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December 6, 2010

Susan Lessard, Chair
c/o Terry Dawson
Maine Board of Environmental Protection
17 State House Station
Augusta, ME 04330-0017

Re: Calais LNG Project Co., LLC and Calais LNG Pipeline Co., LLC

Dear Chair Lessard,

SPB and NN formally oppose CLNG's response to the Board's Show Cause Order. CLNG's failure to show cause requires the Board to deny CLNG's November 23, 2010 request for a fifth continuance and dismiss or return CLNG's application. SPB and NN also oppose CLNG's request for further extension of time to respond to its loss of financial capacity.

This request is far different from the previous four. In those, the applicant's title, right or interest (TRI) in the land for the terminal site, and hence, standing before the Board and the Board's jurisdiction, was not – at least to the Board's and parties' knowledge – in question.[1] Now, the applicant concedes that it no longer has TRI in the land for the terminal *and has not had it for nearly three months*. Furthermore, despite the Chair's Order that CLNG "show cause as to why the applications should remain pending," CLNG failed to respond with any evidentiary or legal support for its position. Indeed, CLNG concedes the present lack of TRI, and offers no proof of how or when that may change. Therefore, SPB and NN ask the Board to deny the relief CLNG requests and, instead, to dismiss or return CLNG's application for lack of TRI and administrative standing.

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1 We now know, of course, that CLNG did not have TRI in the land for the terminal location at the time of its fourth request. CLNG has known since at least August 31, 2010 that it no longer has TRI in the project site. Yet CLNG withheld this development from the Board and parties when it requested a fourth continuance in its September 13 letter. It also chose to omit this development from the Board and the parties at the September 15 in-person conference of counsel, after which it was granted the fourth continuance.

Indeed, CLNG failed to address the matter at all until the property owners themselves, who are not party to this proceeding, notified the Board that the option had expired. CLNG is well aware of two critical obligations here: to maintain TRI throughout this proceeding and to keep the Board informed of material developments during the continuance. In the face of these, CLNG elected to keep the Board and the parties in the dark about this critical development.

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*Also admitted in the State of Maine
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CLNG Failed to Show Cause.

CLNG's November 23 letter is an insufficient response to the Chair's Show Cause Order. The Chair's November 19, 2010 letter was clear. The Chair referenced the undisputed fact that CLNG failed to exercise or renew their Option to Purchase Agreement and therefore lost legal right to the property as of September 1, 2010. The Chair noted that TRI is a "threshold criterion" for processing an application, and directed CLNG's attention to the governing rule: "An applicant must maintain sufficient title, right or interest throughout the entire application processing period." Accordingly, the Chair ordered CLNG to notify the Board of its intent with regard to the pending applications and, if CLNG did not intend to withdraw them, to "show cause as to why the applications should remain pending."

The term "show cause" is a term of art with specific meaning. A show cause order requires the party to whom the order is directed to meet a prima facie burden on the issue that is the subject of the order. *Brennan v. Johnson*, 391 A.2d 337, 339 n.1 (Me.1978) citing *Boyd v. Louisville & Jefferson County Planning & Zoning Comm'n.*, 230 S.W.2d 444, 446-47 (Ky, 1949).

> [T]he term [show cause] has a well understood legal meaning. It is an order requiring a party to appear and show cause why a certain thing should not be done or permitted. It requires the party to meet the prima facie case made by the applicant's verified complaint or affidavit. 60 C.J.S., Motions and Orders, §§ 20, 37(e); 37 Am.Jur., Motions, Rules and Orders, Sec. 38.

Boyd v. Louisville, 230 S.W.2d at 446-47.

Instead of satisfying the well-understood requirements of a show cause order, CLNG submitted a two-page letter *devoid of any evidence of TRI* in the form of an affidavit, other appropriate documents, or other actual proof. Instead, CLNG concedes that it does not have TRI over its proposed terminal site and, once again, says, "Trust us, we're working on it, and we need more time."

CLNG's December 2 letter added nothing more. It merely reported a change in project ownership.[2] CLNG is still trying to "re-secure" TRI. CLNG also failed to provide any indication whatsoever that it has obtained new financial backing or to provide outstanding technical information. Both were required by December 1. The December 2 letter provided zero indication that this project is at all closer to having financial backing. In fact, CLNG stepped backward by requesting a February 15 deadline to provide outstanding information requests relating to the merits.

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[2] CLNG actually had two opportunities to show cause: The November 24 deadline set by the Chair and the originally set deadline of December 1. Both deadlines passed without a single submission of fact.

Of course, CLNG could not possibly provide any real evidence of TRI by the deadline set by the Chair. After flying under the radar for nearly three months, CLNG was exposed by the property owners and forced to concede that it no longer had TRI. CLNG has thus failed to meet its burden under the Chair's Order to show cause as to why its applications should remain pending.

Because CLNG Lacks TRI and Administrative Standing, the Board No Longer Has Jurisdiction.

CLNG now lacks TRI. Maintenance of sufficient TRI is both a requirement of Board rules and a predicate of administrative standing. Standing, in turn, is a jurisdictional requirement. We emphasize that this is not a dispute on the existence of TRI, or management of the Board's docket while other tribunals determine facts relevant to TRI – here CLNG concedes lack of TRI and was unable to demonstrate otherwise in the opportunity to show cause.

SPB and NN have previously argued that CLNG lacks TRI. But the circumstances now are quite different. We are now faced with the undisputed lack of TRI in the very land on which CLNG wishes to build its facility. SPB and NN's prior argument was that the scope of TRI encompassed the ability to ship LNG to the terminal and send gas away from it.[3] The Board disagreed. This time, however, the question involves the land for the terminal itself. Without the land, the terminal cannot be built.

Board regulations require maintenance of sufficient TRI. Site Location regulations require an applicant to demonstrate, as a threshold matter, that it has, "sufficient title, right or interest in all of the property that is proposed for development or use." 96.096 CMR 372.9. The general regulations in Chapter 2 contain the same language.. 96.096 CMR 2.11(D). Both allow TRI to be supported by an option to buy the property.[4] 96.096 CMR 372.9.(b); 2.11(D)(3). The

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[3] Specifically, SPB and NN argued previously that CLNG lacked sufficient TRI absent the ability to ship LNG on tankers to the terminal (based on the position of the United States Coast Guard), and also without the ability to transport the re-gasified product from the terminal to the markets in New England (due to the lack of capacity in the interstate M&NE pipeline).

[4] The Chapter 2 general regulations also provide that an applicant may also prove title, right or interest by providing a copy of FERC's notification of acceptance of CLNG's application for a FERC license. 06-096 CMR 2.11(D). The Site Location of Development Law Chapter 372 regulations, however, do not allow TRI to be shown by means of a FERC notification of acceptance. CLNG is applying for a number of permits, including a Site Law permit, and the Chapter 2 general regulations do not apply to the Site Law application. When another regulation is more specific, the Chapter 2 regulations do not apply: "These rules apply in the absence of procedural requirements imposed by statute or rule. Where other specific procedural requirements apply, those requirements control." 96.096 CMR 2.2(A).

We also note that the reference in Chapter 2 to acceptance of a FERC application likely derives from that agency's jurisdiction over hydro power, which provides for the right of eminent domain. 16

Chapter 2 regulations also provide that – as noted by the Chair and the Carothers – "An applicant must maintain sufficient title, right or interest throughout the entire application processing period." 96.096 CMR 2.11(D).

These regulations accord with administrative standing. The pivotal Maine case on TRI and administrative standing is *Walsh v. City of Brewer*, 315 A.2d 200 (Me.1974). The plaintiff, Thomas Walsh, applied for various permits to develop and operate a mobile home park and spent considerable sums on plans, surveys, and engineering in the process. After the City Council changed the zoning ordinance to preclude the project, Walsh sued the City.

The Supreme Judicial Court of Maine held that Walsh lacked standing to sue the City in court because he never had administrative standing to apply for the permits in the first place. Walsh did not have administrative standing because he did not have TRI in the property he sought to use for the mobile home park. *Id.* at 206-07.

In land-use proceedings, the Court held, standing to be a proper applicant requires an "independently existing relationship to regulated land in the nature of a title, right or interest in it which confers lawful power to use it, or control its use." *Id.* at 207. That relationship to the land is an "indispensible and valid condition for 'applicant' eligibility." *Id.*; *see also Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345, 348 (Me.1995) ("[A]n applicant for a license or permit to use property in certain ways must have 'the kind of relationship to the . . . site' that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks."). Without sufficient TRI, an applicant lacks standing and simply has no place before the Board.

The Court went on to hold that, absent proper applicant standing, it lacked jurisdiction over the matter. "Unless . . . the plaintiff has a relationship to the land qualifying him as a proper 'applicant' under the regulatory ordinances . . . there is absent a necessary condition of . . . subject matter jurisdiction. . . . In short, here, precisely the deficiency constituting plaintiff's lack of standing to sue concomitantly gives rise to a lack of subject-matter jurisdiction in the Court." *Walsh v. Brewer*, 315 A.2d at 210; *see also McNicholas v. York Beach Village Corp.*, 394 A.2d 264, 267 (Me.1978) (lack of standing goes to very jurisdiction of court); *and Nichols v. City of Rockland*, 324 A.2d 295, 296 (Me.1974) ("[S]tanding is a threshold concept dealing with the necessity for the invocation of the Court's power to decide true disputes. . . . Only one who has standing to bring suit may present a properly justiciable controversy to this Court for resolution.").

The fact that CLNG may have once had standing does nothing to impact the fact that is lacks standing now, thus depriving the Board of continuing jurisdiction over CLNG's

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U.S.C. § 814. There is no comparable right of eminent domain to site an LNG import terminal. See generally 15 U.S.C. Chapter 15B. Hence, this method of demonstrating TRI is inapplicable here.

application. Where other land-use applicants let their option expire, they were determined to have no standing and their matters were dismissed. Simply put, CLNG has no standing to seek, and the Board has no jurisdiction to process an application governing land in which CLNG has no interest:

> As we stated recently in *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me.1984), "[s]tanding of a party to maintain a legal action is a 'threshold issue' and our courts are only open to those who meet this basic requirement."
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> To have standing to challenge a municipality's land use regulations, a party must possess sufficient "title, right or interest" in the land to confer upon him lawful power to use it or to control its use. *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me.1974). In the case at bar, the affidavits before this court demonstrate that plaintiffs . . . lack any legal interest in the property that they sought to develop. [Plaintiffs] do not own the site of their proposed motel, although they did for a time have an irrevocable option to purchase the parcel. That option expired on February 1, 1984, and the [plaintiff's] complaint was not filed until February 17. On that latter date, and at all times since, the [plaintiffs] have had no interest in the land adequate to give them standing. Consequently, the action brought by the [plaintiffs] against the Town must be dismissed.

Tisei v. Town of Ogunquit, 491 A.2d 564, 567-68 (Me.1985).

In another case where an option had expired, the applicants' subsequent renewal of the option did not prevent the matter from being dismissed. *Madore v. Maine Land Use Regulation Com'n*, 715 A.2d 157, 1998 ME 178. After LURC rejected their permit application and their option expired, the Madores proceeded to take LURC to court. The trial court dismissed the action for lack of standing because the Madores had not maintained TRI throughout the litigation.

> Immediately after the [trial] court rendered its decision, the Madores wrote a letter to the court suggesting the high likelihood that a renewed agreement could be secured and requesting that the court accept it into the record when filed and reconsider its dismissal of the complaint. The Madores then obtained a renewal of the agreement and sent it to the court with another letter requesting the same relief. Treating these letters as motions for reconsideration, the court denied the motions in a more detailed written order of dismissal. This appeal followed.
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> Here, the Madores do not dispute the court's findings that they did not hold the requisite interest in Lemoine's property when they filed their complaint, did not renew that interest during the briefing period, and did not hold that interest on the day of the hearing in the Superior Court. At the hearing, the Madores

> asserted that because they had lost before LURC and might also lose on appeal, they should not be required to expend the funds necessary to renew the agreement to purchase. This argument exposes the flaw in their efforts to proceed without the necessary interest. While it will always be preferable from a financial perspective to determine whether an expenditure is justified by obtaining a court ruling before incurring the expense, such an approach would, in effect, transform the courts into advisory bodies. Hence we have consistently held that a party may not seek judicial (or administrative) action concerning land use without having an interest in the property at issue. *See Halfway House, Inc.*, 670 A.2d at 1379; *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me.1974). Absent that interest, the applicant does not present an actual controversy to be resolved by judicial action.
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> The court, however, was required to act on the facts before it, and not on an agreement that may or may not be renewed in the future. *See Campaign for Sensible Transp.*, 658 A.2d at 215. Indeed, if the agreement could so readily have been renewed, the Madores could have done so once the intervenor brought the significance of its lapse to their attention. The suggestion that a court should act on the merits of an otherwise nonjusticiable matter because the facts known to the court at the time of its action may change in the future is antithetical to the requirement that courts act only on real controversies before them.

Madore v. Maine Land Use Regulation Com'n, 715 A.2d 157, 1998 ME 178, ¶¶ 6, 9, 10.

In sum, CLNG lacks standing, pure and simple. Administrative standing is a threshold, legal requirement for CLNG to appear before the Board. Maintenance of sufficient TRI is a requirement of both administrative standing and Board rules. CLNG previously demonstrated sufficient TRI by an option on the property, but it has since lost that option. When the Board and parties finally were made aware of CLNG's lack of TRI, the Board Chair gave CLNG an opportunity to show cause as to the threshold requirement. CLNG failed. Therefore, CLNG no longer has standing to invoke the Board's jurisdiction, and its applications should be dismissed or returned.

The following provision in Board TRI rules does not change this analysis or conclusion: "The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest." 96.096 CMR 2.11(D). The case law shows that Board discretion is limited by the doctrines of administrative standing and jurisdiction. Here, all parties concede that CLNG has no TRI in the site land itself. The Board, then, does not have the discretion to maintain jurisdiction over this matter.

CLNG Cannot Overcome a Lack of TRI and Standing.

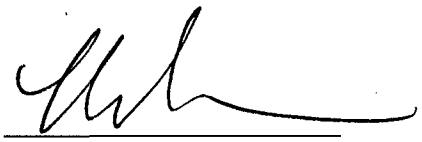
Instead of evidentiary or legal support, CLNG states that the project has been "in suspended animation since mid-August and the fact that title, right or interest has not been maintained during that entire timeframe has not impacted any party, the Department or the Board." This is an audacious statement. CLNG *chose not to inform* the Board, Department, and parties about the loss of TRI. CLNG *chose not to inform* the Board, Department, and parties that it no longer had standing and was in violation of Board rules. Continuance or not, CLNG was obliged to keep the BEP informed of such material and jurisdictional facts. CLNG's lack of disclosure was not only wholly self-serving but also showed stunning disregard for this Board's authority and the parties' rights. CLNG singlehandedly manufactured the scenario which, it now claims, "impacted" no one. Had CLNG been forthcoming, SPB and NN would have immediately requested that CLNG's applications be dismissed or returned at that time for lack of TRI, standing, and jurisdiction.

CLNG also reasons that its applications should remain pending because it is still trying to secure financing so that it could, in turn, attempt to re-secure title, right or interest, that it will have the burden of proof of TRI at trial, and that withdrawal or dismissal now would waste resources. These arguments are wrong and irrelevant because CLNG failed to show cause and provide support of TRI and administrative standing, so the Board has reached the end of its jurisdiction. Further, SPB and NN members are prejudiced each day that these applications are in "suspended animation" – both directly, by incurring legal fees in responding to each new request for a continuance, and indirectly, by putting personal and business matters on hold – all for a project without sufficient basis, or TRI. As a practical matter, we are well past the time when keeping this matter on hold saves resources.

Finally, even if CLNG claims that it may re-secure TRI in the near future, SPB and NN request the Board to return or dismiss this application. By December 1, CLNG was to report on its new financial backing and submit the outstanding technical information to the Board, a deadline the Chair set specifically in order to accommodate both of those developments. CLNG has done neither. Instead, it asks for yet another extension. SPB and NN spent the first half of 2010, due to CLNG's repeated and urgent requests for an expedited docket, scrambling to develop its case and prepare for hearing. SPB and NN have now spent the second half of 2010 attending to CLNG's repeated requests for extensions, and CLNG's consistent failures to meet those deadlines. Furthermore, CLNG has shown disrespect to the Board, the parties, and this process by asking for additional relief and consideration in September while simultaneously withholding material and unfavorable information from everyone involved. There must be an end to this process.

Because this issue goes to the heart of the Board's jurisdiction, SPB and NN request that this issue be considered by the whole Board and that CLNG's applications be dismissed or returned.

Sincerely,



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