
THE
CONSERVATION FUND

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Sheila Newman
Chief of Special Actions
Department of the Army
Alaska District, U.S. Army Corps of Engineers
P.O. Box 6898
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RE: Mitigation in Alaska

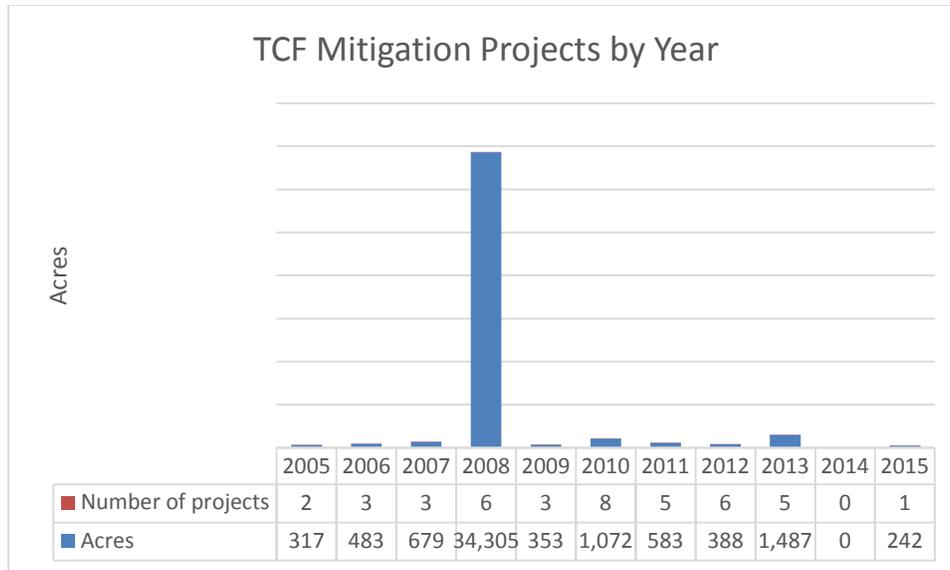
Dear Ms. Newman,

I am writing in reference to the Alaska In-Lieu Fee Compensatory Mitigation Instrument (“Instrument”) between The Conservation Fund (“the Fund”) and the U.S. Army Corps of Engineers Alaska District (“the Corps”) executed by the parties in June 2013.

Since June 7, 2013 the Fund has been able to move only one project through the entire mitigation process overseen by the Corps. This is in comparison to the sixteen mitigation projects completed by the Fund during the previous two year period (2011-2013) and an average of four projects a year for the period from 2005 to 2011 (see graph below). [Note that all five projects in 2013 were completed prior to execution of the Instrument on June 7, 2013.]

The Corps has certified only two mitigation sites in Alaska (Kaleak and Little Su) in the past two years, which pales in comparison to the hundreds of Clean Water Act permits that have been issued by the Corps across Alaska during that same period. The Corps is expediting the impacts to wetlands in Alaska while delaying the mitigation of those impacts.

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The Corps is applying a double standard for mitigation in Alaska. The Fund is experiencing ever-increasing complexity imposed by the Corps that makes it virtually impossible to navigate the bureaucratic process. At the same time, the Corps has been issuing permits to allow wetlands impacts while waiving all mitigation requirements, including permittee-responsible mitigation. The rationale is that since programs like The Conservation Fund are not selling credits at this time, there are no opportunities for mitigation. While the Corps is ratcheting up the mitigation requirements for programs like the Fund's you are ratcheting down the mitigation requirements for those who impact wetlands. It is far easier to impact wetlands in Alaska than it is to mitigate for those impacts.

The burden of proof required for mitigation is substantially higher than for impacting wetlands. While mitigation providers are forced to prove that a property is threatened with conversion, those who are converting wetlands are not required to prove that further avoidance, minimization and mitigation are impossible, as they claim. While the Corps wants proof of threat, you don't require proof that actual threats can be avoided or at least mitigated.

One could conclude that the Alaska District of the Corps is deliberately impeding mitigation to the point that mitigation is no longer practicable. If mitigation is no longer practicable the Corps will no longer require it. The Fund has spent the past eighteen years proving that mitigation is practicable in Alaska. From 1998 to 2013 we protected 48 sites totaling 33,000 acres, including some of the highest-value wetlands in Alaska.

The Corps seems to be allowing its personal biases on land preservation to color the mitigation process. We have heard Corps staff repeat statements such as "less than 1% of the land in Alaska is privately owned" or "there is too much land in conservation in Alaska." These personal biases seem to be at the

heart of the Corps' narrow focus on the imminence of threat as a criteria in the selection of mitigation sites.

As we have written before, whether a property is threatened with conversion to a degraded or non-wetland condition is an arbitrary judgement that cannot be quantified. The 2008 Rule does not require threat of conversion to be imminent, yet the Corps has taken the position that threat must be immediate and defined to be legitimate. The degree or imminence of threat is very much in the eye of the beholder. The Corps has suggested that the threat to a specific property should be apparent to an eighth-grader, yet the eighth-graders we have interviewed have a better understanding of human population growth, climate change and the development of natural resources than the engineers at the Corps.

Alaska is not immune to the forces that have degraded wetlands in most of the United States and the world. Alaska has a bit of an edge in terms of distance and geography, but the pressures of human population and development are rapidly catching up here, too. Only twenty years ago places like the Kenai River seemed remote and pristine, but the Kenai is now threatened with overdevelopment and periodic warnings about storm water discharge, failing septic systems and *E. coli* outbreaks.

Alaska is very different from Ohio or Louisiana. We are blessed with vast areas of natural land that support the full range of native species in normal patterns of abundance and distribution. While the threat of conversion for a tract of land in Ohio or Louisiana might be more imminent than the threat to a tract in the Arctic National Wildlife Refuge, the conservation significance of the parcels is inversely proportionate to the imminence of threat. The tract in Ohio or Louisiana is likely surrounded by a degraded landscape that will not be significantly improved by either preserving or restoring the isolated parcel. The private tract in the Arctic Refuge is surrounded by a vast pristine landscape that would be severely degraded by the loss or conversion of wetlands on the private tract. Threats to the entire Arctic Refuge would result from access to the private site as required under ANILCA, discharge of effluent from the private site, and displacement of wildlife away from human activity on the private site. The managers of the Arctic Refuge face the challenge of reconciling the conflicting uses that occur on the private site with the broader surrounding landscape.

We recognize that restoration of wetlands is a purer form of mitigation than preservation and that restoration comes closer to satisfying the "no net loss" goal of the Clean Water Act. Alaska has fewer restoration needs than other parts of the U.S. and that is a good thing. We are fortunate that very few of our wetlands are degraded and in need of restoration. In Alaska, Humpty Dumpty is still on the wall.

The Corps has announced that the standards for preservation will steadily get more onerous. The Corps seems determined to create restoration opportunities in Alaska by penalizing preservation. We suggest that restoration opportunities in Alaska can be better realized through incentives than through penalties. The most important incentive that the Corps can control is the appropriate use of mitigation ratios. In other parts of the U.S. the Corps requires mitigation ratios of 10:1 (10 acres preserved for each acre impacted) for preservation vs. 1:1 (1 acre restored for each acre impacted) for restoration. We think this is fair and appropriate, and recognize the huge differences in the cost of restoring wetlands compared to

preserving them. But to be effective, the mitigation ratio incentive should be applied at the front end when the permit is issued, rather than a penalty at the back end when the mitigation is implemented.

We ask that you adhere to the timelines laid out in the 2008 Rule on Compensatory Mitigation. The Corps regularly exceeds the timelines laid out in the 2008 Rule at all stages of the mitigation process. This is unfair to program sponsors who are trying to achieve mitigation in a timely manner so as to minimize temporal loss.

Lastly, we ask that you stabilize the mitigation process that the Fund and other mitigation providers must work with. By continually moving the goal posts of mitigation the Corps is exacerbating the uncertainty that has thrown mitigation in Alaska into disarray. At this point we have no idea what it will cost us to generate credits and no confidence that the process will stabilize anytime soon.

Please contact me at (907) 694-9060 if I can be of further assistance.

Sincerely,



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Alaska State Director

Cc:

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