

**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**

November 4, 2015

ORDER ON PENDING MOTIONS

Introduction

This Order addresses the pending motions that were filed by the parties following the technical session that was conducted on October 14, 2015.

During the course of that technical session, the Portsmouth Intervenors made a request for a copy of SEA-3's contract with Purple Strategies and all communications between Purple Strategies, SEA-3 and members of the public. SEA-3 objected to the request. A number of motions and objections were then filed. In this Order I deny the relief requested in Counsel for the Public's Motion to Compel Production of Data Request Response, to Postpone Hearing and for Order to Show Cause. I also deny the relief requested in the Portsmouth Intervenors' Motion to Compel Responses to Data Requests. This Order also grants in part SEA-3's Motion for a Protective Order regarding the data requests.

SEA-3 also filed Motions to Strike the Prefiled Testimony of Peter Britz and Testimony Concerning Railroad Issues. SEA-3's motions to strike were filed twelve days before the scheduled adjudicative hearing in this docket. For the reasons stated in this Order, I deny SEA-3's motions to strike.

Procedural History

On January 8, 2015, 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 were exempted from the requirements of RSA 162-H in 1995. In this docket, SEA-3 seeks to construct 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 sizeable change or addition to the existing Facility. SEA-3 requests that the Subcommittee determine that the construction of 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.*

A final adjudicative hearing on the request for exemption is scheduled for November 5, 2015 and November 6, 2015.

As part of the discovery process in this docket, a technical session was held on October 14, 2015. Paul Bogan, Vice President of Operations of the SEA-3 facility, advised the parties that SEA-3 had retained the services of Purple Strategies, a public relations firm. At the technical session, the Portsmouth Intervenors made a data request for a copy of SEA-3's contract with Purple Strategies and all communications between Purple Strategies and SEA-3 and members of the public. SEA-3 objected to the request.

On October 19, 2015, Counsel for the Public, the Portsmouth Intervenors and SEA-3 all filed motions pertaining to the data request. Counsel for the Public filed a Motion to Compel

Production of Data Request, to Postpone Hearing and for Order to Show Cause. The Portsmouth Intervenor also filed a Motion to Compel Responses to Data Requests. SEA-3 filed a Motion for Protective Order. SEA-3 objects to the relief requested by Counsel for the Public and the Portsmouth Intervenor. Counsel for the Public and the Portsmouth Intervenor object to the relief requested by SEA-3. The cities of Dover and Portsmouth both join in the relief requested by Counsel for the Public and the Portsmouth Intervenor.

On October 23, 2015, twelve days before the scheduled adjudicative hearing in this docket, SEA-3 filed a Motion to Strike the Testimony of Peter Britz. The same day, SEA-3 filed a Motion to Strike Testimony Concerning Railroad Issues in this docket. On November 2, 2015, the City of Portsmouth, Counsel for the Public, the City of Dover and Great Bay Stewards and the Portsmouth Intervenor filed objections to SEA-3's request to strike testimony concerning railroad issues.

Factual Background

A. Data Requests

On or around October 2, 2015, the Committee began receiving letters of support for the SEA-3 exemption petition. The comment letters generally follow a set pattern, and appear to have been produced using a form letter template. At the technical session held on October 15, 2015, Mr. Bogan was asked about the letters by certain parties. Mr. Bogan responded that SEA-3 had retained a public relations consultant, Purple Strategies. Mr. Bogan told the parties that he believed that the letters were the product of a campaign initiated by Purple Strategies. The Portsmouth Intervenor made an immediate request for any written contract with Purple Strategies and for all communication between Purple Strategies, SEA-3 and the public. On October 15, 2015, the Portsmouth Intervenor forwarded the following data requests to SEA-3:

1. Any and all agreements and understandings between Purple Strategies and SEA-3 (or SEA-3's parents, affiliates or subsidiaries, but collectively, "SEA-3") relating to SEA-3's application for an exemption from the certification requirements of RSA 162-H;
2. Any and all agreements between Purple Strategies and SEA-3, as defined above, relating to SEA-3's proposed facility exemption;
3. Any and all documents, communications and correspondence between Purple Strategies and SEA-3 (as defined) relating to Purple Strategies' work or engagement from January 1, 2015 to the present;
4. Any and all communications (in whatever form and however stored, including electronic mail and electronically stored information) between Purple Strategies and third parties, including but not limited to persons submitting letters to the Site Evaluation Committee, relating to the SEA-3 application not pending before the Site Evaluation Committee.

Counsel for the Public and the Cities of Dover and Portsmouth, joined in the data requests when made at the technical session and continue to join in the request as formalized in writing.

In response, SEA-3 filed a Contested Motion for Protective Order. SEA-3 admits that Purple Strategies assisted in the development of a website which members of the public may use to provide comments to the Subcommittee in support of SEA-3's efforts at exemption¹. In its motion for a protective order SEA-3 notes that opponents of the exemption petition have also developed websites seeking to fund and coordinate opposition². In its motion seeking a protective order SEA-3 also alleges that Counsel for the Public misused the Purple Strategies website by creating a false persona (Donald Duck) and submitting straw correspondence in favor of the petition for exemption.

¹ <http://www.securepropanenh.com/TakeAction.aspx>

² The websites opposing the exemption petition are identified by SEA-3 as <https://www.facebook.com/SRASPP/>; <http://www.sraspp.blogspot.com/>; http://www.nopropanetrain.com/#get_involved/clyzj; <https://www.gofundme.com/seacoastNHsafety>

SEA-3 objects to the data requests and requests the Subcommittee to issue a protective order denying the data requests, and enjoining the parties from issuing subpoenas for the information and from interfering with the website. In support of the motion for a protective order, SEA-3 asserts that the data requests seek trial preparation materials. Citing to Superior Court Rules, SEA-3 argues that trial preparation materials are generally not discoverable unless there is substantial need for the materials by the other party and the other party can establish undue hardship to obtain the same materials by other means. SEA-3 also argues that enforcement of the data requests would unduly delay the resolution of the proceedings in this docket. SEA-3 argues that there is no substantial need for the discovery requested especially since the opponents of exemption have organized similar public relations campaigns on the Internet.

Counsel for the Public requests the Subcommittee to compel production of responses to data requests. Counsel for the Public also moves the Subcommittee to continue the adjudicative hearing in this docket and to require SEA-3 to show cause why the petition for Exemption should not be dismissed for failure to respond affirmatively to the data requests. Counsel for the Public asserts that a response to the data requests is particularly warranted because (i) under RSA 162-H:4 IV (c), the Subcommittee is required to consider whether the response to the request for exemption from the general public indicates that the objectives of RSA 162-H:1 are met through the individual review process of the participating agencies; and (ii) public comments generated through the use of the website that was set up on behalf of SEA-3 are unreliable and may be used to mislead the Subcommittee. In his motion, Counsel for the Public admits using the Purple Strategies website to create an e-mail under the persona of “Donald Duck” which was received by the Subcommittee. Counsel for the Public complains that it is not known how the

public is directed to the Purple Strategies website nor whether the letter writers are real people who understand and agree with the contents of the email that is generated and forwarded to the Subcommittee.

The Portsmouth Intervenors and the Cities of Portsmouth and Dover join in Counsel for the Public's concerns and assert that discovery of the extent of Purple Strategies' involvement in solicitation of public comments as well as the methods of inducement of said public comments is highly relevant to the determination the Subcommittee is called to make in this docket. The Portsmouth Intervenors further assert that Purple Strategies was not retained by SEA-3 to assist with trial strategies and trial preparation, but, instead, was engaged to develop "misleading and unreliable public comments." Consequently, the Portsmouth Intervenors assert that the data requests do not seek trial preparation materials and should be enforced. Finally, the Portsmouth Intervenors assert that enforcement of the data requests and a continuance of hearing will not cause undue delay because such delay is caused by SEA-3 and its failure to disclose Purple Strategies' involvement in a timely manner.

B. Motions to Strike

On October 23, 2015, SEA-3 filed two motions to strike testimony. SEA-3 requests the Committee to strike (i) the testimony of Peter Britz, proffered by the City of Portsmouth and (ii) any and all testimony concerning railroad issues.

In support of its request to strike Mr. Britz's testimony, SEA-3 asserts that the testimony is irrelevant and that it invades the province of the Subcommittee. SEA-3 asserts that Mr. Britz's testimony describes the reasons for the City of Portsmouth's appeal of the Newington Planning Board's approval of the Project and provides legal analysis and conclusions concerning the Subcommittee's role in this docket. SEA-3 asserts that any and all facts surrounding the

City of Portsmouth's appeal are irrelevant as they "have no bearing on the Committee's decision." As to the legal points raised by Mr. Britz, SEA-3 states that Mr. Britz should be precluded from advising the Subcommittee "of the law" because it is the Subcommittee's role to know the law and its applicability.

The City of Portsmouth objects to SEA-3's request to strike the testimony of Mr. Britz. The City of Portsmouth asserts that SEA-3's Motion to Strike Mr. Britz' testimony should be denied because SEA-3 failed to file it "as early as possible in the hearing." See NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES, Site 202.24. The City of Portsmouth further asserts that Mr. Britz's testimony is relevant to the issues raised in this docket because Mr. Britz summarized Portsmouth citizens' safety concerns and SEA-3's expansion.

SEA-3 also filed a motion to strike all testimony concerning railroad issues. SEA-3 asserts that testimony about the railroad is irrelevant because the Committee cannot issue any regulations that directly or indirectly affect railroads under federal law and the doctrine of federal preemption.

Counsel for the Public objects to SEA-3's request to strike testimony relating to the railroad issues. Counsel for the Public asserts that SEA-3 waived its right to request the Subcommittee to strike testimony regarding railroad by failing to file a timely request. Counsel for the Public further asserts that the Subcommittee is precluded from striking public comments even if such public comments address railroad safety. See RSA 162-H:10, III. Counsel for the Public further asserts that SEA-3 is precluded from arguing that the Interstate Commerce Commission Termination Act (49 U.S.C. § 10101, *et. seq.*) ("ICCTA") preempts the Subcommittee from addressing the Site and related issues where the Transportation Surface Board has already determined that the ICCTA's preemption provisions do not apply to SEA-3.

See SEA-3, Inc. - Petition for Declaratory Order, FD 35853 (STB served March 17, 2015). As to the alleged preemption by the Federal Railway Safety Act (49 U.S.C. § 20102, *et. seq.*) (“FRSA”), Counsel for the Public asserts that the FRSA does not preempt and does not stop the Subcommittee from reviewing SEA-3’s safety and considering all facts that may affect it, including the railroad.

The City of Portsmouth concurred with Counsel for the Public and asserted that the SEA-3 motion to strike testimony regarding railroad issues should be denied as untimely. The City of Portsmouth further asserts that the Subcommittee is allowed and required to consider such testimony while exercising the state’s police powers and addressing safety of requested improvements.

The City of Dover asserts that SEA-3’s request to strike any and all testimony that even remotely involves the railroad is vague and ambiguous. The City of Dover further asserts that its witnesses’ references to railroad and its safety is highly relevant for determination of safety of the Site and public interests involved in resolution of the issues in this docket. The City of Dover requests the Subcommittee to deny SEA-3’s request, as it relates to the testimony of its witnesses.

Great Bay Stewards asserts that testimony regarding the railroad in general and railroad safety specifically is highly relevant for the determination that the Subcommittee is called upon to make in this docket. Furthermore, Great Bay Stewards asserts that only after the Subcommittee accepts and considers the entire testimony, it can determine of whether or not it is preempted under the federal law. As a result, Great Bay Stewards requests that the Subcommittee to deny SEA-3’s request, as it relates to the testimony of their witnesses.

Analysis

A. Data Requests

Under RSA 162-H:4, IV (c), the Subcommittee may exempt an applicant from the approval and certificate provisions of RSA 162-H if, among other things, the Subcommittee determines that the “(R)esponse to the application or request for exemption from the general public indicates that the objectives RSA 162-H:1 are met through the individual review processes of the participating agencies.” RSA 162-H:4, IV (c). The Subcommittee is required to review and assess all public comment received during the course of a proceeding. The Subcommittee must “consider and weigh written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding.” RSA 162-H:10, III. Our administrative rules require that we allow public comment until the close of the record. See generally New Hampshire Code of Administrative Rules, Site 202.25. The method of written public comment is not limited or defined by either our enabling statute or our administrative rules. The Subcommittee is required to accept and review all public comments.

However, the rules of evidence do not apply in administrative adjudicative proceedings. See RSA 541-A:33. A plain reading of the Statute indicates that the Subcommittee is required to review all comments provided by public members regardless of their source and/or provenance of their origination, provided that they are properly filed with the Subcommittee. It is apparent from the parties’ pleadings that the parties possess sufficient information to address the question of how much evidentiary weight should be attributed to public comments generated through the use of the Purple Strategies website, and Purple Strategies’ form letter template. Although the parties may wish to further explore the circumstances and origination of public comments driven

from public relations campaigns, it is neither necessary nor warranted under the circumstances of this case. The Committee has never required extensive documentation of the source or credulity of public comment letters. All public comment is unsworn. *See* New Hampshire Code of Administrative Rules Site 202.25(b). Extended litigation over the public relations campaigns of the parties, in this case, will not assist the Subcommittee in applying the statutory factors required for a determination to grant or deny the petition for exemption. The information sought by the motions to compel is therefore not necessary to enable the parties to acquire admissible evidence. The provenance of the letters of concern has been revealed to the parties by SEA-3. All parties are free to argue what weight the Subcommittee should give to such letters. Further discovery regarding this issue will unduly delay the prompt and orderly conduct of this proceeding. The motions to compel responses to the data requests are therefore **DENIED**. Having denied the motions to compel responses to the data requests, there is no reason to postpone the adjudicative proceeding or conduct a show cause hearing. Therefore, the relief sought by Counsel for the Public in his Motion to Compel Production of Data Request Response, to Postpone Hearing and for Order to Show Cause is also **DENIED**.

SEA-3 seeks a Protective Order claiming that the Purple Strategies is acting as a trial preparation consultant. The establishment of a public relations campaign and website does not amount to trial preparation consulting – especially when the result is the generation of public comment form letters that are sent to the Subcommittee. Purple Strategies is not acting in a trial preparation capacity. Rather, it acts as a public relations consultant. Nevertheless, as indicated above, litigation over SEA-3’s public relations strategy does not assist the Subcommittee in performing its statutory duties in determining whether to grant or deny the petition for exemption. Additionally, the Subcommittee is not assisted when the parties create false personas

and generate spurious filings to the Subcommittee's attention to attempt to make a point. Therefore, SEA-3's request for a protective order is granted to the extent that the Subcommittee will not hear evidence based on newly issued subpoenas. Additionally, all parties are admonished to refrain from the intentional use of false personas on other parties' websites, and from interference with other parties' websites generally. The determination to be made in this case will be based upon the record before the Subcommittee. The Subcommittee may ascertain the weight of the public comments in dispute without considering each and every communication between SEA-3 and Purple Strategies and between Purple Strategies and each and every individual who provided his or her public comment through the use of the website set up by Purple Strategies. Therefore, SEA-3's request for a protective order is **GRANTED IN PART**.

B. Motions to Strike

As a preliminary matter, it is noted that pre-filed testimony of Peter Britz was filed by the City of Portsmouth on August 17, 2015. Since the initiation of the proceedings in this docket, SEA-3 knew or should have known that various parties in this docket will testify about the issues pertaining to the railroad. It is unclear why SEA-3 waited until twelve days before the adjudicative hearing to file its motions to strike. While the motions could be denied because they are filed too late in the process, I will nevertheless consider the motions on their merits.

Under NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES, Site 202.24, the Subcommittee must admit all documents and materials into evidence "unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged." NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES, Site 202.24; see RSA 541-A:33, II.

SEA-3 asserts that Mr. Britz's testimony should be excluded because it is irrelevant and provides legal opinion. The Subcommittee is called upon in this docket to determine whether to

exempt the Project from certification requirements under RSA 162-H. While making such a determination, the Subcommittee is required to consider whether “existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H:1” and whether “[a]ll environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.” RSA 162-H:4, IV(a)(d). Mr. Britz’s testimony is directly related to these findings. Mr. Britz testified about his opinion as to why the Planning Board of the Town of Newington failed to adequately regulate environmental impacts of the Project and why the Town of Newington’s Ordinance cannot and does not provide adequate protection of the objectives of RSA 162-H:1. This testimony is relevant to issues in dispute in this docket.

In addition, the characterization of Mr. Britz’s testimony as a recitation of legal standards is erroneous. The testimony contains Mr. Britz’s opinion about the extent of protection afforded by RSA 162-H as opposed to the Town of Newington’s Ordinance. His opinion cannot be stated without addressing the objectives and requirements of RSA 162-H. Assuming *arguendo* that Mr. Britz’s testimony contains legal analysis and conclusions, there is nothing in RSA 162-H, the Administrative Procedures Act, RSA 541-A, or our administrative rules that prevents the Subcommittee from hearing testimony that may contain legal analysis provided by one of the parties. While legal arguments are generally provided to the Subcommittee by pleadings and memoranda prepared by counsel, it is not uncommon for testimony to touch on legal standards when both facts and law are in dispute. The Subcommittee is fully capable of distinguishing between legal arguments and factual testimony. Therefore, there is no reason to strike the testimony of Peter Britz. The Motion to Strike Testimony of Peter Britz is **DENIED**.

SEA-3 also filed a motion to strike all letters and testimony concerning railroads. SEA-3 asserts that such testimony is irrelevant because the Subcommittee is preempted from regulating the Project in any manner that directly or indirectly may affect the railroads. SEA-3's argument is premature. Only after listening to the testimony assessing the facts and addressing the arguments of the parties, can the Subcommittee assess whether any particular finding or decision is preempted by federal law. Exclusion of testimony that concerns railroads will prevent the Subcommittee from developing the factual record that is required for the resolution of the issues raised in this docket. Only after a factual record is fully developed, can the Subcommittee assess whether any particular finding or decision is preempted by federal law. SEA-3's Contested Motion to Strike Testimony Concerning Railroad Issues is **DENIED**.

Based upon the foregoing it is hereby:

Ordered, that the Portsmouth Intervenors' Motion to Compel Responses to Data Requests is hereby **DENIED**; and,

Further Ordered, that the Motion of Counsel for the Public to Compel Production of Data Request, to Postpone Hearing and for Order to Show Cause is hereby **DENIED**; and,

Further ordered, that SEA-3's Contested Motion for Protective Order is **GRANTED IN PART** to the extent that the Subcommittee will not hear evidence based on newly issued subpoenas relating to Purple Strategies and that all parties shall refrain from the misuse of the public outreach websites established by other parties; and it is

FURTHER ORDERED that the SEA-3 Motions to Strike related to railroad matters, including the Motion to Strike related to the testimony of Mr. Peter Britz, are hereby **DENIED**.

By Order of the Site Evaluation Committee this 4th day of November, 2015.



Alexander Speidel, Presiding Officer
NH Site Evaluation Committee