



## A TRAINING COURSE FOR MITIGATION BANKING INTERAGENCY REVIEW TEAMS



### Reference Document 12 Financial Assurances – Remedial and Long-Term

#### A. Federal Financial Assurances Policy

##### **2006 Proposed Compensatory Mitigation Regulations**

##### *§332.3 General compensatory mitigation requirements*

##### *(n) Financial assurances.*

(1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring.

(3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.

(4) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or

instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.

(6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions.

#### §332.4 *Planning and documentation*

(c) *Mitigation Plan*. [The mitigation plan must include:]

(13) *Financial assurances*. A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see § 332.3(n)).

#### §332.7 *Management*

(d) *Long-term management*.

(1) The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer.

(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.

(3) Any provisions necessary for long-term financing must be addressed in the original permit or instrument. The district engineer may require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In

cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site.

(4) For permittee-responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.

### **2005 Regulatory Guidance Letter (RGL 05-1)**

See: U.S. Army Corps of Engineers. February 14, 2005. *Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds*. Regulatory Guidance Letter No. 05-1.

[http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl05\\_01.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl05_01.pdf)

### **2003 Model Compensatory Mitigation Plan Checklist**

- Adaptive Management Plan
  - o Remedial measures (financial assurances, management plan, etc.)
- Financial Assurances
  - o Identify party (ies) responsible for assurances
  - o Specify type of assurance, contents and schedule

#### *9. Financial Assurances*

- a. For each of the following, identify party(ies) responsible to establish and manage the financial assurance, the specific type of financial instrument, the method used to estimate assurance amount, the date of establishment, and the release and forfeiture conditions:
  1. Construction phase
  2. Maintenance
  3. Monitoring
  4. Remedial measures
  5. Project success
- b. Types of assurances (e.g., performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, etc.).
- c. Schedule by which financial assurance will be reviewed and adjusted to reflect current economic factors.

### **ADDITIONAL RESOURCES ON FINANCIAL ASSURANCES**

Institute for Water Resources, U.S. Army Corps of Engineers. December 1995. "National Wetland Mitigation Banking Study: Technical and Procedural Support to Mitigation Banking Guidance." IWR Technical Paper WMB-TP-2. See Chapter Five: "Financial and Legal Assurances."

<http://www.iwr.usace.army.mil/inside/products/pub/iwrreports/WMB-TP-2.pdf>

King & Associates, Inc. August 24, 1995. "Implementing Financial Assurance Requirements for Commercial Wetland Mitigation Banks." Alexandria, VA: U.S. Army Corps of Engineers, Institute for Water Resources.



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#### B. Bibliography of Corps District & State Financial Assurances Rules and Models

Baltimore District, U.S. Army Corps of Engineers.

“Escrow Agreement.” Undated. No URL available.

“Performance Bond.” Undated. No URL available.

“Performance Bond Cost Estimates for Mitigation: Minimal Requirements.”  
Undated.

<http://www.nab.usace.army.mil/Regulatory/Mitigation/PerformanceBondCostEstimates.pdf>

Chicago District, U.S. Army Corps of Engineers. “Irrevocable Letter of Credit.”  
Undated.

<http://www.lrc.usace.army.mil/co-r/loc.htm>

Florida Department of Environmental Protection. Rules governing financial  
assurance requirements for mitigation banking. “Financial Responsibility.”  
Amended May 21, 2001. Florida Administrative Code § 62-342.700.

<http://www.dep.state.fl.us/legal/Rules/surfacewater/62-342/62-342.doc>

Form No. 62-342.900(1). “Mitigation Bank Performance Bond to  
Demonstrate Construction and Implementation Financial Assurance.”  
Effective May 21, 2001.

[http://www.dep.state.fl.us/water/wetlands/forms/62-342/900\(1\).pdf](http://www.dep.state.fl.us/water/wetlands/forms/62-342/900(1).pdf)

Form No. 62-342.900(2). “Mitigation Bank Irrevocable Letter of Credit to  
Demonstrate Construction and Implementation Financial Assurance.”  
Effective May 21, 2001.

[http://www.dep.state.fl.us/water/wetlands/forms/62-342/900\(2\).pdf](http://www.dep.state.fl.us/water/wetlands/forms/62-342/900(2).pdf)

Form No. 62-342.900(3). “Mitigation Bank Standby Trust Fund Agreement  
to Demonstrate Construction and Implementation Financial Assurance.”  
Effective May 21, 2001.

[http://www.dep.state.fl.us/legal/Forms/shared/62-342900\(3\).doc](http://www.dep.state.fl.us/legal/Forms/shared/62-342900(3).doc)

Form No. 62-342.900(4). "Mitigation Bank Trust Fund Agreement to Demonstrate Construction and Implementation Financial Assurance." Effective May 21, 2001.

[http://www.dep.state.fl.us/legal/Forms/shared/62-342900\(4\).doc](http://www.dep.state.fl.us/legal/Forms/shared/62-342900(4).doc)

Form No. 62-342.900(5). "Mitigation Bank Trust Fund Agreement to Demonstrate Perpetual Management Financial Assurance." Effective May 21, 2001.

[http://www.dep.state.fl.us/legal/Forms/shared/62-342900\(5\).doc](http://www.dep.state.fl.us/legal/Forms/shared/62-342900(5).doc)

Form No. 62-342.900(6). "Mitigation Bank Standby Trust Fund Agreement to Demonstrate Perpetual Management." Effective May 21, 2001.

[http://www.dep.state.fl.us/legal/Forms/shared/62-342900\(6\).doc](http://www.dep.state.fl.us/legal/Forms/shared/62-342900(6).doc)

Los Angeles District, U.S. Army Corps of Engineers.

"Performance Bond." Undated.

<http://www.spl.usace.army.mil/regulatory/mitig/bond.doc>

"Recommended Bond Surety Companies." Undated.

<http://www.fms.treas.gov/c570/c570.html>

Michigan Department of Environmental Quality, Land and Water Management Division. "Letter of Credit." September 14, 2004.

<http://www.deq.state.mi.us/documents/deq-lwm-wetlands-LetterOfCreditSampleMitigation2.pdf>

Michigan Department of Environmental Quality, Land and Water Management Division. "Surety Bond for a Mitigation Site." September 14, 2004.

<http://www.deq.state.mi.us/documents/deq-lwm-wetlands-SuretyBondSampleMitigation2.pdf>

Norfolk District, U.S. Army Corps of Engineers.

"Exhibit G – Escrow Agreement." Undated. (Part of template for wetland mitigation banking instruments.)

[https://155.78.20.213/ribits/bank\\_estab.php](https://155.78.20.213/ribits/bank_estab.php)