

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-01

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

REPLY OF COUNSEL FOR THE PUBLIC

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby replies to Sea-3, Inc.’s Objection to Public Counsel’s Motion for Leave to Retain Sebago Technics and For An Order On Costs (the “Objection”). The Objection should be overruled and the motion granted because Counsel for the Public’s role in these cases is not so limited, Sea-3 is estopped by its prior positions in this case from arguing that Counsel for the Public may not address safety issues, and the question of preemption is either not ripe or has already been determined by the Surface Transportation Board.

1. Sea-3 argues that Counsel for the Public should not be allowed to litigate safety issues and therefore does not need an expert on safety under a strict and limiting read of RSA 162-H:9. RSA 162-H is a remedial statute which must be liberally construed. *Alex Builders & Sons, Inc. v. Danley*, 161 N.H. 19, 23-24 (2010). Sea-3 mixes “strict compliance law” with a strict construction argument. But strict compliance does not exclude liberal construction as Sea-3’s argument would suggest. *See id.* at 24. Moreover, Counsel for the Public has all of the “...rights and privileges and responsibilities of an attorney representing a party in formal action...” which means he is entitled in this case to raise any issue involved. In nearly every case before the SEC Counsel for the Public has litigated issues

beyond simple environmental effects and need for energy. In *Lempster* safety, aesthetics, and noise (another safety issue) were litigated. In *Granite Reliable*, financial capability, aesthetics, and safety were litigated. In *Groton*, safety, aesthetics and noise were all litigated. In *Antrim*, aesthetics, safety and noise were at issue. In all of those cases, Counsel for the Public retained experts to deal with non-environmental issues under RSA 162-H:10, V. In the Antrim Wind cases, similar objections were made to Counsel for the Public's participation and overruled by the Committee. See In re Antrim Wind Petition for Jurisdiction 2011, *Order on Pending Motions to Intervene and Further Procedural Order*, dated May 6, 2011, at 8-9 ("nothing in the statute that prohibits the participation of Counsel for the Public [beyond the strict wording of 162-H:9]. Indeed, it is important that Counsel for the Public be involved in proceedings before the Committee as early as possible so that the public's interest can be represented at every stage of the proceedings."); In re Antrim Wind Petition for Jurisdiction 2014, *Order on Pending Motions, Appointment of Subcommittee and Procedural Order*, dated March 13, 2015, at 16-17. There is thus no statutory limit on the scope Counsel for the Public's subject matter 'jurisdiction' in these proceedings. Such a limit, moreover, would be contrary to the public interest.

2. There is also no limit in RSA 162-H:10 on the nature of the kind of expert advice that Counsel for the Public, and significantly, the Committee itself, may obtain and require Sea-3 to pay for. RSA 162-H:10, V, provides:

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. The site evaluation committee and counsel for the public are further authorized to assess the applicant for all

travel and related expenses associated with the processing of an application under this chapter.

Sea-3 misreads the statute in its Objection by suggesting that it only permits studies in “furtherance of his duties”. As is plain from the statute, the qualifier “his” does not appear and instead it refers to “the duties.” Clearly one of the duties of the Committee is to evaluate the impacts of the proposal on public health and safety, RSA 162-H:16, IV(c), and the purpose of the Sebago Technics work is to assist the Committee in performing that duty. In addition, as already noted, Counsel for the Public’s duties are not limited in the way that Sea-3 claims.

3. Sea-3 is estopped in this proceeding from making the claim that Counsel for the Public may not litigate safety issues. Sea-3 has repeatedly argued in this proceeding that the participation of other parties who sought to intervene in significant part to address safety issues should be denied or limited on the basis that their interests were already represented by Counsel for the Public. *E.g.*, *Sea-3’s Objection to Petition to Intervene Filed By City of Portsmouth*, dated May 1, 2015, at 10-11; *Sea-3’s Objection to Petition to Intervene Filed By City of Dover*, dated May 1, 2015, at 6; *Sea-3’s Objection to Motions to Intervene Filed By John and Jane Sutherland, Matthew and Erica Nania, and Richard and Cathleen DiPentima*, dated May 1, 2015, at 8-9; & *Sea-3’s Objection to Motion to Intervene Filed By Great Bay Stewards*, dated May 19, 2015, at 8. In contrast, Sea-3 now argues that Counsel for the Public should not be able to raise safety issues. Sea-3 cannot have it both ways. *See, e.g.*, *Pike v. Mullikin*, 158 N.H. 267, 270 (2009) (discussing application of judicial estoppel). It would be unfair to the other intervenors and an affront to the integrity of the Committee’s process to allow Sea-3 to succeed with this argument.

4. Sea-3 again attempts to preclude this Committee from performing its statutory duty to protect public health and safety by drawing a largely imaginary line of federal preemption. While its facility expansion proposal depends on rail, Sea-3 is not a railroad and does not operate a railroad. Preemption protects railroads from some, but not all, state and local regulations. Preemption does not protect entities that are not railroads from *any* state and local regulations. Sea-3 voluntarily came to the Committee and submitted to its jurisdiction. It is clear that everything about Sea-3's expansion plan depends upon the transportation of numerous tanker cars of unodorized propane gas to its facility over a railroad in a questionable state of repair that passes through residential neighborhoods. The railroad is not a party to this proceeding, and nothing about this proceeding, or the study being sought by Counsel for the Public will subject the railroad owner or operator to the Committee's regulatory jurisdiction. Even if Sea-3 ran a railroad and the Committee wanted to require information about it or a study of it, there is nothing about that activity in and of itself that constitutes regulation that is preempted by federal law. None of the authorities cited by Sea-3 stands for the proposition that studies, reviews, or analyses of railroad operations by a State regulatory body are preempted by federal law. *Duluth, W. & P Ry v. City of Orr*, involved a town track speed law, *CSX v. PUC of Ohio*, involved state laws regulating the transportation of hazardous materials, *Roth v. Nofalco*, involved a state law requirement for safety features on tank cars, *Tyrell v. Norfolk S. Ry*, involved state law requirements for workplace safety on railroad tracks, and *Green Mt. R.R. v. Vermont*, involved the state law requirement of pre-construction building permits on railroad property. All of these involved efforts under state laws to exert actual control over the operations of the railroad itself, and did not involve simple review and analysis. All that Counsel for the

Public seeks to do with Sebago is to conduct review and analysis. As a result, the preemption claim is premature because the Committee is not being asked to do anything that either directly or indirectly will have any impact on any rail operations by a railroad.

5. In earlier proceedings at the Town level, Sea -3 brought a petition with the Surface Transportation Board (STB) to “find that the claims Portsmouth has made to the NZBA and the Court, including any claims that are derived from, or depend on, allegations that Portsmouth would be adversely affected as a result of increased rail transportation, are preempted.” Sea-3, Inc. –Petition for Declaratory Order, Surface Transp. Brd., docket number FD 35853, *Decision*, dated March 17, 2015, at 3 (“STB Decision”). Among Portsmouth’s claims was “to require a study of the rail effects of the expansion project.” *Id.* at 2. The STB decided that Portsmouth’s claims before the Town boards and the Rockingham Superior Court were not preempted because they did not involve a railroad or railroad property and because the facts did not show that the local regulation of the facility would “reflect undue interference with ‘transportation by rail carriers.’” STB Decision at 6-7. Thus, the STB Decision means that requiring Sea-3 to conduct a study of the rail effects of the Sea-3 proposal is not preempted. It is plain that Sea-3 has already had a full and fair opportunity to address the matter in the forum of Sea-3’s choice (and one might assume a fairly friendly forum as well) and lost. Having already had a ruling squarely against it on the same facts and the same question, Sea-3 is precluded from litigating them again here. *See Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999) (“collateral estoppel may preclude the relitigation of findings by an administrative board”); *Cutter v. Town of Durham*, 120 N.H. 110, 111 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328-29 (1979)

(“Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or ‘a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.’ ...collateral estoppel precludes a plaintiff from relitigating identical issues by merely ‘switching adversaries’”). Unquestionably the mixed fact and law issue of whether a study of facility and rail safety would interfere with rail and thus be preempted was put before the STB by Sea-3. The equally unmistakable answer on the facts that the STB considered was “no.” Consequently, Sea-3 cannot argue that Counsel for the Public’s request to retain consultants to conduct a rail and facility study is preempted.

6. Lastly, Sea-3 argues that the study to be conducted by Sebago is not relevant to the exemption proceedings before the Committee. Sebago has been asked to review the safety of the facility and the railroad at a relatively high level. The purpose of such a study, which would be valuable to the Committee and the parties, is to understand whether the safety of the facility (and its supply line) is sufficiently regulated. If, for example, either Sea-3 or the railroad has a record of non-compliance to which no regulatory authority has responded, that would be useful to know. Similarly, if Sebago’s work showed a latent issue that has not and may not be addressed by existing regulatory programs, that too would be important for the Committee and the public to learn something about. There is nothing unreasonable or irrelevant about either type of inquiry under the current proceeding. Sea-3’s objection appears to presuppose the outcome of the study just as Sea-3 presupposes the outcome of this case in a circular argument akin to ‘there is nothing to see here so don’t let anyone look.’ Clearly such is inconsistent with the purposes of the Committee’s work and

not consistent with its determinations to be made in this instance. The Committee should approve the request to engage Sebago because it would be “necessary or appropriate to carry out the purposes” of RSA 162-H by helping the Committee and the public understand the ways in which Sea-3’s facility is regulated for safety and the ways it is not.

In conclusion, Counsel for the Public’s motion to engage Sebago Technics, pursuant to RSA 162-H:10, V, should be granted.

Respectfully submitted this 20th day of July 2015.

COUNSEL FOR THE PUBLIC

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Certificate of Service

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.



Peter C.L. Roth