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March 31, 2009

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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

Dear Ms. Sullivan,

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 submitted a comment letter to the Corps on July 10, 2008, stating that MEDOT's prospectus was 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). Specifically, we stated that the mitigation prospectus must provide a specific site for the umbrella mitigation bank in order to determine the ecological suitability and long term sustainability of the proposed mitigation sites. Ultimately, it appears that the Corps agreed with us, and a second Public Notice was issued that included a specific project site: Sears Island. While we are pleased to see that that a specific site has been proposed, we were dismayed to learn – as we had expected – that Sears Island is the chosen site. In addition, we continue to have serious concerns about the bank itself. Our specific comments are set forth below.

Again, the prospectus incorrectly assumes that mitigation banking is to be given priority over other types of mitigation. As we commented in July of 2008, 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 Corps. MEDOT interprets the Mitigation Rule as giving "priority to mitigation banking followed by in lieu fee and permittee-responsible wetland compensation options" (Prospectus, page 9).

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. The prospectus should be changed to reflect this.

Concept of reserving land on Sears Island for port is flawed. Page 6 of the Prospectus states that 330 acres of the island would be reserved “for port development.” MEDOT does not discuss how this proposed port development would impact the mitigation portion of the island. However, given the nature of ports, with emissions, noise, lights, vibrations, and habitat fragmentation, it is likely that development of a port on Sears Island would render much of the mitigation bank unusable.

Moreover, in Table 2 on page 7 of the Prospectus, MEDOT lists projects “potentially requiring mitigation,” which would presumably draw from the proposed Sears Island mitigation bank. Included in this Table is the proposed port development on Sears Island. As stated above, preserving the remaining portion of Sears Island would not be adequate mitigation for destroying acres of wetlands and marine habitat elsewhere on the island.

MEDOT seems to be ignoring the history of Sears Island. MEDOT is either glossing over the true history of Sears Island, or deliberately misleading readers who are not familiar with it. First, on page 18 of the Prospectus, MEDOT states that “MaineDOT constructed an access road to a proposed port location on Sears Island, but following minor site work, the proposal was withdrawn in early 1996 under a cloud of controversy.” The so-called “minor site work” included 10 acres of illegal wetlands fill which resulted in a criminal investigation by the U.S. EPA, and an ultimate civil settlement, including the suspension of one of MEDOT’s consultants. But for MEDOT’s illegal work on the island, this proposal to build a port may not be before us today. Moreover, page 7 of the Prospectus states that the “pristine, undeveloped” land in the area of the upper bay “provides opportunity for a number of intensive land uses,” and a port on Sears Island “remains a viable proposal.” The primary reason that MEDOT withdrew the port proposal from consideration in 1996 was that the federal resource agencies indicated that it would be difficult, if not impossible, to issue a permit for a port on Sears Island. Today, 13 years later, it is still no easier to mitigate for impacts to eel grass, and habitats similar to those provided by the Sears Island wetlands are even harder to find. Therefore, far from being a “viable proposal,” a port on Sears Island seems to be impossibility. We also note that MEDOT appears to be relying on a 1994 report on the resources of Sears Island – these data must be updated.

MEDOT's goal of "compensating in advance" is unclear. MEDOT's prospectus (page 9) 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.

Sears Island is not a reasonable place for a mitigation bank. Page 9 of the Prospectus states "...there are few wetland restoration and/or enhancement opportunities available" on Sears Island. Page 18 states that there is a 1/4 acre of restoration opportunity at the Sear's Family Summer Cottage Site, and restoration expansion opportunities of 1/8 acre near the existing restoration site, and a possible 2 acre creation site. Therefore, most of the bank would be for preservation. Given the federal agencies preference for restoration over preservation, this is not a tenable mitigation bank site.

MEDOT also states that the primary objective of the proposed bank is to "protect the richness and diversity of the preservation area, while allowing for uses such as recreation and education in a manner that leaves no footprint on sensitive environments or wildlife species." While this is a noble goal, it is completely contrary to the idea of using 330 acres of the island for a port development. The port would result in a huge footprint and disastrous impact on the wildlife and habitat of the rest of Sears Island.

As PEER stated in our last letter, 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 95+ [wetland mitigation] sites" over 25 years, but the prospectus gives no indication of how successful those 95+ sites were. Constructing wetland mitigation sites is not the same thing as replacing wetlands functions and values.

In fact, PEER examined Corps monitoring reports for a variety of MEDOT mitigation sites, and found the following:

- Inspection of Royal River Site and Mosquito Brook Site; New Gloucester, ME; Permit No. 200201653, June 27, 2007 found no executed restrictive covenant for one of the sites, non-native trees mistakenly planted, thickness of tree stands was below what was required, parts of the stream bank were undermined and slumping, fish in created vernal pools, and damage from illegal vehicular use.
- Inspection of South Bog Stream Site for Phillips & Madrid Route 4, Maine DOT, Phillips, ME; Permit No. 2005-471, May 13, 2008 found width to depth ratios in stream pools off, variable number of pools over the years, and only "partial compensation" for what was destroyed.

- Inspection of Scarborough Connector Project, Scarborough, ME, 198800820, April 3, 2000 found invasive plants and ATV use.
- Inspection of Topsham Fair Site, Topsham, ME, 199100575, May 22, 2001 found erosion problems, low organics in soil, and wetlands reduced by 5200 sf.
- Inspection of Bay Bridge Site; Brunswick, ME; RAM: 199100575, August 12, 2004, found invasive plants, and wetland size decreased by 8%.
- Inspection of Route 15 Orrington Bypass/Ichabod Lane Site; Hampden, ME; 199301389, May 14, 2001 found invasive plants, wetland hydrology and vegetation criteria not met in the northeast corner of the site, sandbag check dams that were installed in the spring were eroded by the end of the growing season and were only moderately effective in retaining water, and trail erosion occurred along the northern edge of the site.
- Inspection of MEDOT Route 9, Phase II—Amher-1, BD-3, BD-4, BD-5, BD-6, Alex-1, and Pineo Mill sites; ME; Permit No. 199401914, December 19, 2005 found invasive plants, not enough trees, prevalence of non-hydrophytes.
- Inspection of MEDOT /Route 9 Reconstruction – BD-1 Site, Beddington, ME, 199401914; T24MD-2 and Mopang Sites, Washington County, ME, 199602234 May 21, 2001 found that the preservation was unenforceable.
- Inspection of MEDOT Lewiston Connector, Augusta, ME, 199500906 on May 18, 2001, July 15, 2002, and December 9, 2005 found invasive plants, low natural plant recruitment, low number of surviving planted trees and shrubs.

Therefore, it does not appear as though MEDOT has the best track record on mitigation projects.

Conclusion. The proposed mitigation bank would be the first of its kind in New England, and as such, must be done with care. Given the minimal opportunity for wetland restoration on the island, the proposal to create a port in the middle of the preserved land, and MEDOT’s dubious record with mitigation, PEER recommends that the Corps accept Sears Island as mitigation only for preservation, and only if the entire island is preserved.

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

Sincerely,

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