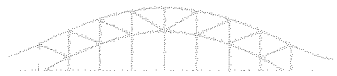

SHAINES & MCEACHERN, PA

Attorneys at Law October 23, 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 Contested Motion to Strike Testimony of Peter Britz, Motion to Strike Testimony Concerning Railroad Issues and Memorandum of Law Regarding Federal Preemption of Railroad Operations, Railroad Safety and Transportation of Hazardous Materials. An electronic version of the enclosed documents are being delivered via email to 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/jba
Enclosures
cc: SEA-3, Inc.
Pamela Monroe, NHSEC (via Email)

282 Corporate Drive, P.O. Box 360
Portsmouth, New Hampshire 03802-0360
Telephone: 603/436-3110, Fax 603/436-2993

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

DOCKET NO. 2015-01

SEA-3, INC.'S MEMORANDUM OF LAW REGARDING FEDERAL PREEMPTION OF RAILROAD OPERATIONS, RAILROAD SAFETY AND TRANSPORTATION OF HAZARDOUS MATERIALS

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and submits the within Memorandum of Law addressing the application of federal preemption under 49 U.S.C. § 10501, 49 U.S.C. § 20106 and 49 U.S.C. § 5125(b) (1) to the Site Evaluation Committee's jurisdiction to regulate rail transportation, rail safety and the transportation of hazardous materials.

Introduction

49 U.S.C. § 10501(b), 49 U.S.C. § 20106 and 49 U.S.C. § 5125(b) (1) respectively preempt state and local laws that regulate transportation by rail carrier, rail safety and the transportation of hazardous materials, regardless of whether the state or local regulation is direct or indirect. Indirect regulation occurs when the application of state or local law has the effect of regulating a federally preempted activity. Any reliance on the impact of increased rail traffic in ruling on SEA-3's request for Exemption constitutes indirect regulation and is preempted by federal law.

Background

SEA-3 seeks an Exemption from the certification provisions of RSA 162-H:1, *et seq.*, in connection with its proposal to construct five (5) additional rail berths and associated equipment necessary for the receipt and refrigeration of propane delivered to the site via railcar by Pan Am Railways ("Pan Am"). These improvements will include the addition of three (3) 90,000 gallon

storage tanks to receive the rail deliveries, which will increase the facility's storage capacity by approximately 1.15%. These improvements will allow SEA-3 to receive the majority of its propane from less expensive domestic sources via rail, instead of from more expensive international sources via ship. Once the improvements are completed, SEA-3 will have the ability to supply New Hampshire with propane from the lowest cost source, be it domestic or international.

In response to SEA-3's application for exemption, the City of Portsmouth, the Great Bay Stewards, Patricia Ford and Robert Gibbons, Richard DiPentima and Catherine DiPentima, William Campbell and Kristina Campbell, Matthew Nania and Erica Nania, and John Sutherland and Jane Sutherland (collectively the "Railroad Interveners"), all filed motions to intervene. The Railroad Interveners all allege that their properties abut Pan Am's rail line and that they will be adversely affected by any increase in rail traffic going to SEA-3's site.[1]

For example, the Great Bay Stewards argue that SEA-3's request for Exemption should be denied because an increase in Pan Am's rail traffic will squeeze more creosote out of its rail ties, resulting in damage to the environment ("Railroad ties protected by creosote leak carcinogens and endocrine disruptors over the tie lifetimes. The release rate is directly proportional to the density of the railroad traffic." See Great Bay Stewards' Supplemental Pre-filed Testimony of Terrence J. Collins at p. 4).

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[1] Each of the individual interveners allege in their Motions to Intervene, "The proposed Intervenors' home is located in the 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." See Ford and Gibbons Motion to Intervene at ¶ 3; DiPentima Motion to Intervene at ¶ 3; Sutherland Motion to Intervene at ¶ 3; Campbell Motion to Intervene at ¶ 3; and Nania Motion to Intervene at ¶ 3. See also, Portsmouth Motion to Intervene at Section D, Increased Rail Traffic, and Great Bay Stewards Motion to Intervene at ¶ 4.

The Railroad Interveners openly ask that the SEC to consider the impact of increased rail traffic upon the environment in ruling on SEA-3's request for Exemption. For example, the Great Bay Stewards stated in their Contested Motion for Site Inspection:

> [T]he provisions of RSA 162-H and Site Rule 202.13 compel a visit to the Great Bay Discovery Center and surrounding Estuary. Sea-3's proposed site expansion directly abuts the Piscataqua River on its Northeast side. The increase in supply-chain activity – **triggered by the site expansion** – will also run straight through the Great Bay National Estuarine Research Reserve and abut the Discovery Center along the entire 50 acre property.

See Great Bay Stewards Contested Motion for Site Inspection at ¶ 3 (filed Sept. 9, 2015) (emphasis added). Given the Railroad Interveners' openly held position that SEA-3's request for Exemption should be denied because it will result in increased rail traffic, there can be no dispute regarding their intent to use the SEC process to regulate Pan Am's rail operations. See Reply of Counsel for the Public dated July 20, 2015, at ¶ 6 (stating that the purpose of Sebago study is to understand if the "safety of the facility (and its supply line) is sufficiently regulated.") (parenthetical language in original).

Argument

Because federal law preempts state law regulation of transportation by rail carrier, rail safety and the transportation of hazardous materials, the SEC is prohibited from utilizing RSA § 162-H:1, et seq. to prevent or otherwise regulate rail traffic in ruling on SEA-3's request for Exemption, which is exactly what the Railroad Interveners are asking the SEC to do.

It is well settled that a regulatory body "'cannot regulate indirectly . . . what it cannot regulate directly.' " Grafton and Upton R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 238 (D. Mass. 2004) (quoting Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota, 236 F. Supp. 2d 989, 1007 (D. S.D. 2002) see also, Norfolk S. Ry Co. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010) (ruling that a city ordinance prohibiting the trucking of bulk materials in

the City without a permit was preempted as an impermissible attempt to regulate the rail carrier's transloading facility, which depended on such trucks) (citing Green Mtn. R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2nd Cir. 2005)); Reply of Public Counsel (dated July 20, 2015) at ¶ 4 (stating "the preemption claim is premature because the Committee is not being asked to do anything that either directly or indirectly will have any impact on any rail operations by a railroad.")

The Committee is now being asked to deny SEA-3's Request for Exemption in order to prevent or consider preventing an increase in Pan Am's rail traffic. To the extent preemption presents an issue of ripeness, as previously suggested by Public Counsel, the forbidden fruit is now at hand and the Rail Interveners are urging this Committee to take a bite. However, any decision to deny SEA-3's requested Exemption that is based on preventing an increase in rail traffic is preempted.

A. The SEC is Preempted by 49 U.S.C. § 10501 from Regulating Transportation by Rail Carrier.

On October 16, 2015, the First Circuit Court of Appeals upheld the right of a rail carrier to construct a propane distribution terminal containing four (4) 80,000 gallon storage tanks within the Town of Grafton, Massachusetts' Water Supply Protection Overlay District, contrary to the Town's Zoning Ordinance and without complying with Massachusetts' tank permitting laws. The only state laws the rail carrier was required to follow were state fire safety and construction codes. See Town of Grafton v. Surface Transportation Board, No. 14-2067, slip op. (1st Cir. Oct. 16, 2015) (copy attached hereto as **Exhibit A**). As noted in Grafton, the Surface Transportation Board's jurisdiction over transportation by rail carrier under the Interstate Commerce Commission Termination Act ("ICCTA") is exclusive:

the ICCTA preempts "State law" governing "regulation of rail transportation":

> The jurisdiction of the board over-(1) transportation by rail carriers . . . and facilities of such carriers; and (2) the construction, acquisition , operation . . . of . . . facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except 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.

49 U.S.C. § 10501(b).

Town of Grafton v. Surface Transportation Board, No. 14-20167, slip op. at p. 3. As demonstrated by the First Circuit's decision in Grafton, the SEC is preempted from regulating Pan Am's transportation activities under RSA Chapter 162-H. The only state laws that can be enforced against a rail carrier engaged in transportation are those that seek to exercise traditional police powers, but only:

> 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, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, 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.

Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2nd Cir. 2005). The pre-construction permit requirements of RSA 162-H:1, *et seq.* do not meet the Green Mountain test. As explained in Green Mountain:

> Other federal courts recognize that the Termination Act preempts most pre-construction permit requirements imposed by states and localities. *See, e.g., City of Auburn,* 154 F.3d at 1030–31 (affirming the Transportation Board's finding that the Termination Act preempted a local environmental permitting requirement); *Soo Line R.R. Co. v. City of Minneapolis,* 38 F.Supp.2d 1096, 1101 (D.Minn.1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings ... that are related to the movement of property by rail is expressly preempted by the [Termination Act]."); *CSX Transp., Inc. v. Ga. Pub.*

> *Serv. Comm'n,* 944 F.Supp. 1573, 1585 (N.D.Ga.1996) (finding state regulation of railroad agency closing preempted by the Termination Act).
>
> For example, the Ninth Circuit concluded, in affirming a Transportation Board decision, that the Termination Act preempted state and local environmental regulations requiring a railway to submit to a permitting process before making repairs and improvements on its track line. *City of Auburn,* 154 F.3d at 1027–28, 1030–31. "[C]ongressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause." *Id.* at 1031; *see also Ga. Pub. Serv. Comm'n,* 944 F.Supp. at 1580–82.
>
> The Transportation Board has likewise ruled that "state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce." *Joint Petition for and Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA,* STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001), *aff'd, Boston & Maine Corp. v. Town of Ayer,* 191 F.Supp.2d 257 (D.Mass.2002) (affirming the Transportation Board's determination that town's pre-construction permit requirement was preempted by the Termination Act); *see also Green Mountain R.R. Corp.,* Petition for Declaratory Order, STB Finance Docket No. 34052, 2002 WL 1058001 (S.T.B. May 24, 2002). As the agency authorized by Congress to administer the Termination Act, the Transportation Board is " 'uniquely qualified to determine whether state law ... should be preempted' " by the Termination Act.[] *Ga. Pub. Serv. Comm'n,* 944 F.Supp. at 1584 (quoting *Medtronic,* 518 U.S. at 496, 116 S.Ct. 2240).
>
> Like the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, Act 250 mandates a pre-construction permit. Act 250's pre-construction permit requirement is preempted for two reasons: (i) it "unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations," *Town of Ayer,* STB Finance Docket No. 33971, 2001 WL 458685, at *5; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely. *Green Mountain R.R. Corp.,* 2003 U.S. Dist. LEXIS 23774, at *13.

Green Mountain R.R. Corp., 404 F.3d at 642-43 (footnote omitted).

Because federal preemption prevents the SEC from directly applying the pre-construction permit requirements of RSA 162-H:1, *et seq.* upon Pan Am, the SEC may not indirectly impose those requirements on Pan Am by denying SEA-3's requested Exemption as a means of preventing an increase in Pan Am's rail traffic.

The logic of this reasoning was readily grasped by the New Hampshire Superior Court when it denied a motion to intervene filed by a group of Portsmouth residents in the City of Portsmouth's appeal from the Town of Newington's Planning Board and Zoning Board of Adjustment. In that case, the Portsmouth residents[2] alleged that increased rail traffic would subject them to increased noise, light and diesel exhaust and potentially impact the wetlands where the trains pass. As explained by the Superior Court:

> That some of the Portsmouth Intervenors live near the rail lines is irrelevant in this case because the Planning Board is without authority to regulate the railroad itself. See CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005) ("[U]nder the plain language of the statute [49 U.S.C. § 10501(b)], any state or local attempt to determine how a railroad's traffic should be routed is preempted."); Burlington N. & Santa Fe Ry. Co. v. Dep't of Transp., 206 P. 3d 262, 263 (Or. Ct. App. 2009) (holding the act "broadly precludes state regulation on those matters" specified in 49 U.S.C. § 10501(b)). In this case, Sea-3, Newington and Portsmouth all agree that regulation of railways is preempted, although Portsmouth argues that Newington may still regulate aspects of the site plan that do not directly touch on rail. In so far as the Portsmouth Intervenors seek standing based on their proximity to the railway, and not the site plan, such proximity is no boon to the Intervenors. In order to logically follow, proximity to the rails is only relevant insofar as the project going forward could increase or change the train traffic on the rails themselves – an issue which is clearly the exclusive domain of the federal government. See 49 U.S.C. § 10501(b) ("The jurisdiction of the Board over (1) transportation by rail carriers and the remedies provided in this part with respect to . . . routes . . . is exclusive."); City of Cayce v. Norfolk S. Ry. Co., 706 S.E. 26 [sic] 6, 11 (S.C. 2011) (holding enforcement of nuisance ordinance prohibiting graffiti on bridges in a railroad was preempted.)

See City of Portsmouth v. Newington Planning Board, et al., Rockingham Co. Superior Court Docket No. 218-2014-CV-00654, Order on Pending Motions dated May 8, 2015 (Wageling, J., presiding) at p's 4 and 5 (copy attached hereto as **Exhibit B**).

As explained by the Surface Transportation Board in SEA-3, Inc. – Petition for Declaratory Order, Finance Docket No. 35853, at 6 (S.T.B. March 16, 2005):

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[2] This group included Richard DePentima, Catherine DePentima, John Sutherland, Jane Sutherland, Robert Gibbons, Patricia Ford, Matthew Nania and Erica Nania, who are among the interveners in this proceeding.

> If Portsmouth or any other state or local entity were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with Pan Am's common carrier operations, those actions would be preempted under § 10501(b). See, e.g., Bos. & Me. Corp.—Pet. for Declaratory Order, FD 35749 (STB served Oct. 31, 2013) (confirming that the Town of Winchester's directive prohibiting Pan Am from conducting transportation over a rail line was preempted). As the Board and the courts have explained, Portsmouth may apply non-discriminatory regulations to protect public health and safety, but only provided that its regulations do not have the effect of foreclosing or unduly restricting Pan Am's ability to conduct operations over its Newington and Portsmouth Branches, or otherwise unreasonably burden interstate commerce.

Any decision to deny SEA-3's Exemption that is intended to regulate Pan Am's rail traffic to SEA-3's site will necessarily foreclose and/or unduly restrict Pan Am's ability to conduct operations and will otherwise unreasonably burden interstate commerce. In ruling on SEA-3's Request for Exemption, the SEC must disregard any evidence pertaining to the alleged impact of increased rail operations by Pan Am or its decision will be preempted.

B. The SEC is Preempted by 49 U.S.C. § 20106 from Regulating Rail Safety.

Issues concerning rail safety are governed by federal law.

> Congress passed the Federal Railway Safety Act (the Act) in 1970 to "promote safety in every area of rail operations," 49 U.S.C. § 20101, and authorized the Secretary of Transportation to make regulations and issue orders "for every area of railroad safety." 49 U.S.C. § 20103.

Duluth, Winnipeg and Pacific Ry. Co. v. City of Orr, 529 F. 3d 794, 795-796 (8th Cir. 2008).

Federal preemption under Federal Railway Safety Act ("FRSA") is governed by 49 U.S.C. § 20106, which provides in relevant part:

> **(a) National uniformity of regulation.--(1)** Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
> **(2)** A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an

> additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--
> **(A)** is necessary to eliminate or reduce an essentially local safety or security hazard;
> **(B)** is not incompatible with a law, regulation, or order of the United States Government; and
> **(C)** does not unreasonably burden interstate commerce.

See generally, Tyrell v. Norfolk Southern Ry. Co., 248 F.3d 517 (2001) (describing difference between FRSA and ICCTA preemption).

Under 49 U.S.C. § 20106, states are preempted from regulating any matter pertaining to railroad safety or railroad security that is the subject of a regulation or order prescribed by the Secretary of Transportation or the Secretary of Homeland Security. Federal regulation in this area is extensive.

As indicated by the results of the Sebago Technics Study obtained by Public Counsel[3], Pan Am's tracks showed evidence of recent, significant improvements, they were inspected by an independent agency in 2014 and 2015 and they meet all Federal Track Safety Standards. See Sebago Study at p. 2. Likewise, Sebago conducted a site inspection of the railroad tracks within SEA-3's facility and also found them to be in compliance with Federal Track Safety Standards. Id. In addition, Sebago Technics conducted a site inspection of all public highway-rail grade crossings along the Portsmouth and Newington Industrial Branch lines and found them all to be in compliance with Federal Highway regulations. Id. at p. 3.

To the extent that the opinions stated in the Sebago Technics Study were limited to the issue of Pan Am's and SEA-3's compliance with federal rail safety regulations prescribed by the U.S. Secretary of Transportation and actively regulated by the Federal Railroad Administration

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[3] While SEA-3 does not necessarily disagree with all of the findings of the Sebago Technics Study, SEA-3 does maintain that requiring such a study and ordering SEA-3 to pay for it constitutes an impermissible pre-clearance requirement under the rationale set forth in Green Mountain R.R. Corp. and consequently the Sebago Study should be excluded under 49 U.S.C. § 10501(b).

("FRA"), the SEC is expressly preempted from regulating those same issues. As no other rail safety experts have been identified by Public Counsel or the Interveners, there is no credible basis to find that any rail safety issues exist outside the scope of federal preemption.

C. The SEC is Preempted by 49 U.S.C. § 5125(b)(1) from Regulating the Transportation of Hazardous Materials.

The Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101, *et seq.*, governs the transportation of hazardous materials. Unlike ICCTA preemption, which only applies to "transportation by rail carrier," HMTA preemption applies uniformly to anyone who is engaged in the interstate movement of hazardous materials. See Roth v. Norfalco LLC, 651 F.3d at 371.

While HMTA preemption "leaves little, if any, room for non-federal regulation," see Roth v. Norfalco LLC, 651 F.3d 367, 374-379 (3rd Cir. 2011), the transportation of hazardous materials by rail renders the provisions of the HMTA subject to the even more stringent preemption provision of the Federal Railway Safety Act ("FRSA"). See CSX Transp., Inc. v. Public Utilities Com'n of Ohio, 901 F.2d 497, 501 (6th Cir.1990) (upholding the district court's decision to apply the FRSA preemption provision to regulations promulgated under HMTA), cert. denied, 498 U.S. 1066, 111 S.Ct. 781, 112 L.Ed.2d 845 (1991).

As noted in the Sebago Technics Study, Sebago employee Fred Fraini was employed by the FRA as a Supervisory Railroad Safety Specialist of Hazardous Materials within FRA's Region 1, with direct, oversight responsibility for both Pan Am and SEA-3 during the period 2003-2013. See Sebago Study at p. 12. As determined by Sebago Technics, both SEA-3 and Pan Am were found to be in compliance with applicable hazardous materials transportation regulations. Id.

To the extent that the opinions stated in the Sebago Technics Study were limited to the issue of Pan Am's and SEA-3's compliance with federal hazardous materials transportation regulations prescribed by the U.S. Secretary of Transportation and actively regulated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") through representatives of the FRA, the SEC is expressly preempted from regulating any of the hazardous materials transportation issues raised in the Sebago Technics Study. As no other hazardous materials transportation experts have been identified by Public Counsel or the Interveners, there is no credible basis to find that any hazardous materials transportation issues exist outside the scope of federal preemption.

Conclusion

For all of the foregoing reasons, SEA-3 submits that federal preemption under 49 U.S.C. § 10501(b), 49 U.S.C. § 20106 and 49 U.S.C. § 5125(b) (1) precludes the Committee from denying SEA-3's Request for Exemption based on any intent to limit or otherwise regulate Pan Am's rail traffic to SEA-3's site or to otherwise regulate rail safety or the transportation of hazardous materials.

Respectfully submitted,

SEA-3, INC.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

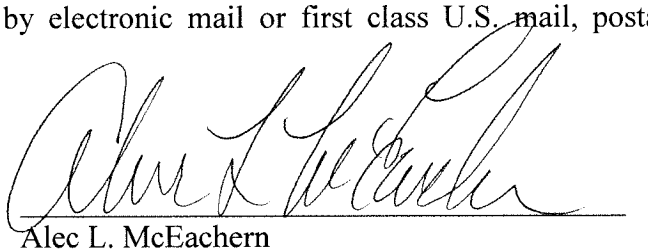
Dated: October 23, 2015

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

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of October, 2015, provided copies of the foregoing pleading to all parties to the proceeding by electronic mail or first class U.S. mail, postage prepaid.



Alec L. McEachern

Exhibit A

United States Court of Appeals
For the First Circuit

No. 14-2067

BROOK A. PADGETT;
CRAIG DAUPHINAIS; JENNIFER THOMAS; BRUCE W. SPINNEY,
AS THEY ARE MEMBERS OF THE BOARD OF SELECTMEN OF THE
TOWN OF GRAFTON,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES,

Respondents,

GRAFTON & UPTON RAILROAD COMPANY,

Intervenor.

PETITION FOR REVIEW OF A FINAL ORDER OF
THE SURFACE TRANSPORTATION BOARD

Before

Torruella, Selya, and Dyk,*
Circuit Judges.

Ginny Sinkel Kremer, Grafton Town Counsel, with whom Blatman, Bobrowski & Mead, LLC, were on brief, for petitioners.

Charles H.P. Vance, Attorney, Surface Transportation Board, with whom William J. Baer, Assistant Attorney General, Robert B. Nicholson and Shana Marie Wallace, Attorneys, Department of Justice, Craig M. Keats, General Counsel, and Evelyn G. Kitay, Deputy General Counsel, were on brief, for respondents.

John A. Mavricos, with whom Jonah M. Temple, Christopher, Hays, Wojcik & Mavricos, LLP, James E. Howard, Linda J. Morgan, and Nossaman, LLP, were on brief, for intervenor.

David F. Hassett and Hassett & Donnelly, P.C., on brief for

*Of the Federal Circuit, sitting by designation.

Congressman James P. McGovern, amicus curiae in support of petitioners.

Jonathan S. Springer and Springer Law Office, PLLC, on brief for Propane Gas Association of New England, amicus curiae in support of respondents and intervenor.

October 16, 2015

DYK, Circuit Judge. The Town of Grafton (the "Town" or "Grafton") petitions for judicial review a declaratory order of the Surface Transportation Board ("Board") finding that 49 U.S.C. § 10501(b) preempts state and local regulations with respect to Grafton & Upton Railroad Company's ("G&U") liquid petroleum gas transloading facility (the "facility"). We deny the petition.

I.

As described in a companion case decided today, Del Grosso v. Surface Transportation Board, No. 15-1069, slip op. at 3 (1st Cir. Oct. 16, 2015), under the Interstate Commerce Commission Termination Act ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, "the Board has jurisdiction over transportation by rail carrier." 49 U.S.C. § 10501(a)(1); see also Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 46 (1st Cir. 2008). This jurisdiction is exclusive, and the ICCTA preempts "State law" governing "regulation of rail transportation":

> The jurisdiction of the Board over—(1) transportation by rail carriers . . . and facilities of such carriers; and (2) the construction, acquisition, operation . . . of . . . facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except 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.

49 U.S.C. § 10501(b). The question here is whether state and local regulation of G&U's propane (or liquid petroleum gas) transloading facility is preempted.

II.

G&U owns and operates a rail line extending approximately sixteen miles between a CSX Transportation, Inc. ("CSXT") line in North Grafton, Massachusetts, and another CSXT line in Milford, Massachusetts. In January 2012, G&U purchased a parcel of land in North Grafton, located immediately adjacent to its rail line and existing rail yard and within a "Water Supply Protection Overlay District" under the Town's zoning regulations. G&U plans to construct a transloading facility on the parcel for transferring propane received by tank car in North Grafton to storage tanks and then to trucks for delivery across New England. In December 2012, G&U notified the Town of its intent to deliver four 80,000-gallon propane storage tanks to its rail yard to be used in constructing the facility. In response, the Town issued a cease and desist order requiring G&U to halt construction and filed a complaint in Massachusetts state court seeking to bar the construction, arguing that construction of the facility would violate state and local law.

The state and local laws at issue are zoning and permitting regulations. Massachusetts law provides that "[n]o person shall construct, maintain or use any tank or container of

more than ten thousand gallons' capacity, for the storage of any fluid other than water, unless the same is located underground, without first securing a permit." Mass. Gen. Laws ch. 148, § 37. The Grafton Zoning By-Law ("ZBL") lists the following as "specifically prohibited" uses: "Storage, transport or sale of petroleum or other refined petroleum products in quantities greater than normally associated with household use . . . ." ZBL § 7.4.C.9. The Town's zoning regulations also require a "special permit" for "any use involving secondary usage or storage of toxic or hazardous materials in quantities greater than normally associated with household use" and for "underground fuel or other storage tanks, including any tanks or collection pits." ZBL § 7.4.D.1; id. § 7.4.D.7. G&U argued that these state and local regulations were preempted and removed the case to federal district court. That court determined it lacked jurisdiction and remanded the case back to the state court.

On June 12, 2013, the state court enjoined the delivery of the storage tanks, directed G&U to file a petition for a declaratory order with the Board to determine whether § 10501(b) preempts the application of state and local zoning and permitting ordinances, and stayed the state court proceedings pending the outcome of the Board proceeding. G&U filed a petition with the Board on July 24, 2013, and the Board instituted a declaratory order proceeding on January 24, 2014.

Before the Board, the Town argued that G&U's activities did not constitute transportation by rail carrier because of the involvement of several companies (the "Propane Companies") with which G&U had previously contracted for the financing, construction, and operation of the facility. The Town's theory was that the facility would be constructed and operated by the Propane Companies (not rail carriers) rather than by G&U (a rail carrier). In a September 17, 2014, decision, the Board found that the state storage tank permit requirement and the Town's ordinances were preempted by § 10501(b) because G&U's construction and operation of the facility constituted "transportation by rail carrier." 49 U.S.C. § 10501(a). The Board concluded, based on G&U's July 2013 termination of the agreements with the Propane Companies, that G&U "can and will hire the people with the necessary expertise to properly operate the facility on its own" and that the record adequately demonstrated that the facility will be an integral part of G&U's operations as a rail carrier. The Board further found that state fire safety and construction codes would still apply to the construction and operation of the facility as long as they were applied in a non-discriminatory manner. The Board concluded by stating that "[t]his action will not significantly affect either the quality of the human environment or the conservation of energy resources."

The Town petitions for judicial review. We have jurisdiction over final orders of the Board pursuant to 28 U.S.C. § 2342. See Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 346 (1st Cir. 2004). Under the Administrative Procedure Act, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The Board's decision is not arbitrary or capricious if there is a "rational basis" for the decision based on facts in the record. Granite State Concrete Co. v. Surface Transp. Bd., 417 F.3d 85, 91-92 (1st Cir. 2005) (citation omitted). In the companion to this case, we established that we do not give Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), deference to the Board's determination of preemption, but we do give Skidmore v. Swift & Co., 323 U.S. 134 (1944), deference, and we defer to the Board's factual findings. See Del Grosso, slip op. at 11.

III.

At the outset the Town argues that the ICCTA preempts only state and not local regulation. This argument is meritless. The ICCTA's use of "State" clearly encompasses both state and local law. See Atl. Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 555 (1914) ("A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of

the state, is a state law within the meaning of the Federal Constitution."); see also City of Saint Louis v. Paprotnik, 485 U.S. 112, 125 (1988) ("[S]tate law . . . may include valid local ordinances and regulations . . . ."). Otherwise, the express preemption of state law would be completely ineffective. It is well established that the ICCTA preempts local as well as state regulation. See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 530 (5th Cir. 2012) ("Congress intended to preempt state *and local* laws that come within the Board's jurisdiction." (emphasis added)); Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 160 (4th Cir. 2010) (city ordinances preempted by ICCTA); City of Auburn v. U.S. Gov't, 154 F.3d 1025, 1031 (9th Cir. 1998) ("We believe the congressional intent to preempt this kind of state *and local* regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it." (emphasis added)).

"Determining whether the ICCTA preempts a state or local law is a two-step inquiry. First, the law must seek to regulate 'transportation,'"[2] and "second, that transportation must be

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[2] The ICCTA broadly defines "transportation" to include a "facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9). The facility here provides "storage, handling, and interchange of . . . property," id., and therefore clearly satisfies the first step of the § 10501(b) inquiry. See Green

conducted 'by a rail carrier.'" Tex. Cent., 669 F.3d at 530; see also, e.g., Norfolk, 608 F.3d at 157-58; Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001). "Whether a particular activity constitutes transportation *by rail carrier* under section 10501(b) is a case-by-case, fact specific determination" based on a series of factors including "(1) whether the rail carrier holds out transloading as part of its business, (2) the degree of control retained by the [rail] carrier, (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing." Tex. Cent., 669 F.3d at 530-31 (internal quotation marks, citations omitted).

The Town challenges the Board's finding that the facility constituted transportation by rail carrier because G&U failed to establish that it would actually operate the facility. But there is no basis for reversing the Board's finding that G&U would operate the proposed facility. The Board properly relied on evidence submitted by G&U, including the relevant contracts and termination agreements with the Propane Companies, and verified statements from G&U's fire safety consultant, G&U's president and CEO, and G&U's vice president of business development. There is no

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Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) ("Certainly, the plain language [of the ICCTA] grants the Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain."); see also N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 248 (3d Cir. 2007).

evidence that G&U lacked the ability to finance, construct, and operate the facility without the significant involvement of third parties. We appropriately defer to the Board's factual findings. See Del Grosso, slip op. at 12. Whatever role the presumption against preemption may play in the analysis under the statute, we are confident it does not have the effect of overcoming deference to the Board's factual findings.

Alternatively, the Town argues that the Board erred in denying discovery on whether the facility was operated by G&U. While Board regulations allow parties to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding," 49 C.F.R. § 1114.21(a)(1), the Town neither sought discovery from G&U nor filed a motion to compel such discovery. Understandably, the Board did not address this discovery issue. In any event, the Town has not shown that such discovery was necessary, given the Town's access to the relevant contractual documents. See Del Grosso, slip op. at 19. The mere fact that G&U reorganized its operations to shift responsibility for the financing and operation of the facility from the Propane Companies to itself is not a basis for discovery.

IV.

While regulation of railroad transloading facilities is generally preempted by the ICCTA, Del Grosso, slip op. at 3, the

Town belatedly argues that preemption is not applicable to health and safety regulations. In this connection, it relies on the presumption against preemption and the general rule that traditional police power regulation is not preempted. See, e.g., Norfolk, 608 F.3d at 158-60 & n.12; Green Mountain, 404 F.3d at 643. But as the Town acknowledges, "[t]he issue before the [Board] was whether G&U had demonstrated that the proposal as set forth would constitute 'transportation' undertaken 'by a rail carrier' within the meaning of § 10501(b)." The Town did not raise before the Board the argument that the ICCTA did not preempt health and safety regulations.[3]

The failure to raise an argument before an agency constitutes a waiver of that argument on judicial review. See Lopez v. Holder, 740 F.3d 207, 211 n.4 (1st Cir. 2014) ("[W]e are barred from considering [arguments] because they were not presented to the agency."); Mazariegos-Paiz v. Holder, 734 F.3d 57, 62 (1st Cir. 2013) ("Were the court free to delve into the merits of issues not presented to the agency, it would effectively usurp the

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[3] The Town argues that it raised the presumption against preemption argument before the Board, relying on a brief reference in a proposed ruling of law that had been submitted to the district court and was attached to the Town's reply brief before the Board. But the phrase "presumption against preemption" appears nowhere in the Town's briefing before the Board, and this single reference in a filing to another court attached as an exhibit to a reply brief is insufficient to "forcefully present[]" an argument for agency consideration. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978).

agency's function."); see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978) (requiring arguments be presented to an agency in a manner that is not "cryptic and obscure"). Because the Town failed properly to raise the health and safety argument before the agency, we decline to address it for the first time.

V.

The Town also argues, for the first time in this proceeding, that the Board violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., by failing to conduct any analysis of the environmental aspect of its decision. NEPA applies to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This court has summarized NEPA's requirements as follows:

> [NEPA] obligates agencies . . . to evaluate the environmental impacts of its proposed actions. To comply with NEPA, the [agency is] first required to determine whether [the proposed project] would have a significant environmental impact. A detailed environmental impact statement ("EIS") is required whenever proposed actions will "significantly affect the quality of the human environment." If uncertain about impact, the agency may start with a less detailed Environmental Assessment ("EA"). If the EA finds a significant impact, a full EIS must be prepared; if not, the agency makes a "Finding of No Significant Impact" ("FONSI"), which exhausts its obligation under NEPA.

Sierra Club v. Wagner, 555 F.3d 21, 24 (1st Cir. 2009) (citations omitted). The Town argues that NEPA applies here because the Board's preemption decision constitutes a "major Federal action,"

as G&U could not construct the facility absent the Board's preemption determination. According to the Town, the Board's statement that "[t]his action will not significantly affect either the quality of the human environment or the conservation of energy resources" constitutes a FONSI, which was produced without the preparation of an Environmental Assessment, in violation of NEPA. The Board responds that NEPA is inapplicable because the declaratory order here is not a "major Federal action," as neither federal funding nor Board licensing was involved, relying on this court's holding that the test for major federal action under NEPA is "whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome." Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d 297, 302 (1st Cir. 1999).

The Board is correct that NEPA does not apply to its declaratory order, because the order was not a "major Federal action" under 42 U.S.C. § 4332(C). The Board made a legal determination concerning preemption of the Town's zoning and permitting ordinances. The Board did not provide federal funds, approve or license the transload facility, or otherwise manifest "indicia of control" over G&U that would be sufficient to establish a "major Federal action." Mayaguezanos, 198 F.3d at 302. Moreover, declaratory orders are categorically exempted from

environmental documentation requirements under the Board's NEPA regulations absent "extraordinary circumstances." 49 C.F.R. § 1105.6(c) ("No environmental documentation will normally be prepared . . . for the following actions . . . (iii) [d]eclaratory orders . . . ."). The petitioners have failed to demonstrate any "extraordinary circumstances" that could overcome the categorical exemption. 40 C.F.R. § 1508.4. Therefore, petitioners have not established that the Board violated NEPA.

We note, however, that since the Board's view is that such declaratory orders are not subject to NEPA, there is no reason for its gratuitous statement, apparently a "standard environmental disclaimer . . . found in virtually all [Board] decisions," about the lack of an environmental impact. Such boilerplate disclaimers do nothing but foster confusion.

PETITION DENIED

Costs to respondents and intervenor.

Exhibit B

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Alec L. McEachern, ESQ
Shaines & McEachern PA
282 Corporate Drive
PO Box 360
Portsmouth NH 03802-0360

Case Name: **City of Portsmouth v Newington Planning Board, et al**
Case Number: **218-2014-CV-00654** ***218-2014-CV-01287***

Enclosed please find a copy of the court's order of May 06, 2015 relative to:

Order on Pending Motions

May 08, 2015

Raymond W. Taylor
Clerk of Court

(507)

C: Jane Mackin Ferrini, ESQ; Christopher Cole, ESQ; John J. Ratigan, ESQ; Laura Spector-Morgan, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD

Docket No.: 218-2014-CV-654

Consolidated With

CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON ZONING BOARD OF ADJUSTMENT, ET AL

Docket No.: 218-2014-CV-1287

ORDER ON PENDING MOTIONS

These consolidated cases are appeals brought by the City of Portsmouth ("Portsmouth") from the Town of Newington ("Newington") Planning Board ("Planning Board") and Town of Newington Zoning Board of Adjustment ("ZBA"). Sea-3, Inc. ("Sea-3") has moved to intervene, to which Portsmouth objects. Richard and Catherine DiPentima, John and Jane Sutherland, Margaret and Louis Salome, Robert Gibbons, Patricia Ford, Matthew and Erica Nania, Thomas and Corrine Szopa, and Steve and Carole Edwards (collectively "the Portsmouth Intervenors") move to intervene. Sea-3 and the Planning Board object to the Portsmouth Intervenors' motion. Sea-3 also moves to dismiss the appeal brought by Portsmouth—a motion that the Court will address in part. For the reasons discussed below, Sea-3's motion to intervene is

GRANTED the Portsmouth Intervenors' motion to intervene is **DENIED**, and Sea-3's motion to dismiss is **DENIED IN PART**.

Sea-3 is the owner of two adjoining parcels of land located at 190 Shattuck Way, in Newington. The two lots together are almost 11 acres in size, and house structures which facilitate the transmission of liquefied petroleum gas (LPG) by water and railroad. Due to changes in the global energy market, the economic feasibility of running such an operation has changed, and Sea-3 sought approval to increase the number of rail unloading berths and construct additional improvements. It is alleged that this will lead to an increase in rail traffic over the lines which run through Portsmouth.

In August of 2013, Sea-3 submitted preliminary plans for renovation to the Planning Board for approval. On December 9, 2013, the project was designated a "development of regional impact" pursuant to RSA 36:55. As a result, notice was given to the Rockingham Planning Commission and surrounding communities, including the City of Portsmouth. Portsmouth was, and continues to be, actively involved in the process. Ultimately, on May 19, 2014, the Planning Board issued its conditional approval for the redevelopment plan. Portsmouth appealed that decision both to this Court (Docket No. 218-2014-CV-654) and the ZBA. The Planning Board appeal was stayed in this Court during the pendency of the ZBA action. On September 15, 2014, the ZBA upheld the Planning Board's decision. Portsmouth filed a motion for rehearing, which was denied on November 7, 2014. Portsmouth subsequently appealed that decision to this Court (Docket No. 218-2014-CV-1287) and the cases were consolidated.

"Any person shown to be interested may become a party to any civil action upon

filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause. . ." N.H. R. Super. Ct. (Civil) 15. Here, it is beyond cavil that Sea-3 is an interested party. As the owner of the property and holder of the conditional approval, Sea-3 unquestionably has an interest in this case, and thus Sea-3's motion to intervene is **GRANTED**.

Turning to the Portsmouth Intervenors, the Court notes "[o]nly 'persons aggrieved' have standing to appeal planning and zoning board decisions to the superior court." Nautilus of Exeter, Inc. v. Town of Exeter, 139 N.H. 450, 452 (1995); see also RSA 677:15, I. "To be considered a person aggrieved, a litigant must have a direct definite interest in the outcome of the proceedings." Joyce v. Town of Weare, 156 N.H. 526, 528 (2007). "[A]n appellant must demonstrate that the appellant has suffered or will suffer an injury in fact." Appeal of Londonderry Neighborhood Coalition, 145 N.H. 201, 203 (2000). The Court reasons that the "injury" must be one capable of being remedied by the administrative agency whose actions have been challenged.

"'Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination' for the trial court." Nautilus, 139 N.H. at 452 (quoting Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544-45 (1979)). In making this determination, the Court considers "factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings." Weeks, 119 N.H. at 545. Standing requires a "definite" injury, as a merely speculative injury is not enough. See Joyce, 156 N.H. at 530 (finding no standing where the petitioner was engaged in litigation which might result in his

acquiring property). The burden lies on the putative intervenors to demonstrate standing. See Golf Course Investors of NH v. Town of Jaffery, 161 N.H. 675, 680 (2011) ("[W]hen the issue of standing is raised, the party challenging the administrative action . . . must sufficiently demonstrate his or her right to claim relief").

In this case, the Portsmouth Intervenors all live between two and three miles from Sea-3's property by road travel. See Planning Board's Objection to Motion to Intervene. The Portsmouth Intervenors represent that "most live within 100 feet of the rail line leading to the Sea-3 property." Reply of Portsmouth Intervenors to Planning Board's and Sea-3's Objections to Motion to Intervene, p. 2. The Court concludes that the proximity factor weighs against a finding of standing in this case—the proposed intervenors all live over two miles away. See Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013) (noting that petitioner concede that a distance of 3.8 miles "lacks proximity"). That some of the Portsmouth Intervenors live near the rail lines is irrelevant in this case because the Planning Board is without authority to regulate the railroad itself. See CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005) ("[U]nder the plain language of the statute [49 U.S.C. §10501(b)], any state or local attempt to determine how a railroad's traffic should be routed is preempted."); Burlington N. & Santa Fe Ry. Co v. Dep't of Trasp., 206 P.3d 262, 263 (Or. Ct. App. 2009) (holding the act "broadly precludes state regulation on those matters" specified in 49 U.S.C. §10501(b)). In this case, Sea-3, Newington and Portsmouth all agree that regulation of railways is preempted, although Portsmouth argues that Newington may still regulate aspects of the site plan that do not directly touch on rail. In so far as the Portsmouth Intervenors seek standing based on

their proximity to the railway, and not the site plan, such proximity is no boon to the Intervenors. In order to logically follow, proximity to the rails is only relevant insofar as the project going forward could increase or change the train traffic *on the rails themselves*—an issue which is clearly the exclusive domain of the federal government. See 49 U.S.C. §10501(b) ("The jurisdiction of the Board over (1) transportation by rail carriers and the remedies provided in this part with respect to . . . routes . . . is exclusive."); City of Cayce v. Norfolk S. Ry. Co., 706 S.E.26 6, 11(S.C. 2011) (holding enforcement of nuisance ordinance prohibiting graffiti on bridges in a railroad was preempted).

Turning next to the type of change proposed, the project calls for the construction of new structures, including three 90,000 gallon storage tanks, various industrial appendages, and new train berths. The bigger and more significant a proposal, the more likely it is that neighbors will be affected. Because the size of this change is significant—indeed, it is a project of regional impact—this factor weighs in favor of finding the Portsmouth Intervenors have standing. See Hannaford Bros., 164 N.H. at 767 (holding that "there is no question" a proposal to construct a building twice the 40,000 square foot restriction is substantial).

Turning to the third factor, the Portsmouth Intervenors claim to have "demonstrated amply to the Planning Board their direct interests in the outcome of the proceedings, which include environmental, health and safety concerns and the potential diminution in value of their residential properties located along the rail lines." Reply of Portsmouth Intervenors to Planning Board's and Sea-3's Objections to Motion to Intervene, p. 2. By way of example, the Portsmouth Intervenors submitted a letter to the

Planning Board, expressing their concerns. Planning Board C.R., p. 220. They wrote: "In addition to the significant safety concerns regarding this type of activity and this magnitude of use intensification, there are potential environmental impacts such as increased noise, light and diesel exhaust, and the potential impact on the wetlands where the trains pass." Id. To the extent that the Portsmouth Intervenors claim injury based on their proximity to the lines, for the reasons discussed above, those injuries cannot support standing before the Planning Board. If, hypothetically, the project would lead to increased train travel on the tracks which would be loud when heard in the Portsmouth Intervenors' homes, that injury is outside the jurisdiction of the Planning Board and cannot confer standing. To the extent that the Portsmouth Intervenors' worry about other general safety and environmental claims, those fears are too speculative and generalized to properly form the basis for standing. As discussed above, it is the Portsmouth Intervenors' burden to demonstrate that they have standing, and they have not identified an injury that will affect them particularly.[1] The injury prong therefore weighs against a finding of standing.

Finally, concerning the extent of the Portsmouth Intervenors' involvement below, the Court notes that the Portsmouth Intervenors appeared through counsel below, and some even wrote letters personally. See, e.g., Planning Board C.R., p. 142. This factor weighs in favor of finding standing. On balance, however, the Court holds a lack of a direct injury and lack of proximity tip the scales against a finding of standing. See Hannaford Bros., 164 N.H. at 770 ("Although the second and fourth Weeks factors weigh in favor of standing, we conclude that because the petitioner lacks proximity and

[1] Prayer A in the Portsmouth Intervenors' Reply requests the court conduct a hearing if necessary to determine whether they have standing. A hearing is not necessary here, because the Court is accepting their offer of proof.

has failed to allege any concrete injury to its particular property . . . the Weeks factors, on balance, do not support the petitioner's standing to appeal."). In reaching this holding, the Court notes that it is allowing Portsmouth to remain in the case, discussed infra, and Portsmouth holds a position similar to the Portsmouth Intervenors'. The Court also rejects the Portsmouth Intervenors' argument that the Court has authority to grant the motion to intervene in the absence of Weeks standing. See id. at 768 ("To accept [that] argument would disregard our statutory mandate to limit standing to persons 'directly affected' . . ."). The Portsmouth Intervenors' motion to intervene is therefore **DENIED**.

Finally, the Court addresses Sea-3's motion to dismiss based upon Portsmouth's standing. The Court observes that the motion to dismiss also raises preemption as a ground—that issue will be addressed by a further order of the Court which will issue in due course.

Here, the Court concludes that the City of Portsmouth does have standing to proceed. As discussed above, the change of use weighs in favor of standing, as does Portsmouth's extensive participation in the proceedings.

Portsmouth's risk of injury, however, is much more particularized. In the event of some sort of catastrophic emergency, presumably Portsmouth Fire Department and EMS personnel would respond, potentially on Portsmouth's dime. Planning Board Appeal ¶40. Moreover, such a "catastrophic event at the site would likely require the evacuation of [the] City's residents and the loss of property and damage." Id. ¶38. Such an event, while speculative, is sufficiently generalized and within Portsmouth's duties and obligations in *parens patriae*. Moreover, as it is a municipality, Portsmouth

has the obligation to plan for the unexpected. Finally, as a municipality, Portsmouth has a special "interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." Massachusetts v. EPA, 549 U.S. 497, 518-19 (2007) (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (Holmes, J.)) (finding that, under the federal system, states are entitled to "special solicitude" in standing analysis). Portsmouth thus has standing to contest the environmental injury that would be too diffuse for a citizen to bring. Finally, Portsmouth is an abutting city to Newington, and is thus proximate for the purposes of Weeks.

In sum, the Court concludes that Portsmouth has standing to pursue the appeal. Sea-3's motion to dismiss on standing grounds is therefore **DENIED**.

So Ordered.

May 6, 2015
Date

Marguerite L. Wageling
Presiding Justice

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

DOCKET NO. 2015-01

SEA-3, INC.'S CONTESTED MOTION TO STRIKE TESTIMONY OF PETER BRITZ

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and moves to exclude the testimony of Peter Britz. In support of this motion, SEA-3 states as follows:

I. INTRODUCTION.

1. The Subcommittee should exclude Peter Britz's testimony because it consists of irrelevant legal opinion. In essence, Britz's testimony asserts that the Newington Planning Board committed legal error when it approved SEA-3's project. The City of Portsmouth's appeal of the Newington Planning Board's decision is a separate matter within the Superior Court's jurisdiction. The Superior Court has now ruled on the issue. Britz's testimony does not make any fact at issue before this Committee more or less likely.

2. This Motion, in the following order: 1) recites the standard to exclude evidence and testimony, 2) briefly summarizes Britz's pre-filed testimony; and 3) explains the grounds for exclusion.

II. STANDARD TO EXCLUDE EVIDENCE.

3. The Subcommittee's receipt of evidence is governed by N.H. R.S.A. § 541-A:33 and N.H. Code R. Site 202.24. Under that framework, the Committee may exclude irrelevant or immaterial evidence.

4. 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.

5. Materiality is a component of relevance: if evidence does not prove a fact at issue, it is immaterial. Welch v. Bergeron, 115 N.H. 179, 182, 337 A.2d 341, 344 (1975) (citing J. McCormick, Evidence § 185, at 434 (E. Cleary ed. 1972); James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 690-91 (1941)).

III. SUMMARY OF BRITZ'S TESTIMONY.

6. Britz is the City of Portsmouth's Environmental Planner/Sustainability Coordinator. Britz Prefiled Testimony at 1. His background is in natural resource management, with nearly 15 years of experience in municipal government. Id. He has a Masters in Marine Affairs Degree. Id. He has not disclosed a legal degree and is not listed as an active duty licensed lawyer in New Hampshire.

7. Britz describes Portsmouth's website on Sea-3 expansion. Id. He then explains why Portsmouth appealed the Newington Planning Board's grant of approval for Sea-3's project. Id. at 2. Britz details Portsmouth's legal arguments, which were submitted to the Superior Court. Id. at 2-3. Britz describes legal differences between the Site Evaluation Committee's purview and the Newington Planning Board's mandate. Id. at 3-4.

IV. GROUNDS FOR EXCLUSION.

8. Britz's testimony is irrelevant because it does not make any fact at issue more or less likely. As a threshold matter, Portsmouth's legal arguments to the Superior Court on appeal of the Newington Planning Board's decision have no bearing on the Committee's decision in this

matter. Britz offers legal opinions, which he is not qualified to give and, even if he was qualified, it invades the province of the Committee.

A. The Testimony is Not Relevant.

9. Portsmouth's litigation against the Newington Planning Board has no bearing on the issues before this Committee. The Newington Planning Board's decisions are only reviewable by the New Hampshire Superior Court. N.H. R.S.A. § 677:15, I. This Committee has no jurisdiction to pass opinion over the correctness of Planning Board's decision.

10. As an administrative agency, the Committee can only exercise the jurisdiction conferred upon it by statute. The Supreme Court has explained:

> "Administrative agencies are granted only limited and special subject matter jurisdiction...." *Appeal of Amalgamated Transit Union,* 144 N.H. 325, 327, 741 A.2d 66 (1999) (quotation and brackets omitted). That jurisdiction "is dependent entirely upon the statutes vesting [the agency] with power and [the agency] cannot confer jurisdiction upon [itself]." *Fullerton v. Administrator,* 280 Conn. 745, 911 A.2d 736, 742 (2006) (quotation and ellipsis omitted). Furthermore, a tribunal that "exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." *Figueroa v. C and S Ball Bearing,* 237 Conn. 1, 675 A.2d 845, 847 (1996) (quotation omitted).

In re Campaign for Ratepayer's Rights, 162 N. H. 245, 250 (2011) (describing the limits of the Site Evaluation Committee's jurisdiction for purposes of standing).

11. Since the legislature specifically granted the Superior Court jurisdiction over appeals of planning board decisions, this Committee lacks the mandate to pass upon the merits of Portsmouth's arguments.

12. The Superior Court has already decided the merits of Portsmouth's appeal of both the Newington Planning Board decision and Zoning Board of Adjustment decision. The Order,

previously submitted to this Committee, remands one limited clarification issue to the Planning Board and affirms all other decisions of the Planning Board and Zoning Board of Adjustment.

13. Since the Committee cannot decide Portsmouth's grievances of the Planning Board decision, the testimony is irrelevant and should be excluded.

B. Britz is Not Qualified to Offer Legal Opinions.

14. Britz is not qualified to offer legal analysis. It cannot be denied that legal analysis requires specialized qualifications. However, Portsmouth has not submitted any evidence suggesting that Britz is qualified by knowledge, training, or experience to give legal argument or opinions. Britz is not listed as an active duty attorney in the State of New Hampshire.

15. Since Britz is not qualified to offer legal opinions, such testimony should be excluded. Britz's answers to questions 7-9 consist of legal opinion and argument, and the Committee should exclude them.

C. Britz's Legal Analysis Invades the Province of the Committee.

16. Even if Britz could qualify to offer legal opinions, those opinions are still not admissible because they invade the province of the Committee. Expert testimony must not usurp the Committee's role. Traditionally, this issue arises when experts intend to "instruct the jury as to applicable principles of law [. . . .]" Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 99 (1st Cir. 1997) (quoting United States v. Newman, 49 F.3d 1, 7 (1st Cir.1995)). Instructing the jury on the law remains firmly and exclusively within the province of the trial judge. Id. Here, where the Committee will make findings of fact and apply the law, Britz's legal opinions should be excluded because they invade the Committee's role in the proceedings.

V. CONCLUSION.

17. The Committee should exclude Britz's testimony because it consists of irrelevant information being offered by an unqualified witness. In any event, the legal opinions invade the province of this Committee.

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

A. Grant the within Motion to Exclude;

B. Exclude Peter Britz's testimony;

C. Alternatively, decline to consider Peter Britz's testimony; and

D. Grant such other and further relief as may be just.

Respectfully submitted,

SEA-3, INC.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

Dated: October 23, 2015

By: _____

Alec L. McEachern, Esq.
N.H. Bar ID #10568
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Phone: (603) 436-3110
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CERTIFICATE OF SERVICE

I certify that I have this 23rd 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

SEA-3, INC.'S CONTESTED MOTION TO STRIKE TESTIMONY CONCERNING RAILROAD ISSUES

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and moves to exclude evidence concerning railroad issues. In support of this motion, SEA-3 states as follows:

I. INTRODUCTION.

1. The Subcommittee should exclude evidence concerning railroad issues because those issues are federally preempted and are outside the scope of the Subcommittee's jurisdiction. Multiple parties have submitted testimony on the preempted railroad issues, consideration of which would result in the Committee directly or indirectly regulating the railroad, which federal preemption prohibits.

2. This Motion, in the following order: 1) recites the standard to exclude evidence and testimony, 2) defines the issue to be excluded and identifies the pre-filed testimony and other submissions in the record that mention the railroad; and 4) explains the grounds for exclusion.

II. STANDARD TO EXCLUDE EVIDENCE.

3. The Subcommittee's receipt of evidence is governed by N.H. R.S.A. § 541-A:33 and N.H. Code R. Site 202.24. Under that framework, the Committee may exclude irrelevant or immaterial evidence.

4. 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.

5. Materiality is a component of relevance: if evidence does not prove a fact at issue, it is immaterial. Welch v. Bergeron, 115 N.H. 179, 182, 337 A.2d 341, 344 (1975) (citing J. McCormick, Evidence § 185, at 434 (E. Cleary ed. 1972); James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 690-91 (1941)).

III. THE TOPIC TO BE EXCLUDED.

6. Issues concerning the railroad should be excluded because they are preempted. The preempted issue includes testimony or evidence concerning or related to the railroad, such as the operation and maintenance thereof, the level of rail traffic, the environmental impact of the railroad, and any other related concern, allegation, or challenge.

7. From the prefiled testimony and record developed to-date, the documents including reference to the preempted railroad issues include, but may not be limited to:

Non-Testimony Letters:

a. Letter from Richard and Catherine DiPentima dated Feb. 17, 2015;

b. Letter from John Sutherland dated Feb. 20, 2015;

c. Letter from Jane Sutherland dated Feb. 23, 2015;

d. Letter from Patricia M. Ford and Robert L. Gibbons dated Feb. 27, 2015;

e. Letter from Corinne and Thomas Szopa dated Feb. 28, 2015;

f. Letter from Margery D. Andrews dated March 4, 2015;

g. Letter from Abdallah Alhamdan dated April 15, 2015;

h. Letter from Matt and Erica Nania dated April 16, 2015;

i. Letter from Great Bay-Piscataqua WaterKeeper dated Apr. 22, 2015;

j. Letter from Great Bay Stewards dated Apr. 29, 2015;

k. Letter from Lamprey River Wild and Scenic Committee dated Apr. 30, 2015;

l. Richard DiPentima's Site Evaluation Committee Statement dated May 7, 2015;

m. Letter of Great Bay-Piscataqua WaterKeeper dated Sept. 10, 2015;

Pre-Filed Testimony:

n. Prefiled Testimony of Dover Assistant Fire Chief James Ormand dated Aug. 17, 2015, specifically Questions 12-15, 21-22;

o. Prefiled Testimony of Portsmouth Fire Chief Steve Achilles dated Aug. 17, 2015, specifically questions 6, 16, and 17;

p. Prefiled Testimony of Portsmouth Environmental Planner/Sustainability Coordinator Peter Britz dated Aug. 17, 2015, specifically questions 5 and 9;

q. Prefiled Testimony of the Great Bay Stewards;

r. Prefiled Testimony of Intervenor Richard DiPentima;

s. Prefiled Testimony of Patricia M. Ford;

t. Prefiled Testimony of Erica Nania;

u. Prefiled Testimony of Jane Sutherland, specifically but not limited to page 2; and

v. Prefiled Testimony of Sebago Technics' Stephen Sawyer, Frederick Fraini and Robert Davids, including the attached "Safety Assessment—Sea 3 Inc. Expansion of Propane Shipments".

IV. GROUNDS FOR EXCLUSION.

8. Testimony concerning the railroad is irrelevant because it is a preempted issue. When an issue is preempted, it is not susceptible to any other regulatory body's jurisdiction or control. Since the Committee cannot regulate it, it should exclude evidence about it.

9. Exercising the power to exclude evidence is important to the process because it avoids confusion of issues and the specter of unfair prejudice. Here, parties opposing SEA-3's

request for exemption seek to admit evidence concerning Pan Am's railway, which is a preempted issue.

10. Other parties have already argued that the Board should nevertheless consider the railroad in deciding SEA-3's Request for Exemption and just not issue a ruling directed at the railroad. That argument has a singular, prohibited purpose: to cause the Committee to indirectly regulate the railroad. It is well settled in the law that a regulatory body cannot indirectly regulate a preempted activity. See SEA-3's Mem. on Fed. Preemption at 3-4 (filed Oct. 23, 2015) (describing case law prohibiting indirect regulation of preempted issue). Should the Committee even consider a preempted issue occurring off SEA-3's site in deciding SEA-3's Request, the Committee would be deciding whether to study whether concerns about the railroad warrant regulating SEA-3. If the Committee were to order a full certification hearing because of railroad concerns, the Committee would be ordering a review to decide whether to limit SEA-3's ability to receive railcars in order to stifle rail traffic. The law against indirect regulation of preempted activities specifically prohibits that analysis. Id.

11. Since federal preemption and the laws against indirect regulation prohibit consideration of railroad issues in deciding SEA-3's Request, railroad evidence is irrelevant and immaterial. Allowing any such evidence would cause the Committee to engage in the prohibited activity of indirect regulation of the railroad. The only way to avoid that prohibited activity is to exclude such evidence and testimony.

12. SEA-3 has contemporaneously filed a Memorandum of Law Regarding Preemption of Railroad Operations, Railroad Safety and Transportation of Hazardous Materials. SEA-3 incorporates by reference the arguments set forth in that Memorandum as grounds for exclusion of the above-described testimony, exhibits and topics.

V. CONCLUSION.

13. The Committee should exclude all railroad evidence because it is irrelevant. Federal preemption precludes state and local governments—including this Committee—from regulating railroad issues. Accepting any argument to the contrary, not matter how the argument is couched, would necessarily result in indirect regulation of the railroad, which federal law prohibits. The Committee should exclude railroad evidence now to avoid direct or indirect regulation of a firmly preempted issue.

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

A. Grant the within Motion to Exclude;

B. Exclude testimony about railroad issues;

C. Alternatively, decline to consider any evidence concerning the railroad; and

D. Grant such other and further relief as may be just.

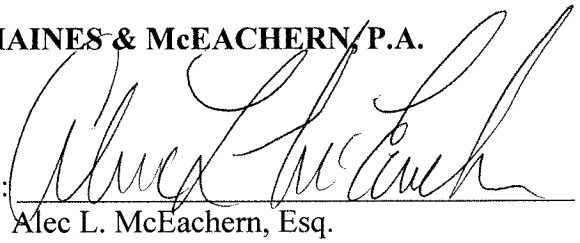
Respectfully submitted,

SEA-3, INC.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

Dated: October 23, 2015

By: 

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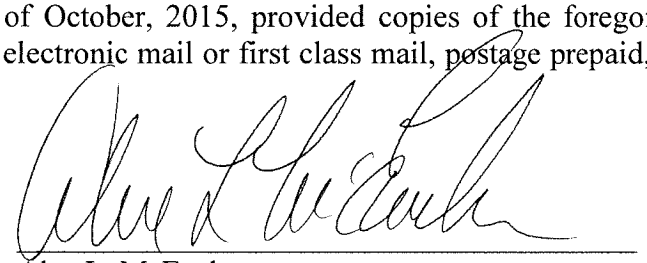
CERTIFICATE OF SERVICE

I certify that I have this 23rd 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