What are Financial Assurances?

- 1 of 12 elements required of all mitigation plans

  33 CFR 332.4(c)

- Short-term mechanism to ensure that:
  - Project is completed
  - Resources are available to correct or replace unsuccessful projects
- Distinct from long-term management funding

Why Financial Assurances?

Risk Management Mechanism

- Mitigation projects can be complex & outcomes may be uncertain
- Responsible parties can fail or walk away
  - Bankruptcy
  - Dissolution
- To ensure compensation obligations can be secured on the ground
  - Constructed
  - Meets performance standards
  - Managed
- Allows partial release of credits before full project success is demonstrated

Basic Requirements for Financial Assurances

- "[Corps] shall require sufficient financial assurances to ensure a high level of confidence that the mitigation project will be successfully completed, in accordance with applicable performance standards."

  33 CFR 332.3(n)(1)

- [Corps] MUST receive notification 120 days prior to expiration/termination

  33 CFR 332.3(n)(5)

How are assurances established?

Single assurance for the entire project

Multiple assurances/phases

- Construction assurances
- Performance assurances
- Interim assurances

When can short-term assurances be released?

- End of operational life of project

  (End of performance monitoring)

- Construction & performance securities may be reduced/phased out as project success is demonstrated
- Permit, plan, or instrument must specify conditions for release/reduction of assurances

33 CFR 332.4(n)(4)

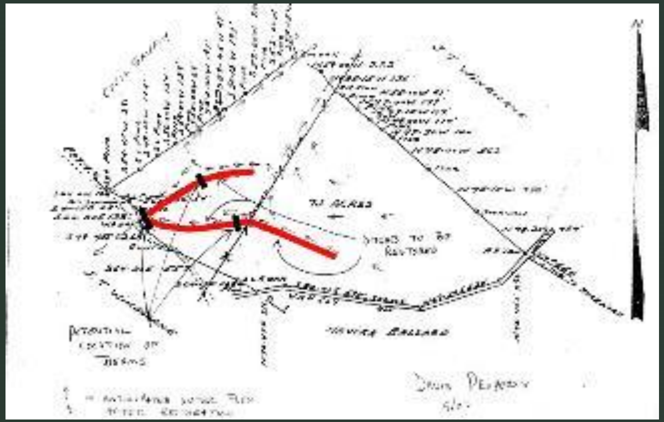
Amount of Financial Assurances

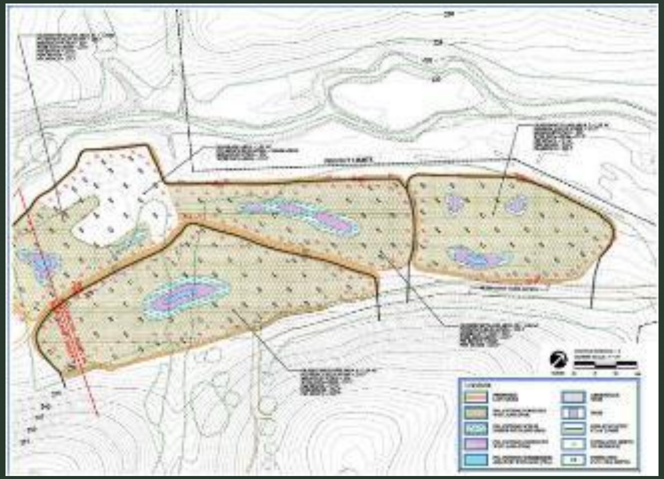
- Determined in consultation with the Sponsor
- Based on full cost of providing mitigation
- Can include costs for:
  - Land
  - Planning, design, and engineering
  - Construction & planting
  - Monitoring & maintenance
  - Reasonably foreseeable remedial work
  - Contingencies
  - Legal & administrative

Amount of Financial Assurances

Should be proportionate to and reflect the project's risks including failure to:

- Complete the project
- Meet performance standards
- Manage/maintain project
- Risk profile changes over project life





Implementing Assurances: Miscellaneous Receipts Statute

- *31 USC 3302(b)* - Money collected by Federal agencies MUST be placed into the U.S. Treasury
- Once deposited into the Treasury it is lost to the federal agency
- Upshot: Federal agencies should not DIRECTLY *OR* INDIRECTLY receive assurance payouts because that money will not be available for mitigation

Assurances must be payable to a 3rd party designee who agrees to complete approved mitigation project

Allowable Forms of Assurances

- Letter of credit
- Escrow account
- Performance bond
- Casualty Insurance
- Appropriations
- Other appropriate mechanisms, subject to district approval

Some Closing Thoughts

Suggested risk hierarchy for addressing non-compliance

Least risk

- Delayed or partial credit release
- Suspend credits
- Require alternative mitigation (ILF)
- Suspend operations
- Permit suspension/revocation
- Mobilize financial assurances
- Terminate instrument

Greatest risk

Considerations for different assurance mechanisms

	Cost	Considerations	Duration	Provides
Letter of Credit	1.5-3% of letter amount	Availability, Collateral, Loan agreement, Beneficiary, Retain original letter, Covered repays issuer	Typically 1 yr but renewable	Payment
Performance Bond	0.7-5% of penal sum	Availability, Collateral, Coverage limits, Indemnity agreement, Retain original letter	Typically 1 yr but renewable some for up to 10 yrs	Payment or Performance (Surety's choice)
Cash in Escrow	100% of required assurance	Availability, Cost to mitigation provider, Beneficiary, Annual costs to maintain	No set limitation	Payment
Casualty Insurance	One time premium (1.25-2% of cap) and deductible for each claim	Qualification of insured, Regulatory agency must make claim	Up to 10 years	Payment or Performance (based on Regulatory agency's approval)