

Maine Turnpike Authority

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June 27, 2013

**Jay Clement, NAE
Senior Project Manager
US Army Corps of Engineers
675 Western Ave #3
Manchester, Maine 04351**

Dear Mr. Clement,

As you know, the MTA has recently undertaken, in cooperation with the MaineDOT, an extensive study of transportation issues affecting the Gorham to South Portland corridor. The MTA's involvement stems from a need to improve access to the Maine Turnpike for the significant number of Turnpike users in the Gorham area. We are currently considering whether to move forward with preparation for an MTA application to build a project that would address that need. However, for reasons more fully described below, the Authority is not prepared to go forward into the permitting stage without a clearer understanding of the requirements that will govern that process. I am therefore writing to you today, in my capacity as Chairman of the Maine Turnpike Authority's governing board, to respectfully request the written opinion of the ACOE on several questions that have arisen in our discussions thus far:

"If the MTA applies for a Clean Water Act permit to construct a Gorham connector, will the ACOE require the MTA to analyze alternatives the MTA is not legally or financially capable of actually building, and, if so, what is the legal authority for such a requirement?"

"Irrespective of the MTA's legal and financial restrictions, may the goal of separating local from through traffic be included in the project's purpose and need statement? If not, would you please explain in your response, with

"If the MTA were to receive federal funding for construction of a Gorham connector would that affect the permitting process and/or the answers to questions one and two, above? If so, would you please explain in your response what those changes would be and what legal authority, if any, you believe would mandate those changes?"

"We have attached a draft Purpose and Need Statement to this letter that we believe accurately captures the objectives of our project. Is this Purpose and Need Statement allowed by current law? If not, would you please provide in your response the legal authority or precedent which you believe would make this purpose and need unacceptable?"

We are asking these questions because preliminary studies have concluded that there are two basic approaches in the Gorham corridor with potential for significant reduction in traffic congestion. One is a limited access highway connecting the limited access bypass built by MaineDOT in 2008 to a point at or near the Maine Turnpike in South Portland. The other is addition of a travel lane to certain segments of local Routes 25 and 114. In January, during preliminary discussions with the Army Corps on formulation of a "Purpose and Need" statement for this project, the ACOE suggested that the project's Purpose and Need should be drafted in a manner that would require both options to be included in an alternatives analysis.

The MTA disagrees with this approach for the following reasons. First, the MTA is a public toll agency created by the legislature with powers that are specifically limited by our enabling legislation and our governing Trust Indenture.¹ Neither one of these documents would allow the MTA to construct an additional lane onto local state routes. Second, even if the MTA were legally empowered to undertake a project of this kind, it would be nearly impossible, financially, for the MTA to do so. Third, the MTA believes that a limited access highway is an entirely different kind of project than reconstruction of a local road. Separating local traffic from through traffic has safety and operational benefits that addition of a lane to crowded local roads simply cannot achieve. In the Gorham-South Portland context, where our goal is essentially to connect one limited access facility with another, we view "limited access" as a legitimate goal in its own right from a transportation perspective. We therefore believe this requirement should be included in the Purpose and Need irrespective of the legal and financial restrictions facing the MTA.

¹ The MTA's Trust Indenture, or "Bond Resolution" is a binding contract entered into between the MTA and the investors in its bonds. These investors have a contractual lien on all MTA revenues to protect their investment and therefore restrictions exist in the Bond Resolution as to how those revenues may be spent. These are *contractual* restrictions. They are independent of the statutory restrictions which also exist and cannot simply be altered by the legislature in the manner that some statutory restrictions might be.

Legal and Financial Capabilities of an Applicant Matter

The MTA's governing board is very concerned with the concept that our agency might be forced to spend significant sums of public money to study an option that the MTA is not legally able to build and which would not be financially viable for the MTA to build even if it were legal for us to do so. This does not seem like sound policy to me or the other members of our board, and we accordingly directed MTA staff to prepare a preliminary analysis of the Clean Water Act and ACOE regulations. We believe there is legal precedent to support our position, and respectfully request that the ACOE address these precedents in its response to this letter.

Project Purpose and an Applicant's Needs

It is well established that the definition of a project's purpose (i.e. "the purpose and need statement") has a significant bearing on the range of alternatives that an applicant will be required to analyze:

"An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics *in light of overall project purposes.*"
- 40 C.F.R. 230.10 (a)(2)

As a general proposition, both case law and ACOE regulations state that the ACOE has a duty to consider an applicant's needs when determining what a project's purpose is. For example, the ACOE's Standard Operating Procedures state: "Defining the overall project purpose is the responsibility of the Corps; *however, the applicant's needs must be considered in the context of the desired geographic area of the development, and the type of project being proposed.*"²

The MTA is the potential applicant here and the MTA's "need" in pursuing this project is to assist its customers in accessing the Turnpike. The "type of project" that will effectively do this is a limited access highway that separates local traffic from through traffic.³ Adding an additional lane to 4.3 miles of local road may bring some indirect benefits in that regard, but the majority of the benefits will fall elsewhere and the benefits that do accrue to Turnpike bound traffic will not be as direct. The difference is between a Turnpike project that will have some incidental benefit for local traffic and a local road improvement project that will have some incidental benefit to the Turnpike. This may seem like semantics, but the difference is real when viewed in the context of what an *applicant's needs* are.

² See Gouger v. US Army Corps, 779 F.Supp. 2d 588, 605 (2011). See also ACOE Standard Operating Procedures (2009), pg 15; Sylvester v. U.S. Army Corps, 882 F.2d 407, 409 (1989); Louisiana Wildlife v. York, 761 F.2d 1044, 1048 (1985); Conservation Law Foundation v. FHWA, 827 F.Supp 871, 886 (1993).

³ In fact, as discussed below, it is probably the only kind of project that the MTA could legally build under these circumstances.

MTA Legal Restrictions

To qualify as a "practicable alternative" under ACOE regulations, an alternative must be "available and capable of being done." We believe the definition of "available and capable of being done" must necessarily exclude options which an entity lacks the essential legal power to undertake.

The MTA is not a general purpose or state-wide transportation agency. It is a special purpose entity created by the legislature with a limited mission - to operate a toll highway from York, Maine, to Augusta, Maine. The Turnpike was created as an independent entity that has the power to fund itself by issuing bonds that are backed solely by Turnpike revenue and which do not in any way pledge the credit of the State of Maine. Because the Turnpike's revenue is the only source securing payment of the bonds it has issued, the purchasers of those bonds need to be assured that the MTA's revenue stream is, and will continue to be, secure. This is the reason that, from the inception of the MTA, expenditures not directly related to its mission of operating the Maine Turnpike have been strictly limited by Maine state law and by contract.

State law restrictions are contained in the Authority's "Enabling Act" (23 M.R.S.A. § 1961, *et seq.*), which prohibits expenditures of MTA revenues for purposes other than construction, operation, maintenance and funding of the Maine Turnpike.⁴ The Enabling Act contains some exceptions, but these are limited in scope and would not be applicable here.⁵

Another source of protection for MTA bondholders is the MTA's Revenue Bond Resolution, a trust indenture which commits the MTA to certain obligations and is administered by an independent trustee bank. The Bond Resolution contains numerous covenants and restrictions of its own concerning how MTA revenue may be spent.⁶ Perhaps more importantly, it has also been held by the Maine Supreme Court that the Bond Resolution incorporates the protections of existing law, including the Enabling Act, within its own terms as a matter of law. This means that any changes to the Enabling Act that remove or substantially impair existing limitations on how MTA revenue may be spent are potentially invalid as unconstitutional impairments of the bondholders' contract.⁷ We believe that a change to the Enabling Act authorizing the MTA to spend \$60 million dollars to add an additional lane to 4.3 miles of Routes 25 and 114 would fall

⁴ See 23 MRSA §1965, 1969, and 1974

⁵ For example, the MTA is allowed to construct access roads for new interchanges and is required to contribute 5% of its operating revenue to MaineDOT for mutually agreed upon MaineDOT projects.

⁶ Funds raised through bonding, for instance, may only be spent on "Turnpike Projects", and toll revenues must be spent on debt service, operations, and certain enumerated annual expenses.

⁷ See First National Bank vs. Maine Turnpike Authority, 136 A.2d 699 (1957), in which a statute requiring the MTA to reimburse utilities it relocated during construction of the Turnpike was declared an unconstitutional impairment of contract because it violated common law that was in place when MTA bonds were issued and had therefore been incorporated, as a matter of law, into the MTA's Bond Resolution.

into this category and be judged invalid, considering the substantial diversion of MTA revenue to non-Turnpike facilities that would be involved.

Other than access roads for new interchanges there is nothing in the Enabling Act or Bond Resolution that allows the MTA to undertake construction projects on local roads. The bond resolution does, however, specifically allow that other stretches of roads may be incorporated into the Turnpike system provided that certain financial tests can be met, and especially if the new road to be incorporated will be tolled.⁸ Therefore, of the two roadway projects that have been discussed in the planning thus far, construction of a limited access highway to be incorporated into the Turnpike system would be consistent with and allowable under our Enabling Act and Bond Resolution, but a major reconstruction project on the local roadway system would not.

We are not dealing here with legal preconditions to a project such as a permit that might be difficult to obtain, or property that an applicant is unable to purchase. That kind of legal barrier is not something that the ACOE is obligated to defer to in its analysis. In this situation, however, we are referring to a project that the MTA is statutorily and contractually forbidden from even pursuing.

City of Shoreacres v. Waterworth, 332 F.Supp.2d 992 (2004) dealt with the Port Authority of Houston's attempts to build a marine terminal. The federal district court in that case ruled that legal restrictions forbidding the Port Authority from spending bond funds outside of Harris County or condemning property outside of Harris County meant that sites outside of Harris County were not "practicable alternatives" under the ACOE definition. We think this is an analogous case to our situation because it dealt with an independent transportation authority which, like the MTA, is restricted in the manner in which funds raised by its bonds can be spent.⁹ We ask that the ACOE consider this case in their response to this letter.

Financial Considerations

Financial restrictions of an applicant are also something that may be considered in determining "practicable" alternatives. The ACOE's Standard Operating Procedures affirm this, stating that "Under the 404(b)(1) Guidelines, if an alternative is unreasonably expensive to the applicant that alternative is not considered to be practicable."¹⁰ This principle is also reflected in case law.¹¹

⁸ MTA General Revenue Bond Resolution, Section 801(d)

⁹ Another point of similarity between our situation and the situation in Shoreacres involves restrictions on eminent domain power. As was the case in Shoreacres, we do not believe existing law would allow the MTA to condemn property for purpose of constructing the local road improvements in question, which would in itself be an almost insurmountable barrier to the MTA undertaking that project. See 23 M.R.S.A. § 1967(2).

¹⁰ Standard Operating Procedures for the U.S. ACOE Regulatory Program (2009), page 20

As described above, the MTA is a limited purpose public entity, not a statewide transportation agency. We are solely funded by toll and bond proceeds. We therefore have a fiduciary responsibility to our users and investors to spend those funds wisely and to spend them on projects that benefit our customers.

We believe an option that would cost in the area of \$60 million¹² to construct with no possibility of recouping that investment or paying for its ongoing maintenance meets the definition of "unreasonably expensive", and therefore "not practicable", when compared with a project that has the ability, through tolling, to pay for all of its own going operations and maintenance, in addition to providing complete payback of the initial investment within 30 years.

Transportation Objectives

Irrespective of the legal and financial constraints on the MTA, we believe that separation of through traffic from local traffic is in itself an important element of this project's purpose. While addition of capacity on local roads may alleviate congestion somewhat in the study area, the separation of through traffic from local traffic will have an effect so much more substantial, both on safety and congestion, as to be a difference in kind rather than simply a difference in degree. More importantly, as has been repeatedly stressed in this letter, the MTA's proper role is to provide services to users of its system. Construction of a limited access facility for traffic that is traversing the region to access the Turnpike provides a benefit specifically to those users and is squarely within the MTA's legitimate mission, whereas construction of street improvements in local neighborhoods that are not connected to the Turnpike is not.

In Conservation Law Foundation v. FHWA, 829 F. Supp 871 (1993), separation of through from local traffic was judged by the First Circuit Court of Appeals to be a valid project purpose in and of itself.¹³ We respectfully request that the ACOE explain in its response why the reasoning that applied in that situation would not be applicable in this one.

¹¹ See, for example, Gouger v. Army Corps (2011); Roosevelt Campobello v. U.S. EPA, 684 F.2d 1041 (1982); Louisiana Wildlife Federation v. York, 761 F.2d 1044 (1985)

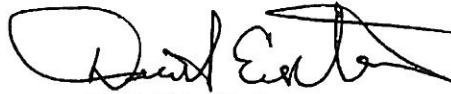
¹² This figure does not include right of way, permitting and mitigation costs. See page ES-11 of the September 2012 Final Report for the Gorham East-West Corridor Feasibility Study

¹³ This case involved construction of a two mile limited access highway crossing of the island of Jamestown, in Narragansett Bay, connecting a bridge on the west side of the island with a bridge on the other side of the island. A proposal for an at grade intersection along part of that crossing as opposed to an overpass was deemed "not practicable", and therefore not considered in the Corps' alternative analysis, because it did not conform to part of the stated purpose and need of the project, which was to separate local from transient traffic. The at-grade intersection at question would have impacted 2.6 acres of wetland, while the overpass impacted 4.3. See Conservation Law Foundation at 887.

Conclusion

Over the past 5 years, the MTA has expended \$1.4 million dollars on studying the Gorham to South Portland corridor. If we choose to embark upon a permitting process we will be expending significantly more. We therefore want to be sure we fully understand the rules before deciding whether to go forward. We owe that not only to our bondholders and toll payers but to various stake holders, such as communities in the Gorham corridor and members of the Maine Legislature. The MTA needs to be accountable to these constituents for whatever decision we make, and that is why we are requesting a written response to the inquiries in this letter. MTA staff would be glad to provide any supplemental information they can or to meet with you or any other representatives of the Army Corps if it would be helpful in further explaining our position or formulating your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel E. Wathen". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Daniel E. Wathen
Chairman

Cc: MTA Staff (Peter Mills, Peter Merfeld, Sara Devlin, Jonathan Arey)

Draft Project Purpose and Need Statement – June 28, 2013

Basic Project Purpose

The purpose of the Gorham East-West Connector is to improve the movement of people and goods between the Gorham Bypass and the Maine Turnpike by providing a limited access highway alternative to local routes 22 and 114 with the capacity to accommodate current and future projected traffic volumes through the year 2035 that can be funded, built and maintained by the Maine Turnpike Authority.