

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

In re:)	
SEA-3, INC.)	Docket No. 2015-01
)	
Request for Exemption)	
)	

OBJECTION OF COUNSEL FOR THE PUBLIC TO REQUEST FOR EXEMPTION

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby opposes the Request for Exemption From The Approval And Certificate Provisions Of RSA Chapter 162-H By Sea-3, Inc. (the "Request for Exemption"). Counsel for the Public opposes the Request for Exemption because Sea-3's request does not meet the statutory standard and because the public interest and the purposes of RSA chapter 162-H will be best served by an application and a proceeding. 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. An exemption from site evaluation review does not exempt the project from regulation; an exempt project remains subject to all applicable federal, state and local regulations and permitting requirements. *AVRRDD*, at 6, 9.

5. The project as it is understood by Counsel for the Public will construct and operate new storage capacity of 270,000 gallons of flammable and explosive propane gas,

plus handling, compression, condenser, and refrigeration equipment. The facility will also more than double the railhead capacity of the facility which will create a tremendous increase of the numbers of propane railroad cars that will be brought in and out of the site's spur and siding through residential neighborhoods in several communities.

6. Sea-3 claims entitlement to an exemption under the four criteria set forth in RSA 162-H:4, IV. Counsel for the Public disagrees with Sea-3 on each point.

A. Existing regulatory programs do not provide adequate protection of the objectives of RSA 162-H:1.

According to the Request for Exemption, Sea-3's operation is subject to the federal Maritime Transportation Security Act, OSHA, EPA's Risk Management Program, the State Fire Code, certain Town ordinances, NPDES, and certain NHDES programs. From this suite of regulations, Sea-3 claims that the objectives of RSA 162-H:1 are protected. The objectives, as stated above include avoidance of undue delay, full and timely consideration of environmental consequences, full and complete public disclosure, and assurance 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.

What the Request for Exemption and other materials show, however, is that the regulatory programs referenced do not adequately protect the objectives of RSA 162-H. Many of the programs mentioned cover any facility of any kind, including those that typically come before the Committee. The existence and application of OSHA regulations, the Fire Code, NHDES environmental programs are all ubiquitous in the modern world for property and business owners. Sea-3 also claims that essential Town authority is preempted

by federal railroad regulations and has successfully dissuaded (thus far) the Town from conducting a rail safety study and reviewing a facility safety program. The Maritime Transportation Security Act is focused on site security from crime and terrorism. *See* Maritime Transportation Security Act of 2002, § 101, PL 107-295 (2002) (setting forth findings and identifying the prevention of crime and terrorism as key objectives). EPA's Risk Management Program governs releases as they relate to air pollution only. *See* 40 C.F.R. § 68.1 ("...the requirements for owners or operators of stationary sources concerning the prevention of accidental releases..."). In addition, Sea-3 refers to the safety of rail operations which are regulated by the Federal Railroad Administrator in its Request for Exemption. *See* Request for Exemption at 9, n. 2. The Committee may have little to say about the rail operations themselves because of preemption, but in considering whether to issue a certificate of site and facility for a ramped up operation at Sea-3's facility within its jurisdiction the Committee should evaluate the efficacy of railroad safety regulation. There is credible evidence suggesting that any presumption of rail safety should be carefully examined by the Committee. *See, e.g.,* S. Rep. 110-270 (2007), at 1-8 (Senate Committee discussing railroad safety challenges caused by human error, systemic industry problems and insufficient oversight by regulators); H.R. Rep. 110-336 (2007), at 27-35 (House Committee detailing systemic failures of the FRA to enact appropriate safety rules and enforce them); *Office of Inspector General Audit Report; FRA Is Nearing Completion of Rules Required By The Rail Safety Improvement Act, But Needs To Improve Oversight, Report no. CR-2013-070*, U.S. Dep't of Transp. Office of Inspector General (2013) (detailing FRA's deficiencies and failures to enact all the safety regulations mandated by Congress in 2008 and failures to provide sufficient guidance, training and supervision to ensure adequate oversight of

compliance with and enforcement of FRA safety rules). FRA's success with rail safety is a work in progress and it is reassuring to know that FRA is dedicated to protecting the public. Nonetheless, as the Committee considers the exemption request, how well the government regulates rail safety is clearly an important consideration.

The Request for Exemption is silent on how the regulatory environment for the facility ensures the avoidance of undue delay and the treatment of the issues posed by the site in a comprehensive and integrated fashion. Instead, the opposite appears to be the case – reliance by Sea-3 on the Town process has resulted in multiple avenues of litigation, some of which would be preempted by Committee jurisdiction.

In addition, the patchwork described provides no integration and does not appear to cover “all environmental, economic and technical” issues. There does not appear to be any attention paid to how the project affects the orderly development of the region, public health, aesthetics, or historic sites.¹ Critically, none of the programs or regulations that Sea-3 is subject to addresses the economic and energy issues that naturally arise, such as supply and market issues, public good, or rates or other economic and energy issues, including those asserted in the Request for Exemption (pp. 4-7). None of the programs will examine whether Sea-3 has adequate financial, managerial and technical capabilities. *See* RSA 162-H:16, IV(a). The City of Portsmouth and the Town of Newington appear to be locked in a dispute over whether the Town's zoning rules require attention to safety, whether it was preempted by federal law from considering safety issues, and also whether the zoning process as completed by the Town sufficiently addressed public health and safety. Sea-3 indicates in

¹ Sea-3 asserts without support that the site “has no aesthetic, environmental, historic or natural resource value.” Request for Exemption, at 14.

the Request for Exemption that the extent of public health and safety regulation is that which is incidental to programs such as OSHA, the Fire Code and the planning board approval process. Noise, traffic and other disruptions of life in the area do not noticeably feature in any of the regulatory programs referred to by Sea-3, except for the Town's planning board approval, which imposed modest street traffic controls and declined to take on safety and railroad issues.² The safety of the operation does not appear unmistakably to be covered by any of the agencies or regulatory programs described by Sea-3. OSHA covers workplace safety generally, the Maritime Security Act appears primarily to focus on security of the facility from crime and terrorism, the Fire Code provides some standards but that generally would be enforced in the first instance by the Town of Newington which may lack resources to assess and manage safety risks associated with a major propane storage, processing and handling facility effectively.³ Moreover, to the extent that the Town intends to require the examination and approval of safety plans prepared by Sea-3, it is evident that this will not be done in such a way that is consistent with the public transparency finding and purpose of RSA 162-H:1. *See Certified Record of Proceedings Before the Town of Newington Zoning Board of Adjustment*, Rockingham Superior Court, dkt. no. 218-2014-CV-00654 ("ZBA Record"), at 59-76 (Meeting Minutes, Newington Planning Board, dated 5/19/14, condition

² See *Certified Record of the Town of Newington Planning Board*, Rockingham Superior Court, dkt. no. 218-2014-CV-00654 ("Certified Record"), at 432-40 (Meeting Minutes dated 5/5/14 indicating vote against conducting a safety study, imposing some traffic controls but stating an inability to do anything about rail traffic and its impacts).

³ See *Certified Record*, at 31 (memo from Newington Fire Chief to Planning Board dated 10/9/13); at 425 (memo from Tom Morgan to Planning Board, dated 5/5/14 regarding Sebago safety study and cost estimate); at 426-27 (memo from Sebago Technics to Town of Newington, dated 5/5/14 with scope of work regarding safety study); at 432-40 (Meeting Minutes, dated 5/5/14 indicating vote against conducting the Sebago safety study as a waste of resources and not within its authority).

to approval no. 5); RSA 162-H:1 (process requires “full and complete disclosure to the public” of the plans). In its approval, the Planning Board made the following condition:

Several 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 the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.

ZBA Record, at 71.

The difficulties with this condition for purposes of determining whether an exemption is warranted include that the prior safety plans are not of record or available to the public, the review and approval of “updates” is similarly outside of the public eye, and there does not appear to be any regulatory component to them.

It is evident that there is legitimate public interest in having an independent analysis of the safety of the proposed facility, its operations and plans. If not constructed and operated correctly, the potential for great risk of harm to the public is real. Under the findings and purposes of c. 162-H, “full and complete disclosure to the public of such plans” is required. RSA 162-H:1. Given that the Town has declined to take on the task of a safety analysis, only the Committee could now require it and, in conjunction with that, formulate conditions to a certificate that may better protect the public interest and serve the purposes of chapter 162-H than would be the case if the facility were exempted. In any case, based on the Town’s decision not to do the study and avail itself of “the opportunity to update and increase fire protection systems ... that are outdated” at the facility in accordance with “numerous requirements set by Newington Fire with the assistance of the State Fire

Marshall's office and an independent Engineer" (sic),⁴ and the Town's decision to defer review of Sea-3's plans to "appropriate public officials" later on, there is serious reason to question whether the safety issues are adequately covered by existing regulatory programs.

The lack of integration is also a key issue: no single regulatory program is designed to take a broader view to ensure that the facility is constructed and run in accordance with all of the programs to which the facility may be subject. No single program ensures that the decision to construct and operate the facility, even if in full compliance with all of those programs, is "treated as a significant aspect of land-use planning." No one of the regulatory authorities has an over-arching view to determine whether the public interest in all of its manifestations will be protected, including economic and technical issues.

The Committee's jurisdiction would provide the much needed integration and would afford the opportunity for the fire and safety, environmental, and economic issues to be addressed by independent experts and the disinterested Committee. The Committee's jurisdiction would provide a neutral forum to resolve the conflict between the municipalities and to avoid a "fractured and repetitive appeal process..." See *Petition of Antrim Wind for Jurisdiction*, dkt. no. 2011-02, Jurisdictional Order dated Aug. 10, 2011, at 26. The Committee's review of Sea-3's project is statutorily defined and will assure that the findings and purposes identified in RSA 162-H:1 will be enforced and complied with. *Id.* The Committee has a well developed regulatory scheme designed to address the siting,

⁴ October 9, 2013 Newington Fire Chief's Memo, *Certified Record* at 31; see also *ZBA Record*, at 59-76 (Meeting Minutes, Newington Planning Board, dated 5/19/14) (relying upon report dated 1/29/14 by SFC Engineering Partnership for findings of fire safety); *Certified Record*, at 144-47 (*SFC Report* stating: "All conclusions drawn here are from the provided site plans only. No fire safety analysis, mechanical/electrical or structural plans have been reviewed at the time of writing. Conclusions drawn as part of this assessment may be rendered non-applicable on receipt of further documentation pertaining to system details.") Despite the Fire Marshal's recommendation that the Town retain an independent engineer, the Town determined not to do so.

construction and operation of energy facilities consistent with the purposes and findings articulated in RSA 162-H:1. *Id.* at 26-27. If exempted, no other body will provide that sort of integrated oversight.

B. Consideration of the proposal by only selected agencies represented on the Committee is not all that will be required.

Represented on the Committee are: the PUC, NHDES, DRED, DOT, NHDHCR, and public members. RSA 162-H:3, I. The facility, however, is likely to be regulated by other bodies not among these 5 state agencies. Most significantly among them, the State Fire Marshal's office, which is not on the Committee. Moreover, it is unclear what role, if any, several of the member agencies will have in their customary jurisdiction. DOT has already informed Sea-3 that it has little or no actual authority.⁵ Sea-3 must, like any other non-exempt facility obtain a limited number of permits from NHDES. It indicates that a key permit will be postponed until after the project is built. Moreover, based on the information in the Request, there is no way to know whether the proposed facility should have any waste permits. There are apparently no forests or parks directly involved so DRED has little or no regulatory jurisdiction, although tourism is a major aspect of the regional economy and there is nothing in the processes that will be followed if exempted that would look at possible impacts on tourism.⁶ Sea-3 makes no suggestion that the PUC has any role, and the PUC does not regulate the business of storage, distribution or transportation of propane except in circumstances not found in this case. *See* RSA 362:4-b (exempting propane business from public utility regulation); *Allied N.H. Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306,

⁵ *See* Request for Exemption, Tab "I" (letter from Ms. Shelly Winters, NHDOT, dated Feb. 11, 2014 ("our involvement and jurisdiction is limited..." and providing instead "information").

⁶ *See* *Travel Barometer, Fiscal Year 2014*, Institute for N.H. Studies, Plymouth State University (showing the Seacoast Region as the second highest collector of Meals and Rentals taxes among 7 regions in NH).

310 (1966); N.H. Admin. R., Puc 502.08 and 502.14. At the same time, Sea-3's construction and operation will be relying upon an unquantified level of general and uncoordinated federal workplace safety, railroad regulation, and port security oversight, none of which is in areas represented on the Committee and none of which appears directed specifically at this kind of activity.⁷ It thus cannot be said that the agency members on the Committee already have the situation in hand, which is the implication of subsection IV(b). Of the five agencies represented, only NHDES has any significant role. While Sea-3 has obtained an AoT permit and a Shoreland Impact permit it intends to "update" its air pollution Permit to Operate only "upon completion of the proposed improvements." This last aspect clearly should be done under the auspices and oversight of the Committee.

C. Response from the general public does not support the exemption.

At present the record before the Committee shows nine letters from New Hampshire residents opposing the exemption, and five identical letters of support from propane dealers supporting the exemption. A number of Portsmouth residents have moved to intervene in opposition to the exemption. The City of Portsmouth has intervened in the case in opposition to the exemption request. Counsel for the Public opposes the exemption.⁸ It cannot be said, therefore, that the evidence shows that the "general public" is satisfied that the objectives of

⁷ Accidents do happen and when they do the results can be terrible. *See, e.g., Gas Explosion at Mexico City Hospital Kills 3 and Wounds Dozens*, N.Y. TIMES, Jan. 29, 2015. (http://www.nytimes.com/2015/01/30/world/americas/mexico-city-hospital-gas-explosion.html?_r=0); *Kingman explosion killed 11 firefighters July 5, 1973*, KPHO.com, posted July 5, 2013 (<http://www.kpho.com/story/22771091/kingman-community-reflects-on-1973-tragedy-that-killed-11-firefighters>); *Toronto propane explosion was preventable, court hears*, THE GLOBE AND MAIL, June 12, 2012 (<http://www.theglobeandmail.com/news/toronto/toronto-propane-explosion-was-preventable-court-hears/article4253746/>); *see also* H.R. Rep. 110-336, at 29-30 (discussing fatal gas tanker train car accidents in South Carolina, Texas, and North Dakota).

⁸ Counsel for the Public "shall represent the public" in the proceeding. RSA 162-H:9, I; *see Antrim Wind Jurisdiction, Order On Motions to Intervene*, dated May 6, 2011, at 9 (counsel for the public represents the public interest).

the statute will be met with the individual reviews by participating agencies. The general public opponents reference issues that will *not* be adequately resolved by the individual permitting processes of member agencies consistently with the purposes of RSA 162-H:1. At the same time, and even assuming propane trade association parties can be considered “general public,” the propane dealers do not attempt to argue that the individual reviews by member agencies will be adequate. Instead, they speak of market issues and extol the safety record of the facility under its previous conditions of operation.

The public acceptance issue is perhaps the most important piece of this puzzle. In each occasion this century that the Committee has granted an exemption, the record shows that members of the public voiced support for the exemption in the proceeding before the Committee. *See, e.g., AVRDD*, at 7, 11-12; *Application of University of New Hampshire*, dkt. no. 2007-01, Decision and Order dated Aug. 8, 2007, at 7; *Application of Sprague Energy Corp.*, dkt. no. 2001-01, Decision and Order dated June 29, 2001, at 5; *Application of Pulp and Paper of America, LLC*, dkt. no. 00-02, Decision and Order dated Jan. 26, 2001, at 6-7. Clearly that is not the case here. Without public acceptance of the exemption the exemption cannot be granted because the Committee must find that all four statutory criteria are met. In light of the significant opposition from the general public and lack of any general public support for it, the criterion under subsection IV(c) cannot be met.

D. All environmental impacts or effects would not be adequately regulated by other federal, state, or local statutes, rules, or ordinances.

By narrowing the scope of the environmental impacts or effects to those for which Sea-3 has obtained a DES permit, it would be possible to meet the fourth criterion. But the only way to do that is by ignoring the language of the statute which speaks of “*all*

environmental impacts or effects.” Sea-3 states that site “has no aesthetic, environmental, historic or natural resource value.” Request for Exemption. Whether this is true depends upon the beholder and would ultimately be the Committee’s job to determine. Yet there is no way to determine from the Request for Exemption whether noise, odor, exhaust, air discharge, and waste products may be produced by the proposed significant expansion of the facility and its proposed changes in use. *See* Request for Exemption, p. 9 (“If propane leaks, it doesn’t puddle but instead vaporizes and dissipates into the air.”). Sea-3 intends to delay permitting of the facility by DES’ Air Resources Division until after the project is complete. Request for Exemption, p. 12. It is not known at this point what conditions might be imposed and whether a DES-ARD Operating Permit will actually be adequate to deal with air pollution that the facility may cause. Consequently, the existence of Shoreland Protection, Alteration of Terrain and air pollution regulations may not adequately regulate “all” the environmental issues that the Committee could address.

Conclusion

Sea-3 proposes a major development of a new facility involving the storage, processing and handling of large quantities of flammable and explosive gaseous fuel. Existing regulation of the facility does not provide an integrated or necessarily focused set of programs that will adequately and reliably protect the public interest. Perhaps most importantly, the safety of the facility is a key question that is not comprehensively addressed by any of the current regulatory programs to which Sea-3 is subject. The Town determined, apparently in contrast to the concerns expressed by its fire chief, and based on a high level and cursory site plan review that the local fire department and the state Fire Marshal’s office could handle things adequately, but without “full and public disclosure” there is no way to be

certain if that is true. Finally, as manifested by the interventions and written comments of members of the general public, the intervention of the City of Portsmouth, and this objection, public opinion does not support the exemption and on that basis alone the Request for Exemption must be denied.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

JOSEPH A. FOSTER
ATTORNEY GENERAL

Dated: April 22, 2015

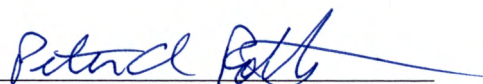


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CERTIFICATE OF SERVICE

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

April 22, 2015



Peter C.L. Roth