Short-term financial assurances

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Institute for Water Resources
What are Financial Assurances?

- Mechanism to ensure that:
  - Project is completed
  - Resources are available to correct or replace unsuccessful projects

- Long-standing practice in other contexts
  - Construction
  - Mining reclamation
  - Hazardous waste facilities
  - Landfill closure
Why Financial Assurances?

- Mitigation projects can be complex and results may be uncertain
- Responsible parties can fail or walk away
  - Bankruptcy
  - Dissolution
- To ensure compensation obligations can be secured on the ground
- Risk Management
Requirement for Financial Assurances

- “The 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)

- DE MUST receive notification 120 days prior to expiration/termination

  33 CFR 332.3(n)(5)
Financial Assurances vs. Long-Term Management funding

- Financial Assurances help guarantee
  - Project is constructed
  - Project meets performance standards

- Long-term management funding
  - Resources for management AFTER performance standards are met
  - Help ensure project is sustainable
When Must Assurances be Posted?

- **Permittee-Responsible**
  - Prior to commencing permitted activity

- **Mitigation Banks**
  - Prior to initial release of credits

- **ILF Programs**
  - Contingencies reflected in advance credit prices
  - Allocating resources prior to project implementation

- **Alternative mechanisms:**
  - Formal commitment by government or public authority
  - State or other agency requirements
How are assurances established?

- Single assurance for the entire project

OR

- Multiple assurances/phases
  1. Construction assurances
  2. Performance assurances
  3. Interim assurances
Amount of Financial Assurances must

- Be determined in consultation with the responsible party

- Reflect:
  - Size and complexity of project
  - Degree of completion of project
  - Likelihood of success
  - Past performance of mitigation provider
  - Other appropriate factors
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
# Sample Construction Assurance Estimate

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
<th>Unit Measure</th>
<th>Pay Unit</th>
<th>Unit Price</th>
<th>Total Fee</th>
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**Subtotal**

<table>
<thead>
<tr>
<th>Description</th>
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**Total Fee (Calculated)** $192,890.25
Determining Assurance Amounts for ON-SITE Remediation

- Cost to complete work & meet performance standards
- Does **NOT** include LAND COSTS
- Presumes high likelihood of meeting performance standards
- Responsible party provides component cost estimates
- Information sources used to verify estimates include
  - Agency in-house engineering estimates
  - Independent third party estimates
  - Similar project costs in same area
  - Software applications
Assurances based upon ON-SITE Remediation

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
Determining Assurance Amounts for OFF-SITE Replacement

- Costs of compensation at alternative site by a third party
- **INCLUDES LAND COSTS** in addition to other project costs
  - IF current site does **NOT** have high potential for successfully meeting mitigation objectives
- Similar sources of information to verify costs as for ON-SITE replacement
Financial Assurances for ILF Programs

- Conventional assurances (bonds, LOCs)
- Self Assurance – setting aside funds
- Alternate mechanism
  - Letter of commitment
  - No financial assurances required for mitigation projects
Miscellaneous Receipts Statute

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