



**US Army Corps
of Engineers®**

Standard Operating Procedures For SPL Regulatory Program Financial Assurance Documents; Accept and Release

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1.0 Purpose. This Standard Operating Procedure (SOP) is designed to ensure Regulatory Division consistency with accepting and releasing financial assurance documents (i.e. performance bonds, letters of credit). Financial assurance documents guarantee the successful implementation, maintenance and monitoring of the compensatory wetland and non-wetland waters establishment, re-establishment, rehabilitation, restoration, and enhancement work, as well as compliance with the terms and conditions of the permit. This SOP will ensure increased efficiency in compliance tracking and result in benefits to aquatic resources through fostering increased compliance with Department of the Army regulatory authorizations (general permits and individual permits).

2.0 Applicability. This standard operating procedure applies to all Los Angeles District Regulatory Project Managers.

3.0 References.

3.1 US Army Corps of Engineers Regulatory Guidance Letter No. 05-01, Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds, dated February 14, 2005.

http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl05_01.pdf

3.2 33 C.F.R. Part 332, Compensatory Mitigation For Losses of Aquatic Resources.

http://www.usace.army.mil/CECW/Documents/cecwo/reg/news/final_mitig_rule.pdf

4.0 Definitions.

Performance Bond: A bond issued by an insurance company to guarantee satisfactory completion of a project by a contractor.

Penal Sum: The sum stipulated in a bond to be paid by the obligor (the one bound to perform the obligation) in case he fails to fulfill its conditions.

Letter of Credit: A document, consisting of specific instructions by a buyer of goods, that is issued by a bank to the seller who is authorized to draw a specified sum of money under certain conditions, i.e., the receipt by the bank of certain documents within a given time.

Principal Sum: capital as contrasted with the income derived from it.

Surety: a person (or company) who agrees to be responsible for the debt or obligation of another. Furthermore, a surety is also a "security against loss or damage or for the fulfillment of an obligation, the payment of a debt, etc.; a pledge, guaranty, or bond.

5.0 Responsibilities. The Project Manager accepts and releases financial assurances required as special conditions of a permitted project.

6.0 Procedures.

6.1 Procedure for receiving, reviewing, accepting and filing a financial assurance document:

- a. Project Manager (PM) receives the draft financial assurance, reviews the document to make sure that the following items are accurate, and if not, will request a revised draft from the Permittee:
 - i. For a Performance Bond: Correct form; File No.; date of the Permit; name of principal is identical to the name of the Permittee; and the penal sum is correct.
 - ii. For a letter of credit: Correct form; File No.; date of the Permit; name of applicant is identical to the name of the Permittee; expiration date; and the principal sum is correct.
- b. Upon completion of his/her review, the PM shall submit the draft document to the Office of Counsel (OC) for legal review. OC legal review may consist of, but is not limited to:
 - i. For performance bonds: That the identified corporate surety is on the Department of Treasury's listing of approved sureties; the penal sum is within the corporate surety's underwriting limitations and is licensed to issue a bond in California or that any identified individual surety is determined acceptable and that the surety's pledged assets are sufficient to cover the bond obligation; and that the individual(s) intended to execute the bond on behalf of the principal has authority to bind the principal.
 - ii. For letters of credit: That the credit is to be issued by a federally insured financial institution rated investment grade or higher and has provided the requisite credit ratings; and that any changes to the Corps' form suggested by the financial institution are legally acceptable.
- c. In the event OC recommends changes, OC will transmit the recommended changes to the PM. Upon receipt of OC's recommended changes, the PM will notify the Permittee of the changes.
- d. When OC determines that the financial assurance document is legally sufficient, the PM may then communicate to the Permittee that the financial assurance document may be fully executed and furnished to the Corps. Correspondence is sent to the Permittee to notify them that the draft financial assurance has been approved (template exists in ORM and is labeled as Financial Assurance Approval letter.rtf). This letter is to be signed by a GS-13 level PM or a supervisor/manager. The yellow copy of this letter shall be placed in the

administrative record with a copy of the acceptable draft financial assurance document attached. Once the PM receives the fully executed financial assurance from the Permittee or financial institution, as appropriate, a copy is made for the administrative record and the original submitted to administrative staff to upload into the Access database and then locked in the Regulatory Division safe in the district office.

- e. The administrative staff will then scan the final financial assurance and place it on the Q: drive (Q:\co\CESPL-CO-R\Bonds\scanned bonds) as a PDF file. The PDF file must be named as follows: “performance_filenumbr-PMinitials_bond/LOC#_\$.amount.pdf (use “LOC” instead of “performance” for all Letter of Credits. Round the amount. Do not use cents.)
- f. Administrative staff shall also enter any remaining data for the financial assurance and permit (i.e., permit date) in the Access database, Q:\co\CESPL-CO-R\Regulatory Database\Regulatory Database.mdb, under the “main bond information” tab (other tabs are not required).
- g. PM can view the final financial assurance on the Q drive under the scanned bonds or via the Access database.

6.2 Procedure for releasing a performance bond:

- a. Once the PM has determined that the terms and conditions of the permit have been successfully completed, the PM shall request the administrative staff to physically obtain the original performance bond. Once the administrative staff locates the performance bond and delivers it to the PM, the date that the document was sent to the PM shall be entered into the Access database by the administrative staff.
- b. Once the PM receives the original performance bond, the PM will return the original performance bond via regular mail to the surety, with a courtesy copy to the Permittee, as an attachment to a performance bond release letter (template exists in ORM and is labeled as Bond Release Letter.rtf and is attached to this SOP).
- c. This letter shall be signed at the Branch Chief level or higher.

6.3 Procedure for cancelling a letter of credit:

- a. Once the PM has determined that the terms and conditions of the permit have been successfully completed, the PM shall request the administrative staff to physically obtain the original letter of credit. Once the administrative staff locates the letter of credit and delivers it to the PM, the date that the document was sent to the PM shall be entered into the Access database by the administrative staff.
- b. Once the PM receives the original letter of credit, the PM will fill out Exhibit B of the letter of credit and prepare a cover letter to the financial institution (template exists in ORM and is labeled as Credit Cancellation Cover Letter.rtf and is attached to this SOP), with a courtesy copy to the applicant at the address included in the letter of credit.
- c. The cover letter and Exhibit B of the letter of credit are to be signed at the Branch Chief level or higher.

- 6.4 Procedure for seeking a written demand on the financial assurance in the event of default of permit conditions:
- a. The PM shall provide the principal/applicant written notice, with a courtesy copy to the surety/financial institution, of its failure to comply with the terms and conditions of the permit and give it an opportunity to cure the non-compliance within a specified time period of not more than 30 days.
 - b. In the event the principal/applicant does not cure the default within the specified time period to the satisfaction of the Corps, the PM shall provide written notification of the default to the surety/financial institution. For letters of credit, the PM will submit a certification of drawing to the financial institution (Exhibit A to the letter of credit).
 - c. In the case of a performance bond, within 30 days of receiving the Corps' notice of default, the surety can either i) remedy the default of the principal to the full satisfaction of the Corps by a specified date, or ii) tender to a party the PM identifies a portion of the penal sum of the bond to remedy the default. If the surety fails to respond to the demand letter or to honor the commitments in the performance bond, the full penal sum is due and owing to a party that the PM needs to identify.
 - d. In the case of a letter of credit, within 7 days of receiving the Corps' certificate of drawing, the financial institution shall provide payment to a party the PM identifies in the certificate of drawing.
 - e. To enforce any outstanding mitigation requirements in which a party accepts monies from a surety/financial institution, it is recommended that the Permittee and the new party enter into an assignment and assumption agreement. A draft assignment and assumption agreement shall be provided to the PM and OC for review and approval prior to execution.

7.0 Records and Measurements. Administrative staff shall enter data for the financial assurance and permit (i.e., permit date) in the Access database, Q:\co\CESPL-CO-R\Regulatory Database\Regulatory Database.mdb, under the "main bond information" tab (other tabs are not required) and then lock the Financial Assurance in the Regulatory Division safe in the district office.

8.0 Attachments. Performance Bond Template, Letter of Credit Template, Financial Assurance Approval Template Letter, Bond Release Template Letter, Credit Cancellation Template Letter, Notice of Deficiencies Demand to Surety Template Letter. All Office of Counsel templates are located on the Division SharePoint site at http://spl-portal:8090/sites/spl_co_r/Shared%20Documents/Forms/AllItems.aspx?RootFolder=%2fsites%2fspl%5fco%5fr%2fShared%20Documents%2fOC%20Templates&View=%7b9398B53A%2d21CE%2d47AA%2dA151%2d0A874A0BE603%7d. All template letters are located in the ORM2 database.



DAVID J. CASTANON
Chief, Regulatory Division

LETTER OF CREDIT TEMPLATE

DRAFT FOR DISCUSSION PURPOSES ONLY

Irrevocable Standby Letter of Credit

No. _____

Date: _____, 200_

District Commander
U.S. Army Engineer District, Los Angeles
c/o Finance & Accounting Office
P.O. Box 532711
Los Angeles, CA 90053-2325
Attn: Regulatory Division

Dear Sir:

The _____ (hereinafter referred to as the "Bank") grants an Irrevocable Letter of Credit No. _____ in the aggregate amount of _____ U.S. Dollars [\$______], (hereinafter referred to as the "Principal Sum") to the U.S. Army Corps of Engineers, Los Angeles District (hereinafter referred to as the "Beneficiary") on behalf of _____ (hereinafter referred to as "Applicant"), for _____ (name of Project), Department of the Army Permit no. _____ dated _____. It is understood that this Letter of Credit cannot be amended, revoked, cancelled, reduced, or otherwise affected without the prior express written consent of the Beneficiary.

The Beneficiary can demand payment from the Bank up to the Principal Sum or fractions thereof up to said amount. Beneficiary has the exclusive right to demand payment of any sums under the terms of this Letter of Credit from the Bank. The demand shall be made by presentation of a witness statement, which shall be in substantially the same form as **Exhibit A** attached hereto, either in person during normal business hours or by certified mail to the Bank, that (i) the amount drawn under this Letter of Credit represents the loss to the Beneficiary as a result of corrective action taken by the Beneficiary, in accordance with 33 Code of Federal Regulations §325.4(d), because the Applicant failed to comply with the conditions of Department of the Army Permit No. _____, (ii) the Beneficiary has given the Applicant 30 days' written notice of its intent to draw, and (iii) the failure of the Applicant to comply with the permit conditions has not been remedied.

The Bank's payment of the demand shall be made by means of a certified

Los Angeles District, or his officially designated representative, as the official authorized to make demand upon the Bank.

Drafts drawn under this Letter of Credit must be marked with the following clause: "Drawn under Letter of Credit No. _____ of [Bank] .

This Letter of Credit shall expire on [must match performance period]. It is a condition of this Letter of Credit that it shall be deemed automatically extended without amendment for additional periods of one (1) year from the present and future expiration date hereof, unless sixty (60) days prior to such expiration date we shall notify you by Registered Mail to your address set forth above that we elect not to consider this Letter of Credit renewed for any such additional period.

This Letter of Credit will be cancelled in whole upon receipt by us by certified mail of a request for cancellation executed by the District Commander, U.S. Army Engineer District, Los Angeles District, or his officially designated representative, which shall be in substantially the same form as **Exhibit B** attached hereto.

We hereby agree with you that the drafts drawn under and in compliance with the terms of this credit shall be duly honored on due presentation to the Bank.

Nothing in this letter of credit will be construed as making the Beneficiary responsible in any manner for any failure of the Applicant to provide adequate assurances to the Bank.

This Letter of Credit is subject to and governed by the 2007 revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication 600), and to the extent not inconsistent therewith, to the laws of California. If this Letter of Credit expires during an interruption of business as described in Article 36 of said publication 600, the Bank hereby specifically agrees to effect payment if this Letter of Credit is drawn against within thirty (30) days after the resumption of business.

Sincerely,

Bank

Signature

Title

This Letter of Credit shall expire on [must match performance period]. It is a condition of this Letter of Credit that it shall be deemed automatically extended without amendment for additional periods of one (1) year from the present and future expiration date hereof, unless sixty (60) days prior to such expiration date we shall notify you by Registered Mail to your address set forth above that we elect not to consider this Letter of Credit renewed for any such additional period.

This Letter of Credit will be cancelled in whole upon receipt by us by certified mail of a request for cancellation executed by the District Commander, U.S. Army Engineer District, Los Angeles District, or his officially designated representative, which shall be in substantially the same form as **Exhibit B** attached hereto.

We hereby agree with you that the drafts drawn under and in compliance with the terms of this credit shall be duly honored on due presentation to the Bank.

Nothing in this letter of credit will be construed as making the Beneficiary responsible in any manner for any failure of the Applicant to provide adequate assurances to the Bank.

This Letter of Credit is subject to and governed by the 2007 revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication 600), and to the extent not inconsistent therewith, to the laws of California. If this Letter of Credit expires during an interruption of business as described in Article 36 of said publication 600, the Bank hereby specifically agrees to effect payment if this Letter of Credit is drawn against within thirty (30) days after the resumption of business.

Sincerely,

Bank

Signature

Title

EXHIBITS TO LETTER OF CREDIT TEMPLATE

CERTIFICATE FOR DRAWING

BANK:

ACCOUNT PARTY/APPLICANT:

IRREVOCABLE LETTER OF CREDIT NO.: _____

BENEFICIARY:

District Commander
U.S. Army Engineer District, Los Angeles
c/o Finance & Accounting Office
P.O. Box 532711
Los Angeles, CA 90053-2325
Attn: Regulatory Division

The undersigned, [an officially designated representative of] the District Commander, U.S. Army Engineer District, Los Angeles District, hereby certifies to the Bank that:

1. In the opinion of the Beneficiary, the Applicant failed to comply with the conditions of the Department of the Army Permit No. _____.

2. The Beneficiary has given 30 days' advance written notice to the Applicant of its intent to draw pursuant to the terms of the Letter of Credit, but the failure of the Applicant to comply with the permit conditions has not been remedied.

3. The amount drawn under the above-referenced Letter of Credit represents the loss to the Beneficiary as a result of corrective action taken by the Beneficiary in accordance with 33 Code of Federal Regulations §325.4(d), caused by the Applicant's failure to comply.

3. The undersigned is authorized under the terms of the above-referenced Letter of Credit to present this certificate as the sole means of demanding payment on the Letter of Credit.

4. The Beneficiary is therefore making a drawing under the above-referenced Letter of Credit in the amount of \$ _____.

5. The amount demanded does not exceed the Principal Sum (as defined in the above-referenced Letter of Credit).

THEREFORE, the District Commander, U.S. Army Engineer District, Los Angeles, or his officially designated representative has executed and delivered this certificate as of the ____ day of _____, 20__.

U.S. ARMY ENGINEER DISTRICT, LOS ANGELES

By: _____

Title: _____

THEREFORE, the District Commander, U.S. Army Engineer District, Los Angeles, or his officially designated representative has executed and delivered this certificate as of the ____ day of _____, 20__.

U.S. ARMY ENGINEER DISTRICT, LOS ANGELES

By: _____

Title: __

CERTIFICATE FOR CANCELLATION Exhibit B

BANK:

ACCOUNT PARTY/APPLICANT:

IRREVOCABLE LETTER OF CREDIT NO.: _____

BENEFICIARY:

District Commander
U.S. Army Engineer District, Los Angeles
c/o Finance & Accounting Office
P.O. Box 532711
Los Angeles, CA 90053-2325
Attn: Regulatory Division

The undersigned, [an officially designated representative of] the District Commander, U.S. Army Engineer District, Los Angeles District, hereby certifies to the Bank that:

1. The Applicant has presented to the Beneficiary documentary evidence of full compliance with the terms and conditions of the Department of the Army Permit No. _____.

2. The Beneficiary therefore requests the cancellation of the above-referenced Letter of Credit.

THEREFORE, the District Commander, U.S. Army Engineer District, Los Angeles, or his officially designated representative has executed and delivered this certificate as of the ____ day of _____, 20__.

U.S. ARMY ENGINEER DISTRICT, LOS ANGELES

By: _____

Title: _____

FINANCIAL ASSURANCE APPROVAL TEMPLATE LETTER

[Date]

Regulatory Division

[Address of Principal/Applicant]

Dear [Insert Name of Principal/Applicant]:

Reference is made to your Department of the Army Authorization (Corps File No. [insert File No.]) for [insert permitted action] which required submission of an acceptable financial assurance. The Corps has reviewed your draft [insert financial assurance] issued by [insert surety/bank name] [(insert financial assurance No.)], dated [insert dated financial assurance] and hereby finds it acceptable. Therefore, you shall cause the surety/bank to fully execute the [insert financial assurance]. As a reminder, the final fully executed financial assurance shall be submitted to the Corps prior to work in waters of the U.S.

Thank you for your submittal. If you have any questions, please contact [insert PM name][insert PM number]or via e-mail at [insert PM email address]. Please refer to this letter and file No. [insert File No.] in your reply.

Sincerely,

Senior Project Manager
_____Branch

BOND RELEASE TEMPLATE LETTER

[Date]

Regulatory Division

[Mailing Address of Surety]

To Whom It May Concern:

On [insert date], [insert surety name] established a Performance Bond [insert number], in the aggregate amount of [insert amount], to the U.S. Army Corps of Engineers ("Corps") on behalf of the [insert principal's name] (original enclosed). [insert Principal's name] has fulfilled the terms and conditions specified in permit No. [insert Permit number] to our satisfaction. Accordingly, Performance Bond No. [insert No.] shall be considered null and void.

If you have any questions, please contact [insert Project Manager name] at [insert number]. Please refer to this letter and [insert file no.] in your reply. A copy of this letter is being forwarded to [insert Principal Address].

Sincerely,

Chief, [insert North Coast or SouthCoast or
Arizona] Branch

Enclosure

CREDIT CANCELLATION TEMPLATE LETTER

[Date]

Regulatory Division

[Bank Address]

Dear Sir or Madame:

On [insert date LOC established] the [insert Bank Name] established an Irrevocable Standby Letter of Credit, No. [insert LOC number], in the aggregate amount of [insert dollar amount], to the U.S. Army Corps of Engineers, Los Angeles District on behalf of the [insert Applicant]. [insert Applicant] has fulfilled the terms and conditions specified in Corps Permit no. [insert permit No.]. Accordingly, we request you cancel in full the Letter of Credit. We have enclosed a "certificate for cancellation" for your records.

If you have any questions, please contact [insert Project Manager name] at [insert number]. Please refer to this letter and [insert file no.] in your reply. A copy of this letter is being forwarded to [insert Applicant Address].

Sincerely,

Chief, [insert North Coast or SouthCoast or
Arizona] Branch

Enclosure

Notice of Deficiencies Demand to Surety Template Letter

[Date]

Regulatory Division

[Insert Address of Surety/Financial Institution]

Dear [insert contact of the Surety/Financial Institution]:

This letter is in reference to Performance Bond No. [insert performance bond no.], executed on [insert date executed]. The bond obligates the Principal ([insert Principal]) to perform and fulfill the terms and conditions of Corps of Engineers (“Corps”) permit number [insert permit No.](attached), and it gives the Corps final authority to determine whether the permit mitigation conditions have been satisfactorily completed. The bond requires that the Corps notify the Principal and Surety and allow them reasonable time to correct any identified deficiencies. Our letter dated [insert date of letter], provided notice of deficiencies pursuant to the bond’s requirement.

Permit No. [insert permit no.] was issued to [insert Permittee] on [insert date permit issued]. The following Special Conditions of Corps Permit [insert Permit No.] have not been fulfilled: [insert Special Conditions of Corps Permit not fulfilled]

In a letter to [insert Principal] dated [insert date] (attached), we expressed concern about [insert Principal] lack of compliance with the Special Conditions of its Corps permit ([insert permit No.]) and approved Mitigation Plan. We advised [insert principal] that non-compliance with the Special Conditions of the Corps permit and Mitigation Plan constitutes a Clean Water Act violation, and outlined the steps necessary for [insert Principal] to bring the mitigation program into compliance with the requirements of the Special Conditions of the Corps Permit and approved Mitigation Plan. These requirements included submittal of all relevant information relating to this matter, and evidence that [insert Principal] is actively seeking to comply with the aforementioned Special Conditions(s) within the next 30 days ([insert Date]) of the date of the letter. As stated above, we then provided notice of deficiencies pursuant to the bond’s requirement in our letter dated [insert date]. To date, we have not received a written response to either letter.

The Corps is hereby providing written notification of the default to [insert Surety/Financial Institution] and demands that, within the next 30 days (by [insert date]), [insert Surety/Financial Institution] remedy the default of the principal to the full satisfaction of the Corps, or tender to [insert party accepting the penal sum of the bond to remedy the default] the full penal sum of the bond to remedy the default.

If you have any questions, please contact me at [insert Project Manager's telephone number] or via e-mail at [insert email address]. Please refer to this letter and [insert File No.] in your reply.

I am forwarding copies of this letter to: [insert CA F&G contact, Regional Water Quality Control Board Contact]

Sincerely,

Chief, [insert North Coast or SouthCoast or
Arizona] Branch

Enclosure(s)