

STATE OF MAINE
KNOX,

SUPERIOR COURT
Civil Action
Docket No. AP-09-001

Ronald C. Huber)
Petitioner)
)
v.)
)
MAINE DEPARTMENT OF)
TRANSPORTATION,)
Respondent)

**REPLY OF RONALD C. HUBER
TO MOTION TO DISMISS OF
MAINE DEPARTMENT OF TRANSPORTATION**

On Feb. 19, 2009 Petitioner Ronald Huber appealed a January 22, 2009 conservation easement at Sears Island granted by the Maine DOT in a Petition for Review of Agency Action filed with to Maine Superior Court in Knox County, made under Maine Rules of Civil Procedure. P.80C. The petition asks the Court to find that that Maine DOT failed to comply with the Maine Sensible Transportation Policy Act ("STPA") and the Maine Site Location of Development Law ("Site Law") when it executed the easement, and that Public Law 277 An Act Regarding the Management and Use of Sears Island, empowering MDOT to do so, is an unconstitutional usurpation of executive branch decision making power by a sole legislative committee. On March 24, 2009, respondent Maine DOT filed a Motion to Dismiss Petitioner Huber's Petition for Review of Final Agency Action. Below is Mr. Huber's reply to Maine DOT's motion.

ARGUMENTS OF LAW

I. Maine DOT's Actions concerning Sears Island are reviewable under the Maine Rules of Civil Procedure.

Maine DOT's protestations to the contrary, their granting a Sears Island conservation easement to Maine Coast Heritage Trust is a "final agency action." The simplest test of a "final" agency action is whether or not the agency provides the petitioner with any "further recourse, appeal or review ... within the agency" after the action has been taken. 5 MRSA Sec 8002(4). In the case of this easement, which determines the future of the largest undeveloped island in Maine; an island owned by the people of Maine, Maine DOT has not provided the petitioner with any recourse to appeal or seek review of its

decision to execute this easement.

Moreover, the finality of MaineDOT's final agency action is demonstrated by its triggering intensive actions and financial expenditures by the agency, including solicitation around the globe for a Sears Island containerport development expert and port applicants. Those expenditures and marketing initiatives would not have taken place were the action of signing the easement not final and dispositive of all issues.

A. Maine DOT does not have the sole authority it asserts to have over the Proposed Use of Sears Island for Transportation Purposes.

MaineDOT claims sole discretion over management decisions affecting Sears Island by virtue of authority granted it pursuant to two statutes:

23 MRSA Sec 61(2-A) Easements may be conveyed. "The Department of Transportation may grant or otherwise transfer easements over property taken or acquired for transportation purposes when the department in its sole discretion determines that the conveyance of such easements is appropriate and necessary."

and

153-B §153-B(G). Property for highways; acquisition.

"G. Construct, improve and maintain transportation projects as directed by law and provide mitigation for existing or potential environmental effects of transportation projects."

First, that discretion does not give the agency plenipotentiary powers that permit it to violate other state laws with impunity in the process of making agency property use decisions. In fact, the purpose of the Maine Sensible Transportation Policy Act is to rein in Maine DOT's land use activities and ensure they meet sensible environmental and cultural impact standards.

Second, the Maine Legislature has the power to approve or disapprove any development activities of any kind on Sears island. As Huber noted at [7] in his February 19, 2009 Petition for review of Agency Action, Public Law 277 An Act Regarding the Management and Use of Sears Island states that Maine MDOT is required:

"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." (*my emphasis*)

The force of this law to empower the Maine Legislature to override the authority of the MaineDOT concerning Sears Island was demonstrated on November 18, 2008, when the Legislature's Transportation Committee voted unanimously to bar MDOT from signing a conservation easement with Maine Coast Heritage Trust until a container port applicant received all necessary state permits. Maine DOT Commissioner Cole and Governor Baldacci protested, to no avail: Maine's Executive Branch was unable to move forward with the signing of the conservation easement until January 22, 2009, when the Legislature's Transportation Committee voted in a split decision to reverse its November 18, 2008 vote, and, of its own volition, de-linked signing of the conservation easement with acquisition of permits by an applicant.

Clearly the Executive Branch does not have "sole authority" over Sears Island. In fact, decision making on activities on Sears Island is susceptible to a system of checks and balances among all three branches of state Government. Public Law 277, which attempts to reserve this authority to the Legislature is hence unconstitutional, as is MDOT's codicil on the state's title to Sears Island claiming the agency to be sole administrator of Sears Island.

We thus ask this court to reject MDOT's claims of possessing a unique sole authority over Sears Island, and to reject its attempt to induce port development there without requisite planning studies under the Sensible Transportation Policy Act and the Site Location of Development Act, as the state requires of all other major transportation development plans in Maine.

B. Huber's Legal Rights Duties and Privileges have been affected by Maine DOT's Actions

Regarding Sears Island.

Maine DOT further claims the easement is not a final agency action because Mr. Huber's legal rights, duties and privileges were not affected by Maine DOT's actions. Motion at 8. Mr. Huber's legal rights duties and privileges, including his religious and ecological mandates as steward of Penobscot Bay, are directly and uniquely affected by the Maine DOT's decision to grant a perpetual conservation easement over 601 acres of Sears Island.

Religion & Ecology. Mr. Huber is under a received religious mandate to care for Penobscot Bay's native fishes and their ecological partner species and has done so to the best of his abilities since being directed to do so by Almighty God in 1992. Sears Island and its western shoals are central to

Penobscot Bay's estuarine ecosystem that Mr Huber has stewarded at Divine request since the early 1990s, both through participation in regulatory processes before MDEP, MDOT, Army Corp of Engineers, US EPA, National Marine Fisheries Service and other government agencies, and through direct participative stewardship adjacent to and within the intertidal and shallow subtidal environments along the western shores of Sears Island.

It would be against the will of God for this area to be dredged, filled or otherwise degraded, as it must be if Maine DOT's grant of a conservation easement over 600 acres of Sears Island is upheld. The dredging and filling of this area for speculative commercial gain would be as sacrilegiously unacceptable within Mr Huber's religious paradigm as destroying the Catholic Vatican, Islam's Ka'baa, or the Jewish Wailing Wall would be for their respective religious followers.

Under the Maine Constitution's Article 1 Section 3. Religious freedom; sects equal; religious tests prohibited; religious teachers:

" All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshiping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship."

Mr. Huber spiritually communes with the wild residents of Sears Island's nursery and transitional diadromous shallows within their environments, walking, wading, submerging, using snorkle and wetsuit as needed to facilitate essential underwater worship and to perceive and interact with the seasonally varying activities within these productive shallows of seagrass, kelp, cobble, sand, mud, and ledge. His actions seek to uphold the public peace; Maine DOT seeks to do the opposite - to disturb the public peace that Almighty God has brought together on the western and northern sides of Sears Island as a veritable natural Noah's Ark and to restrain and obstruct religious worship there.

Right to peaceful public lands governed by law

MDOT's signing of the perpetual conservation easement has triggered an aggressive state effort to attract an industrial applicant to build and operate an island container port and rail yard complex along the west side of Sears Island. Maine DOT records show the January 22, 2009 conservation easement was approved by Maine DOT because it is a necessary precondition for Maine DOT to secure the necessary permits to build a cargo/container port at Sears Island. Such a port, no matter how well

designed, will destroy and impair hundreds of acres of critical feeding and growing habitat for juvenile atlantic cod, shortnose sturgeon, Atlantic sturgeon, Atlantic salmon and river herring.

The Maine DOT violated the Maine Sensible Transportation Act and the Maine Site Location of Development Law when it executed the January 22, 2009 easement at Sears Island. Mr. Huber has a legal right to expect the Maine DOT to fulfill its specific legal duties under the STPA and Maine's Site Law. Maine DOT has no leeway to ignore these laws and the legal duties they place upon the Maine DOT when the Maine DOT executes easements.

The STPA states that Maine DOT "is governed by" and "must comply" with the STPA. 23 MRSA sec 73(5). The easement executed by Maine DOT at Sears Island is a "transportation policy or planning decision" under the STPA. The legislative purpose of the STPA is to prevent the Maine DOT from making transportation policy and planning decisions without proper public notice and participation. 23 MRSA Sec 73(2). If the Maine DOT refuses to perform its legal duties under the STPA, as is the case here, Mr. Huber has a legal right to ask this court to compel the Maine DOT to fulfill its legal duties.

C. Maine DOT's Actions Regarding Sears Island were Final in Nature and Dispositive of All Issues.

Maine DOT claims the easement is not a final agency action because it is not adjudicatory and is not dispositive of all issues. Motion at 9. Maine DOT states at 9:

"Huber's has failed therefore to reasonably link Maine DOT's conveyance of an easement with a decision that limits the rights and duties of specific persons or that constitutes a failure or refusal to act as contemplated by Subsection 8002(4) petition cannot be read to object to the Conservation Easement. Rather, he appears to object to the allotment of 330 acres for future transportation use. However, this transportation use is as yet uncertain, and its implementation is not imminent."

This is false. Maine DOT's Jan. 22, 2009 execution of the easement is most certainly final and adjudicatory. The easement terms state that it is perpetual and cannot be altered or dissolved except by mutual consent of grantor and grantee. More important, the Maine DOT's recent actions show it has already begun to fund and implement its plan to build a cargo port at Sears Island.

When Maine DOT filed its Motion to Dismiss on March 24th, it had just given \$100,000 to the Maine Port Authority to hire a consultant to identify a developer for a cargo/container port at Sears Island.

The Maine Port Authority published the RFP for this consultant on March 13, 2009 and set an April 10th deadline for replies.

Governor Baldacci's Jan. 22, 2009 Executive Order states that as soon as the conservation easement is executed, Maine DOT is 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 ..."

Drafts of the Maine DOT Commissioner's December 4, 2008 letter to the Legislature's Transportation Committee makes plain the critical linkage between the conservation easement and Maine DOT's plans to construct a port at Sears Island when it states:

"If we are successful in moving forward within the letter and spirit of the JUPC report and completion of the conservation easement, it would certainly be Maine DOT's intent, with the Governor's full support, to aggressively pursue the marketing of Mack Point and that portion of Sears Island for transportation use for a port facility. Furthermore; Sears Island presents an opportunity to seek a port developer who will bring to the table a record of applying state of the art 'green solutions' for port development that will bring to Maine transportation solutions that can minimize emissions of green house gases from port operations ..."

On March 3, 2009, in a story titled, "State set to hire marketing expert for Sears Island," Maine DOT Commissioner David Cole is quoted by the Bangor Daily News: "This [Sears Island] is probably the only container port we are going to be developing for a while so we want to make sure we have somebody who understands the market."

In an April 7, 2009 news article by Ramona du Houx in The Maine Democrat, Maine DOT Commissioner Cole said:

'Pursuant to the governor's executive order, we have put 601 acres on the island into a conservation buffer easement. The remaining acreage will be used as a container cargo port, once we find an investor-operator that wants to do it. We view it as a public-private partnership opportunity ... We are going to aggressively market the island and nearby Mack Point to container-port operators. We can build upon investments that have already been made, such as the causeway, and harbor improvements."

II. Huber Has Standing to Challenge the Actions of Maine DOT Because He Has Suffered "Particularized Injury"

Mr. Huber has suffered particularized injury by the Maine DOT's refusal to comply with Maine Sensible Transportation Policy Act and Site Location of Development Act for several reasons.

a. Mr. Huber's work as layman and religious functionary has protected Sears Island and its nearshore nurseries against division and degradation threatened by the cargoport and containerport port encroachment efforts of the Angus King Administration in the mid 1990s and by Governor Baldacci 's administration in 2004 and 2005, as well as other impacts from oil tank operations at nearby Mack Point and alum and oil wastes spilled from General Alum & Chemical Corp into Stockton Harbor.

Mr. Huber also has a unique interest in the Maine DOT complying with the Site Location of Development Act. In 1995 he participated as a stakeholder and interested party in Maine Board of Environmental Protection assumed jurisdiction over the King Administration's Sears Island container/cargoport plan under the Site Location of Development Act.

Maine DOT's refusal to abide by the Site Law and STPA has the effect of threatening imminent nullification of Huber's lay and spiritual stewardship efforts. As such, Mr. Huber suffers a unique and distinct injury both to his profession and his faith, as opposed to that suffered by the general public, if the Maine DOT's refusal to comply with the STPA and Site Location of Development Act at Sears Island is allowed to stand.

b. Mr. Huber is involved in Penobscot Bay groundfish restoration efforts that will be directly and adversely affected by the upholding of Maine DOT's decision at Sears Island.

Mr. Huber is a stakeholder participant in a process by the New England Fishery Management Council to designate nearshore shallow waters in upper Penobscot Bay and elsewhere along the Maine coast as Habitat Areas of Particular Concern for Juvenile Atlantic Cod. The designation, still under regulatory review, will increase protection of the habitats and water quality of the Essential Fish Habitat of these juvenile fishes along the New England coast from the low tide line to 20 meters deep. Any type of disturbance to this nearshore shallows around Sears Island will directly and adversely impact the habitat, prey availability and water quality of these Habitat Areas of Particular Concern, affecting in turn the survivability of the young fish.

The granting of the conservation easement also threatens the remnant wild Atlantic salmon population of the lower Penobscot River as well. This population is now on the brink of extinction because of the destruction, pollution and alteration of its essential aquatic habitat in the Penobscot River and its estuary. This degradation will be increased by the addition of chronic air and water pollutants endemic to container port operations.

The Maine DOT intends to construct a cargo/container port at Sears Island as soon as practicable. The January 22, 2009 easement is a critical element and precondition for the port to be built. This intent is shown by the fact that Maine DOT has recently given \$100,000 in public funds to the Maine Port Authority to issue an RFP for a consultant to find a developer for a cargo/container port at Sears Island. The Maine Port Authority published this RFP on March 13, 2009. The deadlines for bids on this RFP is April 10, 2009. With the conservation easement now secured, Maine DOT's efforts to build a cargo/container port at Sears Island have begun in earnest. This is why on March 3, 2009, Maine DOT Commissioner David Cole told the Bangor Daily News: "This [Sears Island] is probably the only container port we are going to be developing for a while so we want to make sure we have somebody who understands the market." This is why, in an April 7, 2009 news article by Ramona du Houx in The Maine Democrat, Maine DOT Commissioner Cole said:

"Pursuant to the governor's executive order, we have put 601 acres on the island into a conservation buffer easement. The remaining acreage will be used as a container cargo port, once we find an investor-operator that wants to do it. We view it as a public-private partnership opportunity ... We are going to aggressively market the island and nearby Mack Point to container-port operators. We can build upon investments that have already been made, such as the causeway, and harbor improvements."

III. Under Maine law, Maine DOT has Sole Discretionary Authority Over The Use and Development of Sears Island.

The Maine DOT must abide by the Maine Sensible Transportation Policy Act, Title 23, Section 73. Maine DOT claims it has sole discretion when granting easements, and for this reason alone, the court has no jurisdiction to hear this case. Motion at 4-7. This is incorrect. The origins, purpose and findings of the Maine Sensible Transportation Policy Act show the opposite.

The Maine Sensible Transportation Policy Act ("STPA") was enacted by referendum in 1991 by the people of the State of Maine in reaction to the proposed widening of the Maine Turnpike by the Maine

Turnpike Authority. The Maine Sensible Transportation Policy Act is the settled law of Maine. The intent of the STPA is to require that transportation decisionmaking be sensitive to existing natural and social resources. It increases the accountability of Maine's transportation and highway agencies to the people of Maine. The STPA states at Section 2:

"2. Purposes and findings. The people of the State find that decisions regarding the State's transportation network are vital to the well-being of Maine citizens, to the economic health of the State and to the quality of life that the citizens treasure and seek to protect. The people also find that these decisions have profound, long-lasting and sometimes detrimental impacts on the natural resources of the State, including its air quality, land and water The people further find that the decisions of state agencies regarding transportation needs and facilities are often made in isolation, without sufficient comprehensive planning and opportunity for meaningful public input and guidance."

It is settled that the Maine DOT must comply with the Maine Sensible Transportation Policy Act when making transportation policy, planning and capital investment decisions. The STPA states:

"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." 23 MRS Sec 73(5).

The language in the STPA ("are governed" and "must comply") is non-discretionary. The Maine DOT is governed by and must comply with the STPA when making transportation policy, planning and capital investment decisions. Nothing in statute exempts the Maine DOT from its legal duties under the STPA. Maine DOT's Motion fails to cite any statute which relieves it of its duties under the STPA. It is ironic that MDOT asserts on one hand that the MSTPA does not apply to their decision to grant the conservation easement, because it applies solely to "highways", and then on the other hand asserts that the statute "Property for highways; acquisition" applies to their effort to carry out their decision to carry out property conversion by easement.

IV. Huber's Claims under the Maine Sensible Transportation Policy Act and the Maine Site Location of Development Law are Ripe for Review by this Court.

The Jan. 22, 2009 Sears Island easement is a "transportation policy and planning decision" under the Maine Sensible Transportation Policy Act. 23 MRSA Sec 73(5).

a. Even if the easement has no connection with the construction of a cargo port at Sears Island, it is

still a "transportation policy and planning decision" under the STPA.

On Jan. 31, 2008 Maine DOT released a document titled, "Maine Department of Transportation Federal Wetland Mitigation Bank Prospectus: State-Wide, Single-Client." This document declared Maine DOT's intention that "as many as 600 acres of Sears Island become the foundation for a federal mitigation bank via execution of a conservation easement" (page 15) and that the primary goal of this easement would be to preserve a portion of Sears Island in exchange for filling wetlands elsewhere in the state. On Jan. 22, 2009 Maine DOT executed this easement. The explicit purpose of statewide "mitigation banking" is to allow the Maine DOT to destroy wetlands and aquatic habitat at Maine DOT transportation projects. Statewide mitigation banking is a new and highly controversial program. The US EPA said on March 18, 2009 that it has serious concerns about Maine DOT's use of Sears Island for this program. The 600 acres of Sears Island described in the Jan. 22, 2009 easement would be Maine DOT's first "deposit" into this proposed mitigation bank. Maine DOT's sole purpose in executing the Jan. 22, 2009 conservation easement is to facilitate that destruction of wetland and aquatic habitat for transportation purposes at various sites across the State of Maine. As such, the easement is a "transportation policy and planning decision" of statewide significance and must comply with the STPA.

b. Because the Maine DOT's intent in obtaining the easement is to construct a cargo port at Sears Island, the easement is a "transportation policy and planning decision" under the STPA.

Maine DOT has owned Sears Island since 2002. Motion at 1. Maine DOT is authorized by the Maine Legislature to use the entire island for transportation purposes. Motion at 5. On Jan. 22, 2009 Maine DOT executed a conservation easement on Sears Island which will allow 600 acres of Sears Island to "become the federal foundation for a federal mitigation bank" that will allow for "compensatory mitigation for transportation projects statewide." Motion at 2. The easement itself shows that Maine DOT's interest in this easement is to utilize the "protected" 660 acres of Sears Island as a deposit in a federal aquatic resources mitigation bank, which will then allow Maine DOT to obtain federal permits to construct transportation projects that would otherwise not be permitted because of their impact on valuable aquatic resources. Through this easement, the Maine DOT committed 600 acres of public land under its jurisdiction for the specific purpose of protecting it so that other aquatic areas could be destroyed or degraded by Maine DOT transportation projects. This type of statewide policy decision is the hallmark of a "transportation policy and planning decision" under the STPA.

Maine Governor John Baldacci's January 22, 2009 Executive Order, which directed MDOT to execute the easement, makes the same linkage. Maine DOT Commissioner Cole makes the same linkage in a Dec. 4 letter to the Legislature's Transportation Committee. The Senate Chair of the Legislature's Transportation Committee, which was required to approve the easement, made the same linkage in a Nov. 21 article in the Bangor Daily News story.

5. The Maine DOT's Motion makes misleading statements.

Maine DOT tells the court that "[t]he nature of any future transportation use, the date of its development, and the identification of the developer are unknown.....[T]he type and nature of the potential future facility on Sears Island is unknown." Motion at 15 and 16.

Maine DOT documents show the only potential facility that agency intends to construct is a cargo/container port on the southwest section of Sears Island. This port is described in a November 2007 study commissioned by the Maine DOT and the Maine Port Authority from the Cornell Group, Inc. and Vanasse Hangen Brustlin, Inc. This study recommends construction of a two berth cargo/container port at Sears Island that would occupy approximately 75 acres of Sears Island, would cost approximately \$194 million to build, would require a new rail line to Sears Island, a large rail yard on Sears Island, a new and much wider causeway to the island, and would require more than \$25 million in public funding for new road and rail infrastructure improvements for many miles around Sears Island.

In December 2008, Maine DOT Commissioner David Cole drafted a letter to the Legislature's Transportation Committee which states:

"If we are successful in moving forward within the letter and spirit of the JUPC report and completion of the conservation easement, it would certainly be Maine DOT's intent, with the Governor's full support, to aggressively pursue the marketing of Mack Point and that portion of Sears Island for transportation use for a port facility. Furthermore; Sears Island presents an opportunity to seek a port developer who will bring to the table a record of applying state of the art 'green solutions' for port development that will bring to Maine transportation solutions that can minimize emissions of green house gases from port operations ..."

On Jan. 22, 2009 Maine Governor John Baldacci signed an Executive Order which stated:

"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 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."

Just two weeks before Maine DOT filed its Motion in this case, Maine DOT gave \$100,000 in its own funds to the Maine Port Authority to hire a marketing consultant to find a developer to construct a cargo/container port at Sears Island. On March 13, 2009, the Maine Port Authority published this Request for Proposal. The RFP states that the Maine Port Authority seeks a "a qualified consultant to assist it in its efforts to identify and engage a company to develop a container/cargo terminal at Searsport, Maine USA." The RFP required replies to be received by April 10, 2009.

In an April 7, 2009 news article by Ramona du Houx in The Maine Democrat, Maine DOT Commissioner Cole said:

"Pursuant to the governor's executive order, we have put 601 acres on the island into a conservation buffer easement. The remaining acreage will be used as a container cargo port, once we find an investor-operator that wants to do it. We view it as a public-private partnership opportunity ... We are going to aggressively market the island and nearby Mack Point to container-port operators. We can build upon investments that have already been made, such as the causeway, and harbor improvements."

When the Maine DOT told this court on March 24th it does not know the "nature of any future transportation use" of Sears Island, the agency was being disingenuous. The Maine DOT neglected to tell the court that it had just committed \$100,000 in public funds to find a developer to build a \$200 million cargo/container port on Sears Island. Maine DOT records admit its sole interest and purpose in this easement is to use these 600 acres of Sears Island as a mitigation credit to secure state and federal permits for the destruction and degradation of the other 330 acres of Sears Island for a cargo/container port facility. Motion at 1 and 2.

6. Maine DOT incorrectly states the STPA only applies to highway construction.

Maine DOT claims the STPA "only applies to the State's highways" and does not apply to a massive new cargo port. Motion at 12. This is not true.

Section 3(4) of the STPA rules state that significant transportation projects include "public investments

that create new capacity." Section 7(A) of 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."

There is no question that a \$200 million cargo port at Sears Island would create new transportation and port capacity in Maine. Indeed, this is its sole purpose. The November, 2007 port capacity report commissioned by Maine DOT and the Maine Port Authority describes nearly \$30 million in road and rail capacity improvements to accommodate the increased rail and truck traffic created by a cargo port at Sears Island. The entire purpose of the \$200 million cargo port planned by Maine DOT at Sears Island is to create new port, rail and road capacity.

Maine DOT then claims that even if the STPA applies to a cargo port at Sears Island, the complaint is not ripe because "the nature of any future transportation use, the date of its development, the identification of the developer are not known ... There is no funding for any future transportation use, nor has any funding been requested." Motion at 14.

This response by Maine DOT is disingenuous. Maine DOT has just recently supplied \$100,000 in funding to the Maine Port Authority to find a developer for a cargo port at Sears Island. Since 2008 Maine DOT has been trying to create a mitigation bank to allow it to build a port at Sears Island. In the last three months, Maine's Governor and the DOT Commissioner have repeatedly declared their intent to build a cargo port at Sears Island. Maine DOT says it is "impossible and remarkably premature" for it evaluate transportation alternatives to a cargo port at Sears Island. Motion at 14.

Why is it impossible for Maine DOT to evaluate alternatives? Why would it be remarkably premature? Maine DOT provides no answers. Saying it is impossible doesn't make it impossible. Saying it is "remarkably premature" does not make it remarkably premature. Section 7(A) of the STPA rules say:

"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."

MDOT has just recently supplied \$100,000 in funding for a consultant to locate a developer for the Sears Island port. The RFP for this consultant was published March 13, 2009. The deadline for

submissions is April 10, 2009. Far from being "remarkably premature," Maine DOT's recent actions show that it is already behind schedule in conducting an STPA alternatives analysis as described in Section 7(A). This rule says the alternatives analysis must be done before funding of the project has begun. Maine DOT has already begun funding the project.

7. The Jan. 22, 2009 easement violates Maine's Site of Development Law.

In 1996 Maine Board of Environmental Protection (BEP) assumed jurisdiction over a Site Location of Development Act review of the King Administration's Sears Island container/cargoport plan. While that review was canceled when MaineDOT withdrew its port proposal the fact remains that the BEP made an initial determination that potential impacts of a smaller port development to the island's terrestrial and nearshore marine habitat and water quality were substantive issues worth review and selected interested parties, including Mr. Huber. MaineDOT is aware of the likely severe impacts to Penobscot Bay from port development and operation on Sears Island, but has chosen to try to evade responsibility for addressing them via a precautionary review under MSTPA and Site Law. Regarding the latter, Maine's Site Location of Development Law states:

"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 q department." 38 MRSA Sec 483-A(1).

Maine's Site Location of Development Law further defines "Development of state or regional significance that may substantially affect the environment" as "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;" 38 sec 482(2)(A).

There is no question that the January 22, 2009 Governor's Executive Order; the January 22, 2009 easement executed by the Maine DOT and the March 13, 2009 Request for Proposals by Maine Port Authority funded by the Maine DOT represent an effort by the State of Maine to "construct or cause to be constructed ... a development of state or regional significance that may substantially affect the environment" at Sears Island. There is also no question that the development of a two berth cargo/container port at Sears Island will occupy a land or water area in excess of 20 acres. There is no question that Sears Island is the target for this proposed development, despite the Governor and Maine

DOT's attempts to confuse the public with ambiguous language. This is made clear by the fact that there would be no need for the splitting of Sears Island by this easement if the Maine DOT intended to first expand port capacity on the mainland coast at Mack Point, Eastport, Brewer, Bangor or Portland prior to exploring a brand new facility at the undeveloped island of Sears Island.

The Jan. 22, 2009 easement "causes to be constructed" a cargo port at Sears Island because the Maine DOT's entire stated purpose for executing the easement is to obtain sufficient federal mitigation credits to facilitate the construction of a cargo port at Sears Island. The easement instrument admits this as does Gov. Baldacci's Executive Order directing Maine DOT to execute the easement. In an April 7, 2009 news article by Ramona du Houx in The Maine Democrat, Maine DOT Commissioner Cole said:

"Pursuant to the governor's executive order, we have put 601 acres on the island into a conservation buffer easement. The remaining acreage will be used as a container cargo port, once we find an investor-operator that wants to do it. We view it as a public-private partnership opportunity ... We are going to aggressively market the island and nearby Mack Point to container-port operators. We can build upon investments that have already been made, such as the causeway, and harbor improvements."

There is no question these recent actions and statements by Maine DOT show that the Jan. 22, 2009 easement "causes to be constructed" a cargo port at Sears Island. For this reason, Huber's requests are "ripe" and the Maine DOT must apply for permits under Maine's Sensible Transportation Policy Act and Maine's Site Location of Development Law. These applications were required to be tendered prior the execution of the easement, and for this reason must be tendered by the Maine DOT now.

CONCLUSION

For the reasons set forth above, Petitioner Ronald Huber asks this Honorable Court to deny Defendant Maine DOT's Motion to Dismiss Petitioner Huber's Petition for Review of Final Agency Action, carry out that judicial review and rescind and invalidate Maine DOT's grant of a perpetual conservation easement over 601 acres of Sears Island to Maine Coast Heritage Trust.

Dated at Rockland Maine, this 13th day of April, 2009

Ronald C. Huber
148 Broadway
Rockland Maine 04841