

Financial Assurances/Long Term Maintenance for Mitigation Projects



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What are Financial Assurances and Long Term Maintenance?

- Mechanisms for ensuring resources are available to correct or replace unsuccessful mitigation
- Financial Assurances (FA) are funds set aside for covering costs associated with the construction of compensatory mitigation and site monitoring
- Long Term Maintenance (LTM) activities are required to maintain restored, enhanced and preserved ecosystem functions and ensure they are sustained in perpetuity
 - ▶ Examples
 - Repair Fences/gates
 - Control invasive plants
 - Control invasive animals (i.e. beaver)
 - Garbage removal



Why Are FA and LTM needed in Mitigation Context?

- Compensatory mitigation projects are complex and results are uncertain
- Mitigation providers can fail or walk away
 - ▶ Bankruptcy
 - ▶ Dissolution
- The sale of mitigation bank credits is allowed before mitigation project success is demonstrated
- LTM is needed beyond the monitoring period to sustain quality of restored site



When Must FA be Provided?

- Mitigation Banks
 - ▶ To secure initial release of credits and/or in some instances prior to construction
- ILF Programs
 - ▶ Funded through credit prices
- Permittee-Responsible Projects
 - ▶ Prior to commencing the permitted activity
 - ▶ As permit special condition



Requirement for FA

- “The District Engineer (DE) 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)



Amounts of FA

- Amount determined by USACE in consultation with the responsible party
- Based on full cost of providing mitigation project
- Reflect:
 - ▶ Size and complexity of project
 - ▶ Degree of completion of project
 - ▶ Likelihood of success
 - ▶ Past performance of mitigation provider
 - ▶ Other factors that are deemed appropriate for the project



Requirement for LTM

- “....Where active **long-term management** and **maintenance** are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance....”

33 CFR 332.7(b)



Amounts of LTM Endowments

- Amount determined by USACE in consultation with the responsible party
- The amount is a non-wasting endowment
- Based on cost of providing long term maintenance in perpetuity



When can FA be Released?

- Assurances can be phased-out as project milestones or interim performance standards are met
- Permit, plan, or instrument must specify the conditions under which assurances may be released



Implementing FA: 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: USACE should not directly receive assurance payouts because that money will not be available for replacement mitigation
- Assurances must be payable to a 3rd party **designee** of the USACE who agrees to complete mitigation work, **or** to a **standby trust**



Permittee-Responsible Replacement

- Potential use in permittee-responsible compensatory mitigation
- Can be done ONLY if there are NO concerns regarding:
 - ▶ Quality of the site & surrounding landscape
 - ▶ Site ownership/access issues
 - ▶ Willingness of suitable third-party to complete work at the site



Regulator Considerations

- Mitigation provider will propose an assurance mechanism
- Regulator considerations for evaluating proposed mechanism include:
 - ▶ Availability/affordability to mitigation providers
 - ▶ Term & renewal issues
 - ▶ Ease of access to funds & performance considerations
 - ▶ Financial stability of assurance provider
 - ▶ District experience



Conclusions

- Assurances are meant to limit or manage risk of failure but **CANNOT** completely eliminate risk of failure
- Regulators should obtain help of Office of Counsel and staff with experience in establishing assurances
- Work on financial assurances should begin well before finalization of mitigation bank instrument

