STATE OF RHODE ISLAND
ENERGY FACILITY SITING BOARD

IN RE: SEA 3 PROVIDENCE, LLC	**:**	
PETITION FOR DECLARATORY ORDER	**:**	**SB-2021-03**
REGARDING THE RAIL SERVICE	**:**	
INCORPORATION PROJECT	**:**	

DECISION AND ORDER

On March 16, 2021, Sea 3 Providence, LLC (Petitioner or Sea 3) filed a Petition for Declaratory Order with the Rhode Island Energy Facility Siting Board (Board). Specifically, the Petitioner seeks a determination that a proposed rail service and other associated enhancements to its current liquid propane gas (LPG) terminal and storage operations at 25 Fields Point Drive in Providence do not constitute an alteration of a major energy facility such that a full application to the Board is required. Both R.I. Gen. Laws §42-98-3(b) and 445-RICR-00-00-1.6(A)(Board Rules) define "alteration" as "a significant modification to a major energy facility, which, as determined by the [B]oard, will result in a significant impact on the environment, or the public health, safety, and welfare. Conversion from one type of fuel to another shall not be considered to be an 'alteration'". On April 21, 2022, the Board convened an Open Meeting and unanimously found that the proposed additions to the existing facility do constitute an alteration and, as such, are subject to the requirements of Rule 1.6(A) of the Board's Rules if Sea 3 intends to proceed with the proposed enhancements.

FACTS AND TRAVEL

Petitioner provided great detail about the organization, operations, and enhancement plans.[1] Petitioner currently operates facilities for the purpose of receiving shipments of LPG via marine vessels, which LPG is stored in a 19-million-gallon high rise storage tank and ultimately resold to LPG distributors in the region. The site has three spaces where the LPG is offloaded from the storage facilities to tractor trailers for transport by the distributors. According to Petitioner, the site was owned by another entity when the facility commenced operations in 1975 prior to the enactment of the Energy Facility Siting Act (the Siting Act).[2] In 2015 the site became inactive until it was acquired by Petitioner in 2018. At that time, Petitioner acquired a lease from the Port of Providence (ProvPort) to recommence operations and contracted for a lease option on an adjacent vacant parcel.[3] Prior to recommencing operation of the facility, Petitioner modernized, restored, and reinspected all equipment, tanks, and associated piping system, and upgraded and modernized the safety equipment. The Petitioner also developed a new Fire Safety Analysis and Emergency Response Plan.

The Petition for Declaratory Judgment described Sea 3's proposed project. Sea 3 plans to incorporate the vacant adjacent lot into the daily operation of its existing terminal to enable it to acquire LPG by rail in addition to its current means of obtaining supply from marine vessels. Petitioner proposes to connect an existing rail spur to the site to accommodate the offloading of LPG from railcars. Petitioner's proposal will require the installation of the requisite piping and equipment to offload the LPG into six new 90,000-gallon horizontal storage bullet tanks on the

[1] The Board appreciates the amount of detail that Sea 3 provided. The information provided by Sea 3 obviated the need for the Board to issue data requests to obtain this information which, in addition to the evidence provided by the Intervenors, would have been necessary for a thorough review and determination of whether the proposed enhancements constitute an alteration.
[2] R.I. General Laws §42-98-1 *et seq*.
[3] The vacant parcel is located on Seaview Drive.

vacant adjacent property, which will increase the storage capacity on site by less than 4 percent. The rail lines and spur which Petitioner proposes to use already provide service to other operations within ProvPort for other entities. The rail spur is connected to the main rail lines at a point west of ProvPort. Upon entering the port area, the route of the rail spur passes near a residential neighborhood which is located along the border of ProvPort. The Petition also identified other new equipment that will be installed in connection with the rail service delivery and offloading process.[4]

Beginning on May 6, 2021, the Board received over five hundred public comments, most of which were in opposition to the proposed enhancements. Commenters were private individuals, members of the City Council, agencies, organizations, associations, the Rhode Island Department of Environmental Management, and the Office of the Attorney General. The large majority of comments argued that the project would increase the already existing harm to the surrounding area if the project went forward. They characterized the area as an environmental justice area, noting the high rate of people affected with asthma in that area. Many of the comments asserted that the enhancements would increase pollution and be inconsistent with the Act on Climate Act, R.I. Gen. Laws § 42-6.2-1 *et seq.* (Act on Climate) and the State's renewable energy policies and goals. The Board also received comments in support of the Petition, maintaining that propane is both clean and affordable and provides energy security during extreme weather events.

On June 15, 2021, the City of Providence (Providence) filed a Notice of Intervention.[5] The Conservation Law Foundation (CLF) and the Office of the Attorney General (Attorney General)

[4] The equipment includes 16 off-loading rail spaces, four Corkin Propane Misers, six 90,000 gallon storage bullets, four 750 gpm pumps for transfer to truck rack or refrigeration system, two propylene compressors, fin fans, one receiver, two evaporative chillers, piping system, electric MCC substation and breakers for equipment, gas leak and heat detection system, fire pump, mercaptan storage and injection system, dehydration adsorber beds, two pressure vessels for moisture removal, and 2 electrical heaters.

[5] Board Rule 1.10(A)(1) gives the city or town where the proposed facility is located the right to intervene in the proceeding.

filed Motions to Intervene on June 11, 2021 and June 16, 2021, respectively. CLF asserted that its participation is appropriate and in the public interest pursuant to Board Rule 1.10(B)(3).[6] The Attorney General asserted that he had both a statutory right to intervene pursuant to the Environmental Rights Act, R.I. Gen. Laws § 10-20-1 *et seq.*, and should be admitted as a party because the public's rights may not be adequately represented by existing parties as set forth in Board Rule 1.10(B)(2).[7] The Petitioner did not file an objection in response to either the Notice of Intervention or the motions. On June 22, 2021, the Chairman recognized Providence as a party pursuant to Board Rule 1.10(A)(1) and granted the two motions to intervene pursuant to Board Rule 1.10(A)(2). On June 29, 2021, eleven days after the deadline for intervention, The People's Port Authority filed an unsigned motion to intervene, to which Petitioner objected. On July 1, 2021, the Board denied the motion of The People's Port Authority.[8] During the July 1, 2021 hearing, when the Board heard initial oral argument, the Board ordered further briefing on a number of issues and the submittal of pre-filed testimony addressing facts in dispute. The briefs and testimony were filed by the parties on November 12 and November 19, 2021.

After the briefs and pre-filed testimonies were submitted, the Board scheduled the matter for evidentiary hearings on December 2 and December 3, 2021. However, on November 24, 2021, Petitioner's counsel requested a continuance of those hearings due to the unavailability of two of his crucial witnesses. None of the parties objected. Thereafter, the Board scheduled the matter hearings on January 18 and January 19, 2022. Further hearing dates became necessary to hear all

[6] Board Rule 1.10(B)(3) provides that "[s]ubject to the provisions of this Part, any person claiming a right to intervene or an interest of such a nature that intervention is necessary or appropriate may intervene in any proceeding before the Board. Such right or interest may be:…(3) [a]ny other interest of such nature that petitioner's participation may be in the public interest."

[7] Board Rule 1.10(B)(2) allows for intervention for persons with "an interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Board's action in the proceeding."

[8] The Board's reasoning for the denial was described in detail by the Chairman at the first hearing on July 1, 2021. Tr. July 1 at 6-14.

witnesses in the case and the Board scheduled further hearings for February 21 and February 22, 2022. Prior to those hearings, Petitioner's counsel informed the Board of his inability to reschedule previously scheduled court appearances and the matter was again rescheduled until February 28 and March 1, 2022.[9] Because Providence's witnesses were not available on those dates, those witnesses were scheduled and testified on March 31, 2022, finally bringing the evidentiary hearings to a close.

I. POSITION OF THE PARTIES AS SET FORTH IN THE PETITION AND MOTIONS/NOTICE TO INTERVENE

A. Petitioner

In its initial memorandum filed on March 15, 2021,[10] Petitioner argues that its proposed enhancements are not an alteration as defined by law, because they will not have a significant impact on the environment, public health, safety, and welfare, and thus do not require further review by the Board. In support of its argument, it asserts that the proposed enhancements are merely a construction project intended to incorporate another means of bringing LPG to its currently operating terminal. It stated that rail shipments will arrive only once a day and will be in a much smaller quantity than what arrives via marine vessel. It noted that transport by rail is already occurring at a facility in North Kingstown and is standard in the industry. It asserts that its proposed enhancements will afford it the opportunity to purchase at more competitive pricing levels and arrange for more consistent and predictable shipments by expanding the marketplace,

[9] The March 1, 2022 date was not needed and no hearing took place on that date.
[10] In some of the sections that follow, citations to the record relating to the content of the paragraph are made in one footnote at the end of the applicable paragraph, rather than having citations occur after each sentence.

which in turn will afford more homeowners that want to convert from oil a consistent supply at a stable price.[11]

Petitioner states that it did not identify any significant environmental impact noting that it will have both a soil management plan, including a soil erosion and sediment control plan, and a storm water management plan in place during construction. It noted no impact on ground or surface water, wetlands, or wildlife. Currently, Petitioner has an Air Quality Permit. It asserted that any noise will be within the limits of Providence's noise ordinance during and following completion of construction. Because there currently exists a 19-million-gallon storage tank on the property, none of the additions will be visible beyond the immediate vicinity of the property. Petitioner commissioned a traffic analysis which indicated no impact on traffic to the surrounding area. Its current permit allows 244 truck shipments per day. According to the Petitioner, it will not come close to reaching this permitted level, even with the addition of it proposed enhancements.[12]

Petitioner set forth its safety protocols and identified safety of its employees, neighbors, and community as its foremost priority. Access to the fenced and video surveilled area will be only through a secure checkpoint staffed by a guard. Sea 3 maintained it will update its Emergency Response Plan, Process Safety Management Plan, and EPA and Risk Management Plan. In addition to its safety protocols and rail operation, Petitioner will provide extensive training for staff and coordinate with state and local officials. Finally, Petitioner argues that its proposed enhancements are necessary to meet future demand for LPG in the region.[13]

[11] Petition for Declaratory Order at 10 (Mar. 15, 2021).
[12] *Id.* at 11-13; Exhibit 5.
[13] *Id.* at 13-15.

B. The City of Providence

Providence argues that it is "axiomatic" that the modifications of the proposed magnitude constitute an alteration, in that they will result in a significant impact on the environment or public health, safety, and welfare. The City also argued that the adjacent communities are already disproportionately impacted by the activities in ProvPort and constitute an environmental justice community. It expresses that the proposed modifications are inconsistent with the state's goals to curb carbon emissions and the Act on Climate. Lastly, Providence noted its safety and emergency management concerns that are raised by the hazardous nature of transporting LPG through a congested urban area.[14]

C. The Conservation Law Foundation

CLF argued that the impact to both the environment and public health, safety, and welfare are significant and therefore constitute an alteration requiring Board oversight. It disputes Petitioner's characterization of LPG as clean propane, recharacterizing it as dirty fuel, arguing that the state needs to transition away from this fossil fuel in order to achieve the goals established in the Act on Climate, R.I. Gen. Laws §§ 42-6.2-1 *et seq.* CLF argues that incentivizing individuals to switch from oil to propane can increase the number of households heating with propane in Rhode Island from 2% to 32.4% which will hinder the state in reaching its emission reductions goals. It noted that the Board has the power, duty, and obligation pursuant to the Act on Climate to address the impacts of climate change.[15]

Being that the area has been designated by the Department of Environmental Management (DEM) as an environmental justice area, CLF asserts that the community is already overburdened and maintains that these communities experience a higher rate of pollution, disease, and other

[14] Providence Notice of Intervention at 3-4 (Jun. 15, 2021).
[15] CLF Motion to Intervene at 2-5 (Jun. 11, 2021).

public health emergencies. It notes that there has been a long history of environmental problems in the area which is economically disadvantaged. It stresses that Board review would allow for it to weigh the public health and safety impacts of the proposed enhancement.[16]

D. The Attorney General

At the outset, the Attorney General notes that Petitioner will be required to obtain other permits and update existing plans, hire experts to conduct studies and analyses, and document the Petition for Declaratory Judgment like it would for a significant alteration. The Attorney General argues that the proposed enhancements constitute an alteration for the following reasons: 1) they will result in increased diesel emissions and truck traffic that will impact public health and welfare in an already overburdened environmental justice community; 2) there exist serious safety concerns associated with transportation of LPG by rail; and 3) the potential growth of operations is inconsistent with the State's long-term climate change goals.[17]

First, the Attorney General asserts that there is already heavy truck traffic and commercial and industrial activities in that small geographical area where residents are exposed to a greater risk of severe respiratory illness. He points to Rhode Island's high rate of asthma noting that some of the highest concentrations are in the area surrounding ProvPort. He asserts that the proposed enhancements will increase the number of trucks travelling in an area that has already experienced injury from existing truck travel. In addition to the potential health issues and risks raised by the Attorney General, he states that LPG is a highly flammable and dangerous gas which will be routed through densely populated residential areas, the transport and storage of which creates serious fire and explosion risks. Car derailment, tank car crash worthiness, security implications, and the

[16] *Id.* at 5-6.
[17] Attorney General's Mem. in Opposition at 2-6 (May 7, 2021); Attorney General's Motion to Intervene at 8-9 (Jun. 16, 2021).

potential for a catastrophic accident are among the safety issues the Attorney General raises. Lastly, he asserts expansion of Petitioner's facility is inconsistent with the State's goals to reduce greenhouse gas emissions to net-zero by 2050.[18]

E. Petitioner's Response

On June 28, 2021, Petitioner filed a Response to Intervenors' Memoranda. Petitioner asserts that Intervenors' claim of a significant impact is speculative and that the Board's jurisdiction is limited to whether the proposed actions *will* result in a significant impact on the environment or public health safety and welfare, not if it will. Petitioner provided further detail addressing each of the Intervenor's allegations regarding the incorporation of rail service, land use, air quality, and renewable propane.[19]

II. JULY 1, 2021 HEARING

After notice, the Board conducted a hearing for oral argument on the Petition for Declaratory Order on July 1, 2021. At the outset, the Chairman stated that after considering the Petitioner's and Intervenors' memoranda it became apparent that there were a number of facts in dispute necessitating an evidentiary hearing. The Chairman allowed the parties to make oral argument on the legal issues and then advised that the matter would be scheduled for an evidentiary hearing at a date in the future. In the meantime, parties were directed to prefile written testimony of witnesses to support the factual allegations asserted and to file briefs addressing the following issues:

(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:

[18] *Id.*
[19] Sea 3 Response to Intervenors' Mem. (Jun. 28, 2021).

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 Act on Climate apply to the interpretation of whether the Board has jurisdiction under the circumstances in this case? If so, how? If not, why not?

The Board asked the parties to propose a schedule for the filing of briefs which they agreed would be October 30, 2021. Petitioner requested an extension of the briefing schedule to November 12, 2021 with its reply brief due on November 19, 2021 which was agreed to by the parties.

III. PARTIES' BRIEF'S IN RESPONSE TO BOARD'S QUESTIONS

A. Petitioner

Petitioner argues that the statutory and regulatory definition of "alteration" is clear and unambiguous and must be applied literally. The word "will" in the phase "have a significant" impact is mandatory and not permissive or speculative. It asserts that the impacts alleged by the intervenors are only possible or potential. Additionally, it claims that the merger with the adjacent

lot, installation of new storage equipment and the connection to the existing rail line will not significantly increase the inherent risks of operating an LPG terminal.[20]

Petitioner asserts that the Board should exercise its discretion using a standard of "reasonable certainty" and that there has been no evidence of reasonable certainty that the proposed modifications will result in a significant impact on the environment, public health, safety, or welfare. It supports the claim by noting that the modifications will require no change to the existing air quality permit, no change to its current status as a non-contributor of stormwater, no impact to surrounding vegetation, wildlife, or marine life, will be no closer to residences, will not impair recreational use or aesthetics of the surrounding area, and will be able to reduce carbon emissions, and meet growing demand for LPG as an alternative to home heating oil.[21]

Arguing that an impact, if any, would be minor or negligible, Petitioner states that Sea 3 will be required to obtain permits from Providence, DEM, the Coastal Resources Management Council (CRMC), and the Federal Railroad Administration (FRA). It notes that the terminal has existed since 1975, and if unable to accept shipments by rail, it will meet demand with increased vessel shipments and expanded hours of operation or truck racks. Transportation by rail, which it asserts is the most common method of transportation of LPG, will lead to reducing carbon emissions by 50%, because the heating process required for the LPG brought in by vessel will be eliminated. Further, it notes that LPG is already transported by railroad travelling through Providence to North Kingstown. The additional equipment is similar to what is already on site and storage will only be increased by 2.8%. Lastly, Petitioner asserts that the rail project is

[20] Petitioner Mem. of Law at 2-5 (Nov. 12, 2021).
[21] *Id.* at 6.

consistent with the state's policy goal to ensure that facilities required to meet the state's energy needs are built in a timely and orderly fashion to meet demand.[22]

Petitioner argues that a finding of significant impact must be supported by substantial evidence in the record. It asserts that the evidence it provided supports that the impact will not be significant and that no other legally competent evidence has been submitted to rebut this. Lastly, Petitioner asserts that because its petition was filed prior to the passage of the Act on Climate, the Act does not apply. Moreover, even if the Act on Climate did apply, it is not ripe for application, because the standard set forth in the statute has not been articulated.[23]

B. The City of Providence

Providence argues that neither the Siting Act, nor the regulations create a procedure for an energy facility to request removal from Board jurisdiction.[24] Arguing that the phrase "as determined by the Board" in the definition of "alteration" creates a discretionary standard, Providence asserts that the Board must consider the entire definition and not only the phrase "will result". It states that the Act does not intend perfect knowledge of the future but creates a discretionary standard for the Board to apply when determining if something constitutes an alteration. In order for the Board to find a significant impact, Providence asserts there must be evidence to reasonably support such a finding. Thus, the Board must conclude that an additional delivery method, additional storage, additional transport and expanded capacity to process and supply LPG will not have a significant impact on the environment or public health, safety, and welfare of the surrounding Rhode Islanders and their environment.[25]

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[22] *Id.* at 7-9.
[23] *Id.* at 11-15.
[24] The Board did not interpret the Petition as a request to be "removed from jurisdiction." Rather, Petitioner was asking the Board to address the question whether jurisdiction was present. Rule 1.33 of the Board's Rules allows a person to "[p]etition for relief under any statute or other authority designated to the Board…." Thus, Sea 3's Petition for Declaratory Order was permissible under the Board's rules.
[25] Providence Brief at 4-10 (Nov. 8, 2021).

Providence asserts that in order to make a finding that modifications are not significant, there must be a showing that the proposed modifications are not likely to have influence or effect. It cites a number of meanings of the word "significant" which include important, weighty, notable, having or likely to have influence, large enough to be noticed to have an effect, etc. It argues that there can be no dispute that the modifications are significant, because Sea 3 already acknowledges the significance of its proposal which it identifies as essential to the long-term viability of its Providence terminal.[26]

In evaluating the proposed modifications, Providence maintains that the Board must consider whether the proposed modifications are: 1) likely to influence or have an effect on the quality of the state's environment and 2) consistent with the state's energy plans, goals, and policy. It points out that the Board's rules specifically define what is not an alteration, and that if increasing the normal carrying capacity of a transmission line is considered an alteration, increasing the storage and capacity of Sea 3's facility must also be considered an alteration.[27]

Providence disputes Sea 3's emphasis on the other permits it will be required to obtain if the Board finds its proposed modifications are not an alteration. It states that the fact that other approvals are necessary is indicative of the significant nature of the proposed modifications and the fact that their impact will be significant. It also noted that the Board will have the benefit of advisory opinions should it find that the proposed modifications constitute and alteration. Finally, Providence asserts that climate mitigation and resilience are part of the state's energy plan, goals, and policy. It argues that the Act on Climate must be considered by the Board for two reasons. First, because it will apply to a subsequent application if Sea 3's proposed modifications are found to be an alteration and Sea 3 files a full application with the Board. And second, the Supreme Court

[26] *Id.* at 10-11.
[27] *Id.* at 11-13.

has held that law in effect at the time of the decision should be applied if the application would implement legislative intent.[28]

C. The Conservation Law Foundation

CLF argues that applying the phrase "will result" to require certainty is nonsensical. The Petitioner, it asserts, should have the burden of proof to establish that the proposed modifications will not result in a significant impact by clear and convincing evidence which Petitioner has failed to do.[29]

CLF maintains that significance is determined by 1) ensuring that a facility produces the fewest possible adverse effects on all aspects of the environment, 2) achieving consistency with the state's established energy plans, policies, and goals, 3) considering whether efficiency and conservation provide appropriate alternatives, and 4) maximizing efficiency while minimizing use of high-quality water, harmful air emissions, wastewater discharge, and the discharge of solid waste. Like Providence, CLF noted that the Board's regulations provide examples of what is not an alteration.[30]

Although Petitioner lists government agencies from which it will be required to obtain approvals, CLF points out that it does not explain the kinds of permits needed. It notes that some of the impacts of the proposed modifications fall outside the scope of the relevant permit programs, i.e., greenhouse gas emissions. It expresses that none of the permitting entities consider the totality of the proposed modifications' impacts and only focus on the specific aspect over which it has jurisdiction. The fact that other permits are required, it asserts, highlights the fact that the impacts are significant. Moreover, the ability of other agencies to address the impacts should have no

[28] *Id.* at 15-21.
[29] CLF Brief at 2-4 (Nov. 12, 2021).
[30] *Id.* at 6-7.

bearing on the Board's determination of whether it has jurisdiction. If agency oversight was sufficient, there would be no reason to assign the Board oversight. Obtaining a permit from an agency does not equate with the lack of significant impacts. Finally, CLF argues that the Act on Climate is relevant and addressing its impacts fall on all state agencies including the Board.[31]

D. The Attorney General

The Attorney General asserts that the Petitioner has the burden of proof to show that the proposed modifications will not significantly impact the environment or public health, safety, and welfare. He states that the Board has wide discretion and should err on the side of caution when evaluating the impacts to the surrounding community. He is clear that although it is his position that the proposed modifications constitute an alteration requiring a full application to be filed with the Board, he has not taken a position on whether after full application, the proposed modifications should be allowed.[32]

The Attorney General provides that the Board should use a context and intensity analysis that is utilized in the National Environmental Protection Act as guidance in interpreting the term significant. He states that in evaluating context analysis must be of society as a whole, the affected region, and the affected interests and locality and that both short- and long-term effects must be considered. When evaluating intensity, he states that analysis should include evaluation of the degree to which it affects public health, the unique characteristics of the geographic area, the degree to which the effects on the quality of the human environment are likely to be uncertain, unique or unknown, the degree to which the action will establish precedent, and the degree to which it adversely affects districts, sites, highways, objects, species, habitat or other laws. He

[31] *Id.* at 8-11.
[32] Attorney General Brief at 3-7 (Nov. 12, 2021).

emphasizes that the risks to the community are not insignificant but are real, dangerous, and concerning.[33]

The Attorney General disputes Sea 3's suggestion that because it will have to obtain other permits, Board jurisdiction is unnecessary. He argues that for the Board to deny jurisdiction would revert to the system that the Legislature tried to fix when enacting the Siting Act. He asserts that the fact there are other authorities will address certain impacts should not influence the Board's decision of whether the impacts are significant. Finally, he states that Petitioner should not be allowed to contravene the State's environmental and energy goals and that the Board is obligated to consider the Act on Climate.[34]

E. Petitioner's Reply to CLF's Brief

Petitioner filed a reply to CLF's brief disputing CLF's assertion that the standard of review is clear and convincing evidence. It argues that in a previous Public Utilities Commission case before the Rhode Island Supreme Court, the Court announced the standard of review to be a decision "supported by legal evidence."[35] Because the Board is an administrative agency, the Board must render a decision supported by substantial evidence. It states that this evidence must be more than a scintilla but less than a preponderance. Petitioner cites a number of instances where the Court has applied a clear and convincing standard, none of which support applying that standard in this instance. It maintains that because this case does not implicate a fundamental right, the clear and convincing standard is inappropriate.[36]

[33] *Id.* at 7-9.
[34] *Id.* at 9-18.
[35] Petitioner Reply Brief at 2-3 (Nov. 19, 2021)(citing *In re Providence Water Supply Bd.'s Application to Change Rate Schedules*, 989 A.2d 110,114 (R.I. 2010)).
[36] Petitioner Reply Brief at 3-6 (Nov. 19, 2021).

F. Conservation Law Foundation's Reply Brief to Petitioner's Brief

CLF filed a reply brief to address the arguments made by Petitioner in its November 12, 2021 brief that the Act on Climate would constitute an improper retroactive application of the law if it were applied in the instant matter. CLF maintains that it is misleading to describe evaluation of the proposed modifications on the greenhouse gas reduction mandates set forth in the Act as a retroactive application, because it applies only indirectly to the jurisdictional determination being considered by the Board. Further, it asserts that in this instance a retroactive application would be proper because the Board is required to apply the law in effect at the time it considers the matter. Finally, even if the Act had not been passed, the Resilient Rhode Island Act, predecessor to the Act on Climate, included emissions reduction targets and obligated the Board to consider climate impacts when making its decisions.[37]

CLF also addressed Petitioner's claims that the Act on Climate does not apply to a subsequent application Petitioner may choose to file if the Board finds the proposed modifications to be an alteration. It rebuts Petitioner's arguments that the Act is not ripe for application because state planning processes have not been completed. First, CLF asserts that both the Act and its predecessor require the Board to further the purposes of the statute when exercising its authority and this requirement predates the requirement that agencies promulgate rules if directed to do so by EC4 plans. Moreover, an EC4 plan is an update of an already existing greenhouse gas emission's reduction plan from 2016. Additionally, CLF notes that there is a plethora of information state agencies can utilize to meet the obligations set forth in the Act.[38]

[37] CLF Reply Brief at 1-4 (Nov. 19, 2021).
[38] Id. at 4-5.

In addition to filing briefs, the parties all submitted pre-filed testimony in advance of the actual evidentiary hearings in support of the factual assertions that formed the basis of their positions to be litigated.

IV. EVIDENTIARY HEARINGS

The Board conducted evidentiary hearings on January 18 and 19, February 28, and March 31, 2022. At the hearings, the parties presented evidence in support of their arguments that the proposed modifications either did or did not constitute an alteration requiring Sea 3 to obtain a license from the Board. Petitioner presented a total of eight witnesses who testified about its business and current operations in ProvPort, the current marine delivery and unloading processes that are presently occurring, the scope of the proposed modifications, the standards it follows, the safety protocols that would be in place, and how implementation of the proposed modifications would reduce greenhouse gas emissions.[39] Providence presented two witnesses who testified about the hazards and associated environmental and public safety risks that would affect the surrounding community which is already disproportionately impacted by pollution.[40] It also presented a witness that disputed Sea 3's assertions that it had provided training to Providence Fire Department personnel.[41] CLF's witness testified about the environmental impact that an increase in LPG consumption would have on the state's greenhouse gas reduction goals.[42] The Attorney General's witnesses testified about the public safety risks associated with LPG and its transportation by rail, the increased risk to public health that would result to an environmental justice community already

[39] Hr'g Tr. (Jan. 18, 2022); Hr'g Tr. (Jan. 19, 2022).
[40] Hr'g Tr. (Mar. 31, 2022).
[41] *Id.*
[42] Hr'g Tr. at 209-258 (Feb. 28, 2022).

overburdened with environmental hazards, and the negative health impacts that have been suffered by a family living in the surrounding community.[43]

DECISION

I. Definition of Alteration

The terms of the Siting Act, R.I. Gen. Laws §§ 42-98-1 to 42-98-20, make clear that the Board has jurisdiction over a new "major energy facility" that is proposed for construction. In cases where a major energy facility is being modified, however, the Board's jurisdiction over the modification depends upon whether the proposed modifications to the existing facility constitute an "alteration" as defined in the Act.

The current facility was constructed and placed into operation before the passage of the Siting Act and, therefore, is grandfathered under the Act and did not require a license prior to construction and operation. Current operations receive deliveries of LPG exclusively from marine vessels. Over the last three years, the existing facility has received one to three shipments annually.[44] Each cargo ship contains approximately 10.2 million gallons per shipment.[45] The LPG is offloaded from the ship at a cold temperature and delivered directly to the existing refrigerated 19,000,000 gallon cold-storage tank, for storage at minus 45 degrees Fahrenheit.[46] During the offloading process, flares are needed to burn fugitive LPG. Prior to being transferred to truck racks, cold LPG must pass through heaters to be warmed before being received by the trucks at the truck racks. The warmed LPG is then loaded onto the trucks at the truck racks. During the final loading

[43] *Id.* at 15-207 (Feb. 28, 2022).
[44] Willis Pre-filed Test. at 10 (Nov. 12, 2021).
[45] *Id.*
[46] *Id.* at 10-11.

process, additional flaring is necessary. The facility has had approximately 1,666 truck shipments since Sea-3 took possession in 2018.[47]

The new rail project is proposed to allow Sea 3 to receive deliveries of LPG from railcars. Infrastructure and systems will be constructed to receive the railcars off a pre-existing rail spur, along with new facilities that will be operated next to the existing facilities for receipt of the LPG. A neighboring parcel will be acquired by Petitioner to accommodate the new project. As designed, once railcars arrive at the site with LPG, the LPG will be offloaded at warm temperatures via a separate set of infrastructure than is used at the existing facilities for offloading from the marine vessels. The LPG will be transferred into six 90,000-gallon horizontal bullet tanks (not refrigerated), via a piping manifold. The infrastructure then facilitates the transfer of the LPG directly from the bullet tanks to the truck racks. Because the LPG originating from the railcar deliveries already is warm, it does not need to be heated. The project also includes elimination of flaring at the truck racks for both the existing and new project via new equipment that can capture fugitive propane and return it to the tanks. The last phase of the project includes a refrigeration system which will permit the LPG that is received from the railcars to be transferred into the larger pre-existing cold storage tank when there is no truck rack demand at the time the railcar deliveries are being received.[48]

While much of the infrastructure related to the new project functions separately from the existing facilities, the Board finds there is an interlinking relationship between the existing major energy facility and the rail extension project which provides evidentiary support for a conclusion that the new project is a modification to the existing facility.[49] Thus, the Board evaluates the

[47] *Id.* at 11.
[48] Site Report, Ex. Sea 3-9 at 8-9 (Mar. 15, 2021).
[49] This factual issue was not litigated by the parties. However, the relationship between the existing and the new facility is evidenced by the fact that (i) the entire business relates to receiving propane and re-selling propane at

jurisdictional issues based on a finding that the rail project is a modification to the existing facilities.[50]

Since the project is a modification, the question of whether the Board has jurisdiction depends upon whether the proposed modifications to the major energy facility constitute an "alteration" as defined in the Act. The definition states in pertinent part:

> "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.[51]

Given the definition of alteration, there are two conditions that must be present for the Board to have jurisdiction:

> (i) the presence of a significant modification, and
> (ii) a significant impact on the environment, public health, safety, or welfare.

The Petitioner's request for the declaratory ruling is founded upon a factual assertion that these conditions are not met. Therefore, the Petitioner bears the burden of proof in each instance. As generally occurs in petitions for declaratory judgments of various types – the Petitioner typically needs to prove by a preponderance of the evidence that either (i) the modification is not significant, or (ii) that the modifications will not result in a significant impact.[52] However, for reasons that will be explained below, with respect to the factual issue pertaining to the risks to public safety, the Board exercises its discretion to hold the Petitioner to a higher standard regarding risks to public safety.

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wholesale from the site, (ii) flaring at the truck racks will be eliminated, and (iii) phase three of the plan will add facilities that refrigerates the propane received via rail and transfers it to the existing tank when the truck rack demand is not present.

[50] We note that if the project was considered a separate facility or was being built in isolation to receive and process deliveries of propane by railcar, it would constitute a major energy facility in and of itself and, therefore, would be jurisdictional to the Board without further inquiry.

[51] R.I. Gen. Laws § 42-98-3(b).

[52] *See* 26 C.J.S. Declaratory Judgments § 157 Burden of Proof (March 2022). *See also* 23 A.L.R.2d 1243, Burden of proof in actions under general declaratory judgment acts, §9 "Burden Normally on Plaintiff".

Addressing the first condition is a relatively straightforward factual determination. Addressing the second condition, however, raises a question of legal interpretation of the statute, making the determination more complex. Thus, a discussion of the standards is necessary.

II. The Standard for Addressing Whether There Is a "Significant Impact"

The statutory issue arises from the wording of the definition of an "alteration." Its wording may suggest that there must be certainty that impacts will definitively result from the modifications for jurisdiction to be present. This raises a twofold critical question. Specifically:

(i) In order for jurisdiction to be avoided, is it only necessary for the Petitioner to prove that a significant impact to the environment, public health, safety, or welfare is *not likely to result* from the modification? or

(ii) Must the Petitioner establish that there is *no significant risk* of such an impact for jurisdiction under the Act to be avoided?

The Petitioner takes the position that the terms of the statute must be taken literally.[53] According to the Petitioner, *only if* the modification "will result" in a significant impact, does the Board have jurisdiction. Petitioner argues:

> [I]f the Board were to determine that the evidence before it 'could' potentially result in a 'significant' impact, or alternatively, that the evidence demonstrates that the project 'will' result in 'some' or 'minimal' impact, the Board lacks jurisdiction and is compelled by law to grant the Petition.[54]

Petitioner argues that the plain meaning of the statutory definition does not leave any room for interpretation, maintaining that "the Board only has jurisdiction when the substantial evidence in the record shows, with reasonable certainty, that a modification will have a significant impact is [sic] on the environment, public health, safety, or welfare."[55]

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[53] Petitioner Mem. of Law at 2 (Nov. 12, 2021)(citing *Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 345 (R.I. 2004); *McCain v. Town of North Providence,* 41 A.3d 239, 243 (R.I. 2012) citing *State v. Gordon*, 30 A.3d 636, 638 (R.I. 2011); *Tanner v. Town Council of East Greenwich*, 880 A.2d 784, 796 (R.I. 2005).
[54] *Id.* at 3.
[55] *Id.* at 5.

The intervening parties disagree with Petitioner's interpretation. CLF argues that the phrase "will result" should be read in the context of the entire Act.[56] According to CLF, the words "as determined by the Board" indicate that the standard is discretionary and, thus, support the premise that the definition should be interpreted in light of the purposes of the Act.[57] CLF also points out that the Act charges the Board with a critical oversight role involving major issues of public health and safety. CLF states:

> Given the crucial importance of the interests that the Board is charged with safeguarding, the notion that the 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.[58]

The City of Providence makes a similar argument as CLF, stating: "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."[59] The City also maintains that the wording of the definition must be considered in light of the entire statutory scheme.[60] The Attorney General's argument echoes the points of CLF and the City, stating that "[t]he broad discretion of the EFSB should be liberally construed, especially where the threats of this high-risk activity are incontrovertible."[61]

The Board is persuaded that it can and should interpret the wording of the statutory definition in light of the purposes of the entire Act. As the Supreme Court has stated:

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[56] CLF Brief at 2 (Nov. 12, 2021)(citing *Sorenson v. Colibri Corp*., 650 A.2d 125, 128 (R. I. 1994)).
[57] *Id.* at 2.
[58] *Id.* at 4.
[59] Providence Brief at 7 (Nov. 8, 2021)(emphasis in original).
[60] *Id.* at 7-8.
[61] Attorney General Brief at 4 (Nov. 12, 2021).

> In matters of statutory interpretation our ultimate goal is to give effect to the purpose of the act. . . . When the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meaning. . . . However, the plain meaning approach must not be confused with myopic literalism; even when confronted with a clear and unambiguous statutory provision, it is entirely proper for us to look to the sense and meaning fairly deductible from the context.[62]

Further, the Board interprets the words "as determined by the board" as signaling a legislative intent to provide discretion to the Board.

Accordingly, while there is a practical distinction between (i) the risk that an impact will occur and (ii) the actual occurrence of the impact, it would lead to absurd results to conclude that jurisdiction is present ***only if*** the Board determines that a significant impact on public safety or the environment will definitively result from the modification. If jurisdiction can only be asserted upon a finding that there will be a severe impact – even if there was a significant risk that one will occur – the absurdity of such a restrictive interpretation is self-evident.

One of the core purposes of the Siting Act is to address public safety.[63] For that reason, the standard of review needs to address the significance of risk to the environment and public safety. In other words, if the Board finds that ***the risk*** of such an impact is significant, the modification is jurisdictional to the Board. Otherwise, the core purpose of the Board to assure that major energy facilities do not cause unacceptable harm to the environment or public safety would be severely undermined.

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[62] *Raiche v. Scott*, 101 A.3d 1244 (R.I. 2014)(citations and internal quotation marks omitted).

[63] *See* R.I. Gen. Laws § 42-98-1(a)("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.") *See also* R.I. Gen. Laws § 42-98-2(3)("The energy shall be produced . . . with the objective of ensuring that the construction, operation, and decommissioning of the facility shall produce the fewest possible adverse effects on the quality of the state's environment; most particularly, . . . the health and safety of its citizens. . . .")

Given this interpretation of the Act, the significance of risk as well as the significance of the impacts must be considered to determine jurisdiction over the project.[64] Taken together, the Board frames the inquiry as follows:

> Does the proposed modification create a significant risk of an impact on the environment, public health, safety, or welfare? If so, would the impact be significant?

Stated another way, where the Petitioner is seeking a declaratory ruling:

> The Petitioner bears the burden of proof to show that there is no significant risk of impact, or if the risk is realized, that any such impact would not be significant.

This is the standard the Board applies in its review of the evidence in this case.

III. Evidence Necessary to Establish Effective Risk Mitigation for Public Safety

The standard of proof for declaratory actions generally requires the Petitioner to prove its case by a preponderance of the evidence (i.e., more probable than not).[65] The Board, however, views the issue of public safety in this case as requiring a stricter inquiry where the Petitioner maintains that the risks of significant impacts on public safety will be effectively mitigated.

CLF argued that the standard of proof should be "by clear and convincing evidence"[66] on all issues. The Petitioner objected to such a standard, referencing Supreme Court cases which indicate that the reviewing agency's decision must be supported by substantial evidence in the record.[67] This reply of Petitioner to CLF appears to confuse the standard of appellate review of administrative decisions with the standard relating to the burden of proof imposed on the

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[64] In evaluating the evidence to make this determination, the term "significant" is applied in two different contexts. First, there must be a ***risk*** of occurrence that is "significant." In that context, the method of determining whether a risk is "significant" involves, in part, consideration of probability of occurrence. Second, there must be evidence that the ***impact*** would be "significant" if the risk is realized. In that context, the method of determining whether the impact is "significant" involves consideration of the severity of impact on the environment, public health, safety, or welfare.
[65] *See* 26 C.J.S. Declaratory Judgments § 157 Burden of Proof (March 2022). *See also* 23 A.L.R.2d 1243, Burden of proof in actions under general declaratory judgment acts, §9 "Burden Normally on Plaintiff".

[66] CLF Brief at 4 (Nov. 12, 2021).
[67] Sea 3 Reply Brief at 2-4 (Nov. 19, 2021).

Petitioner.[68] Elsewhere in its original memorandum of law, however, Petitioner argues for a standard of "reasonable certainty." In making this argument, Petitioner acknowledges that the Board has discretion in the application of the evidentiary standard, stating "the Board should exercise its discretion according to a standard of 'reasonable certainty' in determining whether this expansion will result in a significant impact."[69]

The Board interprets the statute to provide it with discretion to determine the standard of evidence when it makes the determination on the issue of jurisdiction. Specifically, as explained above, the definition of "alteration" contains the words "as determined by the Board." Thus, the Board interprets the statute and its purposes to permit exercise of that discretion to set a higher burden on the question whether risk mitigation on public safety is likely to be effective or other factors are present which will avoid the risk.[70] While all requirements set forth in the Act are important, public safety should be paramount, especially when the energy source is as highly volatile as propane. In carrying out its duties to protect public safety, the Board needs to be reasonably confident that the evidence put forward to avoid jurisdiction clearly indicates that the risk of catastrophic injury to members of the public will be effectively mitigated without the need for the type of inquiry that would occur in a full licensing proceeding. This standard aligns with proof by clear and convincing evidence. As stated by the Rhode Island Supreme Court, "proof by 'clear and convincing evidence' means that [the factfinder] must believe the truth of the facts asserted is highly probable."[71]

While this is a higher standard than generally applicable in requests for declaratory judgments, it is important to point out that the purpose of this inquiry is to determine whether

[68] *See e.g.,Valley Gas Co. v. Burke*, 446 A.2d 1024, 1030 (R.I. 1982).
[69] Petitioner Mem. of Law at 6 (Nov. 12, 2021).
[70] In other respects, however, we hold the Petitioner to the typical standard of preponderance of the evidence.
[71] *Parker v. Parker*, 103 R.I. 435, 442, 238 A.2d 57, 61 (1968).

further review is warranted under the provisions of the Siting Act. This is a jurisdictional inquiry. A failure by the Petitioner to provide such evidence at this stage does not result in a dispositive finding that denies the issuance of a license. It only means that a full licensing proceeding must take place to fully review the matter.[72]

Given these considerations, the Board applies the following standard:

> When a credible risk to public safety is identified and determined to be significant if left unmitigated, the Petitioner needs to show that the effectiveness of any risk mitigation or the presence of other militating factors is so clear and apparent that the Board can objectively conclude with a reasonable degree of confidence that the risk has been effectively addressed without need of any further inquiry.

The Board finds the application of this standard to be necessary and appropriate. To apply a lower standard could otherwise place the public at unreasonable risk of catastrophic harm, in contravention of the purposes of the Act.

It also is important to consider that a core consideration for full licensing proceedings is whether a project proponent can sufficiently mitigate the risk of harm – an issue of fact to be litigated in those licensing proceedings. When granting licenses in the past, the Board has typically placed conditions on the license to ensure impacts were mitigated during construction and after.[73] Thus, it would not be appropriate for a hearing on the threshold question of jurisdiction to become a proceeding regarding the effectiveness of mitigation measures. Otherwise, the scope of the proceeding to determine jurisdiction would inappropriately expand into a proceeding which

[72] This higher degree of inquiry for jurisdictional purposes should not be construed as necessarily establishing a new standard of review for the licensing proceedings itself. The Board reserves judgment on that question for when a licensing case is before the Board.

[73] *See* SB-2000-01, Order No. 48 (Sept. 18, 2001)(where the Board imposed certain conditions on Providence Gas for the transport of LNG to the facility and required the technical representations of the US Navy and state and municipal fire officials regarding protection of surrounding land uses, particularly residences to be incorporated into the final facility design).

mirrors the licensing proceeding without the required advisory proceedings under the Act – a procedural effect which this case was already on the edge of experiencing.

IV. Application of the Articulated Standards to the Evidence

A. The Modification is Significant

The Board finds that a significant modification is, indeed, present. The current operations are limited to receiving and processing maritime deliveries of LPG. This is the operation that was in existence prior to passage of the Act and did not require a license. The modification, however, expands Sea 3's operations. According to the Sea 3 Providence LLC Existing Liquid Propane Gas Facility Modification Site Report (Site Report) filed with the Petition, the owner of Sea 3 acquired the site with the intent of increasing the amount of LPG which comes through ProvPort to between 80 million to 100 million gallons of thruput per year in order to meet the projected need and demand in the region over the next decade.[74] According to the plan, "[t]he ability to bring in LPG via rail is essential to meeting that goal."[75] The expansion will not only enable Sea 3 to increase the volume of LPG that is processed, but adds facilities to accommodate LPG that is received via rail service through up to sixteen tank cars per day, using new facilities that will be constructed to receive those deliveries in a manner that is different than the maritime deliveries.[76] Thus, the Board finds the modifications to be significant.

B. There Is a Significant Impact on the Environment

Based on the articulated standards and the evidence before the Board, and for the reasons that will be addressed below, the Board finds that the Petitioner has not met its burden of proof regarding the issue of a significant impact on the environment. Specifically, the Board finds that

[74] Site Report, Ex. Sea 3-9 at 5-6 (Mar. 15, 2021).
[75] *Id.* at 6.
[76] Hr'g Tr. at 41 (Jan. 18, 2022).

the Petitioner failed to establish that the project will have no significant risk of impact on the ability of the State of Rhode Island to meet its obligations under the Act on Climate to reduce greenhouse gas emissions, which would be a significant impact on the environment.[77] The Petitioner carries the burden of proving by a preponderance of the evidence that the modifications will not result in a significant impact on the environment. To the extent that the project modifications will result in a material impact on the ability of the State to meet the mandatory targets under the Act on Climate, the Board considers such an impact to be a significant impact on the environment. The Board's review and findings relating to this issue are set forth below.

1. Applicability of the Act on Climate

The Petition was filed with the Board on March 15, 2021. Subsequently, on April 10, 2021, the Act on Climate was signed into law.[78] The Act on Climate amended the "Resilient Rhode Island Act of 2014." The main purpose of the new legislation was to establish enforceable economy-wide targets for greenhouse gas emissions reductions.[79] The law also imposed new obligations on all state agencies, stating:

> Addressing the impacts of 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.[80](emphasis added).

[77] The 2021 Act on Climate, R.I. Gen. Laws, Chapter 42-6.2.
[78] The Governor's press release regarding the signing is dated April 14, 2021. CLF Brief at 11 (Nov. 12, 2021). However, other reports indicate the bill was signed on April 10, the date Petitioner cites in its brief. Petitioner Mem. of Law at 14 (Nov. 12, 2021).
[79] R.I. Gen. Laws §§ 42-6.2-2(a)(2)(i) and 42-6.2-9.
[80] R.I. Gen. Laws § 42-6.2-8 (emphasis added). The term "obligations" was newly inserted in the legislation.

The term "obligations" was newly inserted in the legislation when the Act of Climate was passed. Given the directive in the law that obligates agencies such as the Board to essentially exercise its duties in a manner that furthers the purposes of the Act on Climate, it raises the question regarding the extent to which this law impacts the Board's exercise of its authority in this case. For that reason, the parties were asked to brief the question of how the Act on Climate would affect the interpretation of whether the Board has jurisdiction under the circumstances of this case.[81]

The Petitioner argued that "the Act on Climate should not be applied by the Board to either this Petition or a subsequent application if the Board finds jurisdiction."[82] Petitioner argued that since the Petition was filed before passage of the legislation which did not contain an explicit retroactivity clause, the Board was constrained "to view the Petition in light of the state of the law as it existed at the time of submission."[83] In the alternative, Petitioner argued that the law was not ripe for application because it required the development of a plan yet-to-be developed and regulations not yet promulgated.[84]

In contrast, CLF argued that the Act on Climate was relevant to the proceedings, arguing not only that there were provisions in the law that directed agencies to consider the purposes of the law in the exercise of their duties, but that the new law was relevant to the determination of what constitutes a significant impact on the environment.[85] CLF further elaborated on this point, stating that the Act on Climate "applies to the jurisdictional determination *indirectly*, as *evidence* that the effects of the Project constitute significant environmental harm."[86] Finally, CLF argued

[81] Hr'g Tr. at 27-28 (Jul 1, 2021).
[82] Petitioner Mem. Of Law at 14 (Nov. 12, 2021).
[83] *Id.*
[84] *Id.* at 14-15.
[85] CLF Brief at 11 (Nov. 12, 2021).
[86] CLF Reply Brief at 2 (Nov. 19, 2021).

that the law in effect at the time of the filing under the Resilient Rhode Island Act already expressed a policy of reducing greenhouse gas emissions.[87]

The Attorney General referenced the Siting Act provisions that require the Board to take into account the long-term environmental and energy policy of the state when considering issues brought before the Board and argued that the Act on Climate was a policy to reduce reliance on fossil fuels which the Board needs to consider.[88] The Attorney General also cited the language in the Act on Climate which created the obligation for agencies of the State to consider the law in the exercise of its duties, arguing that it would be improper for the Board not to consider the Sea 3 project's impacts on greenhouse gas emissions.[89]

Similarly, Providence argued that the Siting Act requires the Board to consider climate impacts, citing the same statutory provisions as the Attorney General.[90] Providence also cited the language of Chapter 42-6.2 prior to the law being amended: "Consideration of the impacts of climate change shall be deemed to be within the powers and duties of all state departments, agencies, commissions...."[91] Similar to CLF, Providence argues that "climate mitigation and resilience were part of the state's established energy plans, goals, and policy *before* passage of the Act on Climate.[92]

The Petitioner's argument regarding retroactivity of a law, however, appears to be misplaced. While the Petitioner correctly states the law regarding the retroactivity of statutes and the principle that application of a statute retroactively is disfavored, the argument misses the mark

[87] *Id.* at 4.
[88] Attorney General Brief at 16 (Nov. 12, 2021).
[89] *Id.* at 17.
[90] Providence Brief at 18-19 (Nov. 8, 2021).
[91] *Id.* at 19, *citing* R.I. Gen. Laws §42-6.2-8 (eff. July 2, 2014). Providence also argued that the Rhode Island Supreme Court has allowed application of new laws in administrative proceedings, allowing an agency or trial court to apply the law in effect at the time it makes its decision. *Id.* at 21, citing *Dunbar v. Tammelleo*, 673 A.2d 1063, 1067 (R.I. 1996).
[92] *Id., citing* P.L. 2014, ch. 343 (enacting R.I. Gen. Laws § 42-6.2-1 *et seq*)(emphasis in original).

in the context of the Act on Climate. The Rhode Island Supreme Court cases do establish the principle that "statutes and their amendments are applied prospectively, absent clear, strong language, or by necessary implication that the Legislature intended a statute to have retroactive application."[93] However, this principle applies to statutes that are considered to be "substantive statutes" – i.e., statutes "which create, define, or regulate substantive legal rights."[94] The Supreme Court has stated, "In contrast, remedial and procedural statutes, which do not impair or increase substantive rights, may be construed to operate retroactively."[95]

The reasoning behind this principle appears to arise in cases where a substantive right of a party in litigation is being impacted by the passage of the law in question. If the litigant already has a right in existence and has relied upon that right, the Court has indicated that it will not allow a retroactive impact on that right to occur unless the General Assembly includes language that reflects a clear intent of retroactive effect. In the case of the Act on Climate, however, the law is not imposing a restriction upon or denying any rights that the Petitioner once had to develop its project. Rather, the new law is requiring the Board to consider the impact of greenhouse gas emissions when exercising its duties under the Siting Act. Further, the Petitioner did not file an application for a license prior to passage of the Act on Climate and rely upon the state of the law as of the date of the filing. Rather, the Petitioner is asking whether the Board would have jurisdiction over a project not yet developed if it is constructed. In the context of this jurisdictional inquiry, the answer is dependent upon whether there would be significant impacts on the environment if the project goes forward. The Act on Climate is a consideration in making that determination.

[93] *State v. Briggs*, 58 A.2d 164, 169 (R.I. 2013)(quoting *Rodrigues v. State*, 985 A.2d 311, 318 (R.I. 2009)).
[94] *Id.* at 170.
[95] *Id.*

The Act on Climate is now in effect – long before construction and prior to any licensing application that might be filed. The Board is simply using the Act on Climate as a policy reference in its determination of whether there would be a significant impact if such a project were to go forward in the future. This is not retroactive application of a statute affecting substantive rights of the Petitioner. Rather, the Board is simply determining whether the project, if constructed in the future, would need to obtain a license from the Board prior to construction. The Board's finding of jurisdiction impairs no rights already relied upon by the Petitioner prior to passage of the Act on Climate.[96] It is simply a declaration that indicates whether the Siting Act requires the project to obtain a license.

Even if one could reasonably construe the sequence of the filing of the Petition and effective date of the law as prohibiting the Board from considering the new amendments in the Act on Climate, however, Providence and CLF have made a very persuasive argument that there already were prevailing policy considerations present within existing law regarding the impact on greenhouse gas emissions prior to the filing of the Petition. Thus, even in the absence of the Act on Climate, the state of the law in existence at the time of the filing already permitted the Board to consider the impact on greenhouse gas emissions as a factor in determining whether the project modification will result in a significant impact on the environment.

Finally, Petitioner's argument that the Act on Climate is "not ripe for application" because a plan must first be developed by the Climate Change Coordination Council (EC4) before other agencies take the greenhouse gas reduction targets into account is equally unpersuasive.[97] The targets are not "goals." They are mandatory targets which are clearly and unambiguously

[96] It would make no sense to conclude that Sea 3 had a substantive right prior to the passage of the Act on Climate to increase greenhouse gas emissions without regard to the directional policy targets that were already present in the Resilient Rhode Island Act.
[97] Petitioner Mem. of Law at 14 (Nov. 12, 2021).

established. If there are proposed actions before the Board that would materially impact the ability of the state to meet the mandatory targets in a timely manner, the Board cannot wait for a comprehensive plan from EC4 to address the issue during the licensing proceeding. The obligation of the Board to take the issue into account is already present and not conditioned within the directive contained in the Act on Climate.

For all of these reasons, the Petitioner's argument is not persuasive, and it is appropriate for the Board to consider the impact on greenhouse gas emissions in determining whether the modifications would have a significant impact on the environment.

2. Evidence Regarding Impact of the Project on Emissions Reduction Targets

As explained earlier, the Petitioner has the burden to prove that there will not be a significant impact on the environment from an increase, if any, of greenhouse gas (GHG) emissions resulting from the project modifications.[98]

a. Petitioner's Case Regarding Emissions Impacts

The Petitioner's main witness on the question of emissions was Amy Austin, a Senior Air Quality Engineer from an engineering consulting firm, POWER Engineers, Inc.[99] Ms. Austin evaluated what the carbon emissions from the site would be after the completion of the project. She testified that 60% of the volume of LPG handled and transported from the site will be from rail, as opposed to maritime deliveries to the site. As a result of this change to rail deliveries, it would reduce the need for using the heaters now currently used on the site by 50%.[100] According

[98] It is well-known in environmental sciences that carbon dioxide emissions are a type of greenhouse gas emissions. Methane also is a type of greenhouse gas but is a more potent type than carbon dioxide.
[99] Austin Pre-filed Test. at 5 (Nov. 12, 2021).
[100] Hr'g Tr. at 222-23 (Jan. 18, 2022); Austin Pre-filed Test. at 2.

to Ms. Austin, LPG from deliveries through rail service comes in warm and does not have to be heated. Thus, there would be a reduction in carbon emissions from the reduced use of heaters.[101]

Ms. Austin also testified that there would be a reduction in emissions from the removal of truck rack flares. According to her testimony, the Petitioner plans on removing the truck rack flare which is an emitting source with new equipment that captures fugitive propane in the loading process and returns the residual to the tanks, avoiding the need for flaring.[102] Finally, Ms. Austin testified regarding the comparative emissions between heating systems operated by fuel oil and emissions from heating systems operated with LPG.[103] However, she found it difficult to provide any comparison for emissions from heating with electricity. She stated:

> Conversion of heating systems from fuel oil to LPG would assist RI in incrementally reducing carbon emissions to zero by 2050. It is difficult to compare carbon emissions from the use of electricity for heating since emissions depend on the type of fuel burned, different technologies, and efficiency losses in the transmission and distribution of the electricity.[104]

During cross-examination, she stated that she had not included electric heat in the comparison, because she did not "know enough about the electricity that's provided to Rhode Island residents, what type of fuels are burned."[105]

During the hearings, the Board also requested the Petitioner provide a projection of how much propane handled by the project would be burned in Rhode Island, as opposed to out-of-state.[106] Petitioner provided a response which projected Rhode Island usage of propane in 2022 of approximately 27 million gallons and indicated that the project did not have data about consumption location. The response also indicated that the project owner Blackline sold

[101] Hr'g Tr. at 223 (Jan. 18, 2022). Mr. Willis also testified to this operational change. Willis Pre-filed Test. at 13.
[102] Hr'g Tr. at 223. Mr. Willis also testified about this operational change. Willis Pre-filed Test. at 14.
[103] Austin Pre-filed Test. at 9.
[104] *Id.*
[105] Hr'g Tr. at 232-33 (Jan. 18, 2022).
[106] *Id.* at 289-90.

approximately 5 million gallons to fuel distributors that had operations in Rhode Island in 2021.[107] Elsewhere, in the Petition itself, Petitioner made a representation that approximately 30 million to 35 million gallons of LPG per season are sold in Rhode Island from all sources.[108] The response also indicated that the Petitioner anticipated "being able to capture at least 50% of the [sic] Rhode Island's future propane utilization."[109] This would suggest future Rhode Island consumption originating from Sea 3 would be approximately 15 million to 17.5 million gallons of LPG if there was no further growth of propane usage in Rhode Island.

Mr. Kerry Willis, Vice President of Operations and Capital Projects for Blackline Midstream, testified for the Petitioner as an overview witness about many aspects of the project. Mr. Willis is the Vice President of Operations for both Sea 3 in Providence and LPG facilities in New Hampshire. In addition to other topics, Mr. Willis testified that the amount of LPG that is processed is driven by the expected regional demand for LPG, and he expected that within the next 3-5 years, Sea 3 would be moving over 100 million gallons of LPG annually.[110] While Ms. Austin expressed that she did not have adequate knowledge about the electric system, Mr. Willis offered opinions regarding the difficulty of transforming the electric grid to "greener" generation and its relevancy to converting to electric heat pumps.[111]

When pressed further on cross-examination, he was asked for his understanding of the difference in emissions under the current electric generation system, he testified:

> Without understanding actually the heat rate of the generation and the efficiency of it all, all I can say today is what it's using to generate electricity and that being just under one percent coal and five percent oil. I don't know what the heat rates are, so I can't guess at what the emissions kind of back and forth would be on one system versus another.[112]

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[107] Sea 3 Ex. 16.
[108] Petition for Declaratory Order at 6 (Mar. 16, 2021).
[109] Sea 3 Ex.16.
[110] Willis Pre-filed Test. at 12 (Nov. 12, 2021).
[111] *Id.* at 126-27.
[112] *Id.* at 129.

Other than the testimony referenced above, there was no evidence offered by the Petitioner which compared the emissions from electric heating compared to heating with propane.

b. CLF Witness Testimony Regarding Emissions Impacts

CLF was the only other party to sponsor a witness that directly addressed the issue of greenhouse gas and carbon emissions. CLF's witness was Mr. David Hill. Mr. Hill adopted pre-filed testimony as his own which had been submitted earlier by his colleague Gabrielle Stebbins. He then testified during the evidentiary hearings.

The main points of Mr. Hill's testimony are summarized in the pre-filed testimony at pages 5 and 6. In sum, Mr. Hill assumed that Sea 3's project may increase propane usage from 23 million to 100 million gallons per year. He then assumed that the additional 77 million gallons of propane per year would be burned in Rhode Island alone and that the 77 million gallons of propane would cause oil to propane conversions to occur, instead of oil to electricity conversions (with oil as backup). Based on a mathematical calculation using other assumptions about conversions, he estimated that this assumed effect would increase GHG emissions over a span of fifteen years by 4,135,706 metric tons.[113] Mr. Hill also testified that his calculation of emissions was based on an assumption that there would be zero emissions from the use of electricity by 2030 and beyond because of Rhode Island's stated goal of reaching 100% renewables by 2030.[114] He testified that if the electric sector was not emissions free by 2030, his analysis contained conservative assumptions that provide a counter balance to this assumption.[115] However, he provided no backup calculations to indicate the extent to which the conservative assumptions would compensate for the assumption of zero emissions.

[113] Stebbins Pre-filed Test. adopted by David Hill at 7 (Nov. 9, 2021).
[114] *Id.* at 11.
[115] *Id.* at 13-14.

At the evidentiary hearings, the Chairman asked Mr. Hill about his assumption that by 2030 all electricity consumption would be emissions free. Mr. Hill acknowledged that he did not take into account the actual fuel mix of generation units that would be dispatched by ISO New England in 2030 and beyond.[116]

During cross-examination, Mr. Hill also was asked by the Petitioner about his assumption that the project would increase the amount of propane delivered.

> Q. Okay. So, if the demand in Rhode Island is for 100 million gallons of propane and they get it from either Sea 3 just via vessel or they get it from Sea 3 in Davisville, regardless of how they get it, the numbers would be the same, right?
>
> A. That wouldn't change – the analysis that I did was the end user, the end use emissions associated with those.[117]

c. Findings Regarding Greenhouse Emissions Impacts

In reviewing the evidence presented by both the Petitioner and CLF, the Board finds that neither party provided reliable evidence with respect to the greenhouse gas emissions impacts that are likely to result from the proposed modifications or the impact on the State's emissions reduction targets set forth in the Act on Climate or its predecessor law the Resilient Rhode Island Act.

The question whether the rail project will increase emissions of greenhouse gas relates to the question whether the project will increase volumes of LPG that are delivered into Rhode Island. The Petitioner's assertions relating to the extent to which volumes of propane would increase, however, were contradictory. In the Site Report, there are representations that the project owner intends to increase the volumes, but that rail service is "essential" to reach this goal.[118] Then,

[116] *Id*. at 246-50.
[117] Hr'g Tr. at 232-33 (Jan. 19, 2022).
[118] Site Report, Sea 3 Ex. 9 at 6.

during the evidentiary hearings, there were suggestions that the goal to increase volumes could be met by marine vessel.[119] Yet, on cross-examination, Mr. Willis essentially confirmed that obtaining LPG via rail was essential to the long-term viability of Sea-3 at ProvPort.[120] The Petitioner cannot have it both ways. Either the modifications will likely increase volumes that pass through ProvPort or they will not. The evidence by Petitioner was ambiguous at best.

Further, Petitioner never addressed the extent to which there might be an impact from lower cost propane on the heating sector in Rhode Island by encouraging oil to propane instead of oil to electricity. While credible evidence was presented regarding carbon reductions at the site from reduced heater usage and the elimination of flaring, the Petitioner's main witness, Ms. Austin, did not perform any analysis regarding the generation mix and emissions from the electricity that theoretically could be used for electric heating. In addition, Mr. Willis testified about what he believed to be the generation mix.[121] However, his testimony was contradicted by readily available information regarding the fuel mix of generation published by ISO New England of which the Board took administrative notice.[122] Mr. Hill's testimony in response to Mr. Willis' assumptions also contradicted Mr. Willis.[123]

The testimony of CLF's witness, Mr. Hill, certainly raised legitimate questions that indicate a realistic risk that the project could have a significant impact on the ability of the State of Rhode Island to meet its greenhouse gas reduction targets. However, the analysis that attempted to actually prove the likelihood of such an impact was faulty for two main reasons. First, he made assumptions about zero emissions on the electric grid in 2030 which collide with the reality of how

[119] Hr'g Tr. at 180-81 (Jan. 18, 2022); Hr'g Tr. 224-25 (Feb. 28, 2022).
[120] Hr'g Tr. at 137-43 (Jan. 18, 2022).
[121] Hr'g Tr. at 161-65 (Jan. 18, 2022).
[122] The resource mix is published on the ISO New England website at: https://www.iso-ne.com/about/key-stats/resource-mix/
[123] Hr'g Tr. at 213-14 (Feb. 28, 2022).

the State of Rhode Island is intending to meet the 100% renewable goal.[124] Pending legislation indicates that 100% renewables would be measured by the requirement of suppliers to purchase a specified quantity of renewable energy certificates each year that matches 100% of sales volume.[125] It does not require that all electricity consumed during the winter or any time of the year within Rhode Island's borders be carbon free. This presents a fatal flaw in Mr. Hill's assumption of zero emissions by 2030. First, Mr. Hill provided no reference to support the assumption that regional generation serving Rhode Island in the winter would be carbon free by 2030 and beyond, given the way in which the 100% renewable goal would be measured. While Mr. Hill asserted that his conservative assumptions would offset the effect should emissions not be carbon-free, he provided no quantitative evidence to back up the conclusion. Second, the assumption that Rhode Island consumption of propane originating from the railcar deliveries would be as high as 77 million gallons per year was not supported by any credible evidence, and therefore, likely overstates the impact.

Given the testimony of the parties, the Board finds that neither party provided sufficient evidence for the Board to draw a reliable conclusion that a significant impact on the State's greenhouse gas reduction goals is likely to occur or not likely to occur. Having drawn this neutral conclusion, however, does not mean that the Petitioner prevails on this point. As indicated earlier, it is the Petitioner who carries the burden to prove that there would be no significant impact on the environment. Petitioner failed to meet this burden. The Petitioner provided evidence that partially addressed emissions occurring directly from the operations after the proposed modifications are put in place but did not provide any analyses to show the extent to which there would or would not

[124] The Board takes administrative notice of the pending bills, 2022 H 7277 and 2022 S 2274, that would carry out the policy, if passed into law.
[125] *Id*.

be a significant impact on greenhouse gas emissions from the sales of increased volumes of propane for consumption in Rhode Island. Petitioner appeared to be arguing that processing of propane at the facility and consumption of propane in Rhode Island will be driven by demand for propane.[126] But such an assertion does not address whether the availability of lower-cost propane resulting from the project would be a material contributor to a higher demand for propane in the future which is then used as a heating source over potential electrification options. Counsel for Providence made an argument during her closing which addressed this flaw quite articulately:

> Now, I know that Sea-3 has also made representations about demand, that they don't dictate demand, but as anyone who's taken a simple microeconomics course knows, demand is not what determines economic usage. The other side of the equation is supply, and this project is specifically geared towards changing supply. It will change the supply and demand equation and that will directly impact pricing which will directly impact usage.[127]

In short, Petitioner's argument that demand for propane will be the cause of emissions created by increased propane usage is unpersuasive. It skips over the relationship between price and demand.

Even though CLF's witness did not provide sufficient evidence to prove such an impact, CLF has nevertheless provided enough evidence for the Board to reasonably conclude that the modifications proposed by the Petitioner could have a significant impact on the ability of the State of Rhode Island to meet its emissions reduction targets in the heating sector of the economy, depending upon the outcome of many factors which were never placed in the record by the Petitioner. Most important, Petitioner never provided sufficient evidence to its assertion that the proposed modification would not cause a significant impact. The impact on the emissions reductions targets can only be provided by reliable analyses which are far more sophisticated than what was presented as evidence in these proceedings.[128] Such analyses will be an endeavor that

[126] Hr'g Tr. at 111-112 (Mar. 31, 2022).
[127] *Id.* at 154.
[128] To the extent there are further proceedings before the Board that addresses emissions during the winter, it is imperative that any such analyses address the forecasted emissions from regional generation occurring during the

must be left to licensing proceedings, should the Petitioner decide to continue to pursue its proposed project.

C. There is a Significant Risk to Public Safety

Regarding public safety, an issue of risk of significant impact is raised by the proposal to bring sixteen rail cars of LPG daily to the site for transfer of the LPG into storage for later transport by the truck fleet. For the reasons described below, the Board finds the Petitioner did not meet its burden to prove that the proposed modifications do not create a significant risk to public safety.

1. Petitioner's Federal Preemption Argument

During closing arguments, Petitioner raised for the first time in this proceeding a legal argument relating to the authority of the Board to consider risks associated with the transportation of LPG via rail. Specifically, Petitioner maintains that the doctrine of federal preemption prohibits the Board from considering any safety impacts that may arise from the fact that the LPG is being transported via rail. Petitioner verbally cited the Federal Railroad Safety Act (also referred to as the "FRSA") and the Federal Rail Administration, referencing the federal agency's overarching jurisdiction over rail transportation.[129] The Board interprets Petitioner's argument to be asserting that the determination of jurisdiction by this Board must be confined to the site of the existing facility where the expansion is being proposed and cannot consider safety issues associated with transport of LPG on the rail system over which the Federal Rail Administration has jurisdiction.

Since this issue was not raised until the final hour of the hearings, no other party was in a fair position to respond to this legal argument.[130] Nevertheless, the Board finds Petitioner's

heating season from the regional generation that serves Rhode Island electric load. Otherwise, any purported calculation of greenhouse gas emissions from electricity usage in the winter may not be reliable.

[129] Hr'g Tr. at 108-10 (Mar. 31, 2022). Counsel verbally identified the law as the "Federal Rail Act." The Board assumes that counsel for Petitioner was referring to the Federal Railroad Safety Act. 49 U.S.C.A. § 20101 *et seq*.

[130] No party objected to Petitioner raising this issue at this late stage of oral argument.

preemption argument without merit based on explicit provisions in the Federal Railroad Safety Act. Within the Federal Railroad Safety Act, there is a federal preemption provision which expressly addresses the extent to which that federal law preempts state law. While there is a proviso in the federal law which states "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable," there is a second proviso which contains the following:

> A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order – (A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce.[131]

Given this provision, the Petitioner's argument fails. First, under state law, the Board has jurisdiction to consider safety hazards that may be caused by the alteration or proposed construction of a major energy facility which impact is remote from the actual site of the project.[132] For that reason, the Board may consider significant risks to public safety which are caused by the project's dependency on the rail transportation through the city and along the spur which reaches the site by traversing near a residential neighborhood, provided that any action ultimately taken by the Board (if it issues a license) does not exceed the limits of the preemption proviso. Second, the preemption proviso expressly allows a state to adopt an order which addresses a local safety hazard, provided that such order is not incompatible with federal law and does not interfere with interstate commerce. Third, by asserting jurisdiction that would allow the Board to consider safety hazards associated with the use of the railroad system, the Board is not yet adopting an order that has any practical effect. Rather, any conditions which attempt to create more stringent requirements would be an issue in future licensing proceedings. Finally, Petitioner's assertion that

[131] 49 U.S.C.A. § 20106.
[132] *See* n. 73 *supra.*

the Board's consideration of the safety issues associated with the rail usage will interfere with interstate commerce is not supported by any evidence in the record.[133] A mere assertion of jurisdiction that contemplates a review of the significant risks to public safety in this case clearly does not interfere with interstate commerce.[134]

For these reasons, the Board is not persuaded by Petitioner's preemption argument and considers the issue relating to examination of significant impacts to public safety caused by the project's use of the rail to be within the Board's authority.

2. Risks Relating to Rail Use for Deliveries

The rail project modification to the Sea-3 facilities contemplates the potential for deliveries of sixteen railcars per day of LPG.[135] Each railcar will contain approximately 30,000 gallons of LPG.[136] The railcars will travel south into Rhode Island from Worcester, Massachusetts along the existing mainline through the city of Providence.[137] The railcars will first be brought to staging yards approximately a mile and a half outside of ProvPort.[138] A string of sixteen full railcars will be brought to the site each delivery day. They will enter ProvPort along an existing rail spur at a point that is west of ProvPort, traveling between parcels upon which there exist numerous oil tanks abutting each side of the spur.[139] The railcars will cross Allens Avenue and continue down Terminal Road until the spur crosses Terminal Road heading south toward the LPG site.[140]

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[133] Hr'g Tr. at 109 (Mar. 31, 2022). Counsel argued: "I don't think that on the issue of rail in and of itself alone that either this Board or any board in the State of Rhode Island has the ability to say that it can't be done or it should not be done without overburdening the interstate commerce associated with the transportation of rail in violation of federal laws."

[134] If the Board were to impose a condition on rail usage in the licensing proceeding, consideration of whether it violated the referenced provisions of the FRSA would be a matter to be litigated during the proceedings and/or on appeal after issuance or denial of a license.

[135] Hr'g Tr. at 90 (Jan. 18, 2022).

[136] *Id.* at 33 .

[137] *Id.* at 434-44 .

[138] *Id.* at 160 .

[139] *Id.* at 151 . The rail spur in ProvPort is railroad operated. *Id.*

[140] *Id.*. at 151 .

Enroute to the site the railcars will pass along the spur that is located near a residential neighborhood west of Shipyard Street (along Tennessee Ave and Michigan Ave.),[141] before reaching the site where the LPG storage and related infrastructure is located.

Petitioner's main witness on the issue of railcar transportation safety was a railroad consultant, Mr. Jonathan Shute.[142] Mr. Shute explained that the preferred means of transport of LPG in the industry is by railcar.[143] He also opined about the degree of care that crews handling LPG on rail lines utilize.[144] He offered an opinion that the probabilities of significant events occurring with the transportation of LPG is so small as to be analogous to meteor hits.[145] In his pre-filed testimony, he referenced federal regulations, expressed confidence in the abilities and care taken by rail crews in handling and tracking LPG shipments, and explained that federal compliance inspectors arrive unannounced to evaluate railroad procedures.[146] He described safety systems in place for the transport over rail.[147] Mr. Shute offered an opinion regarding the strong physical integrity of the vessels upon which the LPG is transported.[148] He also testified that a train making its way into ProvPort would be negotiating the track switches at less than ten miles per hour.[149]

Mr. Shute also testified about railcar derailments.[150] According to his testimony, the two most frequent places that trains derail are (i) on crossings where they are at grade and there is an

[141] Hr'g Tr. at 148-50, 261-62 (Jan. 18, 2022). *See also* Hr'g Tr. at 70-75 (Jan. 19, 2022); Figure 4 Fire Safety Analysis. Not all street names are clearly identified on the maps in evidence, but the Board takes administrative notice of them.
[142] Hr'g Tr. at 263 (Jan. 18, 2022); and Shute Pre-filed Test. (Nov. 12, 2021).
[143] Shute Pre-filed Test. at 5. (Nov. 12, 2021).
[144] Hr'g Tr. at 270-72 (Jan. 18, 2022).
[145] *Id.* at 277, 288.
[146] *Id.* at 282-83.
[147] Shute Pre-filed Test. at 7 (Nov. 12, 2021).
[148] Hr'g Tr. at 267, 285 (Jan. 18, 2022); *see also* Shute Pre-filed Test. at 6.
[149] *Id.* at 286-87.
[150] *Id.* at 267-68.

obstruction in the track or (ii) on switches because switches are the weakest part of the track structure. He stated, "if there's a failure of track, it's most frequently at low speed operations."[151] He testified that a derailment where the railcar ends up lying on its side is an infrequent form of derailment.[152]

Mr. Shute testified about the types of railcar safety inspections that occur.[153] He explained that there are inspections of brakes, wheels, caps on piping, and the couplers. He testified regarding the way railcars are designed to prevent cascading and colliding into one another.[154] Mr. Shute also provided testimony explaining hazardous materials security measures that railroads undertake under federal regulations.[155]

Mr. Willis also offered an opinion about the risk to the surrounding community as a result of rail service compared to marine vessel service. In his pre-filed testimony, he answered the following:

> Q. Do you believe that rail service to the property has a significant increase in risk to the surrounding community as compared to marine vessel service?
>
> A. No. First of all, the port is already serviced by rail. Every day, substances such as ammonia and chlorine are shipped into the port via rail that serves adjacent operations. Further, LPG is already transported over the same tracks through the city on its way to the LPG terminal in North Kingstown which is only serviced via rail. Demand determines the volume that will be handled by the facility – not rail. If we do not have access to rail and demand rises to 100,000,000 gallons per year, the facility will meet demand through the most costly, less efficient and less predictable vessel cargo.
>
> We employ every best practice in the industry and run the facility in accordance with the NFPA[156] regulations. We work closely with public safety in the City of Providence and will continue to do so. Whether brought in via rail or vessel, whether stored in bullets or the existing 19,000,000 gallon tank, the worst case scenarios remain the same and our diligence, dedication and investment in preventing them does not waiver.[157]

[151] *Id.* at 268.
[152] *Id.*
[153] *Id.* at 271-72.
[154] *Id.* at 273.
[155] *Id.* at 281-82.
[156] NFPA is an acronym for National Fire Protection Association.
[157] Willis Pre-filed Test. at 17 (Nov. 12, 2021).

During the hearings, Mr. Willis also testified about the rail service that will be used to bring the LPG to the site.[158] He testified that other facilities in ProvPort already bring in hazardous materials via rail. He emphasized that Sea-3 has no control over the railcars until they are parked at the site and that the Federal Railroad Administration and others govern safety practices for how railroads operate.[159] He described his understanding of how hazardous materials are transported by railcars with unique coupling devices that protect against impacts.[160] He also referenced MARSEC security that is applicable at ProvPort and will apply when the railcars are on site.[161] He stated that MARSEC is governed by Coast Guard regulation, describing MARSEC standards as being more rigorous than chemical facility anti-terrorism standards.[162] He testified that the Federal Railroad Administration governs the railcars during transport.[163]

Mr. Willis also testified regarding the railcar transportation occurring within ProvPort, stating that the speed of the railcars is restricted to 15 miles per hour.[164] He testified that the slower the speed, the less risk of derailment. In addition, this means that the probability of a cascading impact is very remote.[165]

Edmund Millar, the Attorney General's witness, provided testimony regarding the risks associated with transport of LPG by railcar. He testified that bringing in rail deliveries create a new and significant risk of fire, explosion, and vapor cloud dispersion along rail routes.[166] He stated that the risks associated with rail deliveries are different and more dangerous than marine deliveries because of movement through densely populated neighborhoods and travel with no

[158] Hr'g Tr. at 45 (Jan. 18, 2022).
[159] *Id.* at 45-46.
[160] *Id.* at 48.
[161] "MARSEC" refers to the Coast Guard security system – MARitime SECurity.
[162] *Id.* at 50. "MARSEC" refers to the Coast Guard security system – MARitime SECurity.
[163] *Id.* at 51.
[164] *Id.* at 57.
[165] *Id.*
[166] Millard Pre-filed Test. at 2-3 (Nov. 12, 2021); Hr'g Tr. at 23-24 (Feb. 28, 2022).

escort.[167] He maintained that rail transport is riskier than truck because railcars move more slowly allowing for more effective terrorist planning and targeting and because they traverse through major cities.[168] He also discussed the ease of access terrorists woud have with the opening and closing of the gates to allow railcar access to the facility and to the area outside of the facility.[169] He asserted that Sea 3 did not look at the potential for increased transportation risks.[170]

The City's witness, Dr. Carla Decerbo, Director of the Providence Emergency Management Agency, noted that the Sea 3 facility is 500 feet away from a large chemical storage facility and a mile away from the LNG facility.[171] She stated that this creates the potential for cascading events.[172] She expressed that increased transport and storage of LPG would increase the likelihood of risks associated with the transport and storage.[173] She testified that Providence's Hazard Mitigation Plan does not include rail delivery of LPG.[174] Changes or additions to transportation mode or to storage quantity would require Providence to update its hazard mitigation planning.[175] Ms. Decerbo stated that regardless of Sea 3's compliance with safety protocols and standards, the fact that there are increased transports and railcars coming in increases the risk of what is already happening in the city.[176] The increased risk to an event occurring also includes a railcar travelling through the city.[177]

[167] Millar Pre-filed Test. at 5 (Nov. 12, 2021).
[168][168] *Id.* at 8.
[169] Hr'g Tr. at 29-30, 37 (Feb. 28, 2022).
[170] *Id.* at 71.
[171] Decerbo Pre-filed Test. at 4 (Nov. 8, 2021).
[172] *Id.*
[173] *Id.* at 6.
[174] Hr'g Tr. at 44-45 (Mar. 31, 2022).
[175] Decerbo Pre-filed Test. at 5 (Nov. 8, 2021).
[176] Hr'g Tr. at 76 (Mar. 31, 2022).
[177] *Id.* at 77.

3. There is a Significant Risk to Public Safety Transporting LPG by Rail

As explained elsewhere, the Petitioner carries the burden of proof. Thus, in the context of rail use, the Petitioner carries the burden to prove there is no significant risk to public safety associated with bringing sixteen railcar deliveries of LPG per day into ProvPort via the rail system as described.

Petitioner's primary position regarding the significance of risk and impact relating to safety can be summarized into six basic categories of argument:

(1) rail is already used in ProvPort to transport and deliver hazardous substances safely,

(2) the level of federal regulations and federal oversight makes rail deliveries reasonably safe,

(3) railroads exercise a great deal of care in handling hazardous materials,

(4) the structural integrity of the railcars makes them effective and safe to prevent severe events,

(5) the slow speed of travel along the spur in ProvPort makes severe accidents highly unlikely, and

(6) all safety measures taken together make the probability of a significant safety impact highly improbable.

In evaluating Petitioner's arguments regarding the significance of the risk, the Board refers to the risk formula that was articulated by the City's witness, Dr. Decerbo. As she stated, "the formula of risk equals probability times severity."[178] She stated that probability relates to the likelihood of an event taking place, while "severity equals magnitude minus mitigation."[179] She further elaborated, stating: "magnitude looks at the potential impacts of the particular identified

[178] Hr'g Tr. at 41 (Mar. 31, 2022).
[179] *Id.* at 41-42.

hazard, and mitigation gets at the preparedness measures that have been taken to try to minimize the level of impact."[180]

With respect to the first point that rail is already used by other businesses in ProvPort, the argument is not persuasive and not related directly to the Board's jurisdictional inquiry. The Board does not have jurisdiction over those activities. While the fact that there have been no significant accidents using rail deliveries for other hazardous substances may be relevant to the probability of rail accidents in ProvPort, it is otherwise of limited probative value. Simply because others have had no incidents shipping their products does not necessarily change the risk profile for deliveries of LPG over the same rail spur.

With respect to the presence of federal regulations, the existence of regulations in and of themselves does not address the severity of the risk. It may be a factor in evaluating likelihood that an accident would occur, but it does not change the severity of risk of bringing sixteen railcars per day into ProvPort near a residential neighborhood. The Attorney General's witness Millar raises important points of risk in this regard.[181]

Petitioner's argument that the railroad companies exercise a high degree of care when handling LPG railcars also is unpersuasive when evaluating the risk to the nearby residents.[182] It may be that railroads exercise great care, but this does not address the severity of risk. Petitioner argues that the structural integrity of railcars and the slow rate of speed at which the railcars will travel as they pass by the residential area provide a significant degree of safety measures. If this activity was occurring at a much greater distance from the residential neighborhoods, it might be

[180] *Id*. at 42.
[181] Hr'g Tr. at 23-38 (Feb. 28, 2022); Millar Pre-filed Test. (Nov. 12, 2021).
[182] Mr. Willis' testimony regarding Sea-3's lack of control over the railcars until they are parked at the site has no relevancy to the determination of impact, since the Board evaluates impacts caused by the project, even those external to the project site.

persuasive. But the relatively close distance between the rail spur over which the railcars pass each day and the residential homes in the area suggest a degree of severity of risk which requires further review. In addition, the frequency of deliveries of these vehicles passing in close proximity impact the risk equation. As Dr. Decerbo opined:

> [R]egardless of the safety measures that they have stated they intend to take, the increased risk is already going to be happening in the city by the sheer number of transports and the sheer number of railcars coming in.[183]

Petitioner's other primary argument relates to overall probability. Specifically, given all safety measures, regulations, and degrees of care that will be taken, Petitioner maintains that the probability of a severe event is so low as to equate to a meteor strike.[184] The reference to a meteor strike was made by Petitioner's key witness on railcar safety and has a superficial appeal. But there are two problems with it. First, it was not supported by any quantitative probability analysis. Second, it is the type of hyperbole that could be used to argue in favor of avoiding regulation of many hazardous activities.

The significance of risk in the context of this case, however, is weighed against the fact that there will be sixteen cars per day of transports in and out of the area in proximity to the residents in that area. It may be that Petitioner in a full licensing proceeding could address the risks in such an effective manner that one might be able to conclude in a future proceeding that the risk to public safety – weighed against all the other factors that are relevant in a licensing proceeding – support a conclusion that the railcar deliveries will not rise to the level of an unacceptable harm to the environment. But when considering the jurisdictional question, it cannot be said that the risk mitigation as described at such a generalized level by Petitioner at this stage

[183] Hr'g Tr. at 46 (Mar. 31, 2022).
[184] Hr'g Tr. at 277 (Jan. 18, 2022).

is so clear and apparent that the Board can objectively conclude with a reasonable degree of confidence that the risk has been effectively addressed without need of any further inquiry.

Finally, the process through which the railcar deliveries will be processed involve railcars being staged at an unspecified location a mile and a half away from the project site.[185] The railcars will be parked offsite for unspecified periods of time. This staging activity raises other questions of significant risk to the surrounding community which was not addressed by Petitioner, other than to state Petitioner has no control over the railcar until it is parked on its property.

4. Risks of Offloading and Handling On-Site

In addition to the risks identified which related to the deliveries by rail, another set of risks exist on site as the new system offloads the LPG from the railcars and the infrastructure processes the LPG for ultimate loading at the truck racks. After the railcars arrive at the site with LPG, the LPG will be offloaded via new infrastructure that is substantially separate from the existing facility. Each delivery day, sixteen railcars will need to be interconnected to the infrastructure. This will significantly increase the frequency of LPG offloading activity compared to the current marine-based delivery system which occurs fewer times per year.[186] In turn, receiving railcar shipments as a significant source of LPG will increase the frequency of connecting and disconnecting transfer lines when offloading LPG from the cars to the bullet tanks.[187] The LPG will be transferred from each railcar into six 90,000-gallon horizontal bullet tanks via a piping manifold. The infrastructure then transfers the LPG directly from the bullet tanks to the truck racks.

[185] *Id.* at 160 (Jan. 18, 2022).
[186] Site Report Ex. Sea 3-9 at 3, 6.
[187] Hr'g Tr. at 94-96 (Jan. 18, 2022).

During the last phase of the construction project, Petitioner proposes to construct a refrigeration system which permits the LPG that is received from the railcars to be transferred into the larger pre-existing cold storage tank, if needed. The addition of the new facilities is expected to increase significantly the number of daily trucks to the site.[188]

The primary argument put forth by the Petitioner to support its position that there are no significant risks being created through the addition and operation of the new infrastructure is that there are regulations in place which address risks and Petitioner will comply. Petitioner also points out that there will be numerous safety systems in place to address the risks and severity of potential accidents or releases of LPG during the processes. Further, Petitioner asserts that it has a history of compliance with the regulations at the current facility and that such compliance will continue with the new project. Moreover, Petitioner argues that the worst-case scenario of an event remains unchanged by the addition of the rail deliveries from the worst-case scenario that currently exists.

Petitioner's arguments, however, miss an important component of risk which relates to the probabilities of occurrence due to the increased frequency of risk-creating activity on site. Each delivery day, Sea-3 would have sixteen 30,000 gallons per railcar transferred on site.[189] Each railcar would need to be offloaded with three transfer line connections, two for liquid and one for vapor.[190] The total number of gallons offloaded on a delivery day would be nominally 480,000 gallons.[191] During offloading, the three transfer lines would have to be connected and disconnected. This results in 3 connections plus 3 disconnections per railcar per day. Counting all sixteen railcars being processed, mathematically it calculates to 48 connections and 48 disconnections in a delivery day. While Petitioner undoubtedly will be taking steps to train its

[188] The trucking increase will remain within current permitted trucking limits.
[189] Hr'g Tr. at 32 (Jan. 18, 2022).
[190] *Id.* at 95.
[191] *Id.* at 41.

employees and put in place processes that are designed to comply with existing regulations, the addition of the new project will increase the frequency of human interaction which, in turn, affects the probabilities of human error which, in turn, increases the probabilities associated with risk.

While it may be true that the worst-case scenario as defined by the Petitioner may not change from the addition of the new facilities, this argument also misses the point. There is an entirely new process of offloading that is being added to the site that does not exist today. This new activity will require amendments to Sea-3's risk management plans because there are new risks being placed into the risk management equation.[192]

With respect to fire safety, the Petitioner's witness, Dr. Robert Palermo, was asked:

> Q. Does the Rail Incorporation Project have a significant impact on the existing safety concerns and inherent risks in the operation of the terminal?
>
> A. There will be no significant impact, as long as the SEA-3 facility is operated in conformance with the applicable regulations.[193]

The answer given to this question illustrates the problem for Petitioner's evidentiary case. To prove its case that there will be no significant risks of impact, Petitioner is essentially relying on the assumption that the facility will always operate in conformance with existing regulations which already are designed to assure safety. In other words, since there are regulations that are designed to mitigate the risks inherent with the handling of LPG and the Petitioner intends to comply with all those regulations, there is no significant risk to public safety.

Mr. Millar provided both written and oral testimony addressing the on-site risks associated with the proposed modifications. He noted the risk of fire, explosion, and flammable vapor cloud dispersion at the site and expressed that the Petitioner had not presented any evidence of the

[192] *Id.* at 144.
[193] Palermo Pre-filed Test. at 13 (Nov. 12, 2021).

potential consequences, estimated distances, or accident impacts of any of these.[194] He maintained that there are serious release risks associated with the proposed offloading and transloading at the site and the danger and the potential huge LPG release disaster outcomes possible from the onsite operations and storage.[195] Mr. Millar expressed that a vapor cloud explosion would not be contained at the facility and discussed the cascading potential.[196] He also addressed the danger and increased risk to workers and to emergency personnel.[197]

While there is no reason to doubt the sincerity of Petitioner's intentions or its capability to operate as safely as possible, Counsel for Providence identified the implications if the Board accepted this argument: "Is not every energy facility in the state going to make the representation if this one works that there will be no impact because trust us, we're going to minimize it, we have it under control, we don't need a license, we don't need your review and we don't need to file an application because we're managing the impacts."[198] Further, as counsel for the Attorney General stated in closing argument, the statement of Dr. Palermo – instead of satisfying the safety concern – "inherently implies that the underlying activity is significantly impactful and that these impacts must be properly accounted for and evaluated."[199]

Just as the Board concluded with respect to the use of the rail system, the Board draws the same conclusion regarding on-site safety. It cannot be said that the Petitioner's assurances that it will comply with existing regulations and operate safely provides sufficient evidence of risk mitigation that is so clear and apparent that the Board can objectively conclude with a reasonable degree of confidence that the inherent risks associated with the on-site operations have been

[194] Millar Pre-filed Test. at 3 (Nov. 12, 2021).
[195] *Id.* at 4, 9; Hr'g Tr. at 31, 35-36 (Feb. 28, 2022).
[196] Millar Pre-filed Test. at 9, 11; Hr'g Tr. at 23-29 (Feb. 28, 2022).
[197] Millar Pre-filed Test. at 6.
[198] Hr'g Tr. at 158-59 (Mar. 31, 2022).
[199] *Id.* at 126.

effectively addressed without need of any further inquiry. For the reasons set forth above, it is clear to the Board that the risks associated with offloading the LPG from the railcars and associated operations on-site create a significant risk to public health, safety, and welfare.

CONCLUSION

As detailed in the findings set forth above, the Board finds that both the risk to the environment and to public health, safety, and welfare support the conclusion that the modifications proposed by Sea 3 to its existing LPG facility constitute an alteration. A licensing proceeding will allow the Board the opportunity to conduct a complete investigation of the proposed modifications and their effect on the state's greenhouse gas reduction targets as set forth in the Act on Climate, the impacts on the surrounding community, and the need for the modifications. The Board will also be able to engage the expertise of other agencies. Only through a full licensing proceeding will the Board be able to thoroughly review and ascertain whether the risks will cause unacceptable harm to the environment.

Accordingly, it is hereby

(153) ORDERED:

The Energy Facility Siting Board finds that Sea 3's proposed modifications to its existing facility constitute an alteration of a major energy facility as defined by R.I. Gen. Laws § 42-98-4(b) in that it will result in a significant impact on the environment or public health, safety, and welfare and that Sea 3 must obtain a license from the Energy Facility Siting Board prior to incorporating the rail expansion project into the existing facility. The Petition for Declaratory Ruling is denied.

DATED AND EFFECTIVE AT PROVIDENCE, RHODE ISLAND ON APRIL 21, 2022, PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED MAY 31, 2022.

ENERGY FACILITY SITING BOARD

Ronald T. Gerwatowski, Chairman

Meredith Brady (May 31, 2022 12:17 EDT)

Meredith E. Brady, Member

Terrence Gray, Member*

*Board Member Gray did not participate in the proceedings.

NOTICE OF RIGHT OF APPEAL PURSUANT TO R.I. GEN. LAWS SECTION 42-98-12, ANY PERSON AGGRIEVED BY A DECISION OF THE BOARD MAY, WITHIN TEN (10) DAYS OF THE ISSUANCE OF THIS ORDER PETITION THE SUPREME COURT FOR A WRIT OF CERTIORARI TO REVIEW THE LEGALITY AND REASONABLENESS OF THIS ORDER.