

**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**

**ORDER ON PENDING MOTIONS AND
NOTICE OF PREHEARING CONFERENCE**

May 19, 2015

I. Background

On January 8, 2015, SEA-3, Inc. (“SEA-3,” or, “Project”) 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 located at 190 Shattuck Way in Newington, New Hampshire. 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 facility 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 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:1 *et. seq.*

After review of the request, the Chairman of the Committee determined that additional information was necessary. On January 30, 2015, SEA-3 was notified that additional information was required for the Committee to review the request for exemption. On February 27, 2015, SEA-3 supplemented its filing as requested by the Chairman.

On March 26, 2015, an Order and Notice of Public Hearing together with an Acceptance of Request and Procedural Order were issued. The Committee found SEA-3's Petition to be complete and accepted it. The Committee also designated a Subcommittee to address SEA-3's request and scheduled a Public Meeting. The Committee also ordered potential intervenors to file motions to intervene by April 22, 2015.

On April 6, 2015, Attorney Peter Roth was designated to serve as Counsel for the Public in this docket. On April 22, 2015, Counsel for the Public filed an Objection to SEA-3's request for exemption. On May 1, 2015, SEA-3 filed a Reply to Counsel for the Public's Objection.

Pursuant to the Committee's Order, the following Motions to Intervene were filed with the Subcommittee:

1. Richard and Catherine DiPentima's Motion to Intervene was filed on April 20, 2015;
2. William and Kristina Campbell's Motion to Intervene was filed on April 20, 2015;

3. Matthew and Erica Nania's Motion to Intervene was filed on April 19, 2015;
4. John and Jane Sutherland's Motion to Intervene was filed on April 22, 2015;
5. City of Portsmouth's Petition to Intervene was filed on April 22, 2015;
6. City of Dover's Motion to Intervene was filed on April 22, 2015;
7. Laura Byergo's Motion to Intervene was filed after the deadline set forth in the Procedural Order, on May 4, 2015; and
8. Patricia M. Ford and Robert L. Gibbons' Motion to Intervene was filed on May 7, 2015.

On May 1, 2015, SEA-3 filed Objections requesting that the Subcommittee deny the requests to intervene filed by City of Dover, City of Portsmouth, John and Jane Sutherland, Matthew and Erica Nania, William and Kristina Campbell, and Richard and Catherine DiPentima. Richard and Catherine DiPentima, John and Jane Sutherland, William and Kristina Campbell, and Matthew and Erica Nania replied to SEA-3's Objection on May 6, 2015.

Pursuant to the Notice of Public Hearing, on May 7, 2015, the Subcommittee conducted a public hearing in the Town of Newington. During the public hearing, the Subcommittee addressed the intervenors' arguments and voted on the requests for intervention. The Subcommittee's decision is memorialized in this Order. This Order also schedules a prehearing conference, to be held in the City of Concord.

II. Intervention

A. Standard for Intervention

The New Hampshire Administrative Procedure Act provides that an administrative agency must allow intervention when:

- (a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least 3 days before the hearing;

(b) The petition states facts demonstrating that the petitioner's rights, duties, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervener under any provision of the law; and

(c) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

RSA 541-A:32, I.

The statute also, in the alternative, permits the presiding officer to allow intervention "at any time upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings." RSA 541-A:32, II.

Similarly, New Hampshire Code of Administrative Rules, Site 202.11(b), requires that a petition to intervene before the Committee be granted if:

(1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's order of notice of the hearing, at least 3 days before the hearing;

(2) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and,

(3) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

New Hampshire Code of Administrative Rules, Site 202.11 also provides that the presiding officer shall grant one or more late-filed petitions to intervene upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearings. Site 202.11(c).

The Administrative Procedure Act and the Committee's procedural rules provide that intervention is mandatory in those cases where a party can establish that it has a right, duty, privilege, immunity or other substantial interest that may be affected by the determination of the issues in the proceeding. The statute and the rule also provide for permissive intervention in

those cases where the presiding officer determines that intervention is in the interest of justice and does not interfere with the prompt and orderly conduct of the proceeding.

Pursuant to RSA 162-H:4, V, disputed petitions for intervention may be decided by the presiding officer.

The Administrative Procedure Act and our procedural rules also allow the presiding officer to place limits on an intervenor's participation. *See* RSA 541-A:32, III; N.H. Code of Administrative Rules, Site 202.11(d). The presiding officer may limit the issues pertaining to a particular intervenor, limit the procedures in which a particular intervenor may participate, or combine intervenors and other parties for the purposes of the proceeding so long as the limitations placed on intervenors do not prevent the intervenor from protecting an interest that formed the basis of intervention.

B. The Motions to Intervene

1. Motions Filed By Local Municipalities. The City of Portsmouth and the City of Dover each filed a motion/petition to intervene in this proceeding. SEA-3 objected to the relief sought by the Cities.

The City of Portsmouth asserted that it is a neighboring community to the Town of Newington, along the Piscataqua River, and shares common transportation routes with Newington. Portsmouth further alleged that the Project may impact the usage of shared roads, rail lines and navigable waters. Portsmouth also asserted that the Project may have an adverse routine impact on the City's general environment and, in case of a catastrophic event, may pose the risk of a significant adverse impact on public safety in the City.

Similarly, the City of Dover alleged that its rights, duties, privileges, immunities and other interests may be affected by this proceeding. Specifically, Dover asserted that it is a

neighboring community of Newington in the vicinity of Great Bay and Little Bay and raised its concerns regarding the Project's potential impacts on the City's environment and public safety.

Municipalities that may be affected by an administrative agency's action are given preferential statutory treatment. RSA 541-A:39 provides that an affected municipality must be provided notice of an administrative proceeding and allowed a "reasonable opportunity to submit data, views, or comments with respect to the issuance of a permit, license or any action within its boundaries that directly affects the municipality. Such actions shall include those which may have an effect on land use, land development or transportation, those which would result in the operation of a business, or those which would have an immediate fiscal impact on the municipality or require the provision of additional municipal services." Additionally, RSA 162-H:16, IV (b) requires that due consideration be given to "the views of municipal and regional planning commissions and municipal governing bodies." While the Project is not, strictly speaking, "within the boundaries" of Portsmouth or Dover per RSA 541-A:39, there is the potential for direct effects on the Cities, and, moreover, RSA 162-H:16 requires that the Subcommittee hear the views of Portsmouth and Dover. It is in the interest of justice to allow the Cities to formally intervene in this docket so the views of each municipality may be known, within the interactive context of this proceeding. The Cities of Portsmouth and Dover, given their proximity to the facility, are directly affected by the request for exemption as it may affect land use and transportation in their respective municipalities, together with the potential need to provide additional public-safety related municipal services. Intervention will not interfere with the prompt and orderly conduct of the proceeding. Therefore, the City of Dover's Motion to Intervene and the City of Portsmouth's Petition to Intervene are granted, pursuant to RSA 541-A:32, II. The Cities of Portsmouth and Dover shall thereby participate as full parties in this docket.

2. Motions Filed by Residents of the City of Portsmouth. Richard and Catherine DiPentima, William and Kristina Campbell, Matthew and Erica Nania, John and Jane Sutherland, Patricia M. Ford, and Robert L. Gibbons are persons that reside in the City of Portsmouth (Portsmouth Residents). Each Portsmouth Resident has filed a *pro se* motion to intervene.

The Portsmouth Residents allege that their homes are located in the neighboring community and directly along the railroad tracks which will be serving the Project. The Portsmouth Residents further allege that their property rights, health, safety and welfare will be affected by the expansion requested by SEA-3.

SEA-3 objected to the requests made by the Portsmouth Residents. SEA-3 alleged that the Portsmouth Residents failed to establish that their rights, duties, privileges, immunities or substantial interests may be affected by the proceeding addressed in this docket. Specifically, SEA-3 alleged that the Portsmouth Residents' concerns stem from the impact that the Project's more intense use of the railroad may have on their interests, as opposed to the Project's impact on-site. SEA-3 further asserted that the Subcommittee is preempted by federal law from addressing the issue of the potential railroad-use impacts on the Portsmouth Residents. SEA-3 further alleged that, other than impact of the railroad on the Portsmouth Residents, the Portsmouth Residents failed to state any particularized impact that the Project may have on themselves, as individuals, and simply raised general public concerns. SEA-3 argued that such general public concerns should be raised and submitted to the Subcommittee by the Counsel for the Public. On this basis, SEA-3 urged the Subcommittee to deny the Portsmouth Residents' request to intervene in this docket. In the alternative, SEA-3 requested that the Subcommittee consolidate the Portsmouth Residents'

representation with Counsel for the Public and impose conditions that would encourage the efficient and orderly conduct of this proceeding.

In response to SEA-3's arguments, Counsel for the Public objected to SEA-3's request for consolidation. Counsel for the Public argued that he cannot represent the interests of a particular group of people because his statutory role is to represent the entire public and not a certain group of citizens with individual interests.

On questioning by the presiding officer, each of the Portsmouth Residents agreed to be consolidated into one intervenor group to facilitate the prompt and efficient conduct of the proceeding in this docket.

The Portsmouth Residents have expressed a combination of interests that may be affected by the outcome of this proceeding. It is in the interest of justice to permit these persons to intervene in this docket, pursuant to RSA 541-A:32, II, to assist the Subcommittee in determining whether the Project should be exempt from the Committee's jurisdiction. SEA-3's assertion of total federal preemption of State authority regarding railroad-related impacts has not yet been fully analyzed by the Subcommittee, and is a legal issue for further consideration. In order to assure the orderly conduct of these proceedings and to avoid duplication of arguments, the Subcommittee finds it advisable to combine the Portsmouth Residents into one group of intervenors. The Portsmouth Residents shall designate a single spokesperson for the purposes of filing pleadings, conducting discovery, and for examination at evidentiary hearings.

3. Motion Filed by Laura Byergo. Laura Byergo resides in Greenland, New Hampshire. In her Motion to Intervene, Ms. Byergo asserted that, due to the fact that LPG will be delivered to the Project by the Pan Am rail line, the Project "poses an environmental threat to the health of the Great Bay and thereby the public's economic interests, property values, health, safety and welfare are directly implicated by the Sea 3 expansion." During the public hearing,

Ms. Byergo stated that the Project will have no direct impact on her, per se, but elaborated that she seeks intervention as a member of public who is concerned about the impact the Project may have on the environment of the region.

SEA-3 objected to Ms. Byergo's request. SEA-3 asserted that Ms. Byergo asserted generalized interests only and failed to state any particularized impact the Project may have on her as an individual. On this basis, SEA-3 requested that the Subcommittee deny Ms. Byergo's request to intervene.

In this matter, it appears that Ms. Byergo has no direct interest in the outcome of this proceeding, strictly speaking. However, intervention by Ms. Byergo will not impair the prompt and orderly conduct of the proceedings, and would be in the interest of justice, in that she may bring useful information to the attention of the Subcommittee. Therefore, Ms. Byergo's Motion to Intervene is granted, under the standards of RSA 541-A:32, II.

III. Notice of Prehearing Conference

Please take notice that a prehearing conference in the above entitled matter will be held, on June 5, 2015 at 9:00 AM. The prehearing conference will be held at the premises of the New Hampshire Public Utilities Commission, located at 21 South Fruit Street, Concord, New Hampshire.

At the public hearing on May 7, 2015, the Subcommittee voted to designate this matter as a contested case. The Subcommittee ordered that a prehearing conference be held and that the Chairman of the Subcommittee schedule an adjudicative hearing to be held at the appropriate time after a prehearing conference.

A prehearing conference is authorized by RSA 541-A: 31, V(b) and New Hampshire Code of Administrative Rules, Site 202.10. Pursuant to RSA 541-A, 31, V(c), the prehearing conference may include, but is not limited to, consideration of any one or more of the following:

- (1) Offers of settlement.
- (2) Simplification of the issues.
- (3) Stipulations or admissions as to issues of fact or proof, by consent of the parties.
- (4) Limitations on the number of witnesses.
- (5) Changes to standard procedures desired during the hearing, by consent of the parties.
- (6) Consolidation of examination of witnesses by the parties.
- (7) Any other matters which aid in the disposition of the proceeding (including scheduling).

All parties to the proceeding, including all intervenors and potential intervenors, should attend the prehearing conference.

IV. Orders

It is hereby ordered that the motions to intervene filed by the City of Portsmouth, City of Dover, the Portsmouth Residents, and Laura Byergo are granted subject to the limitations contained in this Order; and

It is hereby further ordered that the procedural schedule (for the prehearing conference) set forth in this Order shall be followed by the parties unless further amended by the presiding officer.

May 19, 2015



Alexander Speidel, Presiding Officer
Site Evaluation Committee