

**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**

**August 10, 2015**

**ORDER ON PENDING MOTIONS**

**Procedural History**

On January 8, 2015, SEA-3, Inc. (SEA-3) filed a Request for Exemption from the Approval and Certificate Provisions of RSA Chapter 162-H (Petition) with the New Hampshire Site Evaluation Committee (Committee). SEA-3 owns and operates a propane storage and distribution facility (Facility) located at 190 Shattuck Way in Newington, New Hampshire (Site). The existing facility and associated equipment at the Site was exempted from the requirements of RSA 162-H in 1995. 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). 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. 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 Site by rail-car. 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.

SEA-3 requests that the Subcommittee 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:1 *et. seq.*

On March 26, 2015, SEA-3's Petition was deemed to be complete and accepted by the Chairman of the Committee. The Chairman of the Committee also designated a Subcommittee to address SEA-3's request and scheduled a public meeting. On April 6, 2015, Attorney Peter Roth was designated to serve as Counsel for the Public in this docket.

A prehearing conference was held on June 5, 2015. A procedural order was issued on June 18, 2015. An adjudicative hearing is scheduled for October 14-15, 2015.

On June 5, 2015, SEA-3 filed a request for a site inspection. No party has objected to SEA-3's request for site inspection.

On July 7, 2015, Counsel for the Public filed a Motion for Leave to Retain Sebago Technics and for an Order on Costs. SEA-3 filed its Objection to Counsel for the Public's request on July 15, 2015. Counsel for the Public replied to the SEA-3's Objection on July 20, 2015. On July 21, 2015, the Portsmouth Intervenors<sup>1</sup> filed a Memorandum in Support of Counsel for the Public's Request to Retain Experts. Great Bay Stewards filed a Memorandum in support of Counsel for the Public's request on July 29, 2015.

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<sup>1</sup> Richard and Catherine Dipentima, Robert Gibbons and Patricia Ford, William and Kristina Campbell, James and Jane Sutherland, and Erica and Matthew Nania.

On July 29, 2015, Laura Byergo, an intervenor, filed a motion to withdraw her individual appearance and to join as an intervenor with the Great Bay Stewards. To date, no objections have been filed to Ms. Byergo's motion.

**A. Motion for Leave to Retain Sebago Technics and for Order on Costs**

**Standard of Review**

RSA 162-H:10, V, provides that the Site Evaluation Committee and Counsel for the Public “shall jointly conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter . . . .” RSA 162–H:10, V. The costs of such studies and investigations are to be assessed to the Applicant in an amount approved by the Committee. Id. The standard of review is whether the study or investigation is reasonable and “necessary or appropriate.” Id.

What is reasonable, necessary or appropriate must be considered within the scope of the purpose of the siting statute. The statute recognizes that “it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire . . . .” RSA 162-H:1.

The potential significant impacts that should be balanced include impacts to the environment and public health and safety. Id. In achieving this balance, the statute requires the Committee to “ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.” Id.

## **Analysis**

Counsel for the Public seeks to retain Sebago Technics (“Sebago”) to prepare a report concerning the safety of the Project and the railroad line as well as the capabilities of emergency response services in the area. Specifically, Counsel for the Public identified the following scope for Sebago’s investigation and participation in this docket:

- a. Prepare a description of rail segments used to transport product between Rockingham Junction and the SEA-3 Terminal. This would include a review of the Federal Railroad Administration (FRA) accident records on reportable train accidents on these rail segments;
- b. Inspect the existing track facilities within the SEA-3 Terminal and review past records of inspection and maintenance of those facilities;
- c. Review Hazardous Materials Programs and Procedures both the SEA-3 Terminal and Pan Am as they relate to proposed deliveries to the SEA-3 Terminal from Rockingham Junction;
- d. Review the FRA Highway Grade Crossing Inventory to determine accident history and accident prediction data. Visit highway grade crossings between Rockingham Junction and the SEA-3 Terminal to confirm the national inventory data and update photos of these facilities;
- e. Conduct database research into LPG risk assessment (USDOT, NRC, FRA, PHMSA, and NAR);
- f. Conduct a review of USEPA’s Risk Management Plan database and the USCG’s operating and emergency procedures records regarding the existing Terminal operation and safety performance. Review improvement plans and proposals and provide analysis concerning potential safety issues at the Project as proposed;
- g. Conduct meetings with emergency response staff in the following communities – Dover, Newington, Portsmouth, Stratham, Greenland, and Newfields - to determine their preparedness in the event the Project moves forward. In cooperation with local fire officials document education and equipment needs to handle potential incidents with LP gas;
- h. Summarize the findings of these investigations into a narrative memo format report complete with graphics and non-binding recommendations;

- i. Be available to ask questions and respond to questions in addition to attending meetings/hearings in Concord, New Hampshire pursuant to Counsel for the Public's request.

Counsel for the Public asserts that Sebago's investigation and participation in this docket is "necessary to demonstrate that there are aspects of the proposal and its impacts that will not be adequately covered by existing regulatory programs or oversight and that the Committee, and more importantly, the public, can assess those parameters more effectively in a certification proceeding." See Motion of Counsel for the Public for Leave to Retain Sebago Technics and for an Order Directing SEA-3, Inc. to Bear the Costs Thereof, ¶5. Counsel for the Public further asserts that Sebago may provide necessary information concerning the safety of the Project and the need for full review of an application for a certificate of site and facility. Counsel for the Public estimates that the total cost of services and expenses to be provided by Sebago will amount to \$45,000.

SEA-3 objects and asserts that Counsel for the Public's motion should be denied for the following reasons: (i) Counsel for the Public lacks authority to request a safety study under RSA 162-H:9; (ii) compliance with a federal regulatory scheme is not relevant to the issues pending in this docket; and (iii) the Subcommittee is preempted by federal law from requiring a rail safety study.

In support of its position that Counsel for the Public is not authorized by the legislature to request safety study, SEA-3 cites the following:

I. Upon notification that an application for a certificate has been filed with the committee in accordance with RSA 162-H:7, the attorney general shall appoint an assistant attorney general as a counsel for the public. **The counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.** The counsel shall be accorded all the rights and privileges, and responsibilities

of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.

RSA 162-H:9, I (emphasis added). SEA-3 asserts that plain language of the statute does not authorize Counsel for the Public to request a safety study and limits Counsel for the Public's participation in this docket to the issues of protection of the quality of the environment and assurance of an adequate supply of energy.

Furthermore, SEA-3 asserts that the safety study that requires evaluation of compliance with federal laws and regulations is irrelevant because "the sole issue before the Committee" is whether the "existing state or federal statutes, state or federal agency rules or municipal ordinance provide adequate protection of the objectives of RSA 162-H:1." See SEA-3, Inc.'s Objection to Public Counsel's Motion for Leave to Retain Sebago Technics and for an Order on Costs, at 5 (citing RSA 162-H:4).

Finally, SEA-3 asserts that the Subcommittee is preempted from authorizing the safety study requested by Counsel for the Public under 49 U.S.C. § 20106, stating, in relevant part, the following:

**a) National Uniformity of Regulation.—**

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a).

Counsel for the Public asserts that SEA-3's reading of RSA 162-H:9, I, is erroneous and that he is authorized to represent interests of the public as they relate to the safety of the Project. In support of his position, Counsel for the Public quotes the same statute as SEA-3, RSA 162-H:9, I, but emphasizes the part that states “. . . counsel shall be accorded **all the rights and privileges, and responsibilities** of an attorney representing a party in formal action . . . .” See RSA 162-H:9, I.

Counsel for the Public further asserts that he has authority to request a safety study under the part of RSA 162-H:10 that states:

The site evaluation committee and counsel for the public shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter and may employ a consultant or consultants, legal counsel and other staff in furtherance of the duties imposed by this chapter, the cost of which shall be borne by the applicant in such amount as may be approved by the committee.

RSA 162-H:10, V. Counsel for the Public also notes that the Committee has not limited Counsel for the Public's participation in previous dockets.

Counsel for the Public also asserts that SEA-3 should be estopped from arguing that Counsel for the Public is not authorized to request a safety study where SEA-3, in opposing various motions to intervene, argued that Counsel for the Public is authorized to address any concerns and issues that can be raised by the intervenors.

Counsel for the Public argues the Subcommittee is not preempted from ordering the study by federal law. Specifically, Counsel for the Public asserts that federal law protects the railroad from some State regulations, but does not preempt the State's study of their safety. Counsel for

the Public further asserts that SEA-3 should be estopped from raising the issue of federal preemption in this proceedings under a theory of collateral estoppel because the Surface Transportation Board has already found that safety concerns relating to the expansion of the Project raised by the intervenors before the Town Boards and the Rockingham County Superior Court in previous proceedings were not preempted by federal law.

The Portsmouth Intervenors assert that the legislature authorized Counsel for the Public to request a safety study. Specifically, the Portsmouth intervenors submit the Subcommittee should interpret the statute in the context of the overall statutory scheme and should apply the statute in light of the legislature's intent in enacting it and in light of the policy sought to be advanced by the entire scheme. In this regard, the Portsmouth intervenors emphasize that the legislature specifically acknowledged the impact that energy facilities may have on public health and safety and passed the statute so that such impact, among others, would be addressed in integrated fashion. See RSA 164-H:1. Portsmouth intervenors assert that a reading of the statute that would limit Counsel for the Public's participation to the issues of environmental impact and adequacy of supply of energy is contrary to the purpose of the statute.

Great Bay Stewards also support Counsel for the Public's request. Specifically, Great Bay Stewards assert that the safety study is required in order to fully address the potential impact of the Project on environment and public health and safety of the region.

As a preliminary matter, the Subcommittee must decide whether Counsel for the Public has the authority to request safety study. Rules of statutory interpretation are well-settled in New Hampshire:

When construing statutes and administrative regulations, we first examine the language used, and, where possible, we ascribe the plain and ordinary meanings to words used. Words and phrases in a statute are construed according to the common and approved



usage of the language unless from the statute it appears that a different meaning was intended. Additionally, we interpret disputed language of a statute or regulation in the context of the overall statutory or regulatory scheme and not in isolation. We seek to effectuate the overall legislative purpose and to avoid an absurd or unjust result. We can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.

Bovaird v. N.H. Dep't of Admin. Servs., 166 N.H. 755, 758-759 (2014) (citations and quotations omitted). RSA 162-H:9, I, specifically states that Counsel for the Public “shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.” RSA 162-H:9, I. The statute does provide Counsel for the Public with the authority to represent the public with respect to the protection of the environment and to assure an adequate supply of energy. However, the statute does not limit Counsel for the Public’s role to that authority. Rules of statutory construction require the Subcommittee to interpret disputed language in the context of the overall statutory scheme. See Bovaird, 166 N.H. at 758-759.

RSA 162-H:10, V, states that the Committee and Counsel for the Public:

shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter and may employ a consultant or consultants, legal counsel and other staff in furtherance of the duties imposed by this chapter, the cost of which shall be borne by the applicant in such amount as may be approved by the committee.

RSA 162-H:10, V. RSA 162-H:10, V, suggests a broader role for Counsel for the Public, that is: to conduct studies and investigations as long as they necessary or appropriate to carry out the purpose of the statute. RSA 162-H:10, V, permits Counsel for the Public to participate in the broader issues that involve the purposes of the statute as expressed in RA 162-H:1. The purpose of the statute is to balance a broad array of impacts and benefits that go beyond protection of the environment and assuring an adequate supply of energy.

The legislature identified the purpose of the statute in RSA 162-H:1:

The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and **public health and safety**. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:1 (emphasis added). A reading of the statute as a whole indicates that one of the statutory purposes is to ensure public's safety. Therefore, under RSA 162-H:10, V, Counsel for the Public is authorized to conduct studies that address issues of public safety.

The narrow reading of RSA 162-H:9, I offered by SEA-3 fails to consider the statute as a whole. While RSA 162-H:9, I specifically references the authority of Counsel for the Public to represent the public in the protection of the environment and to assure an adequate supply of energy, the statute read as a whole does not limit Counsel for the Public to those issues. The statute also requires that Counsel for the Public be afforded all of the rights privileges and responsibilities of an attorney in a formal action. RSA 162-H:9, I. The rules of statutory construction require the Subcommittee to interpret the statute in light of the overall statutory

scheme and not in isolation. When the entire statutory scheme is considered and the statute is read as a whole, Counsel for the Public must be permitted to represent the public with regard to all issues before the Subcommittee.

Even if the statute were to be read more narrowly, Counsel for the Public would not be precluded from hiring the expert service that he seeks. Protection of the “quality of the environment,” if read broadly and consistently with other provisions of the statute, encompasses public safety and other considerations that the Subcommittee is required to address in order to promote the purposes of RSA 162-H. Counsel for the Public is authorized to request the development of a safety study, and to hire a consultant to assist him with the interpretation of such a study.

SEA-3 also asserts that an evaluation of compliance with federal laws and regulations is irrelevant because “the sole issue before the Committee” is whether the “[e]xisting state or federal statutes, state or federal agency rules or municipal ordinance provide adequate protection of the objectives of RSA 162-H:1.”

Under RSA 162-H:4, IV, while determining whether the Project is exempt from the Committee’s jurisdiction, the Subcommittee is required to consider the following factors:

- (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.

RSA 162-H:4, IV.

The statute specifically requires the Subcommittee to consider whether all environmental impacts or effects are adequately regulated by federal statutes and rules. RSA 162-H:4, IV(d). The requested safety study will contribute to the Subcommittee's consideration of how federal statutes and rules were or will be implemented. The study may also demonstrate whether such statutes and rules provide or will provide adequate regulation. By investigating the methods and results of the implementation of federal statutes and rules, the safety study may reveal facts that will assist the Subcommittee with the decision of whether federal statutes and rules in fact provide adequate protection of the objectives of RSA 162-H:1.

Finally, SEA-3 asserts that Counsel for the Public's request is preempted under (i) the Hazardous Material Transportation Act (49 U.S.C. § 5101, *et. seq.*); (ii) the Federal Railway Safety Act (49 U.S.C. § 20102, *et. seq.*) ("FRSA"); and (iii) the Interstate Commerce Commission Termination Act (49 U.S.C. § 10101, *et. seq.*) ("ICCTA").

Counsel for the Public requests the Subcommittee to authorize the study involving the railroads, not to issue an order that would directly or indirectly regulate the railroads. SEA-3 failed to cite any authority that would indicate that an independent study of the operation of the railroad constitutes regulation of the railroads. SEA-3 argues, however, that such studies will be futile because the Subcommittee's determination of such issues is preempted by federal law. SEA-3's position is premature. Only after a factual record is fully developed can the Subcommittee assess whether any particular finding or decision is preempted by federal law. Sebago and its investigation may assist Counsel for the Public and the Subcommittee with understanding the factual background relevant to the Subcommittee's determination.

Considering the scope of Sebago's investigation and participation, the Subcommittee also finds that the proposed cost for the consultant services is reasonable. Therefore, Counsel for the Public's Motion to retain Sebago will be granted to the extent that the cost to SEA-3 shall not exceed \$45,000.

**B. Request for Site Inspection**

SEA-3 requests the Subcommittee to grant its request for a site inspection. In support, SEA-3 states that site inspection will allow the Subcommittee to see the area where the improvements will be located together with the existing components of the Project and its operation. There is no objection to SEA-3's request.

Under Administrative Rule Site 202.13 the "subcommittee . . . and public counsel shall conduct a site visit of any property which is the subject of a hearing if requested by a party, or on its own motion, if the committee or subcommittee determines that the site visit will assist the committee or subcommittee in reaching a determination in the hearing." N.H. CODE ADMIN. R. ANN. Site 202.13 (2015).

A site visit will assist the Subcommittee in reaching a determination in the hearing. Therefore, the request for a site inspection is granted. The site inspection will be scheduled for a date close in time to the adjudicative proceeding. A further notice of the date and time will be issued.

**C. Motion of Laura Byergo to Withdraw Individual Intervention**

There being no objections filed, Laura Byergo's motion to withdraw as an individual intervenor and to join with the Great Bay Stewards is granted.

## Order

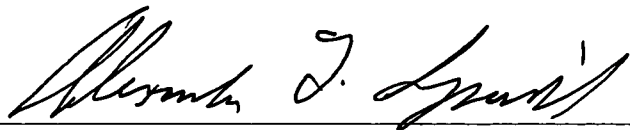
It is therefore ordered that:

The motion of Counsel for the Public to retain Sebago Technics is granted and SEA-3 shall pay for the services of Sebago, as invoiced, in an amount not to exceed \$45,000.00; and

The request for site inspection is granted.

Laura Byergo's motion to withdraw as an individual intervenor and join with Great Bay Stewards is granted.

By Order of the Site Evaluation Committee, this tenth day of August, 2015.



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Alexander Speidel, Presiding Officer  
NH Site Evaluation Committee