

# **Agreement Between the Southeast Alaska Land Trust and the Regulatory Branch,**

**U.S. Army Corps of Engineers, Alaska District**

**To Establish a Fee-based Compensatory Mitigation Program Under Section 404  
of the Clean Water Act.**

## **Authority**

The Clean Water Act (33 U.S.C. 1344) provides that Section 404 is administered by the Secretary of the Army. The Regulatory Branch of the U.S. Army Corps of Engineers is delegated the authority to carry out this administration.

## **Background**

In situations requiring compensatory mitigation the Regulatory Branch, U.S. Army Corps of Engineers may determine that in-lieu fees paid to wetland trust funds or similar organizations, where such fees contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands or other aquatic habitat, may serve as an appropriate alternative to active mitigation measures by the applicant. The use of this fund for compensatory mitigation may occur only after the relevant activity has complied with Corps regulations and policy regarding wetlands avoidance and minimization.

This is an agreement between the Regulatory Branch U.S. Army Corps of Engineers, Alaska District, (hereinafter "Corps") and the Southeast Alaska Land Trust, (hereinafter "SEALTrust"). The purpose of this agreement is to establish an additional mechanism to compensate for wetland or other aquatic habitat losses caused by Clean Water Act, Section 404 regulated activities in southeast Alaska and to provide greater flexibility to applicants

and violators. The Corps and the SEALTrust agree to follow the procedures set forth below.

### **Mission of Southeast Alaska Land Trust**

The SEALTrust is a private organization organized to protect and conserve natural areas and ecologically significant land for scientific, charitable and educational purposes, and is a "holder" under the terms of Section 34.17 of the Alaska Code. The SEALTrust is a "qualified organization" within the provisions of Section 170(h) of the Internal Revenue Code of 1986, as amended, qualified to acquire and hold conservation easements and meets the requirements of the IRS Code as a Sec. 501(c)(3) exempt organization.

The SEALTrust is governed by a Board of Directors and operates through its Executive Director and staff. Funding comes largely through membership dues and donations from individuals, businesses and foundations. The SEALTrust enters into this agreement by a resolution passed by its Board of Directors.

The SEALTrust mission is to use flexible and creative conservation methods to protect land for its natural, recreational, scenic, historical or productive values. This direct protection usually takes the form of acquisition or donation of conservation easements, or in some cases, ownership. It is a private non-profit environmental organization, which is organized to protect and conserve natural areas and ecologically significant land for scientific, charitable and educational purposes.

### **Qualification of Land Trusts**

Nationally, there are numerous local, regional, multi-state and national land trusts directly protecting land for its natural, recreational, scenic, historical or productive value. For purposes of this agreement, a qualified land trust is one that (1) has been determined to be exempt from federal income under section 501 (c)(3) of the Internal Revenue Code and; (2) includes in its mission and/or letter of intent a statement of purpose addressing the protection of wetlands or other aquatic habitat; (3) agrees to participate in and accept funds for the acquisition, restoration, enhancement or preservation of wetlands, or other aquatic habitat or adjacent important upland habitat areas under the terms of this agreement; (4) agrees to coordinate general objectives of all in-lieu fee funded projects with the Corps for concurrence prior to disbursing funds; and (5) provide a yearly accounting of funds forwarded to it from the in-lieu fee program.

### **Program Operation**

In permit approval and resolution of certain enforcement cases, the Corps may determine that compensatory mitigation is appropriate. In those cases, where traditional compensatory mitigation is difficult to accomplish or not the preferred method, an option to pay an in-lieu fee is appropriate. Where the Corps makes such a finding, the SEALTrust, pursuant to the terms of this agreement, will act as a passive recipient of in-lieu fees, which are contributed at an applicant's or violator's option to satisfy mitigation requirements.

The SEALTrust will play no role in the Corps decision to approve or deny a permit or the Corps decision as to whether mitigation is a necessary condition of any such permit or enforcement action. Where the Corps determines that mitigation in the form of payment of

in-lieu mitigation funds to the SEALTrust may be made, the Corps will contact the SEALTrust regarding the acreage needed for mitigation and the type of habitat to be preserved or replaced. The SEALTrust will then determine the monetary amount needed from the applicant or violator in order to purchase, manage and preserve fee ownership and/or conservation easements in the wetland or other aquatic habitat acreage required by the Corps for mitigation. The Corps will then outline this mitigation option to the applicant or violator. If the applicant or violator chooses this option, they will write a check to SEALTrust in the amount indicated. As an alternative to the above, the Corps may independently negotiate a fee amount with an applicant or violator, and have the applicant or violator pay the fee to the SEALTrust. The SEALTrust will provide written notification to the applicant or violator and the Corps upon receipt of the fee. SEALTrust will inform the applicant that they may not use the name of SEALTrust without specific written authorization.

### **Fiscal Accountability & Record Keeping**

The SEALTrust agrees to place all funds received pursuant to contributions made under this Agreement into a FDIC-insured bank account or instrument separate from other funds of its organization. Interest from this account will remain with the account. Any reasonable costs associated with opening or maintaining the in-lieu mitigation fee program may be utilized from the funds in the account.

The SEALTrust shall provide the Corps with an annual report which shall contain a description of projects funded, the location of the site(s), information as to the sites significance, ownership of the land, the holder of any conservation easements, an accounting of funds, and any additional information which would inform the Corps as to the nature of specific projects. The report will be based on a calendar year and provided to the Corps within ninety (90) days following the end of the calendar year. The accounting shall include direct and indirect costs applied to each project.

### **Procedure For Selection**

The SEALTrust, in consultation with the Corps, shall establish a procedure for selection of wetland or other aquatic habitat projects. It shall take into consideration the various geographical areas within southeast Alaska, watersheds, functions and values, scarcity, educational value, and any information, which would identify ecologically significant wetland or other aquatic habitat areas needing protection. It may consider proximity to parks, refuges and other protected lands as well as isolated areas. The Corps will assist in the selection of projects by delineating the wetlands on a prospective property. A property could contain some uplands as protective buffer to the jurisdictional wetland areas.

The SEALTrust shall establish an advisory committee with representatives from environmental agencies and organizations including the Corps, Environmental Protection Agency, National Marine Fisheries Service, U.S. Fish and Wildlife Service, Alaska Department of Fish and Game, and the Alaska Coastal Zone District. This committee shall advise SEALTrust on sites in Southeast Alaska for wetland or other aquatic habitat protection and restoration.

Upon selection of a project, the SEALTrust shall inform the Corps in writing of the property selected and shall provide general information regarding the project. The Corps may veto any selection if it does not meet the general mitigation purpose of preservation, restoration, creation, replacement, or enhancement of wetlands or other aquatic habitat. The SEALTrust shall make it possible for the Corps to visit sites selected by ensuring unencumbered access, as necessary.

### **Costs Associated With Program Administration**

It is the intent of the parties to maximize the funds that can be applied directly to the purchase and/or preservation of valuable wetlands or other aquatic habitat. The parties also agree that certain administrative costs are necessary to accomplish this purpose.

The parties agree that funds may be applied to (1) reasonable pre-acquisition expenses so long as the expenses apply directly to the project purpose, including but not limited to appraisals, surveys, title insurance, closing costs, and travel; (2) management and stewardship costs, and (3) those costs that are directly associated with the in-lieu fee project. In addition to the above referenced items, the SEALTrust will charge a 2% fee for administering the program.

### **Costs Associated With Projects Involving Restoration, Enhancement, Creation**

It is recognized that the majority of aquatic habitat projects selected by the SEALTrust shall be preservation through acquisition or establishment of conservation easements. However, in consultation with the Corps, the SEALTrust may implement a project, or a portion of a project, involving restoration, enhancement or creation of wetlands or other aquatic habitat. In those cases, the SEALTrust will monitor all contracts necessary to initiate and finalize projects involving preservation, restoration, enhancement or creation of wetlands or other aquatic habitat.

### **Allocation of Funds**

SEALTrust agrees to allocate funds to a specific identified project at such time as there are adequate funds to meet the costs of a meaningful in-lieu fee project. A project may be broken into phases for purposes of fund allocation. Records shall be retained on each project and shall be cross-referenced with the Corps permit or action number.

### **Open Communication & Cooperation**

Both the Corps and the SEALTrust acknowledge that it is their desire to facilitate the process set forth in this agreement by open communication and cooperation. Both parties agree to exercise their rights and obligations in good faith as contained in this agreement. If at any time the SEALTrust has questions regarding the application of the funds or the selection of a project, the Corps agrees to make itself available to resolve the issue in a timely fashion.

### **Amendments & Termination**

This agreement may be amended in writing by either party or by mutual consent. Amendments require the written approval by both the Corps and the SEALTrust. Either party

giving ninety (90) days written notice to the other party may terminate this agreement. Prior to termination, the SEALTrust shall provide an accounting of funds and shall complete payments on any contracts for projects approved by the Corps and expenses incurred on behalf of the projects. Upon termination, should funds remain in the in-lieu fee account, the Corps shall direct that payment be made from that account to another non-profit organization or governmental entity for the application of funds for the purpose intended.

### Points of Contact

The points of contact for all written communications between the parties shall be:

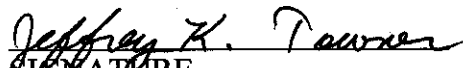
Ralph W. Thompson  
Field Office Manager,  
U.S. Army Corps of Engineers, Juneau Regulatory Field Office  
8801 Glacier Highway, Suite 106B  
Juneau, AK 99801

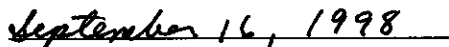
Judy Sherburne  
Vice President  
Southeast Alaska Land Trust  
119 Seward Street, Suite #9  
Juneau, AK 99801

### Effective Date

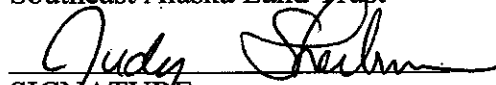
This agreement shall become effective when signed by both the SEALTrust and the Corps.

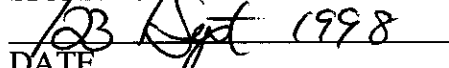
Jeffrey K. Towner  
Chief, East Section, Regulatory Branch

  
SIGNATURE

  
DATE

Judy Sherburne  
~~Vice~~ President  
Southeast Alaska Land Trust

  
SIGNATURE

  
DATE