April 1, 2024

Commissioner Bruce Van Note
Maine Department of Transportation
24 Child Street
Augusta, ME 04333-0016

Sent by email to: jamie.m.sienko@maine.gov

RE: Sears Island

Dear Commissioner Van Note:

Public Employees for Environmental Responsibility (PEER) is writing to remind you of the legal history of the Sears Island case, the reason the permit was withdrawn in 1996, and the subsequent 1996 Consent Decree signed by both the Commissioner of the Maine Department of Transportation (MEDOT) and Counsel for MEDOT as resolution of your violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) (the "Act"). This history is pertinent to your current efforts to once again develop a port on Sears Island; specifically, PEER is concerned that MEDOT is heading down the same fruitless path once again.

The convoluted history of Sears Island litigation. The legal history of Maine's attempts to develop Sears Island is convoluted, and environmental review documents were fraught with errors. In 1981, MEDOT circulated a preliminary study for a causeway to Sears Island. The U.S. Fish and Wildlife Service (USFWS) said the scope of the study was too narrow, as it only contemplated impacts from the causeway and not from any development of the island itself. MEDOT refused to heed that advice, and prepared an Environmental Assessment (EA) under the National Environmental Policy Act (NEPA) that focused solely on the causeway. The Federal Highway Administration (FHWA) adopted MEDOT's EA.

The U.S. Environmental Protection Agency (EPA), USFWS, the National Marine Fisheries Service (NMFS)[1] and the Coast Guard (CG) all objected to the EA, claiming it was insufficient. MEDOT was forced to issue another EA, but this time they focused solely on the port, and once again FHWA adopted it. Again, the three resource agencies objected, and they were joined by the

[1] These three federal agencies are referred to as the "resource agencies" for purposes of Section 404 of the Clean Water Act.

Commerce Department's Economic Development Administration (CDEDA). The CDCEA said it would *not* consider funding the project without a full Environmental Impact Statement (EIS) combining impacts from the proposed causeway, port, and industrial park.

MEDOT responded by creating a document called an "Environmental Assessment Summary," which considered the causeway and port, but refused to acknowledge or examine other impacts for additional development on the island. The FHWA issued a Finding of No Significant Impact (FONSI) on December 16, 1983. Similarly, the U.S. Army Corps of Engineers (Corps) released its own EA on that same day, for just the port and causeway, and also issued a FONSI. EPA, USFWS, and NMFS objected once again, but the Corps issued a permit for the causeway over their objections. Sierra Club then filed suit.

The Sierra Club had two suits in district court. In the first case, Sierra Club argued that the project would significantly affect the environment, and an EIS was necessary. The district court found in favor of the government, holding that an EIS was not necessary. The second district court case was in regard to whether the Coast Guard had violated the General Bridge Act of 1946 when it proposed the causeway. The district court in that case held that the Act was violated, and revoked the permit for the causeway. MEDOT appealed and lost.

Sierra Club appealed the first district court decision to the First Circuit. On August 9, 1985, the court vacated the district court decision, held that the EA/FONSI was flawed, and stated that an EIS must be prepared.[2]

MEDOT appealed and on December 23, 1985, the First Circuit affirmed the district court decision.[3] Specifically, the court held that MEDOT treated the 1,100 foot solid fill causeway as a "bridge" by including a two-foot diameter pipe, thereby circumventing stricter requirements under the Rivers and Harbors Act. Notably, the court stated, "By treating the causeway as a bridge and issuing a bridge permit to authorize its construction, the Coast Guard did the equivalent of issuing a license for a wolf by calling it a dog."

Sierra Club had now prevailed in both cases, and MEDOT was forced to do a comprehensive environmental and alternatives analysis. The only problem was that MEDOT still refused to prepare an adequate review document.

MEDOT issued the Draft EIS (DEIS) on July 7, 1986. The Final EIS (FEIS) was issued in late August 1987, and despite continued opposition by USFWS, NMFS and EPA, the FEIS was approved by FHWA on October 9, 1987. On December 18, 1987, FHWA issued its Record of Decision (ROD) approving the Sears Island project. On March 14, 1988, the Corps issued its Corps ROD approving the MEDOT application for a permit for the Sears Island project. EPA then sought formal review of the Corps' decision by the Assistant Secretary of the Army, who gave final Corps approval for the project on May 11, 1988. On July 22, 1988, the Coast Guard issued its ROD permitting MEDOT to construct the causeway to Sears Island.

[2] Sierra Club v. Marsh, 769 F.2d 868, 1985 (*Sierra I*)
[3] Sierra Club v. Secretary of Transp., 779 F.2d 776, 1985 (*Sierra II*)

Sierra Club went back to court, arguing that MEDOT should be enjoined from constructing the causeway, but the court ruled that plaintiffs failed to demonstrate irreparable environmental harm, and the motion was denied.[4]

Sierra Club was undeterred, and appealed the lower court decision, claiming that the FEIS did not adequately evaluate impacts from the project or adequately evaluate alternatives like Mack Point. EPA, FWS, and NMFS agreed. On March 31, 1989, the First Circuit agreed, vacating the decision of the district court not to issue the preliminary injunction, and remanding the case.[5]

On remand, Sierra Club sought injunctive relief halting construction of terminal, alleging that the permits issued by Corps and Coast Guard did not comply with the Clean Water Act, NEPA, or the Rivers and Harbors Act. On May 30, 1989, the court agreed, holding that a "preliminary injunction shall issue suspending all further project construction pending compliance with NEPA."[6]

Both Sierra Club and MEDOT filed cross motions for summary judgment. On November 1, 1989, the court held:

> The state and federal defendants, their employees, representatives, agents, and all persons acting under or in concert with them, are hereby restrained and enjoined from permitting, commencing, or continuing, any causeway, roadway, building, pier cell or other improvement relating to the development of a marine cargo terminal and industrial park on Sears Island, pending either further order of this court or compliance by the FHWA and the Corps with the NEPA requirement that all new information be assessed with a view to determining whether its environmental significance requires preparation of a supplemental EIS.[7]

On March 29, 1991, Sierra Club went back to district court to request that the court suspend the CG permit for the construction of the causeway. The court held that the issuance of the Coast Guard permit was not arbitrary, capricious, illegal or contrary to law.[8] PEER believes that this permit was unlawful, and the massive impacts from this solid fill causeway were never mitigated.

The subsequent permitting process. In 1992, the Sears Island permit case came back to EPA, with the stunning news that during the flurry of lawsuits and confusion, MEDOT's contractors had filled over 10 acres of freshwater wetlands on the island – wetlands whose existence had never been revealed to the federal resource agencies but were known to others. MEDOT was now seeking not only permission to fill wetlands for the port, but also sought an after-the-fact permit for the illegally filled wetlands. EPA then became involved in two parallel tracks of work on Sears Island: a criminal enforcement case, and the permit review.

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[4] Sierra Club v. Marsh, 701 F.Supp. 886 (1988)
[5] Sierra Club v. Marsh, 872 F.2d 497 (1989)
[6] Sierra Club v. Marsh, 714 F.Supp. 539 (1989)
[7] Sierra Club v. Marsh, 744 F.Supp. 352 (1989)
[8] Sierra Club v. Marsh, 772 F.Supp. 13 (1991)

After years of joint meetings with MEDOT, FHWA, the Corps, the federal resource agencies, and MEDOT's consultants, it became abundantly clear that the Sears Island project was not permittable. On September 29, 1995, a joint letter from EPA, FWS, and NMFS stated the proposed terminal on Sears Island would:

> …irreparably harm the aquatic environment because of both the large size of the fill and the high quality of the affected habitat…All three federal environmental agencies believe that the impacts associated with a Sears Island port facility would cause significant degradation of waters of the United States…in violation of Section 230.10(c) of the 404(b)(1) guidelines…

As you are aware, a Section 404 CWA permit *cannot* issue if a project would cause or contribute to significant degradation of waters of the U.S. This provision of the 404(b)(1) guidelines is rarely invoked, but was absolutely warranted in this case.

The joint letter also stressed the severe environmental impacts associated with the solid fill causeway:

> Construction of the Sears Island causeway has already changed water circulation and current patterns by blocking tidal exchange between Long Cove and Stockton Harbor. Benthic invertebrates (soft shell clams, blue mussels, marine worms, etc.) and 3.7 acres of their habitat at the causeway site were destroyed…Localized sedimentation patterns have changes as a result of the causeway construction.

This, combines with EPA's determination that the impacts could not be adequately mitigated, proved to be too much for MEDOT and FHWA. On May 8, 1996, MEDOT wisely withdrew its permit application.

The enforcement case. The criminal investigation of MEDOT and its contractors was warranted, but was closed due to political concerns. Instead, the case was addressed civilly, and in November of 1996, MEDOT signed a Consent Decree.

Specifically, MEDOT and its contractors were found liable of illegally filling 9.25 acres of wetlands on Sears Island for a terminal, and an additional 0.77 acres for the access road. Section II.4 of the Consent Decree states that, "The obligations of this Consent Decree shall be binding upon the parties to this action…and their successors and assigns." Section III.8 states that MEDOT is, "permanently enjoined from discharging fill materials to any waters of the United States, including wetlands, at the Terminal Site or Access Road site, except in compliance with the express terms of any applicable permits required to be obtained by any federal … laws, rules or regulations."

MEDOT was required to restore 3.2 acres of wetlands and create vernal pools; they were also required to conduct additional wetland restoration and enhancement off island, and pay cash penalties and invest in Supplemental Environmental Projects (SEPs) totaling $700,000.

Section 16a of the Consent Decree states:

> Maine DOT, EPA and the Intervenors agree that, in any future section 404 permit application to discharge additional dredged or fill materials into wetlands or other waters of the United States at Sears Island in connection with a project that includes use of the property where fill remains in place at the Terminal Stie, MDOT or its successors will, as part of such permit application, seek after-the-fact authorization for the Discharge at the Terminal Site and Access Road Site. In such a future permit application process, the determination of whether the overall impacts of the project would comply with the Section 404(b)(1) guidelines (40 C.F.R. Part 230) … will include an evaluation of the impacts of the fill that remains in place on the functions and values of the original (pre-filled) wetlands at the Terminal Site and Access Road, along with the restoration work…

In other words, any permit currently sought by MEDOT will have to assess all the impacts from the illegally filled wetlands, and use the functions and values of the "original (pre-filled) wetlands." PEER believes that this assessment would also cover the impacts from the causeway, as the causeway was only necessary for the development of the port.

Current development efforts. MEDOT is, once again, attempting to build a port on Sears Island, this time to construct a facility for floating offshore wind fabrication, staging, assembly, maintenance, and deployment. And once again, MEDOT has done everything in its power to pre-select Sears Island a the preferred alternative for this development.[9]

But MEDOT is ***not*** the decision-maker on the siting of this facility. The Corps will determine the least environmentally damaging practicable alternative (LEDPA), and even this decision is subject to EPA's 404(c) veto power.

Please note that the impacts that were described in 1996 by the resource agencies are even worse today, given the incredible wetlands losses suffered over the past three decades. Indeed, USFWS released a report just last week finding that wetland loss rates have increased by 50 percent since 2009[10] (and most of these were before the *Sackett* decision, which will exacerbate these losses further).

PEER understands the need to pivot from fossil fuels; however, we cannot sacrifice intact ecosystems for this effort. Indeed, the 2023 Intergovernmental Panel on Climate Change (IPCC) report shows that retaining intact ecosystems is more useful in combatting climate change than wind projects. Because Mack Point is – once again – an available and less environmentally damaging alternative, PEER urges MEDOT to strongly consider Mack Point as the location for this facility. Pursuing Sears Island will likely result in years of litigation and delay.

Finally, PEER notes that Maine's attempts to make Sears Island permittable by removing coastal sand dune protections via the proposed "Act Regarding Offshore Wind Terminals Located in Coastal Sand Dune Systems" is both short-sighted and contrary to NEPA. Using the law to make

[9] See, e.g., https://www.maine.gov/governor/mills/news/governor-mills-announces-sears-island-preferred-site-port-support-floating-offshore-wind-2024

[10] https://www.fws.gov/press-release/2024-03/continued-decline-wetlands-documented-new-us-fish-and-wildlife-service-report

environmental protections disappear does not make the impacts from those decisions disappear as well.

Conclusion. Sears Island is not a permittable location for this project. It was not a viable alternative in 1996, and it is not today. MEDOT should immediately shift its attention to developing Mack Point for this facility. To do otherwise guarantees a repeat of the disastrous events of the 80s and 90s.

Sincerely,

Kyla Bennett, PhD, JD
Director, Science Policy

cc: Corps, Maine Field Office
EPA Region 1, Wetlands Protection Section
USFWS, Maine Field Office
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