

SHAINES & McEACHERN, PA
Attorneys at Law

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August 1, 2014

ENTERED
Office of Proceedings
August 4, 2014
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VIA FEDEX

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

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

Dear Ms. Brown:

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

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

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

Sincerely,

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

FILED
August 4, 2014
SURFACE
TRANSPORTATION BOARD

Enclosures

cc: SEA-3, Inc.
City of Portsmouth

FEE RECEIVED
August 4, 2014
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. _____

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

**EMERGENCY PETITION
FOR DECLARATORY ORDER**

Communications with respect to this
document should be addressed to:

Alec L. McEachern
Shaines & McEachern, P. A.
282 Corporate Drive, Unit #2
P. O. Box 360
Portsmouth, NH 03802-0360
(603) 436-3110

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. _____

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

EMERGENCY PETITION FOR DECLARATORY ORDER

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

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF FACTS

The Parties.

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

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

The Facility.

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

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

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

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

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

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

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

The Newington Planning Board.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Portsmouth's Appeals.

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

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

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

38. Proximity:

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

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

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

39. Type of Change of Use:

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

40. Immediate Impact:

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

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

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

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

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

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

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

LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. Immediate Impact:

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

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

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

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

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

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

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

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

Basis for Emergency Relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION AND REQUESTED RELIEF

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

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

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

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

Respectfully submitted,



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

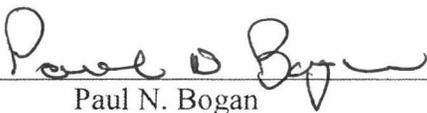
Counsel for Petitioner SEA-3, Inc.

Dated: August 1, 2014

VERIFICATION

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

Executed on July 31, 2014.

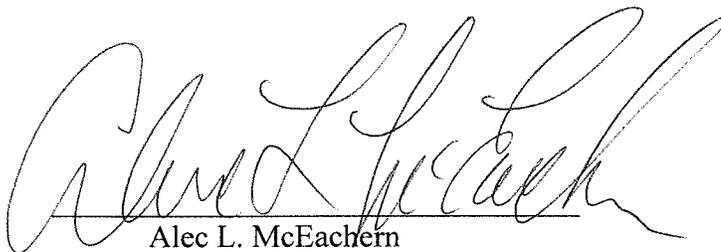


Paul N. Bogan

STATEMENT REGARDING SERVICE

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

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



Alec L. McEachern

Counsel for Petitioner SEA-3, Inc.

Exhibit A



CITY OF PORTSMOUTH

Community Development Department
(603) 610-7232

Planning Department
(603) 610-7216

December 9, 2013

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

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

Dear Planning Board Members:

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

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

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

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

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

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

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

Sincerely,



Rick Taintor
Planning Director

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

Exhibit B



CITY OF PORTSMOUTH

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

Robert J. Lister
Mayor

February 10, 2014

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

Subject: Sea-3 Expansion Proposal at 190 Shattuck Way

Dear Planning Board Members:

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

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

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

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

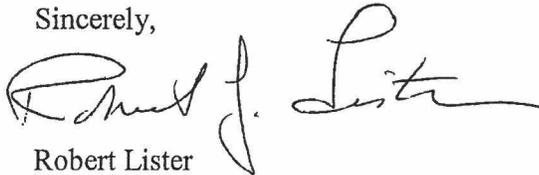
February 10, 2014

Page 2

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

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

Sincerely,

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

Robert Lister
Mayor of Portsmouth

Exhibit C

Staff Meeting with Town Administrators and NH DOT

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

Staff meeting summary:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit D



CITY OF PORTSMOUTH

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

Robert J. Lister
Mayor

February 18, 2014

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

Dear Senator Shaheen:

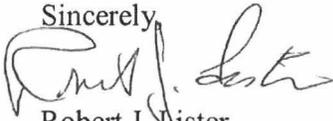
As you may know the Town of Newington has an application for expansion of the Sea-3 liquefied petroleum gas LPG at 190 Shattuck Way in Newington. The City has concerns about the proposed terminal expansion not due to the site plan itself but to the operational changes that will be implemented as a result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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Lister". The signature is fluid and cursive, with the first name being the most prominent.

Robert J. Lister
Mayor of Portsmouth

RJL/jed

c.: Portsmouth City Council Members

Exhibit E



CITY OF PORTSMOUTH

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

Robert J. Lister
Mayor
March 6, 2014

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

Dear Mr. Hebert:

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

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

Thank you for your consideration on this matter.

Sincerely,

Robert Lister
Mayor of Portsmouth

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

Exhibit F



CITY OF PORTSMOUTH

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

Robert J. Lister
Mayor

April 9, 2014

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

RE: Sea-3

Dear Mr. Hebert:

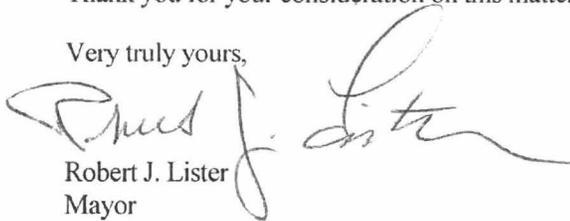
As you are aware, the residents of the City of Portsmouth have expressed abundant concern regarding the impact of the Sea-3 project on the public health, safety, welfare and the environment as a result of increased rail traffic through Portsmouth. On Monday April 7, 2014, the City Council voted unanimously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

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

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

Thank you for your consideration on this matter.

Very truly yours,



Robert J. Lister
Mayor

RJL/jed

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

SEA-3, Inc. 000039

Exhibit G



PLANNING
BOARD

The Town of Newington
New Hampshire

Incorporated 1764

May 21, 2014

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

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

Dear Mr Bogan:

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

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

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

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

Yours truly,



Denis Hebert, Chairman
Newington Planning Board

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

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

FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. The proposed site improvements would add a second means of emergency access to the site over the property of Pan Am Railways.

20. The proposed site improvements would maintain the site's existing vegetative buffers and add a 6-8' earthen berm at the southeastern corner of the site, within the existing fence line, where the site abuts a residential use.

21. The proposed site improvements will result in no change to the site's existing motor vehicle parking or truck distribution facilities.

22. Mr. Hazarvartian, P.E. of Transportation Engineering, Planning and Policy, performed a traffic assessment for the applicant and concluded that the proposed site plan would not alter the historic truck traffic volume which averaged 103 to 161 trucks per day, from 2002 to the present (excepting 2012 and 2013, which were substantially below these numbers due to market conditions).

23. Mr. Bogans testified that there are site constraints that limit the number of LPG rail cars that SEA-3 can receive to 16 rail car tankers with LPG per day, even with the site improvements proposed by this application. (3/24/14 PB mtg. minutes).

24. Mr. Grotenhuis, Senior P.E. of RSG, reviewed for the Planning Board the applicant's traffic assessment and concluded that the truck traffic volume would remain essentially the same, at 160 trucks on average per day. He further found that ongoing changes to the Spaulding Turnpike may alleviate some of the traffic down Woodbury Avenue and through Portsmouth.

25. Based on the evidence presented, the site plan proposal will not increase the truck traffic to and from the site.

26. The proposed site improvements will not change the site's existing distribution capacity or increase traffic impacts associated with existing uses on the site.

27. The motor vehicle area of the proposed site improvements is currently hard packed gravel and will remain hard packed gravel, with the exception of where the improvements are affixed to the ground.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONDITIONS OF APPROVAL

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

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

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

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

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

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

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

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Exhibit H

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

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

v.

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

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

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

PARTIES

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

JURISDICTION AND VENUE

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

BACKGROUND

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

6. Sea-3 presently uses both parcels to import foreign Liquefied Petroleum Gas ("LPG") by ship to distribute domestically by rail and truck.

7. The first parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 13 ("Lot 13"). This parcel is 7.02 acres located within both the General Industrial District ("I") and the Waterfront Industrial and Commercial District ("W"). The Zoning District boundary bisects the western most LPG storage tank. Lot 13 is located west of the rail line and contains a main building, truck loading racks, two large storage tanks for the storage of Liquefied Petroleum Gas (LPG), a smaller distribution tank and associated pipelines.

8. The second parcel is depicted on the Town of Newington's Tax Map at Map 20, Lot 2 ("Lot 2"). This parcel is 3.92 acres located within the Waterfront Industrial and Commercial District ("W"). Lot 2 contains a small building, 3 rail berths with pipelines to transport LPG between the waterfront loading docks through pipes located in Lot 2 to the storage tanks located in Lot 13.

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

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

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

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDING

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

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

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

119 N.H. at 544-45.

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

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

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

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

38. Proximity:

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

39. Type of Change of Use:

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

40. Immediate Impact:

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

41. Participation in administrative hearings:

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

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

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

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

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

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

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

PROCEDURAL ERRORS AND IRREGULARITIES

A. FAILURE TO COMPLY WITH REQUIRMENTS OF RSA 36

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

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

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

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

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

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

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

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

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

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

B. DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

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

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

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

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

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

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

C. FAILURE TO ABIDE BY SITE PLAN REVIEW REGULATIONS

1. Public Health, Safety and Welfare

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

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

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

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

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

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

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

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

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

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

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

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

2. Loading, Street Access, Traffic

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

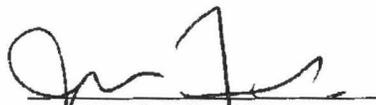
WHEREFORE, the City respectfully prays that this Court grant it the following relief:

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

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

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

The City of Portsmouth
By and through its Attorney

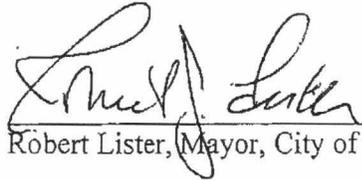


Jarle Ferrini, Staff Attorney
NHBM # 6528
1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

VERIFICATION

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

Dated: June 16, 2014


Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUTNY OF ROCKINGHAM

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

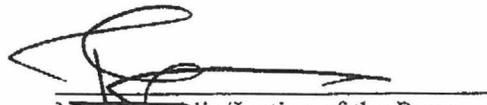

~~Notary Public/Justice of the Peace~~
Commission Expires 9/18/14

Exhibit I



CITY OF PORTSMOUTH

RECEIVED JUN 17 2014

LEGAL DEPARTMENT

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

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

June 17, 2014

HAND DELIVERED

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

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

Dear Chairman Morton:

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

Please advise of the hearing date.

Thank you for your consideration.

Sincerely,

Jane M. Ferrini
Staff Attorney

enclosure

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

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

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

Applicant's Agent
 Name _____
 Address _____
 Telephone _____
 Fax _____
 Email _____

Location of Property
 Address Shattuck Way
 Tax Map 20 Lot 13
 Tax Map 20 Lot 2

Fee
 \$50

Applicant's Request(s)

(Check applicable requests)

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

Property Owner's Consent

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

Jane M Ferrini

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

STATE OF NEW HAMPSHIRE

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

PARTIES

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

BACKGROUND

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

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

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

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

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

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDING

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

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

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

119 N.H. at 544-45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PLANNING BOARD MISINTERPRETED AND MISAPPLIED THE NEWINGTON ZONING ORDINANCE

ZONING DISTRICT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC HEALTH SAFETY AND WELFARE

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

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

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

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

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

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

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

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

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

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

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

DELAY IN DECLARING PROJECT OF DEVELOPMENT OF REGIONAL IMPACT

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

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

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

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

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

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

CONCLUSION

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

The City of Portsmouth
By and through its Attorney



Jane M. Ferrini, Staff Attorney
NHBM # 6528

1 Junkins Avenue
Portsmouth, New Hampshire 03801
(603) 610-7256

CERTIFICATE OF SERVICE

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

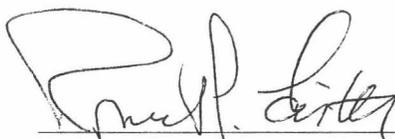
John Ratigan, Esquire
225 Water Street
Exeter N.H. 03833


Jane M. Ferrini

VERIFICATION

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

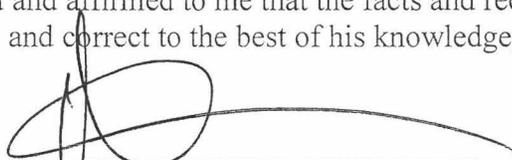
Dated: June 16, 2014



Robert Lister, Mayor, City of Portsmouth

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

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



Notary Public/Justice of the Peace

Commission Expires

9/18/14

Exhibit J



CITY OF PORTSMOUTH

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

Robert J. Lister
Mayor

June 18, 2014

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

Dear Governor Hassan:

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

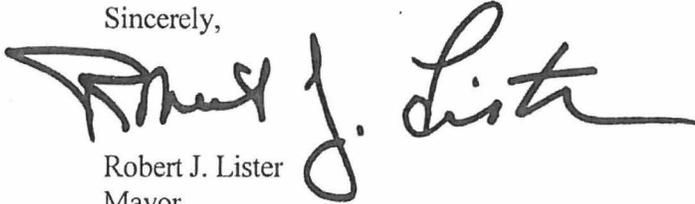
After abutting communities requested that the Planning Board declare this project a "development of regional impact", the City actively participated in the public hearing process. While the Newington Planning Board performed a thoughtful and deliberate review of this application, there was reluctance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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Lister". The signature is fluid and cursive, with a large initial "R" and a long horizontal stroke at the end.

Robert J. Lister
Mayor

RJL/jed

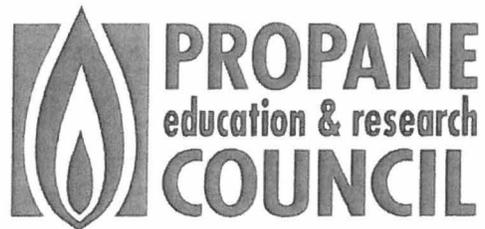
c.: Portsmouth City Council Members
Portsmouth Legislative Delegation

Exhibit K



Propane Industry Impact on U.S. and State Economies

Prepared for:



www.propanecouncil.org

November 2011

PREPARED FOR:

Roy W. Willis

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

PREPARED BY:

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

PRIMARY AUTHORS

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

The primary authors for the report include:

Warren Wilczewski, ICF International – WWilczewski@icfi.com

Michael Sloan, ICF International – MSloan@icfi.com

DISCLAIMER

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

3.32 Odorized Propane's Impact on New Hampshire Economy

2009 Odorized Propane Sales Breakout		
	(Gallons)	(% of State)
Residential	89,297,000	70.5%
Commercial	30,497,000	24.1%
Cylinder	2,687,000	2.1%
Internal Combustion	376,000	0.3%
Industrial	3,744,000	3.0%
Agricultural	125,000	0.1%
Total New Hampshire Odorized Propane Demand	126,726,000	100.0%
Total Propane-Heated Households	67,267	
Propane Share of New Hampshire Home Heating		13.28%

2009 Contribution to State Economy	
	(\$1,000)
Total Market Value of Odorized Propane Sold in New Hampshire (\$1,000)	\$285,924
Supply	\$0
Transportation, Storage, and Wholesale	\$4,650
Retail	\$156,055
Total Direct Value Added in New Hampshire	\$160,705
Indirect and Induced	\$241,239
Total Odorized Propane Industry Contribution to New Hampshire GDP	\$401,944

2009 Employment	
Production	-
Transportation, Storage, and Wholesale	11
Retail	568
Direct New Hampshire Employment Related to Odorized Propane	579

2009 Labor Income	
	(\$1,000)
Production	\$0
Transportation, Storage, and Wholesale	\$685
Retail	\$31,620
Direct Labor Income in New Hampshire Odorized Propane Industry	\$32,305

2009 Odorized Propane Production		
	(Gallons)	(% of U.S. Total)
Refineries	-	0.00%
Gas Processing Plants	-	0.00%
Total New Hampshire Odorized Propane Production	-	0.00%

SECTION 4: HOUSEHOLD HEATING FUELS, BY STATE AND DIVISION

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

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

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

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

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

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

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

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

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

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

Exhibit L

State of New Hampshire



JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

EARL M. SWEENEY
ASSISTANT COMMISSIONER

DEPARTMENT OF SAFETY

James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305
Tel: (603) 271-2791
Speech/Hearing Impaired
TDD Access Relay NH 1-800-735-2964

DECLARATION OF EMERGENCY NOTICE (Title 49 CFR 390.23)

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

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

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

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

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

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

Signed,



Earl M. Sweeney
Assistant Commissioner
New Hampshire Department of Safety