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 and Marietta Ramsdell
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 (B1). 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 emphasis 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 2003
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
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 purposed 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
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 that 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 nation's 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 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
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


CLF: “Defending the Law of the Land”
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
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 is 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 % 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
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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 sites ....must 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@gwi.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 Ledgelawn 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
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 irrevocably 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

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
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. No 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 hearings 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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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, but just as I said, I'm Ruth.

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

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 Giono, also Friends of Merrymeeting Bay.

AUDIENCE MEMBER: Jim Proseman from friends of Sears Island.

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

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

AUDIENCE MEMBER: Could I ask a question?

MS. LADD: Yes.

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

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

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

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

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

This is the first umbrella bank prospectus so this is new to all of us. There's a different concept than just a regular mitigation bank which is one of the reasons we decided to have this meeting to explain it so people could really make sure they understand it.

A bank itself, you know, sort of what is it. We have a new mitigation rule that just came out in the federal register on April 10th so it's really -- of this year, so it's brand new. One of the things it does is it sort of formalizes a lot of guidance that had been put out by the Corps and EPA over a number of years, and puts it all into one place. And it changed the things around to try to bring that up to the current science and understanding and it put in place time lines.

There's a lot of definitions, you know the way regulations are. They're good suecees. But it's brand new and it actually went into effect on the 9th of this month so it's totally new. But I put it here what the bank is.

According to that, it means a site or a suite of sites and in the case of an umbrella, it will be a suite of sites where resources are restored, established -- and established means created, enhanced and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by -- DA means Department of the Army permits. This is a federal rule, not State.

And in general a bank sells compensatory mitigation credits to permittees. If it's a public agency that does their own, it's transfer credits.

It's used when there's -- somebody needs to have some sort of mitigation, and then the responsibility for the mitigation is transferred to the sponsor of the bank. So whoever needs the credits no longer has that responsibility.

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

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

So there is no specific projects proposed under an umbrella. They will be done individually.
and they will go through actually the same process.

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

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

AUDIENCE MEMBER: Give your name because he
writes.

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

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

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

AUDIENCE MEMBER: Who is going to be
making --

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

AUDIENCE MEMBER: Kind of.

MS. LADD: Yes.

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

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

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

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

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

MS. LADD: If that's --

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

AUDIENCE MEMBER: Judy Gates. The
eco-regions are actually created sort of by the
natural areas program and other programs that have been worked on characterizing Maine's geology and geography and everything else, and so there's -- they've kind of settled on these eco-regions as having particular characteristics that make them easy to -- easier to lump. And so it's -- what we're doing is just using something that's kind of state of the art in the State anyway. So they wouldn't necessarily be approving them as we propose them. They would be just saying, yes, we accept that your distribution of projects would be based loosely on this general scheme, the same way that the inland sea program is based.

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

AUDIENCE MEMBER: If the agency approved.

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

AUDIENCE MEMBER: That's what Ruth was saying might be narrower. Might say you're impacting coastal wetland over here but this is a different kind of coastal wetland over here. So that's not a good match and that's up to them at project time. There's three decision making points. There's the bank, the individual projects that go into the bank, and the application that proposes to use credits from the bank. So at each point they need to make a decision.

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

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

AUDIENCE MEMBER: So --

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

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

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

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

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

MR. VAN DENEN: As well as Land Use Regulation Commission.

MS. LAID: So it will depend on the situation.

AUDIENCE MEMBER: Is DEP on that list?

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

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

MS. LAID: Well, I'm not sure.

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

MS. LAID: We went back and forth several times, so --

AUDIENCE MEMBER: I think it was really informal.
AUDIENCE MEMBER: I have an April one.

MS. IADDD: The one that's in the public notice is when we started the clock.

MR. VAN DEN BOSCH: And the title sheet has a date on it and that's the date it was submitted to the Corps. That was the final version of the prospectus.

AUDIENCE MEMBER: Okay, 6/10.

MS. IADD: So once we get the prospectus that the Corps would with input from the Interagency Review Team has to tell the sponsor if the prospectus is complete and I have listed here what constitutes that, and that is also in your handout on the second sheet, the very back page of the second piece of paper.

MS. IADD: So you can see -- I'm not going to talk my way through them because they're listed in there as well. It's pretty basic, quite frankly. Particularly for an umbrella bank.

You'll notice at the very end here, it says for specific sites, you have to have ecological suitability to reach the objectives and the assurance of adequate water for -- that's where the meat is but this one doesn't have any specific sites. So that's where there would be a lot of information, all the ecological related information for specific site, but we don't have any specific sites so we don't have to have that in this which is why it's so short.

I think you'll find that our prospectus for a specific site is going to be much more detailed and much longer, much more involved. So once -- we're currently in the public notice process and we'll get the comments. So we're in this thirty day comment period.

Any comments that we receive including, you know, part of whatever this discussion is will go to DOT and anything I get in writing will go to the Interagency Review Team and to DOT, so that they can evaluate it and see if there's anything they need to do to sort of adjust what their thought process is.

AUDIENCE MEMBER: Jody Spear. This may have something in it about a formal public hearing but I don't see it in this chart.

MS. IADD: It does not.

AUDIENCE MEMBER: I know that that -- the request can be made within the thirty day comment period, but what this -- since we are planning to make that request today and subsequently, what will that do to the schedule?

MS. IADD: It will lengthen it, potentially. The Corps doesn't have to grant that. We have to decide if we feel that a hearing will contribute significantly to our understanding of -- of the prospectus, I guess you'd say. It doesn't mean that we won't but we do have to evaluate it, and whenever we get a request, we have to talk to the Colonel. It's the Colonel of the New England District that makes the decision whether we go forward with a hearing or not.

AUDIENCE MEMBER: Mitigation banking is very controversial and has the potential to lead to more than minimal impact. We're talking about circumventing Section 404 and that's in place for a very good reason, so I -- that's part of what I want on the record today. I think that the requests for public hearing are going to flood in, so --

MS. IADD: The public has a right to do that. I would just suggest the reason we had this meeting, though, is feeling that we could get the same comments here and be able to talk about it than to have a public hearing where everybody gets their three minutes of fame and don't get to talk about it and ask questions.

AUDIENCE MEMBER: Ed Friedman. Could you just take a step back or maybe I should address this to Deane but what was the basis for wanting to go to an umbrella type?

MS. IADD: Can we save that for his part.

AUDIENCE MEMBER: Okay.

MR. VAN DEN BOSCH: I will address that later on.

MS. IADD: When we get -- he's going to have his time to talk about that and hopefully address it. At the end of all of this as I said, I'm hoping we can really have a good discussion. We want to hear all this. People are upset with the process and we need to know about that.

If it's determined that the prospectus based on the comments that are received is complete, and you saw the list, the Corps then allows the sponsor to go and prepare a draft instrument. And this is what the mitigation rule says that needs to be included in an instrument, however, because there is an umbrella, a lot of these things won't be covered. They will be covered on the individual sites that will come under the umbrella none of which are certain. They have to go through the same process, but these are the ones that if you have a site specific proposal, all of this would have to be...
on it, but really the only thing on the umbrella
would be proposed service area, accounting
procedures, legal responsibility, default and
closure provisions, reporting protocols, objectives,
but not site selection factors which -- the site
protection instrument, probably not that's going to
be site specific. No baseline information, no work
plan, maintenance plan. Really none of the rest of
it because there is no site, so it will only --
again, it will be shorter than any site specific
proposal will be which would be much more lengthy.

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

MS. LAID: No.

AUDIENCE MEMBER: It would be nice to have
that.

MS. LAID: Yeah.

AUDIENCE MEMBER: Becky Bartovics.

MS. LAID: We can do that.

AUDIENCE MEMBER: That would be nice.

MS. LAID: If you can just stop and think
of something right specific, that would be an item
that wouldn't be in it.

AUDIENCE MEMBER: I can stop and think, I
just don't have that whole list.

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

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

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

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

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

AUDIENCE MEMBER: What's an in lieu fee
program? Judy Spear.
AUDIENCE MEMBER: So it can be pretty far away? Like you can make a withdrawal in one part of that block and you can make a deposit somewhere else like miles and miles away?

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

AUDIENCE MEMBER: It's too far away.

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

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

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

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

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

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

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

MS. GRIFF: It doesn't necessarily have to be touching and like Ruth said, if you think of some places like the Maine Mall area. There's the wetland mitigation site right next to the Maine Mall area that's quite extensive, and if you look at the water quality of that wetland area, it's not very good.

It's surrounded by the airport and everything else. It was done a long time ago and it's that -- that's led to kind of a greater reliance on inland wetlands. When the resource agencies are actually the ones that set the priorities and say this is what needs to be done, and this is what needs to be done it kind of takes it out of the realm of regulated community and puts it in the natural resource protection community. So there are frame works around that.

MS. LAUD: Just an addendum to that, though, since we're talking about functions of well -- one of the functions that a wetland can serve is flood storage, and if it's deemed that something that's important, that does need to be like right next door or right about there because it doesn't do any good if it's three counties over.

That would need to be there but for example, wildlife habitat. Does it make a lot of sense to do wildlife habitat right next to heavy duty development.

AUDIENCE MEMBER: Judy Spear. Maybe this would be a good time to define the no net loss requirement.

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

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

AUDIENCE MEMBER: But it's the law.

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

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

You can actually look at it on the Maine microcosm and say does it come out, and that's why DEP tracks that because each state has to prove to the federal government that they're complying with that executive order for no net loss. Army Corps and federal agencies may average it out but DEP is not allowed to average it out, so there is -- you know, I haven't seen a report in a couple years but there is a reporting mechanism for that that they run annually to make sure that it's coming out the way it should.

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

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

MS. GATES: The wetland loss tracking system was revamped in 2000 and it went back -- they went back to 1995. They went retroactively back through the permits in 1995 to enter those wetland impacts because that's when the wetland protection rules went into play for the State, and now it's wetland and water bodies protection rules, so it would not -- it would not have captured it in that '95 to 2000 were the violations, but what it did capture were the permits that were issued, state permits that were issued for that. And I don't know if Sears Island is in there or not.

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

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

MS. LAUD: Yes, in essence. You're getting a permit to either fill or alter.
to do enough projects, they're the largest
constructors in the State so it makes sense to do
that and have the expertise in-house.

AUDIENCE MEMBER: But if the DOT is the
only one doing it, why is it sometimes okay to give
money for these projects?

MS. LAUD: That's different. That's an in
lieu fee program, completely different program.

MS. GROSS: That's DOT's program.

AUDIENCE MEMBER: I said I was confused.

MS. LAUD: No, that was good.

AUDIENCE MEMBER: So a deposit isn't money,
it's all land.

MS. GROSS: It's a project.

AUDIENCE MEMBER: It's physical.

MS. LAUD: Yeah.

AUDIENCE MEMBER: Ed Friedeman. If you
could just clarify the deposits. Someone -- how
does that land come into the mix, land or wetland,
or obviously you can create a wetland as well. At
some point DOT takes title to land. How does that
happen?

MS. LAUD: Okay. None of this will really
be addressed by this umbrella banking instrument,
but once specific projects come in, part of the
proposal will be how many credits DOT is sort of
requesting to get and what kind of credits.

So for example, you had fifty acres you
wanted to preserve -- and I'm just making it up --
fifty acres you wanted to preserve and on that fifty
acres, you were going to do five acres of
restoration of forest wetlands and an acre of
marshland. It might be proposed to get -- maybe
it's proposed to get two credits for the -- for
wetlands. One credit for the emergent and
another -- I don't know, say two or three -- we'll
say three for the preservation. That would be six
credits. That's not really that many, but then --
so a credit usually, and this has to be kind of
worked out, and usually it's -- an acre is impacted
somewhere and they've got to get a credit which a
credit equals acre but in reality, it was a fifty
acre parcel with five acres of forested and an acre
of emergent, and then you would -- so they put
those -- what did I say, five credits or six in the
bank.

AUDIENCE MEMBER: Who is they?

MS. LAUD: Either essentially DOT, they put
it in and they have a ledger and says site X has two
credit forested wetland credits, one emergent marsh

credit, and two or three preservation credits, and
then -- then -- so then they do a project and they
need -- let's just say they need three credits of
forested wetland, and -- well, let's say they need
three credits of forested wetland and okay, you've
got two here for that. It could be decide one of
those preservation credits would count for it
because that site was all forested and really
contributed to a forested ecosystem, or it might say
you can only buy two where you've got to come up
with the other one somewhere else by some other
means, and in that case you debit the two
forested -- there are no more forested wetland
credits available at that site and then you have to
go somewhere else.

AUDIENCE MEMBER: What's confusing me is
this all basically within DOT?

MS. LAUD: This is all DOT, it's not --

AUDIENCE MEMBER: So DOT owns right of ways
and things like that, that's -- might be those kind
of places, Sears Island maybe in this case?

MS. LAUD: Right-of-way?

AUDIENCE MEMBER: I don't know -- well,
you're not on, so where is your land bank that you
would be sort of dealing with these parcels?

MR. VAN DUSEN: We'd probably actually be
purchasing land tracts for banking purposes.

AUDIENCE MEMBER: So you can use public
land for it?

MR. VAN DUSEN: No, we have to purchase it.
It becomes public land when we buy it.

AUDIENCE MEMBER: It's public land already,
you can take our land and use it for this.

MS. LAUD: Let me just say something.

Potentially it would be possible if DOT -- say IH
and ND -- they owned a thousand acres and there's
some like degraded system in there or old fill or
something, and they said, you know, we'd really like
you to take that fill cut and fix this degraded
wetland. It might be possible that they would get
some credit for that. That could be entered into
the bank because it's already protected. You get no
preservation credits but they might get restoration
or enhancement credit or something like that.

MS. GROSS: This is as difficult if not
more than doing your taxes. If you have all the
different schedules, Maine DOT has a state
mitigation bank with DEP and Deane has been in
charge of kind of balancing that. And basically
when we were able to do a project and -- for the
same dollar amount or a little bit more, we could do
more acreage for restoration or preservation, we
would take that opportunity and do that because it
makes ecological sense to do that and it's more
efficient with taxpayer dollars to do that than it
is to say no, we'll come back and do that later when
we really think we need it. Maybe it's not
available or maybe more degraded so we've taken that
opportunity. And with the state, we've banked that
and hardly used any of the bank credits. Most of it
is all sitting there.

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

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

MS. LAED: I should note that part of this
is if a bank is actually banked and is used, even if
it's not used, DOT would have to submit a report
annually and it becomes a -- becomes part of the
public record, probably go on the web site.

MS. GAYES: That keeps it from being
confusing.

MS. LAED: The public has a right to be
concerned.

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

MS. LAED: Yes, in this prospectus -- the
permit design is the only time the public is
involved. If it's an individual permit some of the
bigger projects, in that case public notice goes out
just like it did for this, and solicits comments.
And again for those you can request a public -- you
know, it's just the same process and you can provide
input that way. Now, for the smaller projects the
time when the public can provide input is every five
years, what's called a program general permit for
Maine, that has to be re-issued and that goes out to
public notices for comment. So that's the -- in that
case you don't have specific sites because you don't
know what permits are going to fall under it, but
that's the time that the public has opportunity to

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

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

MS. LAED: No, we have to go through this
whole thing.

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

MS. LAED: That's right.

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

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

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

AUDIENCE MEMBER: Question.

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

MS. LAED: I don't blame you.

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

MS. LAED: They sure do.

AUDIENCE MEMBER: And over the course of
the years, hundreds of thousands of acres of
wetlands have been destroyed. Why? Because they
got in the way of projects. Somebody wants to build
a marina or something and the wetlands get in the
way. Well those wetlands provide a service to us.

They start the food process in the marine world and
this, to me, is just unbelievable. The minds that
went into creating this is mind boggling, all
because you want to accommodate somebody who wants
to -- who wants to destroy wetlands because they're
in the way.

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

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

AUDIENCE MEMBER: What’s so important that you can’t avoid a wetland.

MS. IANDE: I guess --

AUDIENCE MEMBER: Somebody’s money investment, is that what it’s all about?

MS. IANDE: Not from my perspective. But I think you would be hard pressed to get around Maine without crossing a wetland or aquatic resource. I’ll leave it at that but it’s not just wetlands, it’s streams, rivers, salt marsh, all of it. They’re all important but only when it’s been determined that they can’t practically avoid or minimize, that they can then move into compensation and then they’re supposed to compensate for the functions and values that are lost whatever impact is left after making a response, and surprisingly there’s a number of projects that start out as impacts and they go away because indeed people do stay out of the wetland because they’ve found -- for a number of reasons, they have found out the permitting process is very expensive and then you’ve got to do compensation stuff and that’s very expensive, so guess what, it’s cheaper to get out of the wetland.

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

MS. IANDE: In that case you will have to write to your Congress people.

AUDIENCE MEMBER: Oh, yeah, that’s a lesson in futility.

MS. GRIESE: For Maine DOT, I would say ninety-five percent of our impacts are associated with our existing infrastructure. So when we’re trying to put a guardrail into a road and we have to make the slopes lower or trying to meet federal safe standards or replacing a bridge or, you know, very rarely are our impacts -- you know, we don’t build a lot of roads any more. We’re building the Gorham bypass and that’s going to be probably, you know, one of the rare new roads that you will see in the next few years at least. So it’s -- that’s where most of our impacts are and that’s usually a federal or state requirement that makes us do that upgrade. We don’t do it unless we have to. So that’s most of our impacts.

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

MS. GRIESE: That was twelve years ago now and I think we’ve learned an awful lot about mitigation techniques and strategies and maintenance since then. The Tumplike project and this umbrella bank isn’t at all equivalent to that, and I say that respectfully, but the reason that we want to do the umbrella bank and why mitigation bank has become more popular is just because of projects like that. We don’t want to spend a hundred and fifty-seven thousand dollars an acre to reclaim a gravel pit to only have it be too wet. We would much rather restore, preserve, create, enhance some natural system that really has functions and values to it and not relocate a gravel pit. So this is seen as well as mitigation banking, if you look at mitigation banking recently versus ten years ago, it’s a huge change in mitigation banking. A lot has been worked by the regulatory agencies, and there’s a lot of checks and balances in place. I say that with kind of a foot in each door but they I think have a lot of requirements that they didn’t have before as far as Maine and everything else with the banks that -- used to be the banks you just kind of close the door and walk away. Doesn’t happen like that any more. So the Tumplike project is a really interesting case study and I know they still use it a lot, but as far as mitigation, that’s exactly what we’re trying to avoid.

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

MS. IANDE: Well, if it’s isolated, they would have to be waters of the United States or they would have to be -- there would have to be something because if it’s truly isolated wetland as opposed to a neighboring wetland if they’re adjacent to a stream, and I apologize if all these terms -- it’s going to open another whole can of worms, but if it’s deemed to be isolated, the federal government
AUDIENCE MEMBER: So this would cover vernal pools, for example?

MS. LAID: It could.

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

MS. LAID: It has.

MS. VAN DUSEN: Absolutely.

MS. GATES: State regulates all wetlands.

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

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

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

MS. LAID: And, you know, we do have twojur -- there's the State jurisdiction which I'm not addressing. I'm really talking federal to keep it clear.

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

MS. LAID: Right, but it could certainly potentially have some project put in it that will impact.

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

MS. LAID: We're -- they're trying to adopt. We are not trying to adopt it, we're looking going into that. I don't know if it serves a purpose right now to do that but there is an appeals process.

Let me just get to the end of the slide.

If there is no dispute, there's probably assigning ceremony or something with the Corps of Engineers, the Colonel would meet at DOT and they would sign it and potentially the state might sign it too if they're going to allow it to be used for mitigation for state permits. Okay.

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

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

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

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

AUDIENCE MEMBER: Could we have -- I had a question -- I don't know if this is fair enough for
you. Peter Taber, Wild Maine Times. I had a
t question as far as perhaps another branch of the
Corps.

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

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

MS. LADD: It has been a problem.

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

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

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

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

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

MS. LADD: I hope -- not that it won't be a
part of because I think it's a critical part of it.
You've got to have buffers, but still just like she
was mentioning earlier, we have to think of no net
loss. So we still have to have some way of
increasing functions and values. So, yeah,

preservation -- we don't want to see a site the size
of this room with no preservation. That would make
no sense. We want to see that plus a nice buffer
that will keep it from being degraded from future
impacts in the vicinity.

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

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

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

AUDIENCE MEMBER: Ed Friedman again. How
many people staff do you have out there monitoring
these projects? All our project managers are sort
of available to do it and I'll be honest, some are
more interested in going out and checking the
mitigation sites than others. Then on my staff I
have all of two wetland scientists for the whole of
New England, and one of them, it's his job if you
will, one of his tasks is to do a compliance report
for me every year and as part of that, he goes out
and looks at fifteen percent of our active
mitigation sites. Those are the ones that are in
the monitoring period, and then prepares a report on
what he found, where the weaknesses are, you know,
something -- anything that needs to be done or in
some cases, there's not much that can be done based
on circumstances of the site. Just in case you're
interested, the biggest most common problem is
invasive species. That's a huge problem.

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

MS. LADD: Exactly.

AUDIENCE MEMBER: Do you have any sort of
relationships with local groups that might help you
monitor or contract with the -- where there's so few
agency people kicking around and so much territory,
are there other people on the ground that will look
at a site for you? And those old projects, that
pool of thirty-five projects, that's not going away,
so we're -- you're talking about in theory having
some larger projects in the future that would
MINIMIZE THE EFFECT TO YOUR STAFF IN TERMS OF HOW MANY ACRES PER PERSON OR WHATEVER, BUT YOU STILL HAVE A backlog.

MS. IADL: The acreage might even be bigger, potentially.

AUDIENCE MEMBER: Right.

MS. IADL: I should note that all projects require monitoring by the permittee or whoever they assign to do it, consultant or something, and we get monitored reports which are supposed to flag problems, but in summer, some are excellent, some are better than others, but we have found that when a site is monitored and they prepare the reports as they're supposed to, those sites tend to be better because they are invested in the project. It's the ones we have to chase for those monitoring reports. They've kind of blown it off, okay, we built it, we're out of here. That's one way that helps us know something is going since we can't get to all the sites. We can at least read all the reports and have some sense of what's going on.

AUDIENCE MEMBER: And your coverage is about fifteen percent a year?

MS. IADL: Per year.

AUDIENCE MEMBER: So about a six year rotation.

MS. IADL: No, that's just with this one person. There are some project managers that go out faithfully to all of their mitigation sites and they just keep tabs on them -- to them it's a personal pride to do it, plus they get a little bean, if you will, they can report to their supervisor that they did this. It helps with our funding, gets paid by site compliance inspection among other things. I think I should mention, too, that's important is -- you talked about other people going. Some of the problem we have is that on private property, access rights are a problem. We even have problems with our sister agencies, Fish and Wildlife and EPA, would like to go out but they have to go through the Corps project manager. They can't just go out to the site unless it's on public lands, but a lot of these are on private lands so we can't just say oh, sure go have a look.

AUDIENCE MEMBER: But you might have an MOU or something like that with local interest or somebody that is really closer on site or sees it every day or walks the dog there or whatever it is.

MS. IADL: And people are allowed to say something, if they happen to know of a mitigation...

AUDIENCE MEMBER: And you see a problem. We welcome the information. Okay.

AUDIENCE MEMBER: Could you describe some of the projects that request permits -- that are requesting permits.

MS. IADL: I think I'm going to decline until the end when Deane finishes because right now this could just go on and on into -- let's --

AUDIENCE MEMBER: I have a question as to -- I have no where seen how credits -- what they actually stand for, like an acre of land restored down on the coast, what does that excuse the destruction of. How much wetland somewhere else?

MS. IADL: That's what has to be spelled out in the agreement, in the prospectus and in the banking agreement.

AUDIENCE MEMBER: So --

MS. GIBBS: For each individual project.

MS. IADL: You won't see it in this umbrella because there are no projects associated with it.

AUDIENCE MEMBER: The conditions for each project are specific?

MS. IADL: Yes.

AUDIENCE MEMBER: But what typically --
Ms. Laid: Ultimately the District Engineer of the Corps of Engineers.

Audience Member: I see. Does the State have input into that?

Ms. Laid: Yes, yep.

Audience Member: I see.

Mr. Van Dunen: Okay. I know there's been -- Deane Van Dunen, Head of the Field Services Mitigation Division at DOT.

Audience Member: And you're here on behalf of the retrievers behind you, right?

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

First of all, I want to talk about the bank objectives. Why are we establishing this umbrella mitigation bank. The first reason is to streamline the Corps' Section 404 permit evaluation process. The second is to provide high value mitigation based on an ecological landscape watershed approach. The third is to preserve and restore resources based on statewide priorities; and the fourth is to follow the mitigation priorities established by the Corps of Engineers and EPA in their new ruling which essentially gives priority for mitigation banking as compensation. Then I want to quickly review why DOT needs an umbrella mitigation bank.

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

Audience Member: Are you going to define these things -- Backy Bartoves -- later?

Mr. Van Dunen: Let's talk about that right now. Cost effective mitigation. There is an "economy of scale" when it comes down to building mitigation projects, and if we build a ten thousand square foot mitigation project, probably to build that and go through the five or ten years of monitoring, we're probably talking in the area of about seventy to eighty thousand dollars. And that's a portion of an acre. But if we build a fairly large site like the restoration to a marsh system or something that might need one hundred two, one hundred three acres, significant acreage, our costs go considerably down per acre.

Audience Member: To --

Mr. Van Dunen: So it's an economy of scale. We can get a better bang for the buck that we have by doing larger mitigation projects.

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

So now I guess I want to jump down. Ruth talked about the banking instrument and I don't think I need to define that, you're all familiar with that. The site development plans, let's just approach that a little bit. Ruth got into that quite a bit and I'll just try to clarify a few things.

The mitigation sites included in the banking instrument will be designed by -- developing a conceptual and final site development plan that will be submitted to this Interagency Review Team.

Now, I talk about there will be conceptual sites submitted first which is to give an overview of the site and the details associated with that, and that would be sort of the credit -- the credit really is schedule for that site, the site itself, how many acres, and the monitoring program, what functions and values the system provides and a variety of different elements that would be part of that proposal, so that would be in the conceptual plan.

And then we get into final design plan where we would really have -- if there was any kind of construction or restoration or enhancement work that had to be done, we would then have plans. They would basically kind of show where we're going to be doing earth work operations able to improve the hydrology in an area. We're going to be doing...
MS. LAID: It's at the prospectus stage.

AUDIENCE MEMBER: That's before the final design.

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

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

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

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

AUDIENCE MEMBER: Like under --

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

MS. GANTZ: You probably just buzz right by it.

AUDIENCE MEMBER: Harlan Mclaughlin. So what we're talking about here is the land banking scheme for lack of a better word, that DOT wants and you guys are the one that's going to decide whether they get it or not, is that how this works?

MS. LAID: Ultimately, yes.

MR. VAN DUSEN: Okay. So upon approval of the final plan that we submit on the mitigation site, there will be then attached to the banking instrument through an addendum. That's how it's actually attached to this umbrella bank, each site.

And so that's specifically -- let me see if there's anything else I want to talk about. In the event final plans are not approved, the IRT will provide Maine DOT with specific reasons for not providing submittal.

AUDIENCE MEMBER: Sean Mahoney. So Dave, I'm just going to throw to the line you provided with if prospectus.

MR. VAN DUSEN: Sure.

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

MS. LAID: They are conceptual.

AUDIENCE MEMBER: That's what I'd like to...
ask you about. So the way you’re looking at this
time line just so I understand, a plan is -- site
development plan would be submitted to the agency,
meaning the Corps and DEP if DEP agrees to go into
the bank, that plan is subject to final approval by
the Corps and possibly DEP. As part of that
approval process, the IRT, other resource agencies
have the ability to comment, provide notice of
potential to stop it if they have --
MR. VAN DUSEN: Absolutely.
AUDIENCE MEMBER: The public also has
during that same time period ability to provide
comments to ask for public hearing?
MR. VAN DUSEN: That’s correct.
AUDIENCE MEMBER: So that’s -- and then at
the end of that process there will be a decision as
to whether or not that projects included in the
umbrella or the bucket.
MS. LAID: I like bucket better.
AUDIENCE MEMBER: And how much credit that
project will provide in the bucket.
MR. VAN DUSEN: Yeah, we will have that in
the prospectus, probably would have pretty good
breakdown.
MS. LAID: At least a proposed --

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 smoothed 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. LAID: 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

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

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

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

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

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

MS. LAUD: Right.

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

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

MR. VAN DUSEN: There's eleven sites.

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

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

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

MR. VAN DUSEN: Exactly.

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

MS. LAUD: It has to be underneath of any other states in New England applied for this kind a program?

MS. LAUD: For a bank? No.

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

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

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

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

MR. VAN DUSEN: Or financial ability.
MS. IADB: Yeah, that they are set up such that they can actually do this work long term. Just like with the permit, we can't just say no, you can't have this permit.

AUDIENCE MEMBER: Pretty much all technical stuff.

MR. VAN DUSEN: Becky.

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

---

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

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

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

AUDIENCE MEMBER: I think I'd like to shed some light. David Cole, Commissioner. The Transportation Committee didn't bless anything and they have not technically been party to this point. We did a presentation to the transportation committee of the consensus agreement, but they took no action at that point. Under State law, the committee must review and approve any change in jurisdiction, use or ownership of the island, so that is why we have to go back to the committee.

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

MR. VAN DUSEN: Right.

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

MR. VAN DUSEN: Sure, and that was certainly one of the consensus agreement points was to look at potential mitigation options on the island.

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

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

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

AUDIENCE MEMBER: Oh, okay.

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

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

AUDIENCE MEMBER: Could I ask the Commissioner a question about that? Do you remember
why, sir, it was withdrawn from there? Usually in
negotiations you give up something, I'll give up
something. Do you remember what the specifics
were -- that sounds like something that our side
would be in favor of but yet we gave that up. What
did we get for it, do you remember that?
AUIDENCE MEMBER: No. I had to refresh my
own memory and I went back to some previous drafts
and the wording I just used is in my memory of it. I'd
have to go back and specifically reference it but I
do remember that it had been discussed in some form
or fashion and at some point was removed. And I
mean, I can speculate on that but my memory is not
what it used to be.
AUIDENCE MEMBER: Jody Spear. I don't know
if anybody else can verify this and I didn't dig it
out myself, but I see something here in quotes that
was provided to me by someone who's reputable and
reliable as a journalist. Page 5 part C mentions
that quote protected property and ellipses,
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MS. LADD: How long do we have this room.
MR. VAN DUSEN: We have it until 5 o'clock.
MS. LADD: So we have twenty minutes, so if
we can focus on the prospectus and if we have
exhausted all the questions on that, we can talk
about some of this other stuff that I know people
are interested in.
AUIDENCE MEMBER: Goal number or objective
number 3 is to preserve and restore some space on
statewide priorities. Who determines the statewide
priorities?
MR. VAN DUSEN: Statewide priorities are
developed by resource agencies, mainly DEP, DMR,
anyone else, LURC perhaps.
MS. GATES: I think LURC is on there.
They're the same people that are looking at projects
who are inland -- so they're linked. They're
conservation priorities and it's not just state
agencies, actually for conservation priorities,
Maine Audubon, TNC, Land for Maine Futures. There's
a lot of parties that can submit something that they
think is a priority for consideration of programs,
and all of those would be brought by those state
agencies to -- you know, that's a public thing.
Here are our priorities for natural resources that

DOT: Is that what's being challenged?
MR. VAN DUSEN: I believe that's a part of
the draft conservation easement. I don't know what
version you have there.
AUIDENCE MEMBER: It's the latest, he made
that clear.
MR. VAN DUSEN: But the conservation
easement is still in the middle of negotiations and
development with the legal teams, so we really
aren't able to comment on that today because it's
really inappropriate at this stage.
AUIDENCE MEMBER: We are not really talking
about Sears Island on this planning committee stuff
here, we're talking about the mitigation bank.
MR. VAN DUSEN: But you're talking about
the conservation easement and that's what I'm not
going to respond to.
AUIDENCE MEMBER: I agree, I think we need
to talk about that in another form.
AUIDENCE MEMBER: That was my purpose in
coming, but I heard you bring up the question.
AUIDENCE MEMBER: I just think we need --
MR. VAN DUSEN: You will have opportunity
to get -- to have that answered at a future meeting
once we have completed conservation easement draft.

we know about, and we would be looking at those, and
if we can do one of those, you know, then we'll do
it. And that's basically to make sure that we're
matching up with those priorities and that what
we're doing isn't conflicting with natural resource
agencies.
MR. VAN DUSEN: I only have just a few more
points on the prospectus that I want to get to
because most everything we've spoken about already.
The real state provisions, I have to
mention that Maine DOT will provide for perpetual
protection and preservation of each bank site
through a management agreement or restrictive
covenant with a third party endorser which probably
would be DEP or a conservation easement. So we will
share that on all our bank sites.
Each real estate instrument must be
approved by the Interagency Review Team, and Maine
DOT will record on a restrictive covenant easement
or similar agreement for each site added to the
umbrella bank by addendum. Just so you're aware
that the protection for those sites will be
perpetual.
Then we've covered establishment of credit,
that would be determined at the time of the site
proposal. The use of credit, we’re clear on the use of credit, I’m assuming. We’ve talked about that quite a bit today.

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

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

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

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

AUDIENCE MEMBER: Oh, it’s biophysical regions?

MR. VAN DER ZEE: Yes.

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

MS. GATES: No.

AUDIENCE MEMBER: Is there any plan to?

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

AUDIENCE MEMBER: Can I just -- Becky

Unfortunately we’re dealing with a regulatory structure and that regulatory structure is set up to handle some sort of balancing. I would say as DOT, we would be equally as uncomfortable providing mitigation that was geographically functionally completely separate, and I think -- I know that Deane has enough experience to know in a regulatory sense that would not fly, either. And we don’t like to waste our time and taxpayer money closing futile mitigation projects. So if we’re impacting for instance lobster habitat in Penobscot Bay, we’re certainly going to be looking there regardless of the fact that mitigation banks are prioritized. It takes steps to look nearly. It’s just how hard do you look. Do you create -- do you do a project that’s really not going to be meaningful? Okay, you move lobsters out of the way, they work back within six months. Is that, for instance, a valid use of money. Well, maybe not, but protecting water quality in that watershed or that biophysical region may be a really valid way to help those lobsters even though it’s not as direct as moving the lobsters. So sometimes indirect mitigation can be more effective than direct mitigation.
MR. VAN DUSEN: And also let me just put one more comment in here. Indirect cumulative impacts, we're compensating for those. Those are related impacts but they're not specifically on the ground impacts like affecting that wetland. It's the cumulative and indirect impacts of that impact.

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

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

MR. VAN DUSEN: Yes.

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

MS. GRIBBS: That's not a question we can answer.

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

MS. LADD: Well, this discussion doesn't have anything to do with Sears Island. The prospectus is just the procedural bit of it. Once they submit it, they do submit it for Sears Island, that maybe will come up.

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

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

MS. GRIBBS: No, it's only one of four procedures.

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

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

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

AUDIENCE MEMBER: You use the term permit.

There are people here that don't want to see a human footprint on that island and you're talking as though it's a done deal.

MR. VAN DUSEN: No, not at all.

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

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

MS. LADD: We have ten minutes left. Any about -- if not about prospectus, we can use the last ten minutes for whatever.

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

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

And there's a really good model for that sort of roadblock which is in the phosphorous fee, DEM storm water program. They've collected phosphorous fees. They can only use them on a watershed basis. They're changing the statute but
they can only use them on a watershed basis which makes sense for phosphorous, but what if there's nothing to be done in that watershed. What if there's nothing to be restored or altered in the case of southern Maine. And so your opportunities are poor because they're right next to development or they're surrounded by insensitive environments.

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

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

Well, maybe in this case there is a great opportunity on site or nearby and we happen to know about that, and there's been -- there's a lot of work going on right now in identifying possibilities and priorities in the State because in lieu fee is a huge opportunity for resource agencies and protection organizations.

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

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

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

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

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

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

MS. GATES: Exactly, and no net loss, I personally take no net loss very seriously and I know other people do as well. We do our own internal accounting with no net loss. We do it for the federal highway but we also do it to make sure that we're kind of keeping ourselves honest and so we don't have any problem saying that we can meet no net loss because we actually meet it times six.

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

MS. GATES: I hear you when you say that how can that be true when there are so many permits being issued and if mitigation is not successful and how can that possibly be true. The science of mitigation has taken huge leaps. The science of wetland ecology -- coastal restoration wasn't even a textbook until five years ago. I mean it's just -- it's leaps and bounds. And I think that if you look at graduate programs in wetland and coastal ecology, you'll see that they're now just burgeoning with people whereas before there may be one at the University of Maine and that was about it, and now she's got her hands full of graduate students. But it's -- I think no net loss...
is a really a good intention and it is an executive order that has to be complied with.

And it's not number cooking as far as the people that are doing it is concerned, that are tracking it. You could cook the numbers to say anything. If you are cooking them, why wouldn't you cook them to say we're getting ten to one instead of one point five to one. It's an honest attempt at accounting and providing support for the regulations and that's all that I can tell you about our view of the net loss.

AUDIENCE MEMBER: You say -- Peter Taber.

You say one point five to one, are you talking about the point at which you start out.

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

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

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

AUDIENCE MEMBER: So we can expect to see better performance in the future. Why I ask that is I understand from an outfit which I think is highly respected which is public employees for environmental responsibility, PEER, that in fact certainly the history of these projects is a disaster, and in fact PEER has a campaign called yes net loss, and they go to some trouble to document again and again where sites are totally ignored.

And in any case, even when you do an excess by the time everything is done, a few years go by and it's a rather sad thing to see.

MR. VAN DUSEN: Right.

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

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

AUDIENCE MEMBER: At least relative to the destruction.

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

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

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

MS. GATES: I understand, but that's what I'm saying. Maine DOT as statewide accounting, we can show no net loss. Can we be responsible to a national level for no net loss? We can't do that.
overcompensate. Is that a bad thing? I don't think so.

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

MR. VAN DUEREN: With regard to DOT, absolutely. Absolutely.

AUDIENCE MEMBER: I'll remember that.

MR. VAN DUEREN: No question.

(After a Time.)

MR. VAN DUEREN: We'll continue at this point with an informal discussion.

CERTIFICATE

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


DATED: June 25, 2008.