

## **Background**

The Matanuska-Susitna Borough (Borough) received surface estate title to thousands of acres of wetlands as part of our Municipal Entitlement. In 2004, we began the process to preserve approximately 12,000 acres of Borough wetlands. The purpose was to create a mitigation bank as a way of preserving high value wetland complexes that the Borough owns. In addition, the bank would help to provide and/or sell credits for compensatory mitigation pursuant to the Clean Water Act (CWA) in an affordable manner to the Borough and others. The sale of mitigation credits to third parties would generate a revenue stream to the Borough while keeping mitigation credit costs low. The "Wetland Bank" was certified in 2009 and operated under the CWA 2008 Rule and USACE Alaska District regulatory guidance letter RGL ID No.09-01 issued in 2009.

**The Borough recently received information (disclosed only as a result of a FOIA request) regarding USACE Alaska District (Corps) changes in policy (effective the 9<sup>th</sup> of July 2014) that have significant adverse economic and environmental impact to the Borough.**

### **Issues:**

1. Recent changes in requirements for compensatory mitigation were developed and implemented through the Corps' Regulatory Guidance Letter without public, Borough, EPA, or the State Interagency Review Team (IRT) input. Essentially the Alaska District Corps is working in complete isolation, with a total lack of transparency or communication with those stakeholders affected.

### ***Possible Solutions:***

*We propose that the Senator or staff talk directly with the head of the Corps in Alaska, and request transparency related to this past Guidance Letter and any and all future considerations or actions impacting the Borough and the Wetland Bank. We propose in addition that the issue be raised with superiors of the Alaska Corps in Corps regional and national headquarters. While we can only guess at the motivation for these recent and contrary actions, they seem to be contrary to both the spirit and the letter of the Clean Water Act, its regulations, and the desires of citizens of the State of Alaska to preserve their environment in a way that marries private enterprise and regulation.*

2. Using the 2014 regulatory guidance letter, the Corps recently permitted the filling of 7.38 acres of waters of the U.S., including wetlands without requiring compensatory mitigation. The Borough as a whole is ranked by the National Fish Habitat Partnership (NFHP) as a "high" risk of habitat degradation and specifically called out Wasilla Creek as one of the 10 "Waters to Watch". Waters to Watch are a collection of rivers, streams, estuaries, watershed systems and lakes from across the country that will benefit from strategic conservation efforts to protect, restore or enhance their current condition. Notwithstanding the NFHP designations the Corps determined compensatory mitigation was not required. The public notice for this permit indicated compensatory mitigation was being offered by the applicant; but when the permit was finally issued, it was not required. This would seem to be a change significant enough to warrant that a new Public Notice be provided prior to issuance of the permit.

3. The Corps decision not to require compensatory mitigation for this permit alone adversely impacts the Borough's potential revenue by approximately \$160,000.00 from the loss of potential wetland mitigation credit sales.

The Borough could potentially lose millions of dollars in wetland mitigation credit sales from credits already released and available for sale if this policy of permitting the filling of waters of the U.S. without requiring compensatory mitigation continues to be allowed by the Corps. This is a special problem since the Borough and its strategic partners have spent 13 years and a significant amount of staff time and public and private funds to establish the Wetland Bank in reliance on laws, rules and regulations now in place but that we believe are being contravened by the Corps staff.

***Possible Solutions for items 2-3:***

*We propose that the Senator or staff talk directly with the head of the Corps in Alaska and have high-level authorities, perhaps the Engineer Inspector General or others from outside the State of Alaska, examine these matters to make an internal investigation as to whether local Corps staff have exceeded their discretion to the detriment of the environment, Wasilla Creek and the Borough.*

4. The Corps recently made another policy change that could effectively limit the life and the value of our Wetland Bank. This issue surfaced with recent attempts to certify the Ketchikan Gateway Borough mitigation bank. Our Wetland Bank was informed that this would be an issue for us as well. The Corps' new policy requires ownership of the surface/subsurface rights or an agreement with sub-surface rights owner(s) to not impact the surface even in those cases in which the possibility of mineral exploration or extraction is "remote" or where other mitigation arrangements are made. Municipal Entitlements for Borough's and Municipalities from the State of Alaska only convey the surface estate.

Other members of the IRT have voiced opposition to this requirement but to no avail. The Final Rule promulgated under the Clean Water Act does not call for requirement of owning sub-surface rights or easement restricting sub-surface rights owner from accessing via surface. Surface rights owners can develop improvements on the surface, develop roads, power plants and the like, but we have been told that all Boroughs in the State can no longer utilize lands for preservation banking.

The Borough could potentially lose tens of millions of dollars in potential wetland mitigation credit sales. We have already classified over 10,000 acres of land beginning back in 2004 and now the Corps has changed the policy without transparency, communication to stakeholders or basis for decision.

***Possible Solutions:***

*We propose that the Senator or staff talk directly with the head of the Corps in Alaska and have high-level authorities, perhaps the Engineer Inspector General or others from outside the State of Alaska, examine these matters to make an internal investigation as to whether local Corps staff have exceeded their discretion to the detriment of the environment and the Borough.*