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November 12, 2021

By Hand Delivery and Electronic Mail

Emma Rodvien, Coordinator
Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

Re: Docket SB-2021-03 - Sea 3 Providence, LLC Petition for Declaratory Order Regarding the Rail Service Incorporation Project (Providence, RI)

Dear Ms. Rodvien:

For filing in the above-referenced docket, enclosed please find:

- Conservation Law Foundation's ("CLF") brief in response to the questions of law posed by the Board at the July 1 hearing in the above-captioned docket;
- The pre-filed testimony of Gabrielle Stebbins and attachments; and
- CLF's exhibit list and exhibits.

Thank you for your attention to this matter.

Sincerely,

James Crowley
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STATE OF RHODE ISLAND
ENERGY FACILITY SITING BOARD

In re: Sea 3 Providence, LLC Petition for Declaratory Order Regarding the Rail Service Incorporation Project (Providence, RI)	Docket SB-2021-03

BRIEF OF CONSERVATION LAW FOUNDATION IN RESPONSE TO QUESTIONS POSED BY THE ENERGY FACILITY SITING BOARD

I. Introduction

Conservation Law Foundation ("CLF") respectfully submits this brief to the Energy Facility Siting Board ("EFSB" or the "Board") in response to the set of questions posed by the Board to the parties in this matter—petitioner Sea 3 Providence, LLC ("Sea 3" or the "Petitioner") and the three intervenors, CLF, the State of Rhode Island (the "State"), and the City of Providence (the "City")—at the first hearing in this docket, which took place on July 1, 2021. In this docket, Sea 3 seeks a declaration that a planned project (the "Project") to modify its facility located at 25 Fields Point Drive, Providence, Rhode Island (the "Facility") is not an "alteration" as defined by the Energy Facility Siting Act (the "EFSA" or the "Act"), R.I. Gen. Laws § 42-98-1–20. The Act's definition of alteration is "a significant modification to a major energy facility, which, as determined by the board, will result in a significant impact on the environment, or the public health, safety, and welfare." R.I. Gen. Laws § 42-98-3(b). If the Project is not an alteration, then it is not subject to the jurisdiction of the EFSB. If it is an alteration, then Sea 3 cannot undertake it without first obtaining a license from the Board. R.I. Gen. Laws § 42-98-4. We will address the Board's questions *seriatim*.

II. Responses to Questions Posed by the Board

a. Question 1: Referring to Section 42-98-3(b) of the Energy Facility Siting Act and the definition of an "alteration." The definition states that an alteration means a "significant modification" that "will result in a significant impact" on the environment, or the public health, safety, and welfare. Please brief the following questions:

i. In interpreting the words "will result", what standard of certainty or probability should the Board use in interpreting the condition that the modification "will result" in a significant impact? In other words, is it a standard of reasonable certainty, a standard of more probable than not, a standard similar to what is used in other legal contexts such as "a preponderance of the evidence," or another standard?

The words "will result" must be read in the context of the full sentence in which they appear. *See*, *e.g.*, *Sorenson v. Colibri Corp.*, 650 A.2d 125, 128 (R.I.1994) ("we consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections."). The full sentence reads:

> "Alteration" means a significant modification to a major energy facility, which, *as determined by the board*, will result in a significant impact on the environment, or the public health, safety, and welfare.

R.I. Gen. Laws § 42-98-3(b) (emphasis added). The words "as determined by the board" indicate that this is a discretionary standard. The Board should thus interpret this standard in the manner that best effectuates the purposes of the Act. *See* R.I. Gen. Laws § 42-98-18 ("The provisions of this chapter shall be construed liberally to effectuate its purposes."). While words in statutes must be given their plain meaning, "the 'plain meaning' approach is not the equivalent of myopic literalism. When we determine the true import of statutory language, it is entirely proper for us to look to the sense and meaning fairly deducible from the context." *In re Brown*, 903 A.2d 147, 150 (R.I. 2006). The words "will result" could be interpreted to require certainty, as suggested by Sea 3 in its Reply Memorandum, but for several practical reasons this reading is nonsensical in the context of the Act.

Firstly, when, as in the instant docket, the Board is presented with a petition to declare that a modification is not an alteration, the Board might only receive input from the petitioner. There is no guarantee that any other parties will intervene in opposition and challenge the petitioner's legal and factual assertions. In such a case, a petitioner could evade the Board's oversight simply by declining to conclusively establish the significant impacts of its own project.

Secondly, even in a contested docket, or a docket in which the Board exercises its investigatory powers to determine its own jurisdiction,[1] the Board will always be forced to make a determination with imperfect and incomplete information. The eventual impacts of a proposed modification to an energy facility can depend greatly on changes in markets and technology. These contingencies, along with any gaps in the evidence supplied to the Board, create uncertainty around the magnitude of project impacts. And if *any* uncertainty as to the significance of project impacts is enough to deprive the Board of its jurisdiction, then projects that are very likely to have significant impacts—and projects that *will* prove to have significant impacts—will proceed without the Board's oversight.

Finally, the Act charges the Board with a critical oversight role, and interpreting the definition of "alteration" to require certainty would frustrate the purposes of the Act. In passing the Act and creating the Board, the General Assembly recognized "that there are major issues of public health and safety and impact upon the environment related to the technologies and energy sources used in some facilities," and that "the evaluation of proposals must recognize and consider the need for these facilities in relation to the overall impact of the facilities upon public health and safety, the environment and the economy of the state." R.I. Gen. Laws § 42-98-1(a). Given the crucial importance of the interests that the Board is charged with safeguarding, the notion that the

[1] *See Newbay Corp. v. Malachowski* 599 A.2d 1040 (R.I. 1991) (holding that the EFSB has the power to investigate whether an energy facility is within its jurisdiction).

General Assembly intended to strip the Board of jurisdiction in cases where a modification is very likely—but not certain—to have significant impacts, or even in cases where there is a reasonable likelihood of significant impacts, is absurd. The risk of allowing a major energy facility to be altered and to cause significant impacts on the environment, and on public health, safety, and welfare without oversight is far greater than the risk of requiring a permit application for a modification that ultimately does not produce significant impacts.

Because the Board must determine whether modifications will result in significant impacts with incomplete and imperfect information, sometimes in cases where the petitioner is the only party before the Board, and because of the critical importance of the Board's oversight to safeguard the environment and public health, safety, and welfare, a standard that requires a finding of certainty to establish jurisdiction is not appropriate.

In order to best effectuate the purposes of the Act, the petitioner should be required to prove by clear and convincing evidence that a proposed modification will *not* result in a significant impact on the environment, or the public health, safety, and welfare. Black's Law Dictionary (11th ed. 2019) defines "clear and convincing evidence" as:

> Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

The burden of proof must fall on the petitioner because it is the moving party—and in some cases the only party—and because the Act places the burden of proof on applicants. *See* R.I. Gen. Laws § 42-98-11(b) (providing that "[t]he board shall issue a decision granting a license only upon finding that *the applicant* has shown" that certain criteria have been met) (emphasis added). Clear and convincing evidence is an appropriate standard because in cases where there is meaningful uncertainty as to whether a modification will result in significant impacts on the environment, and

on public health, safety, and welfare, the risk of allowing those impacts to occur without oversight is far greater than the risk of requiring a permit application for a modification that ultimately does not result in significant impacts.

In the present case, Sea 3 has failed to demonstrate by clear and convincing evidence that the Project will not result in a significant impact on the environment, or the public health, safety, and welfare. Conversely, the evidence strongly indicates that the Project would have several important impacts on Rhode Island's environment, including increases in greenhouse gas (GHG) emissions, and on public health, safety, and welfare, particularly the health, safety, and welfare of some of the state's most vulnerable and environmentally overburdened communities.

ii. In interpreting the word "significant," what standard should the Board apply to determine whether an impact is "significant?"

Once again applying the canon of statutory construction that the words of a statue should be given their plain meanings, it is helpful to refer to dictionary definitions of "significant." *See, e.g.*, *Planned Env'ts Mgmt. Corp. v. Robert*, 966 A.2d 117, 123 (R.I. 2009) ("When…a statute does not define a word, courts will often apply a common meaning as provided by a recognized dictionary."); *see also F. Ronci Co. v. Narragansett Bay Water Quality Mgmt. Dist. Comm'n*, 561 A.2d 874, 877 (R.I. 1989) (relying in part on dictionary definitions to hold that the phrase "significant quantities" is not unconstitutionally vague in the context of wastewater pollution regulation). Black's Law Dictionary (11th ed. 2019) defines "significant" as:

> 1. Embodying or bearing some meaning; having or expressing a sense. 2. Standing as a subtle sign of something; expressive of some hidden or obscure meaning. 3. Of special importance; momentous, as distinguished from insignificant.

Webster's Dictionary defines "significant" as "large enough to be noticed or have an effect," "very important," or "having a special or hidden meaning." *Significant Definition*, Merriam-

Webster.com, https://www.merriam-webster.com/dictionary/significant (last visited Nov. 11, 2021).

Because neither the text of the statute nor these definitions provide any precise threshold for what impacts are "significant" under the Act, the Board should interpret the term in the manner that best effectuates the purposes of the Act. *See* R.I. Gen. Laws § 42-98-18 ("The provisions of this chapter shall be construed liberally to effectuate its purposes."). This is best determined by considering whether and to what extent the impacts of a modification will affect the purposes and policies of the Act. Among the policies of the Act relevant to the environment, or the public health, safety, and welfare, are:

- ensuring that major energy facilities "produce the fewest possible adverse effects on the quality of the state's environment; most particularly, its land and its wildlife and resources, the health and safety of its citizens, the purity of its air and water, its aquatic and marine life, and its esthetic and recreational value to the public;"
- achieving consistency "with the state's established energy plans, goals, and policy;"
- considering "whether cost effective efficiency and conservation opportunities provide an appropriate alternative to the proposed facility;" and
- maximizing efficiency, while minimizing usage of high quality water, potentially harmful air emissions, wastewater discharge; and discharge of waste into the solid waste stream.

R.I. Gen. Laws § 42-98-2.

Some other Rhode Island statutes and regulations with standards that turn on significance define the term "significant," and even provide detailed guidelines for determining whether an impact is significant. For example, under the state's Drinking Water State Revolving Fund regulations, "'[s]ignificantly', as used in the Department's environmental review process, means

considering both the context and intensity of impacts, whether beneficial or detrimental." 216-50 R.I. Code R. § 05-6.2(A)(26). The regulations go on to define "context" and "intensity," and provide a number of factors that can be used to weigh each. *Id.* This framework is based on the former National Environmental Policy Act standard for determining significant environmental impacts.

Also useful in interpreting the EFSA's threshold for significance are the Board's regulations, which provide several examples of modifications that are, and are not, alterations. For instance, "[t]he construction, modification or relocation of a power line of 69 kV or more which are less than 1000 feet in length shall not be treated as an alteration; however, any additional extension shall constitute an alteration." 445-00 R.I. Code R. § 00-1.3(A)(4). If the extension of a single 69 kV power line beyond 1000 feet necessarily results in a significant impact on the environment, or the public health, safety, and welfare, then surely the impacts of Sea 3's Project—including its impacts on state GHG emissions and on local air quality, traffic, noise, and safety—are significant as well.

Question 2: On page 12 of the Petitioner's Memorandum in Response to the intervenors, Sea 3 has identified other governmental entities who will have oversight over the project and from whom Sea 3 would need to obtain approvals.

iii. To what extent do these authorities, taken as a group, lack the expertise to appropriately and competently address the various impacts identified by the intervenors?

In its Reply Memorandum, the Petitioner identifies "DEM, CRMC, the Fire Safety Board, the State Fire Marshall, the City of Providence, the U.S. Coast Guard and certain federal agencies" as governmental entities from which it says it will need to obtain approvals before proceeding with expansion of its Facility. As discussed in the following section, the expertise that these entities possess related to the environmental, and the public health, safety, and welfare impacts of Sea 3's

proposed expansion is not relevant to the question of the Board's jurisdiction. The extent to which these entities even possess "expertise to appropriately and competently address" these impacts is unclear based on the information provided by the Petitioner. Sea 3 lists government entities, but does not explain what kinds of permits or approvals it will need to obtain from each, or what kind of ongoing oversight any would provide.

Even if we assume a very high level of competence from the personnel at each of these entities, Sea 3 will only need to obtain limited, specific permits and approvals from each. Some of the impacts of the Project fall outside the scope of the relevant permit programs entirely. For example, none of these entities will review the GHG emissions impacts of the Project, which by Sea 3's admission is intended to increase demand for and usage of fossil fuels for heating. Even in cases where there is a specific necessary permit or approval related to an impact, the permit or approval would not negate the impact—e.g., a facility may negatively impact local water quality even if it is permitted under the Clean Water Act.

Further, none of these permitting entities consider the totality of an alteration's impacts, as they are focused only on the narrow areas over which they have permitting authority. Many do not even consider cumulative impacts within their own areas of regulation. Only the Board is charged with conducting a holistic review of the siting, construction, or alteration of a major energy facility before granting a license. Beyond its role in coordinating and expediting the review of other agencies, the Board must make a number of findings before granting a license, including findings that a facility is necessary to meet state and regional energy needs, that it is cost-justified, that it will not cause unacceptable harm to the environment, and that will enhance the socio-economic fabric of the state. R.I. Gen. Laws § 42-98-11. Far from simply ensuring that necessary permits and approvals are obtained from other agencies, the Board is responsible for comprehensive review

of each application and its consistency with the standards and policies laid out in the Act. Whatever expertise local, state, and federal agencies possess related to discrete aspects of Sea 3's Project and its impacts is no substitute for Board oversight.

That Sea 3 will need to seek approvals from a variety of local, state, and federal agencies is not evidence that the Board's oversight is surplus or unnecessary. It instead indicates that the project and its impacts are significant, and that the Board's roles in conducting and coordinating oversight are all the more important.

iv. Should the ability of the other state and local authorities, such as the City, DEM, and CRMC, to address an environmental or other impact influence the decision whether an impact is "significant" or not for purposes of the Board finding jurisdiction?

The ability of other state and local authorities to address the impacts of a modification to a major energy facility has no bearing on whether those impacts are "significant" and thus whether the Board has jurisdiction. This is clear from the purposes and structure of the Act. The various state and local agencies charged with regulating aspects of major energy facilities and their impacts existed at the time that the EFSA was enacted, and the General Assembly was well aware of their existence. In the legislative findings section of the Act, the General Assembly noted that "the authority to regulate many aspects of the issues involved in the siting of major energy facilities currently exists in a variety of agencies within the government of the state and the political subdivisions of the state." R.I. Gen. Laws § 42-98-1(b). Eliminating overlap and duplication between the work of these agencies and creating a coordinated decision-making process are among the stated purposes of the Act. R.I. Gen. Laws § 42-98-1(c)–(d).

If the oversight of these state and local agencies were sufficient to ensure that a modification to a major energy facility would not result in significant impacts on the environment, or the public health, safety, and welfare, then there would be no reason to assign the Board

oversight responsibility over alterations. But the General Assembly did assign the Board oversight responsibility over alterations—i.e., over modifications resulting in significant impacts—fully cognizant that various state and local agencies regulate aspects of major energy facilities related to the environment and public health and safety. As discussed above, a facility owner may comply with every permit and rule administered by other state and local agencies in modifying its facility and still cause significant impacts. These agencies have narrow areas of permitting authority. They lack the authority to effectively address certain impacts, such as GHG emissions, and they do not evaluate modifications cumulatively or holistically. Further, our environmental and public health and safety regulations are not so strict as to prohibit any activity that significantly impacts the environment or public health and safety. The Board plays a critical role that is not covered by these other entities.

b. Question 3: Does the recently passed Climate Act apply to the interpretation of whether the Board has jurisdiction under the circumstances in this case? If so, how? If not, why not?

The Act on Climate is relevant to the question of the Board's jurisdiction in this case because state environmental laws and policies are relevant to the determination of what constitutes a "significant impact on the environment." Sea 3's Project and its harmful effects on state GHG emissions, and on the state's efforts to reduce those emissions, constitute "a significant impact on the environment."

Having been passed by the General Assembly and signed into law by the Governor earlier this year, the Act on Climate is an expression of state environmental and energy policy and priorities. *See* R.I. Gen. Laws § 42-98-2(6) (providing that the "alteration of major energy facilities shall be consistent with the state's established energy plans, goals, and policy"). The statute mandates GHG emissions reductions of 45% below 1990 levels by 2030, 80% by 2040, and net-zero emissions by 2050, updating targets contained in the Resilient Rhode Island Act of 2014. It

also creates a judicial enforcement mechanism through which citizens can obtain injunctive relief to enforce state compliance. Moreover, it grants all state agencies the authority to promulgate rules and regulations necessary to achieve the emissions reductions it requires. R.I. Gen. Laws § 42-6.2-8.

The mandates in the law are ambitious and the powers granted to state agencies to achieve them are substantial. This reflects the urgency of the climate crisis. Signing the Act on Climate into law, Governor McKee called climate action "a moral imperative," and said that "[w]ith four hundred miles of coastline, urban and rural coastal communities, fishing and agricultural industries, the Ocean State is on the frontlines of the climate crisis." Press Release, Office of the Governor, *Governor McKee Signs Act on Climate* (Mar. 14, 2021), *available at* https://www.ri.gov/press/view/40885. Reacting to the passage of the Act on Climate, Attorney General Neronha described climate change as "the greatest threat to our environment and way of life." *Id.*

Under the Act on Climate, addressing climate impacts falls within the "powers, duties, and obligations" of all state agencies, and each agency is required to "exercise among its purposes in the exercise of its existing authority" the purposes of the Act on Climate "pertaining to climate change mitigation, adaptation, and resilience in so far as climate change affects its mission, duties, responsibilities, projects, or programs." R.I. Gen. Laws 42-6.2-8. This provision requires the EFSB to consider climate impacts and to further the purposes of the Act on Climate in the exercise of its authority. But the Act on Climate would be relevant to the Board's jurisdictional determination in this case even if it did not contain these explicit directives. This is because state environmental laws and policies are relevant to the determination of what constitutes a "significant impact on the environment." If a project threatens to frustrate implementation of state environmental laws or

jeopardize the achievement of state environmental policy goals, that is strong evidence that the project will have a "significant impact on the environment."

As described above, the Act on Climate is a landmark state environmental law. It mandates the reduction of GHG emissions from all sectors of the state's economy on an aggressive timetable and grants state agencies considerable powers to achieve those reductions. Its passage reflects lawmakers' well-founded belief that climate change is a deeply serious and urgent environmental problem. In our Memorandum of Law, and at the at the hearing that took place on July 1, CLF has argued that the increased use of propane that the petitioner hopes and believes that its project will enable and incentivize will make it meaningfully harder to decarbonize the state's heating sector and comply with the mandates of the Act on Climate. We have submitted pre-filed testimony in support of this position. Any modification to a major energy facility that will frustrate the state's compliance with an environmental statute as critical as the Act on Climate and its response to such a dire environmental problem will necessarily have a "significant impact on the environment."

III. Conclusion

For the foregoing reasons, and for the reasons briefed by the State and the City in response to these questions, and in the other filings submitted by the intervenors, CLF once again urges this Board to deny Sea 3's petition for a declaratory order and require a full application and review of the proposed alterations to its Facility.

CONSERVATION LAW FOUNDATION

By its attorney,

/s/ James Crowley
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CERTIFICATE OF SERVICE

I certify that the original and four copies of this brief were hand-delivered to the Energy Facility Siting Board, with an additional copy for the Public Utilities Commission. Another copy was mailed to the following address via regular U.S. Mail: Meredith Brady, Associate Director of Planning, 235 Promenade Street, Suite 230, Providence, RI 02908. In addition, a PDF version of this brief was served electronically on the service list of this Docket, as that list was provided by the EFSB on October 25, 2021. I certify that all of the foregoing was done on November 12, 2021.

I also filed the pre-filed testimony of Gabrielle Stebbins and certify that it was filed, served, hand-delivered, and mailed in the same manner as above, with its appendices.

*/s/ James Crowley*_____