

December 7, 2016

Ms. Sheila Newman
Chief, Special Actions
Alaska District, U.S. Army Corps of Engineers
P. O. Box 6898
JBER, AK 99506-0898

RE: The Conservation Fund's Alaska In-Lieu Fee "Transitional Funds"

Dear Ms. Newman:

As you know, The Conservation Fund (TCF) is holding approximately \$4,600,000 in "Transitional Funds" reflecting compensatory in-lieu fee mitigation payments made to TCF during 2013 - 2015 based on acres needed for mitigation rather than mitigation credit sales. There has been uncertainty about the characterization of the Transitional Funds and, as a result, uncertainty about the disposition of the funds. TCF has researched the permits under which these payments were made, relevant records associated with the in-lieu fee programs operated by TCF in Alaska, and the federal regulations governing Compensatory Mitigation for Losses of Aquatic Resources (*33 CFR Part 332*, referred to in this letter as the 2008 Mitigation Rule). This letter summarizes the results of our research and our view as to the appropriate characterization of the Transitional Funds and their disposition.

Background

The Conservation Fund operated an in-lieu fee compensatory mitigation program in Alaska from May 20, 1998, to June 7, 2013, pursuant to an Agreement (1998 Agreement) with the U.S. Army Corps of Engineers, Alaska District (Corps), referred to in this letter as the "Old Program." Under the Old Program, Clean Water Act Section 404 permittees made payments to TCF based on wetland acres needed to mitigate for the impacts of their projects, and TCF was obligated to purchase and preserve the specified number of acres of wetland properties. In 2014, the Corps audited the Old Program and found that TCF had exceeded its mitigation obligations by 24,359 acres. (See Corps Memorandum for the Record dated 18 November 2014, Audit of The Conservation Fund's In-Lieu Fee Agreement 1998 – 2013, referred to as the Corps Audit Memo.)

On June 7, 2013, TCF and the Corps entered into TCF's "New Program" by executing TCF's Alaska In-Lieu Fee Compensatory Mitigation Program Instrument (Instrument), establishing a new in-lieu fee program in compliance with the 2008 Mitigation Rule. In coordination with the Corps and the Interagency Review Team (IRT), TCF transitioned from the Old Program to the New Program. Under the New Program, TCF sells mitigation credits to permittees and is obligated to fulfill those debits through the completion of Corps-approved mitigation projects that restore, establish, enhance and/or preserve aquatic resources, utilizing the credit sale proceeds.

After entering into the Instrument on June 7, 2013, TCF received in-lieu fee payments totaling \$4,685,858 from fourteen Section 404 permits developed prior to June 7, 2013, that establish mitigation obligations under the compensation requirements of the Old Program. The aggregate wetland acres required to be mitigated under the fourteen permits totals 1,110.92 acres. The funds paid by the permittees, referred to as “Transitional Funds,” have not been expended by TCF except for a 2% overhead fee as stipulated in the 1998 Agreement. The current balance of Transitional Funds is \$4,592,141. TCF is no longer accepting in-lieu fee payments based on the terms and conditions of the Old Program, so no additional funds will be categorized as Transitional Funds. Table 1 describes the fourteen permits associated with Transitional Funds.

Analysis

Based on its research, TCF has concluded that the Transitional Funds are not proceeds of credit sales or otherwise New Program funds subject to the Instrument or the 2008 Mitigation Rule. Instead, the Transitional Funds reflect obligations to purchase and protect a specified number of acres of wetlands in accordance with the terms and conditions of the 1998 Agreement and the Old Program. A summary of the basis for TCF’s conclusion is set forth below.

- **Transitional Fund permits were developed under Old Program terms and conditions.** Permit requirements associated with Transitional Funds were developed by the Corps prior to June 7, 2013,¹ under Old Program conditions. Both the compensatory mitigation obligations of TCF and the payments made by the permittees were based on the terms and conditions of the Old Program.

Permit language reflecting TCF’s mitigation obligations in acres and permittee payment obligations based on acres is set forth in Table 1; examples are:

- POA-2011-1083: The payment shall be for 1.2 acres (0.6 acre at a 2:1 ratio) of estuarine intertidal unconsolidated shore (E2US).
- POA-1986-768-M5: The permittee is responsible for payment of an in-lieu fee to The Conservation Fund for 128 acres of wetlands and waters of the US filled for project components.
- POA-1998-184-O: The permittee will provide the Corps with written proof that fee-in-lieu compensation for the agreed upon mitigation acreage (5.6 acres) has been paid to a non-profit conservation organization with a memorandum of agreement with the Corps.

Although some permits use the term “credit” or “acres of the credits” or “acre credits,” the permit language makes clear that the permit writer was basing the obligations on

¹ With one exception, all of the permits for which the mitigation payments are Transitional Funds were finalized and issued before the New Program went into effect on June 7, 2013. The one exception is Permit POA-1966-43, which was issued on July 22, 2013. This in-lieu fee payment is included in the Transitional Funds because 1) the permittee requested the compensation amount in anticipation of permit issuance before June 7, 2013, 2) the amount was calculated under the Old Program terms and conditions, and 3) the permit requires compensation in acres.

acres pursuant to the Old Program and not credits under the New Program. Further, in all cases where the term “credit” is used, the permits were issued prior to June 7, 2013, and the in-lieu fee payment was based on acres.

In contrast, under the 2008 Mitigation Rule, if an in-lieu fee program is used by the permittee to satisfy its mitigation obligations, the permit must “specify the number and resource type of credits the permittee is required to secure,” 33 *CFR* § 332.3(k)(4). Because the fourteen permits required compensation in acres rather than credits, this requirement is not met. As a result, the mitigation obligations under the permits and associated Transitional Funds should be characterized as obligations and funds under the Old Program.

- **In-lieu fees for Transitional Funds were quoted and paid under Old Program terms and conditions.** Each of the fourteen permittees was provided prior to June 7, 2013, with a quote establishing the cost of its mitigation obligation; in some cases, these quotes were provided years before that date. In every case, the quote was based on acres and costs under the Old Program, not credits and costs under the New Program. When the permittees later decided to pursue the projects and were required to make the compensatory mitigation payments, it was not practicable², and may not have been legally permissible in light of the permit language, for the Corps or TCF to re-calculate the mitigation requirements in credits under the New Program and require the permittees to purchase credits as compensatory mitigation. In many cases, the cost to the permittee would have been higher than the quote provided. As a result, TCF was asked by the Corps to honor the in-lieu fee quotes that were based on acres and costs under the Old Program.

It is not practicable to now re-calculate the mitigation requirements in credits and require TCF to provide mitigation under the New Program. Neither the Corps nor TCF have the ability to charge the permittees for credits, and TCF would not be able to fulfill those re-calculated credit obligations with the Transitional Funds. As described in detail above, neither the compensatory mitigation obligations required by the Corps in the permits nor the Transitional Funds paid by the permittees as compensation for those mitigation obligations were based on the New Program requirements. If the Transitional Funds had been paid by the permittees prior to June 7, 2013, there is no doubt that they would have been funds paid and mitigation obligations incurred under the Old Program. The timing of the receipt of Transitional Funds after June 7, 2013, was beyond the control of TCF.

² Although the term is defined in a different context, it is useful to reference the 2008 Mitigation Rule’s definition of “practicable” in 33 *CFR* § 333.1(c)(2). Clearly economic cost, technologies, and logistics are factors to take into consideration when determining whether an action is practicable. “Economic costs are an important consideration when determining the practicability of a proposed compensatory mitigation project. In addition to economic costs, existing technology and logistics must also be considered. If a particular compensatory mitigation project is cost prohibitive, then an alternate compensation project that is more practicable should be required,” 73 Fed. Reg. pg. 19627 (10 April 2008).

TCF should not be penalized now for honoring the quotes and accepting the Transitional Funds so the permittees could proceed with their permitted projects.

- **TCF did not sell credits for Transitional Funds.** Transitional Funds were not generated under the conditions of an in-lieu fee program established pursuant to the 2008 Mitigation Rule, as defined in *33 CFR § 332.2*, because TCF did not sell advance or released credits to any of the fourteen permittees. As such, no credit receipts were executed and TCF did not incur debits in the Instrument ledger. Therefore, Transitional Funds should not be characterized as credit sale proceeds or otherwise as New Program funds.

Conclusion

The fourteen Section 404 permits setting forth the mitigation obligations associated with the Transitional Funds were developed under the Old Program. Neither the compensation paid by the permittees nor the mitigation obligations in these permits were determined based on the New Program. In particular, TCF did not sell credits to compensate for these permit obligations, but instead was paid compensation based on acres of wetlands to be protected. Further, the permits do not clearly state the number and resource type of credits the permittees were required to obtain, as required by the 2008 Mitigation Rule. As a result, the Transitional Funds do not reflect proceeds of compensatory mitigation credits under and should not be subject to the 2008 Mitigation Rule or the Instrument.

Instead, TCF has concluded that the Transitional Funds should be characterized and utilized in the same manner as the other funds collected under the Old Program. The mitigation liability associated with the Transitional Funds – preservation of 1,110.92 acres of wetlands – is amply compensated for by the surplus acres (24,359) that the Corps determined were preserved by TCF under the Old Program. Thus the Transitional Funds should be used and disbursed in the same manner as the other remaining funds from the Old Program, as described in the Corps Audit Memo.

Consistent with its disposition of the other funds from the Old Program, TCF proposes to expend Transitional Funds on high-quality aquatic resource projects in Alaska, including preservation, restoration, enhancement, and establishment of aquatic resources.

Thank you for your consideration of this letter. We look forward to your response.

Sincerely,

Chris Little
The Conservation Fund
(907) 929-2249

Table 1. Transitional Funds

Name	Permit	Permit Date	Compensation	Payment to TCF	Permit's Special Condition - Mitigation Language
Port Lions Dock, Kodiak	POA-1966-43	7/22/2013	10.50	\$231,000	Prior to construction, an in-lieu fee, the amount of which is to be established by the Conservation Fund, at a ratio of 1:1, shall be paid by the permittee as compensatory mitigation for the 3.5 acres of unavoidable impacts to intertidal waters. The permittee shall submit proof of payment to the Corps prior to construction.
Haliburton	POA-1980-210-M3	3/26/2013	1.64	\$18,040	Prior to the start of work, an in-lieu fee for 1.64 acres of wetlands as determined by The Conservation Fund (TCF) shall be paid, an e-mail from the TCF acknowledging receipt of monies shall be sent to mary.r.romero@usace.army.mil to compensate for the permanent loss of 1.09 acres of wetlands. The value for the wetland impacts is based on the functional analysis, 1.09 acres of Category 3 wetlands valued at a ratio of 1.5:1, for a total value of 1.64 acres of compensatory mitigation needed.
Togiak Multipurpose Dock	POA-2011-1083	9/24/2012	1.20	\$7,000	Prior to beginning work, the permittee shall provide compensatory mitigation for the project's 0.6 acre of unavoidable permanent impacts to jurisdictional waters of the U.S. by means of an in-lieu fee payment to The Conservation Fund. The payment shall be for 1.2 acres (0.6 acre at a 2:1 ratio) of estuarine intertidal unconsolidated shore (E2US).
AKDOT Kotzebue Airport M5	POA-1986-768-M5	9/20/2012	192.00	\$105,600	The permittee is responsible for payment of an in-lieu fee to The Conservation Fund for 128 acres of wetlands and waters of the US filled for project components. Proof of payment must be provided to William Keller, Chief, North Branch, US Army Corps of Engineers...prior to the placing of any fill authorized by this permit.
ConocoPhillips CD5	POA-2005-1576	12/19/2011	627.00	\$1,975,050	As compensatory mitigation you shall provide the monetary requirements for an in-lieu fee (ILF) to The Conservation Fund to compensate for the unavoidable direct and indirect impacts to aquatic resources. Based on the ratios of 10:1 in the CRD and 3:1 out of the CRD; and calculations for all direct and indirect impacts an ILF is required for a total of 627 acres. You shall submit the proof of payment to our office prior to commencement of any work authorized by this permit.
AKDOT Trunk Road Palmer	POA-1998-184-O	7/15/2002, modified 8/1/2007	6.60	\$145,200	The permittee will provide the Corps with written proof that fee-in-lieu compensation for the agreed upon mitigation acreage (5.6 acres) has been paid to a non-profit conservation organization with a memorandum of agreement with the Corps. Contribution of fee-in-lieu compensation for 6.6 acres of wetlands at a value of \$5000 per

					acre...(This condition was modified on 8/13/07 to reflect an increase in impact from 5.6 to 6.6 acres)
Koniag Shakmanof Cove Kodiak	POA-2010-496	8/19/2011	4.12	\$88,660	As compensatory mitigation for unavoidable permanent impacts to aquatic resources, Koniag Incorporated, shall provide compensatory mitigation in the form of an in-lieu-fee to be paid to the Conservation Fund at a ratio of 2:1 for marine and estuarine waters and 1.5:1 for fresh waters and wetlands. For this project, the cost of credits is \$5,500 per credit, or \$48,785.00 for 8.87 credits. This estimate is valid for 6 months from the date of issuance and is subject to revision if the project circumstances change.
AKDOT Glenn Hwy MP 172-189	POA-2011-812	8/7/2012	47.60	\$261,800	...into 8.3 acres of waters of the US to rehabilitate the Glenn Highway. Temporary impacts to 31 acres of waters of the US would result from construction including a by-pass and temporary bridge....
Caelus Energy Pioneer Nuna Drill Site	POA-2005-1295-M6	2/26/2013	192.00	\$1,548,000	To mitigate for impacts from the construction and operation of Phase 1 (NDS1 43 acres) 192 credits must be purchase. To mitigate for the construction and operation of Phase 2 (NDS2 and the NTP 58.3 acres) 304 credits must be purchased.
Bering Shai	POA-2012-556	4/2/2013	4.60	\$50,600	As compensatory mitigation for unavoidable impacts of the US, an in-lieu, at a 2:1 ratio, shall be paid to the Conservation Fund prior to discharging fill material below the high tide line.
Ekwok Community Landfill Road	POA-2008-1250	10/23/2012	11.73	\$129,013	As compensatory mitigation for the unavoidable loss of 7.819-acres of wetlands, impacts shall be compensated at a 1.5:1 ratio. The Ekwok Village Council shall provide the monetary requirements of an in-lieu fee to the Conservation Fund.
AKDOT Coldfoot Airport	POA-2011-1167	2/15/2013	2.25	\$24,750	Unavoidable project impacts to salmon spawning habitat shall be compensated with at least equal-value salmon spawning habitat at the Corps Category 1 ratio of no less than 3 acres conserved to acre impacted by the project. The project will have a direct impact to 0.70 acres of riverine waters below the ordinary high water line of the Middle Fork Koyukuk River; therefore 2.25 acres of the credits must be purchased from the Conservation Fund in-lieu fee to offset the impacts.
Barrow - Middle Salt Lagoon - RE-PAYMENT	POA-2012-183	1/10/2013	4.80	\$64,020	The in-lieu fee shall be determined by the Conservation Fund with 19.42 acres of Palustrine emergent wetlands and 2.2 acres of Estuarine wetlands compensated at a ratio of 2:1 for a total of 43.22 acre credits
Total				\$4,685,858	
Current Total (-2% fee)				\$4,592,141	