

**STATE OF NEW HAMPSHIRE**  
**SITE EVALUATION COMMITTEE**

**DOCKET NO. 2015-01**

**SEA-3, INC.'S OBJECTION TO PETITION TO INTERVENE FILED BY  
CITY OF PORTSMOUTH**

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and respectfully objects to the Petition to Intervene (the "Petition") filed by the City of Portsmouth (hereinafter "the City"). In support of its Objection, SEA-3 states as follows:

**Introduction**

The Committee should deny the City's Petition because it raises the federally preempted issue of railroad regulation, which is not before the Committee. Additionally, the City fails to establish that its "rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding," and further, the Counsel for the Public adequately represents the issues raised by the City.

**Applicable Legal Standards**

**Standards Governing Consideration of Motions to Intervene.**

The New Hampshire Administrative Procedure Act regulates when an administrative agency must allow intervention. RSA 541-A:32, I. The administrative agency must allow intervention when:

- (a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least 3 days before the hearing;
- (b) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(c) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

RSA § 541-A:32, I. See also N. H. Code Admin. R. Site 202.11(b) (setting forth same requirements).

The statute also regulates when an administrative agency may allow intervention. RSA 541-A:32, II. The statute permits, but does not require, administrative agencies to allow motions to intervene “upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.” Id.

**Standard to Limit Intervenor’s Participation in Proceedings.**

The Administrative Procedure Act and the Site Evaluation Committee’s procedural rules provide for limiting an intervenor’s participation in the proceedings. RSA § 541-A:32, III; N. H. Code Admin. R. Site 202.11(d). The Act gives the Committee discretion in limiting participation; the procedural rules require limitation “if such conditions promote the efficient and orderly process of the proceeding [. . . .]” RSA § 541-A:32, III; N. H. Code Admin. R. Site 202.11(d). The Act and the procedural rules provide three, non-exhaustive limitations for the Committee to impose as follows:

- (a) Limitation of the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition.
- (b) Limitation of the intervenor's use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings.
- (c) Requiring 2 or more intervenors to combine their presentations of evidence and argument, cross-examination, and other participation in the proceedings.

RSA § 541-A:32, III; N. H. Code Admin. R. Site 202.11(d).

**Summary of Petition to Intervene**

The City alleges the following facts in seeking to demonstrate a substantial interest in this proceeding:

- 1) The additional LPG that SEA-3 will receive via rail will be unodorized and will be transported through the City by railcar on its way to SEA-3. See Pet. at p. 4.
- 2) The number of rail cars passing through the City on a daily basis will substantially increase. See Pet. at p. 8.
- 3) The speed of the rail cars will increase. See Pet. at p. 9.
- 4) Pan Am must upgrade the rail line to Class 2 status. See Pet. at p. 9.
- 5) The City will have to pay some of the cost to upgrade its rail crossings as Pan Am upgrades the rail lines. See Pet. at p. 9.
- 6) The increase in rail traffic through Portsmouth will increase noise, lights and diesel fumes along the rail route. See Pet. at p. 9.
- 7) Previously inactive or infrequently used rail lines will see a substantial increase in usage through the City's residential neighborhoods and downtown business center. See Pet. at p. 10.

The City also alleges in Section B. of its Petition that it has appealed the Town of Newington's Planning Board decision, granting SEA-3 site plan approval, in order to compel a safety study of SEA-3's site. See Pet. at p. 6. This factual allegation does not answer the essential question of: "What is the City's substantial interest in SEA-3's facility?" The City is required to allege facts showing that it has a substantial interest in SEA-3's site. Simply alleging that the Newington Planning Board should have requested a study does not satisfy this obligation.

In Section C. of its Petition, the City raises questions regarding SEA-3's profitability and how much LPG may be exported from its facility, but again the City fails to allege any facts demonstrating how it has a substantial interest in the issues. See Pet. at p's 7 and 8.

After raising the specter in Section C. that all of SEA-3's propane is going to be exported by ship, the City reverses course in Section E. and claims that all of SEA-3's propane will be distributed locally by truck (as it has been for the past 40 years). See Pet. at p. 10.

The questions and assertions raised in Sections B., C. and E. of the City's Petition stand in stark contrast to the specific factual allegations made in Sections A. and D. regarding adverse impacts the City claims it will suffer from an increase in LPG rail traffic.

### Argument

#### **The City's Railroad-Related Interests Are Not Before the Committee.**

The City seeks intervention in SEA-3's Request for Exemption for its Newington facility as a means to regulate LPG rail traffic travelling through Portsmouth. However, the case law and regulatory decisions of this state are clear that the state has no jurisdiction to regulate railroad operations because, "Congress intended the federal government to exclusively occupy the field of railroad regulation." See In re Conservation Law Foundation, 147 N. H. 89, 94 (2001) (rejecting the Conservation Law Foundation's claim that the New Hampshire Public Utilities Commission had authority to regulate abandoned rail lines under RSA 365:24-a). The New Hampshire Department of Transportation has already affirmed - in the context of this project - that it has "no jurisdiction over the commodities that Pan Am transports over the line. With respect to commodities that can be transported, Pan Am is subject to rules of the Surface Transportation Board." See Letter of Shelley Winters, Administrator, NHDOT Bureau of Rail & Transit, dated February 11, 2014, Req. for Exemption at Exhibit I.

By federal statute, the Surface Transportation Board exercises exclusive jurisdiction over "transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . ." 49 U.S.C. § 10501(b) (hereinafter "10501(b)"). 10501(b) expressly states that the STB's jurisdiction is "exclusive" and "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to

regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Id. “Section 10501(b) thus is intended 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 (S.T.B. July 19, 2013) (hereinafter “Boston and Maine”).

Upon its enactment, ICCTA:

broadened the express preemption provision of the Interstate Commerce Act to the point that “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N. D. Ga. 1996). Section 10501(b) gives the Board exclusive jurisdiction over ‘transportation by rail carriers,’ and the term ‘transportation’ is defined by our statute, at 49 U. S. C. 10102(9), to embrace all the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad’s traffic should be routed is preempted.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005).

Pursuant to 10501(b)’s preemption provisions, state and local entities are prohibited from deciding matters regulated by the STB. As the STB has explained:

In interpreting the reach of 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g. railroad rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements including building permits, zoning ordinances, and environmental and land use permitting requirements are preempted.

Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013).

Based on § 10501(b)’s broad reach, any state or local law that allows a non-federal entity to restrict or prohibit a federal rail carrier’s operations is preempted, regardless of whether the

state or local law is expressly directed at the carrier's operations. For example, in Norfolk Southern Ry Co. v. City of Alexandria, the Fourth Circuit Court of Appeals ruled that a city ordinance regulating third party truckers travelling to Norfolk Southern's transloading facility to pick up ethanol was preempted as an impermissible attempt to regulate transloading operations at the facility. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010) (citing Green Mtn. R. R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005)). The ruling demonstrates that local governments cannot indirectly regulate interstate commerce by regulating third parties.

In its decision upholding an administrative ruling that § 10501(b) preempts the New Hampshire Public Utilities Commission's statutory authority to decide whether removal of rail track is inconsistent with the public good, the Supreme Court observed: "It has been noted that 'it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" See In re Conservation Law Found., 147 N. H. at 92 (quoting CSX Transp., Inc. v. Georgia Public Serv. Com'n, 944 F.Supp. 1573, 1581 (N.D.Ga.1996)).

a. ICCTA's Preemption Provision Applies to SEA-3 and Pan Am.

ICCTA's broad preemption provision covers SEA-3 and Pan Am. "The statute defines 'transportation' expansively to encompass any property, facility, structure or equipment 'related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.'" Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013) (quoting 49 U.S.C. § 10102(9)). Pursuant to 49 U.S.C. § 11101, SEA-3 has the legal right to receive common carrier rail service from Pan Am because Pan Am is a "rail carrier providing transportation or service subject to the jurisdiction of [the STB . . .]." 49 U.S.C.A. § 11101(a) (West) (conferring rights to common carrier rail service); Boston and Maine, Finance Docket

No. 35749 at 3 (S.T.B. July 19, 2013) (identifying Pan Am as a common rail carrier). SEA-3 is therefore entitled to receive LPG rail cars from Pan Am over the Newington Branch.

b. The City's Claimed Interests Are Preempted by ICCTA.

The only specific facts pled by the City in support of its Petition relate to the claimed negative effects that an increase in LPG rail traffic will have upon the City and its residents. The City alleges it will be impacted by SEA-3's Request because the amount of non-odorized LPG transported through the City by rail will increase, that noise, lights and diesel fumes along the rail route will increase, that train speeds will increase and that it will have pay to improve its rail crossings. Any attempt to impede a federal carrier's railroad operations is preempted by § 10501(b), regardless of whether the specific claims are directly related to railroad operations.

As evident from the forgoing, federal law preempts state and local entities from resolving the City's concerns with LPG rail traffic:

[A]ny permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 7 (S.T.B. May 3, 2005). As noted above, the City's safety concerns regarding the rail line must be addressed to the Federal Railroad Administration which is solely responsible for the safety of the Newington Branch rail line under the Federal Railroad Safety Act ("FRSA").

### **The City Fails to Prove a Substantial Interest.**

The City fails to prove that it has “rights, duties, privileges, immunities or other substantial interests that might be affected by the proceeding” under New Hampshire law. See RSA § 541-A:32, I. The City does not allege any relevant rights, duties, privileges or immunities: the analysis is therefore limited to whether they have “substantial interests”. New Hampshire’s rules on standing to appeal administrative orders are instructive in defining the term “substantial interest” as used in this context. Those standing rules require appellants to distinguish themselves from the general public. See Blanchard v. Boston & M.R.R., 86 N. H. 263, 167 A. 158, 159 (1933) (interpreting statute as conferring standing only upon “those persons only who were interested in or affected by the proceedings in some manner differently from the public, citizens, and taxpayers generally.”).

Aside from the claimed adverse effects of increased LPG rail traffic (which are federally preempted), the City fails to state any facts showing that it would be specially impacted by the proposed improvements to SEA-3’s site, or SEA-3’s profitability or the economics of exporting LPG to foreign countries. The City lacks proximity to SEA-3’s facility and does not allege that it is a propane consumer. While the City claims to share a common transportation system with Newington, that same claim can be made by virtually every community in the State (witness the City of Dover’s Motion to Intervene). Beyond that general allegation, the City makes no allegation as to how many trucks will actually drive through Portsmouth (as opposed to driving north on the Spaulding Turnpike) and if so whether they will travel on the Federal interstate highway system and if so why the City now has a non-preempted substantial interest in regulating interstate commerce when these same trucks have been using this same road system to distribute propane to New England residents for 40 years. As found by the Newington Planning

Board, SEA-3's "site plan proposal will not increase the truck traffic to and from the site." See C. R. at p. 522.

The City complains that the Newington Planning Board declined to require a comprehensive site safety study even though the Board required a Fire Safety Analysis that it reviewed at public hearing and which was reviewed and approved by the Board's own independent engineer. See Certified Record of the Town of Newington Planning Board, Rockingham Superior Court, Dkt. No. 218-2014-CV-00654 ("C. R.") at p's 49, 322-324 and 378. While the City is now asking for a site safety study, it took no steps to question or otherwise challenge the conclusions of SEA-3's Fire Safety Analysis, a study that goes straight to the heart of the City's safety claims.

The City's unsubstantiated safety claims are contradicted by the professional opinion of its own Fire Chief. As stated by the City of Portsmouth's Fire Chief Steven E. Achilles:

The Portsmouth Fire Department and other area fire departments are not debating or questioning the many concerns of our elected representatives or citizens. We met to review and discuss the project, the mode of transportation, our ability to respond, and other related fire and life safety concerns. **At this time the general consensus is that the risk of fire and the accidental release of product is extremely low, but not zero. Most fire departments are extremely familiar with the product and the emergency response required if there is an accidental release or fire.**

See Email correspondence of Steven E. Achilles to Proposed Intervener Richard DiPentima, dated March 24, 2014, C. R. at p. 577 (emphasis added); see also, C. R. at p. 275 (Seacoastonline news story dated March 22, 2014, reporting Chief Achilles' statement that additional propane tank car transportation does not pose an additional significant hazard.).

Chief Achilles' conclusions are consistent with those of Newington's then acting Fire Chief Dale Sylvia who inspected the Site with two State Fire Marshalls and concluded that, "[f]rom a fire department view I believe this is a positive for Newington, because it gives us the

opportunity to update and increase fire protection systems that are already in place but outdated. The operation they are proposing in [sic] not dramatically different then [sic] their current operation.” See Memorandum of Chief Sylvia to the Planning Board dated October 9, 2013, C. R. at p. 31. As noted by Chief Head, the proposed improvements would increase site safety. As found by the Newington Planning Board, “[t]he proposed site improvements will update and modernize the site’s existing fire protection systems.” See C. R. at p. 520.

The City also faults the Newington Planning Board for imposing post approval conditions that will not come back to the Planning Board because the project was designated as having regional impact (based solely on the increased rail traffic that Newington eventually acknowledged it had no authority to regulate). Yet when the Rockingham Planning Commission’s Developments of Regional Impacts Committee held a hearing on the project it recommended that the Newington Planning Board “engage in post development approval inspections to insure that the new site improvements at the Sea-3 [sic] facility are constructed in accordance with NFPA 58.” See C. R. at p. 128.

In short, the City’s alleged substantial interests are either federally preempted or too general in nature to distinguish the City from any other member of the public. Since the City has not demonstrated a substantial interest, it cannot satisfy RSA § 541-A:32, I.

**Public Counsel Represents the Same General Interests as the City.**

The Counsel for the Public already represents the City’s interests. “No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency’s action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State.” Appeal of Richards, 134 N. H. 148,

156, 590 A.2d 586, 591 (1991) (citing Blanchard v. Boston & M.R.R., 86 N. H. 263, 264-65, 167 A. 158, 159 (1933)).

RSA 162-H:9 describes the purpose of the Counsel for the Public as follows:

The counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.

The Committee may “compel consolidation of representation for such persons as have, in the committee’s reasonable judgment, substantially identical interests.” RSA 162-H:9, II.

On April 22, 2015, Counsel for the Public filed an Objection to SEA-3’s Request for Exemption. The Objection asks the Committee to “evaluate the efficacy of railroad safety regulation[,]” safety of the site, and “economic and energy issues that naturally arise, such as supply and market issues”. Counsel for the Public has raised the same alleged interests asserted by the City. Since there is a substantial identify of interests between the City and the Counsel for the Public, the Committee should compel consolidation of representation pursuant to its powers under RSA 162-H:9, II.

### CONCLUSION

For all the reasons set forth herein, the Committee should deny the City’s Petition because the regulation of railroads is preempted by federal law, the City failed to articulate a substantial interest that will be affected by the determination of the issues in this proceeding, the City lacks standing, and because the Counsel for the Public represents its interests. Alternatively, the Committee should, pursuant to its powers under RSA 162-H:9, II, require the City to consolidate representation with the Counsel for the Public and, pursuant to its obligations

under N. H. Code Admin. R. Site 202.11, impose conditions upon the City's participation as promotes the efficient and orderly process of the proceeding.

Respectfully submitted,

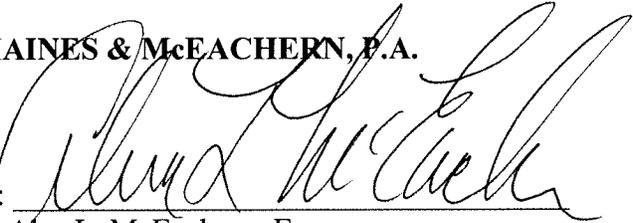
**SEA-3, INC.**

By Its Attorneys,

**SHAINES & McEACHERN, P.A.**

Dated: May 1, 2015

By:



Alec L. McEachern, Esq.

N. H. Bar ID #10568

P.O. Box 360

Portsmouth, NH 03802-0360

Phone: (603) 436-3110

Email: [alec@shaines.com](mailto:alec@shaines.com)