



Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

www.ecologicalrestoration.org

April 9, 2025

Ms. Robyn S. Colosimo

Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works

Office of the Assistant Secretary of the Army (Civil Works)

108 Army Pentagon

Washington, DC 20310-0108

VIA EMAIL

Industry Expert Recommendations on Financial Assurance National Templates to Expedite Mitigation Reviews and 404 Permitting

Dear Ms. Colosimo:

The 2008 Compensatory Mitigation Rule provided detailed guidance and a framework of best practices for the development of compensatory mitigation projects, while preserving flexibility for district engineers to adjust to site-specific circumstances. This autonomy allows each U.S. Army Corps (“Corps”) District and Interagency Review Team to meld standards and practices to individual project considerations, which has contributed greatly to positive mitigation outcomes. But the institutional controls for mitigation projects, particularly financial assurances, are ripe for standardization to reduce uncertainty, disparate interpretations, and often unnecessary delay in financial assurance approvals. In turn, predictability around financial assurance forms will reduce the time regulators spend on mitigation project reviews, bringing more credits to market faster to realize permit streamlining.

The September 8, 2024 ASA memo *Improving U.S. Army Corps of Engineers Timeline Compliance* (“Timeline Memo”) recognized national financial assurance templates as a component of compensatory mitigation project development with significant potential to support streamlining of approvals, stating:

“Districts should work with interested agencies and mitigation providers to develop templates for mitigation banking instruments and key documents associated with MBI’s, such as financial assurance documents.”

The Timeline Memo’s companion *Principles of Delivery* further emphasized the significance of aggregating input from multiple stakeholders, while asserting that approved national templates should be adopted by all districts unless exceptional circumstances warrant deviation:

“Districts should work with interested agencies and mitigation providers to develop templates for mitigation banking instruments and key documents associated with MBI’s, such as financial assurance documents...After templates for mitigation banking instruments and associated supporting documents have been developed, districts and mitigation bank sponsors should not deviate from those templates unless exceptional circumstances warrant changes to the template language for a particular mitigation bank.” (pg. 8/25)

ERBA assembled a Template Committee (“Committee”) composed of 20 members representing mitigation bank and ILF sponsors, turnkey PRM consultants, attorneys specialized in compensatory mitigation, and specialists from the surety and insurance industries. ERBA also sought feedback from Corps legal counsel, Steve Martin, National Fish & Wildlife Association, and ERBA membership at large. The committee compiled examples of approved FA instruments from many districts to identify common elements, discern regional differences, and to recognize a common thread of best practices.

The Committee was further informed by previously published materials describing best practices for financial assurance development and application:

- 2008 Compensatory Mitigation Rule at 33 CFR 332
- *Department of Army Memorandum for All Division and District Counsel, RE: Financial Assurance Instruments for Compensatory Mitigation under the Corps Regulatory Program (“2011 Memo”).* Written 15 years ago, this memo continues to serve as the most comprehensive analysis of the legal framework governing FA language and function to date.
- IWR White Paper, *Implementing Financial Assurance for Mitigation Project Success*, March 2016

ERBA is pleased to present the following financial assurance templates as the product of this stakeholder engagement process:

- I. Performance Bond
- II. Irrevocable Letter of Credit (ILC)
- III. Casualty Insurance Coverage Form*

*A Note on Insurance

Our committee’s consultation with insurance providers and sponsors revealed that insurance is a unique mechanism that warrants recognition of several insurance approaches and a checklist to guide the Corps’ review. Over the past decade a handful of insurance providers have worked with their insurance carriers to develop custom products for the risk present at mitigation sites and to address agency concerns. These providers vary in their specific business approach, but they have all had success working with the Corps on approval of their respective approaches across multiple Corps Districts. Building on input from existing carrier forms and directives in the 2011 Memo, ERBA developed the enclosed casualty insurance policy as an amalgamation of several best practices and drafting lessons learned. For all the templates, and particularly for insurance, the newly proposed insurance template should act as a guidepost and example. It should not be rigidly applied or imposed on sponsors and insurance carriers. Importantly, we acknowledge the progress to date by multiple providers in their use of a coverage form and/or an insurance specification, which combined have now been accepted in over half of the Corps Districts. These approaches should continue to be acceptable to the Corps alongside the proposed template. As an additional resource to the Corps to inform their assessment of insurance proposals for financial assurance, please consider the enclosed “Insurance Primer” as a checklist.

Recommendation for Templates Review and Application

ERBA requests that Corps Regulatory Program leadership and Corps Counsel review these templates and engage with ERBA and other relevant stakeholders on any questions or potential further edits. Once final and issued to the Districts, we strongly recommend training that emphasizes the templates have already undergone Corps Counsel review and should not be edited or otherwise further reviewed by District-level Counsel unless necessary due to project or state law specifics. To fairly honor existing or near final bank approvals, ERBA intends that the templates are implemented prospectively. The financial assurance templates should be used as a guidepost. If a sponsor can demonstrate that a similar form of

a financial assurance still achieves the financial assurance requirements and purpose outlined in the 2008 Mitigation Rule, then the alternative form may also be accepted. We expect that the templates will bring the greatest predictability and efficiency benefits in Districts that currently lack common financial assurance practices or may be reviewing different financial assurance forms on a project-by-project basis.

Best Practice for Financial Assurance Provider Diligence

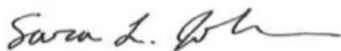
Agency reviewers should check the financial rating of the company offering a bond or insurance policy. AMBest is the most used rating agency, but requires that you sign in to look up an insurance company. Most insurance companies also post ratings on their websites and the sponsor can ask their financial assurance provider for the information. Usually, a rating of A- (investment grade) or better is acceptable. AMBest ratings apply to an insurers' ability to pay claims.

For bonds, there is a US Treasury Listing <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>. The rating found there is the maximum amount of surety that the Federal Government will accept from a given surety company. Again, the sponsor can ask their financial assurance provider for that information.

Meeting Request

Again, and as supported in the Corps' recent guidance aimed at streamlining and efficiencies, financial assurances are an element ripe for standardization within the mitigation program. Adoption of the enclosed recommended templates will support increased investment in mitigation solutions for faster permitting. Please do not hesitate to reach out to ERBA at sjohnson@ecologicalrestoration.org with any requests for additional information or questions. ERBA would appreciate the opportunity to meet with Corps counsel in the next month to provide an overview of these forms and discuss next steps.

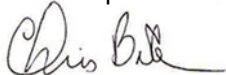
Best regards,



Sara Johnson Executive Director
Ecological Restoration Business Association



Greg DeYoung
ERBA Templates Committee Chair



Chris Baker
ERBA Templates Committee Co-Chair

CC (via email):

Jennifer Moyer, Regulatory Chief, U.S. Army Corps of Engineers
David Olson, Regulatory Program Manager, U.S. Army Corps of Engineers

ENCLOSURES

INSURANCE PRIMER FOR CWA 404 FINANCIAL ASSURANCE POLICY*

**Also see ERBA's website for the preamble "How to Read Any Insurance Policy"*

SPECIFICATIONS:

Insuring Agreement:

Example:

The "Company" will pay on your behalf the "Demand" for "Financial Assurance" arising from a determination by the "Regulatory Body" that the "Compensatory Mitigation Project" identified in the Declarations is in "Default" per the terms of the "Compensatory Mitigation Instrument and/or Plan".

Principles:

1. While this insuring agreement is acceptable, it should not necessarily exclude other alternatives.
2. Simplicity without conflicts emanating from elsewhere in the policy is most critical in the Insuring Agreement. Clarity, brevity and simplicity matter most in the insuring agreement. It is the heart of the policy. This type of policy applies to a very specific, very narrow risk. Simplicity and clarity should not be hard to achieve.

Words in quotes have specific meanings and will be defined in the policy.

- a. "Company" will be the insurance company which is always identified on the declarations page.
- b. "Demand" or in some policies "Claim" is a regulatory action.
 - i. "Default" requires a formal regulatory action against the Named Insured (sponsor or permittee) and can concurrently result in a "Demand".
- c. "Regulatory Body" (or dual regulatory bodies) will be shown on the declarations page. Usually, a USACE District and on occasion also a state DEP/DEQ.
- d. "Compensatory Mitigation Project" Instrument or Plan are identified on the declarations page.

Exclusions:

Principles:

There should be a very limited number of exclusions because the insuring agreement is very narrow. The Insuring Agreement only applies to a very specific purpose unlike, for example, a General Liability policy.

1. Every policy will have a set of exclusions (endorsements) before the body of the policy. These are often just "notifications". They are things that insurers can't ensure by law, that are highly regulated or impacted by law or that are precluded from insurance for other reasons like some other type of policy should address the risk. They generally don't apply for the specific purpose of the financial assurance policy. They might include but are not limited to:
 - a. Office of Foreign Assets Control,
 - b. Terrorism,
 - c. NBC (Nuclear, Biological and Chemical),
 - d. Regulatory Statement,
 - e. State Mandatory Endorsements,
 - f. Others?
2. Exclusions in the body of the policy:

- a. Attorney's fees. Typical policies include attorney fees. In this case, the policy is not intended to create a defense against the regulator, therefore fees should be excluded.
 - b. Civil or criminal penalties. The policy is designed for only one thing – financial assurance as a guarantee for the sole benefit of the regulatory obligation. Anything else that slips into coverage, like criminal or civil penalties, erodes the limit available for financial assurance.
 - c. Claims from offsite. They are not and should not be the subject of financial assurance because they erode the limit thereby limiting the amount of financial assurance available for the regulator's objective. While there are possible claims from offsite damages, other insurance policies may cover those.
 - d. Other exclusions may be permissible as long as they do not detract from the purpose of the policy.
3. Exclusions (endorsements) after the body of the policy. These should be actual policy changes. If an exclusionary endorsement exists when the policy was first issued, they do not require a signature from the insurance company. If they are put on after the policy is in force, they do require a signature from the insurer. Examples:
 - a. Adding an exclusionary endorsement (change to the body of the policy) should require written approval from the regulator.
 - b. Sometimes limits are scheduled by endorsement, other times they may be found on the declarations page,
 - c. Often specific district requirements and state DEQ/DEP requirements are added by endorsement.

Definitions:

Principles: Simplicity, clarity and brevity. Definitions may create reporting or other obligations in the policy – read them carefully with that in mind. There are only 2 classes of definitions:

1. Regulatory terms: All regulatory definitions should be taken directly from rule/law and should reference the rule. They should not narrow or expand the rule/law language. Narrowing a definition detracts from the financial assurance purpose and expanding it erodes coverage limits designed for only 1 purpose.
 - a. Exception: It is common for specific district requirements and state DEQ/DEP language to be inserted by endorsement. The changes, where possible, should still be taken directly from rule/law.
 - b. Policies can be written just to cover only "Mitigation Banks", or may by adding definitions be written to include other forms of compensatory mitigation like PRM and others.
2. Insurance terms: There will be definitions needed for insurance purposes. Example, what is a "Demand" or in some policies what is a "Claim".

Terms and Conditions:

Principles: All insurance policies have conditions built in. These are basic operating requirements for a policy. Below are certain important conditions:

1. Bankruptcy or insolvency should not impact coverage. It seems likely a component of possible failure to meet performance standards.
2. Cancellation, termination and should meet the rule requirement of 120 days without the written permission of the regulator. Other than the policy cannot be cancelled for any reason by the insurer, there should not be conflicting cancellation provisions.
3. Changes (Endorsements) should require approval from the regulator, including limit changes.
4. Cooperation in a claim is a common requirement in insurance.

5. Most insurance policies have a misrepresentation and fraud clause that can void the coverage. That is common in contract law in general, not just insurance. In this case, the insurance is required by a regulator who does not complete applications or provide information to underwriters. Therefore, it is important that misrepresentations or fraud by a named insured not invalidate coverage.
6. Claim reporting requirements. Most insurance policies require timely reporting of a claim. That usually means that once a named insured has knowledge of a claim, they must report it to the insurance company. In this case, named insurance and regulators often go through a process of Adaptive Management. The claim reporting requirement must be amended to allow the regulator and the named insured to address performance failures together without invalidating a claim.

Declarations Page:

Principles: This is just important information though it can impact coverage. Declarations pages will vary from one insurer to the next.

1. Names and contact points of parties to the insurance contract,
2. Identification of the project and project site,
3. Policy period (not policies can be written with annual terms with automatic renewal or multi-year terms),
4. Limits are often scheduled on the declarations page but can be endorsements. It should be clear either way that limits do not change without the written approval from the regulator,
 - a. There should be no policy circumstances where there is a conflict with respect to limits.
5. Premium (and tax),
6. Forms and endorsements list,
7. Carrier signature.
8. There will be a Surplus Lines notification. These are required by all state insurance regulators.

Other:

- There is often a “Regulatory Statement.” This should not impact coverage. It is a recitation of the regulators’ legal obligations to a) require financial assurance and to b) manage it.
- Miscellaneous Receipts Act: This is an internal concern for Federal regulators. The USACE cannot take possession of money if it is not “appropriated” funds. Regulators avoid “constructive receipt” of funds by not directly dictating the use of funds. Regulators do have a continued obligation to regulate, with full authority to approve or reject solutions brought to it. The regulatory process does not stop. Insurance and surety bonds come with an obligation to adjust a claim (offer a solution driven response) therefore limiting the impact of the Miscellaneous Receipts Act. Often there is a requirement that funds go through a “Designee” who in turn presents the solution and implements it.
- Insurance Company Financial Strength: Review the financial rating of the insurance company offering a bond or insurance policy. AMBest is the most used rating agency but requires that you sign in to look up an insurance company. Most insurance companies also post ratings on their websites. The Sponsor can ask their financial assurance provider for that information. Usually, a rating of A- (investment grade) or better is acceptable. AMBest ratings apply to an insurers’ ability to pay claims.

US ARMY CORPS OF ENGINEERS
INSTRUCTIONS AND CONDITIONS TO USE
AND TEMPLATE FOR
IRREVOCABLE STANDBY LETTERS OF CREDIT
TO PROVIDE FINANCIAL ASSURANCE
FOR CONSTRUCTION AND IMPLEMENTATION OF WETLAND MITIGATION

I. *Overview*

These instruction and condictions to use an irrevocable standby letter of credit (ILC) to provide financial assurance covering the construction and implementation of wetland mitigation are for Corps District staff and mitigation providers to use in understanding and formatting of ILCs for mitigation financial assurances. These instructions and conditions are not intended to be part of any ILC.

An irrevocable standby letter of credit (ILC) is one mechanism to provide financial assurance covering the construction and implementation of wetland mitigation including wetland mitigation banks, in lieu fee mitigation, and permittee responsible mitigation. ILC, as used here, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the beneficiary of the ILC of a written demand therefore. ILC's are governed by Article 5 of the Uniform Commercial Code (UCC) adopted by most states in the USA. Neither the financial institution nor the mitigation provider can revoke or condition the ILC. While irrevocable, these ILCs are considered a "standby" ILC because the ILC will only be used in the event a mitigation bank provider fails to perform the required construction and implementation activities resulting in an unremedied mitigation deficiency.

As used here the phrase "construction and implementation" means all activities within a mitigation project occurring prior to the mitigation project entering into the long-term management phase. "Construction and implementation" as used here, includes mitigation construction work, monitoring, management, interim maintenance, and any other activity occurring before the mitigation project meets the final performance standards, is approved for closeout, and enters long-term management.

An ILC is structured so that money is paid merely upon the presentation of the documentation specified by the ILC. The bank or financial institution issuing the ILC is not obligated to determine the validity or accuracy of any event or circumstance underlying the presentation of such money demand documentation. In the context of financial assurance for wetland mitigation, this means that the bank or financial institution issuing the ILC is not obligated to determine whether the covered mitigation is deficient and is under no obligation to provide substitution mitigation. The bank or financial institution is only obligated to pay the specified money upon demand.

II. *Structure to Avoid Inadvertent Treasury Deposit Under Miscellaneous Receipts Act*

The federal Miscellaneous Receipts Act ("MRA") requires that "an official or agent of the Government receiving money for the Government for any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. §3302(b). If the Corps is the beneficiary of an ILC and, as such, makes a demand for money from the bank or financial institution issuing the ILC, an issue arises of whether the Corps must then deposit such

funds into the Treasury under the MRA instead of using the funds to address the wetland mitigation deficiency. To avoid this unintended outcome, an ILC should be accompanied by an agreement among the mitigation provider (*i.e.* mitigation bank or in-lieu fee sponsor or the permittee of permittee responsible mitigation), the Corps, and a non-federal third party who agrees to use the money from the ILC to address the mitigation deficiency as the Corps directs.

The non-federal third party contracted to address the mitigation deficiency at the Corps' direction can be a state agency, local government, or a private profit or non-profit corporation. The third party should not be an individual due to the possibility of death, injury or other circumstance rendering performance impossible. The non-federal third party should be independent of the sponsor or entity providing the permittee responsible mitigation. This means the non-federal third party should be organizationally separate from, and have no corporate or family connection to, the mitigation provider. The District Engineer should also determine the sufficiency of such non-federal third party to provide a high level of confidence the mitigation project will be successfully completed considering the nature of the mitigation involved, state and local laws and other requirements, and structure and nature of such third party.

The contract among the mitigation provider, Corps, and third party to address any mitigation deficiency can be accomplished by adding language to a mitigation bank instrument or in-lieu-fee instrument. The contract can also be a separate written instrument signed by the mitigation provider, Corps, and the third party. Any costs the non-federal third party may charge to address the mitigation deficiency at the Corps' direction should be included in the cost estimate for the construction and implementation of the mitigation and included in the total amount of the ILC.

III. *Use of an ILC for Multipurpose Mitigation*

Where an ILC is used to provide financial assurance for multipurpose mitigation, such as a multipurpose mitigation bank, all the federal agencies requiring financial assurance for construction and implementation of such multipurpose mitigation must be parties to the agreement with the non-federal third party who will remedy any mitigation deficiency at the federal agencies' direction using the ILC. The agreement with the non-federal third party must include provisions requiring coordination and a single direction from the federal agencies involved in the multipurpose mitigation to ensure that the non-federal third party does not receive conflicting directions on accessing the ILC and using moneys therefrom to remedy the mitigation deficiency.

IV. *The ILC:*

- 1) Must be in substantial conformance with the attached Exhibit A template.
- 2) Shall be issued/confirmed by an acceptable federally insured financial institution as provided below.
- 4) Shall have an initial expiration date estimated to cover the entire period for which financial assurance is required for the construction and implementation of the mitigation project. If that time period is longer than one year, the ILC must provide that it will automatically renew for subsequent periods of at least one year unless the financial institution notifies the Corps at least 120 days before the expiration date that the financial institution will not renew or extend the ILC. In such case, the

ILC must provide that the Corps may demand payment under the ILC merely for the failure to extend or renew the ILC.

V. *The Mitigation Provider must submit proof that the Financial Institution(s) is qualified.*

The sponsor/404 permit applicant shall provide the Corps proof that the proposed (and proposed confirming, if applicable) financial institution issuing the ILC is federally insured and either (a) has a credit rating of investment grade or higher as of the date of issuance of the ILC; or (b) is “well capitalized” or “adequately capitalized” as defined in Section 38 of the Federal Deposit Insurance Act [12 USC 1831o(b)].

VI. *Is a confirming letter necessary?*

If the ILC is \$5 million or greater and the issuing financial institution had a letter of credit business of less than \$25 million in the past year, then the ILC must also be confirmed by another acceptable financial institution (having the above qualifications) that had letter of credit business of at least \$25 million in the past year.

The confirming letter template is attached as Exhibit B.

VII. *Using the ILC if the Sponsor/404 Permittee fails to complete the mitigation construction and implementation work.*

If the Sponsor 404/Permittee fails to complete the mitigation construction and implementation work, the non-federal third party, at the Corps’ direction, can demand payment under the ILC from the financial institution/bank issuing the ILC by completing and submitting a drawing certificate based on the Certificate I format attached to the ILC template on Exhibit A.

VIII. *Demanding payment under the ILC if the financial institution/bank fails to renew the ILC for a sufficient time to cover the completion of the mitigation construction and implementation work.*

If the financial institution sends the Corps a notice that it will not renew or extend the ILC, the mitigation construction and implementation work is unfinished, and the Sponsor 404 Permittee has not provided a substitute form of financial assurance for this work, the non-federal third party at the Corps’ direction can demand payment from the financial institution/bank issuing the ILC by completing and submitting a demand draw using the format of Certificate II attached on the ILC template on Exhibit A.

IX. *Reducing or cancelling the ILC as the mitigation construction and implementation work is successfully completed.*

If the District Engineer has determined that the mitigation provider has successfully completed one or more actions needed to construct and implement the mitigation, the District Engineer may allow the mitigation provider to reduce the amount of the ILC. To do so, the District Engineer must require the mitigation provider to obtain a new replacement ILC for the amount of financial assurance required to complete the remaining construction and implementation of the mitigation. The replacement ILC must meet the requirements of this guidance. Simultaneous with the receipt of that replacement ILC, the District Engineer can direct the non-federal third party to send Certificate III

of the template on Exhibit A to the bank or financial institution issuing the ILC to cancel the original ILC.

If the District Engineer has determined that all of the work to construct and implement the mitigation is completed such that the ILC is no longer necessary, the District Engineer can direct the non-federal third party to send Certificate III of the template on Exhibit A to the financial institution issuing the ILC to cancel the ILC.

The sponsor/404 permittee cannot send this form and cancel the ILC, only the non-federal third party acting under the Corps' direction.

**EXHIBIT A
TEMPLATE FOR
IRREVOCABLE STANDBY LETTER OF CREDIT**

Irrevocable Standby Letter of Credit
To Demonstrate Mitigation
Construction and Implementation Financial Assurance

BENEFICIARY(IES):

_____ (Non-federal Third Party)

(Mitigation Banking Instrument/ILF Instrument/404 Permit #)

Address of Non-federal Third Party

ISSUING INSTITUTION:

_____ (Issuing Institution Name)

Address of Issuing Institution

Dear Sir or Madam:

We, [INSERT NAME OF ISSUING INSTITUTION/BANK], hereby establish our Irrevocable Standby Letter of Credit No. _____ (“Letter of Credit”) in your favor, at the request and for the account of

Mitigation Bank Sponsor’s/In-Lieu Fee Sponsor’s/404 Permittee’s Name and Address

(the “Applicant”) up to the aggregate amount not to exceed of _____ (in words) US dollars \$_____ available upon presentation of all of the following:

- 1) This original Letter of Credit together with all executed written amendments hereto.
- 2) An original signed and dated drawing certificate from an Authorized Representative addressed to us bearing reference to this letter of credit No. _____.
- 3) An original signed and dated certificate issued by the [NAME OF NON-FEDERAL THIRD PARTY BENEFICIARY] in the form of Certificate I attached hereto and made a part hereof; or an original signed and dated certificate issued by the [NAME OF NON-FEDERAL THIRD PARTY BENEVICIARY] in the form of Certificate II attached hereto and made a part hereof.

Demands and Payment. We agree pay the demand by means of electronic transfer payable to a party or parties specified by the Beneficiary(ies). We further agree that all drawing certificates drawn on us under and in compliance with this Letter of Credit will be duly honored by us no later than seven (7) business days following presentation to the letter of credit office. Our obligation hereunder is our individual obligation as is not contingent upon reimbursement. We will pay any all drawings under this Letter of Credit with our own funds and not with funds derived from the Applicant or a subsidiary or affiliate thereof.

Whenever this Letter of Credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into an account or trust established for this purpose, in accordance with your instructions.

Partial drawings under this Letter of Credit are permitted. If a partial drawing is made, we will promptly return the original Letter of Credit to the Beneficiary to facilitate subsequent drawings; we at our option may note on the Letter of Credit the amount of such partial drawing. The amount of this Letter of Credit shall be automatically and permanently reduced, without amendment, by the amount of each drawing paid hereunder.

Purpose of Letter of Credit. We are informed that this letter of credit may be drawn on to cover construction and implementation activities of the [INSERT NAME OF MITIGATION BANK, IN-LIEU FEE MITIGATION, OR PERMITTEE RESPONSIBLE MITIGATION] as authorized and required by [] State Agency Permit number _____ and/or [] Corps Mitigation Banking Instrument (MBI)/In-Lieu Fee Instrument (ILFI)/404 Permit number _____, as such permit/MBI/ILFI may be amended and including all plans approved by such permit/MBI/ILFI.

Effective Date and Expiration. This Letter of Credit is effective as of _____ and shall expire on _____ but such expiration date shall be automatically extended without amendment for additional periods of one year from the present or future expiration date unless, at least 120 days before an expiration date, we notify you, [INSERT MITIGATION BANK SPONSOR'S NAME], and [INSERT CORPS DISTRICT ENGINEER] by registered mail or overnight carrier that we have decided not to extend this letter of credit for any such additional period. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you, [INSERT MITIGATION BANK SPONSOR'S NAME], and [INSERT CORPS DISTRICT ENGINEER] as shown on the signed return receipts.

If this Letter of Credit expires during an interruption of business of this financial institution as described in the applicable provision of Article 2 of the Uniform Commercial Code adopted by the State in which this Letter of Credit is issued, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Cancellation of Letter of Credit. In addition to reduction in the amount available under this Letter of Credit due to draws, and notwithstanding any other term or provision of this Letter of Credit, this Letter of Credit may be cancelled upon presentation of an original and signed Cancellation Certificate in the form of Certificate III attached hereto and made a part hereof.

This Letter of Credit is subject to the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce.

This Letter of Credit is not transferrable.

Signature(s), Title(s) of Official(s) of Issuing Institution

Date

DRAWING CERTIFICATE I
TO
_____ BANK OF _____
IRREVOCABLE LETTER OF CREDIT NO. _____

Issuing Bank's Name and Address

Date: _____, 20__

To Whom it May Concern:

The undersigned [INSERT NON-FEDERAL THIRD PARTY BENEFICIARY NAME], hereby certifies to [INSERT ISSUING BANK'S OR FINANCIAL INSTITUTION'S NAME] with reference to Irrevocable Letter of Credit No. _____, dated _____, (the "Letter of Credit"), issued by the [INSERT ISSUING BANK OR FINANCIAL INSTITUTION'S NAME] in favor of [INSERT NON-FEDERAL THIRD PARTY BENEFICIARY NAME] as follows (check box 1, 2, or both as appropriate):

1. The Corps has heretofore provided written notice by U.S. Mail to [INSERT MITIGATION BANK IN-LIEU FEE SPONSOR'S 404 PERMITTEE'S NAME] of the Corps' present right to draw upon the Letter of Credit in accordance with the provisions of that certain Mitigation Banking Instrument # _____.
2. The State Agency has heretofore provided written notice by U.S. Mail to [INSERT MITIGATION BANK IN-LIEU FEE SPONSOR'S NAME] of the State Agency's present right to draw upon the Letter of Credit in accordance with the provisions of that certain Permit/Authorization # [INSERT STATE AUTHORIZATION NAME AND NUMBER].
3. [INSERT MITIGATION BANK SPONSOR'S NAME] has failed to comply with the terms and conditions of the Permit/Mitigation Banking Instrument referenced above.
4. The signatory below is an Authorized Representative of the [INSERT NAME OF THIRD-PARTY BENEFICIARY].

Wherefore, the undersigned, being the beneficiary, or a duly authorized representative thereof, of the Letter of Credit demands payment from you in the amount of [INSERT DEMANDED PAYMENT AMOUNT IN WORDS] US dollars (US\$\$ _____) under the Letter of Credit.

Payment is requested in the form of a wire transfer to a standby trust fund or escrow account according to the following instructions:

IN WITNESS WHEREOF, this Certificate has been duly executed and delivered on behalf of the [] Agency [] Corps as of this _____ day of _____, 20__.

By:

[INSERT NON-FEDERAL THIRD PARTY NAME]

Signature: _____

Print or type name: _____

Requested partial draw hereby acknowledged:

[INSERT NAME OF FINANCIAL INSTITUTION/BANK PROVIDING LETTER OF CREDIT]

By: _____

Name: _____

Title: _____

Date: _____

DRAWING CERTIFICATE II
TO
_____ BANK OF _____
IRREVOCABLE STANDBY LETTER OF CREDIT NO. _____

Date: _____, 20__

Issuing Bank's Name and Address

To Whom it May Concern:

The undersigned [INSERT NAME OF NON-FEDERAL THRID PARTY] certifies to [INSERT ISSUING BANK'S OR FINANCIAL INSTUTION'S NAME] (the "Bank") with reference to Irrevocable Letter of Credit No. _____, dated _____, (the "Letter of Credit"), issued by the Bank in favor of the [INSERT NON-FEDERAL THRID PARY NAME], as follows (check as applicable):

1. The Bank has heretofore provided written notice to the [] State Agency, [] the Corps, and [INSERT MITIGATION BANK SPONSOR'S/IN-LIEU FEE SPONSOR'S/404 PERMITTEE'S NAME] of the Bank's intent not to renew the Letter of Credit following the present Expiration Date thereof.
2. The [] State Agency and [] the Corps have provided prior written notice by U.S. Mail to [INSERT MITIGATION BANK/IN-LIEU FEE SPONSOR'S/404 PERMITTEE'S NAME] of the requirement that [INSERT MITIGATION BANK/IN-LIEU FEE SPONSOR'S/404 PERMITTEE'S NAME] provide the State Agency and/or the Corps with substitute Financial Assurance in compliance with the provisions of that certain [] State Authorization/Permit # ____, (the "Permit"), issued by the State Agency and/or that certain [] Mitigation Banking/In-Lieu Fee Instrument # _____ or [] 404 permit number _____, approved by the Corps.
3. [INSERT MITIGATION BANK SPONSOR'S NAME] _____ has failed to provide the State Agency and/or the Corps with substitute Financial Assurance in compliance with the provisions of the Permit/Instrument within the ninety (90) days of receipt of the notice described in paragraph 1 above.
4. Demands payment from you in the amount of *[INSERT AMOUNT IN WORDS]* US Dollars (US\$ _____).

Payment is requested in the form of a wire transfer to a standby trust fund or escrow account according to the following instructions:

IN WITNESS WHEREOF, this Certificate has been duly executed and delivered on behalf of the Agency as of this _____ day of _____, 20__.

By:

[] [INSERT NON-FEDERAL THIRD PARTY'S NAME]

Signature: _____

Name: _____

CERTIFICATE III
TO
IRREVOCABLE NONTRANSFERABLE STANDBY
LETTER OF CREDIT NO. _____
FOR CANCELLATION

Issuing Bank's Name and Address

Date: _____, 20__

Re: Irrevocable Standby Letter of Credit No. _____ dated _____, 20____
issued by [INSERT NAME OF ISSUING INSTITUTION OR BANK] for the account of [INSERT
NAME OF MITIGATION BANK/IN-LIEU FEE SPONSOR/404 PERMITTEE] ("Applicant")

To Whom it May Concern:

The undersigned being the beneficiary ("Beneficiary") (or a duly authorized representative thereof) of the Letter of Credit, hereby unconditionally and irrevocably notifies you that the Letter of Credit is to be cancelled upon your receipt of this letter. The original Letter of Credit and all amendments thereto are enclosed herein.

In witness whereof, the undersigned has executed and delivered this original certificate as of the
[INSERT CURRENT DATE].

Sincerely,

[INSERT SIGNATURE OF NON-FEDERAL THIRD PARTY]

EXHIBIT B

[INSERT ISSUING FINANCIAL INSTITUTION'S OR BANK'S LETTERHEAD OR NAME AND ADDRESS]

Re: Date: [INSERT DATE]
Irrevocable Letter of Credit No.: [INSERT IRREVOCABLE LETTER OF CREDIT NUMBER]
Account party's name: [INSERT MITIGATION BANK/IN-LIEU FEE SPONSOR'S/404 PERMITTEE'S NAME]
Account party's address: [INSERT SPONSOR'S/404 PERMITTEE'S ADDRESS]
For Mitigation Bank/In-Lieu Fee Mitigation/404 Permittee: [INSERT NAME OF PROPOSED MITIGATION BANK]

Gentlemen:

1. We hereby confirm the above indicated Letter of Credit, the original of which is attached, issued by [INSERT NAME OF ISSUING FINANCIAL INSTITUTION] for drawings of up to United States dollars _____/U.S. \$_____ and expiring with our close of business on [INSERT LETTER OF CREDIT EXPIRATION DATE], or any automatically extended expiration date.

2. Draft(s) drawn under the Letter of Credit and this Confirmation are payable at our office located at [INSERT LOCATION THIS LETTER OF CREDIT NEEDS TO BE TAKEN IN EVENT THERE IS A MITIGATION FAILURE].

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. It is a condition of this confirmation that it be deemed automatically extended without amendment for one year from the expiration date hereof, or any automatically extended expiration date, unless:

(a) At least 120 days prior to any such expiration date, we shall notify the United States Army Corps of Engineers, [INSERT NAME OF CORPS DISTRICT] District, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

(b) The issuing financial institution shall have exercised its right to notify you or the transferee, the account party, and ourselves, of its election not to extend the expiration date of the Letter of Credit.

5. This confirmation is subject to the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce.

6. If this confirmation expires during an interruption of business of this financial institution as described in the applicable provision of Article 2 of the Uniform Commercial Code adopted by the State in which this confirmation is issued, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

[INSERT NAME OF CONFIRMING FINANCIAL INSTITUTION]

By: [INSERT NAME AND TITLE OF PERSON SINGING ON BEHALF OF CONFIRMING
FINANCIAL INSTITUTION]

Compensatory Mitigation Performance Bond

PRINCIPAL:
TYPE OF ORGANIZATION (Mark one "X")
<input type="checkbox"/> Individual <input type="checkbox"/> Partnership <input type="checkbox"/> Joint Venture <input type="checkbox"/> Corporation <input type="checkbox"/> Limited Liability Corporation
STATE OF INCORPORATION:
COMPENSATORY MITIGATION PROJECT:
MITIGATION BANKING INSTRUMENT:
MITIGATION BANKING INSTRUMENT APPROVAL DATE:

EFFECTIVE DATE: TBD
OBLIGEE: U.S. Army Corps of Engineers District/Regulatory Division Address Address
SURETY:
MAXIMUM PENAL SUM OF BOND:
USACE TRACKING NUMBER:

OBLIGATION:

We, the Principal and Surety hereto, are firmly bound as Obligors to the U.S. Army Corps of Engineers (hereinafter called the Obligee) in the penal sum amounts scheduled below, such amounts determined solely by the Obligee. For the payment of the scheduled penal sum, arising from determination by the Obligee that the Compensatory Mitigation Project is in default, we bind ourselves, our heirs, executors, administrators, assigns, and successors, jointly and severally. The limit of liability shall be the full amount of the penal sum. No change in the penal sum will occur unless the Obligee, in its sole discretion, determines that performance standards, milestones, or other success criteria associated with the scheduled period, as set forth in the **XYZ Mitigation Banking Instrument** and the Mitigation Plan contained therein (hereinafter "MBI"), have been achieved or satisfied and certifies its determination in writing. Such determination may be documented by written approval of the applicable As Built or Monitoring Report or by any written confirmation by the Obligee that the in-force penal sum may be retired and replaced by the penal sum scheduled for the subsequent period.

OBLIGATION SCHEDULE:

Period	Obligee Action Triggering Reduction or Increase	Reduction or Increase	Penal Sum
Construction Year 1	NA	N/A	\$
Maintenance & Monitoring Year 1	Approval of As-Built Report	\$	\$
Maintenance & Monitoring Year 2	Approval of Year 1 Monitoring Report	\$	\$
Maintenance & Monitoring Year 3	Approval of Year 2 Monitoring Report	\$	\$
Maintenance & Monitoring Year 4	Approval of Year 3 Monitoring Report	\$	\$
Maintenance & Monitoring Year 5	Approval of Year 4 Monitoring Report	\$	\$
Maintenance & Monitoring Year 6	Approval of Year 5 Monitoring Report	\$	\$
Maintenance & Monitoring Year 7	Approval of Year 6 Monitoring Report	\$	\$
Maintenance & Monitoring Year 8	Approval of Year 7 Monitoring Report	\$	\$
Maintenance & Monitoring Year 9	Approval of Year 8 Monitoring Report	\$	\$
Maintenance & Monitoring Year 10	Approval of Year 9 Monitoring Report	\$	\$

The liability of Surety under this bond shall not be cumulative for the periods and in no event shall exceed the penal sum in effect when the claim is first made.

[IF THE CORPS DISTRICT REQUIRES A TERM VERSUS "GOOD-UNTIL-CANCELLED" MULTI-YEAR BOND, THEN INSERT THE FOLLOWING TERM LANGUAGE:

Notwithstanding anything contained in the Agreement to the contrary, the liability of the Principal and Surety under this Bond is limited to the term beginning the _____ day of _____, 20__, and ending the _____ day of _____, 20__ and any extensions or renewals of the referenced agreement shall be covered under this Bond only when consented to in writing by the Surety. It is further agreed that the refusal by the Surety to extend the term of this Bond shall not constitute a default by the Principal, and shall not give rise to a claim or demand against the Surety under this Bond.]

WHEREAS:

The Oblige approved the MBI identified above.

The Principal is required to provide financial assurance as a condition of the MBI.

THEREFORE:

The above obligation is void if the Principal –

- (a) Specifically performs and fulfills all of the performance standards, milestones, or other success criteria set forth in the MBI during the original term of the MBI and any extensions thereof that may be granted by the Oblige, with or without notice to the Surety, and during the life of any guaranty required under the MBI, as determined by the Oblige, and -
- (b) Also specifically performs and fulfills all of the performance standards, milestones, or other success criteria set forth in any and all duly authorized modifications of the MBI that may hereafter be made, as determined by the Oblige. Notice of those modifications to the Surety is waived.

IT IS FURTHER EXPRESSLY PROVIDED THAT:

The Oblige shall have the full and final authority to determine in writing whether the Principal has performed or fulfilled some or all of the performance standards, milestones, or other success criteria of the MBI.

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

- (a) Identify a replacement contractor to develop an adaptive management or corrective action plan to remedy the default of the Principal to the full satisfaction of the Oblige on a timeline approved by the Oblige.
- (b) Tender to a party or parties approved by the Oblige, or to an approved standby trust, any of the scheduled penal sum that the Oblige determines in writing is due and owing and necessary to cure the default by bringing the Compensatory Mitigation Project into compliance with performance standards, milestones, or other success criteria. In no circumstance shall such a sum be tendered to the Oblige.
- (c) Furnish replacement credits from another mitigation bank or In-Lieu Fee program in the amount, type, and service area determined by the Oblige to be necessary to cure the default.

In the event that the Surety fails to respond within thirty (30) business days to the Oblige's notice of default, or to honor commitments to the full satisfaction of the Oblige under (a) (b)or (c) above, any of the penal sum may, at the election of the Oblige, immediately become due and owing and paid to a party or parties approved by the Oblige.

Any new party or parties identified by the Oblige under this paragraph shall immediately become a Surety or Sureties to this bond.

In accordance with regulation at 33 C.F.R. § 332.3(n)(5), the Surety shall provide the Oblige notification at least 120 days in advance of termination, revocation, or modification of this bond. In the event of cancellation, failure or inability of the Principal to file replacement financial assurance shall not itself constitute a loss under this bond or any renewal or continuation thereof.

WITNESS:

The Principal and Surety have executed this performance bond and have affixed their seals on the date set forth above.

PRINCIPAL
Signature
Name, title
CORPORATE SURETY

Name & Address	State of Incorporation
Signature	
Name, Title (Seal)	

Note to Agency Reviewer: *This insurance template should solely act as a guidepost and example — it should not be rigidly applied or imposed on sponsors and insurance carriers. Multiple providers currently use coverage forms and/or an insurance specification, which combined have now been accepted in over half of the Corps Districts. These approaches should continue to be acceptable to the Corps alongside this proposed template. As an additional resource, we encourage reviewing the Insurance Primer (attached to ERBA's cover memo and on ERBA's website) before reviewing this template.*

Start of Insurance Template:

REGULATORY STATEMENT

The US Army Corps of Engineers (Corps) has the authority to require financial assurances for the establishment of "Mitigation Banks", "Permittee-Responsible Projects", and "In-Lieu Fee Programs", which are designed to offset unavoidable impacts to the waters of the United States authorized through the issuance of Department of the Army permits pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401,403).

The "Named Insured" proposed a "Mitigation Banking Instrument", "Permittee-Responsible Project", or "In-Lieu Fee Program Instrument" for Corps approval, as described more specifically in the attached hereto Stream and Wetland CWA 404 Financial Assurance Policy Coverage Form and affixed endorsements.

The "Regulatory Body" has the sole authority, discretion, obligation, responsibility and accountability for determining compliance with "Compensatory Mitigation" requirements and "Performance Standards" for the aforementioned "Compensatory Mitigation Project". Likewise, the "Regulatory Body" determines what measures are appropriate to ensure that aquatic resource functions comparable to those described in the mitigation plan objectives are provided by the "Compensatory Mitigation Project". (See 33 CFR. 332.7(c).) Among other things, the preceding sentences acknowledge that the "Regulatory Body" has discretion to determine the scope and extent of the non-compliance with "Compensatory Mitigation" requirements and/or performance standards for the aforementioned "Mitigation Bank", "Permittee-Responsible Project", or "In Lieu Fee Program". The "Regulatory Body" has the discretion to determine whether action taken or proposed to be taken by the "Company" to complete or replace the "Compensatory Mitigation" is sufficient to satisfy a "Demand" for "Default" made by the "Regulatory Body," provided that in no case shall the "Company's" obligations or responsibilities require it to expend funds in excess of the Limit of Liability.

**WETLAND AND STREAM CWA 404 FINANCIAL ASSURANCE POLICY
DECLARATIONS**

These Declarations, together with the attached **WETLAND AND STREAM CWA 404 FINANCIAL ASSURANCE COVERAGE FORM** and endorsements thereto, constitute the policy issued to the “Named Insured”. Any coverage listed below is subject to the terms, conditions and limitations set forth below, and in the policy referenced.

Policy Number: TBD

INSURER	UNDERWRITING OFFICE	PRODUCER

ITEM 1: NAMED INSURED	
Named Insured:	(Sponsor Legal Name)
Mailing Address:	
A. Compensatory Mitigation Project	
B. Compensatory Mitigation Instrument and/or Plan	
C. Corps Approval Number	
D. Insured Site:	

ITEM 2: POLICY PERIOD 01/1/2025 to 01/01/2036 *at 12.01 a.m. Standard Time at the address of the Named Insured.

ITEM 3. LIMIT OF LIABILITY FOR ALL DEMANDS			
Period	“Regulatory Body” Action Triggering Reduction or Increase	Reduction or Increase	Limit of Liability
Construction Year 1	NA	NA	\$
Monitoring Year 1	Approval of As-Built Report	\$	\$
Monitoring Year 2	Approval of Year 1 Monitoring Report	\$	\$
Monitoring Year 3	Approval of Year 2 Monitoring Report	\$	\$
Monitoring Year 4	Approval of Year 3 Monitoring Report	\$	\$
Monitoring Year 5	Approval of Year 4 Monitoring Report	\$	\$
Monitoring Year 6	Approval of Year 5 Monitoring Report	\$	\$
Monitoring Year 7	Approval of Year 6 Monitoring Report	\$	\$
Monitoring Year 8	Approval of Year 7 Monitoring Report	\$	\$
Monitoring Year 9	Approval of Year 8 Monitoring Report	\$	\$
Monitoring Year 10	Approval of Year 9 Monitoring Report	\$	\$

ITEM 4: POLICY PREMIUM	\$XXXX
*100% minimum and earned on the Inception Date of the Policy	
SURPLUS LINES TAX and STAMPING FEE	\$XXX
TOTAL PREMIUM & TAX	\$XXX

ITEM 5: REGULATORY BODY	
Name:	U.S. Army Corps of Engineers, XYZ District
Address:	

*The name and address above will be used for all notices to the Regulatory Body.

ITEM 6: NOTICES TO COMPANY INCLUDING NOTICE OF DEMANDS
Notices to Company pursuant to Section V. of this Policy shall be sent to the following: XYZ Insurance Company Attn: Corporate Demands Address Line 1 City, State, Zip

AND

XYZ Insurance Company Attn: (Program Director) Address Line 1 City, State, Zip Email:

ITEM 7: FORMS AND ENDORSEMENTS
Forms & endorsements forming a part this policy as of the inception date are listed in the schedule below: (State-Specific) Surplus Lines Notification Form Wetland and Stream CWA 404 Financial Assurance Policy Declarations Wetland and Stream CWA 404 Financial Assurance Policy Coverage Form In Witness – (Carrier Signature page - usually via endorsement) Disclosure Pursuant to Terrorism Risk Insurance Act Cap on Losses from Certified Acts of Terrorism NOTICE OFAC Ed. (11.15) US Treasury Department's Office of Foreign Assets Control General Service of Suit Notice Notice to Obtain Information or Make a Complaint

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned:	By:
Date:	Authorized Producer Representative:

Wetland and Stream CWA 404 Financial Assurance Coverage Form

In consideration of the payment of the policy premium, and subject to Section V. Limit of Liability and all the terms, conditions, exclusions and limitations of this policy, the "Company" agrees to provide insurance coverage as required under 33 CFR 332.3(n)(1-6) and as described herein.

Section I Insuring Agreement:

The "Company" will pay on your behalf the "Demand" for "Financial Assurance" arising from a determination by the "Regulatory Body" that the "Compensatory Mitigation Project" identified in the Declarations is in "Default" per the terms of the "Compensatory Mitigation Instrument and/or Plan".

Section II Definitions:

1. Adaptive Management Plan:
"Adaptive Management Plan" as defined in 33 CFR 332.7(c) means the written plan approved by the "Regulatory Body" that specifies the adaptive management measures that must be taken to meet the "Performance Standards" set forth in the "Mitigation Banking Instrument", "In-Lieu Fee Program Instrument", "Mitigation Plan" or "DA Permit" to remedy "Default" of the "Compensatory Mitigation Project" identified in Item 1.A of the Declarations. For purposes of this policy, adaptive management does not mean maintenance, repair, or other corrective action undertaken prior to "Default" of the "Compensatory Mitigation Project".
2. Company: (Name and Address of Insurer)
3. Compensatory Mitigation:
As defined in 33 CFR 332.2 Definitions, means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. Compensatory Mitigation includes achievement of the "Performance Standards" specified in the approved "Mitigation Plan" or "DA Permit" conditions
4. Compensatory Mitigation Project
As defined in 33 CFR 332.2 Definitions, means "Compensatory Mitigation" implemented by the permittee as a requirement of a DA permit (i.e., permittee-responsible mitigation), or by a "Mitigation Bank" or an "In-Lieu Fee Program" and includes the elements of the approved "Mitigation Plan" as identified in 33 CFR 332.4(c)(2)-(14).
5. Covered Location:
Means within the property boundaries delineated in the "Mitigation Banking Instrument", "In-Lieu Fee Program Instrument", "Mitigation Plan", or "DA Permit" identified in Item 1. B. of the Declarations.
6. DA Permit:
Means any form of authorization issued by the Department of the Army authorizing activities pursuant to 33 U.S.C. 1344 or 33 U.S.C. 401 or 403. "DA Permit" includes any "Permittee-Responsible Mitigation Project" approved by the District Engineer that is incorporated by reference in a "DA Permit" through permit conditions.
7. Default:
Means a determination made in writing by the "Regulatory Body" that the "Named

Insured" has failed to successfully achieve the "Performance Standards" and/or construction activities, as applicable, milestones, or other success criteria as defined in the insured "Mitigation Banking Instrument", "In-Lieu Fee Instrument", or "DA Permit", including any mitigation plan contained therein.

8. Demand:

Means written direction by the "Regulatory Body" to the "Company" during the "Policy Period" to use any amount available under this policy to correct the deficiencies in the "Compensatory Mitigation Project" as determined by the "Regulatory Body" in accordance with 33 CFR 332.3, 332.6, and 332.7.

9. Designee:

Means the entity or entities that the "Company" chooses to work with, and that the "Regulatory Body" approves, to complete or replace the "Compensatory Mitigation" for which the "Named Insured" is responsible under the terms of the "Mitigation Banking Instrument" or "DA Permit".

10. In-Lieu Fee Program:

As defined in 33 CFR 332.2 Definitions, means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or on-profit natural resources management entity to satisfy "Compensatory Mitigation" requirements for "DA Permits". Similar to a "Mitigation Bank", an In-Lieu fee Program sells "Compensatory Mitigation" credits to permittees whose obligation to provide "Compensatory Mitigation" is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operations and use of "Mitigation Banks". The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

11. In-Lieu Fee Program Instrument:

Means the legal document for the establishment, operation, and use of an "In-Lieu Fee Program".

12. Mitigation Bank:

As defined in 33 CFR 332.2 Definitions, means a site, or suite of sites (i.e., one or more "Compensatory Mitigation Project(s)"), where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor.

The operation and use of a mitigation bank are governed by a mitigation banking instrument.

13. Mitigation Banking Instrument

As defined in 33 CFR 332.2 Definitions, and as identified in Item 1. A. of the Declarations means the legal document for the establishment, operation, and use of a mitigation bank.

14. Mitigation Plan:

As defined in 33 CFR 332.4(c) Means the approved final mitigation plan which must include or address the following elements: objectives, site selection, site protection instrument, baseline information, determination of credits, mitigation work plan, maintenance plan, performance standards, monitoring requirements, long-term management plan, "Adaptive Management Plan", financial assurances, and any other information required, as necessary.

15. Named Insured:

Means the person or entity or entities set forth in Item 1. of the Declarations.

16. Performance Standards:

As defined in 33 CFR 332.2 Definitions, means the observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if the "Compensatory Mitigation Project" meets its objectives. "Performance Standards" includes, but is not limited to, the timely completion of monitoring and maintenance reports and submissions to the "Regulatory Body" as required by the "Mitigation Banking Instrument", "Mitigation Plan", or "DA Permit".

17. Permittee-Responsible Mitigation Project:

As defined in 33 CFR 332.2 Definitions means an aquatic resource restoration, establishment, enhancement, and/or preservation activity (i.e., a "Compensatory Mitigation Project") undertaken by the permittee (or an authorized agent or contractor) to provide "Compensatory Mitigation" for which the permittee retains full responsibility.

18. Policy Period:

Means the period set forth in the Declarations, or any shorter period as defined in Section VIII Conditions: Cancellation, Termination and Release.

19. Regulatory Body:

Means the entity or entities listed in Item 5. of the Declarations.

Section III Policy Territory:

This Policy only applies to "Demands" arising from "Mitigation Banks", "In-Lieu Fee Program" sites, or "Permittee-Responsible Projects" identified in Item 1. B. of the Declarations that are located in the United States, its territories or possessions, and made or brought in the United States, its territories or possessions.

Section IV Exclusions:

This policy does not apply to any expenses, losses, liabilities of, or damages of any kind incurred by, accruing to, or alleged to be liabilities of the "Named Insured", by reason of:

1. Any attorney's fees, expenses, charges or other costs incurred in the investigation, adjustment or defense of any Demand ("Demands").
2. Any civil or criminal penalties imposed by reason of violation of any law or regulation.
3. "Demands" on or arising from any property or location other than the "Covered Location" identified in Item 1.B of the Declarations.

Section V Limit of Liability:

The Limits of Liability scheduled under Item 3 of the Declarations, or endorsed to this policy, shall not be cumulative for the periods and in no event shall exceed the Limit of Liability in effect when the Demand is first made, regardless of the number of "Demands", "Named Insureds", or "Regulatory Bodies".

The Limit of Liability of this Policy may be reduced by the amounts scheduled within Item 3 of the Declarations. However, no reduction in the Limit of Liability will occur unless the "Regulatory Body", in its sole discretion, determines that performance of those actions, obligations and milestones as set forth in the "Mitigation Banking Instrument", "In-Lieu Fee Program Instrument" and "Mitigation Plan" have been achieved or satisfied and certifies its determination in writing. The in-force Limit of Liability will remain in full force and effect until the date

on which the Named Insured(s) receive written verification from the "Regulatory Body" that the conditions for reduction have been fully met.

Once diminished by "Demand" payments, Limit of Liability does not reinstate for any current, preceding or past amount or period.

Section VI Payment of "Demands":

"Demand" payments may include the following actions, each subject to prior written approval by the "Regulatory Body":

1. Payment to a replacement contractor to develop an "Adaptive Management Plan" to remedy the "Default" to the full satisfaction of the "Regulatory Body" on a timeline approved by the "Regulatory Body".
2. Tender to a "Designee" approved by the "Regulatory Body", or to an approved standby trust, any of the scheduled Limit of Liability that the "Regulatory Body" determines in writing is due and owing and necessary to cure the "Default" by bringing the "Compensatory Mitigation Project" into compliance with performance standards, milestones, or other success criteria. In no circumstance shall such a sum be tendered to the "Regulatory Body" or to the "Named Insured".
3. Furnish replacement credits from another "Mitigation Bank" or "In-Lieu Fee Program" in the amount, type, and service area determined by the "Regulatory Body" to be necessary to cure the "Default".

Section VI Notices:

1. All notices to the "Named Insured" shall be sent to the address shown in Item 1 of the Declarations.
2. All notices to the "Regulatory Body" shall be sent to the address(es) shown in Item 5 of the Declarations.
3. All notices to the "Company" shall be sent to the address shown in Section II Definitions, Item 1 "Company" except notice of a "Demand".

Section VII Notice of a Demand:

All Demands must be reported to:
(Company Name, Office, and Address)

Section VIII Conditions:

Assignment:

This Policy may not be assigned or transferred without written consent of the "Company".

Bankruptcy:

Bankruptcy or insolvency of the "Named Insured" or its agents, contractors or subcontractors shall not relieve the "Company" or the "Named Insured" of their respective obligations under this policy, including the Obligation of the "Company" to pay "Demands" up to the Limit of Liability set forth in Item 3. of the Declarations, or as may be reduced by any endorsement to this policy.

Cancellation, Termination and Release:

In accordance with regulation at 33 C.F.R. § 332.3(n)(5), the "Company" shall provide the "Regulatory Body" notification at least 120 days in advance of cancellation, termination or revocation of this policy.

The "Company" is released from all obligations within the policy on the date of termination

except for obligations arising from previously reported "Demands", unless so released by the "Regulatory Body".

Changes:

The policy shall not be changed unless the "Regulatory Body" first approves such changes in writing. Increases or decreases in the Limit of Liability shall only be by endorsement to the policy and require the prior written approval of the "Company" and the "Regulatory Body".

Notice to any agent or knowledge possessed by any agent or by any other person shall not affect a waiver or a change in any part of this policy or stop the "Company" from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued by the "Company" to form a part of this policy.

Change of Law:

If any change in applicable law or regulation after commencement of this policy impacts any responsibility or performance of any provision of this policy, the parties shall find and employ an alternative means to achieve the same or substantially the same result as that contemplated by such provision.

Cooperation:

The "Named Insured" shall allow the "Company" and all of the "Company's" agents, representatives, consultants, contractors and "Designees" unfettered access to the "Covered Location" and shall make all responsible personnel and information of the "Named Insured" available to the "Company" upon reasonable request.

Non-compliance by the "Named Insured" with the above provisions shall not affect any rights of the "Regulatory Body".

Other Insurance:

This insurance is primary over any other valid and collectable insurance unless this insurance has been replaced by another financial assurance mechanism approved by the "Regulatory Body". If another financial assurance mechanism has been approved by the "Regulatory Body" to replace this policy, the "Regulatory Body" should not unreasonably withhold a written release of this insurance to the "Company".

Renewal at the End of the "Policy Period":

At the expiration of the "Policy Period", in consideration of additional premium, subject to Company underwriting rules and insurance rates in effect at the time, coverage afforded by this policy will automatically be renewed at the expiring Limit of Liability. If the Company chooses to not renew this policy, the "Company" will provide written notice of intent to not renew to the Named Insured and to the "Regulatory Body" no less than 120 days prior to the expiration date.

Reporting:

If the "Regulatory Body", in its sole discretion, determines that the "Mitigation Bank", "In-Lieu Fee Program Instrument" or "Permittee-Responsible Mitigation Project" has not sufficiently met the "Performance Standards" required to achieve the "Compensatory Mitigation" obligation, the "Regulatory Body" shall provide written notice to the "Company" of a "Demand" as soon as practicable. Timing of such written notice shall not be cause to invalidate "Company's" obligations to the "Regulatory Body" in the event of a "Demand", provided that the "Demand" is submitted within the "Policy Period."

The "Regulatory Body" shall provide the "Company" with a brief explanation of the "Performance Standards" that must be met to satisfy the objectives of the "Mitigation

Banking Instrument", "In-Lieu Fee Program Instrument" or "Permittee-Responsible Mitigation Project."

After discovering that the "Named Insured" has failed to meet "Performance Standards", the "Regulatory Body" may first attempt to resolve a "Demand" with the "Named Insured" before providing written notice of a "Demand" to the "Company". Such attempts shall not cause any "Demand" submitted thereafter to be prejudiced, precluded, or otherwise considered late, provided that the "Demand" is submitted within the "Policy Period."

Representations and Warranties:

Misrepresentations and/or fraud in the application for insurance or Compensatory Mitigation Instrument and/or Plan identified in Item 1.B. of the Declarations by the "Named Insured" will not invalidate the "Company's obligations to the "Regulatory Body" in the event of a "Demand". However, payment of a "Demand" under such circumstances will not preclude us from separately taking legal action to recover payments of a "Demand" from the "Named Insured". The "Named Insured" agrees that in the event that the "Named Insured" has committed fraud in the application, the "Company" may subrogate or bring suit against the "Named Insured".

In addition, should the "Named Insured" commit fraud in the application, the "Company" agrees to waive any rights including statutory rights to void or terminate the policy arising from such fraud or misrepresentation thereby preserving all "Demand" rights due the "Regulatory Body".

Third-Party Rights:

No third-party rights or beneficiaries are created as a result of this policy, except to the extent that any specific rights are conferred on the "Regulatory Body" by the policy.