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**VIA ELECTRONIC MAIL**

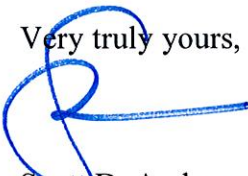
Marybeth Richardson, Presiding Officer  
Maine Department of Environmental Protection  
Southern Maine Regional Office  
312 Canco Rd.  
Portland, ME 04103

RE: MTA York Tollbooth, L-27241-TG-A-N/L-27275-TP-A-N

Dear Marybeth:

Enclosed please find the Intervenor's Brief regarding need for an update to CDM Smith's 2014 financial study.

Thank you.

Very truly yours,  
  
Scott D. Anderson

SDA/mtt  
Enclosure

cc: Service List (via e-mail to entire service list and US Mail to parties, Applicant, DEP Counsel, and DEP Project Manager in Portland)

**STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Maine Turnpike Authority	)	
Natural Resources Protection Act	)	INTERVENOR’S BRIEF
Site Location of Development Act	)	REGARDING NEED FOR UPDATED
York Tollbooth Replacement	)	CDM SMITH MODELLING AND
L-27241-TG-A-N	)	FINANCIAL CALCULATION
L-27275-TP-A-N	)	

INTRODUCTION

At the close of the May 22<sup>nd</sup> hearing the Department permitted the filing of briefs on the question of whether the Maine Turnpike Authority (“MTA”) should be required to recalculate the financial impacts of AET and ORT facilities for a ten-year time period beginning in 2019. See May 24, 2017 email from Ms. Richardson to the service list. For the following reasons MTA should be required to do such a recalculation, and the prior calculation, based on the 2014 CDM Smith study, can no longer be used to support any alternatives decision by the applicant.

DISCUSSION

A. MTA HAS CONCEDED THAT THE 2014 CDM SMITH STUDY CANNOT SUPPORT AN ALTERNATIVES ANALYSIS FOR A TOLLBOOTH COMMENCING OPERATIONS IN 2019 OR 2020.

The Department regulations require a permit applicant to analyze alternatives to the proposed activity and “demonstrate that a practicable alternative does not exist.” *Kroeger v. Dep’t of Envtl. Prot.*, 2005 ME 50, ¶ 17, 870 A.2d 566, 571. “Practicable” is defined as “[a]vailable and feasible considering cost, existing technology and logistics based on the overall purpose of the project.” Ch. 310(3)(R). The question in this proceeding is whether an AET facility, that could be constructed without any wetland impacts, is a practicable alternative to the ORT facility proposed by MTA.

As noted in MTA’s application, its pre-filed testimony, and in its testimony during the May 22<sup>nd</sup> hearing, the MTA Board’s alternatives analysis and decision rejecting AET was based

on a 2014 financial study by Gary Quinlin at CDM Smith.<sup>1</sup> In his 2014 study, Mr. Quinlin provided MTA with a ten-year comparison of the financial feasibility of AET and ORT, with his assessment assuming a tollbooth commencement date of 2015. This ten-year calculation (2015-2024) made predictions regarding anticipated revenue, operating costs, leakage, required surcharges, traffic diversions, and other factors. Based on these predictions, the MTA Board voted, in July of 2014, to reject AET on the grounds that it was not a practicable alternative.

During the May 22<sup>nd</sup> hearing, Mr. Mills conceded that the new tollbooth will not be operational until 2019 or 2020. In response to the Intervenor's request to update the "ten-year" calculation of financial impacts of AET and ORT assuming the actual tollbooth start date of 2019, Mr. Mills and Mr. Quinlin testified that the predictions in the 2014 report cannot be used for such an analysis. Mr. Mills raised the same objections prior to the hearing in letters he submitted to the DEP. In summary, MTA contends that in order to adequately assess the relative financial performance of AET and ORT assuming the actual date of commencement of operations, the MTA would have to update the data in the model and re-run the predictions over a new 10-year period. In other words, while the 2014 study could have been used to evaluate a tollbooth commencing operations in 2015, it cannot be used to evaluate a facility opening in 2019 or 2020.

In his letters and during the hearing, Mr. Mills seemed to suggest that some recent data suggests AET is a less viable option, in particular increases in E-ZPass use that are below what Mr. Quinlin predicted in 2014. Mr. Mills' attention to one factor, while ignoring all others, does

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<sup>1</sup> MTA has also cited a 2009 report by HNTB in support of its rejection of AET. On cross examination, however, the author of the 2009 report, Roland Lavalée, admitted that many of the facts in the 2009 report, including estimated capital costs, operating costs, E-ZPass usage, and other factors relevant to a financial assessment of AET and ORT, are out-of-date. Mr. Lavalée conceded that some of these items were outdated even when CDM Smith issued its 2014 report.



not pass for the reassessment that is necessary before MTA could even offer an opinion as to whether AET is a practicable alternative. Mr. Mills and Mr. Quinlin both admitted that they have not considered how changes in capital costs, operating and maintenance expenses, and anticipated leakage might impact the feasibility of AET.<sup>2</sup>

During the discussion of traffic impacts, Mr. Quinlin admitted that he has not updated his 2014 diversion estimates, even though Elizabeth Roberts at HNTB just completed a more recent assessment of existing traffic impacts on Route 1 and other “diversion routes.” These diversion predictions, which played a significant role in the MTA Board’s rejection of AET, are not only outdated, but they have not been recalibrated with the benefit of recent data.

Equally important in determining whether to require MTA to update the model and predictions is why MTA made its decision regarding the York tollbooth when it did. No one at MTA could have reasonably believed that the new York tollbooth would be operational only 5 months after the MTA Board’s vote in July of 2014. During the May 22<sup>nd</sup> hearing we learned why the MTA Board had voted on AET so early. In 2014, MTA was making decisions about upgrades to some of its other, and smaller, toll facilities, and it wanted to tie the decision at York to these other construction projects.

Apparently MTA needed to make decisions regarding Gardiner, Falmouth, Scarborough, and other smaller tollbooths, and if the MTA was going to pursue AET in York this might have been relevant to how it would upgrade the smaller facilities. In effect, MTA has conceded that

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<sup>2</sup> Capital costs are a significant factor in this analysis, and an update of the figures for AET and ORT are likely to show that AET is a better deal each and every year. For example, when MTA updated the capital cost figures given to HNTB in 2009, so that Mr. Quinlin would have more accurate figures in 2013, the anticipated cost to construct an ORT facility had increased from \$28.9 million to \$36 million. MTA Pre-Filed Testimony Ex. A, p. 11; Ex. B, p. ES-2. AET was only predicted to increase from \$4.4 million to \$4.8 million over the same time period. *Id.* Even over just that four-year period, MTA’s savings with AET jumped from \$24 million to \$31 million.

the Board made its “alternatives” decision for York *years* before it actually intended to construct the new tollbooth, and that the timing was due to administrative convenience to match up with ongoing construction projects. An applicant cannot, however, reject an alternative as impracticable years before it actually needs to make such a decision, and then ignore current data that suggests its decision was incorrect.<sup>3</sup> In particular with respect to AET, what is “practicable” has changed significantly over the past few years, as evidenced by the conversion of cash booth to AET by numerous states, including Massachusetts and New York.

What is even more disturbing is that when they rejected AET in 2014, the MTA Board knew that the new tollbooth was not going to be operational anytime soon, and yet they still instructed CDM Smith to calculate the financial impacts as if the new facility would be open in 2015. The information in the 2014 report itself clearly shows that if MTA had simply corrected for the actual start date—at that time likely 2017 or 2018—the financial assessment changed dramatically *in favor* of AET. As such, not only does the 2014 report need to be updated given that the new tollbooth will not be operational until 2019, but the 2014 decision by the Board cannot support its decision even at that time because it was based on a *known* false calculation over the wrong time period.<sup>4</sup>

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<sup>3</sup> MTA’s testimony on this point was somewhat inconsistent during the hearing. In response to a question from Assistant Attorney General Bensing, Mr. Mills stated that regardless of whether ORT facilities were underway at other sites, this fact did not pre-determine the alternatives analysis regarding York. Later in the hearing, however, Mr. Lavalley seemed to argue that MTA could not operate a system with both AET and ORT facilities, which would mean that the fact that MTA had already started to convert other tollbooths to ORT would have made it impossible to select AET for York. Upon further questioning, Mr. Lavalley seemed to agree that the cash lanes at an ORT facility could be removed later, converting the entire system to AET. Certainly, if MTA had already committed itself to ORT prior to the July, 2014 Board decision, than the “vote” to select ORT at York would have been pre-determined and a nullity. This fact alone would require MTA to revisit its decision.

<sup>4</sup> We want to point out that even though MTA used a false start date that underestimated the financial benefits of AET, at Mr. Quinlin’s “90% confidence” calculation, his report still shows that an AET facility will generate an \$8 million net revenue benefit as compared to ORT. It defies logic, therefore, that MTA could conclude that such an assessment meant that *AET* was not practicable.



The MTA has been clear: the 2014 CDM Smith study cannot be used to make any predictions about the relative financial performance of an AET and ORT facility commencing operations in 2019 or 2020. Further, much of data in that 2014 report suggested that the financial case for AET was likely to improve over time—so MTA has known all along that using the wrong “start date” would generate useless and irrelevant calculations. As the new tollbooth will not, in fact, commence operations until 2019 or 2020, the 2014 study cannot be relied upon to support the alternatives analysis required by Chapter 310 of the Department’s rules and NRPA. Prior to taking any action on MTA’s application, the Department should insist that MTA update the 2014 study to properly assess whether AET is a practicable alternative.<sup>5</sup>

B. REPONSE TO DEPARTMENT QUESTIONS

Our responses below are based on testimony at the hearing by MTA witnesses.

1. What types of data inputs are necessary to bring the model up to date?

MTA has testified (and Mr. Mills noted in his correspondence prior to the hearing) that all of the data inputs must be updated in order to use Mr. Quinlin’s model to predict how a 2019 AET or ORT facility would function. This would include current E-ZPass usage rates, updated capital and O&M figures, and updates to leakage estimates (based on experience of other AET systems operating over the past couple of years).

Also, during the hearing, David Sullivan of Milone & MacBroom, Inc. testified that

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<sup>5</sup> In a similar context, applicants must update alternatives analyses if there have been significant changes in the factors that supported a prior decision. *See Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, 606 F. Supp. 2d 121, 125 (D.D.C. 2009) (changes in applicant’s need and data calculations between date of filing application and anticipated date of issuance of permit required an update to the alternatives analysis). In this case, the applicant has conceded that regardless of whether the 2014 CDM Smith report adequately supported its decision in 2014 to reject AET, the report is now useless, MTA’s own data suggests that the financial case for AET has improved over time, and so the 2014 report should be updated.

HNTB's 2016 traffic assessment should be used to "calibrate" Mr. Quinlin's initial diversion predictions. Everyone agrees that the likelihood of diversion decreases when the "receiving" roadway is more congested. Mr. Quinlin used traffic data regarding Route 1 and other side roads from 2013, but HNTB has updated that information in its 2016 report. Mr. Quinlin should be required to update his 2014 diversion figures based on the current traffic data.<sup>6</sup>

2. Does that data already exist?

The relevant data existed as of 2013, and was provided to CDM Smith so it could conduct its assessment at that time. We assume more recent data continues to be available from the same sources.

3. How long would it take to re-run the model with the new data?

In response to a question by the Commissioner, Mr. Quinlin testified that it would take CDM Smith two months to re-run the model predictions after receipt of the updated data.

4. If new data needs to be collected, how long will it take to collect the data?

We are not in a position to offer an estimate on this issue, but we note that MTA is proposing to construct the largest facility in its system, and the cost implications for toll rates are significant. Also, it appears that some of this data is provided in regular reports from MTA to its bondholders, and so it appears much of the data is readily available.

5. How much would it cost to complete an updated model that yields meaningful results?

Again, in response to a question by the Commissioner, Mr. Quinlin predicted it would

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<sup>6</sup> Further, this updating of traffic data should include summer weekends, not just summer weekdays. There is little value in assessing diversion at 10 am on a Tuesday morning. If MTA wants to concede, as noted by Mr. Quinlin in his response to the eTrans study, that "relatively little" diversion would happen during the summer, then maybe MTA need not assess summertime day/early evening traffic. MTA Pre-Filed Test. Ex. AA, p. 3. Mr. Quinlin should clarify whether there will be any diversion during the summer months and, if not, how that impacts his annual and daily predictions.



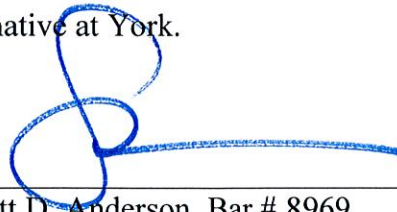
cost approximately \$100,000 to re-run CDM Smith's model. We assume that the cost of collecting existing data is part of existing MTA staffing costs.

Mr. Quinlin also testified that whether the estimate is \$100,000 or a million dollars, this sum is not significant to the MTA given the amount of annual revenue it collects. When asked about his prediction in the 2014 report that an ORT facility would, over the first ten years, lead to an \$8 million deficit over AET, Mr. Quinlin noted that while \$8 million is a lot of money to "you and me," \$8 million over ten years was not a significant enough potential loss to undermine MTA's decision to reject AET. Regardless, cost is not an excuse to ask the Department to rely on an admittedly-deficient report in deciding whether MTA is complying with the NRPA alternatives requirement.

#### CONCLUSION

MTA has conceded that the 2014 CDM Smith report is outdated, and cannot be used to assess the relative financial performance of AET and ORT given the anticipated start date of operations of the new tollbooth. As such, this report—the only report in support of MTA's alternatives decision—is no longer relevant or material to whether AET is a practicable alternative. Only if MTA updates the 2014 study will the Department, the MTA Board, and the public, know whether AET is a practicable alternative at York.

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