



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

109 3 1988

OFFICE OF
WATER

Honorable Robert W. Page, Sr.
Assistant Secretary of the Army
for Civil Works
Department of the Army
Washington, D.C. 20310

Dear Mr. Page:

Under the provisions of the Environmental Protection Agency's (EPA) Memorandum of Agreement (MOA) with the Army under Section 404(q) of the Clean Water Act, I am formally requesting your review of the decision of the Division Engineer, New England Division (NED) to issue a Section 404 permit. As described in the Notice of Intent letter to Mr. Michael R. Deland, Regional Administrator of EPA's Region I Office, dated March 14, 1988, the New England Division Engineer intends to issue a permit to the Maine Department of Transportation (MEDOT) authorizing the construction of an access causeway and a marine cargo terminal in Penobscot Bay at Sears Island, Searsport, Maine. After a thorough review of available information relevant to the case, we have determined that this referral meets the criteria in the MOA for elevation under Section 5.b.1. because we find that there has been a failure to resolve stated EPA concerns regarding compliance with the Section 404(b)(1) Guidelines (40 CFR 230).

If issued, the current 404 permit to MEDOT would result in filling 3.5 acres of intertidal area for the construction of a 1200-foot long solid fill causeway between the mainland and the island; filling 12 acres of intertidal and 15 acres of subtidal habitat for construction of the terminal; and dredging 45 acres. This would destroy more than four acres of productive soft-shell clam habitat and 9 acres of biologically productive intertidal zone. (Also, approximately 1.6 acres of freshwater shrub swamp wetlands were filled during construction of the access road.) In addition to the aquatic impacts, the project would destroy upland wildlife habitat on Sears Island due to construction of 3.8 miles of rail and road access, support facilities to serve the terminal, and an industrial park which the proponents are encouraging to be developed adjacent to the terminal. Further development by the island's owner, Bangor and Aroostook Railroad, is planned for much of the remainder of the island once the causeway is built with federal funds.

EPA and NED agree that the impacts to the aquatic ecosystem at Sears Island would be substantial, and that they would outweigh those that would result from locating the terminal at Mack Point. Both agencies also concur that the Mack Point alternative would cause far less direct and secondary impacts to other resources of concern. Our disagreement is limited to the issue of whether Mack Point is a practicable alternative. As explained in detail in our comments on the draft and final EISS (Enclosures), we believe Mack Point is a practicable alternative.

EPA selected TBS because of its reputation as the most experienced maritime consultant in New England and because we believed this expertise to be essential to an independent evaluation of the practicability of the Mack Point site. TBS produced three documents evaluating issues related to the feasibility of Mack Point (Enclosures). To summarize, this information indicates that Mack Point can accommodate the basic project purpose of a marine cargo terminal with two berths, handling all the future cargo volumes forecasted in the EIS. 1/
EPA's Region I Office secured the services of Temple, Barker and Sloane, Inc. (TBS) to perform a feasibility analysis of the Mack Point site because they were concerned that NED was giving too much deference to the applicant's submitted information and not conducting an independent analysis of the permit application. 2/

1/ Although NED's Record of Decision does briefly address the TBS information, we are concerned that NED deferred to the wishes of the applicant rather than the project's requirements in this case. For example, the fact that the applicant's representatives had, on a number of occasions, indicated that a facility could be built at Mack Point, particularly when combined with the results of the TBS study to the same effect, should have resulted in a more in-depth analysis by NED. Instead, it appears that NED simply repeated the question to the applicant (in a potentially leading manner) and accepted the latest response. Regional Administrator Deland will further address our concerns about this matter in a forthcoming letter to Division Engineer Colonel Rhen.

2/ TBS concluded that these forecasts for cargo traffic in Searsport were overstated because MEDOT relied on unrealistic assumptions for the Searsport area. Nevertheless, even accepting MEDOT's projection for purpose of the 404(b)(1) guidelines analysis, TBS concluded that Mack Point could accommodate all forecasted cargo.

Despite TBS's conclusions, NED rejected Mack Point as a practicable alternative. NED did not find that the operational limitations of a 2-berth facility would alone render the site impracticable. NED instead rejected Mack Point on the basis that the operational limitations associated with a 6-berth facility would be too great. We disagree with that analysis. In this case, all parties agree that future expansion beyond the 2-berth terminal is entirely speculative and would be accomplished not by the applicant but by unidentified private developers; it therefore should not have been relied on to reject Mack Point as a practicable alternative. More importantly, the record indicates that the 2-berth terminal can handle the future tonnage projected in the EIS, thereby satisfying the basic project purpose. 3/

Both EPA and TBS concede that Mack Point is not the optimal site as compared to Sears Island. However, notwithstanding some conflicting information, we believe the record shows that the operational limitations, while requiring careful planning and engineering, do not render Mack Point impracticable.

3/ Project documents have caused great confusion because they have not clarified that there is no actual correlation between the maximum size of terminal (six berths) and the maximum cargo tonnages forecast in the EIS. MEDOT's cargo forecasts, as presented in the EIS, are for 126,319 tons in 1990 and 185, 116 tons in 2010. (Higher forecasts which have been discussed in MEDOT's earlier planning reports (and which includes the high tech automated terminal) were excluded by MEDOT from the maximum EIS forecast and other current forecasts.) The maximum forecast stated in the EIS, 185,116 tons, can be handled at a two-berth facility. This conclusion is confirmed by MEDOT's consultant (BAH, April, 1987. p.19). MEDOT's own data, therefore do not support its and NED's claims that expansion to a 6-berth facility is reasonably foreseeable or that Mack Point would constrain this project from achieving its maximum potential based upon the maximum cargo tonnages forecasted in the EIS.

We believe your review will find that the facts in this case do not support permit issuance because of the existence of a practicable alternative within the meaning of Section 230.10(a) of the Guidelines. We believe at a minimum, you should initiate a thorough review of the issues of purpose, alternatives, and practicability in this case.

Sincerely,

Rebecca W. Hanmer

Rebecca W. Hanmer,
Acting Assistant Administrator
for Water

Enclosures