



DEVAL L. PATRICK  
GOVERNOR  
ANDREA J. CABRAL  
SECRETARY

*The Commonwealth of Massachusetts*  
*Executive Office of Public Safety and Security*  
*Department of Fire Services*

*P.O. Box 1025 ~ State Road*

*Stow, Massachusetts 01775*

*(978) 567~3100 Fax: (978) 567~3121*

*www.mass.gov/dfs*



STEPHEN D. COAN  
STATE FIRE MARSHAL

August 23, 2013

**Via Electronic Filing**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423

234707  
ENTERED  
Office of Proceedings  
August 23, 2013  
Part of Public  
Record

**Re: Petition for Declaratory Order**  
**Docket No.: FD 35752, Grafton & Upton Railroad Company**

Dear Ms. Brown:

Attached for filing in the above referenced proceeding is the Reply of the Massachusetts Department of Fire Services, to the Petition for Declaratory Order filed by the Grafton & Upton Railroad Company on July 23, 2013.

Copies of this letter and its attachments have been served by e-mail and certified mail, return receipt requested, upon counsel for the Grafton & Upton Railroad Company, the American Short Line and Regional Railroad Association, the Town of Grafton, and the Massachusetts Department of Environmental Protection.

If you have any questions regarding this filing, or if I can be of any further assistance, please feel free to contact me at (978) 567-3182.

Very truly yours,

Steven P. Rourke, General Counsel

Enclosures

CC: Keith T. Borman, Esq., American Short Line and Regional Railroad Association  
James E. Howard, Esq. for the Grafton & Upton Railroad  
Fritz R. Kahn, Esq., for the Town of Grafton, Massachusetts  
Mary Jude Pigsley, Esq., Massachusetts Department of Environmental Protection

*Administrative Services • Division of Fire Safety*  
*Hazardous Materials Response • Massachusetts Firefighting Academy*

**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35752**

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**GRAFTON & UPTON RAILROAD COMPANY –  
PETITION FOR DECLARATORY ORDER**

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**REPLY OF  
THE COMMONWEALTH OF MASSACHUSETTS –  
DEPARTMENT OF FIRE SERVICES**

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Commonwealth of Massachusetts  
Department of Fire Services  
P.O. Box 1025 – State Road  
Stow, Massachusetts 01775

Dated: August 23, 2013

Steven P. Rourke, General Counsel  
Attorney for  
Massachusetts Department of Fire Services

## DFS INTEREST IN THE PROCEEDINGS

The Department of Fire Services is a state agency within the Executive Office of Public Safety and Security of the Commonwealth of Massachusetts<sup>1</sup>. The Department of Fire Services (“DFS”) operates under the direction of the State Fire Marshal and consists of several divisions including: statewide hazardous materials response, statewide fire training and fire safety code compliance. Among its many duties and responsibilities, DFS is charged with the uniform oversight and enforcement of the fire prevention laws and regulations of the Commonwealth, including the fire safety code at 527 CMR<sup>2</sup>. The purpose of this filing by DFS is not to deny the long and well established principal of preemption contained in 49 U.S.C. § 10501(b) of the ICCTA. To the extent, the Board finds preemption applicable in this case, DFS recognizes that state or local laws which would act as a preclearance requirement regarding construction of G&U’s proposed facility are preempted by federal law. Rather, DFS is requesting the Surface Transportation Board (“Board”) clarify in its declaratory order, that G&U is subject to the Commonwealth’s police powers regarding the development of the proposed facility. Specifically, the relevant provisions of the state fire safety code and aboveground storage tank (“AST”) construction codes<sup>3</sup> to the extent these codes are intended to protect the public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open ended delays, and can be approved or rejected without exercise of discretion on subjective questions. Green Mountain Railroad Corp. v. Vermont, 404 F. 3d. 638, 643 (2<sup>d</sup> Cir. 2005) (“Green Mountain”).

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<sup>1</sup> Attachment “A” – M.G.L. c. 22D, § 1

<sup>2</sup> Attachment “B” – 527 CMR 1.03(1)

<sup>3</sup> Attachment “C” – 502 CMR 5.00

DFS requests the Board clarify that G&U is required to comply with the provisions of the Massachusetts fire safety code as it applies to the construction, maintenance, and operation of its proposed Liquid Petroleum (“LP”) transloading and storage facility. To be clear, DFS does not seek to interfere in any way with G&U’s plans to conduct its rail operations, rather it desires to oversee and if necessary, enforce compliance with the provisions of the Massachusetts fire safety code to protect the public from the inherent hazards related to structural collapse, fire or explosion associated with the storage and handling of LP.

**I. Introduction and Background**

On or about June 2011, DFS was requested to provide assistance to the Town of Grafton Fire Chief, concerning potential life safety and licensing issues related to a proposed transloading and storage facility for LP to be constructed on Grafton & Upton Railroad (“G&U”) property located in the Town of Grafton, Massachusetts. Approximately one year later, in June 2012, DFS was requested to attend a second meeting regarding the proposed facility and to review “conceptual plans” provided by representatives of the railroad. At no time did anyone submit to DFS, plans which provide adequate specificity to allow DFS to conduct a proper fire safety analysis, which would assist the local officials in determining important public safety issues regarding storage quantities, operations or fire safety emergency plans. (Attachment “D” – Affidavit of H. Jacob Nunnemacher, at ¶ 1-11).

As the result of a notice in December 2012 that G&U intended to deliver to its site, four (4) 80,000 gallon AST’s, the Town of Grafton (“Town”) issued an order to cease and desist the construction of these tanks on the G&U site. Once DFS was notified of the Town’s actions, it issued its own order to G&U to cease and desist until such time as G&U submitted its permit application pursuant to M.G.L. Chapter 148, § 37 and complied with the regulations of the

Massachusetts state fire safety code regarding AST construction. (Attachment “E” – Notice to Cease and Desist). In the interim, the Town sought and obtained injunctive relief from the Superior Court Department of the Trial Court of the Commonwealth of Massachusetts (the “state court”) prohibiting G&U from commencing its planned construction at the site. G&U moved the proceedings from the state court to the U.S. District Court for Massachusetts (the “federal court”). After a four day trial, the federal court found it lacked jurisdiction and remanded the case back to the state court. At the joint request of the Town and G&U, the state court ordered the case referred to the Board to determine whether the provisions of 49 U.S.C. § 10501 preempted state and local regulations from applying to the construction and operation of a proposed LP transloading facility on G&U’s property. Pursuant to that order, G&U has filed the current petition requesting a declaratory order with the Board. As part of its requested relief, G&U is asking the Board to clarify that DFS’s cease and desist order is void and unenforceable to the extent it attempts to impose preclearance or preapproval requirements on the proposed LP transloading operations and arguably that the underlying regulations of the Massachusetts fire safety code are preempted. DFS believes G&U is subject to the provisions of the Massachusetts fire safety code and AST construction code for the following reasons:

**II. The Regulation and Enforcement by DFS of the Massachusetts Fire Safety Code is a Proper Exercise of its Police Powers and Not Subject to Preemption.**

As stated previously, DFS recognizes that where railroad operations are implicated, federal law preempts state and local permitting or preclearance requirements because they may interfere with interstate commerce by allowing a local body to delay or deny the carrier the right to construct facilities or conduct its operations. However, 49 U.S.C. § 10501(b) does not preempt the application of the state’s legitimate police powers to protect public health and safety.

(A) **Construction and Use of the Proposed Transloading and Storage Facility in Grafton**

M.G.L. Chapter 148 s. 37 requires that all AST's used for the storage of any fluid, other than water, in excess of 10,000 gallons, shall not be constructed, maintained or used without first securing a permit therefore from the Marshal. The design, construction, installation, testing and maintenance of these tanks is regulated under the Commonwealth's general police powers to protect the public safety and welfare from the potential dangers of fire or explosion hazards due to tank or container leakage of flammable or combustible liquids, as well as the fire or explosion hazards presented by the proposed storage of approximately 320,000 gallons of LP by G&U.

DFS recognizes that the permitting requirements of M.G.L. Chapter 148, § 37 may be preempted but argues that compliance with the underlying construction requirements and standards of 502 CMR 5.00 is critical to ensure the safe construction and maintenance of the proposed aboveground LP storage tanks and does not raise the type of preclearance issues which would unduly interfere with G&U's operations. The safety regulations of 502 CMR require the submission of technical construction documents including: foundation plans, diking (containment) plans and mechanical drawings stamped by a registered professional engineer. Although the State Fire Marshal has discretion to deny or revoke the permit at issue here, the grounds are generally limited to non-compliance with the submission of plans, dangerous or inadequate construction, failure to inspect or allow inspection and other non-compliance with the state fire safety code. See 502 CMR 5.09. These are generally not the subjective requirements of the type at issue in Borough of Riverdale v. Susquehanna & Western Ry, STB Finance Docket No. 33466 (September 10, 1999) ("Riverdale"). The conditions of the permit requiring submission of construction documents establish notice to the Marshal, clearly identify the responsible party, ensure the production of stamped plans, open lines of communication between

the parties, and provide the parties an opportunity to jointly schedule work phases and stopping points necessary to conduct periodic inspections, which otherwise would not be possible once the tanks were fully constructed. Such periodic tank inspections are critical to ensuring compliance with tank construction codes. These requirements protect both the public safety, as well as the applicant's interests in avoiding costly mistakes and delay in the construction process.

The underlying dispute between the Town and G&U raises the question of whether the proposed transloading facility and its operation is being conducted by G&U or other non-railroad entities, and whether preemption even applies in this matter. However, even if the Board concludes that the proposed transloading is being conducted by G&U, DFS is not preempted under federal law from enforcing the state fire safety code because (a) it is a proper exercise of the state's police powers to protect public safety, (b) it is being applied in a non-discriminatory manner and (c), it does not deny G&U the ability to conduct transloading operations – it merely sets an objective fire safety standard by which these operations must be conducted.

The permit requirement of M.G.L. Chapter 148, § 37 insures that DFS has adequate notice that the applicant, G&U in this case, intends to construct AST's in excess of 10,000 gallons, and that DFS has an opportunity to confirm those tanks will meet the objective construction safety standards for tanks provided for in 502 CMR 5.00. These tank construction standards are national consensus tank construction standards adopted by the State Fire Marshal and the state fire safety code, which include but are not limited to the National Fire Protection Association, Underwriters Laboratory, and the American Society of Mechanical Engineer Standards, regulating tank construction and fire safety.

DFS's authority to enforce tank construction requirements on the proposed transloading facility is well supported by a long line of well established case law from both the Board and the

courts recognizing a state's ability to reasonably regulate railroads through the exercise of its police powers when the regulations involved protect public health and safety. See, e.g., Burlington Northern Railroad Company – Stampede Pass Line, STB Finance Docket No. 33095 (Sept 25, 1996) (“Stampede Pass”), Riverdale, and Green Mountain. The Board has previously opined that local authorities can take actions that are necessary and appropriate to address any genuine emergency on railroad property, and that railroads are not exempt from certain local fire, health, safety and construction regulations and inspections.

In Boston and Maine Corp and Town of Ayer, STB Finance Docket No. 33971 (May 1, 2001) (“Ayer”), the Board restated its long held position that non-discriminatory enforcement of health and safety requirements, such as building and electrical codes, is permissible as long as it does not “unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce.” Id. at 9. In an appellate proceeding arising out of this matter, Boston and Maine Corp v. Town of Ayer, 330 F.3d 12 (1<sup>st</sup> Cir. 2003) the First Circuit Court of Appeals discussed the Board's decision in Ayer, noting that the Board had provided the following three guidelines for permissible state and local regulation:

- (1) non-discriminatory enforcement of local requirements such as building and electrical codes (other than pre-construction) generally are not preempted;
- (2) a town may seek enforcement of voluntary agreements; and
- (3) section 10501(b) should not be interpreted as intending to interfere with the role of state and local agencies in implementing federal environmental statutes.

330 F.3d at 16-17. In addition, the First Circuit listed examples of the types of conditions the Board had determined to be reasonable in Ayer, including in part, requirements that railroads:

- (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit;

- (2) use state or local best management practices when they construct railroad facilities; and
- (3) implement appropriate precautionary measures at the railroad facility, so long as they are fairly applied.

330 F.3d at 17. The court has expressly held that “the railroad must notify the local government when undertaking an activity that would, for another entity require a permit.” Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp, 750 A.2d 57, 66 (N.J. 2000) (“Ridgefield”). The notice requirement established by the application process of the M.G.L. c. 148, § 37 permit is precisely the type of notification the state would otherwise be entitled to receive by another entity constructing AST’s under similar circumstances.

For these reasons, DFS respectfully requests the Board to clarify in its order that G&U is subject to DFS’s cease and desist order to comply with reasonable fire safety regulations as regards tank construction at the proposed facility.

**(B) Operational Requirements Requiring Testing and Remediation of Un/Under-Odorized Rail Cars containing LP intended for Distribution in the Commonwealth**

G&U has indicated that it plans to directly transload LP, between railcar and transport tanker trucks, pending construction of its AST’s. It has requested the Board declare these operations as similarly preempted from the oversight of state regulations. However, there are important public safety regulations in the Massachusetts fire safety code that address operational issues in the handling and use of LP, beyond just the construction of AST’s and storage of LP. These requirements apply whether LP is stored or directly transloaded.

In 2013, the Massachusetts State fire safety code was amended at 527 CMR 6.00 to specifically address the safety issues and concerns regarding the safe storage, handling and use of LP as a result of a fatal explosion in the Town of Norfolk, Massachusetts. In that incident, it

was discovered that LP, shipped by rail, was entering the stream of commerce, inadequately odorized with ethyl mercaptan, which is used to stench LP to provide notice of dangerous leaks to the public and first responders. The addition of ethyl mercaptan to LP is required by federal law, pursuant to 49 U.S.C. § 173.315(b)(1). The lack of odorant in the Norfolk explosion, contributed to the victim's non-awareness of what tragically, was a leak of LP, ignited by an electrical spark, which resulted in his death.

In response, Massachusetts regulations now require rail shipments of LP, intended for use in the Commonwealth, be tested to ensure adequate levels of ethyl mercaptan.<sup>4</sup> The requirement to "stain tube test" railroad shipments of LP, before it is distributed into the chain of commerce, is unique to Massachusetts and critical to ensuring the public safety. The Commonwealth continues to receive rail car shipments from suppliers both in the United States and Canada that are un/under-odorized when they are received in Massachusetts for transloading. For example, testing conducted at DCP Midstream (a similar LP transloading facility) in Westfield, Massachusetts has revealed three unodorized rail cars received since July 11, 2013. Because there are only a handful of LP providers in the U.S. and Canada, DFS has every reason to believe that any shipment of LP by rail car, received for transloading and/or storage by G&U, will also be vulnerable to being un/under-odorized. (See Attachment "G" – Affidavit of Timothee C. Rodrique at ¶ 1-15). Therefore, compliance with the operational requirements of the Massachusetts State fire safety code by G&U, to ensure adequate detection and remediation of this dangerous public safety problem, before such LP enters the stream of commerce, is the proper exercise of the state's reserved police powers historically recognized by both the Board and the courts as previously cited herein. DFS respectfully requests the Board reaffirm in its declaratory order, its long standing position that DFS's actions to ensure compliance with local

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<sup>4</sup> Attachment "F" – 527 CMR 6.04 (modifying NFPA 58, 2008 Edition)

safety codes, including the fire safety codes at issue here (regulating LP tank facilities and operations by railroad), are a valid exercise of the state's police powers and accordingly, are not preempted pursuant to 49 U.S.C. § 10501.

### **III. Relief Requested**

G&U in its petition has requested that the Board "enter an order declaring that 'transloading of LP at its yard in North Grafton, either by means of portable equipment or by the construction and operation of a permanent facility . . . will be transportation subject to the Board's jurisdiction and may not be subject to any zoning, permitting, approval or preclearance procedures by the Town or any other state or local regulatory agency.'" Petition at 23.

The Town on the other hand, has raised serious and substantial questions regarding the nature of the true ownership and control of the proposed LP transloading facilities in North Grafton and whether the construction and operation of the proposed facility constitutes transportation by a rail carrier, entitling it to preemption. In this regard, the Town requests the institution of a "full and complete declaratory order proceeding." Reply at 19.

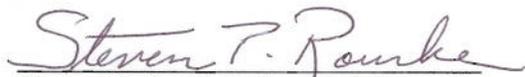
DFS supports the Town's request and also urges the Board to conduct a full and complete declaratory order proceeding, as to determine ownership and control of the facility, and by extension, the issue of preemption which directly affects the rights of DFS and its enforcement authority regarding this proposed facility.

However, if the Board is not inclined to conduct a full declaratory order proceeding, DFS urges the Board, for all the reasons cited herein, to clarify in any order that G&U is subject to the state AST construction provisions of 502 CMR 5.00 and the Massachusetts fire safety code regulations at 527 CMR and must produce all documents required including, but not limited to plans, drawings and test results, and allow for inspection of the proposed tank construction, even

if the Board determines that G&U is not required to make application for a permit pursuant to M.G.L. Chapter 148, s. 37.

Respectfully submitted,

The Massachusetts Department of Fire Services,  
By its attorney,



Steven P. Rourke, General Counsel  
Massachusetts Department of Fire Services  
P.O. Box 1025 – State Road  
Stow, Massachusetts 01775  
(978) 567-3182

Due and Dated: 8/23/2013

## CERTIFICATE OF SERVICE

I certify that I, this day, have served a copy of the foregoing Reply by Certified Mail, Return Receipt Requested and by e-mailing a copy upon the parties of record:

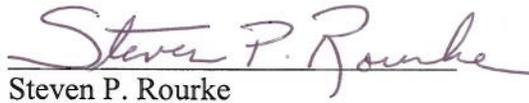
Keith T. Borman, Esq.  
American Short Line And Regional Railroad Association  
50 F Street, NW, Suite 7020  
Washington, DC 20001-1564  
[kborman@aslrra.org](mailto:kborman@aslrra.org)  
(Certified Mail No.: 7002-3460-0001-2004-1711)

James E. Howard, Esq.  
70 Rancho Road  
Carmel Valley, CA 93924  
[jim@jehowardlaw.com](mailto:jim@jehowardlaw.com)  
(Certified Mail No.: 7012-3460-0001-2004-1788)

Fritz R. Kahn, Esq.  
1919 M Street, NW, 7Th Floor  
Washington, DC 20036  
[xiccgc@gmail.com](mailto:xiccgc@gmail.com)  
(Certified Mail No.: 7012-3460-0001-0975-6443)

Mary Jude Pigsley, General Counsel  
Department Of Environmental Protection  
627 Main Street  
Worcester, Massachusetts 01608  
[MaryJudePigsley@state.ma.us](mailto:MaryJudePigsley@state.ma.us)  
(Certified Mail No.: 7012-3460-0001-0975-6450)

Dated at Stow, Massachusetts, this 23<sup>rd</sup> day of August, 2013.

  
Steven P. Rourke

# **ATTACHMENT “A”**



# **ATTACHMENT “B”**

**527 CMR: BOARD OF FIRE PREVENTION REGULATIONS**

1.02: continued

(4) Special Equipment. Special fire protection equipment shall be installed when adequate fire protection is not being provided or hazardous or dangerous conditions exist, as determined by the head of the fire department. The special fire protection equipment shall be installed in accordance with the requirements of 527 CMR and 780 CMR.

(5) Existing buildings: Buildings built under and in full compliance with the codes in force at the time of construction or alteration thereof, and that have been properly maintained and used for such use as originally permitted, shall be exempt from the requirements of 527 CMR pertaining to any of the following matters:

(a) Fire protection of structural elements except as provided for existing buildings under 780 CMR.

(b) Exits required, except as provided for existing buildings under 527 CMR and 780 CMR.

(c) Isolation of hazardous operations and mixed uses; provided, however, that the head of the fire department shall require the installation of fire safety devices or systems (fire extinguishers, fire alarms, fire detection devices, sprinklers or similar systems) where they are necessary to provide safety to life and property. In lieu of requiring the installation of safety devices or systems or when necessary to secure safety in addition thereto, the head of the fire department shall prescribe limitations on the handling and storage of materials or substances or upon operations that are liable to cause fire, contribute to the spread of fire, or endanger life or property.

**1.03: Enforcement Authority**

(1) Enforcement Official. It shall be the duty and responsibility of the Marshal or the head of the fire department or his designee, to enforce the provisions of the code as herein set forth.

(2) Coordinated Inspections. Whenever in the enforcement of 527 CMR, another code, ordinance or by-law is the responsibility of more than one code official of the jurisdiction is involved, it shall be their duty to coordinate their inspections and administrative orders as fully as practicable so that the owners and occupants of the building or structure shall not be subjected to visits by numerous inspectors nor multiple or conflicting orders. Whenever an inspector from any agency or department observes an apparent or actual violation of some provision of some law, ordinance, code or by-law of the jurisdiction, not within the inspector's authority to enforce, the inspector shall report the findings to the code official having jurisdiction.

(3) Right of Entry. The marshal, an inspector, the head of the fire department, or any person to whom the marshal or the head of the fire department may delegate the authority, may, in the performance of the duties imposed by M.G.L. c. 148, or in the furtherance of the purpose of any provision of any law, ordinance or by-law relating to the subject matter of M.G.L. c. 148 or of any rule or regulation contained in 527 CMR, or any order of the marshal or head of the fire department, enter any reasonable hour any building or other premises, or any ship or vessel, to make an inspection or investigation, without being held or deemed to be guilty or trespass. (M.G.L. c. 148, § 4.)

(4) Investigation of Fires. The head of the fire department shall investigate the cause and circumstances of every fire or explosion to determine if such fire was caused by carelessness or design. The investigation shall be made forthwith if it appears to the official making such investigation that the fire or explosion is of suspicious origin or is the result of a violation of law or, if he is unable to determine the cause, he shall immediately notify the marshal. All other fires shall be reported in writing to the marshal within 48 hours, excluding Sundays and holidays on forms furnished by the department. (M.G.L. c. 148, § 2).

(5) Fire Records. The head of the fire department shall keep a record of all fires or explosions, with the results of such investigations, and such records shall be open to the public.

(6) Certificates, Licenses and Permits Issued by the Marshal.

(a) It shall be the duty of the Marshal, or his designee, to issue certain approvals, licenses certificates, licenses or permits required by 527 CMR 2.00, 9.00, 13.00, 22.00, 24.00 or any

# **ATTACHMENT “C”**

502 CMR: OFFICE OF THE STATE FIRE MARSHAL

502 CMR 5.00: PERMIT REQUIREMENTS AND ANNUAL INSPECTION OF ABOVE GROUND STORAGE TANKS OR CONTAINERS OF MORE THAN TEN THOUSAND GALLONS' CAPACITY

Section

- 5.01: Scope and Purpose
- 5.02: Applicability
- 5.03: Definitions
- 5.04: Permit Requirements
- 5.05: Self-Inspection and Related Record Keeping Requirements
- 5.06: Annual Inspection and Use Permit Requirements
- 5.07: Entry Upon the Premises
- 5.08: Compliance with Law and Regulation
- 5.09: Revocation, Suspension or Denial of a Permit

5.01: Scope and Purpose

502 CMR 5.00 is adopted by the State Fire Marshal pursuant to M.G.L. c. 148, § 37 to provide uniform requirements and procedures for the construction, maintenance and use of above ground storage tanks or containers and related permit, inspection and record keeping requirements.

5.02: Applicability

502 CMR 5.00 shall apply to any above ground storage tank or container with a capacity of more than 10,000 gallons used for the storage of any fluid other than water.

5.03: Definitions

For the purpose of 502 CMR 5.00, the following terms shall have the meanings respectively assigned to them:

Above ground storage tank or container. Any tank or container where over 90% of the tank volume is located above the ground surface.

API. The American Petroleum Institute.

API Standard 653. The American Petroleum Institute Standard 653, Second Edition including Addendum 1, December 1996 and Addendum 2, December 1997.

ASME. The American Society of Mechanical Engineers.

Maintenance. The installation, removal, replacement or penetration of any shell plate, annular plate ring material, tank bottom, roof or weld joint which involves the repair, replacement or installation of any material with a dimension of greater than 12" or the jacking or movement of any tank. It does not include the routine painting or cleaning or the removal of superficial oxidation incidental to such painting or cleaning or the dismantling of a tank pursuant to a valid permit issued by the head of the fire department.

Marshal. The State Fire Marshal or said Marshal's designee.

5.04: Permit Requirements

(1) In General. Pursuant to M.G.L. c. 148, § 37, no person shall construct, maintain or use any above ground storage tank or container of more than ten thousand gallons' capacity, for the storage of any fluid other than water, without first securing a permit therefore from the Marshal.

(2) Application Process for Construction, Maintenance or Use Permits. The applicant shall complete and submit to the Department of Fire Services, Office of the State Fire Marshal the prescribed permit application form and permit fee, together with the following documents in duplicate:

## 5.04: continued

- (a) A plot plan certified by a certified land engineer or surveyor. Said plot plan must clearly indicate the following:
    1. the existence of any nearby bodies of water or water courses within 500 yards of the structure;
    2. proximity to any and all utility lines, cables or pipes within 100 yards of the structure, whether above or below ground level and whether active or inactive;
    3. the existence of any public or private ways within 500 yards of the structure; and
    4. topography bench marks and elevations must be indicated.
  - (b) A foundation plan indicating:
    1. results of borings taken;
    2. elevations;
    3. pile schedule and test of pile loading, pre-loading if applicable; and
    4. calculations of safe load on soil, pad, ring or pile according to 502 CMR 5.04(2)(c)(4).
  - (c) Dike plan (which may be included in the foundation plan) shall include:
    1. calculations showing volume of area;
    2. slope and height;
    3. top width;
    4. floor and drainage;
    5. distance from other tanks both within the dike and within adjacent diked areas including those of abutters; and
    6. the total combined gallon capacity.
  - (d) Mechanical drawings of the proposed tank indicating:
    1. plate thickness for each ring, bottom and top;
    2. calculations for thickness of each ring, floor and roof;
    3. welding details and procedures including electrode specifications used, radiography technique, and other nondestructive testing planned to be conducted; and
    4. grade of materials to be used identified by section II of the ASME Code or API.
  - (e) All foundation, mechanical and dike plans shall be stamped and signed by a professional engineer duly registered in the Commonwealth.
  - (f) The Marshal may waive the production of a requested document or may require the production of supplemental documentation as a condition to issuing a permit.
- (3) Issuance of Permit to Construct or Maintain. A permit to construct or perform maintenance on a tank or container may be issued by the Marshal only after the application and any other supporting documents have been submitted, reviewed and approved. The permit may be issued with certain conditions or contingencies.
- (a) Permit Expiration. The subject tank or container work shall commence within six months from the date the permit was issued and must be completed within one year of commencement. If the work has not started or is not completed during the stated time periods a permit shall be deemed expired and a new permit shall be required unless a written extension is granted by the Marshal. Such an extension may be granted only if the applicant can demonstrate that such a delay was not deliberate and that such delay will not present harm to the general public or the environment.
  - (b) Notification and approval of changes or alterations. Prior to completion, the Marshal shall be notified, forthwith and in writing regarding any modifications to any details contained in the original application submission. Any modifications shall be approved by the Marshal.
  - (c) Conference and communications with the Marshal. A conference may be scheduled with the Marshal prior to the commencement of any construction or maintenance. The owner, construction or maintenance principals or their designees and any other involved persons requested by Marshal shall be made available for said conference. Specific work phases requiring stopping points and possible inspection may be required at the conference. The construction principals shall give reasonable and advanced notification to the Marshal's Code Compliance Division of the specified phases of the work progress as they are completed. No work shall continue on the next phase unless the Marshal has approved the previously completed phase.

5.04: continued

(d) Issuance of the use permit. Upon completion of the tank or container it shall be tested by filling with water or other acceptable fluid to the maximum design liquid level. Tanks containing fluids of a cryogenic nature or fluids that are lighter than water and have foundations designed for less than a water test may be tested by an alternative means acceptable to the Marshal. Upon final satisfactory review, inspection and test results, the Marshal may issue a use permit. Unless otherwise specified, the use permit shall expire one year from the date of issuance.

(e) Emergency repair. Maintenance on an emergency basis as a result of an unexpected tank or component failure may be conducted prior to the issuance of a permit if necessary to avoid harm to persons, property or the environment. In such an emergency, the Office of the State Fire Marshal shall be notified as soon as reasonably possible of such emergency maintenance. A permit shall be submitted in accordance with 502 CMR 5.00 within two business days after such an emergency.

5.05: Self-Inspection and Related Record Keeping Requirements

The requirements of 502 CMR 5.05(1) and (2) shall be effective on December 1, 2000.

(1) Self-Inspections. As a condition to continued use of any tank or container under a valid use permit issued by the Marshal, every owner or operator shall conduct self-inspection of every tank or container on a regularly scheduled basis to determine and assure continued safe function. The nature and frequency of said inspections shall be equivalent to or greater than the standards established in API standard 653 or as otherwise prescribed by the Marshal.

(2) Written Records. An accurate written record for each tank or container shall be maintained in such form at least equivalent to or greater than the standards established in API standard 653 or as otherwise prescribed by the Marshal. Such record shall contain a history of all inspections, including the condition of all parts inspected, and a record of all examinations and tests. Such record shall also include all data accumulated on each tank, including a history of any repairs, alterations, replacements and service. The person principally in charge of the tank or container facility shall sign each inspection record. The records shall be kept at the storage facility or at another location readily available for inspection by the Marshal. Such records shall be maintained for a period of five years beyond the demolition of the tank. The records shall be subject to the inspection of the Marshal during regular business hours.

(3) The requirements of 502 CMR 5.05(1) and (2) shall be effective on December 1, 2000.

5.06: Annual Inspection and Use Permit Requirements

(1) Pursuant to M.G.L. c. 148, § 37, all above ground storage tanks and containers subject to the requirements of 502 CMR 5.00 shall be inspected annually. Inspections shall be made of the premises, tanks, dikes and related equipment.

(2) A professional engineer who is registered in the Commonwealth or a person who has been certified according to API Standard 653 Appendix D or a person who otherwise meets the minimum qualifications established by the Marshal, shall conduct the annual inspection. At least 14 days prior to the date of the intended inspection, the owner, operator or inspector of said tank or container shall notify the Marshal and the head of the local fire department of the date and time of the intended inspection. The Marshal shall be given the opportunity to observe or participate in the inspection process.

(3) Upon inspection, the owner or operator of a tank or container shall submit an annual inspection report on a form provided or approved by the Marshal. The report shall contain an affirmation by the qualified inspector that the facility was duly inspected, date of said inspection and a statement that the premises, tanks or containers, related equipment and dikes are in compliance with all applicable regulations. A separate report form shall be submitted for each individual tank or container on or before June 1, 2001 and on an annual basis thereafter.

502 CMR: OFFICE OF THE STATE FIRE MARSHAL

5.06: continued

(4) The Marshal may rely on the affirmations in the annual inspection report and, when satisfied as to accuracy of the report and safety of the subject tank or container, may issue the annual use permit. Said permit shall expire one year from the date of issuance, unless otherwise extended by the Marshal.

(5) Third party inspections conducted under 502 CMR 5.06 shall not waive the authority of the Marshal to conduct an independent inspection for the purpose of determining tank or container safety or compliance with 502 CMR 5.00.

5.07: Entry Upon Premises

Any applicant for or holder of any permit issued under the provisions of 502 CMR 5.00 shall be deemed to have consented to the entry of the Marshal upon the premises during regular hours of operation for the purposes of determining whether the permit applicant or holder is complying with the provisions of M.G.L. c. 148, 502 CMR 5.00, 527 CMR 9.00 or any other related law or regulation.

5.08: Compliance with Law and Regulation

Compliance with all federal and state laws and associated regulations, including but not limited to, the provisions of M.G.L. c. 148, §§ 9, 13, 37, 502 CMR 5.00 and 527 CMR 9.00, regarding the design, construction, use and maintenance of all above ground storage tanks or containers subject to 502 CMR 5.00, is a condition to the issuance and continued effect of any permit or certification issued pursuant to 502 CMR 5.00.

5.09: Revocation, Suspension or Denial of a Permit

(1) The Marshal may suspend, revoke, or in the case of a new applicant, deny any permit issued under 502 CMR 5.00 for any violation of or non-compliance with 502 CMR 5.00, 527 CMR 9.00 or any other related law, regulation, written term, condition or policy related thereto and applicable to the permit holder. Any holder of or applicant for a permit which has been denied, suspended or revoked hereunder, may request a hearing. Such request shall be made in writing to the Marshal within 14 days of receipt of notice of denial, suspension, or revocation.

(2) If the Marshal reasonably believes that a tank, or facility constitutes an immediate threat to public health, safety or welfare or to the environment, the Marshal may immediately, without a prior hearing, order such action necessary to reduce said threat, including the immediate suspension of the right to use a tank or facility. Any person suspended under this section may request a hearing in writing but must do so within 14 days of receipt of the notice of suspension.

REGULATORY AUTHORITY

502 CMR 5.00: M.G.L. c. 148, § 37.

# **ATTACHMENT “D”**

## AFFIDAVIT OF H. JACOB NUNNEMACHER

The undersigned, H. Jacob Nunnemacher, under oath deposes and states:

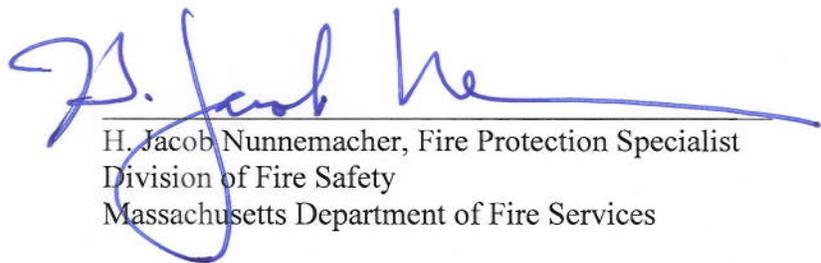
1. My name is H. Jacob Nunnemacher. I am a Fire Protection Specialist employed by the Division of Fire Safety of the Massachusetts Department of Fire Services, and I have held this position for the past fourteen (14) years.
2. One of the agency missions of the DFS is to provide technical assistance to the City and Town Fire Chiefs of the Commonwealth of Massachusetts. I provide technical assistance and expertise on questions of fire protection engineering and safety.
3. On or about April 5, 2011, I was contacted by Mr. John Holstein of Spicer Gas regarding the installation requirements for Aboveground Storage Tanks (AST's) containing Liquid Propane (LP) gas at a proposed site in the Town of Grafton, Massachusetts. I recommended to Mr. Holstein that we meet with the local fire department to make them aware of Spicer's intentions.
4. On or about June 7, 2011, Grafton Fire Chief, Michael Gauthier requested my assistance in the review the LP Gas transloading facility on rail property in the Town of Grafton.
5. I was requested to advise the parties, particularly the Town of Grafton, on the safety requirements concerning a proposal for a LP Gas transloading facility.
6. At the June 7, 2011 meeting, I informed G&U representatives that the town would require a land license for the storage of propane and that a fire safety analysis would be needed for state review. I encouraged G & U representatives to fully share their intentions with town officials to avoid delay.
7. Approximately one year later on or around June 28, 2012, I attended a second meeting with Grafton Fire Department officials, G&U representatives, as well as Mr. Holstein (now with All American Transloading) regarding the proposed LP Gas facility. At that meeting, we discussed the project update and I noted that nothing I had previously discussed was reflected in the updated project.
8. On or about November 2, 2012, I received a fire safety analysis prepared by the Godfrey Group, on behalf of G & U Railroad and provided to me by Chief Gauthier.
9. The safety analysis concerned me for several reasons: G & U representatives stated it was already "out of date"; the number of 1<sup>st</sup> responders available in an emergency was unreliable and inflated; and the hydrant flow report was extrapolated from reduced actual flow rates (as there were concerns regarding the integrity of the water system infrastructure). In addition, the analysis included reliance on auxiliary protection devices (water cannons) not included in any actual plan; and the analysis utilized an

NFPA 58, LP Gas standard, which is not referenced in the Massachusetts Fire Safety Code.

10. On or about November 20, 2012, I requested Mr. Godfrey (Godfrey Group) address the shortcomings in his fire safety analysis. I received an e-mail on December 18, 2012 from Godfrey stating he would be sending a new fire safety analysis with amendments but noting that the submittal was not intended to meet the state tank construction requirements of 502 CMR 5.00, *et seq.*
11. Due to the legal proceedings in this case, I was advised by Agency Counsel to delay any further work on this matter pending resolution of the case. However, at no time to date, have I received any detailed site plans or specifications to allow a well reasoned safety analysis of the proposed facility.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 20<sup>th</sup> DAY

OF August, 2013.



H. Jacob Nunnemacher, Fire Protection Specialist  
Division of Fire Safety  
Massachusetts Department of Fire Services

# **ATTACHMENT “E”**



*The Commonwealth of Massachusetts*  
*Executive Office of Public Safety and Security*  
*Department of Fire Services*

*P.O. Box 1025 ~ State Road*

*Stow, Massachusetts 01775*

*(978) 567-3100 Fax: (978) 567-3121*

*www.mass.gov/dfs*



STEPHEN D. COAN  
STATE FIRE MARSHAL

DEVAL L. PATRICK  
GOVERNOR

TIMOTHY P. MURRAY  
LT. GOVERNOR

MARY ELIZABETH HEFFERNAN  
SECRETARY

December 13, 2012

**Via Regular and Certified Mail, Return Receipt Requested**  
**#: 7010-1670-0001-5325-3670**

John Delli Priscoli  
929 Boston Post Road East  
Marlborough, Massachusetts 01752

**Via Regular and Certified Mail, Return Receipt Requested**  
**#: 7010-1670-0001-5325-3663**

John Delli Priscoli  
100 Prides Crossing  
Sudbury, Massachusetts 01776

## **NOTICE TO CEASE AND DESIST**

Dear Mr. Delli Priscoli:

It has come to the attention of my office that your company, Grafton & Upton Railroad ("GURR") has begun construction of a number of aboveground storage tanks, in excess of 10,000 gallons, on the premises located at 42 Westboro Road, Grafton, Massachusetts.

It is my understanding that you intend to use the tanks for the storage of liquid propane. A review of the records on file at the Department of Fire Services, indicates that GURR has neither applied for nor been issued a permit to construct, maintain, or use such tanks as required by the provisions of M.G.L. Chapter 148, s. 37. Section 37 states in pertinent part that "no person shall construct, maintain or use any tank or container of more than ten thousand gallons capacity, for the storage of any fluid other than water . . . without first securing a permit therefor from the Marshal. . ."

Therefore, I hereby **ORDER** the following:

1. That all persons immediately **CEASE AND DESIST** from any and all work related to the

construction of any aboveground storage tank in excess of 10,000 gallons intended for the storage of any liquid other than water;

2. That GURR make proper application for a permit to construct as required pursuant to M.G.L. Chapter 148, s. 37; and
3. That GURR provide all required documents and plans pursuant to the provisions of 527 CMR, *et. seq.* and 502 CMR 5.00.

If you have any questions or concerns regarding this order, please contact my General Counsel, Steven P. Rourke, at (978) 567-3182.

Very truly yours,



Stephen D. Coan  
State Fire Marshal

SDC/ml

CC: Chief Michael Gauthier, Grafton Fire Department

# **ATTACHMENT “F”**

**527 CMR 6.00: LIQUEFIED PETROLEUM GAS CONTAINERS AND SYSTEMS**

## Section

- 6.01: Purpose
- 6.02: Adoption of NFPA 58 (2008 Edition) by Reference
- 6.03: Conflict Between NFPA 58 (2008 Edition) and Other 527 CMR Provisions
- 6.04: Modification of NFPA 58 (2008 Edition)
- 6.05: Definitions
- 6.06: Installation of Equipment - Compliance Requirements
- 6.07: Permits, Inspections, Storage and Licenses

6.01: Purpose

The purpose of 527 CMR 6.00 is to prescribe minimum standards for LP-gas systems for the protection and safety of the public at large. The application of 527 CMR 6.00 is limited to the storage of LP-gas and the operation of LP-gas systems upstream from the outlet of the first stage regulator.

6.02: Adoption of NFPA 58 (2008 Edition) by Reference

527 CMR 6.00 hereby adopts and incorporates by reference the National Fire Protection Association (NFPA) Standard NFPA 58 entitled: *Liquefied Petroleum Gas Code* (2008 Edition) with the following modifications:

6.03: Conflict Between NFPA 58 (2008 Edition) and Other 527 CMR Provisions

In the event of a conflict between the provisions of NFPA 58 (2008 Edition) and any other provision of 527 CMR, the standard that requires the greater level of safety shall prevail.

6.04: Modification of NFPA 58 (2008 Edition)

Delete the term Authority Having Jurisdiction (AHJ) from NFPA 58 (2008 Edition) and insert the following definition in its place.

3.2.2 Authority Having Jurisdiction (AHJ) shall be the Head of the Fire Department or the Marshal and their designees, as defined in M.G.L. c. 148.

Add a new section title in NFPA 58 (2008 Edition) as follows:

4.2 LP-Container, Filling, Shipment, Odorization, and Testing Requirements

Modify by inserting the following:

4.2.3\* If odorization is required, as provided in 4.2.1, one of the testing thresholds required in section 4.2.5.1(2) shall be completed and documented. The presence of the odorant shall be permitted thereafter by sniff testing each time the propane changes in the distribution network. If the amount of odorant in the propane is questionable by sniff testing or the records are not accepted by or made available to the AHJ as required in section 4.2.6, the testing as prescribed in accordance with the section 4.2.5.1(2) shall be repeated. If necessary, thresholds shall be met by adding additional odorant to obtain proper odorized propane levels as prescribed in sections 4.2.5.1(1) or 4.2.5.1(2). In such situations where the propane odorant is questionable, immediate verbal notification shall be given to the AHJ, which shall be followed by written notification within 24 hours documenting the date, time, and location of discovery and status of such event.

Add the new section and entitle it as follows:

4.2.4 Railcar Shipments.

6.04: continued

Add the following:

4.2.4.1 Each railcar shipment of LP-gas intended for distribution within Massachusetts shall comply with the provisions in section 4.2.5.1(1). Each railcar shipment delivered to a bulk plant for distribution shall be tested for odorization using one of the tests prescribed in section 4.2.5.1(2) subsection (a), (b) or (c).

Add the following new section:

4.2.5 Odorization Thresholds, Testing and filling of Containers:

4.2.5.1 Odorization Thresholds, Testing and filling of Containers:

- (1) If ethyl mercaptan is used for odorization purposes, it shall be injected at a minimum rate of 1 pound per 10,000 gallons of propane.
- (2) For testing purposes one of the following tests listed below in (a), (b) or (c) shall be required to determine adequate ethyl mercaptan odorant levels equivalent to 1 pound per 10,000 gallons of propane.
  - (a) Vapor Test using stain tubes resulting in a minimum of 5 ppm of ethyl mercaptan utilizing ASTM D 5305 or
  - (b) Flash Vapor Test using stain tubes resulting in a minimum of 17 ppm of ethyl mercaptan utilizing ASTM D 5305 or
  - (c) Liquid Test for analysis of volatile sulfurs using gas chromatography resulting in a minimum of 17 ppm of ethyl mercaptan utilizing ASTM D1265.
- (3) Newly filled tanks and containers shall be purged according to manufactures instructions.
- (4) Newly installed tanks greater than 125 gallons shall comply with the following:
  - (a) Within two business days of the tank installation approval by the AHJ, such tank shall be filled with LP-gas and;
  - (b) If the tank is not placed into service within 30 days of the tank installation approval date, such tank shall be tested by the LP-gas company in accordance with 4.2.5.1(2), prior to being placed into service and;
  - (c) Maintain records in accordance with 4.2.6 and report findings, if applicable, in accordance with 4.2.3.

4.2.6 Records

- 4.2.6.1 Records of all testing required by 527 CMR 6.00 shall be maintained. The results shall be kept by both the shipper and user for a minimum of three years from the date of delivery.
- 4.2.6.2 Tests results shall be made available to the AHJ upon request.

Modify Section 4.4 by inserting a second paragraph as follows:

4.4 Effective January 1, 2014, each person handling LP-gas in the quantities of 42 pounds (ten gallons) or greater, shall be trained, at applicable level, in accordance with the Certified Employee Training Program (CETP) or other education programs acceptable to the Marshal. Each person handling cylinders less than 42 pounds shall receive annual training utilizing the program *Dispensing Propane Safely* published by the Propane Education and Research Council. Certificates of completion shall be maintained by the employer for three years and a copy of said certificate shall be given to the trainee at the completion of each program. Certificates of completion shall include the date of completion, the course name and be signed by the instructor or provider. Such certificates shall be submitted to the AHJ upon request.

Add the new section entitled as follows:

4.7 Field Equipment Identification

Add the following:

4.7.1 All LP-gas installations of 125 gallons or greater shall be provided with a sign identifying the responsible party for the installation and maintenance of the LP-gas installation. The sign shall be installed in a plainly visible location. Such sign shall include the name and telephone number of the LP-gas supplier, plant installer, owner, or operator.

6.04: continued

Add the new section entitled as follows:

4.8 Emergency and Reporting Procedure

Add the following:

4.8.1 In situations where a gas leak results in imminent danger, immediate verbal notification shall be given to the head of the fire department, which shall be followed by written notification within 24 hours of said verbal notification documenting the date, time, and the location of discovery and status of such event.

4.8.1.2 In situations where the AHJ has directed an LP-gas provider to take corrective action, the provider shall immediately respond verbally to the AHJ, as directed. Such provider's response shall be followed by written notification, if requested, within 24 hours after resolution, documenting the date, time, and the location of discovery and status of the LP-gas installation.

Modify Section 6.3.7(1) by adding after the word "3 foot" the word "arc".

Add a new section as follows:

8.2.1.6 Areas used for the storage of containers or cylinders awaiting use or resale shall post a readily accessible and clearly visible warning sign stating "NO SMOKING" and "FLAMMABLE GAS" or otherwise indicate the contents of such containers or cylinders, such as "FLAMMABLE GAS - PROPANE" or "FLAMMABLE GAS -BUTANE".

Modify Vehicle Fuel Dispensers by adding 9.4.10 (4) as follows:

(4) "NO SMOKING" and "STOP ENGINE WHEN REFUELING" signs shall be displayed on the front and rear of each dispenser at the filling station. The signs shall have block letters at least one inch high with either red letters on a white background or white letters on a red background.

6.05: Definitions

Abandoned. Any container, which has not been used either for filling or draw off of LP-gas, for a continuous period in excess of 12 months.

Head of the Fire Department. The head of the fire department as defined in M.G.L. c. 148, § 1, or a designee of the head of the fire department.

Imminent Danger. A condition or practice in an occupancy or structure that poses a danger that could reasonably be expected to cause death, serious physical harm, or serious property loss.

Marshal. The state fire Marshal or his designee as defined in M.G.L. c. 148, § 1 and appointed in accordance with M.G.L. c. 22D, § 3.

6.06: Installation of Equipment - Compliance Requirements

- (1) The owner of the storage equipment shall be responsible for the installation of the LP-gas facility and for maintaining it in a safe operating condition.
- (2) No person shall install, remove, connect, disconnect, fill or refill any LP-gas container without permission of the owner of the container.
- (3) Only a trained individual complying with section 4.4 shall install, remove, connect, disconnect, sell, fill, refill, deliver or permit to be delivered, or operate any LP-gas system utilizing containers of over 42 pounds (ten gallons) product capacity.
- (4) The Marshal may order the user of a system in writing to meet additional requirements:
  - (a) Where unusual conditions exist;
  - (b) When it necessary for the protection of life and property;

# **ATTACHMENT “G”**

## AFFIDAVIT OF TIMOTHEE RODRIQUE

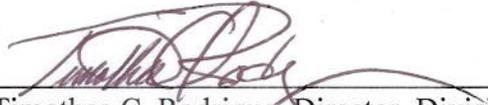
The undersigned, Timothee C. Rodrique, under oath deposes and states:

1. My name is Timothee C. Rodrique. I am the Director of the Division of Fire Safety of the Massachusetts Department of Fire Services, and I have held this position for the past thirteen (13) years.
2. In my capacity as Director, I am responsible, among other things, for the oversight of the operations and civil code investigations performed by civilian code enforcement officers assigned to my office, to enforce the State Fire Code. I have reporting responsibility to the State Fire Marshal. My office, often works in conjunction with Massachusetts State Police personnel assigned to the State Fire Marshal's Office, under the command of Captain Jeanne Stewart.
3. The following information is based upon my personal knowledge as a result of activities conducted by my office relating to the matters described in this Affidavit.
4. The activities of my office were initiated as a result of a significant explosion that occurred July 31, 2010 at 27-28 Wildwood Way, Norfolk, Massachusetts, and which resulted in the loss of life, personal injury and extensive property damage.
5. The Norfolk Fire Department Fire Chief, Coleman Bushnell, expressed his concerns about the possibility of lack of odorant in the propane tanks at that location.
6. By way of background, propane is odorless. Propane is also flammable, explosive, and poses a serious risk of explosion if it is not properly contained in storage vessels and subject to accidental ignition.
7. In order to provide "early warning" to users and the public in the event of a propane gas leak, most propane that is sold or distributed in Massachusetts is required by State and Federal law, to be odorized. See 527 CMR 6.00, the Massachusetts Board of Fire Prevention Regulations, which requires the odorization of propane. Although odorless propane sales are permissible in certain applications, the vast majority of propane sold or distributed for various commercial, residential, and personal use, is required to be adequately odorized.
8. As a result of an investigation conducted by my office, the Massachusetts State Police and the Massachusetts Attorney General's Office, it was discovered that railcars of LP Gas shipped from both U.S. and Canadian producers, were being under-odorized and received at DCP Limited Partnership in Westfield, Massachusetts.
9. DCP Midstream, like G&U Railroad's proposed facility, engages in transloading of LP Gas intended for consumer distribution in Massachusetts.

10. As a result of the agreement entered into between DCP Midstream and the Commonwealth of Massachusetts on September 13, 2010, DCP undertook the testing of railcars received at its facility to ascertain whether the LP Gas shipments it was receiving were adequately odorized as required by both state and federal law.
11. To date, testing at this site has revealed a frequent and consistent pattern of un/under-odorized railcars being received at DCP which are required to be remediated on site or returned to their original source.
12. I am notified of each such un/under-odorized railcar shipment received by DCP management. The most recent shipments were received as of August 15, 2013 in Westfield, Massachusetts from Mark Hydrocarbon, Hydrocarbon, Kentucky.
13. It is my belief that G&U's proposed transloading facility will most likely be subject to the receipt of un/under-odorized shipments of LP Gas.
14. It is vital to detect un/under-odorized LP Gas before it is distributed into the stream of commerce. The only way to do that is through the newly enacted requirements for testing LP Gas shipments imposed by the Massachusetts State Fire Code at 527 CMR 6.00, *et. seq.*
15. Preemption of Massachusetts Fire Code requirements to test and remediate LP Gas shipments which are un/under-odorized, would create a gap in public safety oversight intended to protect both consumers and first responders of LP Gas in Massachusetts.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 20<sup>th</sup> DAY

OF August, 2013.

  
\_\_\_\_\_  
Timothee C. Rodrique, Director, Division of Fire Safety  
Massachusetts Department of Fire Services