

Federal Policy: Financial Assurances

2008 Compensatory Mitigation for Losses of Aquatic Resources

§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.

Resources: Financial Assurances

National Resources

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>.

Scodari, Paul, Steve Martin and Aaron Willis. June 2011. "Implementing Financial Assurance for Mitigation Project Success." Institute for Water Resources, U.S. Army Corps of Engineers. [http://www.iwr.usace.army.mil/docs/iwrreports/Financial Assurance.pdf](http://www.iwr.usace.army.mil/docs/iwrreports/Financial%20Assurance.pdf)

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/cw/cecwo/reg/rgls/rgl05_01.pdf

U.S. Department of Treasury, Financial Management Service. Renewed annually in July. "Recommended Bond Surety Companies." <http://www.fms.treas.gov/c570/c570.html>.

Regional Resources

Baltimore District, U.S. Army Corps of Engineers. "Typical compensatory mitigation cost estimate components. July 15, 2010.

[http://www.nab.usace.army.mil/Wetlands%20Permits/Mitigation/FA CostEstimateComponents071510.pdf](http://www.nab.usace.army.mil/Wetlands%20Permits/Mitigation/FA%20CostEstimateComponents071510.pdf)

Chicago District, U.S. Army Corps of Engineers. June 2008. "Appendix C : Letter of credit." In: "Interagency coordination agreement on mitigation banking within the regulatory boundaries of Chicago District, Corps of Engineers." pp. 29-35.

Session VII: Financial Assurances (Performance Securities)

<http://www.lrc.usace.army.mil/co-r/MBICAJun2008.pdf>

Florida Department of Environmental Protection. May 21, 2001. "Financial responsibility."
Florida Administrative Code §62-342.700.

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

Florida Department of Environmental Protection. May 21, 2001. "Mitigation bank
performance bond to demonstrate construction and implementation financial assurance."
Form No. 62-342.900(1).

[http://www.dep.state.fl.us/legal/Forms/shared/62-342900\(1\).doc](http://www.dep.state.fl.us/legal/Forms/shared/62-342900(1).doc)

Florida Department of Environmental Protection. May 21, 2001. "Mitigation bank
irrevocable letter of credit to demonstrate construction and implementation financial
assurance." Form No. 62-342.900(2).

[http://www.dep.state.fl.us/legal/Forms/shared/62-342900\(2\).doc](http://www.dep.state.fl.us/legal/Forms/shared/62-342900(2).doc)

Florida Department of Environmental Protection. May 21, 2001. "Mitigation bank standby
trust fund agreement to demonstrate construction and implementation financial
assurance." Form No. 62-342.900(3).

[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)

Florida Department of Environmental Protection. May 21, 2001. "Mitigation bank trust
fund agreement to demonstrate construction and implementation financial assurance."
Form No. 62-342.900(4).

[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)

Florida Department of Environmental Protection. "Mitigation bank trust fund agreement to
demonstrate perpetual management financial assurance." Form No. 62-342.900(5). 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)

Los Angeles District, U.S. Army Corps of Engineers. "Performance bond." Undated.

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

Michigan Department of Environmental Quality. August 8, 2011.

"Letter of credit."

http://www.michigan.gov/deq/0,1607,7-135-3313_3687-19829--,00.html

Michigan Department of Environmental Quality Water Resources Division. August 8, 2011.

"Surety bond for a mitigation site." http://www.michigan.gov/deq/0,1607,7-135-3313_3687-19829--,00.html

New Orleans District, U.S. Army Corps of Engineers. Undated. "Escrow agreement for construction and establishment fund."

<http://www.mvn.usace.army.mil/ops/regulatory/Escrow%20C&E%20Template%20Agreement.doc>

Norfolk District, U.S. Army Corps of Engineers. Undated. "Escrow agreement." In: "Template mitigation banking instrument." pp. 29-31.

http://www.nao.usace.army.mil/executive/executive%20offices/regulatory%20office/mitigation%20banks/MBI_template_5-04.doc