

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?

- 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

- ▶ In other words...

Financial assurances help us to manage

RISK

**Risk can be managed
NOT eliminated!**

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)

When Must Financial Assurances be Posted?

- Permittee-Responsible Mitigation
 - Prior to commencing permitted activity
- Mitigation Banks
 - Prior to initial release of credits
- ILF Programs
 - Prior to project implementation



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 must

- Be determined in consultation with the Sponsor
- Reflect:
 - Size and complexity of project
 - Degree of completion of project
 - Likelihood of success
 - Past performance of mitigation provider
 - Other appropriate factors



33 CFR 332.3(n)(2)

Amount of Financial Assurances

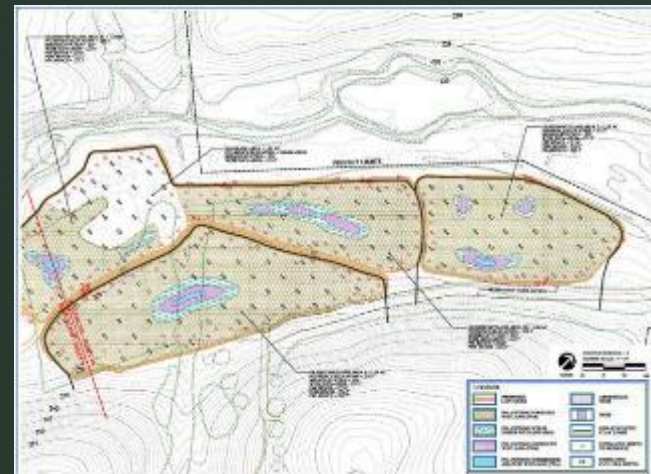
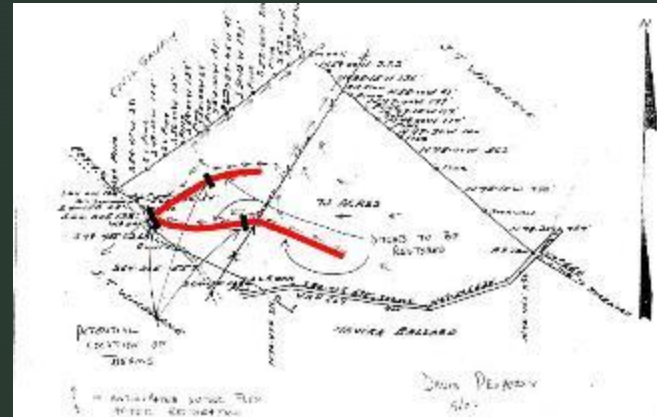
- Based on full cost of providing mitigation
- Could include costs for:
 - Land
 - Planning, design, and engineering
 - Construction & planting
 - Monitoring & maintenance
 - Reasonably foreseeable remedial work
 - Contingencies
 - Legal & administrative



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



Determining the amount of a financial assurance

Approaches:

- ON-SITE corrective actions
 - Does NOT include LAND COSTS
- OFF-SITE replacement
 - Includes LAND COSTS or PURCHASE of bank or ILF credits
- Sponsor should provide component cost estimates
- Information sources used to verify estimates include
 - In-house engineering estimates
 - Independent estimates
 - Similar projects in same area
 - Software applications



TEAM AND WETLAND RESTORATION SITE ENGINEER'S ESTIMATE				Engineer's Estimate	
Description	Quantity	Unit Measure	Pay Unit	Unit Price	Total Fee
Construction Survey	1	LS	LS	\$3,500.00	\$3,500.00
As-Built Survey	1	LS	LS	\$2,500.00	\$2,500.00
Temporary Construction Entrance	2	LS	LS	\$1,500.00	\$3,000.00
Grading	1	LS	LS	\$45,000.00	\$45,000.00
Invasive Species Control	1	LS	LS	\$5,000.00	\$5,000.00
Woody Debris Structure	13	EA	EA	\$500.00	\$6,500.00
Surface Water Diversion	1	LS	LS	\$12,500.00	\$12,500.00
Sediment Bags	4	EA	EA	\$200.00	\$800.00
Impervious Dikes	5	EA	EA	\$500.00	\$2,500.00
Silt Fence	3200	LF	LF	\$2.00	\$6,400.00
Wattles	100	LF	LF	\$5.50	\$550.00
Temporary Seeding	36	AC	AC	\$750.00	\$27,000.00
Permanent Seeding Wet/Sunny	0.9	AC	AC	\$1,200.00	\$1,080.00
Permanent Seeding Dry/Sunny	2.6	AC	AC	\$1,200.00	\$3,120.00
Bare Root Seedlings	2380	Stem	Stem	\$2.25	\$5,355.00
Fencing	1200	LF	LF	\$4.00	\$4,800.00
Clearing and Grubbing	33	AC	AC	\$1,500.00	\$49,500.00
Clearing Only	3	AC	AC	\$1,500.00	\$4,500.00
Incidental Stone	2	Ton	TON	\$50.00	\$100.00
SUBTOTAL					
Mobilization	1	LS	LS	\$9,185.25	\$9,185.25
TOTAL FEE				Total	(Calculated) \$192,890.25

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

Implications of Miscellaneous Receipts Statute

- Corps cannot be the beneficiary (direct or indirect)
- Assurances must be payable to a 3rd party **designee** who agrees to complete approved mitigation project, **or** to a **standby trust**
- Risk of “constructive” receipt



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	2-5% of penal sum	Availability, Collateral, Coverage limits, Indemnity agreement, Retain original letter	Typically 1 yr but renewable	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 (2-10% 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)