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

CITY OF PROVIDENCE'S BRIEF REGARDING
QUESTIONS POSED BY ENERGY FACILITY SITING BOARD

I. Introduction

The City of Providence ("the City") respectfully files this brief at the request of the Energy Facility Siting Board ("EFSB" or "the Board") to answer various questions mentioned at the hearing held on July 1, 2021, and subsequently sent via email dated July 21, 2021 to all parties to this matter—petitioner Sea 3 Providence, LLC ("Sea 3") and three intervenors, the City, the State of Rhode Island ("the State"), and Conservation Law Foundation ("CLF"). It is the City's understanding that the purpose of the questions is to aid the Board in determining whether to grant or deny Sea 3's petition for a declaratory order.

II. The City's Position as Intervenor

Before addressing the specific questions raised, the City seeks to make clear the intent of its intervention in this matter: to urge the Board to require full application and review of the proposed alteration of Sea 3's liquid propane gas ("LPG") energy facility. With its intervention the City does not take any position as to the conclusions to be drawn by the Board pursuant to that review. Rather, the

City's position is limited to its understanding that the General Assembly intended that the Board would have jurisdiction over the type of alteration proposed by Sea 3, and it simply asks that the Board fulfill this function. Accordingly, the City respectfully requests that the Board deny Sea 3's petition for a declaratory order.

III. Overview of Energy Facility Siting Act and Procedural Posture of this Matter Before the Board

The City's role and position as intervenor demands that the City begin its analysis of the questions posed by the Board with a general discussion of the purpose and intent of the Energy Facility Siting Act ("the Act"). *See* R.I. Gen. Laws §§ 42-98-1 *et seq*. With the passage of the Act, the General Assembly intended that "[t]he licensure and regulatory authority of the state be ***consolidated in a single body***, which will render the final licensing decision regarding the siting, construction, operation and/or ***alteration*** of major energy facilities." R.I. Gen. Laws § 42-98-2(4) (emphases added). Indeed, the Act specifically was intended to rectify the Legislature's findings of the circumstances that existed before the Act's creation of this Board—in particular, 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 political subdivisions of the state; that there is ***overlapping jurisdiction*** among several state agencies in the siting of energy facilities; and that there is the ***potential for conflicting decisions*** being issued by the various agencies having authority over the different aspects of the siting of a major energy facility."

R.I. Gen. Laws § 42-98-1(b) (emphases added). One of the main purposes of the Act was to "eliminate overlap and duplication" by creating this Board and vesting it with

coordination and oversight responsibilities. R.I. Gen. Laws § 42-98-1(c); *see also* R.I. Gen. Laws § 42-98-1(d) ("[t]here is need for a ***coordinated decision*** on any major energy facility") (emphasis added).[1]

Accordingly, the Act requires that "[n]o person shall site, construct, or ***alter*** a major energy facility within the state without first obtaining a license from the siting board pursuant to this chapter." R.I. Gen. Law § 42-98-4 (emphasis added). In order to vest coordination and oversight responsibility in the Board, the Act provides that "[a]ny agency, board, council, or commission of the state or political subdivision of the state which, absent this chapter, would be required to issue a permit, license, assent, or variance in order for the siting, construction, or alteration of a major energy facility to proceed, shall sit and function at the direction of the siting board." R.I. Gen. Laws § 42-98-7(a)(2). Under the Act, these agencies—while still following the procedures established by the controlling statute, ordinance, or regulation—must, instead of issuing the permit, license, assent, or variance, forward their findings and recommendation to this Board. *See id.* By virtue of the Act, "[t]he siting board is the licensing and permitting authority for ***all*** licenses, permits, assents, or variances which, under ***any*** statute of the state or ordinance of any political subdivision of the

[1] The General Assembly expressly intended that, with the Act, the EFSB's oversight would ensure that proposed energy facilities, and alterations to those energy facilities, are necessary to meet the energy needs of the state or region, can be expected to produce energy at the lowest reasonable cost to the consumer, will not cause unacceptable harm to the environment, and will enhance the socio-economic fabric of the state. *See* R.I. Gen. Laws § 42-98-11(b); *see also* R.I. Gen. Laws § 42-98-2 (declaration of policy, including that "[c]onstruction, operation, and/or ***alteration*** of major energy facilities shall only be undertaken when those actions are justified by long term state and/or regional energy need forecasts" and giving priority to, *inter alia*, "producing low levels of potentially harmful air emissions") (emphasis added). The General Assembly further expressly intended with the Act that "[t]he construction, operation and/or ***alteration*** of major energy facilities shall be consistent with the state's established energy plans, goals, and policy." R.I. Gen. Laws § 42-98-2(6) (emphasis added).

state, would be required for siting, construction or ***alteration*** of a major energy facility in the state." R.I. Gen. Law § 42-98-7(a)(1) (emphases added). The Board's coordination and oversight role for the siting, construction, or alteration of major energy facilities is thus the plain intent of the Act. *See also* R.I. Gen. Laws § 42-98-18 ("The provisions of this chapter shall be construed liberally to effectuate its purposes.").

By virtue of its petition for a declaratory order, Sea 3 has put at issue whether the proposed changes to its LPG energy facility fall within the Act's definition of "alteration." *See* R.I. Gen. Laws § 42-98-3(b). As this Board knows, the Act defines "alteration" as "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." *Id*. Sea 3's petition is, by extension, an express request essentially to be removed from this Board's jurisdiction (and thus its coordination and oversight)—as this Board has recognized.

Interestingly, neither the Act nor this Board's Rules of Practice and Procedure ("the Rules") expressly address or create a procedure for an energy facility's request to be ***removed*** from the jurisdiction of the EFSB. *See* R.I. Gen. Laws § 42-98-1 *et seq*.; 445-RICR-00-00-1. In terms of procedure, the Act and the Rules mention only applications. *See* R.I. Gen. Laws §§ 42-98-8 and 42-98-9; Rules § 1.5(C) (rule pertaining to "[a]ll other documents of any kind [to be] filed with the Board" still qualified as "regarding an application to site, construct or alter a major energy facility in Rhode Island"). Indeed, the Rules define "party" as "the ***applicant*** and any person

or agency who has, pursuant to these rules or Board order, intervened in Board proceedings." Rules § 1.3(17) (emphasis added). The definition of "party," and the Rules generally, do not define terms like "petitioner" or "petition." Nowhere do the Act or the Rules speak to requests for "declaratory orders," as sought here by Sea 3. Nonetheless, the Supreme Court has rejected the notion that the EFSB's jurisdiction is entirely dependent upon the filing of an application, *see Newbay Corp. v. Malachowski*, 599 A.2d 1040, 1041 (R.I. 1991) (holding that the EFSB has the power to conduct investigative hearings to determine whether an energy facility is within its jurisdiction), and neither the Act nor the Rules expressly prohibits the atypical procedure utilized here by Sea 3. *See* R.I. Gen. Laws § 42-98-7(c) ("The siting board is empowered to issue any orders, rules, or regulations as may be required to effectuate the purposes of this chapter."); *Newbay Corp.*, 599 A.2d at 1041 (the "broad grant of authority" in § 42-98-7 "allows [the] EFSB to make inquiry in order to determine whether a proposed energy facility comes within its jurisdiction").[2]

Due to the unique nature of Sea 3's petition, the City urges this Board to consider the arguably unanticipated nature of the process in which it and the parties before it currently find themselves and to accordingly proceed with caution. At the

[2] The City is concerned, nonetheless, that there may be a meaningful procedural difference between the Board acting on its own initiative to investigate the exercise of its jurisdiction and the Board issuing a "declaratory order" sought by a party before it. Arguably, Sea 3's petition for a "declaratory order" could be construed as a request for a declaratory judgment. The Uniform Declaratory Judgments Act ("UDJA") vests in the Superior Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." R.I. Gen. Laws § 9-30-1. The Superior Court has original, rather than appellate, jurisdiction over UDJA actions. *See Bradford Assocs. v. Rhode Island Div. of Purchases*, 772 A.2d 485, 489 (R.I. 2001). The UDJA does not empower state agencies or boards to issue declaratory judgments. Query whether Sea 3's petition properly should have been filed, instead, in the Superior Court.

very least it is imperative that this Board not shift the burden of proof or persuasion to any party other than Sea 3, who as an applicant undoubtedly would bear such burden. *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 delineated requirements have been met) (emphasis added). Regardless of whether Sea 3 comes before this Board as an applicant or, as here, a "petitioner," the Act cannot reasonably support placing the burden of proof or persuasion on intervenors, whose role and existence is never guaranteed.[3]

It is with these overarching considerations in mind that the City, as intervenor, addresses the questions posed by the Board to aid in its review.

IV. Response to Questions Posed by the Board[4]

(1) The Act's Definition of "Alteration" Requires That the Board Exercise Jurisdiction Over Sea 3's Proposed Changes to its LPG Energy Facility

a. In Order to Grant Sea 3's Petition for Declaratory Order, the Board Should Determine, in Its Discretion, that the Proposed Changes ***Will Not Result*** in a Significant Impact to the Environment, or to the Public Health, Safety, and Welfare

In determining the evidentiary standard to be applied by the Board in interpreting the Act's definition of "alteration," R.I. Gen. Laws § 42-98-3(b), it is important to consider the entire provision, and not just the two words "will result." As mentioned above, the Act defines "alteration" as follows:

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[3] As this Board is aware, it often occurs that energy facilities come before it without the participation of any intervenors.

[4] The questions in the form posed by the Board are included in an Appendix for ease of reference.

> "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." *Id.* (emphasis added).

It is the City's contention that the qualifying phrase "as determined by the board," placed immediately before "will result," is critical to this question and creates a ***discretionary*** standard.

The City's research to date has not found decisional law associating the terms "will result" to an evidentiary standard. Where the City has found that phrase used, there has been no corresponding discussion of likelihood or probability, and it has been utilized in conjunction with other aspects of non-analogous issues under review. *See*, *e.g.*, *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003) (courts will not interpret statutory language in a way that *will result* in an absurd outcome); *Forrestal v. Magendantz*, 848 F.2d 303, 307 (1st Cir. 1988) (in deciding whether to set aside a verdict after trial, the verdict "must be against the clear weight of the evidence or based upon evidence which is false or *will result* in a clear miscarriage of justice"); *Rozes v. Smith*, 388 A.2d 816, 819 (R.I. 1978) (applicant seeking a use variance from a zoning board "must demonstrate that the enforcement of whatever regulation is in question *will result* in a total deprivation of all beneficial use of the subject property").

Although, used in a vacuum, "will result" appears to assume a 1-1 relationship, meaning that if X occurs, Y will follow, the City respectfully submits that the General Assembly did not intend that § 42-98-3(b) would require perfect knowledge of the future. Rather, the language "as determined by the board" expressly qualifies "will result" so as to indicate otherwise. *See* R.I. Gen. Laws § 42-98-18 ("The provisions of

this chapter shall be construed liberally to effectuate its purposes."); *see also, e.g., Generation Realty, LLC, v. Catanzaro*, 21 A.3d 253, 359 (R.I. 2011) ("we must 'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme,'" with the "ultimate goal" being to "give effect to the purpose of the act as intended by the Legislature"). Because § 42-98-3(b) expressly grants to the EFSB the discretion to determine whether the modification will result in a significant impact, the City suggests that it creates a discretionary standard. *See* Black's Law Dictionary, 534 (9th ed. 2009) (defining "discretionary" as "involving an exercise or judgment and choice, not an implementation of a hard-and-fast rule"). In other words, the EFSB has the *discretion* to decide whether the evidence and information before it constitutes an "alteration," as that term was intended by the General Assembly. *See Catanzaro*, 21 A.3d at 259 ("[w]e must determine and effectuate that legislative intent and attribute to the enactment the most consistent meaning") (internal quotations and brackets omitted).

Of course, the City understands that the EFSB is seeking evidentiary guideposts in exercising its discretion, considering that the statute utilizes language not commonly employed. The City respectfully submits that the proper evidentiary standard is that which would survive judicial review. The Act provides that judicial review of EFSB decisions is to be obtained in the same manner as under chapter 5 of title 39, which governs appeals from decisions of the public utilities commission ("PUC"). *See* R.I. Gen. Laws § 42-98-12(b). The review of PUC decisions is "limited to whether the … findings are lawful and reasonable, supported by legal evidence and

sufficiently specific to allow [the court] to determine if the evidence before the PUC reasonably supports its decision." *In re Providence Water Supply Bd.'s Application to Change Rate Schedules*, 989 A.2d 110, 114 (R.I. 2010); *see also* R.I. Gen. Laws § 39-5-1. In other words, if the EFSB determines that a proposed modification will result in substantial impact, there must be evidence that *reasonably supports* that decision.[5]

Importantly, however, as discussed above, the burden of proof rests with Sea 3 to show that the proposed alterations to its LPG energy facility ***will not result*** in a significant impact on the environment, or the public health, safety, and welfare. The evidence must reasonably support a conclusion that the proposed modifications to Sea 3's facility—the addition of rail service delivery of LPG to its current sea vessel-only delivery terminal, the utilization of a currently vacant adjacent lot in its daily operations, the installation of six (6) new 90,000-gallon storage tanks and the equipment necessary to allow for the offloading of LPG into them, and the addition of two (2) more tractor-trailer truck lanes for offloading, among other changes that Sea 3 acknowledges are intended to expand its operational capacity—***will not result*** in a significant impact on the environment, or the public health, safety, and welfare.

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[5] This is the standard for review of decisions by the PUC. Section 39-5-1 also provides, however, that decisions by the "administrator" (of the division of public utilities and carriers, *see* R.I. Gen. Laws § 39-1-2(a)(1)) are to be reviewed pursuant to the provisions of § 42-35-15 of the Administrative Procedures Act ("APA"). It is unclear whether § 42-98-12(b) employs for the EFSB the review standards applicable to the PUC or those applicable to the administrator. The City submits that the APA's "substantial evidence" standard is easier to employ. Under the APA, courts review agency decisions to determine whether they are supported by "substantial evidence," which is defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." *See*, *e.g.*, *Newport Shipyard, Inc. v. Rhode Island Comm. for Human Rights*, 673 A.2d 457, 459 (R.I. 1996).

In other words, the EFSB must conclude that, together, an additional delivery method of LPG, additional storage of LPG, additional transport of LPG, and expanded capacity to process and supply LPG, will not have a future significant impact on surrounding Rhode Islanders and their environment. Respectfully, the City submits that the evidence submitted by Sea 3, alone, with its petition, does not reasonably support such a conclusion.

b. In Order to Grant Sea 3's Petition for a Declaratory Order, the Board Must Find that the Proposed Changes Are *Not Significant* and that Their Impacts Will *Not Be Significant*, Meaning Not Likely to Have Influence or Effect

In determining the standard to be applied to the term "significant," which is twice utilized in § 42-98-3(b), this Board should consider, as other Courts have done, the definition of that word and the context in which it is used.

The Rhode Island Supreme Court has utilized the definition of "significant" from Webster's Third New International Dictionary 2116 (1967): "having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE." *F. Ronci Co. v. Narragansett Bay Water Quality Mgmt. Dist. Comm'n*, 561 A.2d 874, 877 (R.I. 1989) (holding that the term "significant quantities" in the context of regulating pollutants in wastewater was not unduly vague). Other state court decisions likewise have looked to dictionary definitions. *See State v. Pacquing*, 389 P.3d 897, 911 (Haw. 2016) (noting that Black's Law Dictionary, 10th ed. 2014, defines "significant" as "[o]f special importance; momentous, as distinguished from insignificant," and that Merriam-Webster defines "significant" as "large enough to be

noticed or have an effect," "very important," or "having a special or hidden meaning"); *State v. Osman*, 229 P.3d 729, 730 (Wash. 2010) (adopting the same Webster's dictionary definition of "having or likely to have influence or effect; deserving to be considered; important, weighty, notable").

In each of these decisions, once the dictionary definition was adopted, the courts then interpreted the meaning of "significant" based on the context of the regulation at issue. *See F. Ronci Co.*, 561 A.2d at 877 ("we prefer to scrutinize such a regulation in its entirety"). In *Pacquing*, 389 P.3d at 914, the Hawai'i court held that a "significant privacy interest" was any confidential personal information that was involved in a password or other information used for accessing information, or other information used to confirm a person's identity. In *Osman*, 299 P.3d at 732, the Washington court determined that a lost portion of an electronic court record was "significant" because it included the only formal iteration of the lower court's findings and conclusions.

Here, there can be no dispute that the proposed alterations to Sea 3's facility constitute a "significant modification" because Sea 3, with its petition, acknowledges their significance. Sea 3's petition indicates that it acquired this facility site because of the possibility of railcar shipments of LPG. *See Sea 3's Petition for Declaratory Order*, at 14. It expressly states that the proposed modifications are "essential to the long term viability of the Providence terminal." *Id.* In other words, the proposed alterations are significant to Sea 3. Accordingly, it is impossible to classify them as insignificant for purposes of § 42-98-3(b).

In determining whether the proposed alterations will have a "significant impact" on the environment or public safety and welfare, the Board must consider whether they will influence or have an effect on, *inter alia*, the stated policies of the Act. *See* R.I. Gen. Laws § 42-98-2. Thus, the Board should consider, among other things, whether the proposed alterations are likely to influence or have an effect on "the quality of the state's environment," including "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." *Id.* at § 42-98-2(3). The Board also should consider, among other things, whether the changes are "consistent with the state's established energy plans, goals, and policy," *id.* at § 42-98-2(6), including the recently enacted Act on Climate, as discussed below.

In determining whether a modification has a "significant impact," this Board should also consider the context of its own regulations. The Board's Rules begin defining "alteration" by using the same definition as the statute: "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." Rules § 1.3(A)(4). The Rules go on, however, to give concrete examples of what is and what is not an "alteration." *See Gutierrez v. Ada*, 528 U.S. 250, 254 (2000) ("the key to understanding … the phrase" is to look at the references surrounding it in the statute"); *Chambers v. Ormiston*, 935 A.2d 956, 964 (R.I. 2007) ("the *noscitur a sociis* principle of statutory construction … counsels that 'the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the

meaning of other words or phrases associated with it'"). The Rules (like § 42-98-3(b)) do not consider conversion from one fuel to another to be an "alteration." *See* Rules § 1.3(A)(4). The Rules do not consider the maintenance, repair, or replacement of transmission components to maintain the integrity of the transmission system to be an alteration, but only if "such construction does not increase the normal carrying capacity of the transmission line." *Id.* The Rules provide that any construction, modification, or relocation of 1,000 feet or more of a powerline of 69 kV or more constitutes an "alteration." *See id.* The Rules do not consider the construction of a new power line that is between 1,000 and 6,000 feet in length to be an alteration, unless the Board determines that the project may result in a significant impact on the environment or the public health, safety, and welfare. *See id.* Implicit in the rules, however, is that the construction of more than 6,000 feet of power line would be considered an alteration.

When comparing the examples utilized by Rules § 1.3(A)(4)'s definition of "alteration" to the proposed modifications to Sea 3's facility, it exceeds logic to conclude that Sea 3's alterations are not of "significant impact." If it is an alteration to "increase the normal carrying capacity of a transmission line," it must follow that increasing the storage and transport capacity of Sea 3's LPG facility falls within this Board's own definition of "alteration." If it is an alteration to construct, modify, or relocate 1,000 feet or more of a powerline of 69 kV or more, it must follow that an additional delivery method of LPG by rail, the incorporation of a currently vacant lot, the installation of storage tanks that will allow an additional 540,000 gallons of LPG

to be stored on site, the fitting of additional equipment to allow the offloading of LPG into and out of these storage tanks, and the creation of two more tractor-trailer truck lanes for offloading so as to allow additional truck transport of LPG falls within this Board's own definition of "alteration."

Additionally, and as discussed above, despite Sea 3's utilization of an extraordinary procedure seeking to be removed from EFSB oversight, the burden of proof must rest with Sea—as it would if Sea 3 were an applicant—to demonstrate the *insignificance* of the proposed alterations to its LPG facility, and that they will result in *insignificant* impact. It is Sea 3's burden to show that the proposed changes to its LPG facility, which handles and processes a hazardous and flammable fossil fuel, are *insignificant*. It is Sea 3's burden to show that the proposed changes intended to allow it "to grow its operation in Providence" to meet a projected 27.9 million gallon increase in demand for LPG among Rhode Islanders each winter season,[6] and "to provide 100,000,000 gallons of LPG to consumers" to meet regional demands, *see Sea 3's Petition for Declaratory Order*, at 14, will have *insignificant impact* on the environment and on the public health, safety, and welfare. The City submits that such conclusions, particularly at this juncture (without the opportunity for investigation or review by the EFSB) cannot be supported.

[6] Sea 3's petition says that Rhode Islanders presently buy approximately 30-35 million gallons of LPG each winter season and projects that demand will grow to 57.9 million gallons in 2021. *See Sea 3's Petition for Declaratory Order*, at 6 and 14.

(2) The Necessary Approvals From Other State and Local Agencies Is Indicative of the Significant Nature of the Proposed Alterations and Emphasizes the Need for This Board's Oversight Role

a. The *Competency* and *Expertise* of the Other Governmental Agencies Is Irrelevant to the Jurisdictional Question

Sea 3's emphasis on the approvals it needs from the State Fire Marshall, Department of Environmental Management ("DEM"), Coastal Resources Management Council ("CRMC") and the City is a red herring, intended to distract this Board from the intended oversight role given it by the General Assembly. These state and local agencies possess the competency and expertise to perform *their* respective roles. The question here is whether there is an intended role for this Board in this case. Respectfully, the fact that these various approvals are necessary is yet another reason why this Board *must* exercise its jurisdiction over Sea 3's proposal.

As discussed above, one of the main purposes of the Act creating this Board was to "eliminate overlap and duplication" by vesting coordination responsibilities and oversight in the Board. R.I. Gen. Laws § 42-98-1(c); *see also* R.I. Gen. Laws § 42-98-1(d) ("[t]here is need for a coordinated decision on any major energy facility"). The General Assembly understood 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 with the government." R.I. Gen. Laws § 42-98-1(b). Notably, the Act *assumes* that these various state and local agencies have competency and expertise in their respective areas of regulation. *See* R.I. Gen. Laws § 48-98-1(d) ("the technical

expertise for this evaluation *is available within existing agencies* involved in the siting process") (emphasis added).

With the Act, the General Assembly intended to address its concerns about "overlapping jurisdiction" and "the potential for conflicting decisions." *Id.* It created this Board precisely to address the "need for coordinating and expediting the review of each state agency," R.I. Gen. Laws § 42-98-1(e). It vested that oversight responsibility in this Board. *See, e.g.,* R.I. Gen. Law § 42-98-7(a)(2) ("Any agency, board, council, or commission of the state or political subdivision of the state which, absent this chapter, would be required to issue a permit, license, assent, or variance in order for the siting, construction, or alteration of a major energy facility to proceed, shall sit and function at the direction of the siting board."). As mentioned above, when this Board has jurisdiction over the siting, construction, or alteration of a major energy facility, these agencies, instead of granting or denying the relief requested, send their findings and recommendations for final action to this Board. *See* R.I. Gen. Laws § 42-98-7(a)(2).

The sheer fact that various approvals are necessary from various governmental agencies—that Sea 3's proposed alterations implicate state and local regulations in fire safety, environmental protections, coastal management, and land use—itself is indicative of the significant nature of the proposed alterations and the likelihood that the alterations will result in a significant impact on the environment, and the public health, safety, and welfare. The number of state and local agencies whose approvals and/or licenses are necessary for Sea 3 to make the proposed alterations is revealing

of the need for the EFSB's intended oversight role and is reason for it to assume jurisdiction.

Accordingly, this Board can rest assured that, in exercising its jurisdiction over Sea 3 here, it will receive recommendations from these various governmental agencies that have been based on those agencies' competency and expertise in their subject matter—and that this Board can rely upon them when, after reviewing Sea 3's full application, it renders its ultimate licensing decision.

b. The *Ability* of Other Governmental Agencies to Address Environmental and Public Health and Safety Impacts is Irrelevant to the Jurisdictional Question

As explained above and incorporated here, Sea 3's reliance upon the respective roles of various other governmental agencies as a reason for declining jurisdiction over the proposed alterations is a red herring intended to mislead the Board. Indeed, relying upon the ability of other agencies to address these concerns is the ***antithesis*** of the General Assembly's intent when it created the EFSB. The involvement of other state and local agencies whose own regulations and approvals are implicated here (fire safety, environmental, coastal management, and land use regulations) is only relevant to the extent it demonstrates the significant nature of the proposed alterations and the broad scope of their potential impacts. It is evidence that only supports the need for coordination and oversight by the EFSB.

(3) The Board Must Consider Climate Impacts in Determining Whether It Has Jurisdiction in this Case

The Energy Facility Siting Act ***requires*** the Board to consider climate impacts and the issue of climate change in determining whether it has jurisdiction over Sea 3's proposed alterations (and indeed, in all of its decisions and considerations). The Act's declared policies include assuring that "[t]he construction, operation, and/or ***alteration*** of major energy facilities shall be consistent with the state's established energy plans, goals, and policy." R.I. Gen. Laws § 42-98-2(6). Both before and after passage of the recently enacted Act on Climate, P.L. 2021, ch. 001 (eff. April 10, 2021), consideration of climate impacts has been part of the state's established energy plans, goals, and policy. *See* P.L. 2014, ch. 343 (eff. July 2, 2014).

Although the effective date of the Act on Climate (April 10, 2021) post-dates Sea 3's petition (dated March 15, 2021 and docketed as of March 18, 2021), and although statutes are generally construed to operate prospectively from and after their effective date, *see, e.g., Dunbar v. Tammelleo*, 673 A.2d 1063, 1065 (R.I. 1996), the Act on Climate's amendments to §§ 42-6.2-1, 42-6.2-2, 42-6.2-3, 42-6.2-7, and 42-6.2-8 of the General Laws (formerly entitled the "Resilient Rhode Island Act of 2014 – Climate Change Coordinating Council"), and additions of §§ 42-6.2-9 and 42-6.2-10 to the General Laws, did not change this Board's duty to consider the impacts of climate pollutants in the exercise of its powers.

The Act on Climate requires the EFSB to consider climate change in the exercise of its power, providing that

> [a]ddressing the impacts on climate change *shall be deemed* to be within the powers, duties, and obligations of all state departments, agencies, commissions, councils, and instrumentalities, including quasi-public agencies, and each *shall exercise among its purposes* in the exercise of its existing authority, the purposes set forth in this chapter pertaining to climate change mitigation, adaptation, and resilience in so far as climate change affects its mission, duties, responsibilities, projects, or programs.

See R.I. Gen. Laws § 42-6.2-8 (emphases added). Nonetheless, even before Section 42-6.2-8 of the General Laws was amended by the Act on Climate, it previously required that this Board exercise its powers with consideration of the impacts on climate change, providing—pre-amendment and on March 15, 2021—as follows:

> Consideration of the impacts of climate change *shall be deemed* to be within the powers and duties of all state departments, agencies, commissions, councils, and instrumentalities, including quasi-public agencies, and each *shall be deemed* to have and to exercise among its purposes in the exercise of its existing authority, the purposes set forth in this chapter pertaining to climate change mitigation, adaption, and resilience in so far as climate change affects the mission, duties, responsibilities, projects, or programs of the entity.

R.I. Gen. Laws § 42-6.2-8 (eff. July 2, 2014) (emphases added).

Furthermore, climate mitigation and resilience were part of the state's established energy plans, goals, and policy *before* passage of the Act on Climate. *See* P.L. 2014, ch. 343, § 1 (enacting R.I. Gen. Laws § 42-6.2-1 *et seq.*). Prior to the effective date of the Act on Climate, § 42-6.2-3 of the Resilient Rhode Island Act required that state agencies, *inter alia*, (i) assist the climate change coordinating council in implementing the provisions of that act, (ii) develop short- and long-term greenhouse gas emission reduction strategies, (iii) implement programs to achieve energy savings

and reduce expenditures of energy, (iv) increase the deployment of in-state generation of renewable energy and energy efficiency, (v) support efforts to expand the state's green economy and develop green infrastructure, (vi) assess the vulnerability of infrastructure to impacts on climate change and recommend strategies to protect these assets, and (vii) take affirmative steps to eliminate and avoid duplication of effort through consistent coordination between agencies and programs and the pooling of resources. *See* P.L. 2014, ch. 343 (eff. July 2, 2014). Whereas the Act on Climate affirmatively requires that state agencies, such as the EFSB, protect the populations most vulnerable to the effects of climate change and at risk of pollution, *see* R.I. Gen. Laws § 42-6.2-3(10), before its passage this Board was nonetheless tasked with identifying those populations and developing a climate and health profile report documenting the range of health impacts associated with climate change. *See* P.L. 2014, ch. 343, § 1.

Moreover, the Act on Climate was not the state's first enactment of targets for greenhouse gas emission reductions. *See* R.I. Gen. Laws § 42-6.2-2(a)(2). Rather, state targets preexisted passage of the Act on Climate. *See* P.L. 2014, ch. 343, § 1. The Act on Climate moved two of those targets up by five and ten years, respectively, added a net-zero emissions goal by 2050, and expressly recognizes the targets as mandatory. *See* P.L. 2021, ch. 001, §§ 2 and 3. Nonetheless, prior to passage of the Act on Climate, § 42-6.2-2(a)(2)(ii) included targets for greenhouse gas emission reduction and required planning for "the possibility of meeting higher targets through cost-effective measures." Significantly, climate science did not change between March and April

2021. Rather, it was well understood in advance of the filing of Sea 3's petition that the use of fossil fuels for energy is a contributor of climate pollutants.

Regardless, the City respectfully submits that, although statutes generally are construed to apply prospectively, the Act on Climate should apply to this pending agency determination for at least two reasons. Firstly, the EFSB should apply the Act on Climate to Sea 3's petition because it undoubtedly would apply to any (subsequent) application filed by Sea 3 following a determination on its petition. Secondly, the Supreme Court has allowed such application in an administrative proceeding that transpired similarly. In *Dunbar v. Tammelleo*, 673 A.2d 1063, 1067 (R.I. 1996), the Supreme Court held that, because an appellate court will apply the law that is in effect at the time it considers an appeal, "a fortiori an administrative agency or a trial court should apply the law in effect at the time it makes its decision if such application would implement legislative intent." In that case, the Court applied a statutory amendment to an agency application filed three days before its effective date. *See id.* The high court found that the agency administrator "was entitled to a reasonable time to verify the facts set forth in the application and to determine eligibility," and that the "application was not a routine request that should have been ministerially approved on the date of its filing." *Id.* The *Dunbar* decision further found that the agency "act[ed] within a reasonable time in the light of the complexity of the case presented to him." Accordingly, the Court determined that the agency appropriately applied the statutory amendment that became effective three days after the filing of the application. *Id.*

Similarly, here, this Board should apply the Act on Climate to Sea 3's earlier-in-time petition. Sea 3 filed its petition less than a month before the effective date of the Act on Climate, yet several months after its introduction in the General Assembly—a bill that garnered significant media and public attention. Considering that Sea 3's petition is anything but a routine request—the City explained the unusual nature of Sea 3's petition above—this Board should, like in *Dunbar*, have reasonable time to consider its complexities and apply the law in effect at the time it makes its decision on Sea 3's petition. This application of the Act on Climate would also "implement legislative intent," *see Dunbar*, 673 A.2d at 1067, considering the science of climate pollutants. Unlike the application of a statute to a cause of action or petition affecting only the parties to the proceedings, climate science is based on the cumulative effect of the emission of climate pollutants from numerous disparate sources. The emissions from Sea 3's alterations to its facility will have an impact on the Act on Climate's mandatory emission reduction targets regardless of when Sea 3 filed its petition with this Board, and the environmental impact of Sea 3's alterations does not change because it filed its petition before April 10, 2021.

Indeed, for this reason the Act on Climate can and should be considered by this Board—irrespective of its effective date—as *evidence* that Sea 3's proposed alterations will have a significant impact on the environment, and on the public health, safety, and welfare. The additional climate pollutants that will result from increasing Sea 3's capacity to process, store, transport, and sell LPG to consumers undoubtedly will affect the state's ability to meet its mandatory greenhouse gas

reduction targets. To the extent the proposed alterations increase greenhouse gas emissions, reductions must be made elsewhere, or the state will not be able to meet the goals it set for purposes of the environment and public health, safety, and welfare.

In sum, regardless of whether the Act on Climate or its predecessor statutes are applied to Sea 3's petition, this Board's powers and duties are linked expressly and inextricably with considerations of how energy facilities impact the climate. Accordingly, the EFSB must consider climate change, and its causes and effects, in deciding whether the proposed alterations to Sea 3's LPG facility constitute significant modifications that, in the determination of the Board, will result in significant impact to the environment, and to the public health, safety, and welfare.

V. CONCLUSION

For these reasons, and for the reasons briefed by the State and CLF in response to these questions, and in the other filings submitted by the intervenors, the City 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 LPG energy facility.

CITY OF PROVIDENCE,
By its attorney,

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CERTIFICATE OF SERVICE

I certify that on November 8, 2021 I filed this document electronically with the Energy Facility Siting Board and served this document electronically on the service list of this Docket, as that list was provided by the EFSB on October 25, 2021 (and confirmed as current on November 8, 2021). In addition, I prepared the original and four hard copies to be hand-delivered to the Energy Facility Siting Board, one hard copy to be hand-delivered to the Division of Public Utilities and Carriers, and one hard copy to be mailed to Board member Meredith Brady on the same day or as soon thereafter as practicable, but in no event later than the filing deadline of November 12, 2021.

I also filed the pre-filed testimony of Leah Bamberger and Clara Decerbo and certify that they were filed, served, hand-delivered, and mailed in the same manner as above, with their appendices.

/s/Megan Maciasz DiSanto

APPENDIX

(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:

   a. 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?

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

(2) On page 12 of the Petitioner's Memorandum in Response to the intervenors, Sea3 has identified other governmental entities who will have oversight over the project and from whom Sea3 would need to obtain approvals.

   a. 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?

   b. 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?

(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?