

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-01

In re:)
SEA-3, INC.)
Request for Exemption)

**MOTION OF COUNSEL FOR THE PUBLIC TO COMPEL PRODUCTION OF
DATA REQUEST RESPONSE, TO POSTPONE HEARING, AND
FOR ORDER TO SHOW CAUSE**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby moves the Committee to compel the applicant to produce responses to data requests made by the parties at the technical session, to postpone the hearing now scheduled for November 5-6, 2015, and to order the applicant to show cause why the proceeding ought not be dismissed.

In support hereof, Counsel for the Public represents as follows:

1. Pursuant to RSA 162-H:1, the purpose of a proceeding is 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.

2. An applicant may request exemption from the process pursuant to RSA 162-H:4, IV. Subsection IV provides,

In cases where the committee determines that other existing statutes provide adequate protection of the objectives of RSA 162-H:1, the committee may,

within 60 days of acceptance of the application, or filing of a request for exemption with sufficient information to enable the committee to determine whether the proposal meets the requirements set forth below, and after holding a public hearing in a county where the energy facility is proposed, exempt the applicant from the approval and certificate provisions of this chapter, provided that the following requirements are met:

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

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

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

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

3. The Committee has the discretion to grant an exemption if “other existing statutes provide adequate protection of the objectives set forth in RSA 162-H:1.” *Petition of Gorham Paper & Tissue*, dkt. no. 2011-03, Order dated Aug. 5, 2011, at 4. The discretion of the Committee is “statutorily circumscribed by” and subject to the four statutory requirements in subsection IV. *Id.*; *Application of AVRRDD*, dkt no. 2010-02, Decision and Order dated Dec. 29, 2010, at 6. The Committee “must find that an application satisfies all four requirements before it may grant an exemption.” *Gorham Paper*, at 4.

4. Sea-3 claims entitlement to an exemption under the 4 criteria set forth in RSA 162-H:4, IV. Sea-3 bears the burden on all the elements. N.H. Admin. R., Site 202.19.

5. Pursuant to a procedural schedule (as amended) data requests from the parties to Sea-3 were to be issued to and answered by Sea-3 before July 20, 2015, and a technical session was scheduled for October 14, 2015.

6. Well after the data requests deadline and prior to the technical session approximately 50 nearly identical unsigned letters purporting to be from members of the public were docketed by the Committee. Since the technical session additional numbers of the same letter have been docketed. Counsel for the Public was informed that the letters are generated by a Sea-3 promotional website, <http://securepropanenh.com>. Through experimentation, Counsel for the Public learned that the website form directly emails to the Committee's administrator, Pamela Monroe, and that there is no apparent testing of the letters by Sea-3 to determine genuineness before it is sent to the Committee. *See* attached letter dated October 19, 2015, from Donald Duck, 21 Magic Kingdom, Orlando, with email address of peter.roth@doj.nh.gov. It is not known how anyone is directed or induced to go to the Sea-3 website, whether the purported letter writers are real people, or if they are, whether they actually understand and agree with the content of the letter.

7. At the technical session Attorney Cole asked Mr. Bogan, Sea-3's vice president, if he knew anything about these letters. Mr. Bogan replied that he believed that the letters were the product of a campaign by Purple Strategies, a public relations firm that had been engaged by Sea-3's headquarters in New York or Houston, but that he knew little about it. Attorney Cole made a data request, which Counsel for the Public seconded, for information concerning the arrangement between Sea-3 (or its parent Trammo Inc.) and Purple Strategies, and between Purple Strategies and others. Counsel for Sea-3 objected to this request based on the fact that he lacked authority from his client to agree to it.

8. On October 16, 2015, Counsel for the Public, Attorney McEachern and Attorney Cole discussed the manner. Attorney McEachern said that some information could and would be provided while other information was likely to be objected to. He agreed to

inquire further and respond on October 19, 2015. His response came in the form of a motion for a protective order.

9. Inferences may be drawn from the fact that the applicant appears to have paid for the production of favorable public comment in order to meet its burden of showing that the general public believes that the individual review processes of the applicable agencies is sufficient. While the details about the website and the letter production are not presently known, the circumstances could be such that the applicant has attempted to create a misleading impression of public support for the exemption. It is also possible that while the letters are identical and may have been solicited by Purple Strategies, the letters are more or less genuine and not inspired by improper influences such as remuneration or other valuable incentives.¹ At present, however, the applicant has declined to disclose basic information from which the parties might learn whether the purported support for the project is genuine, fictitious or induced in an improper way.

10. Clearly the relationship between Purple Strategies, the applicant and the letter writers (assuming they exist) is relevant and important to one of the primary issues in the case. *See* RSA 162-H:4, IV, (c). The information is also relevant to a basic principle of litigation in this case which requires Sea-3 to proceed honestly, forthrightly, and in good faith. *See Rock Island C.R.R. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.) (“Men must turn square corners when they deal with the government.”) Moreover, this is not simply a question about the weight of the evidence but may go to the question of its basic integrity and truthfulness. *See Consolidated Edison Co. v. National Labor Relations Board*,

¹ Counsel for the Public does not concede that the letters are in fact consistent with RSA 162-H:4, IV (c), and reserves the right to make any arguments about them that he may have.

305 U.S. 197, 230 (1938) (in administrative proceedings “Mere uncorroborated hearsay or rumor does not constitute substantial evidence.”)

11. As such, Counsel for the Public requests the following:

A. That Sea-3 be required immediately to disclose all information reasonably requested by the parties concerning the Purple Strategies engagement and the work it performed to produce the comment letters (subject to appropriate privileges). This is not limited to the production of contracts and the like but may also include answering further data requests and making available knowledgeable people for questioning by the parties;

B. That, pursuant to N.H. Admin. R., Site 202.16, the hearing in this matter be postponed until a procedural schedule for this critical and unforeseen line of discovery can be implemented and carried to completion, including additional data requests and a technical session; and

C. That the Committee enter an order requiring Sea-3 to show cause why its request for exemption ought not to be dismissed due to Sea-3’s refusal to provide relevant and important evidence which refusal is inferential of a lack of good faith in this proceeding.

12. Counsel for the Public sought concurrence from the applicant which was not forthcoming. Counsel for the Public believes that the intervenors from Portsmouth, Dover and the Great Bay Discovery Center would support this request.

Wherefore, Counsel for the Public prays that the Committee enter an order granting this motion and ordering such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

JOSEPH A. FOSTER
ATTORNEY GENERAL



Dated: October 20, 2015

Peter C.L. Roth
Senior Assistant Attorney General
33 Capitol Street
Concord, New Hampshire 03301
603-271-3679

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that I served the foregoing upon the parties by email.



October 20, 2015

Peter C.L. Roth

Roth, Peter

From: Monroe, Pamela <Pamela.Monroe@sec.nh.gov>
Sent: Monday, October 19, 2015 11:42 AM
To: Roth, Peter
Subject: RE:

Peter-
Is this from you or was your e-mail compromised?
Pam

Pamela G. Monroe
Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
Phone: 603-271-2435
Fax: 603-271-3878
pamela.monroe@sec.nh.gov
<http://www.nhsec.nh.gov/>

-----Original Message-----

From: peter.roth@doj.nh.gov [<mailto:peter.roth@doj.nh.gov>]
Sent: Monday, October 19, 2015 11:28 AM
To: Monroe, Pamela
Subject:

Dear Committee members:

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

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

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

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

Sincerely,

Donald Duck
21 Magic Kingdom Orlando