

STATE OF MAINE  
Waldo, ss.  
Docket No.

SUPERIOR COURT  
Civil Action

Harlan McLaughlin  
Petitioner,

v.

MAINE DEPARTMENT OF  
TRANSPORTATION,

Respondent,

PETITION FOR REVIEW OF FINAL AGENCY ACTION  
BY THE MAINE DEPARTMENT OF TRANSPORTATION

For his Petition for review of final agency action by the Maine  
Department of Transportation,  
Petitioner states:

#### **Person Seeking Review**

1. Plaintiff Harlan Ivan McLaughlin lives at 297 Mt Ephraim Rd, Searsport, Maine 04974.

#### **Manner in which Plaintiff is Aggrieved**

2. Mr. McLaughlin has been an avid user and protector of the natural resources and wild residents of Sears Island and her surrounding estuarine water complex since 1947. Mr McLaughlin hiked the island and swam in the island's shallows with his grandparents and now enjoys those same activities with his own grandchildren. Mr McLaughlin feels a strong responsibility to ensure our generation passes on the treasure that is Sears Island as a gift to future generations. The final agency action he seeks to be reviewed will irrevocably harm his ability to enjoy, use, steward and restore this area. To the extent Mr. McLaughlin's standing in this case is construed as being limited to any person who can demonstrate a particular interest that is harmed, it is settled that harm to aesthetic, environmental or recreational interests confers standing. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (Me. 1978) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972) (plaintiffs who were users of State park and who intended to use it in the future had standing to enjoin Park Authority from clearing timber blowdowns). Mr. McLaughlin's freedom to enjoy the wilds of Sears Island will be irrevocably harmed if the final agency action is not invalidated and rescinded.

#### **Final Agency Action to be Reviewed**

3. The final agency action Plaintiff wishes reviewed is the conservation easement executed Jan. 22, 2009 between the Maine Department of Transportation and the Maine Coast Heritage Trust concerning Sears Island, Penobscot Bay, Waldo County, Maine. (Easement attached)

## **Concise Statement of Facts**

4. The State of Maine holds title to certain real property situated on Sears Island in Searsport, County of Waldo, State of Maine.
5. In 1996 MDOT withdrew its application to the Army Corp of Engineers for a port facility on Sears Island when the state was unable to come up with adequate mitigation for the damage to the island's freshwater and marine wetlands that a port would cause.
6. In 2005 Governor John Baldacci suspended consideration of Sears Island as site for a Liquid Natural Gas terminal, in response to a Searsport plebescite, and directed MDOT and Maine Department of Conservation to initiate a planning process to consider the island's future uses.
7. On September 17, 2005 Public Law Chapter 277 H.P. 202 - L.D. 277 An Act Regarding the Management and Use of Sears Island became law. .Public Laws, 1st Special Session, 122nd Legislature. Chapter 277 expands the duties of the Commissioner of Transportation to include:

"O. To bring before the joint standing committee of the Legislature having jurisdiction over transportation matters for review and approval any proposal that would alter the current land use, ownership or jurisdiction of lands owned by the State within the Port of Searsport presently under the jurisdiction of the department."
8. In 2006 the Sears Island Planning Initiative solicited input from area residents and other interested parties. The overwhelming majority favored keeping the entire island in its natural state.
9. In 2007 and 2008 MDOT employed a consensus group of chosen stakeholders to review a "joint use" plan to emplace a conservation easement over 600 acres of Sears Island while reserving 340 acres for "marine transportation" purposes
10. On June 10, 2008, acting under a new federal rule governing wetlands mitigation banking, MDOT proposed "[that] 600 acres of Sears Island become the foundation for a federal mitigation bank via execution of a conservation easement."
11. On November 18, 2008, the Maine Legislature's Transportation Committee reviewed Maine DOT's Joint Use plan for Sears Island, and barred signing of the conservation easement until full permitting of an industrial port on the Island.
12. On January 22, 2009, the Maine Legislature's Transportation Committee reversed its November 18 vote barring signing of the conservation easement until full permitting of an industrial port on Sears Island.
13. On Jan. 22, 2009, Maine Governor John E. Baldacci signed Executive Order 24 FY 08/09 directing the Commissioner of the Maine Department of Transportation ("MDOT") to execute a conservation easement ("Easement") between the State of Maine and the Maine Coast Heritage Trust ("MCHT") for 601 acres of Sears Island (the "Protected Property") while retaining 300 acres of Sears Island for development

and construction of a cargo/container facility and port (the "Transportation Parcel").

14. On Jan. 22, 2009, in response to the Governor's Executive Order, the MDOT Commissioner signed and executed a conservation easement with the Maine Coast Heritage Trust on 601 acres of Sears Island (the "Protected Property"). Maine Department of Environmental Protection Deputy Commissioner Deborah Garrett signed the easement to designate Maine DEP as third party enforcer of the easement. This easement states that the State of Maine desires the easement in order to "ensure the ability to pursue compensatory mitigation credits for transportation projects on the Protected Property, and has identified two degraded locations on the Protected Property depicted in Exhibit B as "Enhancement/Restoration Areas," as suitable for wetland and upland creation, enhancement and restoration compensatory mitigation (pursuant to 23 M.R.S.A. §153B(1)(G),) for the environmental effects of as-yet unidentified Maine DOT transportation projects (the "Transportation Projects")."

15. The Governor's January 22, 2009 Executive Order states this conservation easement is integrally connected with, and a precondition for, the development and construction scheme of a port facility on Sears Island:

"WHEREAS, the Sears Island Planning Initiative Consensus Agreement established that the appropriate uses for Sears Island are compatibly managed marine transportation, recreation, education, and conservation, therefore, the joint use planning process defined two significant land use parcels on the Island, a 601-acre conservation parcel known as the "Protected Property" and a 330-acre "Transportation Parcel", for the benefit of the Town of Searsport, County of Waldo and the State of Maine;

"WHEREAS, Sears Island Planning Initiative Consensus Agreement established that the Maine Department of Transportation (Maine DOT) will actively market, solicit proposals and create partnerships for a cargo/container port on Mack Point and/or Sears Island on the Transportation Parcel;"

"WHEREAS, Sears Island Planning Initiative Consensus Agreement established that the Maine DOT, with the Town of Searsport and appropriate others will provide for light recreation, education and conservation facilities on the Protected Property by conveyance of an easement covering that area;"

"Maine DOT, upon execution of the Conservation Easement, will actively and aggressively work with the Maine Port Authority and other interested parties to initiate the process of marketing and development of a cargo/container port on Mack Point and Sears Island in accordance with the Agreement including initiating a request for proposals for a cargo/container port facility which will utilize environmentally-responsible technologies to minimize impact to natural resources, cultural values and existing marine activities while creating significant economic opportunity for the citizens of the State of Maine."

16. The State of Maine Sensible Transportation Planning Act ("STPA") states at Section 5:

"Applicability to Department of Transportation. Transportation planning decisions, capital investment decisions and project decisions of the Department of Transportation are governed by and must comply with the transportation policy set forth in this section and rules implementing that policy."

17. The marine transportation development scheme described in the conservation easement and the Governor's executive order, and preconditioned on the execution of the easement, meets the definition of a "significant transportation project" under Chapter One, Section 3 of the rules promulgated by Maine DOT pursuant to the Sensible Transportation Policy Act (STPA) ("Rules for the Sensible Transportation Policy Act").

18. Chapter One, Section 7 of the STPA rules states:

"Whether initiated by Maine DOT, MPOs, municipalities or others, all planning for significant transportation projects shall adhere to the requirements of the Sensible Transportation Policy Act (STPA). Before funding a significant transportation project, the STPA requires that the department evaluate the full range of reasonable transportation strategies to address the transportation need. Both STPA and the National Environmental Policy Act (NEPA) require that Maine DOT identify and develop strategies that are context sensitive and minimize adverse effects to environmental quality. In an effort to streamline and integrate the federal and state decision-making processes, MaineDOT will perform the STPA strategy evaluation process ... coincident with undertaking the NEPA planning and decision-making process."

19. The Jan. 22, 2009 execution of a conservation easement by the MDOT on 601 acres of land on Sears Island as mitigation for the construction of a cargo/container facility and port on 300 acres of land on Sears Island is a final agency action pursuant to 5 MRSA §8002 ¶4.

20. Maine's Site Location of Development Law states at 38 MRSA §483-A(1): "A person may not construct or cause to be constructed or operate or cause to be operated or, in the case of a subdivision, sell or lease, offer for sale or lease or cause to be sold or leased any development of state or regional significance that may substantially affect the environment without first having obtained approval for this construction, operation, lease or sale from the department.

21. Maine's Site Location of Development Law states at 38 MRSA 482(2)(A): "Development of state or regional significance that may substantially affect the environment," in this article also called "development," means "any federal, state, municipal, quasi-municipal, educational, charitable, residential, commercial or industrial development that: A. Occupies a land or water area in excess of 20 acres;"

22. The Jan. 22, 2009 conservation easement names the Maine Department of Environmental Protection as the "third party enforcer" for the terms and conditions of the easement. This is an unlawful conflict of interest. The Maine DEP and the easement Grantor, the Maine DOT, are both executive branch agencies whose Commissioners serve at the pleasure of the Governor. The Third Party Enforcer, by definition, must be a party that is completely independent from the Executive

Branch of the State of Maine - not an integral part of it.

### **Grounds For Relief being Sought**

23. Mr. McLaughlin seeks relief for the failure of the Maine DOT to "evaluate the full range of reasonable transportation strategies to address the transportation need"; to "identify and develop strategies that are context sensitive and minimize adverse effects to environmental quality"; to conduct a "strategy evaluation process" and to fulfill other requirements of the Sensible Transportation Policy Act and its rules prior to executing the conservation easement on January 22, 2009.

24. Mr. McLaughlin seeks relief from the un-Constitutional exercise of PL 277 which gives the Joint Committee on Transportation executive powers to approve or disapprove Sears Island-related land use, ownership or jurisdiction decisions, in violation of the separation of powers outlined in Sections 1 and 2 of the Maine Constitution's Article III: Distribution of Powers. PL 277 is also inconsistent with statutory authority given legislative joint committees in MRSA 3 §165. Joint committees, authority.

25. Mr. McLaughlin seeks relief for the failure of MDEP to require MDOT to apply for a Maine Site Location of Development permit for its planned marine transportation parcel/cargo/container port prior to executing the Jan. 22, 2009 conservation easement that is a necessary precondition for this port.

26. MDEP's signing of the conservation easement and assumption of third party enforcer status is itself a final agency action pursuant to 5 MRSA §8002 ¶4. The agency decision itself fails to meet MDEP's own standards of the Site Location of Development Act which call for a "" in large development planning.

Maine's site law clearly states that MDOT must have this permit prior to making an "offer for sale or lease or cause to be sold or leased any development of state or regional significance that may substantially affect the environment without first having obtained approval for this construction, operation, lease or sale from the department." Governor Baldacci's executive order of Jan. 22, 2009 states that upon execution of this conservation easement the MDOT is required to "actively and aggressively work with the Maine Port Authority and other interested parties to initiate the process of marketing and development of a cargo/container port on Mack Point and Sears Island in accordance with the Agreement including initiating a request for proposals for a cargo/container port facility." This language clearly shows that, upon execution of the easement, the MDOT is to initiate efforts to offer for sale or lease or development the 300 acre "transportation parcel" at Sears Island for a major cargo/container port and facility. This marketing activity by MDOT requires a permit under the Site Law, due to the size, scope and statewide and regional significance of the planned port facility.

27. Mr. McLaughlin seeks relief for the failure of MDOT to appoint an Third Party Enforcer for the easement that is actually independent.

### **Demand for Relief**

28. Mr. McLaughlin asks this Court to find Public Law Chapter 277 An

Act Regarding the Management and Use of Sears Island to be an unconstitutional delegation of Executive Branch land use decision-making power to the Maine Legislature's Joint Committee on Transportation, in violation of Sections 1 and 2 of the Maine Constitution's Article III Distribution of Powers, and of MRSA 3 §165 Joint Committees, Authority, and declare all decisions made pursuant to its exercise by the Joint Committee on Transportation and Maine DOT invalid.

29. Mr. McLaughlin asks this Court to rescind the Jan. 22, 2009 conservation easement until the MDOT has fully complied with the requirements of the Maine Sensible Transportation Policy Act and the Maine Site Location of Development Law.

**Certificate of Service**

I, Harlan I. McLaughlin, have served this complaint upon Respondent Maine Department of Transportation by certified mail and upon the Maine Office of the Attorney General.

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Harlan I. McLaughlin

February 25th 2009

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Date