



# CITY OF PORTSMOUTH

LEGAL DEPARTMENT

Robert P. Sullivan, City Attorney – 603-610-7204 (Direct Dial)  
Suzanne M. Woodland, Deputy City Attorney – 603-610-7240 (Direct Dial)  
Kathleen M. Dwyer, Assistant City Attorney – 603-427-1338 (Phone/Fax)

October 22, 2015

**EMAILED to [pamela.monroe@sec.nh.gov](mailto:pamela.monroe@sec.nh.gov)**

Martin P. Honigberg, Chairman  
Alex Speidel, Acting Chairman  
NH Site Evaluation Committee  
NH Public Utilities Commission  
21 S. Fruit Street, Suite 10  
Concord, NH 03301

**RE: SEC Docket Number 2015 – 01  
Request of SEA-3, Inc. for Exemption from the Approval and Certificate  
Provisions of RSA Chapter 162-H**

Dear Chairman Honigberg and Acting Chairman Speidel:

Enclosed for filing is the City of Portsmouth's Memorandum on Federal Preemption in the above-referenced matter.

Thank you for your assistance.

Sincerely

Jane Ferrini, Staff Attorney  
City of Portsmouth

enclosure

cc: Pamela G. Monroe, Administrator - SEC (emailed and mailed)  
Service List (emailed)  
John P. Bohenko, City Manager  
Robert P. Sullivan, City Attorney

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**SITE EVALUATION COMMITTEE**  
**OF THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

**In the matter of the Application of Sea-3, Inc.    SEC Docket No. 2015-01**  
**Request for Exemption**

**CITY OF PORTSMOUTH'S MEMORANDUM ON FEDERAL PREEMPTION**

NOW COMES the City of Portsmouth, by their counsel, and respectfully submits this Memorandum on Federal Preemption and submits the following:

The Interstate Commerce Act ('the Act'), as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA) provides that the Surface Transportation Board has exclusive jurisdiction over railroad matters and Section 10501 (b) provides that 'the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.' Section 10501 (b)'s purpose is to prevent a "patchwork of local regulation from unreasonably interfering with interstate commerce." Boston and Maine Corporation and Springfield Terminal Railroad Company- Petition for Declar. Order, Finance Docket No. 35749 at 3 (S.T.B. July 9, 2013). Interference with interstate commerce can be direct or indirect.

The City anticipates that Sea-3 will claim, in the first instance, (and parenthetically, incorrectly) that the Sebago Safety Study is an impermissible study of the rails which is preempted by the Act and under the exclusive jurisdiction of the Surface Transportation Board. The City also anticipates that Sea-3 may argue that any

recommendation resulting from the Sebago Safety Study may be an unauthorized preclearance requirement that is expressly preempted by the Interstate Commerce Act. By way of explanation, the Surface Transportation Board has found preclearance requirement could take the form of either a permitting requirement or a preclearance requirement like the issuance of an environmental permit, building permit or zoning ordinance. Green Mtn. R. R. Corp. V. Vermont, 404 F.3d 638, 642-643; CSX Transportation, Inc.- Petition for Declar. Order, Finance Docket No. 34662 at 3 (S.T.B. May 3, 2005). The Sabego Safety Study makes no such recommendation for any type of preclearance requirement.

The Sebago Safety Study is an aid to this Committee in evaluating whether the Sea-3 proposal benefits public health and safety pursuant to RSA 162-H:1. Part of the Study is an evaluation of whether Pan Am, the rail line that services the Sea-3 site, has complied with federal requirements; this analysis is not an impermissible interference with rail traffic or commerce or a preclearance requirement.

The State, like cities and towns, is able to exercise its police power over certain sites if the State and local regulation pass a two-part test: “(1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads” New York Susquehanna and Western Railway Corporation v. Jackson, 500 F3d 238 (3<sup>rd</sup> Cir. 2007). “[T]he touchstone is whether the state regulation imposes an unreasonably burden on railroading.” Id. at 253. In certain cases, the exercise of local police power will not be allowed if the provisions are typically allowable but are subject to exclusive discretion or may cause unlimited delay to rail operations. This is best expressed in Green Mountain R.R. Corporation v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005), which states:

[N]ot all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety. It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, can be approved (or rejected) without the exercises of discretion on subjective questions. Electrical, plumbing and fire code, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

It bears emphasis that no data cited or issue addressed by the Sebago Safety Study and no factual assertion, recommendation or conclusion made by the Sebago Study burdens a railway or a railway operation or could be classified as a preclearance requirement. The Sebago Safety Study does not request a cease and desist order prohibiting rail traffic to warehouse because zoning prohibits use of land as freight yard. See Boston and Maine Corporation and Springfield Terminal Railroad Company, Finance Docket No. 35749 (S.T.B. July 19, 2013). The Sebago Safety Study does not require or seek a pre-construction preclearance environment permit. Green Mountain Railroad Corporation v. State of Vermont, 404 F.3d 638 (2<sup>nd</sup> Cir. 2005). The Sebago Safety Study does not involve an ordinance provision that requires a discretionary permit limiting the number of trucks leaving Sea-3's facility or passing through the City. Norfolk Southern Railway Company v. City of Alexandria, 608 F.3d 150 (4<sup>th</sup> Cir. 2010). Nothing in the Sebago Safety Study can be inferred to either burden railway operations or impose any preclearance requirements.

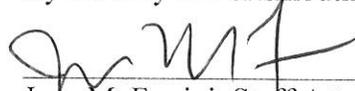
Admittedly, Congress granted the Surface Transportation Board broad authority over the rails. However, it was not the intent of Congress to stifle or prevent the State's separate and legitimate inquiry regarding the safety of the site and the rails in order to

understanding the consequences to the public's health and welfare of the site expansion, including railway operations. Sea-3 may not use ICCTA preemption to ward off legitimate inquiry by this Committee in order to evaluate how the site expansion impacts public health and safety. The Sebago Safety Study reviewed and opined on the railroad's compliance with relevant federal regulations. This analysis, and the Committee's reliance on it in considering Sea-3's Request for Exemption, is appropriate.

Therefore, the City requests that the Committee deny any request to strike or remove any portion Sebago Safety Study and review it in its entirety in its deliberations.

Respectfully submitted,

By the City of Portsmouth



Jane M. Ferrini, Staff Attorney  
N.H. Bar 6528  
1 Junkins Avenue  
Portsmouth, NH 03801  
(603) 610-7256  
[jferrini@cityofportsmouth.com](mailto:jferrini@cityofportsmouth.com)

Dated: 10/22/15

**Certification**

I hereby certify that on this 22<sup>nd</sup> day of October, 2015, I caused a copy of the foregoing Memorandum on Federal Preemption to be sent via email to the persons on the Service List on this Docket.



Jane Ferrini