



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS  
696 VIRGINIA ROAD  
CONCORD, MASSACHUSETTS 01742-2751

August 4, 2008

Regulatory Division  
File No. NAE-2008-1703

Judy Gates  
Director  
Environmental Office  
Maine Department of Transportation  
16 State House Station  
Augusta, Maine 04333

Dear Ms. Gates:

On May 13, 2008, the Maine Department of Transportation submitted the "Maine Department of Transportation Umbrella Wetland Mitigation Bank Prospectus." On June 10, 2008 a Public Notice on the prospectus was issued with comments due by July 10, 2008.

The Corps has evaluated all the comments received, including those from a public meeting held on June 19, 2008 at MaineDOT's headquarters in Augusta, Maine. I am enclosing my determination that a Public Hearing is not warranted. Pursuant to 33 CFR 332.8(d)(5)(ii), I have determined that it is appropriate for MaineDOT to proceed with preparation of the draft mitigation banking instrument as described in 33 CFR 332.8(d)(6).

If you have any questions on this matter, please contact Ruth Ladd in the Regulatory Division at [ruth.m.ladd@usace.army.mil](mailto:ruth.m.ladd@usace.army.mil) or 978-318-8818.

Sincerely,

A handwritten signature in black ink, appearing to read "Philip T. Feir".

Philip T. Feir  
Colonel, Corps of Engineers  
District Commander

Cf:  
Mark Kern, EPA  
Wende Mahaney, USFWS  
Marcy Scott, NOAA-Fisheries  
Jim Cassida, MEDEP  
Marcia Spencer-Famous, MELURC



**U.S. ARMY CORPS OF ENGINEERS  
NEW ENGLAND DISTRICT  
REGULATORY DIVISION**

**Public Hearing Need Determination**

1. Bank Sponsor: **Maine Department of Transportation (Maine DOT)**

File Number: **NAE-2008-1703**

2. Authority: This determination of the need for a public hearing is being taken under authority delegated to the District Engineer from the Secretary of the Army and the Chief of Engineers by 33 CFR 327, as published in the 13 November 1986 Federal Register pursuant to Section 404 of the Clean Water Act, Public Law 95-217.

3. Description, Location, and Purpose of Bank: The sponsor proposes to establish an Umbrella Mitigation Bank pursuant to 33 CFR Part 332, "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule", known as the "Mitigation Rule". The proposed service area for the Umbrella Mitigation Bank (UMB) is the entire State of Maine but specific projects to be included under the umbrella will have their own service areas based on biophysical regions within Maine or other more limited areas determined in consultation with the Interagency Review Team (Corps, EPA, FWS, NMFS, ME LURC, and ME DEP). According to the prospectus submitted by the sponsor, MaineDOT's goals in establishing the UMB are: 1) to streamline the Section 404 permit evaluation process by providing a means of compensating in advance for unavoidable wetland impacts resulting from state transportation projects; 2) to provide high value mitigation based on the ecological/landscape approach; 3) to preserve and restore resources based on state-wide priorities; and 4) to follow mitigation priorities established by the U. S Corps of Engineers (Corps)(33 CFR Part 332) and Environmental Protection Agency's (EPA)(40 CFR Part 230) Compensatory Mitigation for Losses of Aquatic Resources (hereafter "the Rule").

4. Comments: In response to our public notice, we received 10 letters in opposition, 7 of which contained public hearing requests, 0 letters in support of the project, and 4 letters which either requested more information or simply raised points about the banks or its potential candidate projects.

The letters that were against the project and requested a public hearing contained the following concerns:

- a. The UMB lacks any specific site or sites and/or standards for those

- sites.
- b. The bank review process has not addressed various key points or raises concerns about short-cutting the permit process such as:
    1. Community input will not be adequate for subsequently -submitted projects.
    2. Avoidance and minimization have not been addressed.
    3. Adequate information on how the UMB will address the national goal of No Net Loss of aquatic resource functions is missing.
    4. MaineDOT should have to do watershed plans before the bank is established.
    5. If the bank is to provide benefits based on state-wide priorities, those priorities should be provided.
  - c. The UMB proposes to use biophysical region service areas within the entire State of Maine rather than watershed service areas which are referenced throughout the Mitigation Rule.
  - d. The UMB prospectus lacks sufficient clarity and detail.
  - e. There will be specific sites proposed which themselves are of concern for a variety of issues: Sears Island and Sherman Marsh
  - f. MaineDOT should not be both permit applicant and bank sponsor because that causes a conflict of interest.
  - g. MaineDOT is not qualified to be a bank sponsor due to the unknown quality of their past mitigation efforts.
  - h. The establishment of a bank in Maine is precedent-setting.
  - i. Mitigation generally has a poor track record.

The letters that were neutral or against the project, but did not request a public hearing, contained the following comments:

- a. The UMB lacks any specific site or sites and the associated information on the ecological suitability of the site and the assurance of sufficient water for the site.
- b. The bank review process has not addressed various key points or raises concerns about short-cutting the permit process such as:
  1. How the bank and the Maine In-Lieu Fee program will complement each other.
  2. The required content of site development plans and real estate instruments.
  3. The criteria by which the IRT will review Site Development Plans.
  4. How the number and type of credits will be established.
- c. Establishment of a bank would provide alternatives to assist in achieving the goal of no net loss of wetlands.
- d. Focus on avoidance and minimization because studies show that mitigation does not work well overall.
- e. The UMB undermines the CWA's protections of our nation's wetlands and Congress's commitment to "swimmable and fishable" waters.

- f. There is inadequate information on the need for a bank.
  - g. The UMB proposes to use biophysical region service areas within the entire State of Maine rather than watershed service areas. Some feel the use of biophysical regions is appropriate and others disagree.
  - h. The UMB prospectus lacks sufficient clarity and detail.
  - i. There will be specific sites proposed which themselves are of concern for a variety of issues: Sears Island and Sherman Marsh
  - j. There are differing opinions on the appropriateness and qualifications of MEDOT as a bank sponsor.
  - k. The general concept of wetland mitigation banks is good so long as there is adequate opportunity for public input on projects subsequently proposed for inclusion under the UMB.
5. Requests for a public hearing shall be granted, pursuant to 33 CFR 327.4 (b), "unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing". Issues raised in this case were clearly stated and are readily addressed through existing information or are not pertinent to the circumstances for which comments were requested.

- 1) Commenters voiced a concern that there is a lack of a specific site or sites as part of the proposal but there are specific sites which will eventually be proposed that raise concerns.

There is no requirement that there be sites associated with an Umbrella Bank proposal since they will have their own review process, with a Public Notice and the right for the public to comment and/or request a public hearing, as they are submitted for coverage under the umbrella. Each proposal will have its own performance standards and management to address the circumstances of each specific site. Furthermore, each proposal will be fully vetted by an interagency review team.

- 2) Concerns with the bank review and permit review processes

Streamlining the Department of the Army permit review process through the use of mitigation banks does not short-circuit the requirement that avoidance and minimization be addressed first during the permit review process. Avoidance and minimization of proposed impacts are addressed in the project review for those applications, not as part of the establishment of a bank.

Community input will actually be greater than that for permittee-responsible mitigation because subsequent proposed bank sites will have a Public Notice with the opportunity for comment and to request a hearing. Programmatic general permit authorizations do not involve public comment

and individual permit applications will only require mitigation concepts or preliminary plans before they are put out in a Public Notice.

It is true that preservation does not address the goal of no net loss of functions and services. Concerns about the use of preservation will be addressed through the public review of specific projects.

The Mitigation Rule does prioritize mitigation types. However, the priority can be overcome by explaining why a lower priority type, such as permittee-responsible mitigation, is preferable for compensating for the proposed losses of aquatic resource functions and services.

The Mitigation Rule recognizes that not all watersheds have watershed plans in place and there is no requirement that the bank sponsor develop such plans. However, each site proposed for inclusion in the umbrella bank must have information on how it will benefit the ecological unit which it serves.

The Mitigation Rule recognizes that on-site mitigation has been problematic and that, except for site-specific functions such as flood storage, it is preferable to have mitigation sites located where they have long-term sustainability and will be overseen by an appropriate steward. Credit release for specific project sites will be tied to various stages of the mitigation project from land acquisition through the end of the monitoring period where construction is involved.

### 3) Watershed versus biophysical region; service areas

The rule cites, as examples of alternatives to watersheds, ecoregions, physiogeographic provinces, and/or other geographic areas (332.8(d)(6)(ii)(A)).

Biophysical regions were developed for the State of Maine by Robert Bailey with the US Forest Service in 1995 and were subsequently broken down into 19 subsections by Keys et al. (1995). These 19 biophysical regions (or ecoregions) are delineated based on two primary features, climate and landform, but also reflect differences in soils and vegetation. The "Bailey" biophysical regions have been adopted by several natural resource agencies and conservation organizations including the Maine Natural Areas Program, Maine Department of Inland Fisheries and Wildlife, Maine Department of Conservation, Maine State Planning Office, The Nature Conservancy, Maine Audubon, and the US Fish and Wildlife Service's Gulf of Maine Program. Biophysical regions are used to identify state-wide habitat inventory priorities and analyze regional and statewide data, and have been adopted for use in the state's In-Lieu Fee program.

References:

- BAILEY, R.G. 1995. Description of the ecoregions of the United States. Miscellaneous Publication No. 1391, U.S. Department of Agriculture, Forest Service, Washington, DC. 108 pp.
- KEYS, J.E., JR., C.A. CARPENTER, S.L. HOOK, F.G. KOENIG, W.H. McNAB, W.E. RUSSELL, and M-L. SMITH. 1995. Ecological units of the eastern United States: first approximation. USDA Forest Service, Atlanta, GA.

The intent of having the service area for the umbrella bank as the entire state was to allow the flexibility of proposing projects anywhere in the state. Each site-specific proposal would receive public review and comment on its own merits, including the service area for that particular site.

4) The UMB prospectus lacks sufficient clarity and detail.

There has been some confusion as to what is needed for an umbrella bank prospectus to be complete. If there are no sites associated with the umbrella bank prospectus, site-specific information will not be included as it will be part of subsequent submissions which will themselves go through the full public review process. Details related to umbrella banks are given in 33 CFR 332.8(d)(4) and 33 CFR 332.8(g)(1) and (h).

5) Role of MEDOT as permit applicant and bank sponsor; qualifications of MEDOT as a sponsor

MEDOT has done wetland mitigation for many years. As with all repeat-mitigators, much has been learned over the intervening years. The Corps will ask that MEDOT provide additional information on what they have learned from their extensive experience with mitigation construction. Nationally it is not uncommon for entities which apply for many permits to sponsor mitigation banks. The development of the bank does not guarantee approval for its use. That is handled project-by-project during the Corps' review process. Having MEDOT as both permit applicant and bank sponsor is not very different from having them do permittee-responsible mitigation, which has long been the case, except that mitigation would be done in advance of the issuance of permits which authorize the use of the bank. With temporal loss always a concern, banks give the public, the Corps, and the Interagency Review Team more confidence that the mitigation is on a trajectory towards the desired goals than one where the mitigation is constructed during or after the impacts occur.

6) Precedence-setting

Although this is the first umbrella bank proposal in New England, there are many banks and several umbrella banks throughout the country. This is not a new concept except in the region. It should be noted that there is a MaineDOT mitigation bank, which is set up much like an umbrella bank, set up through the Maine Department of Environmental Protection.


7) Need for public hearing

On June 19, 2008, the Corps held a public meeting at the MaineDOT's headquarters in Augusta, Maine. The notice of the meeting was included in the public notice for the UMB. About 16 people not associated with the Corps or MaineDOT attended for all or a part of the meeting. The format included a brief discussion by the Corps of the Mitigation Rule as it applies to mitigation banks and a summary of the UMB by MaineDOT. There was then an extended question and answer period with audience members. There was no time limit that precluded anyone from asking questions and replies. The meeting was recorded by a court stenographer and the minutes have been entered into the public record.

6. I therefore determine that it is not necessary to conduct a public hearing because, through the Corps public comment process, we have sufficient information to adequately evaluate the issues raised. I acknowledge and appreciate the viewpoints that accompanied the request and will assure that this information becomes part of the administrative record to be fully considered before a final decision is made. The Corps will consider relevant new information or circumstances that may arise prior to a final determination of whether or not the sponsor can proceed to develop a Mitigation Banking Instrument.

4 Aug 08

Date

For  LTC, EN Deputy District  
Philip T. Feir Engineer  
Colonel, Corps of Engineers  
District Engineer