



DEPARTMENT OF THE ARMY
ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS
REGULATORY DIVISION
P.O. BOX 6898
JBER, AK 99506-0898

JAN 27 2017

Regulatory Division

Chris Little
The Conservation Fund
700 West Second Avenue
Anchorage, Alaska 99501

Dear Mr. Little,

This responds to your December 7, 2016, letter, in which you request the U.S. Army Corps of Engineers (Corps) to conclude that \$4,685,858 collected during the 2013 – 2015 time frame not be considered in-lieu fee (ILF) funds under The Conservation Fund's (TCFs) Alaska In-Lieu Fee (ILF) Compensatory Mitigation Program Instrument executed June 7, 2013 (Instrument).

In your December 7, 2016, letter, you propose that fees collected for thirteen specific permit actions do not constitute ILF funds under your approved Instrument, thus, the monies collected do not need to be used to fulfill compensatory mitigation obligations compliant with the 2008 Mitigation Rule (Rule). You also believe the 1,110.92 acres of mitigation liability accepted does not require fulfillment on the ground in the form of identified compensatory mitigation projects compliant with the 2008 Rule. You believe that these obligations were fulfilled under your previous Agreement.

The Corps does not concur with your position. The current Instrument, Section D. Approval of Final Instrument, clearly states *"At such time when the Instrument becomes effective, the Instrument replaces and supersedes the Agreement Between TCF and the Corps, Alaska District to Establish a Fee-Based Compensatory Mitigation Program Under Section 404 of the Clean Water Act, dated May 20, 1998."* The Instrument became effective June 7, 2013, thus, after that date TCF is only authorized to collect compensatory mitigation fees and assume compensatory mitigation liability under the current Instrument which requires compliance with the Rule.

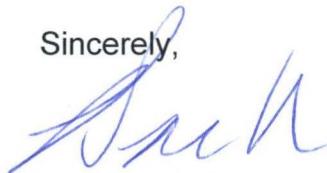
It is necessary for TCF to identify mitigation sites and fulfill the requirements for compensatory mitigation on the ground. In accordance with Rule, the transfer of mitigation liability from the permittee to TCF occurred on the date of the financial transaction, not the date the permit was authorized (33 CFR 332.3(l)(3)). There was no mitigation liability for TCF until after June 7, 2013, for any of the permit actions identified in your December 7, 2016, letter, rendering it impossible to fulfill these requirements prior to the expiration of the 1998 Agreement. The permit issuance date is not relevant to a sponsor's rights and responsibilities under the Rule (33CFR332.3(l)(3)).

TCF is required to fulfill all mitigation liability it accepted through the financial transactions for each permit identified by selecting sites and producing compensatory mitigation plans compliant with Rule. TCF's Instrument allows acres to be used as a means of credit determination. TCF must identify sites and develop compensatory mitigation plans to fulfill all credit and acre sales.

Please provide sales transaction documentation to the Corps for each of the thirteen permits identified in your December 7, 2016, letter. The Corps will cross reference this documentation with applicants to determine when the transfer of liability for each permitted action occurred. In addition, please provide any other documentation you would like the Corps to consider prior to our final decision.

If you have any questions, please contact Sheila Newman, Special Actions Branch Chief at 907-753-5556 or sheila.m.newman@usace.army.mil.

Sincerely,



David S. Hobbie
Regional Regulatory Chief