

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-01

**Request of SEA-3, Inc. for Exemption
From the Approval and Certificate Provisions of RSA Chapter 162-H**

**FINAL DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT AND
ISSUING A CONDITIONAL EXEMPTION**

I. Background

This Decision and Order resolves all issues stemming from the Petition for Exemption from the Approval and Certificate Provisions of RSA 162-H (Petition) filed by Sea-3, Inc. (SEA-3). On November 5, 2015 and November 6, 2015, an adjudicative hearing was held in this docket. On November 6, 2015, all parties and intervenors in the docket presented a settlement agreement marked as Exhibit 2 (Settlement Agreement). As part of the Settlement Agreement, all parties to the proceeding withdrew their objections to the Petition and agreed that a conditional exemption from the requirements of RSA 162-H may be granted.

After review of the record and after hearing about the settlement from each of the parties, the Subcommittee voted to grant the Petition subject to the conditions contained in the Settlement Agreement. This Decision and Order memorializes the Subcommittee's consideration and ruling.

II. Procedural History

A. The Application for Exemption

On January 8, 2015, SEA-3 filed the Petition with the Site Evaluation Committee (Committee).

SEA-3 owns and operates a propane storage and distribution Facility located at 190 Shattuck Way in Newington, New Hampshire (Site or Facility). Petition at 2. The existing Facility and associated equipment at the Site was exempted from the requirements of RSA 162-H in 1995. Id. The Site contains two parcels of real estate owned by SEA-3: (i) 7.02 acres to the west of the Newington Branch trail that lies partly within Newington's General Industrial Zoning District and partly within the Waterfront Industrial and Commercial Zoning District (Upper Lot); and, (ii) 3.92 acres located within Newington's Waterfront Industrial and Commercial Zoning District with frontage on the Piscataqua River on the other side of the Newington Branch trail (Lower Lot). Id. at 2-3. SEA-3 seeks to construct five additional rail unloading berths, three 90,000 gallon above ground storage tanks, a condenser, condenser cooling unit, dryer and heater, mechanical building, refrigeration equipment and associated pipelines and accessory equipment. Id. at 7-8. The proposed improvements appear to be a sizable change or addition to the existing Facility. The purpose of the proposed improvements is to facilitate the off-loading, processing and distribution of liquid propane gas delivered to the Facility by rail car. Id. at 6-7. The proposed improvements will allow SEA-3 to offload additional quantities of propane from the rail berths, pump it to the Lower Lot storage tanks, send it to the dryer and condenser, refrigerate it and, ultimately, pipe it to the primary storage tanks located on the Upper Lot for storage. Id. at 7-8.

SEA-3 requested that the Committee determine that the construction of five additional rail unloading berths, storage facilities and associated equipment at the Site should be exempt from the approval and certification provisions of RSA 162-H *et. seq.* Id. at 17.

After review of the Petition, the Chairman of the Committee determined that additional information was necessary. See, SEC Letter, Docket No. 2015-01, (Jan. 30, 2015). On January 30, 2015, SEA-3 was notified that additional information was required for the Committee to review the Request for Exemption. Id. On February 27, 2015, SEA-3 supplemented its filing as requested by the Chairman. See, Surface Transportation Board Pleadings; Statement of SEA-3, Inc., Rockingham Superior Court – Pleadings; Newington ZBA Certified Records; Newington Planning Board Certified Record; Newington Planning Board Certified Record – SEA-3 Site Plan; Newington Planning Board Certified Record – Pan Am Map. Docket No. 2015-01 (Feb. 27, 2015).¹

On March 26, 2015, an Order and Notice of Public Hearing together with an Acceptance of Request and Procedural Order were issued in this docket (Procedural Order). The Committee found that SEA-3's Petition was complete and accepted it. Procedural Order at 2. A subcommittee was designated to address SEA-3's request (Subcommittee). Id. at 4-6. The Committee also set forth a procedural schedule that was followed in this docket and ordered potential intervenors to file motions to intervene by April 22, 2015. Id. at 3-4. Pursuant to the Procedural Order, a public meeting was held on May 7, 2015. During and following the meeting, the following parties were allowed to intervene in this docket:

- City of Newington;
- City of Portsmouth;
- City of Dover;
- Great Bay Stewards;

¹ Available at www.nhsec.nh.gov.

- Portsmouth Group of Intervenors (Richard and Catherine DiPentima, William and Kristina Campbell, Matthew and Erica Nania, John and Jane Sutherland, Patricia M. Ford, and Robert L. Gibbons); and
- Laura Byergo.²

See, Order on Pending Motions and Notice of Prehearing Conference, Docket No. 2015-01 (May 19, 2015); Order on Late Filed Motions to Intervene, Docket No. 2015-01 (June 3, 2015).

On January 23, 2015, Counsel for the Public filed an Objection to the Petition. SEA-3 replied to the Counsel for the Public's Objection on May 1, 2015.

On July 6, 2015, Counsel for the Public filed a Motion for Leave to Retain Sebago Technics and for an Order Directing SEA-3 to Bear Cost Thereof. Counsel for the Public's Motion was granted on August 10, 2015. See, Order on Pending Motions, Docket No. 2015-01 (Aug. 10, 2015). On September 17, 2015, the Subcommittee and the parties visited the Facility for a Site inspection.

On October 22 and October 23, 2015, City of Portsmouth and SEA-3 filed legal memoranda on the issue of federal preemption. See, City of Portsmouth's Memorandum on Federal Preemption, Docket No. 2015-01 (Oct. 22, 2015); SEA-3 Memorandum of Law – Federal Preemption, Docket. No. 2015-01 (Oct. 23, 2015). By agreement of the parties, an adjudicative hearing was scheduled for late October. The parties subsequently agreed and the matter was rescheduled to November 5, 2015 and November 6, 2015.

An adjudicative hearing was held on November 5 and November 6, 2015.

² Ms. Byergo filed a Motion to Withdraw as individual intervenor on July 30, 2015. See, Motion to Withdraw, Docket No. 2015-01 (July 30, 2015). Ms. Byergo's Motion was granted on August 10, 2015. See, Order on Pending Motions, Docket. No. 2015-01 (Aug. 10, 2015). Thereafter, Ms. Byergo joined Great Bay Stewards in representing Stewards' interests in this docket.

B. Town of Newington Planning Board Review

The record in this docket includes the record of the proceedings before the Newington Planning Board. The Newington Planning Board reviewed the Project under its local ordinances pertaining to zoning and site plan review. That record is summarized as follows.

On November 5, 2013, SEA-3 filed an application for site review with the Planning Board of the Town of Newington. See, Planning Board Certified Records, Docket 2015-01, Town of Newington, NH Application Form for Land Subdivision and Site Plan Review (Nov. 5, 2013). From September 9, 2013 to May 5, 2014, the Planning Board conducted numerous public hearings while addressing SEA-3's application. See, Planning Board Certified Records, Docket 2015-01 (Feb. 27, 2015). During these hearings, the Planning Board heard testimony from a safety expert hired by SEA-3, Mr. Philip Sherman (March 24, 2014), and retained and considered a report prepared by its own safety expert, Mr. Nicholas J. Cricenti, Jr. (February 10, 2014). See, Planning Board Certified Records, Docket 2015-01, Minutes of February 10, 2014, Minutes of March 24, 2014. The Planning Board also received testimony from the Town's Fire Chief, Andrew Head (March 24, 2014), a senior Federal Railway Authority official, John Killoy (March 10, 2014), and a state railway official, John Robinson (March 24, 2014). See, Planning Board Certified Records, Docket 2015-01, Minutes of March 10, 2014, March 24, 2014. As a result, the Planning Board concluded that federal law preempted the Planning Board from addressing and regulating the railroad servicing the Facility. See, Planning Board Certified Records, Docket 2015-01, Town of Newington Planning Board Findings and Conditions of Approval (May 19, 2014). The Planning Board further determined that expansion of the Facility would promote the health, safety and welfare of the community and approved SEA-3's application for site review without requiring SEA-3 to conduct and submit a comprehensive

study of public safety associated with the expansion of the Facility. Id. The Planning Board did, however, request SEA-3 to comply with the following condition designed to address the safety of the Facility:

[s]everal safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.

Id.

The City of Portsmouth appealed the Planning Board's decision to the Rockingham County Superior Court and to the Zoning Board of Adjustment of the Town of Newington. See, Petition for Appeal of the Town of Newington Planning Board's Decision Pursuant to RSA 677:15, I and 677:15, I-a (a) (June 16, 2014). Among other arguments, the City of Portsmouth asserted that, by refusing to conduct a comprehensive safety/hazard study of the Facility and the railroad leading to the Facility, the Planning Board failed to provide full consideration of SEA-3's application and erroneously approved the application. Id. The Zoning Board of Adjustment denied the City of Portsmouth's appeal and Motion for Reconsideration. The City of Portsmouth appealed the Zoning Board of Adjustment decision to the Rockingham County Superior Court.

The Rockingham County Superior Court consolidated the appeals of the Planning Board's decision and Zoning Board of Adjustment decision and issued an Order on October 7, 2015 (Clerk's Notice). See, Order on the Merits, Docket Nos. 218-2014-cv-00654, 218-2014-cv-01287 (Rockingham County Super. Ct. Oct. 7, 2015). The Court found that the Planning Board correctly determined that it was preempted by federal law from regulating "the actual railway and transportation on railroads." Id. at 32. The Court further found that the record

demonstrated that the Planning Board “engaged in extensive safety review of the Sea-3 site” and “it was reasonable and lawful for the Planning Board to conclude that the site plan adequately addressed fire safety and hazard concerns.” *Id.* at 32. However, the Court also found that the Planning Board should have reviewed and considered the safety plan that was adopted in conjunction with the original SEA-3 approval. The case was remanded to the Planning Board so that the Planning Board could review the safety plan and make appropriate findings on the record.

C. Proceedings before the Surface Transportation Board

On August 4, 2014, SEA-3 filed an Emergency Petition for Declaratory Order with the Surface Transportation Board³. *See*, Emergency Petition for Declaratory Order, FD 35853 (Aug. 4, 2014). SEA-3 requested the Surface Transportation Board to declare that the City of Portsmouth was federally preempted under the Interstate Commerce Commission Termination Act (49 U.S.C. § 10101, *et. seq.*) (“ICCTA”) from requiring extensive safety/hazard studies of the Facility and the railroad. *Id.* In support, SEA-3 asserted that regulation and/or study of the Facility and associated railroad constituted regulation of “transportation by rail carrier” and should be preempted. *Id.* The Board denied SEA-3’s Petition and found that SEA-3’s activities do not constitute “transportation by rail carrier” and are not preempted under ICCTA because they are not performed by or on behalf of a rail carrier. SEA-3, Inc. - Petition for Declaratory Order, FD 35853 (STB served March 17, 2015). SEA-3 did not appeal Board’s decision.

³ The Surface Transportation Board is a federal administrative agency established pursuant to 49 U.S.C. §703 *et. seq.* The Surface Transportation Board is both an adjudicatory and a regulatory agency. It is charged with resolving railroad, rate and service disputes and proposed rail mergers. It is decisionally independent but administratively attached to the federal Department of Transportation. *See generally*, www.stb.dot.gov.

III. Position of the Parties In This Docket.

A. SEA-3.

SEA-3 has requested that the Subcommittee exempt the improvements from the certification requirements of RSA 162-H. See, Petition at 17. In support, SEA-3 asserts that the Facility and its improvements are extensively regulated under federal, state and local laws, rules and regulations that provide adequate protection of the objectives of RSA 162-H. Id. at 10-13.

SEA-3 specifically identified the following applicable laws, rules and regulations:

- **Federal:** Maritime Transportation Security Act of 2002 (46 U.S.C. § 701) requires SEA-3 to implement a comprehensive Facility Security Plan that is approved by the Federal Maritime Security Coordinator. The United States Coast Guard requires SEA-3 to maintain and comply with a Standard Operating Procedures & Emergency Manual pursuant to 33 C.F.R. §127.007. SEA-3 is also required to comply with Environmental Protection Agency's (EPA) Risk Management Program regulations (40 C.F.R. § 68, *et. seq.*) and OSHA's Process Hazard Analysis regulations for liquefied petroleum gases (29 C.F.R. § 1910.110, *et. seq.*) that requires SEA-3, among other things, to maintain a Contingency Plan as well as a Safety Standards and Procedures Manual and a Standard Operating Procedures Manual. SEA-3 is also regulated by the EPA pursuant to the National Pollutant Discharge Elimination System (NPDES). Petition at 10-11.
- **State:** SEA-3 is required to comply with the requirements of the New Hampshire State Fire Code that mandates compliance with the National Fire Protection Association's Liquefied Petroleum Gas Code (NFPA 58). SEA-3 is regulated by New Hampshire Department of Environmental Services (DES) that has already issued an Alteration of Terrain and Shoreland Impact Permits. SEA-3 also holds a Permit to Operate issued by the Air Resources Division that will be updated upon completion of the improvements. Petition at 11-12.
- **Local:** Section 6 of the Town of Newington's Zoning Ordinance requires SEA-3 to comply with NFPA 58. SEA-3 is also required to comply with the Town of Newington's Zoning Ordinance and Site Plan Review Regulations. Petition at 11-12.

SEA-3 further asserts that the Town of Newington has already conducted a thorough and meaningful review of SEA-3's application for site plan approval and determined that: (i) the preliminary design complies with NFPA 58; (ii) the improvements will enhance safety at the

Facility; (iii) the improvements will not change the existing distribution capacity or increase traffic impacts; and (iv) the improvements will result in no adverse change to existing dust, erosion or run-off conditions and will upgrade the existing storm drainage system. Petition at 12-13.

According to SEA-3, the only state agency that has permitting authority over the Facility is DES. Id. at 13. SEA-3 claims that DES oversight and regulation is sufficient to satisfy the objectives of RSA 162-H because the Facility does not and will not have an adverse effect on aesthetics, the environment, and historic or natural resources in the region. Id. at 13-14.

Finally, SEA-3 asserts that the majority of public comments demonstrate that the public generally agrees that the objectives of RSA 162-H have been met through the review conducted so far. Id. at 16. SEA-3 also argued that the Subcommittee is preempted from addressing rail safety issues by federal law. Id. at 16.

SEA-3 offered the following prefiled testimony in support of its position:

- Prefiled testimony of Paul N. Bogan, Vice President of Operations for SEA-3. PFT Bogan;
- Prefiled and supplemental prefiled testimony of Kim Eric Hazarvartian, Ph.D., P.E., a principal engineer with TEPP LLC. PFT Hazarvartian 1 and Hazarvartian 2;
- Prefiled and supplemental prefiled testimony of Philip R. Sherman, P.E., a consulting fire protection engineer. PFT Sherman 1 and Sherman 2;
- Prefiled testimony of Stephen J. Haight, P.E., an owner of Haight Engineering, PLLC. PFT Haight; and
- Prefiled testimony of Joseph U. Rose, president of the Propane Gas Association of New England. PFT Rose.

Dr. Hazarvartian testified that SEA-3 hired TEPP LLC to prepare a Traffic Assessment Memorandum regarding transportation of propane by truck from the Facility. PFT Hazarvartian 1, at 2. He further testified that SEA-3 does not plan to make any changes to the truck loading rack. PFT Hazarvartian 1, at 2. Consequently, according to Dr. Hazarvartian, the proposed site

plan modifications will not materially affect the transportation of propane by truck. The same historic average capacity of approximately 10 trucks per hour will not change. PFT Hazarvartian 1, at 3. Dr. Hazarvartian's Traffic Assessment Memorandum was provided to and considered by the Town of Newington's Planning Board during consideration of SEA-3's application for site review. PFT Hazarvartian 1, at 2. Dr. Hazarvartian acknowledged that he did not prepare a Traffic-Impact Study. PFT Hazarvartian 2, at 1. He testified that a study is not required where it is unlikely that the Facility will generate 100 peak-hour vehicle-trips. PFT Hazarvartian 2, at 1.

Mr. Sherman testified that he was retained by SEA-3 to generate an NFPA 58 fire safety analysis and to review SEA-3's design documents for compliance with this analysis. PFT Sherman 1, at 1. Based on the plans and specifications, Mr. Sherman concluded that the preliminary design for the proposed expansion is in accordance with NFPA 58, 2011 Edition. PFT Sherman 1, at 4. Mr. Sherman further advised the Subcommittee that the Planning Board of Town of Newington was aware of his determination and considered it while reviewing SEA-3's application for site review. PFT Sherman 1, at 4. Mr. Sherman opined that, once SEA-3 finalizes the design of the Facility, it will be required to obtain relevant permits and approvals from the Town of Newington or State of New Hampshire and will be required to demonstrate that the final design of the Facility complies with NFPA 58. PFT Sherman 1, at 4.

Mr. Haight testified that he was retained to prepare SEA-3's application for site plan approval before the Planning Board of the Town of Newington. PFT Haight, at 1. He also prepared the necessary permit applications that were filed with DES. PFT Haight, at 1. Mr. Haight described the proposed changes to the Facility. He also testified that SEA-3 has already obtained the Alteration of Terrain and Shoreland Impacts Permits. PFT Haight, at 2-5.

According to Mr. Haight, a Permit to Operate (Air Permit), which includes the two refrigerated storage tanks, the flare, and an emergency generator will be updated. PFT Haight, at 5.

Mr. Rose testified about the significance of the expansion of the Facility to New Hampshire propane consumers and the New Hampshire fuel market. PFT Rose.

Mr. Bogan testified about the configuration of the existing Facility and modifications SEA-3 seeks to make, as well the process of unloading and storing propane from the rail carriers. PFT Bogan, at 4-6; 16-18. The anticipated improvements described by Mr. Bogan will be constructed on land owned by SEA-3. PFT Bogan, at 6. However, SEA-3 intends to install the new rail siding and berths on a narrow strip of land next to the existing rail line that separates SEA-3's two lots from each other. The strip of land is owned by Pan Am Railroad. PFT Bogan, at 6. Mr. Bogan explained that this land will be leased by SEA-3 from Pan Am. PFT Bogan, at 6.

Mr. Bogan described the process of unloading LPG from the rail carriers and explained that the current rail/truck delivery systems are not capable to deliver sufficient amounts of LPG to satisfy demand in New Hampshire. PFT Bogan, at 6-14. Mr. Bogan also described the current safety mechanism that is used by SEA-3 to ensure fire safety. PFT Bogan, at 18-19. Mr. Bogan detailed the process of unloading, transporting and storing of LPG. The process is monitored by SEA-3 personnel who are physically present during the unloading and refrigeration processes and by personnel who remotely monitor the process from the Facility's main control room. PFT Bogan, at 18-19. In addition, SEA-3 uses temperature and pressure monitors attached to each piece of equipment. PFT Bogan, at 18-19. In the event of any unsafe reading, all unloading equipment will be automatically turned off and all valves will be automatically closed. PFT Bogan, at 18-19. Also, all processing areas will be continuously monitored by gas

and fire detection systems consisting of infra-red ultra-violet flame detection monitors. PFT Bogan, at 18-19. Mr. Bogan described the federal, state, and local laws and regulations that currently regulate the Facility and asserted that they provide sufficient regulation to comply with the objectives of RSA 162-H. PFT Bogan, at 19-27.

SEA-3 also filed a legal memorandum addressing the doctrine of federal preemption. See, SEA-3 Memorandum of Law – Federal Preemption. SEA-3 asserts that the following federal statutes prevent the Subcommittee from directly or indirectly regulating the railroad: (i) Hazardous Material Transportation Act (49 U.S.C. § 5101, *et. seq.*); (ii) Federal Railway Safety Act (49 U.S.C. § 20102, *et. seq.*) (“FRSA”); and (iii) Interstate Commerce Commission Termination Act (49 U.S.C. § 10101, *et. seq.*) (“ICCTA”).

B. Counsel for the Public.

Counsel for the Public originally opposed the Petition and argued that the Project should not be exempt from the certification requirements of RSA 162-H. See, Objection of Counsel for the Public to Request for Exemption, Docket No. 2015-01 (April 22, 2015). Counsel for the Public originally argued that the existing regulatory scheme fails to provide adequate protection of the objectives of RSA 162-H:1. Id. at 3-9. Counsel for the Public argued that the laws and regulations cited by SEA-3 do not provide adequate and integrated review and regulation of the Project. Id. at 3-5, 8. Counsel for the Public initially was concerned that applicable federal laws, the Fire Code, and the Zoning Ordinance were insufficient to assure the safety of the operation of the Facility. Id. at 6. Counsel for the Public also originally argued that it is unlikely that the Town’s review adequately addressed the issue of safety of the Facility because the Planning Board of the Town of Newington found that it was federally preempted from studying

and considering the safety of the railroad and refused to order SEA-3 to conduct safety study of the Facility. Id. at 5-7.

Counsel for the Public originally asserted that public comments demonstrate that the public does not believe that SEA-3's expansion may be adequately resolved through the individual permitting process of member agencies consistently with the purpose of RSA 162-H:1. Id. at 10-11.

Counsel for the Public filed the prefiled testimony of Stephen Sawyer (a licensed professional engineer), Frederick Fraini (a special railroad consultant), and Robert Davids (a professional track design advisor and railroad inspector). See, CFP PFT. Counsel for the Public's experts testified that they were retained by Counsel for the Public to provide an independent assessment of certain safety issues associated with the Facility and the Portsmouth Newington Industrial Track (Track) used by it to deliver propane to the Facility. See, CFP PFT, at 1. They provided the following opinion of the safety of the Facility and Track:

[a]s it is presently configured and operated, the SEA-3 Facility and the Track, appear generally to be in compliance with applicable safety regulations of the Federal Railroad Administration, and they appear to have a generally safe record of operation from the data we obtained. While additional facilities at SEA-3 and increased traffic on the Track may raise additional and increased safety risks, we cannot opine about those due to a lack of operating history and a clear understanding of the reconfigured Project.

See, CFP PFT, at 2.

Counsel for the Public's experts identified only two areas of concern: (i) first responders' lack of required training and resources; and (ii) the safety of off-site crossings. See, CFP PFT, at 2. They did elaborate, however, that the towns "are primarily responsible for ensuring safe

crossings and warning systems and they may wish to consider whether additional enhanced safety systems at those crossings should be installed and operated.” See, CFP PFT, at 2.

On November 6, 2015, Counsel for the Public withdrew his objection to the Petition and joined in asking the Subcommittee to approve a Settlement Agreement that, amongst other things, would permit a conditional exemption for the Project. In withdrawing his objection, Counsel for the Public explained that the Settlement Agreement was a resolution of the disputed facts. Transcript, November 6, 2015, p. 8. Although he refused to concede that the Facility met the statutory requirements for an exemption, Counsel for the Public opined that “the Settlement Agreement resolves those disputed facts in a way that gets the exemption.” Transcript, November 6, 2015, p. 8.

C. Town of Newington.

The Town of Newington supported the Petition and requested the Subcommittee to exempt the Facility from certification requirements of RSA 162-H. The Town of Newington submitted the following prefiled testimony:

- Prefiled testimony of Nicholas J. Cricenti, Jr., a Consulting Fire Protection Engineer and President of SFC Engineering Partnership, Inc. PFT Cricenti;
- Prefiled testimony of Justin Richardson, Esq., a member of the Planning Board of the Town of Newington at the time of consideration of SEA-3’s site review application and representative of the Planning Board before the Zoning Board of Adjustment during the variance process. PFT Richardson;
- Prefiled testimony of Denis J. Hebert, a Chairman of the Planning Board of the Town of Newington. PFT Hebert;
- Prefiled testimony of Andrew W. Head, a Fire Chief of the Town of Newington. PFT Head.

In his prefiled testimony, Mr. Cricenti asserted that he completed an assessment of SEA-3’s plans, a hydrology study depicting drainage and storm water management of SEA-3’s Facility,

and the fire safety analysis prepared by Mr. Sherman for SEA-3's Facility. See, PFT Cricenti, at 1. He also was requested to identify potential areas of SEA-3's regulatory non-compliance. See, PFT Cricenti, at 1. As a result of his assessment, he submitted three (3) reports to the Planning Board of the Town of Newington: (i) January 29, 2014, Report analyzing SEA-3's site plan for legislative or regulatory non-compliance; (ii) February 7, 2014, Report identifying potential areas of legislative or regulatory non-compliance with drainage and storm water management relative to the Facility; and (iii) an analysis of the Fire Safety Analyses by Mr. Sherman. See, PFT Cricenti, at 2-6.

In his January 29, 2014, Report, Mr. Cricenti determined that SEA-3's plan showed, "in general terms" compliance with NFPA 58 and NFPA 54 (the only New Hampshire State Fire Codes that control liquefied petroleum and natural fuel gas). See, PFT Cricenti, at 2. He also explained that following site plan approval, further design and review would be required to provide a greater level of detail not required for a site plan, but necessary for the issuance of building and electrical permits and for construction code. See, PFT Cricenti, at 2. In his February 7, 2014 Report, Mr. Cricenti concluded that the addition of sediment controls as contemplated by the plans would likely improve storm water quality flowing off-site. He determined that the proposed improvements did not raise regulatory or legislative non-compliance issues. See, PFT Cricenti, at 3. Mr. Cricenti also reviewed Mr. Sherman's report. Mr. Cricenti opined that the fire safety analysis (FSA) "appeared to comply with NFPA 58 and no significant problems were found with the proposed system or the FSA." See, PFT Cricenti, at 3-4. Mr. Cricenti assumed, however, that more complete FSA documents would be submitted prior to the issuance of a Building Permit. See, PFT Cricenti, at 4.

Mr. Cricenti further testified that he identified two safety issues with the Site that were addressed by SEA-3: (i) the addition of a second access point suitable for fire apparatus access to the Facility; and (ii) installation of the master streams along the railroad sidings. See, PFT Cricenti, at 4-5.

Attorney Richardson testified that, during the review of SEA-3's application for site review, the Planning Board of the Town of Newington determined that the Project would promote public safety and orderly development of the region. See, PFT Richardson, at 1. Specifically, Attorney Richardson testified that the Board considered the fact that the Facility and all proposed improvements will allow transfer and distribution of additional quantities of propane to New Hampshire residents and will be located in the area that is designated for use by industrial development. See, PFT Richardson, at 2-3. The Board further considered that transportation of LPG by rail cars provides a safer alternative than transportation by trucks and modification of the Facility would require Pan Am to upgrade certain rail tracks that would directly benefit public safety. See, PFT Richardson, at 3. Attorney Richardson confirmed that the Planning Board did not require SEA-3 to conduct and submit a comprehensive study of public safety associated with the expansion of the Facility. See, PFT Richardson, at 3. He further testified, however, that neither the Board nor he personally believed that such study was warranted where the Board has already received extensive testimony from the Fire Chief, the Planning Board's fire safety consultant, a senior Federal Railway Authority official, a state railway official, and the Applicant's experts that demonstrated "conclusively that SEA-3's proposed expansion would 'promote' the health, safety and welfare of the community." See, PFT Richardson, at 4-7. As a result, Attorney Richardson concluded and asserted the following:

[t]he Newington Planning Board conducted an extensive investigation into all public safety aspects of the proposed Project. While many expressed concerns about the safety of rail transportation of propane, no credible reports, engineering or other studies were presented to suggest a risk to public safety or that further study was required.

See, PFT Richardson, at 6.

Attorney Richardson asserted that the Committee review is not statutorily required because the Planning Board has already conducted an extensive review of the Facility and the improvements. He testified that the Planning Board review addressed the impact on the environment and the safety of the region and considered public comments that were provided to the Planning Board. See, PFT Richardson, at 7-8.

Denis Hebert, Planning Board Chairman, testified that, while addressing the safety of the Facility, the Planning Board retained and reviewed the findings of the fire safety expert as well as the findings of the expert hired by SEA-3. See, PFT Hebert, at 2-3. Mr. Hebert confirmed that the Planning Board considered a safety study of the railways over which LPG will be delivered to the Facility. However, after consultation with numerous experts, the Planning Board concluded that it lacked jurisdiction to require such a study. See, PFT Hebert, at 3. Mr. Hebert submitted that the Planning Board conducted a thorough and extensive review of proposed modification of the Facility. See, PFT Hebert, at 4-6.

Fire Chief Head opined that Facility's expansion will not increase the fire risk associated with operation of the Facility because SEA-3 will employ the same process of delivery of LPG from rail cars to storage tank and from storage tank to the trucks. See, PFT Head, at 2. Chief Head further testified that, in fact, the new fire protection system that SEA-3 seeks to install will lower the risk of fire. See, PFT Head, at 2. Chief Head testified that "as budget allows the

department tries to send [firefighters] to a class provided by the Propane Gas Association of New England.” See, PFT Head, at 3. Chief Head testified that SEA-3 would be required to provide its final plans and safety plans to his office. He would then consult with an expert for review and comments on compliance with existing laws and regulations. See, PFT Head, at 3.

On November 6, 2015, the Town of Newington joined in asking the Subcommittee to approve a Settlement Agreement that, amongst other things, would permit a conditional exemption for the Project. In doing so, the Town acknowledged that the statutory criteria of RSA 162-H:4, IV were met by the issuance of an exemption subject to conditions contained in the Settlement Agreement. Transcript, November 6, 2015, p. 9.

D. City of Portsmouth.

The City of Portsmouth originally urged the Subcommittee to deny the Petition. The City of Portsmouth filed the following prefiled testimony:

- Prefiled testimony of Steven Achilles, Fire Chief of the City of Portsmouth. See, PFT Achilles; and
- Prefiled testimony of Peter Britz, Environmental Planner/Sustainability Coordinator of the City of Portsmouth. See, PFT Britz.

Chief Achilles asserted that the City of Portsmouth is part of a mutual aid agreement with the Town of Newington. See, PFT Achilles, at 2. Chief Achilles further opined that it is likely that the City of Portsmouth’s firefighters will be the first responders in case of fire on the Site. See, PFT Achilles, at 3. In light of these factors, Chief Achilles asserted that Mr. Sherman should have considered the Portsmouth Fire Department’s training and resources while making his determination about the fire safety of the Facility. See, PFT Achilles, at 3. He further asserted that Mr. Sherman failed to attach an Emergency Evacuation and Notification Plan to his report and that review of such plan is crucial for determination of the Facility’s safety. See, PFT

Achilles, at 4. Chief Achilles opined that safety of transportation of LPG via ships should have been considered and addressed by Mr. Sherman in his report. See, PFT Achilles, at 4.

Mr. Britz testified that the City of Portsmouth appealed the Town of Newington Planning Board's decision to grant application for site review because the City of Portsmouth believed that the Planning Board failed to consider and address impacts on public safety when it refused to conduct a comprehensive safety/hazard analysis. See, PFT Britz, at 2-3. Mr. Britz asserted that full review by the Committee is warranted because it applies a different standard and will ensure that the State's interests are properly balanced and all objectives of RSA 162-H are properly addressed. See, PFT Britz, at 3-4.

The City of Portsmouth filed a memorandum addressing the issues of federal preemption. The City of Portsmouth asserted that the ICCTA does not preempt the Sebago Safety Study and its recommendations. Id. Specifically, the City of Portsmouth asserts that implementation of Sebago recommendations falls within the State's police powers that does not constitute preclearance requirements preempted by federal law. Id.

On November 6, 2015, the City of Portsmouth withdrew its objection to the Petition and joined in asking the Subcommittee to approve a Settlement Agreement that, amongst other things, would permit a conditional exemption for the Project. The City of Portsmouth agreed that an exemption subject to conditions contained in the Settlement Agreement complies with the provisions of RSA 162-H:4, IV. Transcript, November 6, 2015, p. 9.

E. City of Dover

The City of Dover initially asked the Subcommittee to deny SEA-3's Petition. The City of Dover filed the prefiled testimony of Eric Hagman, an Interim Fire Chief of City of Dover.⁴ See, PFT Hagman.

Chief Hagman testified that the City of Dover's firefighters will assist the Town of Newington's fire fighters in case of an emergency under a mutual aid agreement. See, PFT Hagman, at 2. He further asserted that LPG presents a risk of fire or spill. See, PFT Hagman, at 2. He asserted that a fire or spill at the Site would be devastating for surrounding communities, including the City of Dover. See, PFT Hagman, at 2-3. He further testified that his strongest concern about the danger was associated with the transfer and storage of LPG. See, PFT Hagman, at 3. Chief Hagman testified that SEA-3 has never provided any training to Dover's responders, did not disclose the Facility's plan and did not conduct a tour of the Facility to increase Dover's responders' familiarity with the Facility. See, PFT Hagman, at 3-4. Furthermore, Chief Hagman asserted that Mr. Sherman, in his safety report, failed to analyze and identify whether Dover fire fighters possess the level of training and resources required for response to a fire emergency that may be associated with the Facility. See, PFT Hagman, at 4. Finally, Chief Hagman expressed his concerns about the source of the data and conclusions reached by Mr. Sherman in his safety report. See, PFT Hagman, at 4.

On November 6, 2015, the City of Dover withdrew its objection to the Petition and joined in asking the Subcommittee to approve a Settlement Agreement that, amongst other things, would permit a conditional exemption for the Project. The City of Dover adopted the Settlement

⁴ Chief Hagman adopted testimony that was originally provided by Deputy Chief, James Ormand.

Agreement because it, in Dover's expressed opinion, addressed all of its concerns with the Facility. Transcript, November 6, 2015, p. 9.

F. Portsmouth Intervenors

The Portsmouth Intervenors originally urged the Subcommittee to deny SEA-3's request to be exempted from the certification requirements of RSA 162-H. The Portsmouth Intervenors submitted the following prefiled testimony:

- Prefiled testimony of Richard DiPentima. See, PFT DiPentima;
- Prefiled testimony of Robert L. Gibbons. See, PFT Gibbons;
- Prefiled testimony of Patricia M. Ford. See, PFT Ford;
- Prefiled testimony of Erica Nania. See, PFT Nania; and
- Prefiled testimony of Jane and John Sutherland. See, PFT Sutherland.

Mr. DiPentima testified that his residence is located approximately two miles from the Site and is adjacent to the rail lines that lead to the Facility. See, PFT DiPentima, at 1. Mr. DiPentima was dissatisfied with the Town of Newington Planning Board's review of the effect of the improvements on the environment, safety, and orderly development of the region. See, PFT DiPentima, at 3. Mr. DiPentima identified the following flaws in the Planning Board's review of SEA-3's application for site review: (i) failure to address the potential effect on the Facility within a one-mile radius of the Facility in case of a catastrophic event ; (ii) failure to consider catastrophic events at similar facilities throughout of the United States; (iii) failure to conduct safety/hazard study of SEA-3's proposed expansion; (iv) failure to conduct a comprehensive risk evaluation that "looks at threats, vulnerability, likelihood and consequences, which together, an overall value for risk can be calculated"; (v) failure to conduct a comprehensive gap analysis of the emergency response capabilities for communities in the

region in the event of a worst likely or worst case incident of the Site; and (vi) failure to consider potential economic impacts of the SEA-3's expansion in the event SEA-3 decides to sell received LPG to other States or abroad. See, PFT DiPentima, at 3-6.

Mr. Gibbons testified that his residence is located approximately 1.8 miles from the Site. See, PFT Gibbons, at 1. Mr. Gibbons asserted that the Planning Board failed to conduct a thorough review of the Facility's impact on safety and the economy of the region. See, PFT Gibbons, at 1-2. Mr. Gibbons also complained that the Planning Board failed to discuss a response plan that would be implemented in case of emergency and failed to consider the DOT Emergency Response Guidebook that requires evacuation of residences and businesses within a one-mile radius in case of emergency. See, PFT Gibbons, at 1-2. Mr. Gibbons further asserted that the Planning Board failed to consider that SEA-3 may sell acquired LPG abroad, leaving local market and local communities with an insufficient supply of propane. See, PFT Gibbons, at 3.

Ms. Ford testified that her residence is located approximately two miles from the Site. See, PFT Ford, at 1. Ms. Ford expressed her concerns about the impact the expansion may have on the safety of the region. See, PFT Ford, at 1. Ms. Ford asserted that the Planning Board of the Town of Newington failed to fully address these concerns. See, PFT Ford, at 1-2. Ms. Ford was also concerned that SEA-3 will export LPG abroad, leaving local communities to carry the burden of an expanded Facility and its effect on taxes, real estate values and economy of the region. See, PFT Ford, at 2-3.

Ms. Nania testified that her residence is located approximately two miles from the Site. See, PFT Nania, at 1. Ms. Nania stated that the Newington Planning Board failed to address safety, environmental, and economic concerns associated with the expansion of the Facility.

See, PFT Nania, at 1-2. Similar to other intervenors, Ms. Nania argued that the Planning Board failed to consider the consequences of a catastrophic event that can take place at the Site and failed to consider the effect that associated pollution may have on the environment and orderly development of the region. See, PFT Nania, at 2-3.

Mrs. and Mr. Sutherland reside approximately two miles from the Site. See, PFT Sutherland, at 1. The Sutherlands' concerns and argument are similar to the issues raised by other Portsmouth Intervenors in this docket. See, PFT Sutherland. The Sutherlands testified that further safety studies of the railroad and the Site are required. See, PFT Sutherland, at 1-3. They also argued that the effect of the expansion of the Facility on local economy was not reviewed and addressed by the Planning Board of the Town of Newington. See, PFT Sutherland, at 3.

On November 6, 2015, the Portsmouth Intervenors withdrew their objection to the Petition and joined in asking the Subcommittee to approve the Settlement Agreement that, amongst other things, would permit a conditional exemption for the Project. The Portsmouth Intervenors indicated that they are "very, very happy" with the Settlement Agreement. Through counsel, they indicated that the Settlement Agreement represents a reasonable compromise. Transcript, November 6, 2015, p. 10.

G. Great Bay Stewards

The Great Bay Stewards initially sought denial of the Petition. The Great Bay Stewards identified the following witnesses:

- Peter Kinner, a marine scientist. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing;
- Peter Wellenberger, an Executive Director of the Great Bay Stewards. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing;

- Terrence J. (Terry) Collins, Ph.D., Teresa Heinz Professor of Green Chemistry and Director of the Green Science Institute at Carnegie-Mellon University. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing; and
- Fred C. Mason, Managing Director of Caterpillar Luxembourg, S.A.R.L. and Director of Global Product Source Planning, Caterpillar, Inc. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing.

The Great Bay Stewards' witnesses testified about the importance, uniqueness, and the value of the Great Bay as well as the amount of effort, commitment, and financial resources spent on preserving and improving it. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing, at 4-10. The Great Bay Stewards originally asserted that SEA-3's expansion will significantly increase rail traffic on the Rockingham Junction that, in turn, will affect Great Bay's pristine environment and may subject the Great Bay to a potential environmental hazard in case of a catastrophic event. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing, 10. The Great Bay Stewards asserted that "the probability and potential impact of incidents and accidents related to increased rail volume must be assessed by a safety and environmental impact study under the SEC certification process." See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory hearing, at 14. The Great Bay Stewards further opined that the Subcommittee should assert jurisdiction over the Project so that it can assess the railroad's impact on the environment of the region. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing, at 16. Finally, the Stewards originally argued that jurisdiction should be asserted so that all permits, regulations, and conditions are identified in an integrated manner. See, Great Bay Stewards Prefiled Testimony and Identification of Witnesses for Adjudicatory Hearing, at 18.

On November 6, 2015, the Great Bay Stewards withdrew their objection to the Petition and joined in asking the Subcommittee to approve a Settlement Agreement that, amongst other things, would permit a conditional exemption for the Project.

IV. The Settlement Agreement

Though the parties presented disparate positions during the litigation of this matter, the parties were able to reach a Settlement Agreement. The Settlement Agreement was presented to the Subcommittee on November 6, 2015. The Settlement Agreement provides that the Subcommittee may grant an exemption to SEA-3, subject to certain conditions.

The conditions contained in the Settlement Agreement include the following:

A. SEA-3 must commission a comprehensive fire safety analysis pursuant to NFPA 58 for the entire Facility. The analysis will be submitted to the Town of Newington for approval and to the Fire Marshal for review and comment.

B. SEA-3 will facilitate a “virtual tour” of its Facility in Newington for all personnel from the Portsmouth and Dover Fire Departments. This virtual tour will occur in 2016 and at least once every five years thereafter.

C. SEA-3 will provide rail car and tanker truck training for the Portsmouth and Dover Fire Departments.

D. SEA-3 shall participate in a mutual aid table top drill convened by the Newington Fire Department.

E. SEA-3 shall not receive more than 16 propane rail cars per day at the Facility. Any increase must be approved by the Site Evaluation Committee after notice to the Town of Newington, the cities of Portsmouth and Dover and the Attorney General.

F. The Newington Fire Department, Building Inspector and the New Hampshire State Fire Marshal shall conduct a full inspection of the upgraded Facility. SEA-3 shall promptly address any issue arising from the inspections.

G. The Chief of the Newington Fire Department shall develop an emergency response plan, including a notification system to alert surrounding towns in the event of an emergency. The development of this plan shall be funded by a grant obtained by the Town of Newington and SEA-3 shall be responsible for any additional costs.

H. SEA-3 shall provide a copy of its contingency plan to the Chief of the Newington Fire Department.

I. Counsel for the Public and the intervenors shall withdraw all objections to the Petition and agree to take no appeal from the conditional exemption.

J. The City of Portsmouth shall have its appeal docketed in the Rockingham County Superior Court.

K. In the event of a default under the Settlement Agreement by SEA-3, any party may notify the Committee and the Committee shall open a docket and may revoke the conditional exemption or take other remedial action.

A copy of the Settlement Agreement is attached as part of this Decision and Order.

V. Analysis

At the outset, the Subcommittee recognizes the significant efforts of all of the parties in this docket to achieve settlement. As with most cases before the Committee, the issues in this docket are complex and common ground amongst the interests of the various parties may be difficult to achieve. The Subcommittee appreciates the efforts of the parties and will incorporate the Settlement Agreement into this Decision and Order.

Despite the substantial agreement of the parties, the Subcommittee must make an independent determination as to whether an exemption from the requirements of RSA 162-H should be granted. In conducting that analysis, the Subcommittee must follow the requirements of RSA 162-H:4, IV. The Subcommittee cannot grant an exemption, even a conditional exemption, unless the requirements of the statute are met.

RSA 162-H:4, IV, provides that the Subcommittee may exempt a proposed energy Facility from the application and certification requirements of the statute in cases where the Committee “determines that other existing statutes provide adequate protection of the objectives of RSA 162-H: 1” and 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.

If the Subcommittee is satisfied that the proposed energy Facility meets each of the foregoing criteria, it may make a determination to exempt the proposed Facility from the requirements of RSA 162-H. If the Subcommittee finds that the proposed Facility does not meet the criteria, then the Subcommittee must deny the request for exemption. In this case, with the aid of the Settlement Agreement, the Subcommittee is convinced that SEA-3 meets the requirements for an exemption.

A. Existing State or Federal Statutes, Agency Rules and Municipal Ordinances.

The Subcommittee must determine whether “(e)xisting state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H: 1.” There are a number of state and federal statute and rules that govern the operation of the existing exempted Facility that will also apply to the expanded Facility.

Security of the Facility is governed primarily under federal law. The Facility is subject to security laws and regulations contained in and derived from the Maritime Transportation Safety Act of 2002. See, 46 USC §70101-70132 and 33 CFR §105 et. seq. (pertaining to port security.) Training of personnel, frequency of emergency drills communications, fencing, lighting and other on-site security measures are governed by the federal statute and regulations. In addition, the Facility is subject to operational safety oversight under both federal and state laws, including the EPA’s Risk Management Program, 40 CFR §68, et.seq., and the Occupational Safety and Health Administration’s Process Hazard Analysis regulations, 29 CFR §1910.110 et. seq. Safety at the Facility is also governed by the State Fire Code and the Newington Zoning Ordinance Section 6, both of which require compliance with the NFPA Liquefied Petroleum Gas Code (NFPA 58.)

The impact of the Facility on the environment, air and water quality is also well regulated under federal, state and local laws. DES and the EPA both regulate SEA-3 with regard to water pollution under the National Pollution Discharge Elimination System. DES regulates wetland impacts and other environmental impacts sustained during construction. In fact, SEA-3 has already obtained an Alteration of Terrain Permit and a Shoreland Impact Permit from DES. SEA-3 also currently holds a Permit to Operate issued by the Air Resources Division of DES for

its current Facility and will be required to update that permit upon the completion of construction of the improvements.

In addition to existing federal and state laws and regulations, the Project underwent a lengthy review by the Newington Planning Board as part of site review. See, RSA 674:43. The planning board review process addressed fire safety and environmental issues and provided the public with comprehensive public disclosure of the plans for expansion at the Facility and the benefits and impacts of such plans.

The existing federal, state and local regulation of the Facility and its expansion is also complemented by the terms and conditions of the Settlement Agreement. The Settlement Agreement outlines a plan for local and state agencies and departments to assure that the Facility remains safe and environmentally sound.

Finally, it should be noted that there was much litigation in this docket over the safety and environmental impacts of the rail travel that would deliver the propane filled rail cars to the Facility. Neither the Site Evaluation Committee nor any state agency has authority to regulate travel on interstate railways. See, 49 U.S.C. §10501 (regulation of interstate rail travel by the Surface Transportation Board is exclusive and preempts remedies provided by other federal or state law.) It is important to note that the safety of the railroad delivering the propane to SEA-3 is subject to oversight and regulation under the auspices of the Interstate Commerce Commission Termination Act and the Rail Safety Improvement Act of 2008. The Federal Railroad Administration and the Surface Transportation Board are charged with overseeing the operational safety of interstate railways including the transportation by rail of hazardous materials such as propane. That said, the Subcommittee reserves judgment on the question of whether the Site Evaluation Committee or any New Hampshire state agency has safety oversight

over SEA-3 owned tracks within the SEA-3 owned premises at the Site. In any event, this separate question is rendered moot by the Settlement Agreement.

B. The Objectives of RSA 162-H:1 Can Be Met By Selected State Agencies.

The Subcommittee must review the Petition and determine whether “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.” RSA 162-H:4, IV (b). The Petition in this case satisfies that standard. A review of the Petition reveals that DES and the Fire Marshal’s office are the two state agencies that would either issue permits or enforce state statutes and regulations at the Facility.

DES has already reviewed the Project and issued an Alteration of Terrain Permit, and a Shoreland Impact Permit. The expanded Facility will also require an updated Permit to Operate from the Air Resources Division of DES. The Fire Marshal will enforce and assist the Town of Newington in enforcement of all applicable fire, life safety and building codes for the proposed expansion of the Facility. The Facility is in a relatively remote area in an industrial district. There are few if any aesthetic impacts or impacts on historic resources⁵. The expansion is not likely to increase the Facility’s existing impact on the natural environment or wildlife.

The Settlement Agreement also assures that the Fire Marshal will continue to be involved in the enforcement of laws and rules designed to assure public safety and will contribute to region-wide training and education about public safety hazards in the event of an emergency at the Facility.

⁵ There is a 19th century burial site on the premises that will not be disturbed by the proposed expansion of the facility. If it becomes necessary to disturb the site, SEA-3 may need to notify the Division of Historical Resources and engage in their process.

Only two state agencies would normally regulate the construction and operation of the Facility. Therefore we find that the objectives of RSA 162-H :1 can be met by the regulatory authority granted to DES and the Fire Marshal and that the objectives of RSA 162-H:1 can be met without exercising the full scope of the Committee's jurisdiction.

C. Response to the Request for Exemption from the General Public

RSA 162-H:4, IV(c) requires the Subcommittee to consider whether the response to the Petition from the general public indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies. On May 7, 2015, the Subcommittee held a public hearing in the Town of Newington. At the hearing, SEA-3 had an opportunity to present its proposal to the Subcommittee and the public. In addition, the Subcommittee heard extensive comment from the public. At the public hearing, the Subcommittee heard from 15 members of the public. Nine speakers spoke in favor of exempting the Project while 7 spoke against it. The primary concern of those who spoke against the exemption for the Project dealt with the safety of rail transportation to the Facility.

During the pendency of the docket, the Subcommittee also received extensive written comment. The written public comment in the docket became a source of controversy. SEA-3 hired a public relations firm for the apparent purpose of educating the public about the Project and turning out support for the exemption Petition.⁶ SEA-3's public relations firm created a website which provided members of the public with the ability to sign a form letter that was sent to the Subcommittee. The Subcommittee received approximately eighty (80) of these form letters in support of the Petition. In addition to the receipt of form letters, the Subcommittee did

⁶ Opponents of the Petition apparently sponsored a somewhat similar, albeit less successful, internet campaign against the Petition.

receive a large amount of individualized written correspondence, both in favor of and opposed to the Petition. While one might argue about the provenance of the numerous form letters, on balance, the public supports the request for exemption. While very few of the oral or written comments addressed the issue as to whether or not state agencies represented on the Committee could adequately regulate the Project outside of the jurisdiction of the Site Evaluation Committee, the written correspondence certainly implied that view. Additionally, the Petition set forth significant and substantial arguments addressing the ability of certain state agencies to regulate the Project. It is reasonable to conclude that those members of the public supporting the Petition generally adopted its contents.

On the whole, we find that the response from the public to the Petition generally supported the granting of an exemption.

D. All Environmental Impacts Are Adequately Regulated by Other Federal, State, or Local Statutes, Rules, or Ordinances.

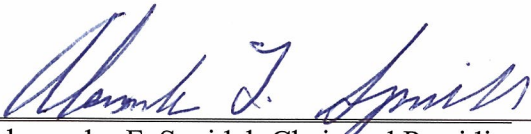
The fourth criterion that must be considered by the Subcommittee is whether the environmental impacts of the proposed expansion of the Facility are adequately regulated by other federal state or local laws, rules and ordinances. As indicated above, the Facility is situated in a remote industrial district. The improvements to be built are already approved by DES as they pertain to the Alteration of Terrain Permit and the Shoreland Impact Permit. In addition, SEA-3 will be required to update its air permit. The construction and operation of the Facility will be subject to the programmatic permit for the NPDES as enforced by the EPA and DES. In addition, the Facility is subject to the planning, zoning and building ordinances of the Town of Newington, all of which include consideration of the environment. Regulation by the EPA, DES, the Fire Marshal and the Code enforcement provisions in Newington demonstrate that all

environmental impacts of the Project are adequately regulated by federal, state and local laws, rules and ordinances.

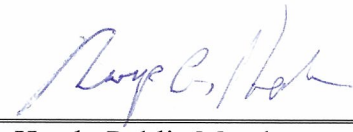
VI. Conclusion and Order

Having reviewed and considered the Petition, the prefiled testimony and the Settlement Agreement, we find that the evidence in this docket supports the granting of a conditional exemption from the requirements of RSA 162-H. The exemption is subject to the conditions contained in the attached Settlement Agreement.

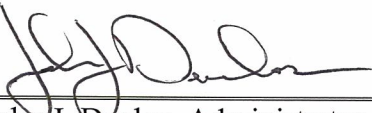
So ordered this ^{15th} day of December 2015.



Alexander F. Speidel, Chair and Presiding Officer
NH Public Utilities Commission



Roger Hawk, Public Member



John J. Duclos, Administrator
Dept. of Environmental Services

presentation shall occur in 2016 and once every 5 years thereafter, or sooner if substantial facility changes are implemented or such is requested by the Portsmouth or Dover Chiefs.

3. Sea-3 shall provide rail car training and tanker truck training in Portsmouth and Dover for all Portsmouth and Dover Fire Department shifts (and for Seacoast Technical Assistance Response Team "START") at Sea 3's expense in form and substance satisfactory to the Chiefs of the Portsmouth and Dover Fire Departments. Sea-3's expenses shall be limited to the cost of providing the training and shall not extend to reimbursement of wages to the participating Departments. Fire Departments from all communities along the rail line from Rockingham Junction to the Sea-3 facility in Newington shall be invited to attend the trainings in either Portsmouth or Dover. The rail car training and tanker truck training shall occur in 2016 and once every 5 years thereafter.

4. The Newington Fire Department shall convene, and Sea-3 shall participate in, a Mutual Aid command district table top (e.g. a facilitator-led discussion centered on a simulated real world emergency) for the scenarios of: 1) a leak and/or fire on site, including but not limited to the dock area located on the property of Sprague, or another facility related scenario requested by the Chief of the Newington, Portsmouth, or Dover Fire Departments; and 2) a rail car fire just outside of the facility and still in Newington. The table top shall be facilitated by NH Homeland Security Emergency Management ("HSEM"). This exercise should include all emergency response partners such as Coast Guard, United State Environmental Protection Agency ("EPA")/NH Department of Environmental Services ("DES"), HSEM, State Police, and including the activation of the HSEM Emergency Operations Center ("EOC"). This process shall include the creation of an After-Action Report by HSEM, which includes, but is not limited to a gap analysis of the Seacoast Region's emergency response capabilities for LPG related incidents. Sea-3 shall pay for the table top and for

all out of pocket costs and expenses of the exercise, with participating agencies paying their own personnel costs. The table top shall occur within one year of completion of Sea-3's upgrade and at least once every 5 years thereafter, or more frequently if requested by the Chiefs of the Newington, Portsmouth, or Dover Fire Departments.

5. Sea-3 shall not receive more than 16 propane rail cars (no more than 33,000 gallons per car) to the facility per day consistent with the May 19, 2014 Newington Planning Board approval (letter of decision May 21, 2014). In the event Sea-3 wishes to increase the daily amount/volume of rail transported propane to the facility Sea-3 shall petition the Committee, with notice to the Cities of Portsmouth and Dover, the Town, and the Attorney General, and must obtain an order from the Committee approving such increase.

6. The NHFMO, Newington Fire Department, and Newington building inspector shall conduct a full facility inspection upon completion of the facility upgrade. Sea-3 shall promptly address any issues noted in such inspection in accordance with any orders or directives made by the NHFMO, the Newington Fire Department, or the Newington Building Inspector.

7. The Chief of the Newington Fire Department shall develop an Area Emergency Response Plan, including appropriate evacuation procedures to be determined by the Chief, and to be reviewed by the NHFMO, and to also include a plan regarding emergency notification systems to alert the surrounding communities of an emergency. Each surrounding community shall determine the need to activate their "reverse 911" or any other emergency notification system used by the community in an emergency. The Town shall seek a grant for this plan and Sea-3 shall provide any additional financial support not covered by the grant to ensure the completion of the plan in a timely manner.

8. Sea-3 shall provide the Chief of the Newington Fire Department a copy of its contingency plan and the Chief shall make it available to area fire departments upon request.

9. Upon entry of an order approving this Agreement and granting the exemption, Counsel for the Public and Interveners shall withdraw their Objections to Sea-3's Request for Exemption subject to the negotiated conditions and shall take no appeal from any decision of the Committee granting Sea-3's Request for Exemption with the negotiated conditions.

10. When the order approving this Agreement and granting Sea-3's exemption become final, the City of Portsmouth shall dismiss (voluntarily non-suit with prejudice) its appeal docketed in the Rockingham County Superior Court as 218-2014-CV-654 (City of Portsmouth v. Newington Planning Board, et. al.).

11. Sea-3's failure to comply with its obligations, commitments, and undertakings pursuant to this Agreement, or any condition that may be imposed by the Committee, shall constitute a default, provided, however, that the non-occurrence of any event required under this Agreement that is outside of Sea-3's control shall not constitute a default. By way of explanation, but not limitation, events that are the responsibility of the municipalities or other agencies under this Agreement, including but not limited to their participation in trainings, are outside of Sea-3's control. In the event of a default by Sea-3, any party hereto may notify the Committee of such default, and the Committee shall open a docket and may revoke the exemption or take such other action within its discretion to address the default. Nothing herein is intended, nor shall it be deemed, to alter or settle

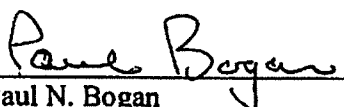
Sea-3's obligation to pay the fees of Sebago Technics pursuant to the Committee's order dated August 10, 2015.

III. Conclusion

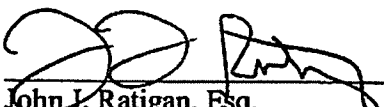
In witness whereof on the date set forth above, the parties, by and through their duly authorized representatives and/or legal counsel, have caused this Agreement to be duly executed in their respective names and/or by their fully authorized agents.

SEA-3, Inc.

Town of Newington



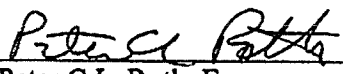
Paul N. Bogan
Its Duly Authorized Vice President




John J. Ratigan, Esq.

Counsel for the Public

City of Portsmouth



Peter C.L. Roth, Esq.




Jane M. Ferrini, Esq.

City of Dover

Portsmouth Interveners

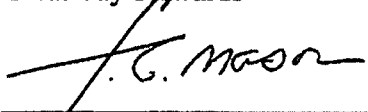


Anthony I. Blenkinsop, Esq.



Christopher Cole, Esq.

Great Bay Stewards



Fred C. Mason (non-attorney representative)

