

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. \_\_\_\_\_

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A  
EVERSOURCE ENERGY  
SEACOAST RELIABILITY PROJECT  
Application for a Certificate of Site and Facility  
SEC Docket No. 2015-04**

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**APPEAL OF CONSERVATION LAW FOUNDATION  
PURSUANT TO RSA 541:6 AND RSA 162-H:11  
FROM DECISIONS AND ORDERS OF THE SITE EVALUATION  
COMMITTEE DATED JANUARY 31, 2019 AND APRIL 11, 2019**

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**A. PARTIES AND COUNSEL**

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<sup>1</sup> The Town of Durham has entered a settlement agreement with Public Service Company of New Hampshire d/b/a Eversource relative to the project at issue in this appeal. The University of New Hampshire did not file a motion for rehearing with the Site Evaluation Committee.

<sup>2</sup> The Town of Newington has entered a settlement agreement with Public Service Company of New Hampshire d/b/a Eversource relative to the project at issue in this appeal.

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**B. ADMINISTRATIVE AGENCY’S ORDERS AND FINDINGS  
SOUGHT TO BE REVIEWED**

This Rule 10 appeal by Conservation Law Foundation (“CLF”) pursuant to RSA 541:6 and RSA 162-H:11 is from a decision and order of a Subcommittee of the New Hampshire Site Evaluation Committee (“Subcommittee” and “SEC”) dated January 31, 2019 granting Public Service Company of New Hampshire d/b/a Eversource Energy’s (“Applicant”) application for a certificate of site and facility, and from an order of the Subcommittee dated April 11, 2019 denying CLF’s motion for rehearing and reconsideration and motions for rehearing filed by other parties.

**C. QUESTION PRESENTED FOR REVIEW**

Did the Subcommittee err as a matter of law and act unreasonably by not requiring Applicant to seek and obtain a grant of right from the Governor and Council under RSA 4:40 and RSA 482-A:3 when Applicant's project includes the installation of concrete structures in public waters on tidally submerged lands in Little Bay, and when, under New Hampshire's public trust doctrine, Little Bay and its tidally submerged lands are held in trust by the state for the benefit of the public?

**D. PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS**

The statutes involved in this case, which are included in the Appendix, are: RSA 4:40, RSA Chapter 162-H, RSA 371:17, and RSA 482-A:3. *See* Appendix ("App.") Volume ("Vol.") III at 242, 244, 263, 264. The pertinent SEC rule for purposes of this appeal is N.H. Admin. R. Site 301.03, which also is included in the Appendix. *See* App. Vol. III at 278.

**E. PROVISIONS OF INSURANCE POLICIES, CONTRACTS, OR OTHER DOCUMENTS**

Not applicable. A separate table of contents is set out in the Appendix to this Notice of Appeal. The Appendix contains the documents cited in this Appeal.

**F. CONCISE STATEMENT OF THE CASE**

This appeal pertains to the SEC Subcommittee's issuance of a certificate of site and facility for Applicant's proposed construction of a



12.9-mile electric transmission line from Madbury, New Hampshire, through the towns of Durham and Newington, to a termination point in Portsmouth (“project”). App. Vol. I at 16. The project includes the installation of three submarine cables in Little Bay, between Durham and Newington. *Id.* at 18; App. Vol. III at 296. Little Bay is a tidal water body, with tidally submerged lands, within the Great Bay estuary.

The project, as approved by the Subcommittee, involves the use of a jet plow, hand-jetting, and trenching to bury the three submarine cables in the sediments of Little Bay. App. Vol. I at 18. *See also* App. Vol. III at 297. In locations where a minimum 42-inch burial depth for the cables cannot be achieved, Applicant intends to install “concrete mattresses” – articulated structures measuring eight feet wide by twenty feet long by nine inches thick – on tidally submerged land on top of the buried cables. App. Vol. I at 18; App. Vol. III at 303. The decision authorizes the installation of up to 8,681 square feet of these structures, with most of the concrete mattresses anticipated to be installed in areas extending from the eastern (Newington) and western (Durham) shores,<sup>3</sup> some of them fully exposed at

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<sup>3</sup> *See* App. Vol. III at 290-295; *id.* at 305-310 (excerpts from Applicant’s Exhibit 122 depicting the three cables at the eastern (Newington) side of Little Bay with gray shading over the cable lines representing concrete mattresses (*id.* at 310) and at the western (Durham) side of Little Bay, similarly depicting concrete mattresses (*id.* at 305). *See also id.* at 308 and 309 (depicting concrete mattresses that may be used closer to the middle of the bay).

low tide. App. Vol. I at 111, 117. Applicant has described the concrete mattresses as causing permanent impacts to Little Bay. *Id.* at 151, 190.<sup>4</sup>

There is no dispute that Little Bay and its tidally submerged lands are public trust resources that, pursuant to New Hampshire's public trust doctrine, are held by the state in trust for the benefit of the public. *See Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82, 89 (1994). It also is undisputed that there are numerous public uses of Little Bay, including the project area, that are protected under the public trust doctrine. Such uses include boating, fishing, and recreational and aesthetic enjoyment. App. Vol. III at 286-287, 288-289. The impacts of concrete mattresses on boating, recreation, aesthetic values, and Atlantic sturgeon (a federally-listed threatened fish species) were a topics of significant concern during the Subcommittee's proceedings.<sup>5</sup> With specific regard to boating, the intended use of concrete mattresses resulted in a requirement that Applicant consult with state authorities to determine if navigational markers will be necessary. App. Vol. I at 35-36. It also necessitated agreement by Applicant to install temporary markers to identify the concrete mattresses

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<sup>4</sup> The Subcommittee's January 31, 2019 Decision and Order acknowledges Applicant's description of the concrete mattresses as follows: "Permanent impacts to Little Bay will be caused by the installation of concrete mattresses that will be eight-feet by twenty-feet and nine inches tall." App. Vol. I at 151. *See also id.* at 190 ("The Applicant acknowledges the concrete mattresses will permanently change the substrate from unconsolidated to artificial (rock) substrate.").

<sup>5</sup> *See, e.g.*, App. Vol. I at 233 (potential dangers to boaters and kayakers using Little Bay recreationally); *id.* at 230, 288 (impacts to recreational uses generally); *id.* at 181 (impacts to Atlantic sturgeon feeding habitat).

for navigational purposes, pending their identification on NOAA navigation charts. *Id.* at 223, 234-235.

Despite the requirement that Applicant demonstrate that it has the necessary property rights to proceed with the project,<sup>6</sup> Applicant neither sought nor obtained a grant of right from the Governor and Council to install concrete mattresses in Little Bay. In post-hearing briefs, CLF as well as the Towns of Durham and Newington argued that Applicant cannot lawfully proceed with the installation of concrete mattresses on Little Bay's tidally submerged land absent such approval, as required by RSA 4:40, which provides in pertinent part that requests for the disposal or leasing of state-owned properties shall be submitted to Governor and Council for its review and approval. RSA 4:40, I; App. Vol. III at 22-24; 29; 135-136. Durham and Newington noted that the Attorney General's office had reached a similar conclusion in a pipeline project involving land beneath tidal waters. *Id.* at 29; 135-136; 311. CLF urged the Subcommittee either to deny the Applicant's application for a certificate of site and facility on the ground that it had not obtained all necessary property rights to proceed with the project, or to establish as a condition of any certificate that Applicant must obtain approval by Governor and Council for its proposed use of concrete mattresses. App. Vol. III at 24.

In its January 31, 2019 Decision and Order, the Subcommittee concluded that Governor and Council approval of the installation of concrete mattresses in Little Bay is not required. In reaching this conclusion, the

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<sup>6</sup> See N.H. Admin. R. Site 301.03(c)(6), set forth in App. Vol. III at 278-279.

Subcommittee relied on the Public Utilities Commission's (PUC) issuance of an order *Nisi* that licensed Applicant's project to cross public waters, including Little Bay, pursuant to RSA 371:17. App. Vol. I at 73-77. It also imposed a new condition that Applicant include the removal of concrete mattresses as part of any decommissioning plan should the project cease to be used and then determined that RSA 4:40 does not apply because the installation of concrete mattresses would not be permanent and therefore does not amount to the "disposal" or "leasing" of state-owned property.<sup>7</sup> *Id.* at 76-79, 233.

In motions for rehearing, CLF and the Town of Durham contested the Subcommittee's determination that Governor and Council approval is not required for the installation of concrete mattresses. CLF and Durham argued that the Subcommittee had acted beyond its statutory authority by adjudicating property rights, and that it had erroneously and unreasonably ignored New Hampshire's public trust doctrine and the role of the Governor and Council in making grants of right under that doctrine. App. Vol. III at 138, 140-142; 160. CLF and Durham challenged the Subcommittee's determination that Governor and Council review and approval was not required, including the Subcommittee's reliance on RSA 371:17 as obviating the need for Governor and Council review, its failure to acknowledge the role of the Governor and Council as required by RSA 4:40,

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<sup>7</sup> The Subcommittee rested its conclusion that the concrete mattresses will not be permanent on the fact that "the Applicant agreed to file a decommissioning plan that will detail the decommissioning of each element of the Project and the Applicant did not seek to exempt concrete mattresses from this decommissioning plan." App. Vol. I at 79.

and its characterization of the concrete mattresses as not permanent for purposes of public trust considerations. App. Vol. III at 140-142; 156-159. CLF and the Town of Durham further identified New Hampshire's wetlands statute as demonstrating the need for Governor and Council review, as set forth in RSA 482-A:3, II, which provides:

(a) The department shall submit to the governor and council all requests for permits approved by the department which meet the definition of major projects located in great ponds or public-owned water bodies under the rules of the department which have been approved by the department.

(b) The governor and council shall consider the request for permit transmitted by the department. The governor and council may approve as transmitted or deny the submitted request. Following action by the governor and council the requests shall be returned to the department for permitting, if approved, or filing, if denied.

*Id.* at 141, 160. CLF asked the Subcommittee to rehear the issue, reconsider its original decision, and

(1) issue a condition requiring Applicant to obtain all necessary property rights either by seeking review and approval by the Governor and Executive Council or by addressing this question in a court of competent jurisdiction, or (2) deny a certificate of site and facility unless and until Applicant has affirmatively sought and obtained approval by the Governor and Council.

*Id.* at 142.

In its order denying motions for rehearing, the Subcommittee reaffirmed its prior decision, finding that it had not exceeded its authority in determining that Governor and Council review was not required, and maintaining its positions that the installation of concrete mattresses in Little

Bay would not constitute “disposal” or “lease” of state property warranting such review under RSA 4:40 and that PUC approval pursuant to RSA 371:17 was sufficient. *Id.* at 208-210. The Subcommittee then proceeded to state that “[t]he use of portions of Little Bay for construction and operation of the Project are not prohibited by the public trust doctrine” and that such use is “one of the legal uses authorized by the Legislature,” concluding that “[t]he Project does not violate the public use doctrine by ‘substantially impair[ing] the recognized public use of those resources.’” *Id.* at 210 (*quoting Chernaik v. Brown*, 295 Ore. App. 584, 600 (2019)).

Finally, the Subcommittee rejected the need for Governor and Council review pursuant to New Hampshire’s wetlands statute under RSA 482-A:3, II. While recognizing the requirement for Governor and Council review of wetlands permits for major projects in public waters, the Subcommittee rejected the need for such review on the ground that the Department of Environmental Services (“DES”) did not issue a final wetlands permit but instead “submitted its recommended permit and conditions to the Subcommittee,” which, in turn, incorporated such recommendations as conditions in the certificate of site and facility. App. Vol. III at 210-211. The Subcommittee concluded: “Nothing in RSA 482-A:3,II, requires the Subcommittee to seek approval from the Governor and the Executive Council.” *Id.* at 211.

#### **G. JURISDICTIONAL BASIS FOR APPEAL**

The jurisdictional grounds for this appeal are RSA 541:6 and RSA 162-H:11.

**H. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE REVIEW AND APPROVALS REQUIRED FOR THE INSTALLATION OF STRUCTURES IN PUBLIC WATERS AND ON TIDALLY SUBMERGED LANDS UNDER NEW HAMPSHIRE’S PUBLIC TRUST DOCTRINE AND RELEVANT STATUTES. THE ACCEPTANCE OF THIS APPEAL IS NECESSARY TO PROTECT THE RIGHTS OF THE PUBLIC UNDER NEW HAMPSHIRE’S PUBLIC TRUST DOCTRINE AND PROVIDES AN OPPORTUNITY TO CORRECT PLAIN ERRORS OF LAW BY THE SUBCOMMITTEE, TO CORRECTLY INTERPRET A MATTER OF IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND TO CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.**

This appeal provides an opportunity for the Court to address important questions about how private entities acquire a right greater than that of the public to use public waters and tidally submerged lands that, under New Hampshire’s public trust doctrine, the state holds in trust for the benefit of the public.

“New Hampshire has long recognized that lands subject to the ebb and flow of the tide are held in public trust.” *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82, 88 (1994). With “its origins in the concept of *jus publicum*, an English common law doctrine under which the tidelands and navigable waters were held by the king in trust for the general public,” New Hampshire law recognizes that “land covered by public water is capable of many uses,” and that such lands “are held ‘for the use and benefit of all the [public], for all useful purposes.’” *Id.* at 89 (*quoting Concord Mfg. Co. v. Robertson*, 66 N.H. 1, 7-8 (1889)). Such useful

purposes include boating, fishing, and bathing, including recreational uses. *Id.* at 90.

The manner in which a private entity may obtain a grant of right to use public waters and tidally submerged lands is essential to the state's role as trustee of these resources *for the benefit of the public*. The Court has made clear that in light of the state's role as trustee, only the state may grant to private entities rights in public waters and tidally submerged lands, and only by "*explicit legislative authority*." *Concord Mfg. Co. v. Robertson*, 66 N.H. at 14 (emphasis added). *See also State v. Hutchins*, 79 N.H. 132, 134 (1919) ("A legislative grant or release of public rights of navigation in favor of private parties is not to be presumed."). *See also id.* at 139-140 (extent of private rights over public waters are established by terms of the Legislature's grant; private rights in public waters cannot be acquired by prescription).

The Subcommittee's decision is erroneous as a matter of law, and is unreasonable, because it fails to properly address and make accommodation for the state's important role as trustee of Little Bay and its subtidal lands for the benefit of the public. In the first instance, the Subcommittee exceeded its authority in determining Applicant's property rights for purposes of installing concrete mattresses in Little Bay, and in rendering a determination that the installation of concrete mattresses would not violate the public trust doctrine by substantially impairing public uses. The Legislature has granted the Site Evaluation neither the authority to



adjudicate and determine property rights, nor the authority to render public trust determinations. *See generally* RSA Ch. 162-H (App. Vol. III at 244).

Beyond issues related to the SEC's statutory authority, the Subcommittee's determination that the Governor and Council need not review the project and grant rights for Applicant, as a private entity, to install concrete mattresses is unlawful and unreasonable. As subtidal lands for which the state serves as trustee for the benefit of the public, the floor of Little Bay is state-owned property, the disposal or leasing of which is subject to Governor and Council review under RSA 4:40. The Subcommittee's reliance on RSA 371:17 as obviating the need for Governor and Council review and granting (or denying) of rights is erroneous as a matter of law, as RSA 371:17 fails to explicitly address the installation of structures such as concrete mattresses on subtidal lands. *See* RSA 371:17 (Supp. 2018) (titled "Licenses for New Poles" and pertaining licensing by PUC related to "*pipeline, cable or conduit . . . under, over or across any of the public waters of the state. . .*") (emphasis added).<sup>8</sup>

The Subcommittee's decision not to require Governor and Council review and granting (or denying) of rights under RSA 4:40 also is erroneous as a matter of law, and is unreasonable, based on its characterization of the concrete mattresses as impermanent for purposes of public trust consideration, and on the incorrect theory that the concrete mattresses, which will be in the bay for at least as long as the transmission line remains in operation, does not constitute "disposal" or "leasing" of the state-owned

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<sup>8</sup> RSA 317:17 is set forth in its entirety at page 263 of Appendix Volume III.

property. Applicant itself has acknowledged both the permanent nature of the concrete mattresses and the unlikelihood that the transmission project will ever be decommissioned. App. Vol. I at 151, 190; *id.* at 297 (stating that Applicant “does not anticipate the need for decommissioning the Project.”). Moreover, regardless of the permanency of the concrete mattresses, the structures will be installed for a substantial and indeterminate period of time, infringing on public uses and necessitating the review and grant of right required by RSA 4:40.

The Subcommittee’s failure to require Governor and Council review and a grant of right under RSA 482-A:3,II is similarly unlawful and unreasonable. That statute makes plain that DES “shall submit to the governor and council all requests for permits approved by the Department which meet the definition of major projects located in great ponds or public-owned water bodies under the rules of the department which have been approved by the department.” RSA 482-A:3, II(a). The Subcommittee’s determination that such Governor and Council review is not required because the SEC, as opposed to DES, is the final permitting authority, is erroneous as a matter of law and unreasonable. RSA 482-A:3,II does not convey an explicit (or even implicit) legislative intent to delegate the authority to the SEC to issue a grant of right for a major project in public trust waters. Nor does it convey an explicit legislative intent to not require Governor and Council review for a major project in public-owned water bodies simply by virtue of the project requiring SEC approval.

The Subcommittee's decision, and the issues raised in this appeal, raise important considerations that are necessary to protect the public's interest in public waters and tidally submerged lands, and to ensure the state fulfills its fiduciary role as trustee of such resources for the public's benefit. Absent the Court's review of the Subcommittee's decision and the issues raised in this appeal, the public will be deprived of important rights as they relate to this project and in future projects affecting public trust resources that are subject to SEC review.

#### **I. CERTIFICATION OF ISSUES PRESERVED**

The issue raised herein has been previously presented to the SEC Subcommittee and has been properly preserved for appellate review by a properly filed pleading. Specifically, the issue was raised in CLF's Post-Hearing Memorandum (App. Vol. III at 4, 22-24) and Partially Assented-To Motion for Rehearing and Reconsideration (*id.* at 138, 140-142) as well as in pleadings filed by other parties.<sup>9</sup>

#### **J. CONTENT OF RECORD ON APPEAL**

The Appellant requests that the Court require the Site Evaluation Committee to transmit to the Court the entire record for appeal in Docket No. 2015-04.

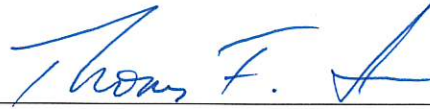
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<sup>9</sup> See Post-Hearing Brief of Town of Durham and University of New Hampshire (App. Vol. III at 40, 68-69), Town of Newington's Post-Hearing Brief (*id.* at 77, 135-136), and Town of Durham's Motion for Rehearing (*id.* at 155, 156-160).

Respectfully submitted,

CONSERVATION LAW FOUNDATION

BY:

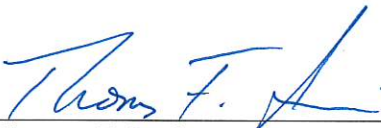


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Date: May 13, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal has on this  
13<sup>th</sup> day of May 2019 been sent by email to the service list in Docket No. 2015-04.



Thomas F. Irwin, Esq.