US Army Corps of Engineers®

REGULATORY GUIDANCE LETTER

No. 05-1 Date: 14 February 2005

SUBJECT: Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds.

1. Purpose and applicability

a. Purpose. The U.S. Army Corps of Engineers (Corps) has the authority to issue permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. These permits may require compensatory mitigation to ensure that issued permits and resolution of unauthorized activities result in a no-net loss of aquatic resource functions. The purposes of this guidance are: 1) to provide general guidance on the use of letters of credit, performance bonds and other financial assurances, and 2) to provide specific guidance for the use of performance bonds to ensure the completion of compensatory mitigation projects.

b. Applicability. This guidance applies to Department of the Army (DA) permits that are conditioned to include any type of financial assurance to ensure that required compensatory mitigation is completed. It may also be used when financial assurances are required for mitigation and/or restoration for unauthorized activities.

2. General Considerations for Financial Assurances.

a. The Purpose of Requiring Financial Assurances. The overall success of compensatory mitigation, including establishment (i.e., creation), restoration, and enhancement of natural ecosystems is subject to many variables. Site-specific factors such as local droughts, fires or floods, pest infestations, diseases or illegal entrance by off-road vehicles may negatively affect a compensatory mitigation project before it has achieved the specified performance standards, and thus may require additional effort or remediation to ensure functional success. Detailed, well-written special conditions and compliance requirements without the requirement of financial assurances are usually sufficient for DA permits to ensure that relatively simple compensatory mitigation activities are completed and provide for desired aquatic resource functions. However, for some DA permits, district engineers may require financial assurances on a permit-by-permit basis to ensure the initiation and successful completion of required compensatory mitigation. For example, district engineers may determine that financial assurances are necessary to ensure that multiple-year plantings occur, invasive species are controlled, and adequate water is supplied after the initial physical phases of landscape construction (e.g., soil amendments, grading, plantings, seeding) are completed.

b. Considerations for Requiring Financial Assurances. Because the circumstances of each permit case are unique, the decision to require financial assurances should be made on a permit-by-permit basis. The analysis used to determine that an additional financial assurance is required for a particular permit must be documented on a case-specific basis and included as part of the administrative record for that permit. At their discretion, district engineers may choose to require financial assurances on a case-by-case basis for many reasons, some of which may include tthe length of monitoring required for the compensatory mitigation project, whether the mitigation is for an after-the-fact permit or constructed in advance of impacts, the type of mitigation (establishment, restoration or enhancement), experience with the permittee and/or consultant, and whether it requires new technology or includes proven techniques, whether the permit is for a project that impacts aquatic resources that provide high or low quality functions, and the likelihood of mitigation site sustainability. Funding for many long-term management activities such as prescribed burning, invasive species control, and maintenance of water control structures may also require financial assurances. These are among the many factors that should be taken into account when deciding whether or not to require additional financial assurances.

c. Types of Financial Assurances. Examples of financial assurances include performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively enacted dedicated funds for government-operated banks or other approved instruments.

d. Amount of Financial Assurance. The dollar amount of any financial assurance, including the penal sum of a performance bond, is determined by the district engineer. Any required financial assurances should be sufficient to cover contingency actions such as default by the permittee or failure to meet performance standards. In addition, the amount of the financial assurances should be based on the size and complexity of the proposed compensatory mitigation project, the estimated amount required to construct and remediate the proposed compensatory mitigation project and monitoring of the compensatory mitigation site. The financial assurances may also include a reasonable amount to cover contingency costs or other amount determined to be appropriate to the level of the uncertainty for completion of a successful compensatory mitigation project. In some cases, the financial assurance may be increased to provide funds for the real estate costs associated with the purchase of another compensatory mitigation site if the current site cannot support the desired aquatic resource because of insufficient hydrology (e.g., possible reduction of groundwater in a highly urbanizing setting or change in surface water rights) or other factors that could affect compensatory mitigation project success. District engineers must document the analysis used to determine the amount of the financial assurance, and must include this analysis in the administrative records for their permits.

e. Use and Release of Financial Assurances. Financial assurances may be phased out or reduced once the project has been demonstrated to be functionally assured and self-sustaining in accordance with performance standards/success criteria. District engineers should clearly specify the conditions under which financial assurances are used to ensure mitigation, and the conditions under which the financial assurances are to be released to the permit applicant and/or provider of

the financial assurance. Special conditions should provide the permit applicant and/or financial assurance provider with an adequate chance to correct deficiencies with the compensatory mitigation project. In some cases, release of the financial assurance can be keyed to stages demonstrated with achievement of mitigation project performance standards or other special conditions. As discussed in section 3(a) of this Guidance, district engineers should not position themselves to accept directly, retain, or draw on financial assurance funds in the event of default of the permittee, unless specifically authorized by Federal statute.

3. **Specific Considerations for Performance Bonds.** This section provides guidance specific to the use of performance bonds.

a. Legal Considerations Applicable to Performance Bonds. Unlike some other Federal agencies, the Corps lacks statutory authority to accept directly, retain, and draw upon performance bonds to ensure compliance with permit conditions. If the Corps were to receive the sum of a performance bond directly, the sum would be categorized as a "miscellaneous receipt" under the Miscellaneous Receipts Statute, 31 U.S.C. §3302(b), and would be deposited in the U.S. Treasury without being used to ensure permit compliance. This situation applies to the use of other financial assurances as well. However, along with its authority to deny permit authorizations, the Corps has the authority to issue its permits with conditions. District engineers have the discretion to condition the approval of a permit to require the posting and execution of a performance bond by a permittee, as long as the Corps is not positioned to accept directly, retain, or draw upon bond monies in the event of a default. If and when they are used, such bonds should be executed with the signatures of an additional governmental or non-governmental environmental management entity or entities as a bond "surety" or "sureties," who agree to ensure performance if the Corps should determine that the permittee, as the bond "principal," has defaulted on any of its responsibilities. The permit should also specify that the Corps stands as a third-party "obligee" to the principal and surety(ies) of the bond, possessing the full and final authority to determine the penal sum amount, and to determine whether the principal and the surety(ies) have specifically performed some or all of the obligations, covenants, terms, conditions, and agreements of the bond. Finally, the bond should specify that if both the principal and the surety(ies) default in their responsibilities, the Corps retains the full and final discretionary authority to identify new parties as additional surety(ies) to the bond.

b. Suggested Permit Language if Performance Bond is Used. If a district engineer determines that a performance bond is necessary to ensure the completion of a compensatory mitigation project, the permit should list the posting and execution of the bond as a special condition. The following is suggested language for a special permit condition involving a performance bond:

> "The Permittee has executed a Performance Bond dated **[insert date bond executed]** in the amount of **[insert amount determined by district engineer]**, attached to this permit as **[insert Attachment Number or Letter]** and made a part

hereof, to provide financial assurance for the performance of all of the obligations, covenants, terms, conditions, and agreements required of the Permittee under this permit. The bond shall be posted before construction authorized by this permit commences."

c. Model Performance Bond. The appendix to this guidance is a Model Performance Bond, which is provided as a suggested template for district engineers that choose, on a permit-by-permit basis, to use performance bonds as special conditions to DA permits. This Model Performance Bond may be modified at the discretion of district engineers on a permit-by-permit basis.

4. Duration. This guidance remains effective unless revised or rescinded.

FOR THE COMMANDER:

Encl

DON T. RILEY
Major General, U.S. Army
Director of Civil Works

Appendix

MODEL PERFORMANCE BOND

DATE BOND EXECUTED (Must be same or earlier than date of permit.)
OBLIGEE: [Insert District Name], United States Army Corps of Engineers [Insert Address]

PRINCIPAL (Legal name and business address)	**Surety(ies)** (Legal name(s) and business address(es))
TYPE OF ORGANIZATION ("X"ONE) ___Individual ___Partnership ___Joint Venture ___Corporation	PENAL SUM OF BOND, amount determined solely by Obligee **Million(s)** **Thousand(s)** **Hundred(s)** **Cent(s)**
STATE OF INCORPORATION	PERMIT DATE **PERMIT NO.**

OBLIGATION:

We, the Principal and Surety(ies) hereto, are firmly bound as Obligors to the U.S Army Corps of Engineers (hereinafter called the Obligee) in the above penal sum, an amount determined solely by the Obligee. For the payment of the penal sum, we bind ourselves, our heirs, executors, administrators, assigns, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown below the name of the Surety. The limit of liability shall be the full amount of the penal sum.

CONDITIONS:

The Principal received the permit identified above.

THEREFORE:

The above obligation is void if the Principal –

(a) Specifically performs and fulfills all of the obligations, covenants, terms, conditions and agreements of the permit during the original term of the permit and any extensions thereof that may be granted by the Obligee, with or without notice to the Surety(ies), and during the life of any guaranty required under the permit, and -

(b) Also specifically performs and fulfills all of the obligations, covenants, terms, conditions, and agreements of any and all duly authorized modifications of the permit that may hereafter be made. Notice of those modifications to the Surety(ies) are waived.

IT IS FURTHER EXPRESSLY PROVIDED THAT:

The Obligee shall have the full and final authority to determine whether the Principal and Surety(ies) have specifically performed and fulfilled some or all of the obligations, covenants, terms, conditions and agreements of the permit.

Within thirty (30) business days of receiving notice from the Obligee that the Principal has defaulted on some or all of the obligations, covenants, terms, conditions and agreements of the permit, the Surety(ies) shall either -

(a) Remedy the default of the Principal to the full satisfaction of the Obligee by a certain date determined by the Obligee, or -

(b) Immediately tender to a party or parties identified by the Obligee the portion of the penal sum that the Obligee determines is due and owing and necessary to remedy the default. In no circumstance shall such a sum be tendered to the Obligee. Any new party or parties identified by the Obligee under this section shall immediately become a Surety or Sureties to this bond. If the Obligee determines that it is unable to identify such a party or parties, the Suerty(ies) shall remedy the default of the Principal under (a) of this section.

In the event that the Surety(ies) fail(s) to respond within thirty (30) business days to the Obligee's notice of default, or to honor comitments to the full satisfaction of the Obligee under (a) or (b) above of this section, the full penal sum may, at the election of the Obligee, immediately become due and owing and paid to a party or parties identified by the Obligee. In no circumstance shall the full penal sum be tendered to the Obligee. Any new party or parties identified by the Obligee under this paragraph shall immediately become a Surety or Sureties to this bond.

WITNESS:

The Obligee, Principal and Surety(ies) have executed this performance bond and have affixed their seals on the date set forth above.

PRINCIPAL		
Signature 1 (Seal)	Signature 2 (Seal)	Corporate Seal
Name, title 1 (typed)	Name, title 2 (typed)	

INDIVIDUAL SURETY(IES)

Signature 1 (Seal)	Signature 2 (Seal)
Name, title 1 (typed)	Name, title 2 (typed)

COPORATE SURETY(IES)

Surety A		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	

Surety B		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	

Surety C		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	

Surety D		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	
Surety E		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	
Surety F		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	
Surety G		
Name & address	State of Incorporation	Liability limit
Signature 1 (Seal)	Signature 2 (Seal)	
Name, title 1 (typed)	Name, title 2 (typed)	
Obligee		
[Insert District Name] **U.S. Army Corps of Engineers** **[Insert District Address]**		
Signature 1 (Seal)	Signature 2 (optional) (Seal)	

Name, title 1 (typed)	Name, title 2 (typed)

Bond Premium	Rate Per Thou. ($)	Total ($)

INSTRUCTIONS

1. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

2. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURET(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety for each individual surety shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

3. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.