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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
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