



PAN AM RAILWAYS  
1700 IRON HORSE PARK  
NO. BILLERICA, MA 01862

ENTERED  
Office of Proceedings  
September 30, 2014  
Part of  
Public Record

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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,

A handwritten signature in blue ink, appearing to read "Robert B. Culliford", written over a horizontal line.

Robert B. Culliford  
Counsel for Boston and Maine Corporation/  
Springfield Terminal Railway Company

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. FD 35853**

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**SEA-3, INC. -EMERGENCY PETITION  
FOR DECLARATORY ORDER**

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**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.**

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**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**

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**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 litigation<sup>1</sup>. 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 facility<sup>2</sup>. 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.

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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).

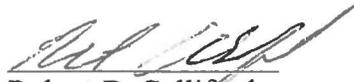
The Petition is also factually distinct from other efforts by non-rail carriers to utilize STB jurisdiction to evade state and local regulation. *Florida East Coast Ry. Co., v. City of West Palm Beach*, 110 F. Supp. 2d 1367 (2000). Here, Sea-3 has voluntarily participated in the permitting process through 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,



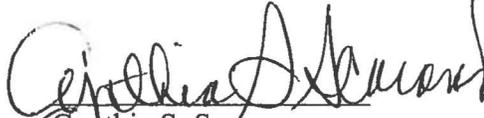
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1700 Iron Horse Park  
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*Counsel for Intervenors Boston and Maine  
Corporation and Springfield Terminal Railway  
Company*

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 30<sup>th</sup> 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.

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT

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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

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- 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 consistent 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 (Class1 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 14<sup>th</sup>. (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,

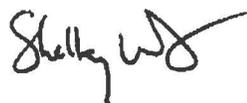
This letter should serve to summarize the Bureau of Rail & Transit's involvement in the proposed SEA-3 project that would involve utilization of Pan Am's privately owned Portsmouth and Newington Railroad Branches. While the Department acknowledges the concerns you expressed, our involvement and jurisdiction 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 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