in transportation (49 U.S.C. §10101(5)) because of the lost revenues, or (2) to store and cause congestion on their lines because of the lack of capacity at the SEA-3 Facility, which will not promote an efficient rail transportation system (49 U.S.C. 10101(3)).

In addition, the intermodal transloading that SEA-3 will perform has been found to be “part of rail transportation that would come within the Board’s jurisdiction.” *Id.*

CONCLUSION

CSXT respectfully requests the Board to grant its request for intervention, to conclude that prevention of the construction of the new rail tracks at the Facility is preempted by 49 U.S.C. 10501(b), and to grant SEA-3's Petition.

Respectfully submitted,



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Dated: February 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Petition to Intervene and Comments in Support in Docket No. FD 35853, *SEA-3, Inc. —Emergency Petition for Declaratory Order* to be served electronically on:

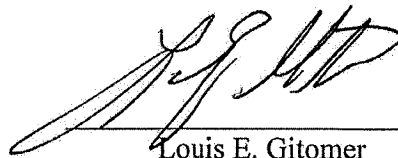
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