STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Maine Turnpike Authority	)	
Natural Resources Protection Act	)	
Site Location of Development Act	)	INTERVENOR'S COMMENTS
York Tollbooth Replacement	)	ON DRAFT ORDER
L-27241-TG-A-N	)	
L-27275-TP-A-N	)	

The following are comments by the Intervenor, Coalition For Responsible Toll Collection, on the September 5, 2017 Draft License Decision on the Permit Applications Submitted by the Maine Turnpike Authority ("Draft Order").

SUMMARY

First and foremost, the Intervenor, which includes the Town of York and the members of the citizen group Think Again, want to thank the DEP Commissioner and staff for your time and consideration of the issues presented in this permitting proceeding. For nearly a decade, the Town and the citizens of York have given their time and resources to ensure that MTA's decision to upgrade or replace the York Tollbooth is done with consideration of the interests and concerns of the host community. These concerns include minimizing or eliminating environmental impacts, and the Intervenor continues to assert that MTA's own data and reports show that AET is a practicable alternative.

With respect to the Draft decision, the Department should reconsider its permitting decision and deny a permit to the MTA for its proposed "Open Road Tolling" plaza for several reasons. First, the Department's proposed "balancing" of the nature and extent of resource impacts with the robustness of the alternatives analysis is unlawful and creates a dangerous precedent in protecting the State's wetland resources. Second, the Department's acceptance of MTA's conclusory assertion that it will suffer initial revenue losses with AET that will imperil

its obligation to bond holders finds no support in the record. Third and finally, the primary problem with MTA's 2014 decision to reject the AET alternative is that MTA knew, at that time, that the financial assessment that led to the rejection of the upland alternative was already outdated.

A. THE DEPARTMENT MAY NOT "BALANCE" WETLAND IMPACTS WITH THE REQUIREMENT TO CONDUCT A FULL ALTERNATIVES ANALYSIS.

In assessing whether AET is a "practicable" alternative, the Department stated that,

> The extent and severity of impacts to the wetlands and the value and functions of the wetlands impacted are weighed against the practicability of a potential, less damaging, alternative to the proposed project, and that balancing underlies the Department's analysis of whether the impacts from the proposed project as proposed are found to be reasonable.

(Draft Order at 7). The Department then determined that "the extent of the impacts to wetlands" were not significant enough to overcome the "drawbacks" associated with the "practicability" of an AET facility. (Draft Order at 17).

There is simply no support in NRPA, the Chapter 310 rules, or any other legal document for this "weighing" or "balancing" test. Chapter 310 provides that an activity "<u>will be considered</u> to result in an unreasonable impact if the activity will cause a loss in wetland area, functions, or values, and there is a practicable alternative that will be less damaging to the environment. Ch. 310, § 5(A) (emphasis added). This means <u>any</u> loss in area, functions or values, not just those that are deemed more than "small." (Draft Order at 16).

The only question in this proceeding, therefore, is whether AET is a "practicable" alternative, as the parties all concede that ORT will result in wetland impacts, and AET will not. If AET is "practicable"—meaning it is sufficient to meet the project needs of MTA—then the Department is prohibited from issuing a permit for MTA's ORT facility, regardless of the extent of wetland impacts. This is because in the presence of a practicable upland alternative, MTA's

ORT facility "will be considered" unreasonable and unlawful under NRPA. Ch. 310 §5(A).

The Department has not evaluated, separately and without regard to the nature and extent of wetland impacts, whether AET is a practicable alternative. Instead, it has determined that "after weighing the extent of the impacts to the wetlands with the practicability of the AET alternative," AET is not a practicable alternative. This is not the test under Chapter 310.

In addition to being unlawful, this "weighing" or "balancing" test is bad policy and establishes a disturbing precedent for future DEP proceedings. If the Department need not scrutinize an applicant's alternatives in cases in which wetland impacts are deemed less significant, then ultimately hundreds or thousands of acres of wetlands in Maine could be harmed over time, even though upland alternatives were available in many of these cases. The alternatives analysis is the first, and most important, step in protecting Maine's wetland resources, as it can force applicants to avoid all impacts. The Department has weakened this critical protection with its new and unsupported "weighing" test.

For the reasons set forth below, MTA's own data shows that AET is a practicable alternative. More importantly, the MTA Board of Directors new this when they rejected AET in 2014, years before MTA had any intention of building the new York Tollbooth.

B. THE RECORD SUPPORTS ONLY ONE CONCLUSION REGARDING REVENUE IMPACTS OF AN AET FACILITY: MTA WOULD GENERATE MORE REVENUE THAN BOTH THE EXISTING FACILITY AND ITS PROPOSED ORT FACILITY, NOW, AND IN THE FUTURE.

The CDM Smith report shows that, at the "90% confidence" level, an AET facility, commencing operations in 2015, would generate $8.1 million in additional revenue over an ORT facility over the first ten years of operations. (CDM Smith Report, Table 16, "Net Difference from Base"). This conclusion by MTA, not the Intervenor, assumed all of the "serious drawback" from AET would occur. Draft Order at 17. Even if we assume that the timing of the

CDM Smith report was appropriate, and even if we accept that the 10-year assessment period chosen by MTA was reasonable, MTA predicted that AET would be a better financial decision. Even with all of the "drawbacks," MTA's own data shows that AET is practicable.

Although this analysis compels a conclusion that AET is practicable, the Department discounts it on two grounds. First, the Department concludes that, even if AET is a better financial decision over the long-term, "an initial loss in revenue is predicted if an AET system is implemented" and that this initial loss of revenue "could negatively affect the applicant's ability to issue and pay back bonds." (Draft Order at 16). Second, the Department has accepted MTA's conclusion that this $8 million surplus with AET only occurs with a surcharge "as much as $3.00", and the "imposition of a surcharge...limits the flexibility of the applicant to raise tolls in the future." *Id.*

Neither of these assertions are supported by the record. First, MTA's figures showed initial losses in revenue only for years 2015-2018. (CDM Smith Report Table 5, "Total Net AET Toll Revenue Impact"). As MTA has conceded, these revenue predictions are fixed by year, given that each year MTA predicted that E-ZPass use would increase, until the anticipated revenue shortfall is extinguished in 2018. As the MTA Board knew in 2014 that the new York Tollbooth would not be operational until 2018 at the earliest, its figures never predicted "an initial loss of revenue" with AET.

Second, MTA has known since 2014 that a $3.00 surcharge was a complete fiction, and would never be necessary. During the hearing, Gary Quinlin, the author of the 2014 CDM Smith report, admitted that even for a tollbooth commencing operations in 2015 his $3.00 surcharge was too high, and that it should have been set somewhere between $2.50 and $3.00. (Trans. p. 101, lines 1-2). Further, this $3 surcharge was obviously too high as it generated a net $8 million

surplus in revenue over the first 10-year period. Finally, as with initial revenue predictions, the need for the surcharge dropped over time, as shown on Figure 6 in the CDM Smith Report. Mr. Quinlin testified that, based on his report, an AET facility commencing operations in 2019 (the current earliest date of operations of any new tollbooth in York) would need less than a $2.00 surcharge. (Trans. p. 115, lines 7-9). Given these factors, the "$3.00" surcharge was a fiction the day it was published.

So how large of a surcharge is necessary for an AET facility that will commence operations in 2019 or 2020? No one knows, because MTA has refused to update its data and the Department has refused to ask the question. The Department's reliance on admittedly incorrect and overinflated surcharge data makes any prediction about how AET would impact "the flexibility of the applicant to raise tolls in the future" nothing but pure speculation. All we know is that the AET surcharge is not, and never will be, and never was predicted to be, anywhere near $3.00.[1]

As the record fails to support the Department's findings on short time revenue losses or the size of any necessary surcharge, the parties and the Department are left with a single undisputed conclusion. CDM Smith reviewed every available data point, and considered every "drawback" to AET, and concluded that: "the best 10-year net total revenue, after recognizing

[1] Little comment is necessary on MTA's "diversion" figures. These figures are based on an overinflated surcharge, have not been updated given actual traffic conditions, and the MTA's 2016 attempt to "clarify" diversion was based on a model that did not even consider Friday-Sunday traffic. Mr. Quinlin's predictions for weekend diversions fluctuate wildly from his conclusion that "higher amounts under peak weekend conditions" will occur (CDM Smith Report p. 48) to "relatively little" diversion predicted in July and August (MTA Pre-Filed Test. Ex. AA, p. 3). As such, not even Mr. Quinlan knows what the diversion might be during summer weekends. Nor has the MTA provided any rational data, study or even an explanation for why any driver would subject themselves to hours of traffic delays in Ogunquit to save a dollar or two.

both operating and capital investment cost, would come from AET." (CDM Smith Report p. 48). That is the only conclusion supported by this record.

C. IN DETERMINING WHETHER AN UPLAND ALTERNATIVE IS PRACTICABLE, THE DEPARTMENT CANNOT RELY ON DATA THAT AN APPLICANT KNOWS IS INACCURATE AND OUTDATED.

MTA filed its NRPA application in October of 2016. At that time, it anticipated that the new tollbooth would commence operations in 2019. (NRPA App. Ex. 2G, p. 4). Its decision to reject AET occurred in July of 2014, more than two years prior to MTA filing its application and five years prior to the project's anticipated operation date. The Department has concluded that this multi-year lag between the alternatives analysis and the construction and operation of the new tollbooth is reasonable, as MTA "move[d] forward to design the project" after rendering its alternatives decision in 2014. Draft Order at 16. "At some point," the Department has concluded, "the applicant must decide on the tolling method" and "it is impracticable to continue to reconsider the original decision as to which tolling method should be developed."[2] *Id.*

There are several problems with this analysis. First, there is no evidence in the record to support the Department's finding that after making the decision in 2014 to reject AET, the MTA "moved forward to design the project." In contrast, MTA testified in the hearing that it made its decision to reject AET in York in 2014, not because it was preparing applications for that project, but because it was making decisions about other tollbooths in the MTA system. (Trans. p. 62, lines 7-13).

[2] As an initial matter, this interpretation of Chapter 310 is far weaker than the Army Corps of Engineers' guidance under 404, in which the Corps informs applicants in bold text that "[t]he applicant should consider and anticipate alternatives available during the timeframe that the Corps conducts its alternatives analysis." (June, 2014 ACOE Information for Preparing an Alternatives Analysis Under Section 404, p. 5, at http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Alternatives/20140624-Preparing_Alternatives_%20Analysis.pdf). No explanation is given for why the Department has concluded that the timeframe to consider practicable upland alternatives under Chapter 310 expires years before an application is even filed.

Second, even if the MTA Board had no choice but to render a decision on the alternatives in York in 2014, MTA was aware of two critical facts: (1) the new tollbooth was not going to be operational, under any set of circumstances, beginning in 2015; and (2) that if the new tollbooth was not operational for several years, the 10-year calculation starting in 2015 was useless to predict the relative financial performance of AET and ORT. Making matters worse, based on the information they had, MTA actually knew for the actual start date—sometime after 2017 or 2018—the relative financial performance was predicted to dramatically improve.

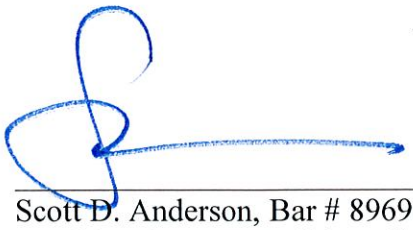
Given this, the MTA's alternatives decision was not only premature, but had the MTA analyzed the data based on an actual project operation date, all the figures relied upon by MTA in rejecting the upland alternative would have changed, all of them in favor of AET—and MTA knew this at the time. Regardless of whether anyone understands why the MTA Board would simply ignore the relevant facts, such is not an option for the Department.

If the Department issues a NRPA permit based on the MTA's 2014 alternatives analysis, it will be doing so based on an outdated analysis, conducted for a project other than the one seeking a permit, and known by the applicant, at the time of the decision, to be outdated and incorrect. This is not a situation in which it was "impracticable" for the applicant to update a prior valid alternatives analysis, but one in which the applicant seeks a permit on the basis of a known flawed and outdated study.

CONCLUSION

For the reasons set forth above the Intervenor, Citizens for Responsible Toll Collection, respectfully request that the Department reconsider its decision to issue a permit to MTA for its proposed ORT facility.

Date: September 12, 2017



Scott D. Anderson, Bar # 8969
Coalition for Responsible Toll Collection
VERRILL DANA, LLP
One Portland Square
Portland, ME 04101
(207) 774-4000
sanderson@verrilldana.com