

**Site Evaluation Committee
of the New Hampshire Public Utilities Commission**

In the Matter of the Application of Sea-3, Inc.
(Request for Exemption)

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SEC Docket No. 2015-01

**PORTSMOUTH INTERVENORS' MEMORANDUM IN SUPPORT OF COUNSEL FOR
THE PUBLIC'S REQUEST TO RETAIN EXPERTS**

NOW COME the Portsmouth Intervenors,¹ by their counsel, Sheehan Phinney Bass & Green, Professional Association, and respectfully submit this Memorandum in Support of Counsel for the Public's Motion for Leave to Retain Sebago Technics, and in response to the Objection to that Motion by the Applicant Sea-3.

Background

Sea-3 seeks an order pursuant to which the significant expansion of its facility along the Piscataqua River in Newington, New Hampshire would be determined to be exempt, under RSA 162-H:4 (IV), from the otherwise applicable site certification process established by the Legislature in RSA 162-H. In the course of this proceeding under RSA 162-H, the Attorney General appointed Senior Assistant Attorney General Peter C. L. Roth as Counsel for the Public under RSA 162-H:9. See Objection of Counsel for the Public to Request for Exemption, April 22, 2015, pp. 3-12. After evaluation of the exemption application, Counsel for the Public objected to the Applicant's request for exemption, determining that Sea-3 failed to meet the four criteria set forth in RSA 162-H (IV). After a lengthy prehearing conference, Counsel for the

¹ The Portsmouth Intervenors are Richard and Catherine Dipentima; Robert Gibbons and Patricia Ford; William and Kristina Campbell; John and Jane Sutherland; and Erica and Matthew Nania.

Public made its Motion for Leave to Retain the expertise necessary to properly and comprehensively evaluate the project. The purpose of that evaluation – to be conducted by Sebago Technics in accordance with a proposal attached to Counsel for the Public’s Motion – is to investigate and opine on the safety of the Sea-3 expansion in connection with facility safety, emergency response capability and planning, and the safety of the railways that provide ingress and egress to and from the [expanded] facility.

Sea-3’s Objection to the Motion for Leave to Retain Sebago asserts, broadly speaking, two reasons why the Site Evaluation Committee should reject Counsel for the Public’s Request: (1) Counsel for the Public is not authorized, Sea-3 says, to “examine safety issues;” (2) the anticipated study by Sebago will evaluate Pan Am Railways’ compliance with existing safety regulations and this Committee is preempted by federal legislation such that, Sea-3 asserts, “the Committee has no authority to investigate whether Pan Am is in compliance with federal regulations promulgated by the Secretaries of Transportation and Homeland Security.” Sea-3 Objection at 7.

Argument

Sea-3’s objection is mistaken – and, if countenanced, would eviscerate the process called for under RSA 162-H whenever rail traffic is somehow involved in an energy siting project. First, Counsel for the Public is plainly authorized to evaluate the safety of a given project within the Committee’s jurisdiction – and to retain the expertise necessary to assist in that evaluation. RSA 162-H was passed by the Legislature because it “recognize[d] that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of

natural resources, **and public health and safety.**” RSA 162-H:1 (Declaration of Legislative Purpose) (emphasis added). To those ends, the Legislature also expressly charged the Attorney General with the duty of appointing an assistant attorney general as Counsel for the Public. RSA 162-H:9 (I). Divorcing section I of RSA 162-H:9 from the rest of the statute and its expression of its overall purpose, Sea-3 argues that Counsel for the Public’s role is limited to the two categories: protection of the environment and assurance of an energy supply. Accordingly, Sea-3 – in addition to insisting that the Committee cannot (e.g., has no authority to) consider the manner in which hazardous materials are transported into the expanded facility – now asks the Committee to curtail the role of the Counsel for the Public to consideration of the environment and the energy supply.

Sea-3’s “a la carte” treatment of the statute, which involves a comprehensive scheme to evaluate the appropriateness of a given site for energy production or distribution, is simply wrong. In a recent case, the New Hampshire Supreme Court considered the interpretation of a statutory provision, employing the following long-settled rules:

“In matters of statutory interpretation, we are the final arbiters of legislative intent as expressed in the words of the statute considered as a whole. In the Matter of Watterworth & Watterworth, 149 N.H. 442, 445 (2003). We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Id. Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. Id. **‘Our goal is to apply statutes in light of the legislature’s intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme.’** Fichtner v. Pittsley, 146 N.H. 512, 514, (2001) (quotation omitted).”

Henderson Holdings at Sugar Hill, LLC v. Town of Sugar Hill, 164 N.H. 36, 38-39 (2012)

(emphasis added). Sea-3’s effort to curtail the role of Counsel for the Public to two supposedly

narrow categories or issues, and no others, simply asks this Committee to interpret and apply RSA 162-H without reference to its express legislative purposes.

Moreover, Sea-3's now familiar argument concerning the wide – and for the Committee, Counsel for the Public and Intervenors, crippling – scope of federal preemption is also mistaken. First, Sea-3 is itself not a rail carrier; its expansion proposal certainly involves the trafficking of propane by rail through historic districts and residential neighborhoods in Portsmouth and perhaps other communities. The Committee has the jurisdiction to evaluate whether the expansion plan, on a holistic basis, has the necessary safeguards to protect “the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, **and public health and safety.**” RSA 162-H:1.

Finally, nothing proposed by Counsel for the Public or by the comprehensive study to be carried out by Sebago Technics is in conflict with any federal regulation. The proposed Sebago Technics study is intended, in part anyway, to evaluate a key portion of the Sea-3 expansion: the manner in which it receives and transports the supplies of propane it intends to traffic. Nothing in the federal regulations or statutes preempts a state agency such as the Committee from evaluating compliance with existing law, or from evaluating whether existing law is sufficient to protect the public. And predictably, none of the cases or statutes cited by Sea-3 stand for the proposition that a health and safety study, or a compliance evaluation, by an agency charged with enforcement of important state laws is prohibited by the matrix of federal laws relating to

railroads or the transport of hazardous materials.² The Surface Transportation Board already rejected this argument in the Petition for Emergency Declaratory Relief brought by Sea-3 and joined by Pan Am. See Sea-3, Inc. –Petition for Declaratory Order, Surface Transp. Brd., Docket No. FD 35853, Decision, dated March 17, 2015, at 3. Respectfully, in order to carry out its obligations under RSA 162-H, the Committee should do the same, allow the study to occur, and evaluate the ramifications of its findings and, if any, recommendations, as they relate to the surrounding communities.

Respectfully, the Committee should allow the Motion for Leave to Retain Sebago Technics submitted by Counsel for the Public, in order to permit the Committee and the interested parties and municipalities to fully understand the ramifications of the project for which Sea-3 so eagerly seeks to avoid the full force of the certification process under RSA 162-H.

² In fact, Sea-3 seems to consistently overstate the scope of federal preemption as a way of preventing state and local authorities, and interested communities and citizens, from bringing any meaningful scrutiny to the expansion project. One of the cases cited by Sea-3 for the proposition that this Committee (and virtually anyone else that is not a federal agency) cannot even permit a study of the rails leading into, and on the Sea-3 property actually states as follows:

“Nevertheless, as the district court observed, “not all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety.” *Id.* It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.”

Green Mountain R.R. Corporation v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

Respectfully submitted,

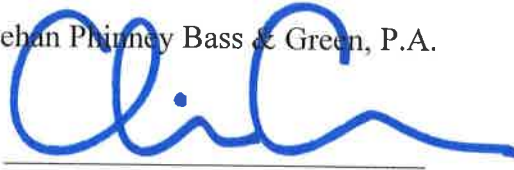
PORTSMOUTH INTERVENORS,

By Their Attorneys,

Sheehan Phinney Bass & Green, P.A.

Dated: July 21, 2015

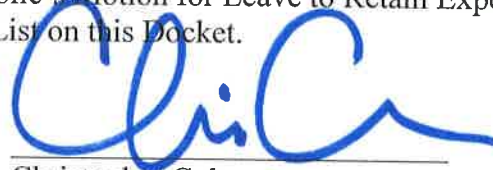
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Certification

I hereby certify that on this 21th day of July 2015, I caused a copy of the foregoing Memorandum in Support of Counsel for the Public's Motion for Leave to Retain Expert, to be sent via email to the persons on the Service List on this Docket.



Christopher Cole