

Maintenance and Monitoring Performance Bond

Bond No. _____

Penal Sum: \$ _____

Know All Men By These Presents,

That we, **[name]** of **[address]** (hereinafter called the Principal), as Principal, and **[bonding company]** with an office at **[address]**, a corporation duly organized under the laws of the State of **[state]** (hereinafter called the “Surety”), as Surety, are held and firmly bound unto the **U.S. Army Corps of Engineers, Wilmington District**, (hereinafter called the “USACE”) and the **[name and address of party that will receive the funds in the event of default]**, (hereinafter called the “Obligee”), up to the maximum penal sum of **[amount]** Dollars (\$ **amount**) (hereinafter called the “Maximum Penal Sum”), for the payment of which we, the Principal and the Surety, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into the **[name] Mitigation Banking Instrument** (hereinafter called the “MBI”) with the USACE, dated the **[day]** day of **[month]**, **[year]**, which includes the Final Mitigation Plan for the **[name of mitigation site]** (the “FMP”) to ensure that aquatic resources within the boundaries of the mitigation site will be **[enter appropriate activities (ex. restored, enhanced, monitored).]**

WHEREAS, the principal promised to deliver to the USACE and the Obligee a Bond substantially in the form hereto upon completion and compliance with construction and other criteria of the UMBI, FMP, and permits.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that this Bond will not be released in whole or in part until the Principal receives written verification from the USACE that the conditions for release in the FMP have been fully met. If the above bounden Principal shall meet the final performance standards as defined in the FMP, then this obligation shall be null and void; otherwise it shall remain in full force and effect. This bond is subject to the following conditions:

1) This bond shall remain in full force and effect for a period of **[number]** years. **[If the bond will be reduced on an annual basis, include the following statement and fill in the columns below.]** The Maximum Penal Sum of this bond may be reduced by the USACE, by these scheduled amounts:

Year	Reduction	Revised Penal Sum
1	\$	\$
2	\$	\$
3	\$	\$
4	\$	\$
5	\$	\$
6	\$	\$
7	\$	\$

2) USACE shall issue a full and final release of this Bond when the **[enter event. Ex:**

construction activities are complete and/or seven year monitoring period is complete; all monitoring reports have been submitted and have been approved by the USACE; and the success criteria identified in the FMP have been achieved and approved by the USACE.]

This Bond shall not be released in whole until the Principal receives written verification from the USACE that all the conditions for release have been satisfied.

3) If any payment under this Bond, as set forth in subsection 4 (b) below, is made, then the outstanding penal sum of the Bond shall be reduced by the corresponding amount of such payment. Notwithstanding anything contained herein to the contrary, the aggregate liability of the Surety is limited to the Maximum Penal Sum stated above, regardless of the number or amount of claims brought against this bond and regardless of the number of years this bond remains in effect. The USACE shall issue a full and final release of this Bond and any and all of Surety's obligations hereunder when Surety has tendered payment in whole, or in parts equal to the aggregate sum, of the Maximum Penal Sum of this Bond.

4) The Surety's obligation under this Bond shall arise after the USACE has notified the Principal of their failure to abide by, or cure default conditions related to, the terms and conditions of the FMP. Upon notice of the Principal's default under the FMP, the Surety, in its sole discretion and notwithstanding any of the provisions of the above, shall remedy the Principal's default by taking action under 4) a) or 4) b) below. In the event that the Surety either fails to respond to USACE's notice of default within thirty (30) business days of receipt of said notice, or fails to honor Surety's commitments under this bond to the full satisfaction of the USACE, then Surety shall remedy such default in accordance with subsection 4) c) below:

- a) Remedy the default of the Principal to the full satisfaction of the USACE by a reasonable date determined by the USACE; or
- b) Immediately tender to the Obligee, that portion of the Maximum Penal Sum that the Obligee determines, in their discretion, is due and owing and necessary to remedy the default. If payment is tendered to the Obligee under this subsection, the Obligee shall immediately become a Surety or Sureties to this Bond, or
- c) In the event that the Surety fails to respond within thirty (30) business days to the USACE's notice of default, or to honor commitments to the full satisfaction of the USACE under paragraph a) or b) of this section within a reasonable time to be determined by the USACE, the remaining portion of the Maximum Penal Sum may, at the election of the Obligee, immediately become due and owing and paid to the Obligee. The Obligee under this paragraph shall immediately become a Surety or Sureties under this bond for the remaining term of the bond.

5) Surety shall have no obligation to the Principal, USACE, the Obligee, or any other person or entity for any loss suffered by the Principal, USACE, the Obligee, or any other person or entity by reason of acts or omissions which are or could be covered by the Principal's general liability insurance, products liability insurance, completed operations insurance or any other insurance. Under no circumstance shall the USACE be responsible to arbitrate any insurance claims made, declined or disputed under this Bond.

6) The Surety hereby waives notification of amendments to the UMBI, permits, applicable laws, statutes, rules, and regulations, and agrees that no such amendment shall in any way alleviate its obligation on this Bond.

NOTWITHSTANDING ANYTHING CONTAINED IN THE AGREEMENT TO THE CONTRARY, THE LIABILITY OF THE PRINCIPAL AND SURETY UNDER THIS BOND IS LIMITED TO THE TERM BEGINNING THE _____ DAY OF _____, 20__, AND ENDING THE _____ DAY OF _____, 20__. AND ANY EXTENSIONS OR RENEWALS OF THE REFERENCED AGREEMENT SHALL BE COVERED UNDER THIS BOND ONLY WHEN CONSENTED TO IN WRITING BY THE SURETY. IT IS FURTHER AGREED THAT THE REFUSAL BY THE SURETY TO EXTEND THE TERM OF THIS BOND SHALL NOT CONSTITUTE A DEFAULT BY THE PRINCIPAL, AND SHALL NOT GIVE RISE TO A CLAIM OR DEMAND AGAINST THE SURETY UNDER THIS BOND.

In accordance with 33 C.F.R. § 332.3(n)(5), the Surety shall provide the USACE and the Obligee written notification at least 120 days in advance of termination, revocation, or modification of this Bond.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the USACE or the Obligee named herein, or their successors or assigns.

The above-bounden parties have executed this instrument under their several seals, dated this ____ day of _____, 2016, the name and corporate seal of each corporate party being affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Principal: [sponsor]

By: _____
[enter name and title]

Surety: [bond company]

By: _____
Attorney-in-Fact

Obligee: [name of person to receive funds]

By: _____
Director or Acting Director