**62-342.700 Financial Responsibility.**

(1) To provide reasonable assurances that the proposed Mitigation Bank will meet the requirements of Section 373.4136, F.S., this section and the associated permit conditions, non-governmental bankers shall provide proof of financial responsibility for: (a) the construction and implementation phase of the bank, and (b) the perpetual management of the bank, as required in this section. Governmental entities shall provide proof of financial responsibility under subsection 62-342.700(12), F.A.C. The amount of financial responsibility provided in the mechanisms required in this section shall be based on the cost estimates determined under subsection 62-342.700(10), F.A.C.

(2) Submitting Financial Responsibility Documentation. The applicant shall provide draft documentation of the required financial responsibility mechanisms described below with the permit application, and shall submit to the Department the executed or finalized documentation within the time frames specified in the permit. The provisions of this section shall also apply for any modifications to the Mitigation Bank Permit.

(3) General Terms for Financial Responsibility Mechanisms. In addition to the specific provisions regarding financial responsibility mechanisms for construction and implementation in subsection 62-342.700(4), F.A.C., and perpetual management in subsection 62-342.700(9), F.A.C., the following terms shall be complied with:

(a) The financial responsibility mechanisms shall be payable at the direction of the Department to its designee or to a standby trust agreement. The financial responsibility mechanism shall be retained by the Department if it is of a type which is retained by the beneficiary according to industry standards.

(b) Demonstration of financial responsibility shall be continuous until complete satisfaction of the applicable permit conditions and approved release of financial responsibility by the Department.

(c) All financial mechanisms must guarantee that the banker will perform all of its obligations under the permit, provide alternative financial assurance of a type allowed by this section, and obtain the Department’s written approval of the alternative assurance provided within 90 days after receipt by both the banker and the Department of a notice of cancellation of a bond or intent not to extend the expiration date of a letter of credit.

(d) A banker may satisfy the requirements of this section by establishing more than one acceptable financial mechanism per Mitigation Bank.

(e) A banker may use a financial assurance mechanism allowed under this section for more than one Mitigation Bank. The amount of funds available through the mechanism must be no less than the sum of funds that would be available through separate mechanisms acceptable for each Mitigation Bank.

(f) A banker must notify the Department by certified mail within 10 days after the commencement of a voluntary or involuntary proceeding:

1. To dissolve the banker,

2. To place the banker in receivership,

3. For entry of an order for relief against the banker under Title 11 of the United States Code, or

4. A general assignment of its assets for the benefit of creditors under Chapter 727, F.S.

A banker may not assign its assets for the benefit of creditors. A banker will be without the required financial assurance in the event of a bankruptcy of the trustee of any trust provided under this rule, or the suspension or revocation of the authority of any trustee to act as trustee, or in the event of a bankruptcy of the issuing institution of any bond or letter of credit, or the revocation of the authority of such institution to issue such instruments. The banker must notify the Department within 10 days, and establish other financial assurance within 60 days after such an event.

(4) Financial Responsibility for Construction and Implementation.

(a) No financial responsibility shall be required where the construction and implementation of the Mitigation Bank, or a phase thereof, is completed and successful prior to the withdrawal of any credits.

(b) Financial responsibility for the construction and implementation of each phase of the Mitigation Bank may be established by surety bonds, performance bonds, irrevocable letters of credit, or trust funds. If a bond or an irrevocable letter of credit is used as the financial mechanism, a standby trust fund shall be established, in which all payments under the bonds or irrevocable letter of credit shall be directly deposited.

(c) The amount of financial responsibility established shall equal 110% of the cost of construction and implementation of the Mitigation Bank (or each phase of the Mitigation Bank) which is being constructed and implemented. When the bank (or appropriate phase) has been completely constructed, implemented, and is trending toward success in compliance with the permit, the respective amount of financial responsibility shall be released.

(d) The financial responsibility mechanism shall become effective prior to the release of any mitigation credits.

(5) Surety or Performance Bond.

(a) A banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by obtaining a surety or performance bond that conforms to the requirements of this subsection. The company issuing the bond must be licensed to do business in Florida, and be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury, or a Florida-domiciled surety or insurance company with at least an A rating in the latest printing of the A.M. Best’s Key Rating Guide to write individual bonds up to 10 percent of the policyholder’s surplus. The banker shall provide proof that the bond company meets these requirements.

(b) The surety or performance bond shall be worded in substantial conformance with Form 62-342.900(1). Deviations from the form shall be identified and submitted to the Department for review and approval.

(c) Under the terms of the bond, the surety shall become liable on the bond obligation when the mitigation banker fails to perform under the terms of the Mitigation Bank Permit. In all cases, the surety’s liability shall be limited to the sum stated in the bond.

(d) The mitigation banker who uses a surety or performance bond to satisfy the requirements of subsection 62-342.700(4), F.A.C., must establish a standby trust fund when the surety or performance bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund for distribution by the trustee in accordance with the Department’s instructions. The standby fund agreement must meet the requirements specified in subsection 62-342.700(7), F.A.C.

(e) The bonding company shall provide notice of cancellation of a bond by certified mail to the banker and to the Department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the banker and the Department, as evidenced by the return receipt.

(f) A bond may be canceled by the banker if the Department has given prior written consent. The Department shall provide such consent when either the banker substitutes alternative financial assurance allowed under this rule and such alternate financial assurance is approved by the Department and is effective or the Department releases the banker from the requirements of this subsection.

(6) Irrevocable Letter of Credit.

(a) A mitigation banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by obtaining an irrevocable letter of credit that conforms to the requirements of this subsection. The irrevocable letter of credit shall be provided by a federally insured depository that is “well capitalized” or “adequately capitalized” as defined in Section 38 of the Federal Deposit Insurance Act (12 USC 1831(o)). The banker shall submit proof of such capitalization to the Department.

(b) The irrevocable letter of credit shall be worded in substantial conformance with Form 62-342.900(2). Deviations from the form shall be identified and submitted to the Department for review and approval.

(c) A mitigation banker who uses an irrevocable letter of credit to satisfy the requirements of subsection 62-342.700(4), F.A.C., must also establish a standby trust fund when the irrevocable letter of credit is acquired. Under the terms of the irrevocable letter of credit, all amounts paid pursuant to a sight draft by the Department will be deposited by the issuing institution directly into the standby trust fund to be distributed by the trustee in accordance with instructions from the Department. This standby trust fund must meet the requirements specified in subsection 62-342.700(7), F.A.C.

(d) Letters of credit must be irrevocable and issued for a period of at least one year, and the expiration date must be automatically extended for a period of at least one year unless, at least 120 days prior to the expiration date, the issuing institution notifies both the banker and the Department by certified mail of a decision not to extend the expiration date. The terms of the irrevocable letter of credit must provide that the 120 days begins on the date when both the banker and the Department have received the notice, as evidenced by the return receipts.

(7) Standby Trust Fund.

(a) A mitigation banker using a surety or performance bond or irrevocable letter of credit shall contemporaneously establish a standby trust fund. The trustee of the standby trust shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal agency or an agency of the state in which the fund is established. The banker shall provide proof of such regulation and examination to the Department.

(b) The standby trust agreement shall be worded in substantial conformance with Form 62-342.900(3). Deviations from the form shall be identified and submitted to the Department for review and approval.

(8) Trust Fund.

(a) A mitigation banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by establishing a trust fund that conforms to the requirements of this section. The trustee of the trust fund shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal agency or an agency of the state in which the fund is established. The banker shall provide proof of such regulation and examination to the Department.

(b) The trust agreement must be worded in substantial conformance to Form 62-342.900(4). Deviations from the form shall be identified and submitted to the Department for review and approval.

(9) Financial Responsibility for Perpetual Management.

(a) A banker shall establish either a trust fund or an irrevocable letter of credit or surety or performance bond with a corresponding standby trust fund to provide financial responsibility for the perpetual management of the Mitigation Bank, or phase thereof. When a trust fund is used, the requirements of subsection 62-342.700(8), F.A.C., must be met. When a surety or performance bond or irrevocable letter of credit is used with a standby trust fund, the requirements of subsections 62-342.700(6), 62-342.700(5), and 62-342.700(7), F.A.C., respectively, must be met, except all references to construction and implementation shall be changed to perpetual management. Trust fund agreements for perpetual management shall be worded in substantial conformance with Form 62-342.900(5). Deviations from the form shall be identified and submitted to the Department for review and approval.

(b) The amount of financial responsibility provided shall be sufficient to be reasonably expected to generate annual revenue equal to the annual cost of perpetual management, established under subsection 62-342.700(10), F.A.C., at an assumed average rate of return of six percent per annum, for the bank, or for banks constructed in phases, for all phases for which credits have been released.

(c) The financial responsibility mechanism must be in effect prior to the withdrawal of credits from the Mitigation Bank, or applicable phase thereof.

(10) Cost estimates.

(a) For the purposes of determining the amount of financial responsibility that is required in this section, the banker shall submit a detailed written estimate, in current dollars, of the total cost of construction and implementation and of the cost of perpetual management of the Mitigation Bank. The written cost estimate shall be certified by a licensed professional whose license authority in the State of Florida includes the ability to provide such certified written estimates.

(b) The cost estimate for construction and implementation shall include all costs associated with completing construction and implementation of the Mitigation Bank, or phase thereof, including, as applicable, earthmoving, planting, exotic/nuisance vegetation removal, land surveying, structure installation, consultant fees, taxes, monitoring activities and reports.

(c) The cost estimate for the perpetual management of the Mitigation Bank shall be based on the costs of maintaining and operating any structures, controlling nuisance or exotic species, fire management, consultant fees, monitoring activities and reports, taxes, and any other costs associated with perpetual management. The amount of financial responsibility shall equal the cost of perpetual management for the bank, or, for banks constructed in phases for all phases for which credits have been released.

(d) The banker shall submit written cost estimates, together with verifiable basis for the estimates to the Department along with the financial responsibility mechanism.

(e) The costs shall be estimated based on a third party performing the work at the fair market value of services. The source of any cost estimates shall be indicated.

(11) Cost adjustments.

(a) Every two years, the banker shall undertake an estimate of the costs of the remaining construction, implementation, and perpetual management. The banker shall submit the estimate to the Department in writing certified by a licensed professional whose license authority in the State of Florida includes the ability to provide such certified written estimates accompanied by supporting documentation. Construction, implementation, and perpetual management costs shall be listed separately. The Department shall review the cost adjustment statement and supporting documentation to determine if they reflect all construction, implementation, and perpetual management costs. If the cost adjustment statement and supporting documentation accurately reflects a good faith estimate of all construction, implementation and perpetual management costs, the Department shall approve the cost adjustment statement.

(b) At each cost adjustment, the banker shall revise the construction, implementation, and perpetual management cost estimate for inflation and changes in the costs to complete or undertake the current phase of the Mitigation Bank or appropriate phase thereof.

(c) Revised cost estimates shall be used as the basis for modifying the financial mechanism. If the value of the financial mechanism is less than the total amount of the current construction and implementation and perpetual management cost estimates, the banker shall, upon Department approval of the cost adjustment statement, increase the value of the financial mechanism to reflect the new estimate within 60 days. If the value of the funding mechanism is greater than the total amount of the current cost estimate, the banker may reduce the value of the funding mechanism to reflect the new estimate upon receiving Department approval of the cost adjustment statement.

(d) The Department shall require adjustment of the amount of financial responsibility provided for construction, implementation or perpetual management at times other than the cost adjustment period when the estimated costs associated with compliance with the permit conditions exceed the current amount of financial responsibility and such financial assurances are deemed necessary to ensure compliance with the permit conditions.

(e) The banker may provide revised cost estimates more frequently than every two years. If at any time the banker learns that actual costs exceed estimated costs by more than 25 percent, the banker shall provide a revised cost estimate and adjust the corresponding amount of financial responsibility under this section.

(12) Financial Responsibility for Governmental, Non-Department and Non-Water Management District, Mitigation Banks.

(a) Governmental entities other than the Department or Districts shall demonstrate reasonable assurances that it can meet the construction and implementation requirements in the Mitigation Bank Permit by any of the mechanisms in subsection 62-342.700(4), F.A.C., above, or by other financial mechanisms which are sufficient to meet the requirements of this section.

(b) Governmental entities other than the Department or District shall establish a trust fund for the perpetual management of the Mitigation Bank which meets the requirements of subsection 62-342.700(9), F.A.C., above. The trust fund for perpetual management may be funded as Mitigation Credits are withdrawn, provided that the trust fund is fully funded when all Mitigation Credits are withdrawn. Governmental entities shall comply with the cost adjustment provisions in subsection 62-342.700(11), F.A.C.