

# **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 Therefore, the proposal should be denied or withdrawn.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. Not 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 its 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 meetings 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.