

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

DOCKET NO. 2015-01

**SEA-3, INC.'S OBJECTION TO MOTION TO INTERVENE FILED BY
GREAT BAY STEWARDS**

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and respectfully objects to the Motion to Intervene filed by Great Bay Stewards of Greenland, New Hampshire (hereinafter "the Proposed Intervenor"). In support of its Objection, SEA-3 states as follows:

INTRODUCTION

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

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.

Standards on Limiting 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). While the Act permits the Committee to limit 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 MOTION TO INTERVENE

The Proposed Intervenor’s Motion recites that the Proposed Intervenor is “a non-profit membership organization whose mission is to preserve and protect the Great Bay for future

generations.” Motion ¶ 2. The Proposed Intervenor does not allege its proximity to the SEA-3 site, but a map consultation suggests the Proposed Intervenor is located 5.7 miles away in straight-line distance.

The Proposed Intervenor incorporates by reference a letter it wrote “dated March 13, 2015 to the SEC.” *Id.* ¶ 3. The Motion and letter dated March 13, 2015 only allege concerns about the railroad use. For example, the Motion states:

- “The proposed Intervenor’s headquarters is located in a neighboring community and is directly along the rail tracks which are intended to service the expansion, with substantial intensification of the use of those tracks and the carrying of materials to the Sea 3 facility.” Motion ¶ 3.
- “The undersigned Intervenor respectfully state that this project, as described by SEA-3, being dependent on the delivery of propane by the Pan Am rail line, poses an environmental threat to the health of the Great Bay and thereby the public’s economic interests, property values, health, safety and welfare are directly implicated by the Sea 3 expansion [. . . .]” *Id.* ¶ 4.

Similarly, the Proposed Intervenor’s letter only alleges concerns regarding the railroad. See generally, Letter of Great Bay Stewards (received by the Committee on Apr. 29, 2015).

ARGUMENT

The Proposed Intervenor’s Motion is Untimely.

The Proposed Intervenor’s Motion is untimely. The Committee’s Order and Notice of Public Hearing Acceptance of Request and Procedural Order dated March 26, 2015, required proposed intervenors to file motions to intervene on or before April 22, 2015. Additionally, the Order directed proposed intervenors to deliver any such motions to the Committee’s address. The Proposed Intervenor delivered its Motion to an incorrect address on May 4, 2015, and did not provide a copy to SEA-3, Inc. Even if the Motion is deemed filed when delivered to the incorrect address, it was twelve days late and is untimely.

The Railroad-Related Interests the Intervenor Purports to Represent Are Not Before the Committee.

The railroad-related interests the Proposed Intervenor asserts are not before the Committee. The Proposed Intervenor seeks to prohibit or limit expanded use of the railway. Federal preemption precludes consideration of that issue by this Committee.

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.

The New Hampshire Supreme Court has upheld an administrative ruling that § 10501(b) preempts the New Hampshire Public Utilities Commission's state statutory authority to decide whether removal of rail track was not consistent with the public good. In re Conservation Law Found., 147 N. H. 89, 95, 782 A.2d 909, 913 (2001). The 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.” Id., 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 Proposed Intervenor’s Claims Are Preempted by ICCTA.

The Proposed Intervenor’s concern in this matter is limited to concerns about use of the railroad. See Motion to Intervene ¶¶ 3-4; Letter of Proposed Intervenor. The Proposed Intervenor alleges it will be impacted because railroad traffic will increase. Id. 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 Proposed Intervenor’s concerns with rail use and 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, if the Proposed Intervenor has any safety concerns regarding the Newington Branch rail line, it must address those concerns 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”).

Since the Proposed Intervenor only asserts railroad-related interests, which are preempted, the Committee should deny the Motion to Intervene.

The Proposed Intervenor Fails to Prove a Substantial Interest.

The Proposed Intervenor fails to prove that it has any “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 Proposed Intervenor 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.”).

The Proposed Intervenor’s alleged injuries are common to the general public. Aside from operating near the railroad and having concerns about rail traffic, which is a federally preempted

issue, the Proposed Intervenor fails to state any facts showing how it would be specially impacted by the safety of SEA-3's site. Since the Proposed Intervenor has not demonstrated a substantial interest that is before this Committee, it cannot satisfy RSA § 541-A:32, I.

Public Counsel Represents the Same Interests as the Proposed Intervenor¹

The Counsel for the Public already represents the Proposed Intervenor'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 [. . .]" Counsel for the Public has raised the same alleged interests asserted by the Proposed Intervenor. Since there is a substantial identify of interests between the Proposed Intervenor and the Counsel for the Public, the Committee should compel consolidation of representation pursuant to its powers under RSA § 162-H:9, II.

¹ SEA-3, Inc. respectfully maintains that, while Public Counsel already represents the Proposed Intervenor's general interest, that interest is federally preempted.

CONCLUSION

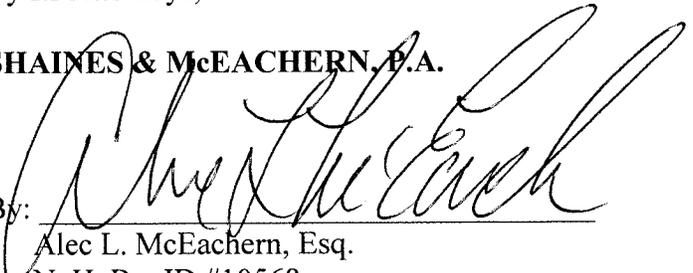
The Committee should deny the Proposed Intervenor's Motion because the issue of regulating railways is preempted by federal law, the Proposed Intervenor fails to articulate a substantial interest that will be affected by the determination of the issues in this proceeding, the Proposed Intervenor lacks 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 Proposed Intervenor 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 Proposed Intervenor's participation as promotes the efficient and orderly process of the proceeding.

Respectfully submitted,

SEA-3, INC.

By Its Attorneys,

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By: 

Dated: May 19, 2015

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