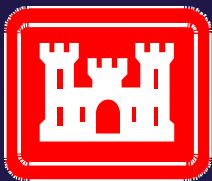


Financial Assurances



Financial Assurances

Requirement:

“...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)



Why Financial Assurances are needed

- Funds to correct or replace unsuccessful mitigation if responsible party is unable/unwilling to do so
- Allow permit issuance using permittee-responsible mitigation prior to successful mitigation implementation
- Allow initial credit release for third party mitigation before successful mitigation implementation



Financial Assurances

- Where alternate mechanism is available to ensure a high level of confidence that mitigation will be provided & maintained (e.g. commitment from a government agency), DE may determine that financial assurances are not necessary



Forms of Assurances

- Performance bonds
- Escrow accounts
- Casualty insurance
- Letters of credit
- Legislative appropriations
- Other appropriate instruments, subject to DE approval



Definitions

- **Performance bond**

- Contract between sponsor or permittee & surety for benefit of DE, but payable to designee or standby trust
- Payment by surety upon meeting specified conditions

- **Escrow account**

- Cash or valuable property deposited in an account held by a trustee pending satisfaction of conditions



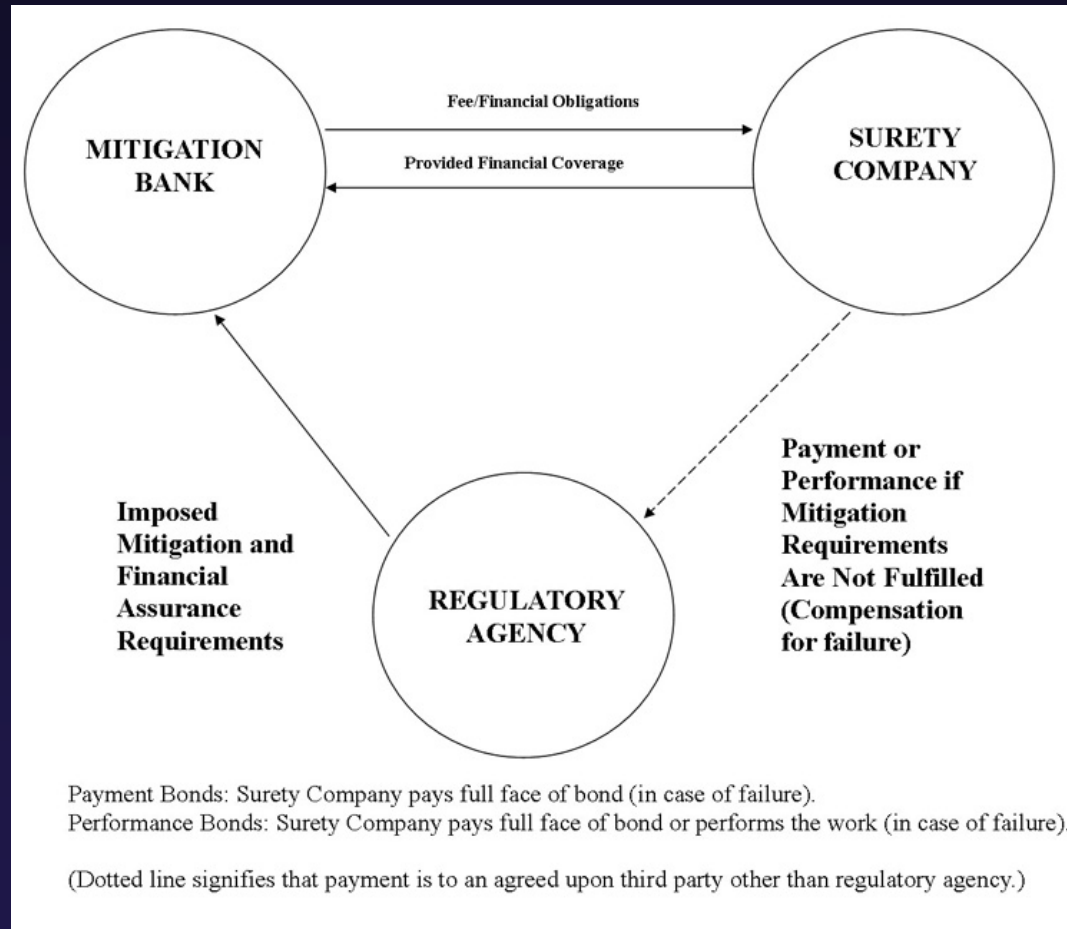
Definitions continued

- **Casualty insurance**
 - Insurance policy with defined conditions specifying when payment is due
- **Letters of credit**
 - Contract by a bank agreeing to pay to the beneficiary (standby trust or DE's designee) upon meeting specified conditions
 - Often irrevocable



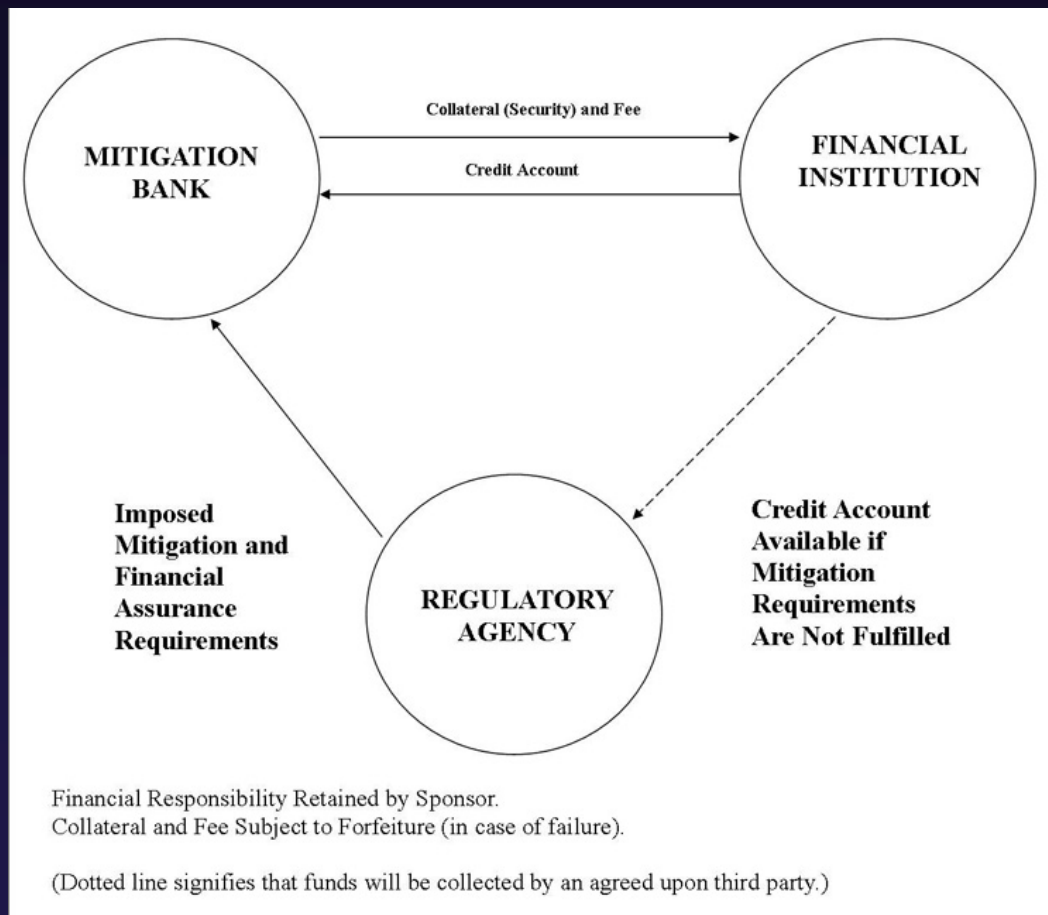
Performance Bonds

(source: IWR)



Letter of Credit

(source: IWR)



Definitions cont'd

- **Standby trust agreement**
 - Independent third party with fiduciary responsibility to the beneficiary
 - DE cannot be the direct beneficiary
 - Relationship established through a valid document, but not funded
 - Enduring
 - When assurances called, funds are paid into Standby Trust



Issues in Implementation

- **Regulators' considerations**
 - Certainty
 - Escrow account and letter of credit – money in the bank
 - Solvency of surety or insurance company
 - Paperwork/administrative requirements
- **Permittee/Sponsor's considerations**
 - Amount of money set aside
 - Pooling risk



Regulatory requirements

- Permit special condition to require assurances in place prior to commencing permitted activity
- Assurances phased out once the project determined to have met performance standards
 - Permit or instrument must specify conditions under which the financial assurances may be released
- DE must receive notice at least 120 days prior to termination or revocation



Regulatory requirements cont'd

- Financial assurances must be payable to the designee of the DE or standby trust
 - DE cannot receive the funds per Miscellaneous Receipts Statute
 - Funds in trust to be distributed by trustee according to DE's instructions



Amount of financial assurances determined by DE

- In consultation with applicant/sponsor
- Type and amount based on:
 - Size & complexity of project
 - Degree of completion at time of project approval
 - Likelihood of success
 - Past performance of sponsor
 - Any other appropriate factors
- Consider cost of replacement mitigation incl.:
 - Land acquisition
 - Planning, design, and engineering
 - Construction, mobilization
 - Legal fees
 - Monitoring



Additional considerations in determining assurance amounts

- Amounts should reflect where replacement work is located
- Replacement work presumed to proceed at project site, if no concerns regarding:
 - Quality of the site and surrounding landscape
 - Site ownership/access issues
 - Willingness of suitable third-party to complete work at the site



Determining Assurance Amounts for On-site Replacement Work

- Basis: Cost to implement work & meet performance standards at site
- Components: If site is suitable and secure, don't need land costs
- Sources: Usually sponsor or permittee is expected to provide component cost estimates;
- Other sources that can be used to verify sponsor's estimates include:
 - Corps in-house engineering estimates
 - Current Bank or ILF rates in same service area
 - Contractor estimates



Determining Assurance Amounts for Off-site Replacement Work

- Basis: Cost to complete work at alternate site by a third party (e.g. established ILF or bank in the same service area)
- Components: Include land costs, design, implementation, management, etc.
- Sources: Could be based on estimates for comparable mitigation projects in the area

