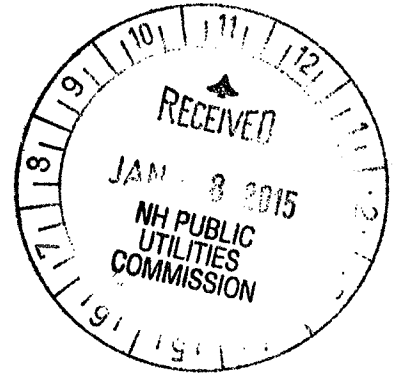


SHAINES & McEACHERN, PA
Attorneys at Law

January 7, 2015



VIA FEDEX

Martin P. Honigberg, Chairman
Site Evaluation Committee
c/o NH Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: Docket 2015 _____ Request for Exemption of SEA-3, Inc. For
Improvements to an existing Energy Facility in Newington, NH

Dear Mr. Honigberg:

Enclosed for filing with the Site Evaluation Committee, please find an original and 18 copies of SEA-3, Inc.'s Request for Exemption From the Approval and Certificate Provisions of RSA Chapter 162-H for its existing energy facility at 190 Shattuck Way, in the Town of Newington.

If you should have any questions regarding this filing, please do not hesitate to contact me. Thank you for your assistance in this matter.

Very truly yours,

SHAINES & McEACHERN, PA

By: 

Alec L. McEachern

ALM/jba

Enclosures

cc: SEA- 3, Inc.

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

DOCKET NO. _____

APPLICANT: SEA-3, INC.

**REQUEST FOR EXEMPTION FROM THE APPROVAL
AND CERTIFICATE PROVISIONS OF RSA CHAPTER 162-H
BY SEA-3, INC.**

**Alec L. McEachern, Esq.
N.H. Bar ID #10568
Shaines & McEachern, P. A.
P.O. Box 360
Portsmouth, NH 03802-0360
Phone: (603) 436-3110
Email: alec@shaines.com**

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

DOCKET NO. _____

**REQUEST FOR EXEMPTION FROM THE APPROVAL
AND CERTIFICATE PROVISIONS OF RSA CHAPTER 162-H
BY SEA-3, INC.**

NOW COMES SEA-3, Inc. ("SEA-3"), and, pursuant to RSA 162-H: 4, IV, respectfully requests an exemption from the approval and certification provisions of RSA 162-H:1, et seq., for the construction of five additional rail unloading berths and associated handling equipment at its existing propane storage and distribution facility located at 190 Shattuck Way, Newington, New Hampshire. In support of this Request, SEA-3 states as follows:

Applicant

SEA-3 is a Texas Corporation duly registered to do business in the State of New Hampshire. SEA-3's principal place of business is 1111 Bagby, Suite 2510, Houston, Texas 77002. SEA-3's sole shareholder is Trammo, Inc., 320 Park Avenue, New York, New York 10022. The names and addresses of SEA-3's Directors are as follows: Paul Bogan, 190 Shattuck Way, Newington New Hampshire 03801, David Smotherman, 1111 Bagby, Suite 2510, Houston, Texas 77002, and Michael Tracey, 1111 Bagby, Suite 2510, Houston, Texas 77002. The names and addresses of SEA-3's officers are as follows: David Smotherman, President, 1111 Bagby, Suite 2510, Houston, Texas 77002, Paul Bogan, Vice President for Operations, 190 Shattuck Way, Newington, New Hampshire 03801, Michael Tracey, Vice President for Marketing, 1111 Bagby, Suite 2510, Houston, Texas 77002, David Herr, Vice President, 1111 Bagby, Suite 2510, Houston, Texas 77002. A statement of SEA-3's assets and liabilities is attached hereto as Exhibit A.

Background

Since 1975, SEA-3 has owned and operated its propane storage and distribution facility at 190 Shattuck Way in the Town of Newington (the “Facility”). Over this period, the Facility has received propane deliveries by ship, via the Piscataqua River, and by rail, via the Newington Branch, a rail line owned by the Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a Pan Am Railways (“Pan Am”). The Facility is one of only two primary refrigerated storage facilities for propane in New England and the only one with rail access. The Facility has a refrigerated storage capacity of 560,000 barrels and distributes propane (a/k/a LPG) throughout New Hampshire and New England. During its existence, the Facility has distributed up to 40% of the propane consumed in the New England market and is an essential part of New Hampshire’s energy market.

The Facility is situated on two separately deeded parcels that are separated from each other by the Newington Branch rail line (the “Rail Line”). The western-most parcel consists of 7.02 acres and is located to the west of the Rail Line and lies partly within Newington’s General Industrial Zoning District and partly within the Waterfront Industrial and Commercial Zoning District (the “Upper Lot”). The Upper Lot contains: (a) a main building housing offices, control rooms, the refrigeration plant and boiler; (b) a truck loading rack with five loading stations, each having the capacity to load one truck at a time; (c) a 400,000 barrel refrigerated storage tank and a 160,000 barrel refrigerated storage tank (collectively the “Primary Storage Tanks”); and (d) a smaller 60,000 gallon distribution tank that feeds the truck loading stations.

The eastern-most parcel consists of 3.92 acres and is located within Newington’s Waterfront Industrial and Commercial Zoning District and has frontage on the Piscataqua River (the “Lower Lot”). The Lower Lot contains a cleared, fenced area with a hard-packed gravel

surface adjacent to the Rail Line and contains: (a) a small storage building; (b) a rail spur with three rail berths and associated improvements for the loading and unloading of LPG, with each rail berth having the ability to handle two railcars at a time for a total capacity of six cars; and (c) a flare.

The Upper and Lower Lots are joined by a pipe rack that crosses over the Rail Line. The pipe rack contains a 16" liquid distribution line, a 10" flare vapor line, a 8" liquid distribution line, a 8" vapor line, a 6" vapor line, a 3" water line and numerous electrical and instrument control conduits.

LPG that arrives by ship has already been refrigerated and is pumped from the ship and transported via pipeline across the Lower Lot, over the Rail Line and directly into the refrigerated Primary Storage Tanks on the Upper Lot for storage and eventual distribution. LPG that arrives by rail car on the Lower Lot is at ambient temperature when it arrives. The ambient temperature LPG is offloaded from the rail cars and sent via pipeline to the Upper Lot where it is either sent to the 60,000 gallon distribution tank for immediate distribution via the truck rack or to the refrigeration plant where it is refrigerated and piped into the Primary Storage Tanks for storage. When ready for distribution, the refrigerated LPG is piped out of the Primary Storage Tanks, heated and then odorized prior to distribution via the truck rack. For the period January 1, 2014 through December 3, 2014, the Facility received and offloaded approximately 99 LPG rail cars using the existing rail offloading facilities.

A staff of 16 employees operates the Facility 24 hours a day, 365 days a year. These employees receive extensive training in both operations and safety and utilize state of the art, automated equipment and technology to operate the Facility and insure its security. During the

39 years that the Facility has been in operation, it has had no explosions, fires, significant injuries or major environmental incidents.

Role of SEA-3's Facility in New Hampshire's LPG Market

As one of only two primary propane storage facilities in New England and the only one with rail access, SEA-3's Facility plays a critical role in both New Hampshire's and New England's energy market. According to the U. S. Census Bureau's 2009 American Community Survey, 67,267 of New Hampshire's 506,342 homes (or 13.28% of all New Hampshire homes) utilize LPG as their primary heat source.¹ New England wide, the total number of homes that use propane as their primary heat source is 246,499.

The presence of a primary storage tank facility in New Hampshire allows propane to be stockpiled and released during peak-demand, cold-weather months, thereby stabilizing the local propane market and securing a critical energy supply for the State and region. In 2009, New Hampshire consumed 126,726,000 gallons, or 3,017,286 barrels of propane. Approximately 70.5% of this consumption was for residential use with the balance going to commercial and industrial uses.

Recent changes in world energy markets have made SEA-3's Facility even more important to the State and region. For decades, New Hampshire's and New England's propane demand has been met from international sources such as the North Sea, North Africa, the Middle East and Venezuela. As a result, the New England region's propane distribution network is based on the receipt of propane by ship from ocean going vessels.

¹ As reported by Warren Wilczewski and Michael Sloan on page 97 of their November 2011 Report titled, Propane Industry Impact on U. S. and State Economies, prepared for the Propane Education and Research Council, portions attached hereto as Exhibit B.

In recent years however, international propane supplies have decreased, leading to higher international prices, while at the same time U. S. propane production has significantly increased (due to new drilling technologies), making U. S. prices significantly lower than international prices. Due to this price spread reversal, the long-standing business model of importing propane to New England on oceangoing vessels has ceased to be viable. The effect is readily apparent in the below table which sets forth the number of truck transports from SEA-3's Facility on an annual basis as well as the number of truck transports per day for the busiest month of the year, for the period 2009-2013:

Calendar Year	Total Annual Tank Truck Transport Count	Average Daily Tank Truck Transport Count For Peak Month (January)
2009	17,287	158
2010	14,710	133
2011	8,227	105
2012	2,839	40
2013	436	8

With New England's primary propane storage tank facilities now drastically underutilized, the region has been forced to rely on rail and truck shipments from other regions of the United States to satisfy local demand on an as-needed basis. As a result, 75% of all LPG now comes into New England by rail from various production facilities throughout the U. S. and Canada with the remaining LPG being trucked into New England, primarily from the terminus of the TEPPCO pipeline in Selkirk, New York.

The effect of these market changes has been to deny New Hampshire and the New England region the ability to stockpile propane. Without this ability, New Hampshire's retail propane distributors now face shortages during the critical winter heating season due to supply and logistical bottlenecks as they all compete for the delivery of product at the same peak-demand periods. During periods of short supply, propane prices can and do spike upward.

Higher propane prices allow suppliers of other fuels to increase their prices as well. As a direct result of these conditions, the New Hampshire Department of Safety declared an emergency on December 27, 2013, allowing interstate truck drivers carrying propane to exceed the hours of service regulations set forth in the Federal Motor Carrier Regulations. In declaring this emergency, the Department of Safety specifically cited the shortage of propane at SEA-3's Facility. As stated in the Department's Declaration of Emergency Notice:

Pursuant to 49 CFR Section 390.23 and New Hampshire RSA 266:72-a, the New Hampshire Department of Safety declares that an emergency exists pertaining to the delivery of propane, gasoline, diesel, and fuel oil to distributors, residential and business establishments within the State of New Hampshire.

The emergency exemption is issued in connection with anticipated emergency conditions from a shortage of propane at Sea-3 in Portsmouth [sic], two major winter storms in a row, and a period of sub-zero temperatures, all of which have resulted in hazardous driving conditions and extra demands on fuel supplies. It is deemed that a declaration of emergency is required to ensure the continuation of these essential services to both residential and commercial establishments and governmental buildings within the State. [Emphasis added.]

See Declaration of Emergency Notice (Title 49 CFR 390.23), dated December 27, 2013, attached hereto as Exhibit C. The conditions that created this propane shortage will remain unless the Facility's rail capacity is increased.

The Facility's current rail capacity is too small to meet market demand. With just three unloading berths, the Facility can only receive six rail cars per day, amounting to 198,000 gallons, enough to fill just 18 tank trucks. The below table illustrates the amounts involved in both gallons and barrels (42 gallons = 1 barrel):

Unit	Capacity in Gallons	Capacity in Barrels
Tank Truck	11,000 gallons	262 barrels
Rail Car	33,000 gallons	786 barrels
6 Rail Cars	198,000 gallons	4,714 barrels
16 Rail Cars	528,000 gallons	12,571 barrels
SEA-3 Facility's Primary Storage Tanks	23,520,000 gallons	560,000 barrels

Based on its current rail capacity of six cars per day, it would take SEA-3 one hundred and nineteen (119) receiving days to fill its Primary Storage Tanks, assuming no distribution of product. This offload capacity is inadequate to build and maintain a stockpile going into the critical winter heating season. In order for New Hampshire to benefit from the stabilizing effect of SEA-3's Primary Storage Tank Facility and help avoid future fuel emergencies, SEA-3 must increase its rail car off-loading capacity.

The Proposed Improvements

SEA-3's plan calls for the construction of five new rail unloading berths on land to be leased from Pan Am, located between the Rail Line and the existing unloading berths, together with associated improvements on SEA-3's Lower Lot, to be located within an existing cleared, graveled and fenced-in area (the "Cleared Area"). See, Site Plan attached hereto as Exhibit D, Sheets C-1 and C-2. These areas are shown on the photographs attached hereto as Exhibit E. (Exhibit E, Figure 1, is a view from Pan Am's property of the intended location of the new rail berths, to the right of the Rail Line; Figure 2 is a view from the Lower Lot, from outside the Cleared Area, looking west along the Lower Lot's northern boundary toward the Upper Lot; Figure 3 is a view from inside the Cleared Area looking toward the southeast corner; Figure 4 is a view from inside the Cleared Area looking toward the southwest corner; Figure 5 is a view from the Cleared Area looking at the existing rail berths; and Figure 6 is a view from the Upper Lot east to the river.)

The five new rail berths will be enclosed within SEA-3's security fencing. The Lower Lot improvements consist of compressors and pumps, three 90,000 gallon above ground storage tanks, a condenser, condenser cooling unit, dryer and heater and a mechanical building housing refrigeration equipment, with piping joining these components to the existing pipe rack and the

Primary Storage Tanks. As proposed, propane will be offloaded from the rail berths and pumped to the Lower Lot storage tanks before being sent to the dryer and condenser and then refrigerated and piped to the Primary Storage Tanks on the Upper Lot for storage. The additional 90,000 gallon storage tanks, condenser, dryer and refrigerating equipment are required on the Lower Lot because the Upper Lot's existing facilities are not capable of offloading and refrigerating 16 rail cars per day.

The proposed improvements will be fenced off and located within an existing cleared, industrially zoned area with no public access and will be screened from the Piscataqua River by an existing stand of trees. See Exhibit E, Figure 7 (view of Lower Lot from waterfront pier).

Impacts/Benefits of Proposed Improvements

SEA-3's Facility currently employs sixteen full-time persons. While the Facility has been largely dormant due to recent market changes, SEA-3 has retained all of its employees who are highly trained and skilled in the operation of the Facility. If the requested improvements are not approved, SEA-3 will have to assess the continued viability of the Facility and the need to maintain its workforce.

If approved, SEA-3 will make a major economic investment in the Facility. This investment will benefit the local and state economy and will also increase the Town of Newington's property tax base.

If approved, New Hampshire will once again enjoy the benefit of having a fully utilized primary storage tank facility for propane. When operating to capacity, SEA-3's Facility will help prevent fuel emergencies by providing a critical propane stockpile that will stabilize markets during periods of peak-demand, benefitting both homeowners and businesses throughout the state.

Propane is among the most clean-burning of all fossil fuels and is an approved, clean fuel under both the 1990 Clean Air Act and the National Energy Policy Act of 1992. Propane gas is nontoxic and is not harmful to soil or water. If liquid propane leaks, it doesn't puddle but instead vaporizes and dissipates into the air. As a result of its properties, the placement of propane tanks is not regulated by the United States Environmental Protection Agency.

In New Hampshire, propane is typically utilized by homeowners and businesses located in rural areas who lack access to natural gas mains and who want a fuel source other than oil, electricity or wood. If the requested improvements are not approved, propane supplies and pricing in New Hampshire will be more volatile. This will have the effect of decreasing consumer willingness to utilize propane, leading to increased carbon emissions as consumers choose less environmentally friendly alternatives.

Having an affordable, dependable supply of propane in New Hampshire will encourage economic development throughout the State.

The proposed improvements will not be visible to the public and will be installed on an existing cleared and graveled area and will not result in the loss of any natural resource habitat and will have little or no impact on the environment.²

² While the Committee does not have jurisdiction over railroad operations (see discussion *infra*), it should be noted that rail transport is the safest, most environmentally sound way to move freight over land. On average, trains are four times more fuel efficient than trucks, resulting in lowered greenhouse gas emissions and reduced pollution. In addition, moving freight by rail reduces highway congestion. See United States Government Accountability Office, GAO-11-134, Surface Freight Transportation, A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers (January 2011) at p's 27-31, 58, relevant portions attached hereto as Exhibit F. Each LPG rail car is equivalent to 3 tractor trailer loads. Each train of sixteen rail cars will remove 48 tractor trailers from our interstate highway system.

Statutory Analysis

The decision whether to exempt an applicant from the approval and certification provision of RSA Chapter 162-H is governed by RSA 162-H:4, IV, which provides:

IV. In cases where the committee determines that other existing statutes provide adequate protection of the objectives of RSA 162-H:1, the committee may, within 60 days of acceptance of the application, or filing of a request for exemption with sufficient information to enable the committee to determine whether the proposal meets the requirements set forth below, and after holding a public hearing in a county where the energy facility is proposed, exempt the applicant from the approval and certificate provisions of this chapter, provided that the following requirements are met:

(a) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H:1;

(b) A review of the application or request for exemption reveals that consideration of the proposal by only selected agencies represented on the committee is required and that the objectives of RSA 162-H:1 can be met by those agencies without exercising the provisions of RSA 162-H;

(c) Response to the application or request for exemption from the general public indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(d) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

The proposed project qualifies for an exemption from the provisions of RSA 16-H for the following reasons:

(a) The Facility is subject to existing federal, state and local laws that adequately protect the objectives of RSA 162-H:1.

The security of the Facility is governed by federal law. Because of its ability to receive ocean going vessels, the Facility is subject to federal regulations under the Maritime Transportation Security Act of 2002, as codified in 46 U. S. C. Chapter 701. Under these regulations, SEA-3 is required to implement a Facility Security Plan that is approved by the

Federal Maritime Security Coordinator. See 33 C. F. R. § 105.120(a). SEA-3's Facility Security Plan must satisfy all of the requirements of 33 C. F. R. §§ 105.200-296, which are extensive and include requirements that SEA-3 train all Facility personnel in emergency procedures and contingency plans, conduct security drills every three months and maintain fencing, lighting, surveillance and a backed-up communication system providing continuous communication between Facility security personnel and national and local authorities having security responsibility. SEA-3's Facility Security Plan is audited annually by an independent third party and its content is classified as sensitive security information and is protected by federal law pursuant to 33 C. F. R. § 105.400(d).

The operational safety of the Facility is regulated by federal law through compliance with the EPA's Risk Management Program regulations set forth at 40 C. F. R. § 68, et seq., as well as OSHA's Process Hazard Analysis regulations for liquefied petroleum gases set forth at 29 CFR § 1910.110, et seq. The Facility is also subject to the New Hampshire State Fire Code and Section 6 of the Town of Newington's Zoning Ordinance, both of which mandate compliance with the National Fire Protection Association's Liquefied Petroleum Gas Code ("NFPA 58").

The proposed improvements are subject to both federal and state law regulating environmental impact. The Facility is regulated by the United States Environmental Protection Agency ("EPA") pursuant to its National Pollutant Discharge Elimination System ("NPDES") and it is also subject to comprehensive regulation by the New Hampshire Department of Environmental Services ("DES"). SEA-3 and its representatives have consulted with DES officials including representatives of the Air Resources Division, the Wetlands Bureau and the Waste Management Bureau, to discuss all applicable DES requirements for the proposed improvements. Based on these consultations, SEA-3 has applied for and received an Alteration

of Terrain Permit dated March 21, 2014 (Permit: AoT-0695) and a Shoreland Impact Permit dated January 22, 2014 (2014-00105), necessary for the proposed improvements. Copies of both permits are attached hereto as Exhibit G. SEA-3 currently holds a Permit to Operate issued by the Air Resources Division (SP-0226, Facility ID # 3301500002, Application # 12-0064 dated 2/20/2013) for the existing Primary Storage Tanks, flare and generator. SEA-3 will update this permit upon completion of the proposed improvements.

The Town of Newington further regulates the proposed improvements through its zoning ordinance and site plan review regulations. The proposed improvements will be located within Newington's Waterfront Industrial District and constitute an allowed use in that District provided they comply with NFPA 58. Upon receiving SEA-3's application for site plan approval, Newington's Planning Board designated the project as having regional impact pursuant to RSA 36:54 and notified the communities of Portsmouth, Greenland, Stratham and Newfields. The Planning Board held seven public hearings on the proposed improvements over the period November 2013 - May 2014. These hearings involved extensive public comment, testimony and reports from fire safety experts, transportation experts and representatives of the State of New Hampshire Department of Transportation ("NHDOT") and the Federal Railroad Administration ("FRA").

These hearings culminated in the Planning Board's unanimous vote to approve the proposed improvements on May 19, 2014. The Planning Board supported its decision with 8 pages of written findings, which included findings that: the preliminary design complies with NFPA 58, (§§ 15-18); the improvements will enhance the Facility's safety (§§ 9, 10, 19 and 46); the improvements will not change the Facility's existing distribution capacity or increase traffic impacts (§§ 21-26); the improvements will result in no adverse change to existing dust, erosion

or run-off conditions (§ 28); and will upgrade the existing storm drainage system (§ 29). A copy of the Planning Board's Decision and written Findings are attached hereto as Exhibit H.

The above referenced federal, state and local laws adequately protect the objectives of RSA 162-H by addressing and regulating issues concerning public welfare, health and safety and the environment. During the seven months of public hearings that took place before the Town of Newington's Planning Board, SEA-3 made a full and complete disclosure of its plans to the public, which plans indicated no evidence of environmental impact. Requiring a further lengthy review process at the State level for improvements to an existing facility, when the only state agency required to approve the proposed improvements has already issued the necessary approvals and where the Newington Planning Board has approved the project following seven months of public hearings and a thoughtful and deliberate review would result in an undue delay in the construction of the project, in violation of the objectives of RSA 162-H. Such delay will likely result in harm to the state's businesses and the more than 67,000 residential households that rely on a dependable supply of propane to meet their winter heating and fuel needs, all contrary to the objectives of RSA 162-H:1.

(b) A review of the request for exemption reveals that consideration of the proposed improvements by only select agencies represented on the committee is required and that the objectives of RSA 162-H:1 can be met by those agencies without exercising the provisions of RSA 162-H.

The Department of Environmental Services administers the laws and regulations pertaining to the material environmental aspects of this project. The proposed improvements will be located at an existing industrial facility within an existing cleared area that consists of hard packed gravel with little or no vegetation. The affected area is isolated, with no public

access, and has no aesthetic, environmental, historic or natural resource value. The only state agency with jurisdiction over the proposed improvements is the DES, which has already issued the approvals necessary to construct the proposed improvements. The DES' issuance of the Alteration of Terrain and Shoreland Impact Permits demonstrates that the objectives of RSA 162-H:1 have been met. Exercising the provisions of RSA 162-H by requiring certification in this circumstance would not further the objectives of the statute and would in fact violate them by unduly delaying the construction of needed improvements.

(c) Response to the request for exemption from the general public will indicate that the objectives of RSA 162-H:1 have been met through the individual review process of the participating agencies.

During Newington's lengthy site plan review process, the City of Portsmouth and certain residents of Portsmouth and Greenland appeared at the hearings and requested that the Planning Board deny the application or, in the alternative, that it require a railroad safety study as part of the approval process, all due to the anticipated increase in LPG rail traffic. After receiving extensive testimony on this issue from representatives of the FRA and NHDOT and legal advice from its counsel, the Newington Planning Board declined to impose any conditions on LPG rail traffic servicing SEA-3's Facility based on its lack of jurisdiction under federal law. See Exhibit H, ¶ ¶ 33-48; see also, Exhibit I, Letter of Shelley Winters, Administrator, NHDOT Bureau of Rail & Transit, dated February 11, 2014 (informing Newington that, "**NHDOT has no jurisdiction over commodities that Pan Am transports over the line.**" [emphasis added]).

Administrator Winters' statement recognizes the preemptive effect of the Interstate Commerce Act under federal law. The Interstate Commerce Act, as amended by the Interstate Commerce Commission Termination Act ("ICCTA"), expressly states that the jurisdiction of the

Surface Transportation Board over “transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . is exclusive.”

49 U.S.C. § 10501(b) (hereinafter “§ 10501(b)”). Upon its enactment, ICCTA:

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

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

May 3, 2005).

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

Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for

Declar. Order, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013).

Following the Newington Planning Board’s approval of SEA-3’s planned improvements, the City of Portsmouth appealed the approval to the Superior Court and the Newington Board of Adjustment. In response, SEA-3 filed an emergency petition for declaratory order with the Surface Transportation Board (“STB”), a copy of which is attached hereto as Exhibit J (without exhibits). This petition is currently pending before the STB.

While the City of Portsmouth opposes SEA-3's planned improvements, it has publicly acknowledged that its concerns "are not due to the site plan itself" (see, Letter of Mayor Lister to U. S. Senator Shaheen, dated February 18, 2014, attached hereto as Exhibit K) and it has further acknowledged that the Newington Planning Board "performed a thoughtful and deliberate review of this application." See Letter of Mayor Lister to Governor Hassan, dated June 18, 2014, attached hereto as Exhibit L.

SEA-3 anticipates the City of Portsmouth and certain residents who purchased homes near the Rail Line will oppose this Request for Exemption based on their opposition to LPG rail traffic through their communities. However, any attempt to utilize RSA 162-H to achieve their goal of regulating rail operations is preempted by federal law and must be rejected. See CSX Transp., Inc. v. Easterwood, 507 U. S. 658, 663 (1993) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way.").

RSA 162-H must be interpreted in a manner that does not frustrate or conflict with federal law. Consequently, in determining whether the general public's response indicates that the objectives of RSA 162-H:1 have been met through the individual review process of the participating agencies, the Committee must disregard any public response that is based on opposition to LPG rail traffic as the Committee does not have jurisdiction to regulate rail operations.

SEA-3 expects that the majority of the permissible public response to the proposed improvements will indicate that the objectives of RSA 162-H have been met through the individual review process of the participating agencies.

(d) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules or ordinances.

The proposed improvements will be located within an existing industrial complex on land that consists of hard-packed gravel with little if any vegetation and no wetlands. The improvements will result in no adverse change to existing dust, erosion or run-off conditions and will upgrade the existing storm drainage system.

The minimal environmental impacts of the proposed improvements will be subject to regulation by the federal government under the EPA's National Pollutant Discharge Elimination System and also by the New Hampshire DES and the Town of Newington's zoning, planning and building ordinances, all which will adequately regulate the environmental impact and effects of the project.

Conclusion

As demonstrated by the information provided in this Request for Exemption, other existing statutes will adequately protect the objectives of RSA 162-H:1, such that the Committee should exempt the applicant from the approval and certificate provisions of RSA Chapter 162-H and thereby avoid undue delay in the construction of SEA-3's proposed improvements to its energy facility.

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

- A. An Exemption from the approval and certification provisions of RSA 162-H:1, et seq., for the proposed improvements described herein; and
- B. Such other and further relief as may be just and expedient.

Respectfully submitted,

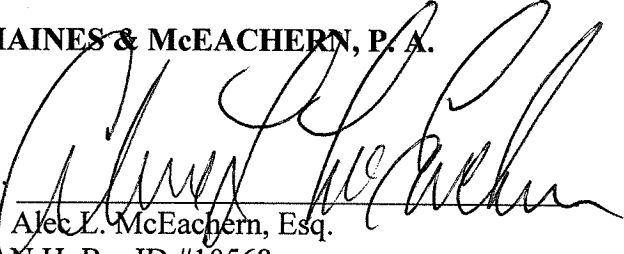
SEA-3, INC.

By Its Attorneys,

SHAINES & McEACHERN, P. A.

Dated: January 6, 2015

By



Alec L. McEachern, Esq.

N.H. Bar ID #10568

P.O. Box 360

Portsmouth, NH 03802-0360

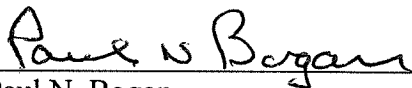
Phone: (603) 436-3110

Email: alec@shaines.com

VERIFICATION

I, Paul N. Bogan, Vice President of SEA-3, Inc., declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this pleading.

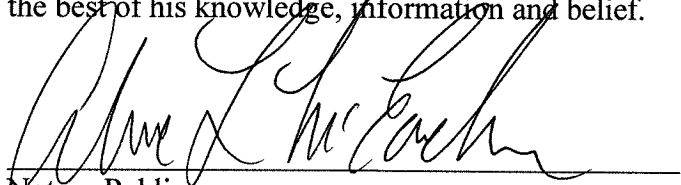
Executed on January 6, 2015.



Paul N. Bogan

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Personally appeared before me this 6th day of January, 2015, Paul N. Bogan, in his capacity as Vice President of SEA-3, Inc., and under oath did affirm and state that the foregoing Request for Exemption is true and correct to the best of his knowledge, information and belief.



Notary Public

My Commission Expires: 8/24/2016