

PO Box 222
Searsport, ME 04974

July 10, 2008

Ruth M. Ladd
Chief, Policy Analysis and Technical Support Branch
Regulatory Division
New England District Corps of Engineers
696 Virginia Road
Concord, MA 01742-1751

Dear Ms. Ladd:

We are writing to request a formal Public Hearing (or several area Public Hearings) on the Maine Department of Transportation's proposed Umbrella Mitigation Bank for Transportation, which calls for using the entire state of Maine as the service area.

First, we find the scope of the proposal concerning. Maine is a very large state and loss of natural wetlands here will impact a far larger region. Furthermore, the suggestion that the "umbrella" may cover as yet undetermined or unannounced projects calls for some serious ground rules that have not been proposed. References to "unavoidable wetlands impacts" with no mention of how avoidability is determined are unsettling.

Second, the bioregion approach is inconsistent with the federal recommendations of watershed based determinations and, therefore, requires much more extensive study and planning. This alone seems to provide sufficient basis for a public hearing and more time.

The language in the prospectus suggests performance standards, management and enforcement plans but gives little or no indication that these aspects have been given any thoughtful attention.

In short, there are just too many unanswered questions, too many vague pronouncements to inspire confidence in moving ahead quickly with the proposal without giving the public their say.

Bob Ramsdell

Marietta Ramsdell

Bob and Marietta Ramsdell

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JUL 14 2008

REGULATORY DIVISION



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
One Blackburn Drive
Gloucester, MA 01930-2298

JUL 9 2008

Ms. Christine Godfrey
Chief, Regulatory Division
U.S. Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Re: Public Notice NAE-2008-1703, Maine Department of Transportation, Umbrella Wetland Mitigation Bank for Transportation (UMBT)

Dear Ms Godfrey:

The National Marine Fisheries Service (NMFS) has reviewed Public Notice #NAE-2008-1703, which describes the proposed establishment of a mitigation bank by Maine Department of Transportation (MEDOT), with the entire state of Maine as a service area. The purpose of this umbrella bank will be to provide a framework within which future restoration, creation, enhancement, and/or preservation projects will be made available as mitigation for transportation projects affecting waterways and wetlands.

Process for Developing a Mitigation Banking Instrument

This public notice is a preliminary step in the process required to develop a mitigation banking instrument. This process is described in 33 CFR 332, Compensatory Mitigation for Loss of Aquatic Wetlands (Mitigation Rule), as published in the Federal Register on April 10, 2008. The Mitigation Rule indicates that this process starts with the development of a mitigation banking prospectus. This prospectus must then be deemed complete by the Interagency Review Team (IRT), a committee made up of representatives from MEDOT, the Army Corp of Engineers (ACOE), and other agencies, including NMFS. The complete prospectus is then published in a public notice, such as the one being reviewed here. Through the public notice, the ACOE will decide if the sponsor, MEDOT, may proceed to the next step of developing a draft Mitigation Banking Instrument (BI). This decision is based on the following criteria:

- Objectives of the bank have merit.
- Structure of the bank as proposed is appropriate.
- Proposed service area is acceptable.
- There is a need for a mitigation bank.
- Ownership and long term management concepts are acceptable.
- The sponsor is adequately qualified.

As a member of the IRT, NMFS would like to provide comments regarding the potential of the proposed UMBT to provide compensatory mitigation based on the criteria



described above, as well as general comments regarding the clarity and functionality of the proposed BI in order to assist in the development of the UMBT.

Comments on Criteria for Determining Bank Potential

Bank Objectives:

The objectives of the bank are defined in Section 2.0 of the prospectus. These objectives include: 1) Streamlining the Section 404 permit evaluation process by providing a means of compensating for unavoidable wetland impacts resulting from transportation projects; 2) developing mitigation based on the ecological/landscape approach; 3) preserving and restoring resources based on state priorities; and 4) following the mitigation priorities established in the Mitigation Rule. In addition, the UMBT would augment the existing MEDOT state mitigation bank, and provide complementary benefits to the state's in lieu of fee program (ILF) established by Maine Department of Environmental Protection in 2007. NMFS agrees that these objectives have merit, however, clarification is needed regarding how the UMBT and ILF will complement each other, and in what situations one will be preferred over the other. Section 3.5 of the prospectus describes the type of permitted actions that may be eligible to use credits from the UMBT as compensatory mitigation. These actions include MEDOT projects authorized by the ACOE under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act (Category II or Individual Permit). This section indicates that eligibility will be determined on a case-by-case basis in consultation with regulatory and resource agencies. However, this section also indicates that ACOE and MEDEP will determine if UMBT is ecologically preferable to other options. It is not clear which agencies will decide when the UMBT or ILF program is appropriate for providing compensation, how they will be used in combination, or how the two programs will be integrated into the permitting process.

Bank Structure:

The structure of the proposed bank is discussed in several sections of the prospectus. The general design of the BI is described in section 3.1, which states that the UMBT would use a combination of restoration, creation, enhancement, and preservation of aquatic resources for the purpose of generating compensation credits to be used as compensatory mitigation for unavoidable impacts related to transportation projects. Mitigation sites providing the compensation credits would be developed through Site Development Plans (SD Plans), attached as addendums to this BI.

Although section 3.2 discusses SD Plans, the prospectus has several sections that indicate the content of these plans. For example, section 3.4 says that each final plan will describe the design to be implemented accompanied by the credit accounting approved by the IRT, and section 5.0 indicates that project specific plans will identify which biophysical region(s) will be serviced by that project, and section 6.0 indicates that success criteria will be specified in the final plans, while section 10 says that MEDOT will provide financial assurances for each bank site as part of the individual plans. The prospectus should clearly define the required content of SD Plans in one section.

In addition, section 3.2 addresses the approval process for SD Plans by the IRT; however, the criteria by which the IRT evaluates these plans are not defined. It is unclear what constitutes a favorable review by the IRT, and how feasibility will be determined. The document needs to further develop the criteria used to evaluate SD Plans and the procedures that signify IRT approval. This section also indicates that projects built in advance of gaining IRT approval of SD Plans for purposes other than mitigation will not be approved by the IRT, even if they meet the Mitigation Rule criteria for a bank project. The prospectus should further clarify how project screening will determine a project's purpose.

Section 3.4 and 3.5 discuss the establishment and use of credits respectively, while Section 3.6 describes the accounting procedures for credits. It is not clear in these sections how the IRT will evaluate the SD Plans in order to establish approximation of credits to be expected. In addition, the accounting metrics that these credits are based on are not defined. Clarification is needed in the prospectus document regarding the types of accounting metrics that may be considered by the IRT, and the procedures for estimating credits based on these metrics.

Section 6.0 states that MEDOT is responsible (in coordination with IRT) for remedial action/adaptive management if a mitigation site fails to achieve the success criteria specified in the final SD Plans. The prospectus does not provide any guidance regarding dispute resolution if the IRT, and MEDOT disagrees on the terms of success or the need for remediation. Dispute resolution procedures also need to be clarified in section 3.2, which states that if the IRT does not approve final SD Plans, the IRT will provide specific reasons for the disapproval, and then MEDOT may resubmit revised plans and justifications that address the IRT concerns. There is no procedure outlined in the event that these revised plans and justifications are not approved by the IRT.

Service Area:

The service area for the proposed banking instrument is the entire state of Maine. Section 5.0 of the prospectus indicates that project specific plans will identify which biophysical region(s) will be serviced by a mitigation project. There are 19 biophysical regions which have been defined by the prospectus. NMFS agrees that these biophysical regions are an appropriate method of defining the service area for specific projects, and that the statewide service area is acceptable for the UMBT. However, the prospectus needs to describe how these regions satisfy the watershed approach to compensatory mitigation as prescribed by the Mitigation Rule. The prospectus should specify that projects providing compensatory mitigation will be located within the same watershed as the impacted site through the use of biophysical regions. In addition, the Mitigation Rule states that projects which are compensating for impacts on coastal watersheds should be located in coastal watersheds, and that compensatory mitigation sites in marine resources should replace the lost functions and values within the same marine ecological system that was impacted (Section 332.3 (b) 1). The prospectus should clarify that impacts on marine or estuarine resources will be compensated for within the same marine ecological system, such as an estuary or embayment, and will replace the lost functions and values of the

specific marine resources impacted, and that impacts on marine resources will not result in mitigation projects in freshwater resources.

Need for a Bank:

The need for the UMBT is discussed at the end of Section 2.0 of the prospectus. This section indicates that the UMBT is needed as a response to the priorities set forth in the Mitigation Rule, and to provide opportunities for watershed scale mitigation projects focusing on state-wide priorities. The UMBT is also needed to provide cost-effective mitigation based on project scale and site specific parameters, and to plan mitigation for large scale transportation projects or regions where numerous transportation projects are forecast. NMFS agrees that the establishment of a mitigation bank in Maine would provide mitigation opportunities and alternatives for achieving the goal of no net loss of wetlands on a watershed scale. However, NMFS believes it is important to emphasize that although preservation and enhancement are available options, the Mitigation Rule states that restoration should generally be the first option (Section 332.3 (a) 2), because the gains in terms of aquatic resource functions are greater, and where practicable preservation should be done in conjunction with aquatic resource restoration or enhancement (Section 332.3 (h) 2). The Mitigation Rule also encourages implementation of compensatory mitigation projects in advance of or concurrent with the activity causing the authorized impacts [Section 332.3 (m)]. The UMBT prospectus should provide guidance on how the timing of mitigation credit establishment will coincide with credit use. In addition, projects seeking to establish credit should be screened carefully to ensure they were not built for purposes other than mitigation.

Ownership and Long Term Management:

Section 3.3 indicates that MEDOT will provide perpetual protection of each bank site through various real estate instruments such as conservation easements, restrictive covenants, and management agreements. These real estate instruments will conform to current ACOE guidance, and must be approved by the IRT. The prospectus does not indicate if these real estate instruments will be a part of the SD Plans or developed as a separate agreement by MEDOT. NMFS feels that further explanation on how the development of these real estate instruments will coincide with the process for developing a BI and the SD Plans would clarify the process and strengthen the prospectus document.

Sponsor Qualifications:

MEDOT's qualifications are discussed in Section 9.0 of the prospectus. MEDOT has a Mitigation Unit experienced in meeting regulatory performance standards and permit requirements of wetland mitigation projects. This unit is accountable for the functional replacement of unavoidable wetland impacts caused by MEDOT projects. NMFS agrees that MEDOT is adequately qualified to sponsor this mitigation banking instrument, and manage the resulting mitigation site activities.

General Comments

As a member of the IRT, NMFS will review project plans and reports within their particular expertise and statutory mandate to the extent that time, resources and agency priorities allow, and based upon that review, provide appropriate guidance. However, NMFS has consultation responsibilities under Federal statutes, including the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Fish and Wildlife Coordination Act (FWCA) and the Endangered Species Act (ESA), and those consultations will be conducted as appropriate on a case by case basis. Participation in the IRT and/or review of this prospectus should not be construed as a substitute for these consultations. Nor should NMFS' participation in the Bank Review Team be considered to bind the agency to any future consultation recommendation or condition, or to circumscribe the nature and extent of any potential recommendations or conditions made as a result of that consultation.

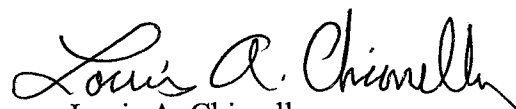
In addition, NMFS may provide conservation recommendations pursuant to these statutes at later phases of development of this BI or Site Development Plans (SD Plans) as appropriate. This process is guided by the requirements of our Essential Fish Habitat regulation at 50 CFR 600.905, which generally outlines each agency's obligation in this consultation procedure.

Conclusions

NMFS feels that the prospectus should clarify how the UMBT will comply with the priorities of the Mitigation Rule. Specifically, the prospectus should state that projects providing compensatory mitigation will be located within the same watershed as the impacted site, and impacts on marine or estuarine resources will be compensated for within the same marine ecological system. In addition, the prospectus should provide guidance on how the timing of mitigation credit establishment will coincide with credit use, and how the preference of restoration as a primary option for mitigation will be encouraged. Further explanation is also needed regarding how the UMBT and ILF will be combined, how the development of real estate instruments coincides with the development of BIs and the SD Plans, and how disputes over the need for remediation and approval of SD Plans would be resolved. The prospectus should also provide specific details regarding the required content of an SD plan and the criteria by which the IRT will judge these plans.

NMFS appreciates the opportunity to comment on this important action. If you have any questions about this letter, please contact Marcy Scott at 978-281-9108, or email Marcy.Scott@noaa.gov.

Sincerely,



Louis A. Chiarella

New England Field Office Supervisor
for Habitat Conservation

RECEIVED

JUL 14 2000

REGULATORY DIVISION

cc: Jeff Murphy, PRD, NMFS Field Office, Orono, ME
Wende Mahaney, USFWS, Old Town, ME
Ruth Ladd, ACOE, Concord, MA
Mark Kern, US EPA, Boston, MA
Deane VanDusen, MEDOT, Augusta, ME
James Cassida, ME DEP, Augusta, ME

Ladd, Ruth M NAE

From: Ron Huber [coastwatch@gmail.com]
Sent: Friday, July 11, 2008 1:20 PM
To: Ladd, Ruth M NAE
Subject: Maine Umbrella Mitigation Plan comments

Penobscot Bay Watch
POB 1871
Rockland ME 04841

7/10/08

Ruth Ladd
USACE
696 Virginia Rd.
Concord, MA 01742
978-318-8818
ruth.m.ladd@usace.army.mil

Re: MDOT UMB prospectus (NAE-2008-1703)

Dear Ms Ladd
Penobscot Bay Watch is a citizens' association dedicated to protecting and restoring the living marine resources of Penobscot Bay.

We are writing in strong opposition to the proposed umbrella mitigation bank with the entire State of Maine as a service area.

Our concern is that

1. The proposal is too vague for reasonable review. It lacks details required under federal Mitigation Rules, and as such is unacceptable
2. This plan would, in practice, use land already set aside in a Sears Island Joint Use deal as a property in the proposed mitigation bank.
3. No net loss of wetlands. The size of the proposed "net" so to speak, is too large. Under the proposed bank, destruction of eelgrass around Saerse Island could be mitigated by freshwater wetlands restoration in a geographically different area of Maine.
4. Conflict of interest. For MDOT to be both bank owner and customer makes a mockery of the decisionmaking process.
5. This further reduces community input potentials for wetlands oversight and protection by streamlining (weakening) the permit process.

We believe that this proposal should be outright denied; if not, at least a public hearing needs to be held to take testimony from informed parties.

Best wishes

Ron Huber, executive director
Penobscot Bay Watch
POB 1871
Rockland ME 04841

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Ron Huber
Penobscot Bay Watch
POB 1871
Rockland Maine 04841

Ladd, Ruth M NAE

From: Godfrey, Christine A NAE
Sent: Friday, July 11, 2008 9:04 AM
To: Ladd, Ruth M NAE
Subject: FW: Comments on UWMB by MDOT

Attachments: MDOT Proposal for a Umbre.doc; ATT9949773.htm



MDOT Proposal for ATT9949773.htm
a Umbre.doc ... (202 B)

Ruth,

FYI.
-Chris

-----Original Message-----

From: Susan Bartovics [mailto:bartovi@earthlink.net]
Sent: Thursday, July 10, 2008 1:35 PM
To: Godfrey, Christine A NAE
Subject: Comments on UWMB by MDOT

Christine A. Godfrey
Chief, Regulatory Division
New England District
United States Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Dear Chief Godfrey, July 10, 2008

Please find attached a comment regarding the Umbrella Wetlands Mitigation Bank proposal by the Maine Department of Transportation.

Thanks in advance for your attention in this matter, Becky Bartovics President Penobscot Bay Alliance

273 North Shore Road
North Haven, ME 04853

Cc: Ruth M. Ladd

Chief, Policy Analysis and Technical Support Branch

Regulatory Division

New England District Corps of Engineers

696 Virginia Road

Concord, MA 01742-1751

Comments on the MDOT Proposal for an Umbrella Wetlands Mitigation Bank

For some of the reasons detailed below, we believe that the Army Corps of Engineers should reject the application for the proposed Umbrella Wetlands Mitigation Bank by the Maine Department of Transportation and so we would like formally request a public hearing in the matter regarding this application by MDOT.

We request a formal Public Hearing in the matter relating to the proposal of an Umbrella Wetlands Mitigation Bank by the Maine Department of Transportation (MDOT)

1) An Umbrella Wetlands Mitigation Bank in Maine would be the first such

instrument in all of New England. For that reason alone, a public hearing is necessary. It is precedent setting for the entire region. What we do here in Maine will have consequences throughout New England so it behooves us to create the highest possible standards for such an instrument. Comparatively, New England is a small region with greater wetland losses just due to greater human densities. Therefore this proposal bears increased scrutiny. One would hope that the Army Corps of Engineers would encourage public participation in order to refine and improve the effectiveness of its purview.

2) Maine DOT has proposed using bioregions as service areas for a mitigation bank rather than watershed based service areas as recommended by the federal government. These areas are too large to effectively preserve the functions and values in local ecosystems that wetlands provide. A bioregion approach is sufficiently different from conventional practice to require a public hearing.

3) There has been no watershed planning to guide the process of compensatory mitigation. No functions and values have been identified for wetlands that may be destroyed, as no sites are involved in the proposal. We believe that these three reasons also warrant a public hearing.

As pertains to the application for an Umbrella Wetlands Mitigation Bank by MDOT, we respectfully submit that the proposal has not been adequately developed and should be rejected.

1) Nationally, wetland habitat losses have resulted in serious environmental and economic consequences. Whether one looks at the horrifying flooding along the entire length of the Mississippi, caused largely by human disregard for wetland functions, or one looks to local fisheries where stock have seriously been reduced, there have been significant impacts to local communities, their economies and aquatic ecosystems directly related to destruction of wetlands. The very fact that MDOT does not propose avoidance and minimization as primary goals and also does not propose design requirements to enforce and monitor a program that provides wetland habitat compensation implies disregard for the impact of loss on the environment. Creating a wetland mitigation bank prior to finding need effectively puts the cart before the horse.

2) MDOT has expressed its desire to streamline and simplify the permitting process by use of mitigation banking. While it may seem expedient to speed up the process of developing projects in the short run, the costs associated with improperly protecting our resources are likely to have far a greater impact on our pocketbooks long term. Again we cannot afford to lose these very important resources. Net loss is not acceptable anywhere in the service areas and certainly not on the coast.

3) No watershed planning is proposed to provide performance standards for or technical feasibility of a mitigation bank which gives little confidence that enforcement is likely, much less part of the overall expectations for future management.

4) No overall methods for verification and monitoring of mitigation areas have been proposed. The Corps itself states that only 15 percent of its sites are monitored annually and that by a single visit per year. MDOT expects that other agencies will hold easements, without establishing any benchmark for performance. Wetland mitigation banking has a poor record of efficacy in which the actual amount of wetland impacts offset is only about 20 percent, meaning that the section 404 permitting process has been fostering an 80 percent net loss of wetlands. (National Wetlands Newsletter 23). Since MDOT has built more than 85 mitigation sites, (as per Deane Van Deusen) one would assume that The Corps would require an evaluation of the success rate of these sites in order to determine if MDOT is capable of performing the necessary development and management of restoration, creation and enhancement projects within such a bank structure. Maine cannot afford to lose the functions and values of wetlands that are so critical to local economies and ecologies.

5) It is our understanding that MDOT intends to rely heavily on preservation on some sites. Preservation will not allow for no net loss (NNL) which is national policy. The Clean Water Act sets the bar higher at restoring and

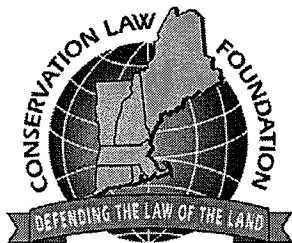
maintaining the chemical, physical and biological integrity of the nations waters. If the MDOT proposes Sears Island as a protected or preserved property, it should be noted that the Consensus Agreement of the Sears Island Planning Initiative signed in April of 2007 and endorsed by Governor Baldacci clearly removes any threat of development from the 600 acres designated to be protected so it would not be available for mitigation banking.

6) The conflict of interest inherent in the proposed MDOT plan. which allows the agency to both operate the bank as well as make determinations of its use, gives little hope that wetland functions will be maintained. There are insufficient checks and balances built into the overall plan to assure the protection of the public interest.

7) Finally, and most importantly, no sites have has been proposed within this application. Since it is required to propose sites to be in compliance with the Rules for mitigation, the current proposal should be rejected.

There is reason behind the Clean Water Act and the 404 Guidelines to protect wetlands habitats They are very important to the functioning of any hydrological systems. Given the relatively little attention being paid to the costs to the diversity in the aquatic environment, and its direct impact on local economies we believe that the Army Corps of Engineers should hold a public hearing on the MDOT proposal and that ultimately they should reject the application.

Respectfully submitted,
Becky Bartovics
President
Penobscot Bay Alliance
273 North Shore Road
North Haven, ME 04853



CONSERVATION LAW FOUNDATION

July 10, 2008

Ruth M. Ladd
U.S. Army Corps of Engineers
Maine Project Office
675 Western Avenue #3
Manchester, Maine 04351

Re: Proposed Umbrella Wetland Mitigation Bank Prospectus

Dear Ms. Ladd,

Please accept these comments on behalf of the Conservation Law Foundation (CLF) regarding the Maine Department of Transportation's (DOT) proposal for an Umbrella Wetland Mitigation Bank for Transportation (UMBT).

Due in large part to the lack of success of previous on-site and single-project off-site wetland mitigation efforts, CLF supports the general concept behind wetland mitigation banks. However, one overriding concern with such banks is ensuring the existence of an adequate level of public participation and comment in the decision making process as to what is and is not appropriate for either "deposits" or "withdrawals" from mitigation banks. Beyond the obvious need for continued compliance with section 404 of the Clean Water Act, 33 U.S.C. § 1344 (2000), a mitigation bank must not become a procedural device to ignore the safeguards ensuring thorough review of all proposed mitigation or as a reason in and of itself that supports any activity leading to a loss of wetlands. To that end, any "deposit" in the proposed UMBT must provide the opportunity for both procedural and public involvement and be subject to the same exacting administrative and/or judicial review process, where applicable.

Another area of concern is the vast size of the Bailey's Ecoregions that DOT proposes using in the UMBT prospectus, as opposed to a more concentrated watershed approach. While we recognize that on-site mitigation is not always a viable alternative, the current proposal would allow mitigation in areas far too remote from the filling site to offset the damage to existing wetlands, which would undermine the goals of wetland mitigation. This aspect of the proposed UMBT is very troubling and we reiterate the importance of very careful review of site specific mitigation deposit applications.

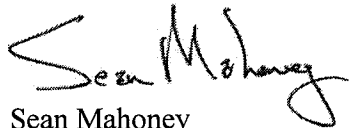
Conservation Law Foundation

I also want to take this opportunity to express CLF's displeasure with DOT's decision to treat the restoration of Sherman Marsh as wetland mitigation to be deposited into the proposed UMBT. Maine's tidal wetlands encompass only 79 square kilometers, or approximately 19,500 acres,¹ as compared to the approximately 5 million acres of freshwater wetlands.² When viewed in this context, the importance of restoring coastal tidal wetlands is self-evident. For precisely that reason, we strongly supported and undertook efforts to raise and secure the necessary funding for DOT's initial decision to restore Sherman Marsh and to treat that restoration as a net-gain of wetlands area. The reversal of that decision by DOT and its current intent to use the Sherman Marsh restoration project to offset future filling or destruction of coastal wetlands is troubling to say the least. We recognize that this UMBT proposal does not extend to site specific designations, but we want to formally put in the record that CLF is opposed to this change in direction.

Furthermore, CLF is very concerned with the precedent that using Sherman Marsh as mitigation credits will set for other wetlands and how other future mitigation credits are established. Allowing wetlands created by a natural occurrence to be credited to the UMBT to offset further wetland filling is unreasonable and circumvents the "no net loss" goal of wetland mitigation. Mitigation credits can only be established through restoration, creation, enhancement and preservation. This leaves no room for a fifth option of naturally occurring events, such as flooding.

CLF appreciates the opportunity to comment on the proposed UMBT and strongly urges you to take these points into consideration.

Very truly yours,



Sean Mahoney
VP and Director, Maine Advocacy Center
Conservation Law Foundation

¹ See H. A. Jacobson et al., *1987 Distribution and Abundance of Tidal Marshes Along the Coast of Maine*, ESTUARIES, Vol. 10, No. 2, June 1987, p 128-131. Also available at http://estuariesandcoasts.org/cdrom/ESTU1987_10_2_126_131.pdf

² United States Geological Survey National Water Summary on Wetlands Resources, available at http://water.usgs.gov/nwsum/WSP2425/state_highlights_summary.html

Ladd, Ruth M NAE

From: Vivian Newman [newviv@roadrunner.com]
Sent: Thursday, July 10, 2008 6:55 PM
To: Ruth.M. Ladd@usace.army.mil
Subject: comments on MDOT UWMB

Importance: High

Christine A. Godfrey
Chief, Regulatory Division
New England District
United States Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Dear Ms. Godfrey:

Re: Public Notice NAE-2008-1703 -
Proposed Maine Department of
Transportation's Umbrella Wetland
Mitigation Bank (UWMB)

I am writing to urge that the Corps reject the proposed MDOT UWMB forthwith. Please enter my comments into the official record.

As a taxpayer and longtime advocate for wetlands protection, I consider this proposal put forth by state and federal public officials to have hit a new low. The proposal for an umbrella "of, by, and for MDOT" as broad and undefined as this is the functional equivalent of a pig in a poke and rife with conflict of interest -- is a far cry from "of, by, and for" the interested public seeking protection and restoration of the functions and values of wetlands. At best, this prospectus is far from ready for prime time, as it lacks essential information and analysis. It is certainly not fit to be the first for New England that would presumably set standard.

Although I attended the informational meeting held in Augusta on June 19, 2008 I found very little clarification or answers to many of the specific issues raised there.

How, for example, does this proposal fit with this 2008 rule:

" This rule improves the planning, implementation and management of compensatory mitigation projects by emphasizing a watershed approach in selecting compensatory mitigation project locations, requiring measurable, enforceable ecological performance standards and regular monitoring for all types of compensation and specifying the components of a complete compensatory mitigation plan, including assurances of long-term protection of compensation sites, financial assurances, and identification of the parties responsible for specific project tasks."

(DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Parts 325 and 332

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 230

[EPA-HQ-OW-2006-0020; FRL-8545-4]

RIN 0710-AA55

Compensatory Mitigation for Losses of Aquatic Resources)

Over the past decade there have been innumerable papers identifying the weaknesses in wetlands mitigation generally, national conferences on mitigation banking, and guidelines and criteria put forth by wetlands scientists and regulators (e.g. Environmental Law Institute, National Research Council, Association of State Wetlands Managers).

As Earthjustice has noted, the increasingly convoluted approach to water and wetland protection continues to result in what they describe as "mitigated disasters". We should instead refocus our attention and resources on avoidance and minimization of harm to our aquatic ecosystems.

Thank you for the opportunity to comment.

Sincerely,

Vivian Newman
POB 388
South Thomaston ME 04858
newviv@roadrunner.com

10 July 2008

Ladd, Ruth M NAE

From: Kyla Bennett [biojustus@comcast.net]
Sent: Wednesday, July 09, 2008 8:04 PM
To: Ladd, Ruth M NAE
Cc: Schweisberg.Matt@epamail.epa.gov; Wende_Mahaney@fws.gov
Subject: Comments on PN# NAE-2008-1703

SENT BY E-MAIL AND REGULAR MAIL

July 10, 2008

Ruth M. Ladd
U.S. Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

RE: Comments on NAE-2008-1703, Maine Department of Transportation Umbrella
Mitigation Bank Prospectus

Dear Ms. Ladd,

Thank you for the opportunity to comment on the Maine Department of Transportation (MEDOT) Umbrella Mitigation Bank Prospectus. Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues. PEER represents thousands of local, state and federal government employees nationwide; our New England chapter is located outside of Boston, Massachusetts.

PEER believes that MEDOT's prospectus is too vague, and does not comply with the U.S. Army Corps of Engineer's (Corps') April 10, 2008 Mitigation Rule (hereinafter the "Rule," 33 CFR Part 332). As such, we believe that the Corps should determine that the prospectus does not, as written, have potential for providing appropriate compensatory mitigation for Department of the Army permits. Our specific comments are set forth below.

Prospectus is incomplete and violates 33 CFR Part 332.. 33 CFR Part 332.8(d)(2) (the April 10, 2008 "Mitigation Rule"), which is applicable to umbrella mitigation banks, states that a mitigation bank prospectus must provide a summary of the following: 1) the objectives of the bank; 2) how the bank will be established and operated; 3) the proposed service area; 4) the need for the bank and the technical feasibility of such bank; 5) ownership and long-term management of the bank; 6) qualifications of the sponsor; 7) the ecological suitability of the site to achieve the objectives of the bank (including the biological, chemical, and physical characteristics of the bank site); and 8) assurance of water rights to support long-term sustainability of the bank. In the Public Notice for MEDOT's Umbrella Mitigation Bank prospectus, the Corps states:

Since there are no specific sites proposed yet because the umbrella concept has not been approved, the ecological suitability and long term sustainability of sites will only be addressed in subsequent project submittals after the sponsor has been notified if and when a draft banking instrument can be developed. Public Notice for NAE-2008-1703, June 10, 2008, page 1.

This is not consistent with the Mitigation Rule. There is a mandatory duty to include the information about ecological suitability and water rights. In fact, Section 332.8(h) states that for umbrella mitigation banks, sites must be included "using the procedures in paragraph (g)(1)." Paragraph (g)(1)

states that the "approval of umbrella mitigation bank sites ...must follow the appropriate procedures in paragraph (d) of this section," unless the district engineer determines it should be streamlined. Paragraph (d) of this section states:

The prospectus must provide a summary of the information regarding the proposed mitigation bank ... at a sufficient level of detail to support informed public and IRT comment...A complete prospectus includes the following information:

- i. The objectives of the proposed mitigation bank or in-lieu fee program.
- ii. How the mitigation bank or in-lieu fee program will be established and operated.
- iii. The proposed service area.
- iv. The general need for and technical feasibility of the proposed mitigation bank or in-lieu fee program.
- v. The proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites.
- vi. The qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor.
- vii. For a proposed mitigation bank, the prospectus must also address:

- A. The ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and

- B. Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank (33 CFR Part 332.8(d)(2)).

Therefore, the prospectus proposed by MEDOT is incomplete, and it does not provide a mitigation banking site which can be examined for its ecological suitability. Moreover, the prospectus does not include any discussion of assurance of sufficient water rights. It does not appear that the Rule contemplates approval of a prospectus without at least one site included. Provisions exist in the Rule to add sites to an approved plan, but the language of the Rule indicates that a complete prospectus must have at least one site. Without it, neither the public nor the IRT would have enough information to evaluate the merits of the prospectus. As MEDOT's proposed prospectus is incomplete, we urge the Corps to reject it on these grounds.

The prospectus incorrectly assumes that mitigation banking is to be given priority over other types of mitigation. MEDOT's prospectus states that the Mitigation Rule gives "priority" to mitigation banks over in-lieu mitigation and permittee-responsible mitigation. Specifically, MEDOT states that one of its goals in establishing an umbrella mitigation bank is that it allows them to:

follow mitigation priorities established by ...the Rule...This ruling gives priority to mitigation banking followed by in lieu fee and permittee-responsible wetland compensation options (Prospectus, page 5).

This interpretation of the Rule is incorrect. The Rule simply establishes criteria and standards for all types of compensatory mitigation. The district engineer is given discretion as to which type of compensatory mitigation has the most likelihood for success, and what is environmentally preferable. The Rule states that the district engineer should give preference to a mitigation bank only when permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and type of credits already available (Part 332.3(b)(2)). Moreover, the Rule states that the district engineer should give in-lieu fee programs preference when the in-lieu fee program has released credits available from a specific approved in-lieu fee project, or give permittee-responsible mitigation preference when the project would restore an outstanding resource. Therefore, any preference to the type of mitigation used is case by case, and not an overall preference for mitigation banks.

MEDOT's goal of "compensating in advance" is unclear. MEDOT's prospectus also states one of its goals is to "compensate in advance" for wetland losses. This will only occur if the mitigation bank is in place and functioning before the wetlands alteration occurs, and it is not clear from the prospectus that this will be the case. In other words, the prospectus is so vague that it is impossible to tell whether this goal will be met with this proposed umbrella mitigation bank.

There is no evidence that MEDOT has the qualifications to adequately construct and sponsor a bank. Wetland mitigation is difficult, and more often than not, it fails. In fact, in 2003, the Corps studied the success of wetland mitigation throughout New England, and found that only 17% of the sites examined were considered to be adequate functional replacements of the wetlands filled (Success of Corps-Required Wetland Mitigation in New England, April 3, 2003, page 11; <http://www.nae.usace.army.mil/reg/wholereport.pdf>). MEDOT states in its prospectus that it has "built some 85+ [wetland mitigation] sites" over 25 years, but the prospectus gives no indication of how successful those 85+ sites were. Constructing wetland mitigation sites is not the same thing as replacing wetlands functions and values. Therefore, PEER urges the Corps to assess MEDOT's success at wetland mitigation before it approves this prospectus.

Use of Sears Island as mitigation bank is nonsensical. Although the prospectus does not mention any potential mitigation bank sites, MEDOT released a document on January 31, 2008 entitled "Maine Department of Transportation Federal Wetland Mitigation Bank Prospectus: State-Wide, Single-Client." This document clearly stated MEDOT's intention that "as many as 600 acres of Sears Island become the foundation for a federal mitigation bank via execution of a conservation easement" (page 15). They also state that only 3/4 of an acre of wetland restoration opportunities exist on the island, and that the primary goal would be to preserve a portion of Sears Island in exchange for filling wetlands elsewhere in the state. What is even more disturbing is MEDOT's plan to use the remaining 341 acres of the island for a port. The Corps is well aware that in the early 1990s, MEDOT and its consultants told numerous federal agencies that there were no wetlands on the island - and then proceeded to illegally fill more than 10 acres of them. The U.S. Environmental Agency (EPA) filed a civil enforcement action against MEDOT and its contractors. MEDOT settled the case for \$800,000 worth of wetland restoration and preservation efforts. The original plan to construct a cargo port on Sears Island was wisely withdrawn by MEDOT due to the federal agencies overwhelming concerns about the environmental impacts and MEDOT's inability to mitigate for them.

PEER believes that MEDOT does indeed have a mitigation banking site in mind: Sears Island. PEER also believes that the prospectus before us today does not mention Sears Island because of the controversy surrounding MEDOT's role in the past enforcement action and permit application for a port on Sears Island. However, if the Corps approves this prospectus, it will encourage MEDOT to try, once again, to develop Sears Island. We therefore urge the Corps to require MEDOT to put all its cards on the table, and allow both the public and the IRT to review the adequacy of preservation of part of Sears Island as a mitigation bank.

Conclusion. Due to the fact that MEDOT's proposed prospectus does not include all the information required by the Mitigation Rule, together with the fact that there is no evidence in the record to indicate MEDOT's qualifications to be a bank sponsor, we urge the district engineer to make the determination that the proposed mitigation bank does not have the potential for providing appropriate compensatory mitigation for District of Army permits.

Please feel free to contact me if you have any questions.

Sincerely,

Kyla Bennett

Kyla Bennett, Director
New England PEER
P.O. Box 574
North Easton, MA 02356
508-230-9933
nepeer@peer.org
web site: www.peer.org

Friends of Merrymeeting Bay

P.O. Box 233
Richmond, ME 04357

7/10/08

Ruth Ladd
USACE
696 Virginia Rd.
Concord, MA 01742
978-318-8818
ruth.m.ladd@usace.army.mil

Via E-Mail

Re: MDOT UMB prospectus (NAE-2008-1703)

Ruth,

Please accept our comments here regarding the proposed Umbrella Mitigation Bank for Maine. Merrymeeting Bay is located at the junction of 6 rivers draining nearly 40% of Maine or about 10,000 square miles including the Kennebec and Androscoggin drainages. The Bay itself is a freshwater tidal riverine system including about 9,000 acres of tidal wetland. While we are not in the neighborhood of Sears Island, a subject of much of the mitigation discussion, we do know wetlands, we do know development issues and we are a member of the Maine Land Trust Network.

We were present at the DOT meeting a few weeks ago in Augusta and have reviewed comments submitted by Jody Spear and by the Islesboro Land Trust. They both have brought forward excellent points and rather than reiterate them it is far more expedient to go on the record as agreeing with them. This being said, a few points of exceptional concern to us are:

- 1. The vagueness of the proposal [as you yourself stated]. You were "selling" a concept, without details that are required by 33 CFR Section 332.8(d)(2) (from the April 10, 2008 "Mitigation Rule"), which is applicable to umbrella mitigation banks, states that a mitigation bank prospectus *must* provide a summary of the following:
 - 1) the objectives of the bank; 2) how the bank will be established and operated; 3) the proposed service area; 4) the need for the bank and the technical feasibility of such bank; 5) ownership and long-term management of the bank; 6) qualifications of the sponsor; 7) the ecological suitability of the

site to achieve the objectives of the bank (including the biological, chemical, and physical characteristics of the bank site); and 8) assurance of water rights to support long-term sustainability of the bank.

The Corps states in the Public Notice that: "Since there are no specific sites proposed yet because the umbrella concept has not been approved, the ecological suitability and long term sustainability of sites will only be addressed in subsequent project submittals after the sponsor has been notified if and when a draft banking instrument can be developed."

This is not in compliance with the Mitigation Rule. There is a mandatory duty to include the information about ecological suitability and water rights. In fact, Section 332.8(h) states that for umbrella mitigation banks, sites must be included "using the procedures in paragraph (g)(1)." Paragraph (g)(1) states that the "approval of umbrella mitigation bank sitesmust follow the appropriate procedures in paragraph (d) of this section," unless the district engineer determines it should be streamlined. Paragraph (d), quoted above requires the *prospectus* to include the information that is missing from MDOT's document. Therefore, the prospectus is incomplete, and must be rejected on these grounds.

2. It was made clear at the meeting that this UMB is really all about maximizing a "take" on Sears Island. There are many issues around the Sears Island deal that need to be resolved but even if it is finalized, we see a problem with a "double-dipping" when land set aside for protection under a "separate" arrangement, is also used as a deposit in the proposed mitigation bank.

3. No net wetland loss. Despite the well-known and acknowledged failures of many artificial wetlands, utilizing pre-existing wetlands for credits does not support the no loss requirement.

4. Conflict of interest. The DOT cannot with a straight face be both bank owner and customer.

5. As Deanne Van Dusen admitted at the DOT meeting, this proposal is about streamlining the permit process and we are uncomfortable with that. You said the ACE mitigation officers cannot adequately keep up with maintenance and inspection of current projects and so far, nationwide, there is little to show for success in the banking arena and with long-range success of mitigation project in general. It's tough to rebuild Mother Nature.

We can only conclude by quoting Steve Miller from the ILT:

After reading the prospectus and background material, we feel strongly that the time is not ripe for this bank. Any one of several specific reasons enumerated in the [referenced comments] would be cause for denying the proposal; considering all of the reasons taken together, we believe there is an overwhelming preponderance of evidence to deny.

Should the Corps, even in the face of such evidence, decide to proceed, we urge you to conduct a full and open public hearing on the Prospectus now, as well as at any other decision points along the way.

Thank you very much.

Sincerely,

Ed Friedman, Chair
207-666-3372
edfomb@zwi.net
www.friendsofmerrymeetingbay.org

July 10, 2008

Christine A. Godfrey
Chief, Regulatory Division
New England District
United States Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Re: Public Notice NAE-2008-1703

Dear Ms. Godfrey:

These comments are on behalf of the Maine Chapter of the Sierra Club in response to the request for public comment on the June 10, 2008 "Maine Department of Transportation Umbrella Wetland Mitigation Bank Prospectus." The Maine Chapter of the Sierra Club is strongly opposed to any wetland mitigation measures that undermine the Clean Water Act's protections of our nation's wetlands and Congress's commitment to "swimmable and fishable" waters. The proposed prospectus does not provide sufficient information and does not comply with the requirements of the ACE's new mitigation rule and should be rejected.

In order to satisfy the Section 404(b) guidelines and the provisions of the Clean Water Act, Maine Department of Transportation (MDOT) Mitigation Bank Prospectus must comply with applicable Department of the Army compensatory mitigation regulations at 33 CFR Part 332. The MDOT's Federal Umbrella Mitigation Bank for Transportation (UMBT), as detailed in the prospectus contained in the June 10, 2008 Public Notice NAE-2008-1703 does not contain several of the elements that are clearly required in the regulations. These deficiencies are explained below.

Pursuant to §332.8(d)(2) of the regulations, "the prospectus must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment." Section 332.8(d)(2) further provides that the following elements must be included in a complete prospectus:

- the objectives of the proposed bank;
- how the bank will be established and operated;
- the proposed service area;
- the general need for and technical feasibility of the bank;
- the proposed ownership arrangements and long-term management strategy;
- the qualifications of the sponsor;

- the ecological suitability of the site to achieve the objectives of the bank; and
- the assurance of sufficient water.

The current prospectus provides very limited information and does not address all of these mandatory elements. It is also difficult to see how this prospectus is consistent with the watershed approach called for in the regulations. [See §332.8(b)(3)]. There is no discussion of the basis for the proposed state-wide service area of the bank and it is difficult to see how the District Engineer can conclude that appropriate compensatory mitigation would be provided by those mitigation projects.

First off, the prospectus fails to include information on the ecological suitability of the proposed bank site, or identify the initial bank site(s) at all. As noted above, information about the initial site(s) must be included for a prospectus to be complete. [See §332.8(h)] Furthermore, the preamble to the April 10, 2008 Compensatory Mitigation for Losses of Aquatic Resources: Final Rule [73 FR 19594-19705] clearly directs that an umbrella mitigation bank must be established on the basis of a defined site. “The proposed rule, as well as the final rule, requires a mitigation bank site to be included in the initial mitigation banking instrument. The mitigation banking instrument becomes an umbrella instrument when additional compensatory mitigation project sites are added.” [§332.8(h)][§230.98(h).] Until information on the suitability of the initial site(s) is provided, the District Engineer will not be able to determine if the bank has the potential to provide appropriate compensatory mitigation for activities authorized by ACE permits. The District Engineer must be able to make that determination through the initial evaluation, before allowing MDOT to draft an instrument. [§332.8(d)(5)(ii).] Without a full assessment of the ecological suitability of the proposed bank site, the prospectus is simply incomplete and should be rejected.

Moreover, the prospectus fails to provide information on the need for the bank. The hierarchy provided by the Clean Water Act requires that MDOT first avoid and then minimize impacts to aquatic resources. It is not clear what impacts MDOT is considering before-the-fact that will not be avoidable and therefore require compensation. It is also unclear the time frame over which this prospectus would apply. As written, MDOT’s prospectus seems like a blank check for future wetland destruction. Additional information is necessary to evaluate this proposal. This information will help determine if and where there is an expected need for compensation, including compensation through bank credits.

The prospectus does not provide sufficient information on the qualifications of the sponsor -- MDOT. There is no discussion of MDOT’s record with prior compensatory mitigation projects. Sears Island in Waldo County and Jones’ Marsh in Hancock County are only two examples of MDOT compensatory mitigation projects with dismal results. The only information provided is that MDOT has operated a state-approved wetland mitigation bank, which is administered by Maine DEP. There is insufficient information to assess MDOT’s competence and track record in its operation of the state mitigation bank.

The Maine Chapter of the Sierra Club respectfully requests that the District Engineer find that: 1.) the prospectus is not complete; and 2.) that it cannot be determined on the basis of the information provided by MDOT that the proposed bank has the potential for providing appropriate compensatory mitigation for activities authorized by ACE permits.

Sincerely yours,

Kenneth S. Cline
Maine Chapter of the Sierra Club Conservation Chair
31 Ledge lawn Ave.
Bar Harbor, ME 04609

July 9, 2008

Christine A. Godfrey
Chief, Regulatory Division
New England District
United States Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Re: Public Notice NAE-2008-1703

Dear Ms. Godfrey:

I am writing on behalf of the Sierra Club's National Wetlands Working Group in response to the request for public comment on the "Maine Department of Transportation Umbrella Wetland Mitigation Bank Prospectus," published on June 10, 2008. These comments are being submitted to supplement the comments being submitted by the Maine Chapter of the Sierra Club. The Sierra Club is committed to ensuring that Clean Water Act protections are afforded to all of the nation's wetlands and other waters to the full extent of the law and regulations. Our organization has been a strong advocate for reform of federal agency wetland mitigation policy for many years, and many of our members participated in the most recent federal mitigation rulemaking. We are strongly interested in assuring that the new mitigation rule is implemented effectively and properly.

As I will discuss below, the proposed prospectus is seriously deficient, and fails to comply with applicable Department of the Army compensatory mitigation regulations at 33 CFR Part 332. As a result, we respectfully request that you determine that the proposed mitigation bank has not been shown to have the potential for providing appropriate compensatory mitigation for Department of the Army (DA) permits.

The Maine Department of Transportation (MaineDOT) is proposing to establish a Federal Umbrella Mitigation Bank for Transportation (UMBT), as detailed in the prospectus contained in the June 10, 2008 Public Notice NAE-2008-1703. However, the prospectus fails to contain a number of the elements that are clearly required in the regulations, and further described in the preamble to the April 10, 2008 Compensatory Mitigation for Losses of Aquatic Resources: Final Rule [73 FR 19594-19705]. As indicated in §332.8(d)(2) of the regulations, "the prospectus **must** [emphasis added] provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment." And §332.8(d)(2) provides that the following elements are to be included in a complete

prospectus: the objectives of the proposed bank; how the bank will be established and operated; the proposed service area; the general need for and technical feasibility of the bank; the proposed ownership arrangements and long-term management strategy; the qualifications of the sponsor; the ecological suitability of the site to achieve the objectives of the bank; and the assurance of sufficient water.

The current prospectus provides very limited information. There is no discussion of the basis for the proposed state-wide service area of the bank, and the 19 biophysical regions where mitigation projects are anticipated, and so it is unclear how the District Engineer can conclude that appropriate compensatory mitigation would be provided by those mitigation projects, and would be consistent with the watershed approach called for in the regulations. [see §332.8((b)(3)].

The prospectus fails to provide information on the general need for the bank. What impacts to aquatic resources does MaineDOT anticipate being unable to avoid for which compensatory mitigation will be required, where and over what time-frame? This information will help determine if and where there is an expected need for compensation, including potentially via bank credits.

The prospectus fails to provide sufficient information on the qualifications of the sponsor. What is MaineDOT's record with prior compensatory mitigation projects? The only information provided is that MaineDOT has operated the only state-approved wetland mitigation bank, which is administered by Maine DEP. There is no information provided concerning the establishment and operation of that bank, the types of credits provided by that bank, monitoring results and other information necessary to judge MaineDOT's qualifications to administer the proposed bank to provide compensation for DA permitted activity.

The most pronounced deficiency in the prospectus is the failure to comply with the requirement to include information on the ecological suitability of the proposed bank site, or identify the initial bank site(s) at all. Information about the initial site(s) must be included for a prospectus to be complete, as provided in §332.8(h), and further clarified in the preamble, which very clearly directs that an umbrella mitigation bank must be established on the basis of a defined site. "The proposed rule, as well as the final rule, requires a mitigation bank site to be included in the initial mitigation banking instrument. The mitigation banking instrument becomes an umbrella instrument when additional compensatory mitigation project sites are added (see §332.8(h)[§230.98(h)])" Until sufficient information on the suitability of the initial site(s) is provided, it does not appear that the District Engineer will be able to determine if the bank has the potential to provide appropriate compensatory mitigation for activities authorized by DA permits. And the District Engineer must be able to make that determination through the initial evaluation, before informing MaineDOT that it can proceed to draft an instrument. [§332.8(d)(5)(ii).

We respectfully request that the District Engineer find that the prospectus is not complete and that it cannot be determined on the basis of the information provided thus far by MaineDOT that the proposed bank has the potential for providing appropriate

compensatory mitigation for activities authorized by DA permits. We appreciate the opportunity to provide these comments.

Sincerely yours,

Robin Mann
National Wetlands Working Group
Sierra Club
266 Beechwood Drive
Rosemont, PA 19010

Ladd, Ruth M NAE

From: jody spear [jodyspear@hotmail.com]
Sent: Wednesday, July 09, 2008 5:02 PM
To: Ladd, Ruth M NAE
Subject: MDOT UMBT Prospectus

Dear Ms. Ladd:

RE: MDOT UMBT prospectus (NAE-2008-1703)

The DOT application cannot be taken seriously, first and foremost, because no mention is made of a specific site. The Rule that governs this procedure (33 CFR Sec. 332.3[b][2]) states: "... development of mitigation banking requires site identification in advance." In view of this clear provision, stated in several places in the Rule, the non sequitur on page 1 of the ACOE public notice preceding the prospectus is particularly vexed: "... there are no specific sites proposed yet because the umbrella concept has not yet been approved ..." and "...the ecological suitability of sites will be addressed only in subsequent project submittals after the sponsor has been notified if and when a draft banking instrument can be developed."

ACOE must reject any application that fails to identify a site.

Of course we know that behind this prospectus is a plan to make Sears Island the first deposit in a federal UMBT -- the first site on which DOT destruction of wetlands would require mitigation. And we know that "preservation" is the kind of mitigation DOT has in mind because at a Joint Use Planning Committee meeting of 14 March 2008, when DOT brought up the concept of a UMBT, they referred to "preservation as a mitigation tool." But "preservation" does not result in a [net] gain of aquatic resource area or functions," by definition (333.2), so DOT's plan is antithetical to the no-net-loss provision of Sec. 404 of the Clean Water Act.

Although DOT is characteristically vague in defining how its UMBT would be managed, the prospectus does mention (under 3.3) "management [by] restrictive covenants with third-party enforcement or conservation easements" and (under 6.0) "a third-party stewardship organization [adopting] the responsibilities of long-term site management." And indeed the Rule (332.7) has a provision for "long-term protection ... through ... conservation easements held by ... conservation organizations...." The Sears Island example demonstrates how DOT would shift management obligations to a third party and, in the process, attempt to offset destruction of wetlands in port construction simply by the existence of a conservation easement on the island. (The opportunities for wetlands "restoration" on Sears Island are negligible, and Commr. David Cole has stated that mitigation off the island would be "very expensive.")

This interpretation of the Rule -- circumvention of Sec. 404 in a joint-use "preservation" stratagem undertaken with conservation partners -- is unacceptable, as are other "discretionary" policies that undermine CWA.

Deane van Dusen refers to "streamlining the Sec. 404 permit process" in defining the first of DOT's goals in the prospectus, but undermining or

circumventing of CWA can be read into every context in which "streamlining" appears. Sec. 332.8(g)(1) seems to say that if the District Engineer authorizes "streamlining" of UMBT application approval, critical requirements (1-8 under 332.8[d][2]) can be bypassed. The prospectus states (under 3.2 -- Site Development Plan) that "... as long as the initial plan concepts are approved by IRT with confirmation from the Corps District Engineer [,] ... project sites can be built in advance of the UMBT deposit [.]" This too sounds like "streamlining" -- and it violates the most essential safeguards we have on the books to protect water quality. Not acceptable.

The paragraph defining streamlining (332.8[g][2]) is not explicit enough to confirm what I suspect to be true, but in any case, the repeated mention of discretion/flexibility to be exercised by the District Engineer is cause enough for concern. Where is there opportunity for public participation? It would appear that once the UMBT is in place, the District Engineer and the IRT hold all the power. Not acceptable.

Deane van Dusen should not continue to maintain that the Rule gives priority to mitigation banks. Sec. 332.3(b)(2) cites a preference to use mitigation-bank credits WHEN KEY CONDITIONS HAVE BEEN SATISFIED (rigorous scientific/technical analysis and site identification in advance) but goes on to say that other programs may be preferred, depending on circumstances that make an in-lieu-fee program or a permittee-responsible project more appropriate than mitigation-banking credits.

Mitigation banking has an abysmal record wherever it has been tried. It is comparable in concept with carbon-offset trading, which has been shown to be ineffectual. Moreover, DOT's own history of wetlands "restoration" (not least the monumental mess they made on Sears Island) makes the agency an inappropriate sponsor of a mitigation bank. (Review of DOT's mitigation of the 85+ sites it claims to have "built" should be required to assess its competence.)

Conspicuously missing from the prospectus is any mention of avoidance and minimization of damage to wetlands -- options that must be considered before choosing mitigation in the permitting process to destroy sensitive areas. Also of signal importance are the requirements that MDOT assure ecological suitability [of a specific site] and water rights to support long-term sustainability -- likewise the completion of "rigorous scientific and technical analysis" of watershed and marine-ecosystem needs, typically associated with mitigation banks (332.3 [b][2]). The ecoregional approach DOT proposes cannot achieve the meaningful mitigation that a smaller-scale watershed approach -- emphasized in the Rule -- is intended to do.

Because these points are not addressed in the prospectus -- and because the need for a mitigation bank is not demonstrated -- the application should be considered invalid.

What the state does NEED from its transportation engineers, of course, is maintenance of existing infrastructure, not new construction of highways and ports -- industrial projects that degrade irretrievably the quality of place on which Maine's tourist industry and creative economy depend.

A valid UMBT would have to provide appropriate compensatory mitigation for DA permits; DOT's proposed mitigation bank does not. The application should be denied. (Should it not be denied, public hearings are in order.)

Jody Spear, Harborside 04617

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Ladd, Ruth M NAE

From: M. Fisette [mff01@roadrunner.com]
Sent: Monday, June 30, 2008 8:05 PM
To: Ladd, Ruth M NAE
Subject: Public Commnet, File No. NAE-2008-1703, Umbrella Mitigation Bank from Maine DOT

Dear Ruth Ladd,

This public comment is to register my strong objection to this proposal. It just seems like a way to circumvent laws like the NRPA, Clean Water Act, and River and Harbor Act. A statewide service area would be way too broad and not acceptable. No need is established at all.

I also respectfully request a formal public hearing be held in Maine before any positive ruling on this misguided proposal. Such a hearing is necessary because of the serious implications, lack of publicity, newness of the concept, legal implications, and state wide impacts.

Sincerely, _____

Michael Fisette
PO BOX 498
Stockton Springs, ME 04981



Monday, July 7, 2008

Ruth Ladd
US Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

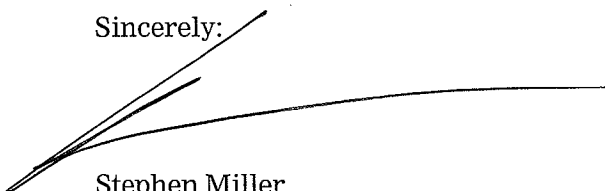
Dear Ms. Ladd

Attached please find our comments on the proposed Maine Department of Transportation's umbrella wetland mitigation prospectus. After reading the prospectus and background material, we feel strongly that the time is not ripe for this bank. Any one of several specific reasons enumerated in the enclosed would be cause for denying the proposal; considering all of the reasons taken together, we believe there is an overwhelming preponderance of evidence to deny.

Should the Corps, even in the face of such evidence, decide to proceed, we urge you to conduct a full and open public hearing on the Prospectus now, as well as at any other decision points along the way.

Thank you for your service to our nation and your thoughtful attention to this very important matter.

Sincerely:



Stephen Miller

RECEIVED

JUL - 8 2008

REGULATORY DIVISION

Comments on Maine Department of Transportation Umbrella Wetland Mitigation Bank Prospectus

Introduction

The Clean Water Act was enacted to “restore and maintain the chemical, physical and biological integrity of the nation’s waters.” For reasons outlined below, we submit that the Maine Department of Transportation (MDOT) Umbrella Wetland Mitigation Bank Prospectus is premature, lacks sufficient detail and has inherent and fundamental flaws. Therefore, the proposal should be denied or withdrawn.

The proposed wetland mitigation bank will not prevent a net loss of aquatic resources and would, in fact, undermine the Clean Water Act and 404 Guidelines.

Umbrella Mitigation Bank Structure

We are concerned that conflicts, misplaced priorities or misguided emphasis may arise due to having MDOT function as both the Umbrella Wetland Mitigation Bank sponsor and also the sole (or certainly the primary) permittee/user of the Bank.

The EPA has determined that, “... the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts ... The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.”

Therefore, mitigation should always and only be an alternative of last resort. Avoiding discharge to wetlands is the best way to accomplish the federal goal of no net loss of wetlands. Failing in that, minimizing impacts to wetlands is the next best approach.

The use of mitigation as a means of protecting aquatic resources has a sad history of failure. Mitigation projects often fail to replace lost wetland functions and acreage. According to several reliable sources, project-specific mitigation has resulted in an 80 percent net wetland loss rate and initial results on mitigation banking show no improvement over project specific mitigation. See for example the National Research Council’s *Compensating for Wetland Losses Under the Clean Water Act*, 2001 and R.E. Turner et al. *Count It By Acre or Function — Mitigation Adds Up to Net Loss of Wetlands* in the National Wetlands Newsletter 5 (2001).

The MDOT Umbrella Wetland Mitigation Prospectus diminishes the importance of avoidance and minimization in favor of mitigation and permit issuance - undermining 404 goals and requirements. The MDOT Prospectus implies that mitigation can fully compensate for wetland losses. This is a dangerous precedent to set in New England’s first Mitigation Bank proposal.

The Guidelines at 332.2 *Definitions* explain that, “In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor.” This suggests that, in general, a degree of separation is expected between a mitigation bank sponsor and the user of the bank. A qualified mitigation bank sponsor not only transfers mitigation credits to permittees but also assumes the immense responsibility of fulfilling the compensatory mitigation work on the ground.

MDOT is not qualified as a sponsor. MDOT can not be seen as a “third-party” in wetland mitigation; MDOT is the “developer” or agent responsible for discharges into wetlands. As the Prospectus notes, MDOT “is the largest development entity in the state with 25 years of experience in wetland mitigation project development. The department has built some 85+ sites...” When the applicant for a 404 permit is also the mitigation bank sponsor, the requirement to “avoid and minimize impacts to waters of the United States” is seriously compromised and the public interest not served.

It is highly inappropriate for MDOT to own and control the mitigation bank. Another state agency, such as Maine Department of Environmental Protection, or an appropriate nonprofit organization, such as Maine Audubon, would be a far better sponsor of any federal wetland mitigation bank in Maine.

Because this proposed mitigation bank positions MDOT as both the bank sponsor and the permittee/user of the bank credits, the effect is actually more like permittee-responsible mitigation and therefore provides no greater public benefit or value, or arguably *less* public benefit, than would be the case without the bank. MDOT’s Prospectus looks like a mitigation bank but acts like permittee-responsible off-site and/or out-of-kind mitigation, the least desirable mitigation approach.

The MDOT Prospectus cites the Corps guidelines’ preference for mitigation banking but then undermines that argument with the proposed structure and failure to use a watershed approach or any other mechanism for maximizing ecological benefits.

The MDOT Prospectus is far worse than letting the fox into the chicken coop; this Bank would let the fox design, build and stock the chicken coop for its own exclusive eating pleasure!

Watershed Approach

The MDOT Prospectus proposes to use Bailey’s Ecoregions of Maine as the basis for decisions about wetland needs, functions and services. The Prospectus does not use a watershed approach as recommended by the Corps 33 CFR Guidelines.

The Corps Guidelines speak directly to scale, indicating that, “The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits.” The Guidelines define a watershed as “a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean.” The suggestion and definition would lead one to believe that an appropriately scaled watershed unit might be a stream or wetland that is hydraulically connected to a cove or inlet, not one of the very large ecoregions as proposed.

Also, the watershed approach, according to the Guidelines, “involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs.” The MDOT Prospectus is silent as to reasons for its large service area preference and is equally silent as to wetland needs, functions and services in the watershed or watersheds proposed to be served by the bank. Not only is there no evidence of need, there is no indication as to how wetland needs in watershed areas will be determined. How will a functional assessment of each proposed site be built into the management and operation of the bank?

The Prospectus does not discuss when or whether a watershed plan or an ecoregional plan to determine wetland needs will be undertaken. We maintain that the watershed plan should be completed before the Bank is established. Otherwise, the Bank may reverse the proper sequence and overemphasize mitigation and permit issuance, almost guaranteeing a piecemeal approach to compensatory mitigation. If the Watershed Plan is done first, then any proposed Bank can be based on the findings of the watershed plan. Aquatic needs must be addressed before the bank is considered and this requires a tremendous amount of research and analysis, totally absent from the Prospectus.

MDOT expects to provide bank benefits “based on state-wide priorities” but fails to explain what the priorities are, when the public and IRT might be able to review them, and how they were or will be established.

Large service areas, as proposed, would encourage off-site mitigation. The Bank should instead discuss the importance of and preference for adjacent or contiguous (on-site) mitigation. Off-site mitigation is less valuable than on-site mitigation and the Prospectus should make note of this point. In-kind and on-site mitigation should be emphasized in the Prospectus.

The case for creating a MDOT Umbrella Wetland Mitigation Bank is not supported by the Prospectus. The only appropriate conclusion would be that this effort is premature and not necessary at this time.

Insufficient Detail for Public Comment

The Guidelines, at 331.8(d)(2) require that a banking prospectus “provide a summary of the information regarding the proposed mitigation bank... at a sufficient level of detail to support informed public and IRT comment.”

Mitigation banks are presumed, in the Guidelines, to “typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation.” The MDOT Prospectus, however, never addresses any of these expected bank benefits. In fact, the Prospectus can not claim “rigorous scientific and technical analysis, planning and implementation.”

There is no specific site information included in the Prospectus, failing to provide the public with ample detail for comment. The Guidelines are unclear as to whether the umbrella approach should have one or more sites included in the Prospectus. At 332.8(h) *Umbrella mitigation banking instruments* we read, “A single mitigation banking instrument may provide for future authorization of additional bank sites.” How one can have “additional sites” unless one has at least one initial site to which others are added?

The MDOT Prospectus does not describe the ecological suitability of any site or sites to be incorporated into the bank as required by 332.8(d)(2)(vii)(A). In fact, there is no information at all about the physical, chemical and biological characteristics of any bank site or how that information might be generated once the bank is established.

From 332.2 *Definitions*, it would appear that a mitigation bank must include a “site, or suite of sites” simply to qualify for definition as a mitigation bank. Creating the bank and then proposing sites for credit, a sequence the MDOT Prospectus presumes, would appear to not be supported by the Guidelines.

Creation of mitigation credit must be clearly tied to real wetland functions that have been created or restored and must be secondary to alternatives and minimization. The Prospectus promises that “mitigation sites will begin with the submission of conceptual plans” but we are not told what the components of such concept plans would include.

The Bank could easily distort 404 requirements during review of deposit sites, creating mitigation credit before specific wetland discharge issues where the credits could be used are known.

Also, having no site-specific information in the MDOT Prospectus puts the discussion of mitigation before discussion of watershed need, which is a required component of any banking instrument. The Prospectus does not offer any indication as to how scientific wetland functions and services information will be used in determining wetland project sites.

Such vagueness as to need and ecological approach will invite litigation. Courts have ruled that vague and unsupported mitigation is illegal. See *Wyoming Outdoor Council, et al. V. U. S. Army Corps of Engineers*. The MDOT Prospectus must provide much more detail to assist in review. If the Prospectus is not more detailed, the Banking Instrument itself may continue in the same vague manner and undermine the Clean Water Act requirements.

Will MDOT, when applying for a 404 permit, take “all appropriate and practicable steps to avoid and minimize impacts” as required by federal law if they are simultaneously sitting on mitigation credits in a bank they control? Is the public interest served in this manner? Does the Prospectus give us sufficient information to answer these important questions?

The Prospectus fails to place mitigation into the proper context of first avoiding, then minimizing, and only as a last resort mitigating impacts. The Prospectus fails to show how it will further the no net loss goal of federal policy.

Monitoring and Ongoing Obligations

The MDOT Prospectus is extremely vague as to how it will fulfill monitoring and other obligations created by use of the proposed bank credits. Mitigation Banks fail. A study by staff of the Ohio EPA concluded that “Too often, mitigation banks have simply meant more acres of poor quality wetland restoration than a comparable, small individual mitigation site.”

The 2005 U.S. Government Accountability Office (GAO) Report on Compensatory Mitigation Oversight confirms that the Corps often fails to ensure compliance with compensatory mitigation permit requirements. Further, GAO concludes that the Corps places a high priority on issuing permits and not on compliance monitoring or enforcement. The Prospectus is silent on compliance and enforcement while making wetland discharges easier and apt to occur more quickly.

In light of the evidence of poor mitigation compliance cited in the 2005 GAO Report, what is the compliance status of MDOT mitigation on Sears Island? MDOT’s known record on Sears Island wetlands is horrible — from unauthorized discharge into freshwater wetlands to noncompliant causeway construction and mitigation failure there. In 1996 MDOT agreed to a wetland enforcement settlement that included restoration of approximately 3.2 acres of freshwater wetlands at the site of a proposed cargo port, creation of at least one vernal pool, and restoration of .75 acres of freshwater wetlands at the south end of the island. The compliance and viability of this work is unknown.

MDOT’s wetland history should be more thoroughly discussed in the Prospectus.

Mitigation monitoring prerequisites must provide for effective short-term and long-term compliance and mitigation management requirements must provide for long-term and effective wetland conservation. Mitigation banking standards, accountability and enforcement measures should be more clearly outlined and made much stronger in the MDOT Prospectus.

Ecological performance standards and measurable criteria to determine whether a project has accomplished it’s goals should be more clearly discussed in the Prospectus. Credit release should be tied to credible in-kind, on-site wetland functions and services that have been proven to be compatible with adjacent wetlands and watershed needs.

Role of Preservation Credit

We are concerned that preservation may be the primary or only compensatory mitigation approach in the early years of the proposed bank. The Guidelines clearly indicate, using imperative language, that “preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities.” The MDOT Prospectus would appear to present preservation as a mitigation approach on equal standing with restoration and creation.

Preservation as a mitigation tool always results in a net loss of wetland acreage and functions. By itself, it is wholly unacceptable as compensatory wetland mitigation. Preservation credit in the Bank should only be allowed in conjunction with and to further protect restoration, enhancement or creation sites, if at all.

Public Hearings

The public meetings to date on this matter demonstrate a tremendous public interest in this proposal. If the Corps does not outright deny the Bank proposal, then full and open Public Hearings at all key decision making points must be conducted, including hearings regarding the Prospectus, Draft Instrument, Final Instrument and Site Development Plans.

Conclusions

The MDOT Umbrella Wetland Mitigation Bank Prospectus should be denied. Important reasons for this conclusion include:

- The proposed sponsor/permittee structure is inconsistent with the Clean Water Act goals and the Corps Guidelines.
- The Prospectus fails to use a watershed approach and fails to establish need.
- Insufficient ecological detail regarding physical, chemical and biological values is available.
- Compliance and ongoing management of the Bank generally and sites specifically are poorly or not at all described in the Prospectus.
- Preservation as a mitigation tool is not well articulated and would appear to be given too much value.

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U.S. ARMY CORPS OF ENGINEERS
NEW ENGLAND DISTRICT

IN RE: DEVELOPING AN UMBRELLA MITIGATION BANK
FILE NUMBER: NAE-2008-1703

Public Meeting at MAINE DEPARTMENT OF TRANSPORTATION

Reported by Ronald G. Veno, a Notary Public in and for the State of Maine, on June 19, 2008, at the Maine Department of Transportation, Augusta, Maine, commencing at 3:00 p.m.

FOR ARMY CORPS OF ENGINEERS: Ruth Ladd
FOR DEPT. OF TRANSPORTATION: Deane Van Dusen
Judy Gates

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AUDIENCE MEMBER: Judy Gates, I'm Director or of DOT's Environmental Office.
AUDIENCE MEMBER: Ruth Gadey.
AUDIENCE MEMBER: Ed Friedman, Friends of Merrymeeting Bay.
AUDIENCE MEMBER: Misty Giorski, also Friends of Merrymeeting Bay.
AUDIENCE MEMBER: Jim Freeman from friends of Sears Island.
AUDIENCE MEMBER: Jody Spear, Sierra Club here unofficially.
AUDIENCE MEMBER: Sally Jones and I'm here with -- I guess they're called Fair Play for Sears Island. I'm just an interested citizen.
AUDIENCE MEMBER: Harlan McLaughlin and I'm here with Fair Play for Sears Island.
AUDIENCE MEMBER: Vivian Newman.
AUDIENCE MEMBER: Kristen Puryear, Maine.
AUDIENCE MEMBER: James Gillway, Town Manager, Searsport.
AUDIENCE MEMBER: Duane Scott, Maine DOT.
AUDIENCE MEMBER: Peter Glazer, I'm an intern Conversation Law Foundation.
AUDIENCE MEMBER: Shawn Mahoney, Conservation Law Foundation.

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TRANSCRIPT OF PROCEEDINGS

MS. LADD: I'm Ruth Ladd, I'm with the Corps of Engineers. My office is actually down in Concord, Massachusetts. I'm the Chief Policy Analyst, Technical Support Branch within the regulatory provision because mitigation banking is something that's fairly new to our district, and so I'm the lucky one that gets to, you know, sort of manage these on the way through. Because it's not a permit, doesn't really fit with that. So that's why I am involved and I'm really -- again, thank you very much for being here.

Many of you already know Deane Van Dusen who is with Maine DOT, he's going to be speaking to you also. We're going to try to have this informal, so thank you all for agreeing to sit in this inner circle. I think it makes it more conducive to a discussion which I hope we'll be able to have.

The -- I think that there's few enough that it probably merits actually going around the circle if people are willing to give your name. If you want to give affiliation, that's fine, not required to, but just as I said, I'm Ruth.

MR. VAN DUSEN: I'm Deane Van Dusen, I head up the mitigation for the environmental office.

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AUDIENCE MEMBER: Becky Bartovics, Penobscot Bay Alignment.
AUDIENCE MEMBER: Bill Bartovics, driver.
MS. LADD: Thank you all so much. The way this is going to work is that I'll give a little discussion. This is called a public meeting in the Corps parlance. The difference between that and a hearing and I'll review a little bit of procedural sort of a thing about what -- about banks and how that all works, and then Deane is going to talk about the specifics of the umbrella Mitigation Bank prospectus which is what the public notice was, hopefully all of you saw, and if not prior to today, you saw it in the handouts that has the public notice for that. Then we'll end up with questions and discussion.
This is not a huge group. Feel free if you have a question and don't understand something that I said and I think Deane said the same thing and we'll handle it at the time. Strictly talking process, kind of remember those questions to the end so I'll be glad to do the best I can, and answer those right as we go along.
I do ask if anybody gets a phone call to take it out in the hall. I appreciate that.

1 Hearing versus a meeting. It sounds sort
2 of -- you get into English language too much, but
3 our regulations, it's very specific what a hearing
4 is. Very formal -- some of you may have been to it.
5 Very formal deal where it's completely one way. You
6 would be able to say something with a very set
7 amount of time, you might be given three minutes and
8 it's recorded by a court reporter, but there is no
9 feedback. You could ask a question but we kind of
10 nod our heads and we can't say anything. So it is
11 entered into a public record because there's a
12 public -- like a court reporter taking down the
13 notes, but it's extremely formal, Colonel is usually
14 present to oversee the whole process.

15 A meeting which is what this is is much
16 more informal and there's a lot of opportunity for
17 questions and discussions and there's really no time
18 limit. Obviously we don't want to go to midnight
19 but other than that we can talk for awhile and DOT
20 has kindly volunteered to record this, thank you
21 very much so it will be entered into a record what
22 is said here. This -- this is so everybody is
23 aware --

24 AUDIENCE MEMBER: Could I ask a question?
25 MS. LADD: Yes.

1 one of the reasons we decided to have this meeting
2 to explain it so people could really make sure they
3 understand it.

4 A bank itself, you know, sort of what is
5 it. We have a new mitigation rule that just came
6 out in the federal register on April 10th so it's
7 really -- of this year, so it's brand new. One of
8 the things it does is it sort of formalizes a lot of
9 guidance that had been put out by the Corps and EPA
10 over a number of years, and puts it all into one
11 place. And it changed the things around to try to
12 bring that up to the current science and
13 understanding and it put in place time lines.
14 There's a lot of definitions, you know the way
15 regulations are. They're good snoozers. But it's
16 brand new and it actually went into effect on the
17 9th of this month so it's totally new. But I put in
18 here what the bank is.

19 According to that, it means a site or a
20 suite of sites and in the case of an umbrella, it
21 will be a suite of sites where resources are
22 restored, established -- and established means
23 created, enhanced and/or preserved for the purpose
24 of providing compensatory mitigation for impacts
25 authorized by -- DA means Department of the Army

1 AUDIENCE MEMBER: At the hearing there is a
2 presentation at the beginning.

3 MS. LADD: Yes, there usually is a brief
4 presentation so people understand what the heck the
5 hearing is about.

6 AUDIENCE MEMBER: And you're limited in
7 time for testifying but you can submit longer
8 written comments.

9 MS. LADD: As you can for any project for
10 which there's a public notice requesting comments,
11 yes, absolutely true, yup.

12 This is only the second bank prospectus
13 that we have handled here in New England. We had
14 one for one down in Massachusetts and it never has
15 gotten beyond the prospectus stage. It's sort of
16 gone quiescent. Maybe it will come back again. I
17 suspect it was a private entrepreneurial bank and my
18 guess is that they have invested so much money that
19 until they have a certainty of selling the credit,
20 they don't want to go further. That's my guess. So
21 that was the first one that came along, this is the
22 second.

23 This is the first umbrella bank prospectus
24 so this is new to all of us. There's a different
25 concept than just a regular mitigation bank which is

1 permits. This is a federal rule, not State.

2 And in general a bank sells compensatory
3 mitigation credits to permittees. If it's a public
4 agency that does their own, it's transfer credits.
5 It's used when there's -- somebody needs to have
6 some sort of mitigation, and then the responsibility
7 for the mitigation is transferred to the sponsor of
8 the bank. So whoever needs the credits no longer
9 has that responsibility.

10 If it's an in-house kind of thing, DOT,
11 DOT -- it would be at both ends of it but just
12 sounds kind of a concept of a bank, and the whole
13 operation and use of the bank is governed by what's
14 called a mitigation banking instrument which is
15 signed by the Corps of Engineers, the sponsor, and
16 it may include the State as well.

17 Now, what is an umbrella bank as opposed to
18 just an egg bank? It's mostly procedural, and if
19 you read the prospectus, you'll probably note the
20 lack of meat, so to speak. It's just a framework
21 for reporting, accounting, sort of how -- how the
22 pieces of the bank are going to be put in under this
23 umbrella.

24 So there is no specific projects proposed
25 under an umbrella. They will be done individually

1 and they will go through actually the same process.
 2 They are going to have -- there will have
 3 to be a prospectus and a banking instrument, but it
 4 saves having to have separate reporting on each
 5 site. And it can -- and it provides a framework, it
 6 tells like the extent of everything, you know, how
 7 much area it's going to cover. So you could have an
 8 umbrella that covers a much larger area than even
 9 cumulatively all the individual sites under it, it
 10 just sort of allows there to be other projects
 11 anywhere within that geographical area considered
 12 for submission to be under this umbrella. Kind of a
 13 strange concept and if anybody has questions, I'll
 14 entertain them because I had to read this about five
 15 times myself to try to understand what it was all
 16 about.

17 AUDIENCE MEMBER: You're talking about
 18 creating new wet --

19 AUDIENCE MEMBER: Give your name because he
 20 writes.

21 AUDIENCE MEMBER: Jim Freeman. This is
 22 talking about creating new wetlands or taking
 23 existing wetlands and putting those in the bank.

24 MS. LADD: Yes. It can -- theoretically,
 25 it can cover creation of wetlands, restoration of

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1 wetlands where there were once wetlands and are no
 2 longer, and enhancements of existing wetlands that
 3 have been -- don't have their full suite of
 4 functions any more, and it can be preservation where
 5 no work is done and it's just protected in some way,
 6 or a combination.

7 AUDIENCE MEMBER: Who is going to be
 8 making --

9 MS. LADD: The sponsor is the one who
 10 proposes it and that will come under specific
 11 submissions that will come under the umbrella but
 12 that aren't covered by this prospectus that we're
 13 talking about now but it could be any of those.
 14 Just because we approve the umbrella does not
 15 automatically mean anything underneath it submitted
 16 to go under the umbrella is automatically approved.
 17 They all have to go through the same public notice
 18 process, evaluation and all of that. Does that
 19 help?

20 AUDIENCE MEMBER: Kind of.

21 MS. LADD: Yes.

22 AUDIENCE MEMBER: Becky Bartovics, and I
 23 think you said that this enables you to examine each
 24 site specifically but then you said each site
 25 wouldn't have to be examined -- be --

10

1 MS. LADD: The site is not examined under
 2 this umbrella -- this umbrella is a procedural
 3 document, really.

4 AUDIENCE MEMBER: Okay.

5 MS. LADD: You don't get into specifics of
 6 sites until there are subsequent submissions by DOT
 7 for specific sites that would have a specific
 8 service area within the State of Maine.

9 AUDIENCE MEMBER: So I guess maybe jumping
 10 ahead, the eco-region is -- would those be codified
 11 so that any site within each of those eco-regions
 12 that would be the size of the region or the
 13 catchment or service area or --

14 AUDIENCE MEMBER: It could be, but there
 15 could be a situation where you might have -- I could
 16 see where you might have a proposed project where it
 17 wasn't felt for some reason that the entire
 18 eco-region made sense, that it should be someplace
 19 smaller or that it should be something larger if it
 20 can be -- the sponsor would have to explain why
 21 they -- it wouldn't be what it is, but when a
 22 prospectus is submitted to the Corps and goes out
 23 for public notice, it's also -- I'm jumping ahead of
 24 myself. It's also reviewed by what's called
 25 Interagency Review Team and there may be comments,

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1 something might be proposed to people who say that's
 2 not a good idea, that would be a comment that would
 3 go back to the sponsor.

4 AUDIENCE MEMBER: Sponsor in this case is
 5 DOT, right?

6 MS. LADD: That's right. My piece right
 7 here is more generic, just so everybody understands
 8 but there could be others that come along. But we
 9 are talking about DOT specifically on this
 10 prospectus. A sponsor can be both public --

11 AUDIENCE MEMBER: Sean Mahoney. If the
 12 prospectus, if this prospectus is approved by the
 13 Corps, then it's approving the eco-regions that are
 14 proposed in the prospectus, so those won't change,
 15 right?

16 MS. LADD: If that's --

17 AUDIENCE MEMBER: So the eco-regions change
 18 by project, the bank creates the eco-regions, and
 19 then by project the sponsor determines what projects
 20 may or may not qualify for either making a deposit
 21 into the bank or taking a withdrawal based on
 22 eco-regions that are approved in the prospectus,
 23 isn't that right?

24 AUDIENCE MEMBER: Judy Gates. The
 25 eco-regions are actually created sort of by the

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1 natural areas program and other programs that have
 2 been worked on characterizing Maine's geology and
 3 geography and everything else, and so there's --
 4 they've kind of settled on these eco-regions as
 5 having particular characteristics that make them
 6 easy to -- easier to lump. And so it's -- what
 7 we're doing is just using something that's kind of
 8 state of the art in the State anyway. So they
 9 wouldn't necessarily be approving them as we propose
 10 them. They would be just saying, yes, we accept
 11 that your distribution of projects would be based
 12 loosely on this general scheme, the same way that
 13 the inland sea program is based.

14 AUDIENCE MEMBER: I'm not questioning the
 15 basis for the eco-region, all I'm saying is if a
 16 project as it's written now, let's just say Casco
 17 Bay cost includes Brunswick and also includes
 18 Scarborough, a project in Scarborough with impacts
 19 could make a withdrawal from the bank to compensate
 20 for those impacts if the compensation is in
 21 Brunswick.

22 AUDIENCE MEMBER: If the agency approved.

23 AUDIENCE MEMBER: And if the eco-regions
 24 are --

25 AUDIENCE MEMBER: That's what Ruth was

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1 you have -- if you picked up the handouts, there's a
 2 flow chart, and I apologize for the graininess of
 3 it, but because it's a scan of something that was
 4 e-mailed to me and then I printed it out, so it's
 5 not as clean as it could be, but it's something that
 6 was developed and handed out at the recent
 7 mitigation banking conference. And someone saw it
 8 and said oh, I think I'll share this with people and
 9 so that's how I came to have this. I don't know who
 10 developed it but it's pretty handy and it really
 11 helps make some sense out of all that verbiage
 12 that's in the mitigation rules.

13 But right at the top you'll see that
 14 there's an opportunity -- the sponsor can submit a
 15 draft for the Corps to have a look at and provide
 16 comments, and in that case since it did happen, lot
 17 of people actually provided comments that we were
 18 still trying to sort out how to do this but we
 19 developed an Interagency Review Team which is what
 20 IRT is, IRT, to look at it. And it was -- usually
 21 the standard members of it are the Corps, EPA,
 22 United States Fish and Wildlife, National Fishery
 23 Service and State permitting agency, but other
 24 agencies can be added in, and that lists what is the
 25 Interagency Review Team for this umbrella bank.

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1 saying might be narrower. Might say you're
 2 impacting coastal wetland over here but this is a
 3 different kind of coastal wetland over here. So
 4 that's not a good match and that's up to them at
 5 project time. There's three decision making points.
 6 There's the bank, the individual projects that go
 7 into the bank, and the application that proposes to
 8 use credits from the bank. So at each point they
 9 need to make a decision.

10 AUDIENCE MEMBER: I'm just wondering if
 11 you're going to go into this whole regions thing
 12 later on in the presentation?

13 MR. VAN DUSEN: I'm going to touch on it a
 14 little bit more than we have so far.

15 AUDIENCE MEMBER: So --

16 MS. LADD: DOT is the public sponsor in
 17 this case, and it could be private and that's the
 18 situation in Massachusetts that I mentioned. If the
 19 sponsor that decides there's going to be a bank;
 20 it's not like the Corps says somebody go do a bank.
 21 It has to come from a sponsor. Now, I'm starting to
 22 get into the heavy lifting part of the process.

23 And the first thing is that the sponsor
 24 did -- in this case DOT did, ask for a preliminary
 25 review of the draft prospectus. They did that -- if

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1 But for sites that come underneath it,
 2 we'll probably be adding IH and W depending on the
 3 site. It might include DMR, Department of Marine
 4 Resources and we could in some situations have the
 5 NRCS, Department of Agriculture agency.

6 MR. VAN DUSEN: As well as Land Use
 7 Regulation Commission.

8 MS. LADD: So it will depend on the
 9 situation.

10 AUDIENCE MEMBER: Is DEP on that list?

11 MS. LADD: Yes, state permitting agency,
 12 yeah. So -- but LURC and DEP are on the list. We
 13 are required to provide comments back to the
 14 sponsor, to DOT, within thirty days. So then the
 15 sponsor --

16 AUDIENCE MEMBER: Could you just say the
 17 date this all began so I know where to start the
 18 thirty days. What's the date?

19 MS. LADD: Well, I'm not sure.

20 AUDIENCE MEMBER: The preliminary draft I
 21 believe went to mid February.

22 MS. LADD: We went back and forth several
 23 times, so --

24 AUDIENCE MEMBER: I think it was really
 25 informal.

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1 AUDIENCE MEMBER: I have an April one.
 2 MS. LADD: The one that's in the public
 3 notice is when we started the clock.
 4 MR. VAN DUSEN: And the title sheet has a
 5 date on it and that's the date it was submitted to
 6 the Corps. That was the final version of the
 7 prospectus.
 8 AUDIENCE MEMBER: Okay, 6/10.
 9 MS. LADD: So once we get the prospectus
 10 that the Corps would with input from the Interagency
 11 Review Team has to tell the sponsor if the
 12 prospectus is complete and I have listed here what
 13 constitutes that, and that is also in your handout
 14 on the second sheet, the very back page of the
 15 second piece of paper.
 16 MS. LADD: So you can see -- I'm not going
 17 to talk my way through them because they're listed
 18 in there as well. It's pretty basic, quite frankly.
 19 Particularly for an umbrella bank.
 20 You'll notice at the very end here, it says
 21 for specific sites, you have to have ecological
 22 suitability to reach the objectives and the
 23 assurance of adequate water for -- that's where the
 24 meat is but this one doesn't have any specific
 25 sites. So that's where there would be a lot of

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1 information, all the ecological related information
 2 for specific site, but we don't have any specific
 3 sites so we don't have to have that in this which is
 4 why it's so short.
 5 I think you'll find that our prospectus for
 6 a specific site is going to be much more detailed
 7 and much longer, much more involved. So once --
 8 we're currently in the public notice process and
 9 we'll get the comments. So we're in this thirty day
 10 comment period.
 11 Any comments that we receive including, you
 12 know, part of whatever this discussion is will go to
 13 DOT and anything I get in writing will go to the
 14 Interagency Review Team and to DOT, so that they can
 15 evaluate it and see if there's anything they need to
 16 do to sort of adjust what their thought process is.
 17 AUDIENCE MEMBER: Jody Spear. This may
 18 have something in it about a formal public hearing
 19 but I don't see it in this chart.
 20 MS. LADD: It does not.
 21 AUDIENCE MEMBER: I know that that -- the
 22 request can be made within the thirty day comment
 23 period, but what this -- since we are planning to
 24 make that request today and subsequently, what will
 25 that do to the schedule?

18

1 MS. LADD: It will lengthen it,
 2 potentially. The Corps doesn't have to grant that.
 3 We have to decide if we feel that a hearing will
 4 contribute significantly to our understanding of --
 5 of the prospectus, I guess you'd say. It doesn't
 6 mean that we won't but we do have to evaluate it,
 7 and whenever we get a request, we have to talk to
 8 the Colonel. It's the Colonel of the New England
 9 District that makes the decision whether we go
 10 forward with a hearing or not.
 11 AUDIENCE MEMBER: Mitigation banking is
 12 very controversial and has the potential to lead to
 13 more than minimal impact. We're talking about
 14 circumventing Section 404 and that's in place for a
 15 very good reason, so I -- that's part of what I want
 16 on the record today. I think that the requests for
 17 public hearing are going to flood in, so --
 18 MS. LADD: The public has a right to do
 19 that. I would just suggest the reason we had this
 20 meeting, though, is feeling that we could get the
 21 same comments here and be able to talk about it than
 22 to have a public hearing where everybody gets their
 23 three minutes of fame and don't get to talk about it
 24 and ask questions.
 25 AUDIENCE MEMBER: Ed Friedman. Could you

19

1 just take a step back or maybe I should address this
 2 to Deane but what was the basis for wanting to go to
 3 an umbrella type?
 4 MS. LADD: Can we save that for his part.
 5 AUDIENCE MEMBER: Okay.
 6 MR. VAN DUSEN: I will address that later
 7 on.
 8 MS. LADD: When we get -- he's going to
 9 have his time to talk about that and hopefully
 10 address it. At the end of all of this as I said,
 11 I'm hoping we can really have a good discussion. We
 12 want to hear all this. People are upset with the
 13 process and we need to know about that.
 14 If it's determined that the prospectus
 15 based on the comments that are received is complete,
 16 and you saw the list, the Corps then allows the
 17 sponsor to go and prepare a draft instrument. And
 18 this is what the mitigation rule says that needs to
 19 be included in an instrument, however, because there
 20 is an umbrella, a lot of these things won't be
 21 covered. They will be covered on the individual
 22 sites that will come under the umbrella none of
 23 which are certain. They have to go through the same
 24 process, but these are the ones that if you have a
 25 site specific proposal, all of this would have to be

20

1 on it, but really the only thing on the umbrella
2 would be proposed service area, accounting
3 procedures, legal responsibility, default and
4 closure provisions, reporting protocols, objectives,
5 but not site selection factors which -- the site
6 protection instrument, probably not that's going to
7 be site specific. No baseline information, no work
8 plan, maintenance plan. Really none of the rest of
9 it because there is no site, so it will only --
10 again, it will be shorter than any site specific
11 proposal will be which would be much more lengthy.

12 AUDIENCE MEMBER: Do you have this
13 printed -- this particular aspect of exactly what
14 will be part of the umbrella bank and what isn't?

15 MS. LADD: No.

16 AUDIENCE MEMBER: It would be nice to have
17 that.

18 MS. LADD: Yeah.

19 AUDIENCE MEMBER: Becky Bartovics.

20 MS. LADD: We can do that.

21 AUDIENCE MEMBER: That would be nice.

22 MS. LADD: If you can just stop and think
23 of something sight specific, that would be an item
24 that wouldn't be in it.

25 AUDIENCE MEMBER: I can stop and think, I
21

1 MS. LADD: Maine has a program set up with
2 the nature conservancy and now the Corps is
3 involved, too, where permanent applicants have as an
4 option to permit what's called permittee responsible
5 mitigation to pay into a fund where the monies are
6 pooled on -- based on biophysical regions, and that
7 money is then used economies of scale to be able to
8 do something that makes more ecological sense than
9 going out and say building a ten thousand acre --
10 square foot little thing in somebody's back yard or
11 preserving three acres in a corner, some little
12 parcel of land. So it becomes an option that's
13 available to applicants and which could be
14 encouraged by the regulatory agencies if they felt
15 it made a little more sense. That's a very
16 simplistic explanation.

17 AUDIENCE MEMBER: DEP has a really good web
18 site on in lieu fee program.

19 MS. LADD: And there is a fact sheet on the
20 fee program and -- in general and specifically the
21 fund and there's examples of how to apply for funds
22 and how to -- I'm trying to think of all the
23 different attachments, shows the biophysical
24 regions.

25 AUDIENCE MEMBER: I'm like a total lay
23

1 just don't have that whole list.

2 MS. LADD: Everything on the first side
3 down until you get to baseline information, and it's
4 all taken from that handout.

5 AUDIENCE MEMBER: Oh, okay, sorry. All
6 right.

7 MS. LADD: So if you get down to -- okay.
8 If you are on the handout on the second page, it's
9 all the things at the top of the page. There's six
10 bullets and then it's the next -- objectives are
11 going to be sort of generic because each site is
12 going to have its own objectives as well. It will
13 probably be to offset the function of something --
14 since each site will have a different set of
15 objectives, so it's really those bullets at the top.
16 Those are the key ones.

17 AUDIENCE MEMBER: Wouldn't monitoring
18 requirements be part of any --

19 MS. LADD: No, because one might require
20 five years of monitoring, something else might
21 require ten years of monitoring depending on -- and
22 if it's preservation, there might be no years of
23 monitoring so, yeah. It will depend.

24 AUDIENCE MEMBER: What's an in lieu fee
25 program? Judy Spear.

1 person -- Sally Jones. Just a normal citizen, and I
2 didn't even understand what land mitigation was this
3 morning, and my question is -- has to do with the
4 specific sites, and this is just what a normal
5 person might want to try to understand. Since the
6 whole state is one big bank and you're making these
7 withdrawals and these deposits of actual say
8 wetlands or streams, when you make a withdrawal of
9 let's say a wetland, does the deposit have to be
10 touching the place where you made the withdrawal?

11 MS. LADD: When you say touching --

12 AUDIENCE MEMBER: Can it be somewhere else
13 in the whole state?

14 MS. LADD: No.

15 AUDIENCE MEMBER: Does it have to be in the
16 same service area?

17 MS. LADD: Yes.

18 AUDIENCE MEMBER: And how close does it
19 have to be to where the withdrawal is made.

20 MS. LADD: Well, in theory, in theory if
21 you have -- and the public notice that has the
22 little map in it, and you can see the --

23 AUDIENCE MEMBER: So it has to be in the
24 same block of color?

25 MS. LADD: Yes.
24

1 AUDIENCE MEMBER: So it can be pretty far
2 away? Like you can make a withdrawal in one part of
3 that block and you can make a deposit somewhere else
4 like miles and miles away?

5 MR. BUBAR: Now, it's important to realize
6 that each time someone wants to do that, it's part
7 of the permit application process and it could be
8 that when the Corps, EPA, DEP, Fish and Wildlife
9 Service, whatever look at it, they may say we don't
10 want them using that bank.

11 AUDIENCE MEMBER: It's too far away.

12 MS. LADD: It's either too far away,
13 doesn't offset the function.

14 AUDIENCE MEMBER: I was just concerned
15 since the whole state was this bank that there were
16 going to be like these withdrawals made all over the
17 place and then the deposits could be just put all
18 over the place, and in my mind I would want them to
19 be touching sort of like right next to each other.
20 If you're making a withdrawal on one little area of
21 coast, shouldn't you make the deposit as close to
22 that?

23 MS. LADD: That's the way we used to do
24 mitigation and unfortunately it hasn't worked very
25 well because people tried to get it really close.

25

1 mitigation site right next to the Maine Mall area
2 that's quite extensive, and if you look at the water
3 quality of that wetland area, it's not very good.
4 It's surrounded by the airport and everything else.
5 It was done a long time ago and it's that -- that's
6 led to kind of a greater reliance on inland fees
7 that when the resource agencies are actually the
8 ones that set the priorities and say this is what
9 needs to be done, and this is what needs to be done
10 it kind of takes it out of the realm of regulated
11 community and puts it in the natural resource
12 protection community. So there are frame works
13 around that.

14 MS. LADD: Just an addendum to that,
15 though, since we're talking about functions of
16 well -- one of the functions that a wetland can
17 serve is flood storage, and if it's deemed that
18 something that's important, that does need to be
19 like right next door or right about there because it
20 doesn't do any good if it's three counties over.
21 That would need to be there but for example,
22 wildlife habitat. Does it make a lot of sense to do
23 wildlife habitat right next to heavy duty
24 development.

25 AUDIENCE MEMBER: Judy Spear. Maybe this

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1 Well, if our impact is right here we should do
2 mitigation right here, and we ended up particularly
3 with small projects of a lot of little mitigation
4 sites the size of this room and there's nobody to
5 provide long term stewardship. They tended not to
6 necessarily be built very well. They often were
7 right next to a parking lot so they ended up being a
8 place for shopping carts.

9 AUDIENCE MEMBER: But you're not going to
10 do like the coast and Aroostook County, that would
11 never happen even though the whole state is one big
12 bank.

13 MS. GATES: Judy Gates. There are also
14 state and federal rules that provide a lot of
15 structure around this that say that you have to
16 match your mitigation with the function of that
17 separate impact and -- for instance with coastal
18 wetlands, you cannot use fresh water wetlands to
19 mitigate for coastal wetland impacts. You can do
20 the reverse but you cannot --

21 AUDIENCE MEMBER: And it doesn't
22 necessarily have to be touching?

23 MS. GATES: It doesn't necessarily have to
24 be touching and like Ruth said, if you think of some
25 place like the Maine Mall area. There's the wetland

26

1 would be a good time to define the no net loss
2 requirement.

3 MS. LADD: Yes. Nationally there is what's
4 called a goal of no net loss of functions and
5 values, aquatic resource functions and values that
6 would result from any impacts to regulated
7 resources. Without getting too fancy. There are
8 aquatic resources that the federal government does
9 not regulate but I won't go there right now, but
10 those that we do, if there's -- there are certain
11 functions and values that wetlands serve. We're
12 supposed to be getting back at least that much for
13 future generations so that we have at -- we prefer
14 to have gained.

15 The challenge to that is a lot of wetlands
16 take a long time to develop. Some are extremely
17 difficult to build, if you will, even if it's a
18 restoration effort which means once upon a time
19 there was a wetland there. So it's challenging but
20 that's the goal, is to have no net loss of aquatic
21 resource functions and values nationally. It's
22 understood that each project doesn't necessarily
23 meet that.

24 AUDIENCE MEMBER: But it's the law.

25 MS. LADD: Problematically, the law --

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1 well, it's actually an executive order, I believe,
 2 but the goal is to have the program particularly
 3 come out that way because it's -- on balance, and
 4 actually when they look at it nationally, I should
 5 mention that there's -- there are programs, nothing
 6 to do with the Corps of Engineers or regulatory
 7 stuff where there's proactive wetland and stream
 8 restorations, and they kind of count that into the
 9 whole -- when they start coming up with those huge
 10 numbers. Fish and Wildlife Service does these huge
 11 national studies and sometimes I'm a little not sure
 12 of the results.

13 MS. GATES: Closer to home, if you look
 14 again at DEP, they have a wetland loss tracking
 15 system that they've set up that's quite extensive,
 16 that for every permit that they've written since
 17 1995, they have the wetland loss tracking entry that
 18 records the type of wetland that was impacted, the
 19 square footage, the compensation that was provided
 20 and the functions and values, and all of that is
 21 used on an annual basis for Maine in particular so
 22 that even if you look at -- at the nation, it's easy
 23 to say well, sure, prairie popples, you can do
 24 those, but what does that do for Maine.

25 You can actually look at it on the Maine

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1 microcosm and say does it come out, and that's why
 2 DEP tracks that because each state has to prove to
 3 the federal government that they're complying with
 4 that executive order for no net loss. Army Corps
 5 and federal agencies may average it out but DEP is
 6 not allowed to average it out, so there is -- you
 7 know, I haven't seen a report in a couple years but
 8 there is a reporting mechanism for that that they
 9 run annually to make sure that it's coming out the
 10 way it should.

11 MS. LADD: Without getting too far off
 12 track, I should note that every time we do a program
 13 and have a general permit which is how we do smaller
 14 impact projects in each state in New England, we do
 15 have a cumulative impact assessment and we are
 16 looking statewide on those. I don't want to get too
 17 far. There was a question -- before -- did the
 18 hand --

19 AUDIENCE MEMBER: Harlan McLaughlin. I was
 20 wondering when this started? If you're talking
 21 about this close monitoring, if it started before or
 22 after there was some problems with DOT filling some
 23 wetlands on Sears Island? Some people think may be
 24 questionable stuff going on.

25 MS. GATES: The wetland loss tracking

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1 system was revamped in 2000 and it went back -- they
 2 went back to 1995. They went retroactively back
 3 through the permits in 1995 to enter those wetland
 4 impacts because that's when the wetland protection
 5 rules went into play for the State, and now it's
 6 wetland and water bodies protection rules, so it
 7 would not -- it would not have captured it in that
 8 '95 to 2000 were the violations, but what it did
 9 capture were the permits that were issued, state
 10 permits that were issued for that. And I don't know
 11 if Sears Island is in there or not.

12 With your permission, I'd like to get -- my
 13 part is a little bit tedious and -- maybe -- these
 14 are all good questions and I'm glad to have the
 15 opportunity to talk about no net loss and functions
 16 and values, in lieu fee and all of that, but in the
 17 interest of sort of getting through the program, if
 18 you will, let's -- if we could defer those kind of
 19 questions toward the end unless you're so confused
 20 we really have to straighten this out, okay?

21 AUDIENCE MEMBER: Could I -- I'm kind of
 22 confused. Harlan McLaughlin still. I'm wondering
 23 about the withdrawals. Withdrawal means you're
 24 destroying wetlands, correct?

25 MS. LADD: Yes, in essence. You're getting

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1 a permit to either fill or alter.

2 AUDIENCE MEMBER: Now the deposits, you can
 3 deposit by giving money?

4 MS. LADD: No, neither.

5 AUDIENCE MEMBER: Or can you -- who can
 6 deposit and who might use this besides the DOT?

7 MS. LADD: Nobody.

8 AUDIENCE MEMBER: Nobody but the DOT uses
 9 it?

10 MS. LADD: For this. The in lieu fee is a
 11 different program and that's available to anybody,
 12 but the banking program, this proposal is only for
 13 DOT.

14 AUDIENCE MEMBER: Okay. Are there a lot of
 15 places where they have this umbrella bank set up?

16 MS. LADD: In other parts of the country
 17 but not in New England.

18 AUDIENCE MEMBER: Are there a lot of them?

19 MS. LADD: No. Most of them are for DOT's.
 20 In fact, they probably all are.

21 MS. GATES: There's a couple statewide ones
 22 like South Carolina and Georgia, I think, Florida.
 23 But they're DOT's.

24 MR. VAN DUSEN: All DOT's.

25 MS. GATES: And that's because DOT's tend

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1 to do enough projects, they're the largest
 2 constructors in the State so it makes sense to do
 3 that and we have the expertise in-house.
 4 AUDIENCE MEMBER: But if the DOT is the
 5 only one doing it, why is it sometimes okay to give
 6 money for these projects?
 7 MS. LADD: That's different. That's an in
 8 lieu fee program, completely different program.
 9 MS. GATES: That's DEP's program.
 10 AUDIENCE MEMBER: I said I was confused.
 11 MS. LADD: No, that was good.
 12 AUDIENCE MEMBER: So a deposit isn't money,
 13 it's all land.
 14 MS. GATES: It's a project.
 15 AUDIENCE MEMBER: It's physical.
 16 MS. LADD: Yeah.
 17 AUDIENCE MEMBER: Ed Friedman. If you
 18 could just clarify the deposits. Someone -- how
 19 does that land come into the mix, land or wetland,
 20 or obviously you can create a wetland as well. At
 21 some point DOT takes title to land. How does that
 22 happen?
 23 MS. LADD: Okay. None of this will really
 24 be addressed by this umbrella banking instrument,
 25 but once specific projects come in, part of the

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1 credit, and two or three preservation credits, and
 2 then -- then -- so then they do a project and they
 3 need -- let's just say they need three credits of
 4 forested wetland, and -- well, let's say they need
 5 three credits of forested wetland and okay, you've
 6 got two here for that. It could be decide one of
 7 those preservation credits would count for it
 8 because that site was all forested and really
 9 contributed to a forested ecosystem, or it might say
 10 you can only buy two where you've got to come up
 11 with the other one somewhere else by some other
 12 means, and in that case you debit the two
 13 forested -- there are no more forested wetland
 14 credits available at that site and then you have to
 15 go somewhere else.
 16 AUDIENCE MEMBER: What's confusing me is
 17 this all basically within DOT?
 18 MS. LADD: This is all DOT, it's not --
 19 AUDIENCE MEMBER: So DOT owns right of ways
 20 and things like that, that's -- might be those kind
 21 of places, Sears Island maybe in this case?
 22 MS. LADD: Right-of-way?
 23 AUDIENCE MEMBER: I don't know -- well,
 24 you're not on, so where is your land bank that you
 25 would be sort of dealing with these parcels?

35

1 proposal will be how many credits DOT is sort of
 2 requesting to get and what kind of credits.
 3 So for example, you had fifty acres you
 4 wanted to preserve -- and I'm just making it up --
 5 fifty acres you wanted to preserve and on that fifty
 6 acres, you were going to do five acres of
 7 restoration of forest wetlands and an acre of
 8 marshland. It might be proposed to get -- maybe
 9 it's proposed to get two credits for the -- for
 10 wetlands. One credit for the emergent and
 11 another -- I don't know, say two or three -- we'll
 12 say three for the preservation. That would be six
 13 credits. That's not really that many, but then --
 14 so a credit usually, and this has to be kind of
 15 worked out, and usually it's -- an acre is impacted
 16 somewhere and they've got to get a credit which a
 17 credit equals acre but in reality, it was a fifty
 18 acre parcel with five acres of forested and an acre
 19 of emergent, and then you would -- so they put
 20 those -- what did I say, five credits or six in the
 21 bank.
 22 AUDIENCE MEMBER: Who is they?
 23 MS. LADD: Either essentially DOT, they put
 24 it in and they have a ledger and says site X has two
 25 credit forested wetland credits, one emergent marsh

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1 MR. VAN DUSEN: We'd probably actually be
 2 purchasing land tracts for banking purposes.
 3 AUDIENCE MEMBER: So you can use public
 4 land for it?
 5 MR. VAN DUSEN: No, we have to purchase it.
 6 It becomes public land when we buy it.
 7 AUDIENCE MEMBER: It's public land already,
 8 you can take our land and use it for this.
 9 MS. LADD: Let me just say something.
 10 Potentially it would be possible if DOT -- say IH
 11 and WD -- they owned a thousand acres and there's
 12 some like degraded system in there or old fill or
 13 something, and they said, you know, we'd really like
 14 you to take that fill out and fix this degraded
 15 wetland. It might be possible that they would get
 16 some credit for that. That could be entered into
 17 the bank because it's already protected. You get no
 18 preservation credits but they might get restoration
 19 or enhancement credit or something like that.
 20 MS. GATES: This is as difficult if not
 21 more than doing your taxes. If you have all the
 22 different schedules, Maine DOT has a state
 23 mitigation bank with DEP and Deane has been in
 24 charge of kind of balancing that. And basically
 25 when we were able to do a project and -- for the

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1 same dollar amount or a little bit more, we could do
 2 more acreage for restoration or preservation, we
 3 would take that opportunity and do that because it
 4 makes ecological sense to do that and it's more
 5 efficient with taxpayer dollars to do that than it
 6 is to say no, we'll come back and do that later when
 7 we really think we need it. Maybe it's not
 8 available or maybe more degraded so we've taken that
 9 opportunity. And with the state, we've banked that
 10 and hardly used any of the bank credits. Most of it
 11 is all sitting there.

12 But it really is just a table for what's
 13 there and what we've withdrawn and where it's gone
 14 and it's all in an accounting kind of nightmare of
 15 number shifting. It makes perfect sense when you
 16 put it on the table, it's just a matter of keeping
 17 track when you do an individual project so you don't
 18 get confused.

19 So it's -- you know, to talk about it this
 20 way, I think, how does anybody -- how do we
 21 understand and do this because it is complex and
 22 really it's just steps your way through it just like
 23 reading your tax instruction and hoping you get to
 24 the end.

25 MS. LADD: I should note that part of this

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1 comment on that so there are opportunities. And it
 2 wouldn't be the first time that people called up a
 3 project manager and said I have a comment. Yes,
 4 sir.

5 AUDIENCE MEMBER: Shawn Mahoney. I guess
 6 just to clarify on that. So if the Department --
 7 and you probably will get into a lot of what your
 8 presentation was going to be, but if the Department
 9 has a project or has a piece of land that isn't
 10 necessary to compensate for a current project, isn't
 11 even accessed like the example you were just using,
 12 but a project that it has and it wants to put it
 13 into the bank, are you saying there is no
 14 opportunity for public --

15 MS. LADD: No, we have to go through this
 16 whole thing.

17 AUDIENCE MEMBER: Any kind of deposit to
 18 the bank has to go through the public notice?

19 MS. LADD: That's right.

20 AUDIENCE MEMBER: So that if the Department
 21 is requesting ten credits for whatever it's doing
 22 and somebody thinks it should be more or less, they
 23 can comment on that and say it's appropriate, not
 24 appropriate?

25 MS. LADD: That's right. Now, I should --

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1 is if a bank is actually banked and is used, even if
 2 it's not used, DOT would have to submit a report
 3 annually and it becomes a -- becomes part of the
 4 public record, probably go on the web site.

5 MS. GATES: That keeps it from being
 6 confusing.

7 MS. LADD: The public has a right to be
 8 concerned.

9 AUDIENCE MEMBER: Is there any opportunity
 10 for public participation in any of these decisions?

11 MS. LADD: Yes, in this prospectus -- the
 12 permit design is the only time the public is
 13 involved. If it's an individual permit some of the
 14 bigger projects, in that case public notice goes out
 15 just like it did for this, and solicits comments.

16 And again for those you can request a public -- you
 17 know, it's just the same process and you can provide
 18 input that way. Now, for the smaller projects the
 19 time when the public can provide input is every five
 20 years, what's called a program general permit for
 21 Maine, that has to be re-issued and that goes out to
 22 public notice for comment. So that's the -- in that
 23 case you don't have specific sites because you don't
 24 know what permits are going to fall under it, but
 25 that's the time that the public has opportunity to

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1 well, actually, I haven't gotten there yet so I'll
 2 save it. We've already gotten so out of order.

3 AUDIENCE MEMBER: Question.

4 AUDIENCE MEMBER: Ruth Gadey from West
 5 Gardiner. My 77-year-old brain is spinning right
 6 now.

7 MS. LADD: I don't blame you.

8 AUDIENCE MEMBER: As far as I'm concerned,
 9 wetlands have a purpose.

10 MS. LADD: They sure do.

11 AUDIENCE MEMBER: And over the course of
 12 the years, hundreds of thousands of acres of
 13 wetlands have been destroyed. Why? Because they
 14 get in the way of projects. Somebody wants to build
 15 a marina or something and the wetlands get in the
 16 way. Well those wetlands provide a service to us.
 17 They start the food process in the marine world and
 18 this, to me, is just unbelievable. The minds that
 19 went into creating this is mind boggling, all
 20 because you want to accommodate somebody who wants
 21 to -- who wants to destroy wetlands because they're
 22 in the way.

23 MS. LADD: I think one thing that's
 24 important to say, I probably should have said it
 25 right up front but I was just so focused in talking

40

1 about the bank process, is that any form of
 2 mitigation should be the very last thing that's
 3 considered. The first thing the Corps is required
 4 to do is to have the applicant avoid impacts to
 5 wetland or any aquatic resource in the first place,
 6 be it open water, mud flat, river and pool -- you
 7 know, anything. First thing is they have
 8 to recognize that all those functions serve -- in
 9 some cases you can't completely avoid them but maybe
 10 you can minimize whatever your proposal was.

11 AUDIENCE MEMBER: What's so important that
 12 you can't avoid a wetland.

13 MS. LADD: I guess --

14 AUDIENCE MEMBER: Somebody's money
 15 investment, is that what it's all about?

16 MS. LADD: Not from my perspective. But I
 17 think you would be hard pressed to get around Maine
 18 without crossing a wetland or aquatic resource.
 19 I'll leave it at that but it's not just wetlands,
 20 it's streams, rivers, salt marsh, all of it.
 21 They're all important but only when it's been
 22 determined that they can't practically avoid or
 23 minimize, that they can then move into compensation
 24 and then they're supposed to compensate for the
 25 functions and values that are lost whatever impact

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1 is left after making a response, and surprisingly
 2 there's a number of projects that start out as
 3 impacts and they go away because indeed people do
 4 stay out of the wetland because they've found -- for
 5 a number of reasons, they have found out the
 6 permitting process is very expensive and then you've
 7 got to do compensation stuff and that's very
 8 expensive, so guess what, it's cheaper to get out of
 9 the wetland.

10 AUDIENCE MEMBER: There never should be a
 11 permitting process for that, or dumping or anything
 12 else.

13 MS. LADD: In that case you will have to
 14 write to your Congress people.

15 AUDIENCE MEMBER: Oh, yeah, that's a lesson
 16 in futility.

17 MS. GATES: For Maine DOT, I would say
 18 ninety-five percent of our impacts are associated
 19 with our existing infrastructure. So when we're
 20 trying to put a guardrail into a road and we have to
 21 make the slopes lower or trying to meet federal safe
 22 standards or replacing a bridge or, you know, very
 23 rarely are our impacts -- you know, we don't build a
 24 lot of roads any more. We're building the Gorham
 25 bypass and that's going to be probably, you know,

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1 one of the rare new roads that you will see in the
 2 next few years at least. So it's -- that's where
 3 most of our impacts are and that's usually a federal
 4 or state requirement that makes us do that upgrade.
 5 We don't do it unless we have to. So that's most of
 6 our impacts.

7 AUDIENCE MEMBER: Jody Spear. This reminds
 8 me of the Turnpike widening in Sanford which I'm
 9 told led to remediation of a gravel pit to create
 10 wetlands that are now way too wet and this is an
 11 example of a mitigation attempt that's a failure.

12 MS. GATES: That was twelve years ago now
 13 and I think we've learned an awful lot about
 14 mitigation techniques and strategies and maintenance
 15 since then. The Turnpike project and this umbrella
 16 bank isn't at all equivalent to that, and I say that
 17 respectfully, but the reason that we want to do the
 18 umbrella bank and why mitigation bank has become
 19 more popular is just because of projects like that.
 20 We don't want to spend a hundred and fifty-seven
 21 thousand dollars an acre to reclaim a gravel pit to
 22 only have it be too wet. We would much rather
 23 restore, preserve, create, enhance some natural
 24 system that really has functions and values to it
 25 and not relocate a gravel pit. So this is seen as

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1 well as mitigation banking, if you look at
 2 mitigation banking recently versus ten years ago,
 3 it's a huge change in mitigation banking. A lot has
 4 been worked by the regulatory agencies, and there's
 5 a lot of checks and balances in place. I say that
 6 with kind of a foot in each door but they I think
 7 have a lot of requirements that they didn't have
 8 before as far as Maine and everything else with the
 9 banks that -- used to be the banks you just kind of
 10 close the door and walk away. Doesn't happen like
 11 that any more. So the Turnpike project is a really
 12 interesting case study and I know they still use it
 13 a lot, but as far as mitigation, that's exactly what
 14 we're trying to avoid.

15 AUDIENCE MEMBER: I'd like to ask a
 16 question about scope, Vivian Newton speaking. Does
 17 this cover isolated wetlands?

18 MS. LADD: Well, if it's isolated, they
 19 would have to be waters of the United States or they
 20 would have to be -- there would have to be something
 21 because if it's truly isolated wetland as opposed to
 22 a neighboring wetland if they're adjacent to a
 23 stream, and I apologize if all these terms -- it's
 24 going to open another whole can of worms, but if
 25 it's deemed to be isolated, the federal government

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1 has to decide if there's a nexus to interstate
 2 commerce, and if there is not, it would not be
 3 considered -- if it's on a site where we have
 4 jurisdiction because of something else, we can then
 5 require compensation of that isolated wetland that's
 6 being lost.

7 AUDIENCE MEMBER: So this would cover
 8 vernal pools, for example?

9 MS. LADD: It could.

10 AUDIENCE MEMBER: But it hasn't in the
 11 past, the general mitigation.

12 MS. LADD: It has.

13 MR. VAN DUSEN: Absolutely.

14 MS. GATES: State regulates all wetlands.

15 AUDIENCE MEMBER: Well, the State has only
 16 recently begun to regulate.

17 MS. GATES: Vernal pools themselves have
 18 been wetlands and have been regulated as such and
 19 usually they're surrounded by forest as well, but
 20 you're right, specifically the significant wildlife
 21 habitat hasn't been regulated until recently and
 22 that's -- so the whole --

23 AUDIENCE MEMBER: So some of the accounting
 24 to show the pros and cons, plusses and minuses over
 25 the last ten years, would they include these areas?

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1 at it.

2 AUDIENCE MEMBER: And earlier you said that
 3 somewhere along the line we would talk about the
 4 basis for why we need the umbrella and I just was
 5 hoping that we could get to that.

6 MS. LADD: We will. Eventually. Actually
 7 I think we were through most of this. Where we
 8 stopped at this page sort of deals with once the
 9 prospectus is deemed complete and then the sponsor,
 10 in this case, DOT, would be told to go ahead and
 11 develop an instrument which becomes sort of the
 12 final approval, if you will, but if there's issues
 13 raised, the Corps sort of acts as a mediator to try
 14 to help that get resolved if it can be and keeps the
 15 sponsor apprised of how that's going.

16 When they're reviewing the draft, sponsor
 17 has to address any comments that comes up and then
 18 reaches a point where the Corps decides, yes, we're
 19 going to approve this instrument or no, we are not.
 20 And regardless of which decision it is, we have to
 21 notify that Interagency Review Team and of course
 22 also the sponsor, and then there's a whole appeals
 23 process should one of the members of that
 24 Interagency Review Team disagree, and that's on that
 25 second page that shows the flow chart. And I'm not

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1 MS. GATES: Well, they would at the state
 2 level because even if they're isolated wetlands they
 3 would have been regulated. Speaking for DOT, we
 4 don't -- we try really hard not to do too many
 5 mitigation projects. We try to make one mitigation
 6 project for both state and federal regulations so
 7 usually it ends up being submitted as part of the
 8 package anyway and U. S. Fish and Wildlife has been
 9 interested in vernal pools for at least the last ten
 10 years.

11 MS. LADD: And, you know, we do have two
 12 jur -- there's the State jurisdiction which I'm not
 13 addressing. I'm really talking federal to keep it
 14 clear.

15 AUDIENCE MEMBER: Well, I was trying to put
 16 it into the context of this umbrella.

17 MS. LADD: Right, but it could certainly
 18 potentially have some project put in it that will
 19 impact.

20 AUDIENCE MEMBER: As I said, I'm a total
 21 lay person. I understand that this is an instrument
 22 that we're trying to adopt in order to help us
 23 accomplish --

24 MS. LADD: We're -- they're trying to
 25 adopt. We are not trying to adopt it, we're looking

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1 going into that. I don't know if it serves a
 2 purpose right now to do that but there is an appeals
 3 process.

4 Let me just get to the end of the slide.
 5 If there is no dispute, there's probably assigning
 6 ceremony or something with the Corps of Engineers,
 7 the Colonel would meet at DOT and they would sign it
 8 and potentially the state might sign it too if
 9 they're going to allow it to be used for mitigation
 10 for state permits. Okay.

11 AUDIENCE MEMBER: I actually had a question
 12 on that slide. Could you just turn it back on for
 13 one second. Becky Bartovics, sorry. It says the
 14 Corps must tell IRT if they intend to approve or not
 15 approve. Where on this flow chart does that happen?

16 MS. LADD: Right here down almost to the
 17 bottom on the left hand side where it says phase 4.
 18 The first box says --

19 AUDIENCE MEMBER: Okay, I'm sorry, I missed
 20 that.

21 MS. LADD: That's okay. Anything else I
 22 needed to mention? I don't think so. I'm going to
 23 turn it over to Deane and he's going to.

24 AUDIENCE MEMBER: Could we have -- I had a
 25 question -- I don't know if this is fair enough for

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1 you. Peter Taber, Wild Maine Times. I had a
2 question as far as perhaps another branch of the
3 Corps.

4 MS. LADD: I'm just going to turn the
5 lights on.

6 AUDIENCE MEMBER: The history as I
7 understand it is the compliance is a very weak part
8 of these various projects, these mitigation
9 projects.

10 MS. LADD: It has been a problem.

11 AUDIENCE MEMBER: And I understand that in
12 fact, the Corps has been short on funds for officers
13 to look into this compliance, is that true?

14 MS. LADD: Yes, in the sense that when you
15 stop and think about how many mitigation -- we
16 have -- New England, we have something like
17 thirty-five mitigation sites around New England and
18 some of them -- it's a much less smaller number that
19 are currently in the monitoring period which could
20 be five to ten years, something like that. It is a
21 smaller number, but the point is there's a lot of
22 sites and to keep track -- and some of them are
23 really small, and to keep track of them is extremely
24 hard with the staff that we had which is one
25 reason -- pool mitigation is much easier to do

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1 MS. GATES: How has Maine DOT done in
2 compliance and DOT specifically?

3 MS. LADD: I don't have -- to remember all
4 the sites, I can't -- the question was how Maine DOT
5 has gone in compliance through the years, and
6 actually, to compare to most permittees, they have
7 done well. Could they do better? Of course they
8 could do better. Have they learned from their
9 mistakes? Yeah. And there's certain sites that are
10 outstanding, I think as far as mitigation.

11 Now, I said before, it takes a long time
12 for some of these resources to really develop into a
13 healthy -- what you want -- the type of system that
14 you want. If you had a forest wetland and that's
15 what you wanted, you don't get a forested wetland in
16 five years, you'll get it in ten years but if it's
17 on a trajectory to end up where it wants to be and
18 there are a lot of sites that are indeed going the
19 right way. Yes, sir.

20 AUDIENCE MEMBER: Ed Friedman again. How
21 many people staff do you have out there monitoring
22 these projects? All our project managers are sort
23 of available to do it and I'll be honest, some are
24 more interested in going out and checking the
25 mitigation sites than others. Then on my staff I

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1 compliance. Or you could visit -- potentially visit
2 it more than one time a year, any large site.

3 In fact we tend to look at the large sites
4 more often because there's more merit to it. To go
5 out and look at a site that's a thousand square
6 feet, you know, when you're trying to do priorities
7 and decide what are we going to do, that's probably
8 not the site you go to look at. So to go to your
9 point about not having staff, the idea is to be as
10 efficient as we can, and one way to be more
11 efficient is to be focusing on larger --

12 AUDIENCE MEMBER: Does that mean that
13 preservation will be an increasingly larger part of
14 mitigation?

15 MS. LADD: I hope -- not that it won't be a
16 part of because I think it's a critical part of it.
17 You've got to have buffers, but still just like she
18 was mentioning earlier, we have to think of no net
19 loss. So we still have to have some way of
20 increasing functions and values. So, yeah,
21 preservation -- we don't want to see a site the size
22 of this room with no preservation. That would make
23 no sense. We want to see that plus a nice buffer
24 that will keep it from being degraded from future
25 impacts in the vicinity.

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1 have all of two wetland scientists for the whole of
2 New England, and one of them, it's his job if you
3 will, one of his tasks is to do a compliance report
4 for me every year and as part of that, he goes out
5 and looks at fifteen percent of our active
6 mitigation sites. Those are the ones that are in
7 the monitoring period, and then prepares a report on
8 what he found, where the weaknesses are, you know,
9 something -- anything that needs to be done or in
10 some cases, there's not much that can be done based
11 on circumstances of the site. Just in case you're
12 interested, the biggest most common problem is
13 invasive species. That's a huge problem.

14 AUDIENCE MEMBER: Well, typically like to
15 colonize disturbed sites?

16 MS. LADD: Exactly.

17 AUDIENCE MEMBER: Do you have any sort of
18 relationships with local groups that might help you
19 monitor or contract with the -- where there's so few
20 agency people kicking around and so much territory,
21 are there other people on the ground that will look
22 at a site for you? And those old projects, that
23 pool of thirty-five projects, that's not going away,
24 so we're -- you're talking about in theory having
25 some larger projects in the future that would

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1 minimize the effect to your staff in terms of how
 2 many acres per person or whatever, but you still
 3 have a backlog.
 4 MS. LADD: The acreage might even be
 5 bigger, potentially.
 6 AUDIENCE MEMBER: Right.
 7 MS. LADD: I should note that all projects
 8 require monitoring by the permittee or whoever they
 9 assign to do it, consultant or something, and we get
 10 monitored reports which are supposed to flag
 11 problems, but in summer, some are excellent, some
 12 are better than others, but we have found that when
 13 a site is monitored and they prepare the reports as
 14 they're supposed to, those sites tend to be better
 15 because they are invested in the project. It's the
 16 ones we have to chase for those monitoring reports.
 17 They've kind of blown it off, okay, we built it,
 18 we're out of here. That's one way that helps us
 19 know how something is going since we can't get to
 20 all the sites. We can at least read all the reports
 21 and have some sense of what's going on.
 22 AUDIENCE MEMBER: And your coverage is
 23 about fifteen percent a year?
 24 MS. LADD: Per year.
 25 AUDIENCE MEMBER: So about a six year

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1 rotation.
 2 MS. LADD: No, that's just with this one
 3 person. There are some project managers that go out
 4 faithfully to all of their mitigation sites and they
 5 just keep tabs on them -- to them it's a personal
 6 pride to do it, plus they get a little bean, if you
 7 will, they can report to their supervisor that they
 8 did this. It helps with our funding, gets paid by
 9 site compliance inspection among other things. I
 10 think I should mention, too, that's important is --
 11 you talked about other people going. Some of the
 12 problem we have is that on private property, access
 13 rights are a problem. We even have problems with
 14 our sister agencies, Fish and Wildlife and EPA,
 15 would like to go out but they have to go through the
 16 Corps project manager. They can't just go out to
 17 the site unless it's on public lands, but a lot of
 18 these are on private lands so we can't just say oh,
 19 sure, go have a look.
 20 AUDIENCE MEMBER: But you might have an MOU
 21 or something like that with local interest or
 22 somebody that is really closer or on site or sees it
 23 every day or walks the dog there or whatever it is.
 24 MS. LADD: And people are allowed to say
 25 something, if they happen to know of a mitigation

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1 site and you see a problem. We welcome the
 2 information. Okay.
 3 AUDIENCE MEMBER: Could you describe some
 4 of the projects that request permits -- that are
 5 requesting permits.
 6 MS. LADD: I think I'm going to decline
 7 until the end when Deane finishes because right now
 8 this could just go on and on into -- let's --
 9 AUDIENCE MEMBER: I have a question as
 10 to -- I have no where seen how credits -- what they
 11 actually stand for, like an acre of land restored
 12 down on the coast, what does that excuse the
 13 destruction of. How much wetland somewhere else?
 14 MS. LADD: That's what has to be spelled
 15 out in the agreement, in the prospectus and in the
 16 banking agreement.
 17 AUDIENCE MEMBER: So --
 18 MS. GATES: For each individual project.
 19 MS. LADD: You won't see it in this
 20 umbrella because there are no projects associated
 21 with it.
 22 AUDIENCE MEMBER: The conditions for each
 23 project are specific?
 24 MS. LADD: Yes.
 25 AUDIENCE MEMBER: But what typically --

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1 what would say -- for example, what would six
 2 hundred acres of island -- island land, I think it's
 3 two hundred seventeen acres of wetland, what's that
 4 worth? What's the potential equivalent?
 5 MS. LADD: I have no idea. Unless -- you
 6 know, the Interagency Review Team would sit down and
 7 look at it and they'd be thinking of is this
 8 disturbed preservation that has impact on credits if
 9 it's wetland versus upland, and its proximity to
 10 development, the type of resources, how good -- I
 11 don't know. I just can't stand here and say what
 12 the number would be.
 13 AUDIENCE MEMBER: Would that pay for one, I
 14 don't know, a widening of a mile of road or would it
 15 pay for a cargo port or something?
 16 MS. LADD: And that part of it isn't
 17 anything to do with the bank. That part of it comes
 18 out of the permit process, so when the person
 19 applies for that mile of widening or the port or
 20 whatever it is, during that process, that's when
 21 it's decided if that whatever bank is appropriate
 22 and what the appropriate number of credits that they
 23 have to get out, so that --
 24 AUDIENCE MEMBER: The final question from
 25 me. Who makes that decision?

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1 MS. LADD: Ultimately the District Engineer
2 of the Corps of Engineers.

3 AUDIENCE MEMBER: I see. Does the State
4 have input into that?

5 MS. LADD: Yes, yup.

6 AUDIENCE MEMBER: I see.

7 MR. VAN DUSEN: Okay. I know there's
8 been -- Deane Van Dusen, Head of the Field Services
9 Mitigation Division at DOT.

10 AUDIENCE MEMBER: And you're here on behalf
11 of the retrievers behind you, right?

12 MR. VAN DUSEN: That's right. Dog and pony
13 show. I know the discussion this afternoon has
14 actually been on a number of things that I am going
15 to be talking about and I'm probably going to be
16 skipping through things because I think a lot of it
17 we've already covered, but I'll try to pull out what
18 we haven't covered so far and then -- and again pipe
19 up if you have any questions while I'm running
20 through this, and then we'll open the floor for
21 questions for both Ruth and me and Judy.

22 First of all, I want to talk about the bank
23 objectives. Why are we establishing this umbrella
24 mitigation bank. The first reason is to streamline
25 the Corps' Section 404 permit evaluation process.

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1 that and go through the five or ten years of
2 monitoring, we're probably talking in the area of
3 about seventy to eighty thousand dollars. And
4 that's a portion of an acre. But if we build a
5 fairly large site like the restoration to a marsh
6 system or something that might need one hundred two,
7 one hundred three acres, significant acreage, our
8 costs go considerably down per acre.

9 AUDIENCE MEMBER: To --

10 MR. VAN DUSEN: So it's an economy of
11 scale. We can get a better bang for the buck that
12 we have by doing larger mitigation projects.

13 Then the fourth point is on mitigation
14 planning and construction for large scale regional
15 transportation projects and biophysical regions for
16 a number of road projects that are currently
17 scheduled for, okay? So we'd be specifically
18 looking at our six and twenty year plans looking at
19 areas of the state where we're probably going to
20 have significant number of projects, and with that
21 probably some wetland impacts, and then we can kind
22 of look in those areas and sort of start planning on
23 developing a bank or bank sites for that biophysical
24 region.

25 So now I guess I want to jump down. Ruth

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1 The second is to provide high value mitigation based
2 on an ecological landscape watershed approach. The
3 third is to preserve and restore resources based on
4 statewide priorities; and the fourth is to follow
5 the mitigation priorities established by the Corps
6 of Engineers and EPA in their new ruling which
7 essentially gives priority for mitigation banking as
8 compensation. Then I want to quickly review why DOT
9 needs an umbrella mitigation bank.

10 There are four points I want to cover here.
11 The first is we want to respond to the new Corps/EPA
12 new rule. The second is to provide an opportunity
13 to build landscape watershed scale mitigation
14 projects based on statewide priorities which kind of
15 incorporates some of those goals that I just spoke
16 about. The third is potential for more cost
17 effective mitigation based on project scale and site
18 specific parameters. That's an important point.

19 AUDIENCE MEMBER: Are you going to define
20 these things -- Becky Bartovics -- later?

21 MR. VAN DUSEN: Let's talk about that right
22 now. Cost effective mitigation. There is an
23 economy of scale when it comes down to building
24 mitigation projects, and if we build a ten thousand
25 square foot mitigation project, probably to build

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1 talked about the banking instrument and I don't
2 think I need to define that, you're all familiar
3 with that. The site development plans, let's just
4 approach that a little bit. Ruth got into that
5 quite a bit but I'll just try to clarify few things.

6 The mitigation sites included in the
7 banking instrument will be designed by -- developing
8 a conceptual and final site development plan that
9 will be submitted to this Interagency Review Team.
10 Now, I talk about there will be conceptual sites
11 submitted first which is to give an overview of the
12 site and the details associated with that, and that
13 would be sort of the credit -- the credit really is
14 schedule for that site, the site itself, how many
15 acres, and the monitoring program, what functions
16 and values the system provides and a variety of
17 different elements that would be part of that
18 proposal, so that would be in the conceptual plan.

19 And then we get into final design plan
20 where we would really have -- if there was any kind
21 of construction or restoration or enhancement work
22 that had to be done, we would then have plans. They
23 would basically kind of show where we're going to be
24 doing earth work operations able to improve the
25 hydrology in an area. We're going to be doing

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1 planting. We're going to be doing basin control and
 2 all the real specific elements of constructing a
 3 mitigation project on that site. That would be for
 4 restoration, creation or enhancement, and of course
 5 preservation.

6 Like Ruth said it would be just probably
 7 not a project, basically a credit that we would get
 8 for that area but it's very important for those
 9 wetland systems that we would be developing in that
 10 area. So the development of the mitigation sites
 11 will begin of course with the conceptual plan and
 12 then we'll move on to the final plan, and this will
 13 all have to go through Interagency Review Team for
 14 approval.

15 And if at any point that the review team
 16 doesn't like what we're submitting, they will
 17 comment back and of course we'll have the option to
 18 revisit it and resubmit it, and I expect that
 19 probably will happen quite a bit.

20 AUDIENCE MEMBER: Could I ask a question?
 21 Vivian Newman. The IRT approval process, is there
 22 any opportunity for public participation in there?

23 MS. LADD: I think the last official
 24 opportunity is part of the prospectus commenting
 25 unless -- unless there's a permit application

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1 associated with it in which case it would be an
 2 individual permit review, probably, and there's a
 3 whole thing associated with that as well.

4 AUDIENCE MEMBER: Typically are the -- are
 5 the public involved in the mitigation part?

6 MS. GATES: They come in as submission on
 7 individual project.

8 MS. LADD: Oh, yes, that end of it.

9 MS. GATES: If we ask to put -- I like to
 10 think of it as a bucket instead of an umbrella but
 11 if we ask to put a project in to the bank, that's
 12 like an application to the Corps and they do a
 13 public notice and take public comment on those
 14 individual projects that are going into the bank.
 15 And you will have an opportunity to -- the public
 16 has an opportunity to comment on those.

17 AUDIENCE MEMBER: I'm asking simply because
 18 many people are particularly focused on certain
 19 local areas that they know a great deal about and
 20 this would be an opportunity to utilize their
 21 knowledge.

22 MS. LADD: That's the whole idea, yeah.

23 AUDIENCE MEMBER: That's the first part,
 24 the conceptual proposal part. Is that when the
 25 public gets involved or is it at the final?

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1 MS. LADD: It's at the prospectus stage.

2 AUDIENCE MEMBER: That's before the final
 3 design.

4 MS. LADD: It's much like a permit. When
 5 we put out a permit to public notice, there's often
 6 some tweaking afterwards, the mitigation may not be
 7 finalized.

8 AUDIENCE MEMBER: And how does the public
 9 know? Is it in the paper?

10 MS. LADD: If you can -- well, you may put
 11 it in the paper but we put it out -- we have a whole
 12 list of people who give the public notice on the
 13 internet. It's put on our web page, the Corps web
 14 page.

15 MR. VAN DUSEN: We would be in the local
 16 paper and usually the three dailies, state dailies,
 17 Portland Press Herald, Kennebec Journal and Bangor
 18 Daily News.

19 AUDIENCE MEMBER: Like under --

20 MR. VAN DUSEN: There's a public notice
 21 section.

22 MS. GATES: You probably just buzz right by
 23 it.

24 AUDIENCE MEMBER: Harlan McLaughlin. So
 25 what we're talking about here is the land banking

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1 scheme for lack of a better word, that DOT wants and
 2 you guys are the one that's going to decide whether
 3 they get it or not, is that how this works?

4 MS. LADD: Ultimately, yes.

5 MR. VAN DUSEN: Okay. So upon approval of
 6 the final plan that we submit on the mitigation
 7 site, there will be then attached to the banking
 8 instrument through an addendum. That's how it's
 9 actually attached to this umbrella bank, each site.
 10 So that's specifically -- let me see if there's
 11 anything else I want to talk about. In the event
 12 final plans are not approved, the IRT will provide
 13 Maine DOT with specific reasons for not providing
 14 submittal.

15 AUDIENCE MEMBER: Sean Mahoney. So Deane,
 16 I'm just going to turn to the time line you provided
 17 with if prospectus.

18 MR. VAN DUSEN: Sure.

19 AUDIENCE MEMBER: You've got site
 20 development plans, and the reason for a lot of
 21 people who are here is that one for Sherman Marsh
 22 and one for Sears Island, so I think everybody here
 23 has -- that's involved.

24 MS. LADD: They are conceptual.

25 AUDIENCE MEMBER: That's what I'd like to

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1 ask you about. So the way you're looking at this
 2 time line just so I understand, a plan is -- site
 3 development plan would be submitted to the agency,
 4 meaning the Corps and DEP if DEP agrees to go into
 5 the bank, that plan is subject to final approval by
 6 the Corps and possibly DEP. As part of that
 7 approval process, the IRT, other resource agencies
 8 have the ability to comment, provide notice of
 9 potential to stop it if they have --

10 MR. VAN DUSEN: Absolutely.

11 AUDIENCE MEMBER: The public also has
 12 during that same time period ability to provide
 13 comments to ask for public hearing?

14 MR. VAN DUSEN: That's correct.

15 AUDIENCE MEMBER: So that's -- and then at
 16 the end of that process there will be a decision as
 17 to whether or not that projects included in the
 18 umbrella or the bucket.

19 MS. LADD: I like bucket better.

20 AUDIENCE MEMBER: And how much credit that
 21 project will provide in the bucket.

22 MR. VAN DUSEN: Yeah, we will have that in
 23 the prospectus, probably would have pretty good
 24 breakdown.

25 MS. LADD: At least a proposed --

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1 Marsh is, that bridge work needs to be done as soon
 2 as possible because the bridge is being undermined
 3 now that the tide is under the supports. So we're
 4 kind of taking a chance that that won't be accepted
 5 into the bank and the project will already be done
 6 and we'll have spent the money, but we have to do
 7 the bridge anyway so it's all kind of -- has to get
 8 smooched into this big ball.

9 AUDIENCE MEMBER: Somebody just asked this.
 10 At this point in time, my comment on this document,
 11 that's not the time to -- from your point of view,
 12 to be commenting on whether or not that's an
 13 appropriate project.

14 MS. GATES: We will be submitting an
 15 application.

16 MS. LADD: That will be a prospectus on its
 17 own.

18 MS. GATES: We will submit an application
 19 and add that to the bank and to the Corps and likely
 20 DEP, because we like to keep our state bank going as
 21 well, and at that point is the time for people to
 22 say this is why it should be or shouldn't be, or
 23 this is what needs to be tweaked. Part of the idea
 24 with Sherman Marsh as well as that we don't know
 25 what acreage is going to result. The figure that

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1 MR. VAN DUSEN: Yeah.

2 AUDIENCE MEMBER: So the -- now
 3 specifically, what is your conception since you've
 4 got it here for Sears Island and Sherman Marsh? I
 5 mean you start with Sherman Marsh because I'm
 6 interested in that since that was supposed to be a
 7 net gain project, and then it's been changed now to
 8 be used for mitigation.

9 MS. GATES: Well, Maine Yankee funds that
 10 were originally to fund that are actually mitigation
 11 funds, so even though the original description of
 12 that project was proactive, in fact, it was being
 13 mostly funded with mitigation funds. So to refer to
 14 it as a purely proactive, it is now purely
 15 mitigation is not accurate in my opinion.

16 AUDIENCE MEMBER: All right.

17 MS. GATES: What we have done is opted to
 18 fully fund to the extent that other partners want
 19 to. We do have some Maine Yankee funds in the
 20 project now that are toward part of the project, but
 21 that marsh restoration, DOT has opted to fund that
 22 as much as possible to preserve the opportunity to
 23 add it to the bank. Once the project is done, and
 24 this is -- the risk we're taking is that the bridge
 25 work for Route 1 in Newcastle which is where Sherman

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1 was thrown out was two hundred seventeen acres, but
 2 that included the part that's already subtidal or
 3 intertidal, so we've got to see what the net gain is
 4 in that project before we ask for a certain amount
 5 of credits. So you almost can't do it until it's
 6 done.

7 AUDIENCE MEMBER: And -- Sean Mahoney,
 8 still. I mean I'll just say it now because we're on
 9 the record. I mean we at Conservation Law
 10 Foundation have some serious concerns about using a
 11 project that was already planned while that first
 12 stated because of natural forces, was already
 13 planned with a variety of different funds to be part
 14 of an event but we'll make those comments at the
 15 appropriate time. How about the Sears Island
 16 concept because I think that's probably got as many
 17 people interested as --

18 MR. VAN DUSEN: Well, that kind of
 19 parallels Sherman Marsh. It's an island that --
 20 state owned, and we're dedicating a portion of it
 21 for conservation, education and recreational uses,
 22 and the -- there's a need to get something from that
 23 six hundred acre portion for transportation uses.
 24 It seems feasible that using that for mitigation
 25 credit would be very -- very -- not very disruptive

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1 to the conservation easement, and yet would provide
 2 us with some potential credit for long term use for
 3 transportation related projects.

4 MS. GATES: The mitigation bank was a way
 5 that we looked at to be able to preserve credit for
 6 preservation, and the Transportation Committee was
 7 very specific that if any conservation that went on
 8 on the island, they wanted to be able to get credit
 9 for that at some point if not -- at some point.
 10 There's almost no way to do that without creating
 11 mitigation bank, and so it really pushes you to that
 12 option unless you have a project sitting right there
 13 ready to go which we don't. So --

14 AUDIENCE MEMBER: So it's probably fair to
 15 say that the genesis for the mitigation bank is
 16 coming because of the timing of what's happening
 17 with Sherman Marsh and with Sears Island because
 18 there's a provision in the law that something that's
 19 already been planned to do doesn't get to count as
 20 mitigation if it's already in the works.

21 MS. GATES: The major genesis of the bank
 22 is the change in the mitigation rule. We don't
 23 have -- we have a state bank but not a federal bank
 24 and so we don't have the option to even use the
 25 first priority method. So --

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1 development. If it was indeed preserved and there
 2 was a document in place now saying nobody could
 3 build on it, that would be something else but as I
 4 understand it, that's not the case.

5 MR. VAN DUSEN: That's right.

6 AUDIENCE MEMBER: Were you saying that you
 7 actually would be combining some credits with the
 8 State land?

9 MS. LADD: No, state one we don't
 10 acknowledge. We don't give credit for that.

11 AUDIENCE MEMBER: And one party can't
 12 withdraw from the other parties. No, it has to be
 13 signed on through the bank.

14 MR. VAN DUSEN: There's only DEP credit
 15 eligible in the State bank, no Corps credit.

16 MS. GATES: Going forward you may be able
 17 to do that.

18 AUDIENCE MEMBER: I just wanted to get to
 19 the issue to end up where we're double dipping at
 20 all here.

21 MS. GATES: We double dip now.

22 MS. LADD: It's the opposite of double
 23 dipping, it's having to do twice as much as opposed
 24 to being able to use the same thing twice shift.

25 AUDIENCE MEMBER: Harlan McLaughlin. Have

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1 AUDIENCE MEMBER: And is the Corps -- the
 2 Corps does not recognize the State bank?

3 MS. LADD: Right.

4 MS. GATES: Well, the State bank has been
 5 used for state projects already and those are
 6 already preserved.

7 AUDIENCE MEMBER: Becky Bartovics. Didn't
 8 you say that there's quite a lot already in the
 9 State banks?

10 MR. VAN DUSEN: There's eleven sites.

11 AUDIENCE MEMBER: That are in the bank that
 12 you have used very little of?

13 MR. VAN DUSEN: Yeah, we've used a little
 14 of them.

15 MS. GATES: The Corps would not go back and
 16 look at those and say now we give you credit for
 17 those because those are already pre-certified.
 18 Those would just be available for state use.

19 MR. VAN DUSEN: Exactly.

20 AUDIENCE MEMBER: This may sound dumb. Jim
 21 Freeman. There's already a hundred acres of
 22 preserve because they were not destroyed, haven't
 23 been touched on Sears Island, that's already state
 24 land, so how can you --

25 MS. LADD: It has to be underneath of

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1 any other states in New England applied for this
 2 kind a program?

3 MS. LADD: For a bank? No.

4 AUDIENCE MEMBER: Have any applied that you
 5 know of that have been turned down, not only New
 6 England but the rest of the country? Is that
 7 something that's turned down?

8 MS. LADD: I think so but I can't answer
 9 definitively. I think some have been rejected but I
 10 don't know for sure. There are a lot of mitigation
 11 banks in the rest of the country, a lot, and I won't
 12 say that they're all good. Some of them were set up
 13 awhile ago.

14 AUDIENCE MEMBER: What would be some of the
 15 reasons for rejecting it, from your perspective?

16 MS. LADD: That we didn't I guess feel --
 17 well, it would have to be that it wasn't designed
 18 well. Their monitoring wasn't good, didn't have
 19 good enough financial assurances, didn't have
 20 confidence in the sponsor to be able to follow
 21 through, that they didn't have experience needed.
 22 It would have been something substantive. It
 23 couldn't be well, we just don't think it's a good
 24 idea.

25 MR. VAN DUSEN: Or financial ability.

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1 MR. LADD: Yeah, that they are set up such
2 that they can actually do this work long term. Just
3 like with the permit, we can't just say no, you
4 can't have this permit.

5 AUDIENCE MEMBER: Pretty much all technical
6 stuff.

7 MR. VAN DUSEN: Becky.

8 AUDIENCE MEMBER: I'm not representing
9 anybody other than Penobscot Bay Alliance right now,
10 just so you know, but I have -- I do know that the
11 consensus agreement for Sears Island was signed
12 April of 2007 which is long before the mitigation
13 bank was planned, and my understanding is that this
14 three hundred forty-one acres that were set aside
15 was what was -- what the Department of
16 Transportation and the Transportation Committee for
17 the legislature were accepting as what they would
18 get out of the discussion, so I'm confused as to why
19 then would you think it was appropriate to go back
20 and take the six hundred acres which was already
21 slated for preservation and therefore not as likely
22 for being developed, how could that be part of a
23 mitigation bank? And I actually -- yeah, well
24 something else later but I don't understand how that
25 could happen.

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1 committee of the consensus agreement, but they took
2 no action at that point. Under State law, the
3 committee must review and approve any change in
4 jurisdiction, use or ownership of the island, so
5 that is why we have to go back to the committee.

6 The other issue is, I think you were asking
7 about the six hundred acres as being part of the
8 mitigation, and again, my memory is a little bit
9 fuzzy on this, but when the consensus agreement was
10 being negotiated, there initially was specific
11 language in there saying that the six hundred acres
12 could not be used -- these are my words. I don't
13 know exactly how it was framed, and that was lifted
14 out of the document. Prior to that, it was
15 specifically said that it couldn't be used. I guess
16 I would contend that the document may be silent on
17 the issue and was anticipated that these kinds of
18 things would have to be worked out.

19 MR. VAN DUSEN: Right.

20 AUDIENCE MEMBER: But the fact that it was
21 in a previous draft specifically said you couldn't
22 use the six hundred acres, that was taken out. I
23 guess it remains an open question.

24 MR. VAN DUSEN: Sure, and that was
25 certainly one of the consensus agreement points was

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1 MR. VAN DUSEN: Well, I certainly think
2 that on the forty acres, we're going to look on that
3 parcel for our mitigation options. I think coming
4 from my division, we're going to look there first,
5 try to build out the forty acres. And then I think
6 when we can move into the six hundred acre
7 conservation area, but I think that -- I know we did
8 talk about earlier, about actually using the three
9 hundred forty-one acres as potential mitigation area
10 earlier on in the discussion when the joint use
11 planning committee first formed, and I think we all
12 agreed that yes, we would do that.

13 AUDIENCE MEMBER: But I don't know that I
14 ever heard the discussion in the consensus
15 agreement -- during the consensus agreement which
16 was when the governor accepted and has been blessed
17 that there was any talk of using the six hundred
18 acres for mitigation.

19 MR. VAN DUSEN: That's right. There's
20 only --

21 AUDIENCE MEMBER: I think I'd like to shed
22 some light. David Cole, Commissioner. The
23 Transportation Committee didn't bless anything and
24 they have not technically been party at this point.
25 We did a presentation to the transportation

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1 to look at potential mitigation options on the
2 island.

3 AUDIENCE MEMBER: And the other thing I
4 would add, I do specifically remember in the
5 presentation to the transportation committee, we
6 talked about the mitigation bank as a way because
7 this was a major point of concern for many, was that
8 if you went ahead and did a conservation easement,
9 you wouldn't be able to use it as mitigation later
10 on, and this was a way of trying to as part of the
11 planning, deal with it now rather than down the
12 road.

13 AUDIENCE MEMBER: The day that you made the
14 presentation to the -- excuse me for interrupting,
15 but that day was -- there were a lot of bells --
16 there was another presentation.

17 AUDIENCE MEMBER: This was -- no, that was
18 the briefing. This was like a year ago.

19 AUDIENCE MEMBER: Oh, okay.

20 AUDIENCE MEMBER: I would say this was
21 probably last June and I don't know if I --

22 AUDIENCE MEMBER: I didn't hear any of
23 that.

24 AUDIENCE MEMBER: Could I ask the
25 Commissioner a question about that? Do you remember

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1 why, sir, it was withdrawn from there? Usually in
 2 negotiations you give up something, I'll give up
 3 something. Do you remember what the specifics
 4 were -- that sounds like something that our side
 5 would be in favor of but yet we gave that up. What
 6 did we get for it, do you remember that?
 7 AUDIENCE MEMBER: No. I had to refresh my
 8 own memory and I went back to some previous drafts
 9 and the wording I just used is my memory of it. I'd
 10 have to go back and specifically reference it but I
 11 do remember that it had been discussed in some form
 12 or fashion and at some point was removed. And I
 13 mean, I can speculate on that but my memory is not
 14 what it used to be.
 15 AUDIENCE MEMBER: Jody Spear. I don't know
 16 if anybody else can verify this and I didn't dig it
 17 out myself, but I see something here in quotes that
 18 was provided to me by someone who's reputable and
 19 reliable as a journalist. Page 5 part C mentions
 20 that quote protected property and, ellipses,
 21 conservation easement, end quote, could be used
 22 quote, as mitigation by preservation, enhancement,
 23 creation or restoration of wetlands or habitat
 24 values to offset environmental impact of
 25 transportation activities near Sears Island by Maine

1 MS. LADD: How long do we have this room.
 2 MR. VAN DUSEN: We have it until 5 o'clock.
 3 MS. LADD: So we have twenty minutes, so if
 4 we can focus on the prospectus and if we have
 5 exhausted all the questions on that, we can talk
 6 about some of this other stuff that I know people
 7 are interested in.
 8 AUDIENCE MEMBER: Goal number or objective
 9 number 3 is to preserve and restore some space on
 10 statewide priorities. Who determines the statewide
 11 priorities?
 12 MR. VAN DUSEN: Statewide priorities are
 13 developed by resource agencies, mainly DEP, DMR,
 14 anyone else, LURC perhaps.
 15 MS. GATES: I think LURC is on there.
 16 They're the same people that are looking at projects
 17 who are inland -- so they're linked. They're
 18 conservation priorities and it's not just state
 19 agencies, actually for conservation priorities,
 20 Maine Audubon, TNC, Land for Maine Futures. There's
 21 a lot of parties that can submit something that they
 22 think is a priority for consideration of programs,
 23 and all of those would be brought by those state
 24 agencies to -- you know, that's a public thing.
 25 Here are our priorities for natural resources that

1 DOT. Is that what's being challenged?
 2 MR. VAN DUSEN: I believe that's a part of
 3 the draft conservation easement. I don't know what
 4 version you have there.
 5 AUDIENCE MEMBER: It's the latest, he made
 6 that clear.
 7 MR. VAN DUSEN: But the conservation
 8 easement is still in the middle of negotiations and
 9 development with the legal teams, so we really
 10 aren't able to comment on that today because it's
 11 really inappropriate at this stage.
 12 AUDIENCE MEMBER: We are not really talking
 13 about Sears Island on this planning committee stuff
 14 here, we're talking about the mitigation bank.
 15 MR. VAN DUSEN: But you're talking about
 16 the conservation easement and that's what I'm not
 17 going to respond to.
 18 AUDIENCE MEMBER: I agree, I think we need
 19 to talk about that in another form.
 20 AUDIENCE MEMBER: That was my purpose in
 21 coming, but I heard you bring up the question.
 22 AUDIENCE MEMBER: I just think we need --
 23 MR. VAN DUSEN: You will have opportunity
 24 to get -- to have that answered at a future meeting
 25 once we have completed conservation easement draft.

1 we know about, and we would be looking at those, and
 2 if we can do one of those, you know, then we'll do
 3 it. And that's basically to make sure that we're
 4 matching up with those priorities and that what
 5 we're doing isn't conflicting with natural resource
 6 agencies.
 7 MR. VAN DUSEN: I only have just a few more
 8 points on the prospectus that I want to get to
 9 because most everything we've spoken about already.
 10 The real state provisions, I have to
 11 mention that Maine DOT will provide for perpetual
 12 protection and preservation of each bank site
 13 through a management agreement or restrictive
 14 covenant with a third party endorser which probably
 15 would be DEP or a conservation easement. So we will
 16 share that on all our bank sites.
 17 Each real estate instrument must be
 18 approved by the Interagency Review Team, and Maine
 19 DOT will record on a restrictive covenant easement
 20 or similar agreement for each site added to the
 21 umbrella bank by addendum. Just so you're aware
 22 that the protection for those sites will be
 23 perpetual.
 24 Then we've covered establishment of credit,
 25 that would be determined at the time of the site

1 proposal. The use of credit, we're clear on the use
 2 of credit, I'm assuming. We've talked about that
 3 quite a bit today.

4 Credit, debiting and accounting procedures.
 5 Maine DOT will be responsible for credits and debits
 6 in the umbrella bank and Maine DOT will use separate
 7 ledger for each mitigation site and accounting
 8 ledger that has been developed in consultation with
 9 Interagency Review Team.

10 Geographic service area, we can talk about
 11 that a little bit more. We have the nineteen
 12 biophysical regions map that's at the back of your
 13 handout, and these specifically will be detailed in
 14 any kind of proposed site or site proposal per what
 15 biophysical region the bank site will service. And
 16 it may be a portion of one of those sites, it may be
 17 several of those regions depending on the site.
 18 Then, let's see, that's -- so there's nineteen
 19 biophysical regions -- yes.

20 AUDIENCE MEMBER: Shawn Mahoney. On the
 21 biophysical region, has the natural resource program
 22 used that previously for wetland compensation.

23 MS. GATES: The DOT program is based on
 24 biophysical region.

25 AUDIENCE MEMBER: Oh, it's biophysical

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1 Bartovics. Could I just say that I've been part of
 2 the bay management efforts on the State Planning
 3 Office and of course, they haven't come up with any
 4 new rulings, but I have to say as a denizen of
 5 Penobscot Bay, I would have a hard time seeing any
 6 kind of mitigation in Sheepscot River or Sheepscot
 7 Bay because of the habitat that would be lost in
 8 Penobscot Bay. And we have fishermen who depend on
 9 any kind of, you know, wetlands -- the provisions
 10 that wetlands provide to Penobscot Bay. It's not
 11 going to help them if there are juvenile lobsters in
 12 Sheepscot Bay that make it, but the ones that are in
 13 Penobscot Bay are not going to make it. So I would
 14 have a very hard time with any kind of mitigation
 15 outside of very close proximity. I don't understand
 16 actually how you can ever say there is no net loss.
 17 I don't think that -- I think that the natural
 18 system is very hard to replicate and replicating a
 19 natural system that has longevity -- even you said
 20 yourself, that these natural systems, you can't
 21 really determine whether they're going to have any
 22 longevity, and building one is not necessarily going
 23 to provide the nutrients in any kind of short order
 24 that are going to be lost. So I --

25 MS. GATES: Logistic arguments are valid.

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1 regions?

2 MR. VAN DUSEN: Yes.

3 AUDIENCE MEMBER: Has there been any
 4 tweaking of them as a result of the new Corps rules?

5 MS. GATES: No.

6 AUDIENCE MEMBER: Is there any plan to?

7 MS. GATES: The decision on the biophysical
 8 regions was made by an interagency group. That
 9 actually included Maine Audubon and TMC that worked
 10 on inland program for two or three years, and there
 11 was a lot of discussion about boundaries and should
 12 they be shifted, should there be micro boundaries,
 13 what should they be based on. There was also work
 14 done by the State Planning Office back in the early
 15 2000's that talked about the fact that
 16 watershed-based mitigation wasn't really practical
 17 for Maine given the topography because many of the
 18 watersheds were too small, so that kind of pushed us
 19 to biophysical regions. And given that that was
 20 kind of an accepted way to look at the natural
 21 environment, we're just trying to be consistent with
 22 that, but as far as tweaking the boundaries, that
 23 seemed kind of beyond what we were assigned to do as
 24 part of that.

25 AUDIENCE MEMBER: Can I just -- Becky

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1 Unfortunately we're dealing with a regulatory
 2 structure and that regulatory structure is set up to
 3 kind of handle some sort of balancing. I would say
 4 as DOT, we would be equally as uncomfortable
 5 providing mitigation that was geographically
 6 functionally completely separate, and I think -- I
 7 know that Deane has enough experience to know in a
 8 regulatory sense that would not fly, either. And we
 9 don't like to waste our time and taxpayer money
 10 closing futile mitigation projects. So if we're
 11 impacting for instance lobster habitat in Penobscot
 12 Bay, we're certainly going to be looking there
 13 regardless of the fact that mitigation banks are
 14 prioritized. It takes steps to look nearby. It's
 15 just how hard do you look. Do you create -- do you
 16 do a project that's really not going to be
 17 meaningful? Okay, you move lobsters out of the way,
 18 they work back within six months. Is that, for
 19 instance, a valid use of money. Well, maybe not,
 20 but protecting water quality in that watershed or
 21 that biophysical region may be a really valid way to
 22 help those lobsters even though it's not as direct
 23 as moving the lobsters. So sometimes indirect
 24 mitigation can be more effective than direct
 25 mitigation.

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1 MR. VAN DUSEN: And also let me just put
 2 one more comment in here. Indirect cumulative
 3 impacts, we're compensating for those. Those are
 4 related impacts but they're not specifically on the
 5 ground impacts like affecting that wetland. It's
 6 the cumulative and indirect impacts of that impact.

7 AUDIENCE MEMBER: And it may be a reason
 8 why the proposed activity shouldn't be allowed at
 9 all if you can't compensate it.

10 MS. GATES: Right, and it's completely
 11 within the regulatory realm for them to deny
 12 projects because you haven't provided adequate or
 13 acceptable mitigation, and I've seen it done, so I
 14 know they don't shy away from that. So, you know,
 15 it's -- I don't -- you know, like I said, we don't
 16 like to waste anybody's time.

17 MR. VAN DUSEN: Yes.

18 AUDIENCE MEMBER: Ruth Gadey. Who's going
 19 to benefit financially from a port on Sears Island.

20 MS. GATES: That's not a question we can
 21 answer.

22 AUDIENCE MEMBER: Why is all this going on
 23 if somebody hasn't applied?

24 MS. LADD: Well, this discussion doesn't
 25 have anything to do with Sears Island. The

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1 footprint on that island and you're talking as
 2 though it's a done deal.

3 MR. VAN DUSEN: No, not at all.

4 AUDIENCE MEMBER: I just want to let you
 5 know that Penobscot Bay Alliance will also be part
 6 of the group that will be asking for public hearing
 7 which I think you already know.

8 MR. VAN DUSEN: Essentially that really
 9 wraps up my discussion with regards to -- we have
 10 certainly some obligations, but it's all -- I should
 11 say DOT has some obligations with regards to
 12 umbrella bank which is all laid out in the
 13 prospectus. Talks about reporting requirements and
 14 specifics like that, and then there's a section on
 15 Maine DOT's qualifications and experience with doing
 16 mitigation. We have eighty-five plus sites in the
 17 State. With my staff -- there's two people on my
 18 staff, myself and Mark Livus. Between us we have
 19 fifty-one years of experience with mitigation, so I
 20 think we are prepared and we'll do a good job at
 21 this. And also the Department is backing us and is
 22 certainly hoping this is going to be able to go
 23 forward. I guess we should open it up for
 24 questions.

25 MS. LADD: We have ten minutes left. Any

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1 prospectus is just the procedural bit of it. Once
 2 they submit it, they do submit it for Sears Island,
 3 that maybe will come up.

4 MR. VAN DUSEN: Then we'll answer questions
 5 like that.

6 AUDIENCE MEMBER: It should be directed
 7 because they said Sears Island was the genesis for
 8 this whole procedure.

9 MS. GATES: No, it's only one of four
 10 procedures.

11 AUDIENCE MEMBER: Well, you're talking
 12 twenty-five percent about it.

13 AUDIENCE MEMBER: Seems like it's causing
 14 the taxpayers millions of dollars to do this for
 15 private enterprise to come in to Sears Island.

16 MS. GATES: Whether a private enterprise or
 17 state enterprise is proposed for Sears Island, it's
 18 definitely going to require state and federal
 19 permits for the size it's going to have to be. It's
 20 going to have to be reviewed under state and federal
 21 laws and at that point that's the appropriateness of
 22 that development in that place. DOT is not
 23 proposing it.

24 AUDIENCE MEMBER: You use the term permit.
 25 There are people here that don't want to see a human

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1 about -- if not about prospectus, we can use the
 2 last ten minutes for whatever.

3 AUDIENCE MEMBER: Becky Bartovics. I would
 4 love to find out a little bit more about the
 5 bioregions and why you chose that instead of -- I
 6 think somewhere I've seen you looking at both
 7 bioregions or watershed-based, and why did you
 8 actually choose not to go watershed-based?

9 MS. GATES: The watersheds -- to look at
 10 watersheds and basing on in lieu fee program was
 11 done by Jackie Sartoris, head of the State Planning
 12 Office. She took about three years to look at it
 13 and the conclusion that her study came to was that
 14 if you look at the number of impacts that happen in
 15 any one watershed, particularly the small watersheds
 16 in southern Maine, there would never be enough money
 17 built up to do anything meaningful and you would end
 18 up with a couple thousand dollars sitting here and
 19 several thousand dollars sitting there. And what we
 20 really wanted to avoid was that.

21 And there's a really good model for that
 22 sort of roadblock which is in the phosphorous fees,
 23 DEM storm water program. They've collected
 24 phosphorous fees. They can only use them on a
 25 watershed basis. They're changing the statute but

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1 they can only use them on a watershed basis which
 2 makes sense for phosphorous, but what if there's
 3 nothing to be done in that watershed. What if
 4 there's nothing to be restored or altered in the
 5 case of southern Maine. And so your opportunities
 6 are poor because they're right next to development
 7 or they're surrounded by inhospitable environments.

8 So -- so you want to be able to kind of
 9 step across the border and look ecosystem-wide
 10 instead of watershed-wide. And if you look at
 11 things like wildlife habitat and the way water
 12 moves, it's not restricted to watersheds
 13 necessarily, and even with water, you know, one
 14 watershed goes into another watershed, you know,
 15 there's benefits to be gained by sometimes looking
 16 larger.

17 The way that mitigation was structured
 18 before the rules changed was you would look here and
 19 then you would start doing there, and now what we do
 20 is we look landscape level, ecosystem level, and we
 21 say okay, it doesn't make sense to go this big so
 22 we're going to bring it in. Okay, does it make
 23 sense to go this big.

24 Well, maybe in this case there is a great
 25 opportunity on site or nearby and we happen to know

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1 bring to that group.

2 AUDIENCE MEMBER: I think all of those
 3 little wetlands are as important as the great big
 4 ones.

5 MS. GATES: But they get considered in the
 6 ecosystem. That ecosystem is not just from an
 7 airplane. That ecosystem is also what you see
 8 walking around. It doesn't mean that you're not
 9 seeing those individual habitat, it means that
 10 instead of protecting just the vernal pool which is
 11 what DEP used to be only able to do, now they can
 12 protect the vernal pool and the critical habitat
 13 which is a salamander's landscape. So really you're
 14 looking at people's landscape and saying, okay, all
 15 of this is really nice but just over that line is
 16 something that's just beautiful. That's the only
 17 place that that creature lives. Would you pass up
 18 an opportunity like that to get something here, and
 19 I think that's what the agencies are trying to
 20 balance.

21 AUDIENCE MEMBER: But all of this begs the
 22 question what no net loss means.

23 MS. GATES: Exactly, and no net loss, I
 24 personally take no net loss very seriously and I
 25 know other people do as well. We do our own

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1 about that, and there's been -- there's a lot of
 2 work going on right now in identifying possibilities
 3 and priorities in the State because in lieu fee is a
 4 huge opportunity for resource agencies and
 5 protection organizations.

6 So in terms of why we picked biophysical
 7 regions, it's based really on the soils and the
 8 plants and the weather patterns that people much
 9 smarter than me have put together and put a lot of
 10 work into establishing those as the way that things
 11 live, you know, the type of earth or type of soil
 12 that supports a certain moss or salamander, and that
 13 seemed intuitively to be the smart thing to do was
 14 to rely on all of that work that had been done
 15 before.

16 The natural areas program had been doing a
 17 lot of work on biophys -- based on biophysical
 18 regions, and in the name of working with and
 19 supporting other agencies, I think we made a
 20 conscious choice through the in lieu fee program
 21 development to try to be on the same page.

22 DOT is a little unique in that group
 23 because we're a developer per se, but we do an awful
 24 lot of natural resource work and see an awful lot of
 25 Maine, and I think that's our perspective that we

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1 internal accounting with no net loss. We do it for
 2 federal highway but we also do it to make sure that
 3 we're kind of keeping ourselves honest and so we
 4 don't have any problem saying that we can meet no
 5 net loss because we actually meet it times six.

6 MR. VAN DUSEN: Yeah. It varies from year
 7 to year but I think our average -- I think the
 8 country-wide average for federal highway is one
 9 point five to one. That means for every acre of
 10 impact, we're compensating with one point five acres
 11 of mitigation.

12 MS. GATES: I hear you when you say that
 13 how can that be true when there are so many permits
 14 being issued and if mitigation is not successful and
 15 how can that possibly be true. The science of
 16 mitigation has taken huge leaps. The science of
 17 wetland ecology -- coastal restoration wasn't even a
 18 textbook until five years ago. I mean it's just --
 19 it's leaps and bounds. And I think that if you look
 20 at graduate programs in wetland and coastal ecology,
 21 you'll see that they're now just burgeoning with
 22 people whereas before there may be Anne Calhoun
 23 sitting at the University of Maine and that was
 24 about it, and now she's got her hands full of
 25 graduate students. But it's -- I think no net loss

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1 is a really a good intention and it is an executive
 2 order that has to be complied with.
 3 And it's not number cooking as far as the
 4 people that are doing it is concerned, that are
 5 tracking it. You could cook the numbers to say
 6 anything. If you are cooking them, why wouldn't you
 7 cook them to say we're getting ten to one instead of
 8 one point five to one. It's an honest attempt at
 9 accounting and providing support for the regulations
 10 and that's all that I can tell you about our view of
 11 the net loss.

12 AUDIENCE MEMBER: You say -- Peter Taber.
 13 You say one point five to one, are you talking about
 14 the point at which you start out.

15 MR. VAN DUSEN: That is country-wide
 16 federal highway, DOT's. For every one acre of
 17 impacts, they're actually compensating with one
 18 point five acres.

19 AUDIENCE MEMBER: But that's by no means --
 20 that's by no means the final outcome.

21 MR. VAN DUSEN: That's a net gain, I guess
 22 is what we're saying here.

23 AUDIENCE MEMBER: So we can expect to see
 24 better performance in the future. Why I ask that is
 25 I understand from an outfit which I think is highly

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1 just like the difference between landscape on one
 2 site specifically. There are a lot of different
 3 levels to look at mitigation. If you're talking
 4 about DOT's performance on mitigation and that is
 5 evidence for whether it can adequately make an
 6 umbrella program work, it's a very different
 7 question as to whether at the national level there
 8 is no net loss. In reality looking across all
 9 projects, because there are a lot of projects that
 10 don't require mitigation and other projects that
 11 require extra because of what they're impacting, and
 12 on the whole, that may balance out. But if you look
 13 at individual sites, that may be dismal. If you
 14 look at Maine DOT sites, I don't believe they're
 15 dismal. I think we have a very good accounting of
 16 our sites. We have very good stewardship of our
 17 sites, we have a lot of experience with this, and in
 18 terms of qualification to do an umbrella bank, I
 19 think we can make a good argument.

20 AUDIENCE MEMBER: I wasn't questioning your
 21 ability to manage an umbrella bank.

22 MS. GATES: I understand, but that's what
 23 I'm saying. Maine DOT as statewide accounting, we
 24 can show no net loss. Can we be responsible to a
 25 national level for no net loss? We can't do that.

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1 respected which is public employees for
 2 environmental responsibility, PEER, that in fact
 3 certainly the history of these projects is a
 4 disaster, and in fact PEER has a campaign called yes
 5 net loss, and they go to some trouble to document
 6 again and again where sites are totally ignored.
 7 And in any case, even when you do an excess by the
 8 time everything is done, a few years go by and it's
 9 a rather sad thing to see.

10 MR. VAN DUSEN: Right.

11 AUDIENCE MEMBER: So what I'm hearing about
 12 this whole federal umbrella or bucket, if you will,
 13 tells us that of a decidedly disastrous history,
 14 the -- we're turning over a new leaf and we're going
 15 to see the number of wet -- the spans of wetlands
 16 grow in the future, that's right.

17 MR. VAN DUSEN: Ruth, can you approach that
 18 from the Corps's perspective?

19 AUDIENCE MEMBER: At least relative to the
 20 destruction.

21 MS. LADD: That's what the hope is. I
 22 guess that's all I can say. This is the umbrella.
 23 I don't know anything about the project itself.

24 MS. GATES: I think as far as disastrous,
 25 if you're looking nationally at mitigation, it's

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1 We can only look in our own back yard and we can't
 2 unfortunately have all of that.

3 MR. VAN DUSEN: Actually, getting back to
 4 the ratios or our performance standards, Peter, I
 5 talked about the one point five for mitigation but
 6 really state-wide we're really six to one. For
 7 every one acre of impact, we're compensating with
 8 six acres.

9 AUDIENCE MEMBER: So you have a highway
 10 widening project say that eliminates six -- one acre
 11 of wetland.

12 MR. VAN DUSEN: Right.

13 AUDIENCE MEMBER: You are doing what to
 14 make up for that, you are creating six acres?

15 MR. VAN DUSEN: Again, it depends on the
 16 projects and the compensation options that we have,
 17 the mitigation options that we have, and really all
 18 comes down to the agencies and what site they
 19 select, or we present all the options to the
 20 agencies and then we go and show them all and they
 21 select which one they think best fits the functions
 22 and values of the wetlands to be impacted. And
 23 often we end up really overcompensating with those
 24 projects because those are the projects available.
 25 That's all we've got. And so, yeah, we tend to

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1 overcompensate. Is that a bad thing? I don't think
2 so.

3 AUDIENCE MEMBER: And you're confident that
4 in the long run the State comes out with more
5 wetland than when --

6 MR. VAN DUSEN: With regard to DOT,
7 absolutely. Absolutely.

8 AUDIENCE MEMBER: I'll remember that.

9 MR. VAN DUSEN: No question.

10 (After a Time.)

11 MR. VAN DUSEN: We'll continue at this
12 point with an informal discussion.

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C E R T I F I C A T E

I, Ronald G. Veno, a Court Reporter and
Notary Public within and for the State of Maine, do
hereby certify that the foregoing is a true and
accurate transcript of the proceedings as taken by
me by means of stenograph,

and I have signed:

Court Reporter/Notary Public

My Commission Expires: August 8, 2008.

DATED: June 25, 2008.

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