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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.¹ 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

¹ We note that the cover page of the Public Notice states that the date of the Notice was June 10, 2008, and that the comment period ends on July 10, 2008. However, page 2 of the Notice states that comments should be received by July 3, 2008 (see Public Notice, page 2). We assume that the July 3, 2008 date is incorrect, as 33 CFR Part 332.8(d)(4) provides that comment periods for mitigation bank prospectuses will be 30 days.

mitigation for Department of the Army permits. Our specific comments are set forth below.

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

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

This is not consistent with the Mitigation Rule. There is a mandatory duty to include the information about ecological suitability and water rights. In fact, Section 332.8(h) states that for umbrella mitigation banks, sites must be included "using the procedures in paragraph (g)(1)." Paragraph (g)(1) states that the "approval of umbrella mitigation bank sites ... must follow the appropriate procedures in paragraph (d) of this section," unless the district engineer determines it should be streamlined. Paragraph (d) of this section states:

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

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

- A. The ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and
- B. Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank (33 CFR Part 332.8(d)(2)).

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

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

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

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

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

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

Use of Sears Island as mitigation bank is nonsensical. Although the prospectus does not mention any potential mitigation bank sites, MEDOT released a document on January 31, 2008 entitled “Maine Department of Transportation Federal Wetland Mitigation Bank Prospectus: State-Wide, Single-Client.” This document clearly stated MEDOT’s intention that “as many as 600 acres of Sears Island become the foundation for a federal mitigation bank via execution of a conservation easement” (page 15). They also state that only ¾ 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,

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