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June 15, 2012

Searsport Planning Board
c/o J. Bruce Probert, Chair
Town of Searsport
1 Union St.
PO Box 499
Searsport, ME 04974

RE: DCP Midstream Application

Dear Bruce:

As a follow up to the meeting on Monday, I want to raise a few items of concern as we move forward with the Planning Board's review of DCP's project. I appreciate that the Planning Board is working hard to conduct an open process and I want to ensure that you and the other Board members have access to all relevant information you need in order to evaluate compliance with the performance standards in your ordinances.

I am concerned, however, that opponents of the project are taking advantage of the "open to the public" portion of the Board's meeting agenda in a manner that is prejudicial and disruptive. Of particular concern is what occurred at the meeting Monday, which jeopardizes what has until now been a fair and impartial process. That concern is underscored by the fact that a majority of the people making substantive comments on the application were non-Searsport residents from Islesboro and other towns. DCP asks that the Board please consider the following issues as we move forward.

A. Inappropriate and Untimely Public Comment

Public comment taken this past Monday was concerning for several reasons. First and foremost the Planning Board has not yet scheduled a public hearing on DCP's application, so the Board should not be taking substantive testimony on the proposed project. As you know, permit decisions must be made on the record properly before the Planning Board, which is the purpose of a public hearing; consideration of substantive comments of the type made Monday night, outside the public hearing, is impermissible and risks the Board reaching conclusions based on information outside the hearing record. See, e.g., City of Biddeford v. Adams, 727 A.2d 346, 349 (Me. 1999) (holding that an administrative board acts improperly if it considers extrinsic evidence while reaching its decision); Adelman v. Town of Baldwin, 750 A.2d 577, 582 (Me.

2000) (stating that it is impermissible for a board member to rely on extrinsic evidence when adjudicating issues before the board). Of particular concern was the inaccurate and grossly exaggerated nature of the comments with respect to safety, especially by the spokesperson for Islesboro—the Coast Guard and the Army Corps have already fully evaluated this issue and concluded that the Project will be operated in a safe manner and the Planning Board has voted to retain a consultant to help it evaluate the technical aspects of the Project.

Although we appreciate that the Planning Board's prior practice has been to permit comment on any issue during the "open to the public" period in your meetings, the public will have a full opportunity to comment on the project after the Board has assembled all relevant information, including balloon tests, 3D models, and third party reviews. The comments made Monday night were simply inappropriate and premature and cast a shadow on the process which we hope can be eliminated, but at a minimum, we ask that the Board make clear that, in order to prevent any continued due process problems, further substantive public comment will be taken only during the public hearing.

Monday's public comment, moreover, was characterized by yelling, insults and outbursts, frequently by individuals who do not live in Searsport. Although we do not object to the Board hearing from residents of other towns, these individuals do not have legal standing under your ordinances and the performance standards in Searsport's ordinances do not regulate development or property rights or any other issues in other towns. There are state and federal permitting proceedings (in which these individuals have participated, and continue to participate) and the Searsport Planning Board is not responsible for addressing these concerns. It was especially distressing to have been prevented by the crowd outbursts from raising our objections to the problem posed by what was being said in the public comment period, a concern we raised with counsel for the Board both before and during the meeting Monday night.

B. <u>Requested Information Must Be Relevant to Performance Standards</u>.

The Board is currently deciding on the number and scope of required third party reviews. As noted in our meetings, these third party reviews should be designed to provide the Board with information helpful to its review of the performance standards. As we have stated repeatedly, DCP wants to ensure that the Planning Board has all information relevant to its review of your standards. We have some concerns, however, regarding the proposed scope of the "economic study," as set forth in the Board's recent completeness determination. Many opponents of the project are pressuring the Board to commission a study that is far broader than what is necessary.

We understand that the Board has concluded that the economic study is necessary to evaluate the "economic" impacts of the project under the "undue adverse effect" standard. As you determine what type of study is necessary to evaluate this standard we think it is important to consider two issues. First, which "economic" issues are subject to the "undue adverse effect" standard, such that an economic study would provide relevant information? Second, is it permissible for the economic study to evaluate general impacts of a 135-foot high tank or does the study have to be focused on the specific impacts from this proposed facility?

I. Which "Undue Adverse Effect" Standards Have an Economic Aspect?

The phrase "undue adverse effect" is used numerous times in the Site Plan Review performance standards, but only three standards arguably have economic aspects: impact on municipal services, public utilities, and property values. See Site Plan Review Ordinance § VI(6).[1]

Given this, the proposal to include an assessment on "tourism" is inappropriate, as there are no performance standards that address tourism. As the Planning Board will not be evaluating the project's impact on tourism, a study evaluating such impacts is not helpful and a waste of both the Planning Board's and DCP's time and resources.

Opponents of the project appear to be suggesting that because, in their mind, this project will hurt tourism—which will hurt local businesses—which will reduce tax revenue—which will impact "municipal services" or "property values," including tourism in the evaluation of "undue adverse effects" is appropriate.[2] However, the courts have been clear that anytime a standard of "no unreasonable adverse effect" is applied, such a standard must be sufficiently specific and detailed so that applicants know what is required in order to comply with the standard. See Kosalka v. Town of Georgetown, 752 A.2d 183 (Me. 2000) (standard that required project to conserve "natural beauty" unconstitutionally vague as it lacked cognizable, quantitative standards); Wakelin v. Town of Yarmouth, 523 A.2d 575 (Me. 1987) (ordinance requirement that project be "compatible with the existing uses in the neighborhood" was unconstitutionally vague as the ordinance did not include quantitative and specific standards); Stucki v. Plavin, 291 A.2d 508 (Me. 1972) (applicant must understand what information is required and what specific standards apply or the ordinance is unconstitutionally vague). Because the link between tourism and "municipal services" is so attenuated, and none of the performance standards can reasonably be read to include impacts on tourism, the opponents' interpretation of the Town's ordinance is likely unconstitutional ..

With regard to property values, the ordinance is clear that (1) impact to property values is not town-wide, but specific to certain parcels and (2) the burden is on the property owner, not DCP, to show that the project will "substantially change" the value of property. See Section II, "Property Value." DCP can respond, if it chooses, to any specific claim, but is not required to evaluate the impact on the entire Town's property value base, for property tax or any other reason. Although it might be reasonable for the Town to retain an independent expert to evaluate a dispute between DCP and a specific landowner on whether the project will "substantially change" someone's property value, a Town-wide assessment of impacts would provide no useful

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[1] The other issues are non-economic, including surface water drainage, scenic and environmental resources, lighting, water quality/supply, and erosion. See Site Plan Ordinance, § VI(5), (8), (9), (12), (13), (14).

[2] Please note that although we do not believe that an economic impact study is required for reviewing this project, we have submitted a report that shows that the impact of DCP's project on the Town's tax structure, under any scenario, is positive.

information in resolving such a dispute, and, for the reasons above, is not relevant to assessing impacts on municipal services.[3]

2. Information Regarding General Economic Impacts of A Large Bulk Fuel Tank Are Not Relevant—Only Information Regarding Specific Impacts of DCP's Project.

Even assuming that an economic study might provide relevant information regarding impacts on municipal services and property values, the answer to the second question is that a broad-based economic impact study, evaluating the impacts of this type of development, will provide no relevant or even helpful information to the Board.

This is because the Maine Supreme Court has held that a planning board cannot base an "undue" or "unreasonable" adverse effect determination on the general characteristics of a project when such characteristics are common to any project of that type. See Davis v. SBA Towers II, LLC, 979 A.2d 86 (Me. 2009). In the Davis case, the Town of Lincolnville denied a permit for a 195-foot high cell tower on the basis that the tower was "visible above the tree line," which was one of the ordinance factors in assessing visual impacts. The Supreme Court determined that because the "tree line" was never higher than 50-80 feet, and the zoning ordinance permitted 195-foot high cell towers, every tower of that height would necessarily be "visible above the tree line." As a result, the planning board could not reject the application on the basis that the tower was so visible, even though this was one of the applicable criteria. In other words, because the ordinance permitted cell towers at that height, the planning board could not find an undue adverse effect based on a characteristic (taller than the tree line) that would be common to all towers. See Davis, 979 A.2d at 93-94. To find otherwise would be to prohibit the type of use (195-foot high cell towers) expressly allowed by the zoning ordinance.

As with the residents of Lincolnville, the voters of Searsport have determined, in enacting the Land Use Ordinance, that DCP's proposed Bulk Fuel Distribution Facility is an appropriate use in the industrial zoning district. See Land Use Ordinance at § IV. Further, in 2011 Searsport voters amended the Land Use Ordinance to raise the height limit for Bulk Fuel Storage Tanks in the Industrial District to 150 feet. As a result, the mere fact that DCP has proposed a 135-foot high Bulk Fuel Storage Tank in the Industrial District could never be the basis for the Board finding that there was an "undue adverse effect," at this project, at this height, is an allowed use. See id. [4]

Accordingly, to the extent the Board seeks a study of the economic impacts of the project (regarding municipal services or any other issue), such a study cannot evaluate the general

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[3] DCP believes the best way to evaluate whether the project will result in an undue adverse effect on municipal services is to ask the Town departments, many of whom have already concluded the project will not have any adverse impact, let alone an "undue" adverse effect.

[4] Further, as more evidence that Searsport residents do not believe that a 135-foot high LPG tank constitutes an "undue adverse effect" on the Town, the voters soundly rejected a recent attempt by Thanks But No Tank and other opponents to impose a moratorium on this project.

impacts of the project on the broader issues of property tax burden, tourism, and Town-wide property values. The study cannot evaluate the impact of this type of fuel tank or its height on any Town-wide or, even more inappropriate, "region-wide" basis. Even if the Board could identify a qualified consultant to provide relevant information on such a scale, the Planning Board could never rely on such information in evaluating whether this project constitutes an "undue adverse effect."[5]

In closing, DCP has proposed to construct a bulk tank storage facility in exactly the area of Town the Land Use Ordinance has designated for such a use. Further, the Town just recently amended its Land Use Ordinance to permit a tank structure of this height and overwhelmingly rejected an attempt to place a moratorium on this project. Although we appreciate that the Planning Board must ensure that this project will not result in an unreasonable and adverse impact to certain resources, it is critical that the Board's requests for information, including its retaining of third party experts, be limited to identifying such unreasonable adverse effects, and not include information unrelated to specific performance standards.

Thank you for your consideration of these comments.

Very truly yours,

Kelly

Kelly B. Boden

KBB/mtr

cc: Kristin Collins, Esq.

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[5] The proposal by Yellow Wood Associates, therefore, for an eight month study of the "potential impacts of the development on the town and the region," specifically on property values, transportation infrastructure, tourism, businesses, and other town and regional issues grossly exceeds what the Board needs and is irrelevant to its evaluation of any actual performance standard.