



**SHAINES & McEACHERN, PA**  
**Attorneys at Law**

October 19, 2015

***VIA E-MAIL AND FEDEX***

Martin Honigberg, Chairman  
NH Site Evaluation Committee  
NH Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301

Re: SEA-3, Inc. ("SEA-3")  
Request for Exemption  
NHSEC No. 2015-01

Dear Chairman Honigberg:

Enclosed for filing in connection with SEA-3, Inc.'s Request for Exemption please find the original and two copies of SEA-3, Inc.'s Motion for Protective Order. An electronic version of the enclosed document is being delivered via email to Jane Murray at the Department of Environmental Services, Jody Carmody, Docket Supervisor at the Public Utilities Commission and Pamela Monroe, Administrator at the Site Evaluation Committee.

I certify that copies of the within filing have been electronically sent to the parties identified on the SEC's Service List last updated June 11, 2015.

Very truly yours,

SHAINES & McEACHERN, P.A.

By: 

Alec L. McEachern

ALM/jm

Enclosures

cc: SEA-3, Inc.  
Michael Iacopino, Esq. (via Email)  
Jane Murray, NHDES (via Email)  
Jody Carmody, NHPUC (via Email)  
Pamela Monroe, NHSEC (via Email)

**STATE OF NEW HAMPSHIRE**

**SITE EVALUATION COMMITTEE**

**DOCKET NO. 2015-01**

**SEA-3, INC.'S CONTESTED MOTION FOR  
PROTECTIVE ORDER**

*NOW COMES* SEA-3, Inc. (“SEA-3”), through its counsel, Shaines & McEachern, P.A., and moves for a protective order concerning its communications with Purple Strategies, LLC (“Purple Strategies”). In support of this motion, SEA-3 states as follows:

**I. INTRODUCTION.**

1. The Subcommittee should issue a protective order prohibiting attempts to discover information about SEA-3’s trial preparation consultant, Purple Strategies. The requested information is not discoverable and is of no relevance whatsoever to these proceedings.

2. This Motion, in the following order: 1) recites the legal standard, 2) summarizes the discovery dispute; and 3) explains the grounds for issuing a protective order. Sea-3 attaches a proposed protective order hereto.

**II. LEGAL STANDARD.**

3. The Committee’s powers to order discovery are circumscribed by NH Site Admin. R. Site 202.12, which provides, in relevant part, for data requests:

in the nature of interrogatories, requests for production of documents, requests for admission of material facts, depositions and any other discovery method permissible in civil judicial proceedings before a state court when such discovery is necessary to enable a party to acquire evidence admissible in a proceeding and when such method will not unduly delay the prompt and orderly conduct of the proceeding.

4. State Courts do not allow for discovery of trial preparation experts, absent “a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” N.H. Super. Ct. Civ. R. 21(e).

5. This Committee does not authorize discovery unless 1) “necessary to enable a party to acquire evidence admissible in a proceeding; and 2) “will not unduly delay the prompt and orderly conduct of the proceeding.” NH Site Admin. R. Site 202.12.

6. Evidence is potentially admissible if it is relevant. Relevant evidence tends to make the existence of a fact at issue in the case more or less likely. See N.H. R. Evid. 401. Irrelevant evidence does not make a fact at issue more or less likely. See id.

### **III. BACKGROUND AND NATURE OF THE DISPUTED REQUEST.**

7. Sea-3 maintains a website that enables members of the public to voluntarily, and without compensation, submit their viewpoint to this Committee. See <http://www.securepropanenh.com/TakeAction.aspx>. Purple Strategies assisted Sea-3 in developing the website. Opponents of SEA-3’s project also maintain a web presence to encourage public participation. See, e.g., <https://www.facebook.com/SRASPP/> (encouraging the public to attend the SEC’s hearing on May 6, 2015); <http://www.sraspp.blogspot.com/> (related website); [http://www.nopropanetrain.com/#!get\\_involved/c1yzj](http://www.nopropanetrain.com/#!get_involved/c1yzj) (encouraging the public to contact elected officials); <https://www.gofundme.com/seacoastNHsafety> (encouraging public to donate funds to combat Sea-3’s application).<sup>1</sup>

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<sup>1</sup> Each website states that it is operated, at least in part, by residents of Portsmouth. The [nopropanetrain.com](http://www.nopropanetrain.com) website states it is run by residents of Dunlin Way, Portsmouth. The Portsmouth Interveners submitted testimony from Richard DiPentima, Erica Nania, and Jane Sutherland, all of whom reside on Dunlin Way in Portsmouth. The [gofundme.com](https://www.gofundme.com/seacoastNHsafety) website states “we, along with the City of Portsmouth, State Attorney’s Office, and others, are opposing through legal means the request that the waiver be denied,” and that the money raised “will help us support the legal work necessary to continue our efforts in the courts versus Sea-3[. . .]” From that information, it is reasonable to conclude that the individual interveners are integrally involved in these websites.

8. At the Technical Session on October 14, 2015, counsel for the Individual Interveners expressed skepticism as to the bona fides of letters submitted by members of the public in response to the Sea-3 website. Rather than contact the persons who submitted the letters and whose names and addresses are clearly listed on the website, Counsel for the Individual Interveners initially lodged a data request to obtain SEA-3's contract with Purple Strategies. Counsel for the Individual Interveners then expanded the request to all communications whatsoever between Purple Strategies and Sea-3 and between Purple Strategies and members of the public, as follows:

- “1. Any and all agreements and understandings between Purple Strategies and Sea-3 (or Sea-3 parents, affiliates or subsidiaries, but collectively, “Sea-3”) relating to Sea-3's application for an exemption from the certification requirements of RSA 162-H;
2. Any and all agreements between Purple Strategies and Sea-3, as defined above, relating to Sea-3's proposed facility expansion;
3. Any and all documents, communications and correspondence between Purple Strategies and Sea-3 (as defined) relating to Purple Strategies' work or engagement from January 1, 2015 to the present;
4. Any and all communications (in whatever form and however stored, including electronic mail and electronically stored information) between Purple Strategies and any third parties, including but not limited to persons submitting letters to the Site Evaluation Committee, relating to the Sea-3 application now pending before the Site Evaluation Committee.”

9. Both Counsel for the Individual Interveners and Counsel for the Public stated they would seek to continue the final hearing on the merits if they do not receive the documents sought in their wide ranging and all-encompassing request. It was also suggested that a party might serve a subpoena on Purple Strategies. Both Counsel for the Interveners and Counsel for the Public represented that they will file a Motion to Compel.

10. This attack on Sea-3's public outreach efforts did not stop there. On Monday, October 19, 2015, a person accessed SEA-3's securepropanenh.com website and, through that website, submitted an e-mail letter to the Committee. That person identified himself as "Donald Duck" with an address of "21 Magic Kingdom Orlando." That person listed his e-mail address as "peter.roth@doj.nh.gov," which is Counsel for the Public's e-mail address. The e-mail is appended hereto as **Exhibit 1**. SEA-3 reasonably concludes that Counsel for the Public submitted the e-mail letter with a fictitious name in an attempt to undermine the public's use of the securepropanenh.com website.

#### **IV. GROUNDS FOR PROTECTIVE ORDER.**

11. The Committee should grant a protective order because the data requests seek information that is protected from discovery. SEA-3 specifically retained Purple Strategies to assist SEA-3 in preparing for and participating in these Committee proceedings. Sea-3 did not retain Purple Strategies to submit testimony or evidence in these or any other proceedings. As such, Purple Strategies' engagement falls squarely within the protected category of trial preparation.

12. To the extent that the Interveners or Counsel for the Public asserts some "substantial need" for the information, no such need exists. The Committee should balance the nature of the sought materials and the purposes of the upcoming final hearing on the merits. The requested materials have little, if any, relevance to the requirements of N.H. R.S.A. § 162-H, IV(a)-(d).

13. The Interveners and Counsel for the Public have made it plain that they wish to somehow to undermine letters submitted by members of the public using materials obtained through the proposed data request. That is not a legitimate purpose for a subpoena. As a

preliminary matter, public statements are not subject to cross-examination. See NH Site Admin. R. Site 202.25(b). The Committee is entitled to give whatever weight, if any, it deems appropriate to any statements for or against the Application. The Interveners and Counsel for the Public's desire to discredit statements from members of the public generated by Sea-3's public awareness outreach does not amount to a substantial need, particularly when the Individual Interveners have engaged in the exactly the same genre of public awareness outreach.

14. In essence, the Interveners want to engage in a wide ranging fishing expedition in a desperate attempt to undermine Sea-3's public outreach efforts while the Interveners engage in the very same conduct. The Intervener's desire to employ this kind of tactic falls far short of the "substantial need" required to compel discovery of trial preparation materials.

15. Moreover, Counsel for the Public, if he in fact submitted the fictitious letter, inappropriately misused SEA-3's website in a deliberate attempt to discredit and undermine the value of the public's letters submitted to this Committee. Such conduct directly conflicts with Counsel for the Public's statutory mandate. See N.H. R.S.A. § 162-H:9, I ("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."). All parties should be enjoined from such misuse of SEA-3's website.

16. The Committee should grant a protective order because the proposed discovery would unduly delay the prompt and orderly conduct of the proceeding. See NH Site Admin. R. Site 202.12. N.H. R.S.A. § 162-H:4, IV contemplates deciding requests for exemption within 60 days. On March 26, 2015, the Committee accepted Sea-3's application. 202 days later, and only 22 days before the final hearing on the merits, the Interveners lodged this discovery request on an irrelevant, protected topic. Continuing the final hearing for this late-arriving request for

irrelevant, protected information would result in an undue delay. The Committee should issue a protective order so that the application may proceed to the final hearing.

**V. CONTESTED MOTION.**

17. Given the dispute between Sea-3, the Individual Interveners and Counsel for the Public, this Motion is submitted as a contested motion. Given the urgency of the matter, Sea-3 has not yet discussed the matter with the remaining parties.

**VI. CONCLUSION.**

18. The Interveners seek information that is protected from discovery and is of no relevance whatsoever to these proceedings. Allowing the Interveners' request would likely result in a needless, further delay of these proceedings. The parties to this matter should be enjoined from abusing the securepropanenh.com website. A protective order is warranted so the matter may proceed to the final hearing on the merits.

**WHEREFORE**, SEA-3, Inc. respectfully requests that the Committee:

- A. Grant the within Motion for Protective Order;
- B. Enter the attached Protective Order; and
- C. Grant such other and further relief as may be just.

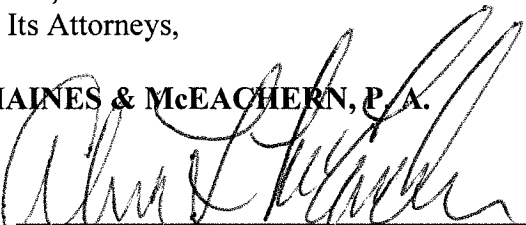
Respectfully submitted

**SEA-3, INC.**

By Its Attorneys,

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

By



Alec L. McEachern, Esq., N.H. Bar ID #10568

P.O. Box 360

Portsmouth, NH 03802-0360

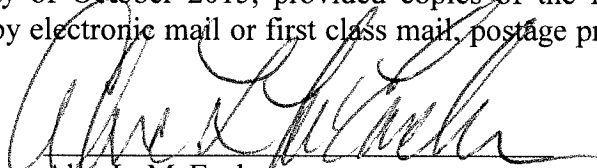
Phone: (603) 436-3110

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

Dated: October 19, 2015

**CERTIFICATE OF SERVICE**

I certify that I have this 19<sup>th</sup> day of October 2015, provided copies of the foregoing pleading to all parties to the proceeding by electronic mail or first class mail, postage prepaid, in the United States mail.



Alec L. McEachern



**STATE OF NEW HAMPSHIRE**

**SITE EVALUATION COMMITTEE**

**DOCKET NO. 2015-01**

**[PROPOSED] PROTECTIVE ORDER RELATIVE TO PURPLE STRATEGIES**

The Site Evaluation Committee finds and rules as follows:

1. At the October 14, 2015 Technical Session, the Interveners' requested a copy of SEA-3's contract with "Purple Strategies" and subsequently expanded their request to include all communications between "Purple Strategies" and SEA-3 and members of the public as follows:

Any and all agreements and understandings between Purple Strategies and Sea-3 (or Sea-3 parents, affiliates or subsidiaries, but collectively, "Sea-3") relating to Sea-3's application for an exemption from the certification requirements of RSA 162-H;

Any and all agreements between Purple Strategies and Sea-3, as defined above, relating to Sea-3's proposed facility expansion;

Any and all documents, communications and correspondence between Purple Strategies and Sea-3 (as defined) relating to Purple Strategies' work or engagement from January 1, 2015 to the present;

Any and all communications (in whatever form and however stored, including electronic mail and electronically stored information) between Purple Strategies and any third parties, including but not limited to persons submitting letters to the Site Evaluation Committee, relating to the Sea-3 application now pending before the Site Evaluation Committee.

2. The request seeks trial preparation materials, which is not discoverable.
3. SEA-3 and Purple Strategies, LLC, and their related entities, employees and/or agents are not required to respond to the Interveners' data request.
4. All parties are restrained from issuing a subpoena to obtain that information from Purple Strategies, LLC, or its related entities, employees and/or agents.
5. All parties are restrained from interfering with SEA-3's websites.

**SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
Alexander Speidel, Presiding Officer  
Site Evaluation Committee

# **EXHIBIT 1**

## Jake Marvelley

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**From:** Secure PropaneNH <securepropanenh@gmail.com>  
**Sent:** Monday, October 19, 2015 2:01 PM  
**To:** Jake Marvelley  
**Subject:** Fwd:

----- Forwarded message -----

**From:** <[peter.roth@doj.nh.gov](mailto:peter.roth@doj.nh.gov)>  
**Date:** Mon, Oct 19, 2015 at 11:28 AM  
**Subject:**  
**To:** [securepropanenh@gmail.com](mailto:securepropanenh@gmail.com)

Dear Committee members:

I strongly urge the Site Evaluation Committee to approve the Sea-3 Inc. exemption request. As a resident of New Hampshire, I am convinced that allowing Sea-3 to upgrade its railcar offloading capacity in Newington as soon as possible would benefit the more than 77,000 New Hampshire homes and businesses that rely on propane. Without the exemption, we face higher propane prices, supply shortages, and nights with “no heat” during the next two winters. Some propane dealers may be forced to unload propane from rail cars into tanker trucks parked along railroad sidings, which lack the automatic cutoffs and fire safety systems installed at the Newington terminal.

New Hampshire needs the propane. The best, cheapest way to bring it in is by rail and it's coming by rail regardless of the fate of the Sea-3 proposal. Without the Sea-3 upgrade, the propane will simply be taken off the trains and pumped into trucks at temporary rail sidings – a method that is nowhere near as efficient, safe or secure as offloading it at a permanent storage and terminal facility like Sea-3.

A small group of opponents in Portsmouth who bought homes along the existing Pan Am Railways tracks continue their “Not In My Backyard” (NIMBY) opposition, even though the independent Safety Study they demanded has now been completed. In 1996, the SEC granted a similar exemption to Sea-3 for more extensive improvements to the Newington terminal. Since then, the criteria for granting an exemption in RSA 162-H have essentially remained the same while the local, state, and federal rules and regulations governing Sea-3 have dramatically increased protection of the environment and public safety.

Given the fact that Sea-3 has satisfied all of the legal requirements for an exemption from the SEC's lengthy review process and given the benefits this upgrade will bring to the New Hampshire economy and families relying on propane, I do hope you will respond to the Sea-3 application with an affirmative vote.

Sincerely,

Donald Duck  
21 Magic Kingdom Orlando