

Hopping Green & Sams

Attorneys and Counselors

MEMORANDUM

To: Interested Persons

From: Eric Olsen

Re: Proposed DEP Rulemaking Changing Financial Responsibility Requirements for Wetland Mitigation Banks

Date: January 4, 2018

Existing Florida Department of Environmental Protection (DEP) rules require a mitigation bank permit applicant to provide financial responsibility ensuring the mitigation bank's successful construction and implementation as well as its perpetual management. DEP is proposing to change these mitigation bank financial responsibility rules. A copy of these proposed rule changes is attached. This memo discusses these rule changes and some potential issues the rule changes may create.

Adding the Use of Insurance

The existing rules allow a mitigation bank to provide financial responsibility only through the use of a letter of credit, bond or trust fund. The proposed rule changes would add the use of an insurance policy as another mitigation bank financial responsibility option. However, insurance could only be used to provide financial responsibility for the construction and implementation of a mitigation bank, and not for perpetual management.

If an insurance policy is proposed, the company issuing the policy must be authorized to transact insurance in the State of Florida and must have at least an A+ rating in the A.M. Best's Key Rating Guide. The insurance policy must be worded in substantial conformance to a standard insurance policy form, a copy of which is attached.

The insurance policy can also be used with one or more other allowed financial responsibility mechanisms to provide the total required financial responsibility. When an insurance policy is used, the policy must be payable into either a standby trust fund or standby escrow account.

Note, however, these proposed rules require the insurance policy to be issued for a period of no less than one year beyond the anticipated completion and success of the mitigation bank or the last success criterion insured, whichever occurs first. This means that if, for example, a mitigation bank is projected to take two years to successfully complete, the insurance policy

must be issued for a period of three years. This requirement may increase the cost or decrease the availability of insurance policies for mitigation bank construction and implementation.

Adding the Use of Escrow Accounts

The proposed rule changes would also add the use of escrow accounts established with the Florida Department of Financial Services (DFS) as a means of providing financial responsibility for both the construction and perpetual management of a mitigation bank. The DFS is a part of the Florida State Treasury and the Bureau of Collateral Management typically serves as the agent for these escrow accounts. The escrow account will be assessed a fee by DFS in accordance with section 17.61(4)(b), Florida Statutes. According to information from the DFS, the fees charged for these escrow accounts appear to be less than the fees typically charged by entities serving as trustees for trusts or standby trusts. The proposed rules would also allow the use of these escrow accounts in a standby format to receive monies that are ever paid from a letter of credit, bond, or insurance policy.

If an escrow account is used, the escrow agreement must be worded in substantial compliance with a DEP rule adopted form, a copy of which is attached.

Other Changes

- The proposed rules consolidate several forms currently used for construction and implementation financial responsibility with the corresponding forms used for perpetual management financial responsibility such that one form can be used for both activities.
- The proposed rules clarify that multiple financial assurance mechanisms may be used for a single mitigation bank. Thus, for example, a mitigation bank permittee may use a combination of insurance, letter of credit, bonds or trust funds to cover the construction and implementation costs.
- The proposed rules eliminate the existing prohibition on a mitigation banker assigning its assets for the benefit of creditors.
- The proposed rules allow any bonding company listed in the latest Circular 570 of the U.S. Department of Treasury or with an A+ rating in A.M. Best's Key Rating Guide to provide performance bonds for financial assurance. This eliminates an existing rule requirement that the bonding company be listed as an acceptable surety on federal bonds.
- The proposed rules clarify that no financial responsibility is required for construction and implementation where a mitigation bank, or a phase thereof, is determined by the agency to be completed and successful pursuant to the final success criteria in the permit prior to the withdrawal of any credits.
- The proposed rules require that trustees of trust funds be entities regulated and examined by a federal agency or a Florida state agency. This change is a limitation from current rules which also allow entities to be trustees if their trust operations are regulated and examined by any state agency, not just a Florida state agency.

- Prescribed fire is added to the list of example activities that must be covered by perpetual management financial responsibility.

Providing Input

These proposed rules were published in the Florida Administrative Register on December 22, 2017. The DEP is not currently proposing any public hearing, but will schedule a public hearing (to occur on January 19, 2018) only if requested by a member of the public not later than January 12, 2018. DEP will also accept written comments on the proposed rule through January 12, 2018. There is also a deadline for providing a lower cost regulatory alternative proposal to this rule.

Please contact me if you have any questions regarding this proposed DEP rulemaking.

Notice of Proposed Rule

DEPARTMENT OF ENVIRONMENTAL PROTECTION

RULE NO.: RULE TITLE:

62-342.700: Financial Responsibility

PURPOSE AND EFFECT: The Department proposes to amend Chapter 62-342.700, F.A.C., to allow mitigation banks established under Part IV of Chapter 373, F.S., to use certain forms of insurance and escrow as a means of demonstrating the financial responsibility required pursuant to Section 373.4136(1)(i), F.S. The effect would be to establish additional mechanisms for demonstrating the required “financial responsibility for the construction, operation, and long-term management of a mitigation bank” in rule, in accordance with Section 373.4136(11)(a), F.S. Other mechanisms of demonstrating financial responsibility currently authorized in the rule (i.e., surety bond, performance bond, trust fund, standby trust fund and irrevocable letter of credit) would remain unaffected.

SUMMARY: Rule 62-342.700, F.A.C., will be amended to allow mitigation banks to use certain forms of insurance and escrow accounts as a means of demonstrating financial responsibility.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:

The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the Agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: Based upon the Department’s economic review, neither a SERC or legislative ratification is required because the adoption of additional options for proving financial responsibility does not increase costs to the regulated public. This change will allow an applicant greater choice and flexibility to provide single or multiple mechanisms, likely resulting in lower costs and less time or process to obtain such mechanisms.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 373.4131, 373.4136(11) FS.

LAW IMPLEMENTED: 373.4131, 373.4135, 373.4136 FS

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: January 19th, 2018, 1:00 p.m., ET

PLACE: This hearing will be broadcast via webinar. Parties can register to attend the webinar via their personal computers with audio by telephone (regular long distance telephone charges will apply) or by speakers connected to their computer (no telephone charges will apply). Webinar registration is via <https://attendee.gotowebinar.com/register/6379418528932848897>. Alternatively, persons may view the webinar at the following location where staff will be present to accept comments: Florida Department of Environmental Protection, Bob Martinez Building, Room 609, 2600 Blair Stone Road, Tallahassee, FL 32399.

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting: John Humphreys at (850)245-8487. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: John Humphreys, Florida Department of Environmental Protection, Submerged Lands and Environmental Resources Coordination, 2600 Blair Stone Road, MS 2500, Tallahassee, FL 32399-2400, telephone: (850)245-8487, e-mail: John.Humphreys@dep.state.fl.us or facsimile (850)245-8499.

THE FULL TEXT OF THE PROPOSED RULE IS:

62-342.700 Financial Responsibility.

(1) To provide reasonable assurances that the proposed Mitigation Bank will meet the requirements of Section 373.4136, F.S., this ~~section~~ rule and the associated permit conditions, non-governmental bankers shall provide proof

of financial responsibility for: (a) the construction and implementation ~~phase~~ of the bank, and (b) the perpetual management of the bank, as required in this section. Governmental entities shall provide proof of financial responsibility under subsection ~~62-342.700(15)~~ ~~62-342.700(12)~~, F.A.C. The amount of financial responsibility provided in the mechanisms required in this ~~section~~rule shall be based on the cost estimates determined under subsection ~~62-342.700(13)~~ ~~62-342.700(10)~~, F.A.C.

(2) Submitting Financial Responsibility Documentation. The applicant shall provide draft documentation of the cost estimate and required financial responsibility mechanisms described in subsections ~~62-342.700(5)~~ and ~~62-342.700(13)~~ with the permit application, and shall submit to the Agency the executed or finalized documentation within the time frames specified in the permit. The provisions of this section shall also apply to ~~for~~ any modifications to the Mitigation Bank Permit.

(3) General Terms for Financial Responsibility Mechanisms. In addition to the specific provisions regarding financial responsibility mechanisms for construction and implementation in subsection 62-342.700(4), F.A.C., and perpetual management in subsection ~~62-342.700(12)~~ ~~62-342.700(9)~~, F.A.C., the following terms shall be complied with:

(a) The financial responsibility mechanisms shall be payable at the direction of the Agency to its designee or to a standby trust or standby escrow agreement. The financial responsibility mechanism shall be retained by the Agency if it is of a type which is retained by the beneficiary according to industry standards.

(b) Demonstration of financial responsibility shall be continuous until complete satisfaction of the applicable permit conditions and approved release of financial responsibility by the Agency.

(c) Collectively, the AH financial responsibility mechanisms must guarantee that the banker will perform all of its obligations under the permit, provide alternative financial assurance of a type allowed by this section, and obtain the Agency's written approval of the alternative assurance provided within Within 90 days after receipt by both the banker and the Agency of a notice of cancellation or termination of a financial responsibility mechanism, the banker shall establish a financial responsibility mechanism that meets the criteria of this rule, subject to the Agency's written approval of a bond or intent not to extend the expiration date of a letter of credit.

(d) A banker may satisfy the requirements of this section by establishing more than one acceptable financial responsibility mechanism per Mitigation Bank. Whenever more than one mechanism is used, the banker shall identify the specific financial responsibility mechanism for each individual activity on the cost estimate as required under subsection 62-342.700(13), F.A.C.

(e) A banker may use a financial ~~assurance~~ responsibility mechanism allowed under this section for more than one Mitigation Bank. The amount of funds available through the mechanism must be no less than the sum of funds that would be required for available through separate mechanisms ~~acceptable~~ for each Mitigation Bank.

(f) A banker must notify the Agency by certified mail within 10 days after the commencement of a voluntary or involuntary proceeding:

1. To dissolve the banker;
2. To place the banker in receivership;
3. For entry of an order for relief against the banker under Title 11 of the United States Code; or
4. A general assignment of its assets for the benefit of creditors under Chapter 727, F.S.

~~A banker may not assign its assets for the benefit of creditors. A banker will be without the required financial assurance in the event of a bankruptcy of the trustee of any trust provided under this rule, or the suspension or revocation of the authority of any trustee to act as trustee, or in the event of a bankruptcy or receivership of the issuing institution of a financial responsibility mechanism of any bond or letter of credit, or the revocation of the authority of such institution to issue such instruments. The banker must notify the Agency within 10 days, and establish other financial assurance within 60 days after such an event.~~

(4) Financial Responsibility for Construction and Implementation.

(a) No financial responsibility shall be required where the construction and implementation of the Mitigation Bank, or a phase thereof, is completed and successful, as determined by the Agency pursuant to the final success criteria in the Permit, prior to the withdrawal of any credits.

(b) Financial responsibility for the construction and implementation activities of each phase of the Mitigation Bank, or each phase thereof, may be established by surety bonds, performance bonds, irrevocable letters of credit, insurance policies, escrow accounts, or trust funds, as described below. If a bond or an irrevocable letter of credit is

used as the financial mechanism, a standby trust fund shall be established, in which all payments under the bonds or irrevocable letter of credit shall be directly deposited.

(c) The amount of financial responsibility established shall equal 110 percent of the cost of construction and implementation of the Mitigation Bank, or each phase thereof, in accordance with subsection 62-342.700(13), F.A.C., and as adjusted in accordance with subsection 62-342.700(14), F.A.C., during the course of the project (or each phase of the Mitigation Bank) which is being constructed and implemented. When the bank (or appropriate phase) has been completely constructed, implemented, and is trending toward success in compliance with the permit, the respective amount of financial responsibility shall be released.

(d) The financial responsibility mechanism shall become effective prior to the release of any mitigation credits.

(5) Surety or Performance Bond.

(a) A banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by obtaining a surety or performance bond that conforms to the requirements of this subsection. The company issuing the bond must be authorized licensed to do business in Florida, and The company must also be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury, or a Florida-domiciled surety or insurance company with at least an A+ rating in the latest printing of the A.M. Best's Key Rating Guide and authorized to write individual bonds up to 10 percent of the policyholder's surplus. The banker shall provide documentation evidencing proof that the bond company meets these requirements.

(b) The surety or performance bond shall be worded in substantial conformance with Form 62-342.700(5) 62-342.700(4), "Mitigation Bank Performance Bond to Demonstrate Construction and Implementation Financial Assurance" (effective date February 19, 2015), which is incorporated by reference herein and available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05067>. This form and all the forms incorporated in Rule 62-342.700, F.A.C., also are available from the Department of Environmental Protection's Internet site, <http://www.dep.state.fl.us/water/wetlands/erp/forms.htm>; or by contacting the Division of Water Resource Management, Submerged Lands and Environmental Resources Coordination Program, Department of Environmental Protection, 2600 Blair Stone Road, MS #2500, Tallahassee, Florida 32399-2400, (850)245-8336. Deviations from the form shall be identified and submitted to the Agency for review and approval.

(c) Under the terms of the bond, the surety shall become liable on the bond obligation when the mitigation banker fails to perform under the terms of the Mitigation Bank Permit. In all cases, the surety's liability shall be limited to the sum stated in the bond.

(d) The mitigation banker who uses a surety or performance bond to satisfy the requirements of subsection 62-342.700(4), F.A.C., must establish a standby escrow or standby trust fund when the surety or performance bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby escrow or standby trust fund for distribution by the agent or trustee in accordance with the Agency's instructions. The standby escrow agreement and standby trust fund agreement must meet the requirements specified in subsections 62-342.700(9) and 62-342.700(10) subsection 62-342.700(7), F.A.C., respectively.

(e) The bonding company shall provide notice of cancellation of a bond by certified mail to the banker and to the Agency. Cancellation may occur no sooner than 120 days from the date of receipt of the notice of cancellation by both the banker and the Agency, as evidenced by the return receipt.

(f) A bond may be canceled by the banker if the Agency has given prior written consent. The Agency shall provide such consent when either the banker substitutes alternative financial assurance allowed under this rule and such alternate financial assurance is approved by the Agency and is effective or the Agency releases the banker from the requirements of this subsection.

(6) Irrevocable Letter of Credit.

(a) A mitigation banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by obtaining an irrevocable letter of credit that conforms to the requirements of this subsection. The irrevocable letter of credit shall be provided by a federally insured depository that is "well capitalized" or "adequately capitalized" as defined in Section 38 of the Federal Deposit Insurance Act [12 USC 1831o(b)]. The banker shall submit documentation evidencing proof of such that the federally insured depository is appropriately capitalized to the Agency.

(b) The irrevocable letter of credit shall be worded in substantial conformance with Form 62-342.700(6) 62-342.700(2), "Mitigation Bank Irrevocable Letter of Credit to Demonstrate Construction and/ Implementation Financial Assurance" (effective date February 19, 2015) [available at

<http://www.flrules.org/Gateway/reference.asp?No=Ref-05068> and as described in paragraph (5)(b) above], incorporated by reference herein. Deviations from the form shall be identified and submitted to the Agency for review and approval.

(c) A mitigation banker who uses an irrevocable letter of credit to satisfy the requirements of subsection 62-342.700(4), F.A.C., must also establish a standby escrow or standby trust fund when the irrevocable letter of credit is acquired. Under the terms of the irrevocable letter of credit, all amounts paid pursuant to a sight draft by the Agency will be deposited by the issuing institution directly into the standby escrow or standby trust fund to be distributed by the agent or trustee in accordance with instructions from the Agency. The standby escrow or standby trust fund must meet the requirements specified in subsections 62-342.700(9) and 62-342.700(10) ~~subsection 62-342.700(7)~~, F.A.C., respectively.

(d) Letters of credit must be irrevocable and issued for a period of at least one year, and the expiration date must be automatically extended for a period of at least one year unless, at least 120 days prior to the expiration date, the issuing institution notifies both the banker and the Agency by certified mail of a decision not to extend the expiration date. The terms of the irrevocable letter of credit must provide that the 120 days begins on the date when both the banker and the Agency have received the notice, as evidenced by the return receipts.

(7) Insurance Policy.

(a) A mitigation banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., for construction and implementation activities by obtaining an insurance policy that conforms to the requirements of this subsection. The insurance policy shall be provided by an insurance company that is authorized to transact insurance in the State of Florida and has at least an A+ rating in the A.M. Best's Key Rating Guide. The banker shall provide documentation to the Agency evidencing that the insurance company meets these requirements.

(b) The insurance policy must be worded in substantial conformance to Form 62-342.700(7), "Mitigation Bank Insurance Coverage Form" (date), incorporated by reference herein [available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-XXXX> and as described in paragraph (5)(b) above]. Deviations from the form to meet insurance company documentary requirements must satisfy all criteria listed on the "Mitigation Bank Insurance Form" and be identified and submitted to the Agency for review and approval.

(c) The insurance policy must be issued for a period of no less than one year beyond the anticipated completion and success of the mitigation bank, or the last success criterion insured, which ever occurs first based on the construction and implementation schedule in the mitigation bank permit.

(d) The insurance policy must be non-cancellable for the term of the policy. The insurance policy shall include a provision to notify the Agency and banker by certified mail at least 120 days prior to the termination of the policy, nonrenewal of the policy, or a change to the terms and conditions of the policy. The insurance policy must automatically renew for the same terms and conditions of the policy unless the insurance company provides notice of nonrenewal to the banker and the Agency as required in this subsection.

(e) Under the terms of the insurance policy, the Agency must have the authority to file claims when the banker either fails to perform under the terms of the mitigation bank permit, as determined solely by the Agency, or fails to replace the insurance policy with an alternative financial responsibility mechanism prior to the termination of the insurance policy. The insurance policy must afford the Agency with the sole authority to determine whether action taken or proposed to be taken by the insurance company is sufficient to satisfy a claim made by the Agency.

(f) The mitigation banker who uses an insurance policy to satisfy the requirements of subsection 62-342.700(4), F.A.C., must establish a standby escrow or standby trust fund when the insurance policy is acquired. Under the terms of the insurance policy, all amounts paid by the insurance company in satisfaction of a claim will be deposited directly into the standby escrow or standby trust fund for distribution by the agent or trustee in accordance with the Agency's instructions.

(g) The declaration's page of the insurance policy shall include all of the following items:

1. Insured location – the bank address;

2. Mitigation bank permit number;

3. Insurer's claim's notice address;

4. Regulatory entities and addresses, to include the U.S. Army Corps of Engineers;

5. Surplus line agent – name, address, license number;

6. Producing agent's name, address, and other contact information;

7. Insured's name, address, and other contact information;

8. Policy premium;

9. Limit of liability;

10. Policy inception and expiration dates;

11. Service fee;

12. Premium receipts tax; and

13. Deductible amount.

(8) Escrow.

(a) A mitigation banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by a deposit of cash into an interest-bearing escrow account with the Florida Department of Financial Services.

(b) The escrow agreement must be worded in substantial conformance to Form 62-342.700(8), "Standby Escrow Agreement" (date), incorporated by reference herein [available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-XXXX> and as described in paragraph (5)(b) above]. Deviations from the form must be identified and submitted to the Agency for review and approval.

(c) The escrow agreement must be irrevocable until the Agency determines that it is no longer required and authorizes a final payout.

(9) Standby Escrow.

(a) A mitigation banker using a surety or performance bond, irrevocable letter of credit, or insurance policy shall contemporaneously establish either a standby escrow with the Florida Department of Financial Services meeting the requirements of this subsection or a standby trust fund under subsection 62-342.700(10), F.A.C.

(b) The standby escrow agreement shall be worded in substantial conformance with Form 62-342.700(8), F.A.C., incorporated by reference in subsection 62-342.700(8), F.A.C., except that the agreement will identify that it is establishing a standby escrow account. Deviations from the form must be identified and submitted to the Agency for review and approval.

(c) The standby escrow agreement must be irrevocable until the Agency determines that it is no longer required.

(10)(7) Standby Trust Fund.

(a) A mitigation banker using a surety or performance bond, or irrevocable letter of credit, or insurance policy shall contemporaneously establish either a standby trust fund meeting the requirements of this subsection or a standby escrow under subsection 62-342.700(9), F.A.C. The trustee of the standby trust shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Florida in which the fund is established. The banker shall provide documentation evidencing proof of such regulation and examination to the Agency.

(b) The standby trust agreement shall be worded in substantial conformance with Form 62-342.700(10) 62-342.700(3), "Mitigation Bank Standby Trust Fund Agreement to Demonstrate Construction and Implementation Financial Assurance" (effective date February 19, 2015) [available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05069> and as described in paragraph (5)(b) above], incorporated by reference herein. Deviations from the form shall be identified and submitted to the Agency for review and approval. This form and Form 62-342.700(11) Forms 62-342.700(4), 62-342.700(5) and 62-342.700(6), incorporated in Rule 62-342.700, F.A.C., references reference the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-1 et seq. (February 19, 2015), which is incorporated by reference herein (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>). A copy of the Act may also be obtained by contacting the Division of Water Resource Management Submerged Lands and Environmental Resources Coordination Program, Department of Environmental Protection, 2600 Blair Stone Road, MS #2500, Tallahassee, Florida 32399-2400, (850)245-8336.

(11)(8) Trust Fund.

(a) A mitigation banker may satisfy the requirements of subsection 62-342.700(4), F.A.C., by establishing a trust fund that conforms to the requirements of this section. The trustee of the trust fund shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Florida in which the fund is established. The banker shall provide documentation evidencing proof of such regulation and examination to the Agency.

(b) The trust fund agreement must be worded in substantial conformance to Form 62-342.700(11) 62-

342.700(4), "Mitigation Bank Trust Fund Agreement to Demonstrate Construction and Implementation Financial Assurance" (effective date February 19, 2015) [available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05070> and as described in paragraph (5)(b) above], incorporated by reference herein. Deviations from the form shall be identified and submitted to the Agency for review and approval.

~~(12)~~(9) Financial Responsibility for Perpetual Management.

(a) A banker shall establish financial assurance ~~either a trust fund or an irrevocable letter of credit or surety or performance bond with a corresponding standby trust fund to provide financial responsibility~~ for the perpetual management of the Mitigation Bank, or phases thereof, using the financial responsibility mechanisms described in subsections 62-342.700(5) through (11), F.A.C., except that an insurance policy under subsection 62-342.700(7), F.A.C., may not be used. When an escrow agreement or trust fund agreement is used, the requirements of subsections ~~subsection 62-342.700(8) and 62-342.700(11), F.A.C., respectively,~~ must be met, except all references to construction and implementation in Forms 62-342.700(8) and 62-342.700(11) shall be changed to perpetual management. When a surety bond, ~~or~~ performance bond, guarantee bond, or letter of credit is used, with a standby trust fund agreement must be established by the banker~~fund,~~ and the requirements of subsections 62-342.700(5), 62-342.700(6), ~~62-342.700(9) and 62-342.700(10)~~ 62-342.700(7), F.A.C., respectively, must be met, except all references to construction and implementation on required forms and agreements shall be changed to perpetual management. ~~Trust fund agreements for perpetual management shall be worded in substantial conformance with Form 62-342.700(5), "Mitigation Bank Trust Fund Agreement to Demonstrate Perpetual Management Financial Assurance" (February 19, 2015) [available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05071> and as described in paragraph (5)(b) above], incorporated by reference herein. Standby trust fund agreements for perpetual management shall be worded in substantial conformance with Form 62-342.700(6) "Mitigation Bank Standby Trust Fund Agreement to Demonstrate Perpetual Management Financial Assurance" (February 19, 2015) [available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05072> and as described in paragraph (5)(b) above], incorporated by reference herein. Deviations from the form shall be identified and submitted to the Agency for review and approval.~~

(b) The amount of financial responsibility provided shall be sufficient to be reasonably expected to generate annual revenue equal to the annual cost of perpetual management, established under subsection ~~62-342.700(13)~~ 62-342.700(10), F.A.C., at an assumed average rate of return of six percent per annum, for the bank, or for banks constructed in phases, for all phases for which credits have been released.

(c) The financial responsibility mechanism must be in effect prior to the withdrawal of credits from the Mitigation Bank, or applicable phase thereof.

~~(13)~~(10) Cost estimates.

(a) For the purposes of determining the amount of financial responsibility that is required in this section, the banker shall submit a detailed written estimate, in current dollars, of the total cost of construction and implementation and of the cost of perpetual management of the Mitigation Bank. The written cost estimate shall be certified by a licensed professional whose license authority in the State of Florida includes the ability to provide such ~~certified written~~ estimates.

(b) The cost estimate for construction and implementation shall include all costs associated with completing construction and implementation of the Mitigation Bank, or phase thereof, including, as applicable, earthmoving, planting, exotic/nuisance vegetation removal, prescribed fire, land surveying, structure installation, consultant fees, taxes, monitoring activities and reports.

(c) The cost estimate for the perpetual management of the Mitigation Bank shall be based on the costs of maintaining and operating any structures, controlling nuisance or exotic species, fire management, consultant fees, monitoring activities and reports, taxes, and any other costs associated with perpetual management. The amount of financial responsibility shall equal the cost of perpetual management for the bank, or, for banks constructed in phases for all phases for which credits have been released.

(d) The banker shall submit written cost estimates, ~~together~~ with verifiable basis for the estimates to the Agency along with the financial responsibility mechanism. If more than one financial responsibility mechanism is proposed for the construction and implementation or for perpetual management, the cost estimate shall specify the appropriate mechanism for each itemized cost.

(e) The costs shall be estimated based on a third party performing the work at the fair market value of services.

The source of any cost estimates shall be indicated.

~~(14)(11)~~ Cost adjustments.

(a) Every two years, the banker shall undertake an estimate of the costs of the remaining construction and, implementation, and perpetual management. The banker shall submit the estimate to the Agency in writing certified by a person licensed ~~professional whose license authority~~ in the State of Florida ~~includes the ability~~ to provide such ~~certified written~~ estimates, accompanied by supporting documentation. Construction, implementation activity costs, and perpetual management costs shall be listed separately. The Agency shall review the cost adjustment statement and supporting documentation to determine if they reflect all construction, implementation costs, and perpetual management costs. If the cost adjustment statement and supporting documentation accurately reflect ~~reflects~~ a good faith estimate of all construction, implementation costs and perpetual management costs, the Agency shall approve the cost adjustment statement.

(b) At each cost adjustment, the banker shall revise the construction, implementation, and perpetual management cost estimate for inflation and changes in the costs to complete or undertake the current phase of the Mitigation Bank or appropriate phase thereof in accordance with subsection 62-342.700(13), F.A.C.

(c) Revised cost estimates shall be used as the basis for modifying the financial responsibility mechanisms ~~mechanism~~. If the value of any the financial responsibility mechanism is less than the total amount of the current construction, implementation and perpetual management cost estimates, the banker shall, upon Agency approval of the cost adjustment statement, increase the value of the financial mechanism to reflect the new estimate within 60 days. If the value of any the funding mechanism is greater than the total amount of the current cost estimate, the banker may reduce the value of the funding mechanism to reflect the new estimate upon receiving Agency approval of the cost adjustment statement.

(d) The Agency shall require adjustment of the amount of financial responsibility provided for construction, implementation and ~~or~~ perpetual management at times other than the cost adjustment period when the estimated costs associated with compliance with the permit conditions exceed the current amount of financial responsibility and such financial assurances are deemed necessary to ensure compliance with the permit conditions.

(e) The banker may provide revised cost estimates more frequently than every two years. If at any time the banker learns that actual costs exceed estimated costs by more than 25 percent, the banker shall provide a revised cost estimate and adjust the corresponding amount of financial responsibility under this rule section ~~rule section~~.

~~(15)(12)~~ Financial Responsibility for Governmental, Non-Department and Non-Water Management District, Mitigation Banks.

(a) A governmental entity ~~Governmental entities~~ other than the Department or Districts shall demonstrate reasonable assurances that it can meet the construction and implementation requirements in the Mitigation Bank Permit by any of the mechanisms in subsection 62-342.700(4), F.A.C., above, or by other financial mechanisms which are sufficient to meet the requirements of this section.

(b) Governmental entities other than the Department or Districts ~~District~~ shall establish a trust fund for the perpetual management of the Mitigation Bank which meets the requirements of subsection 62-342.700(11) ~~62-342.700(9)~~, F.A.C., above. The trust fund for perpetual management may be funded as Mitigation Credits are withdrawn, provided that the trust fund is fully funded when all Mitigation Credits are withdrawn. Governmental entities shall comply with the cost adjustment provisions in subsection 62-342.700(14) ~~62-342.700(11)~~, F.A.C.

Rulemaking Authority 373.4131, 373.4135(1), 373.4136(11) FS. Law Implemented 373.4131, 373.4135, 373.4136 FS. History—New 2-2-94, Formerly 17-342.700, Amended 12-12-94, 9-12-95, 5-21-01, 2-19-15,_____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Justin Green, Director, Division of Water Resource Management

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Noah Valenstein, Secretary

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: December 7, 2017

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: August 20, 2015

MITIGATION BANK INSURANCE COVERAGE FORM

This policy provides financial responsibility for construction and implementation authorized by the Mitigation Bank Permit (or Permit) as required by Rule 62-342.700, F.A.C. The specific construction and implementation activities to be covered under this Policy are described in the Mitigation Bank Permit as identified in the Declarations page of this Policy, and further detailed in the associated cost estimates, as modified from time to time.

Words and phrases that appear in quotation marks have special meaning. Refer to Section II – Definitions.

In consideration of the payment of the premium by you, we agree with you, subject to all terms, exclusions, and conditions of this Coverage Part, as follows:

I. INSURING AGREEMENT

If the Regulatory Agency determines, at its sole discretion, that the Mitigation Banker has failed to comply with the conditions of the Mitigation Bank Permit up to the point of achieving final success, and reports the claim to the Insurer during the policy period, then the Insurer agrees to satisfy the claim at the sole election and in the sole manner that is approved by the Regulatory Agency in writing.

II. DEFINITIONS

1. “Insurer” means:

[Insurer’s name and address]

2. “Insured Location” means the physical location of the Mitigation Bank site as identified in the Declarations of this policy.

3. “Mitigation Bank” means the project permitted under Chapter 373, Florida Statutes, and Chapter 62-342, F.A.C, or authorized by the U.S. Army Corps of Engineers.

4. “Mitigation Bank Permit” or “Permit” means all permit and U.S. Army Corps of Engineer Mitigation Bank Instrument numbers, referenced in the Declarations page, and as amended from time to time, issued to a person or entity to create, operate, manage, and maintain a mitigation bank. The term “Mitigation Bank Permit” shall also include the entire contents of the Regulatory Agency’s permit file, including but not limited to cost estimates submitted by the Permittee pursuant to Rule 62-342.700, F.A.C., or as required by the U.S. Army Corps of Engineers.

5. “Permittee” means the entity authorized to create, operate, manage, or maintain a Mitigation Bank pursuant to a Mitigation Bank Permit. The Permittee is also the “Named Insured” as set forth in the Declarations page of this policy.

6. “Policy Period” means the period set forth in the Declarations page, or any shorter period due to the cancellation or termination of the policy pursuant to the terms and conditions of the policy.

7. “Regulatory Agency” means the entity or entities set forth in the Declarations page of this policy pursuant to Rule 62-342.700, F.A.C.

III. LIMIT OF LIABILITY AND DEDUCTIBLE

1. The limits of liability shown in the Declarations page are the maximum amounts the Insurer will pay for claims reported during the policy period. The Regulatory Agency may make partial or multiple claims which shall not exceed the policy limit at the time of the claim. The Insurer will pay to the Regulatory Agency the full amount of any claim and may seek reimbursement for any deductible amounts included in the limits of liability from the Permittee.

2. The Permittee agrees to reimburse the Insurer for any deductible amounts as specified in the Declarations page. However, the Permittee's failure to reimburse the Insurer for all or part of a deductible amount does not reduce the amount the Insurer must pay the Regulatory Agency for a claim.

IV. LIMIT OF LIABILITY CHANGE — The limits of liability shall remain unchanged unless the Permittee requests in writing a modification in the limits of liability. Such requests must include a copy of the Regulatory Agency's written approval of the specific modification in the limits of liability. No modification in the limits of liability shall be authorized by the Insurer except upon prior written approval by the Regulatory Agency.

The Insurer shall modify the limits of liability to the amount approved by the Regulatory Agency by issuing an endorsement to the policy setting forth the new limits of liability. The Insurer shall provide all copies of endorsements modifying the limits of liability to the Permittee and Regulatory Agency at the address identified in the Declarations page to this policy.

Any change in the limit of liability without the prior written approval of the Regulatory Agency shall be invalid.

V. EXCLUSIONS

This insurance does not apply to claims or to any costs arising out of any claims based upon:

1. Any claim for which the Regulatory Agency did not provide notice in writing during the policy period.
2. Any property or location other than the insured property.
3. Any defense costs, including court fees, attorneys' fees, legal fees, expert witness fees, or other expenses or costs incurred in your defense for any reason.

VI. CLAIMS

1. The Regulatory Agency may provide written notice of a claim in the event the Regulatory Agency determines that the Permittee has:

- A. failed to comply with the conditions and terms of the Mitigation Bank Permit; or
- B. failed to replace this policy with an alternate financial responsibility mechanism within 90 days following receipt of notice of nonrenewal or notice of cancellation of the policy.

2. The Regulatory Agency shall provide written notice to the Insurer of a claim. Such claim notification must be in writing and may, at the Regulatory Agency's discretion, include copies of correspondence or other notification that the Regulatory Agency provided to the Permittee documenting

the noncompliance that resulted in the claim and any other information the Regulatory Agency deems relevant to the claim.

The Insurer agrees that the Regulatory Agency's knowledge of the Permittee's noncompliance with the terms of the Mitigation Bank Permit does not constitute late reporting of a claim. The Insurer also acknowledges and agrees that prior to filing a claim, the Regulatory Agency may first choose to advise the Insurer of how to come back into compliance with the Permit and allow reasonable time for the Permittee to correct any noncompliance of the Permit, may proceed against the Permittee in an enforcement action for violations of the Permit, or may discontinue the withdrawal of credits from the Mitigation Bank as authorized under Florida Administrative Code Chapter 62-342 or the enforcement authorities of the U.S. Army Corps of Engineers, and that doing any of these shall not act as a waiver of any claim. The Insurer also acknowledges and agrees that the Regulatory Agency is not required to exhaust its enforcement remedies against the Permittee prior to filing a claim.

3. The Regulatory Agency shall have the sole discretion and responsibility to determine which of the following methods shall be used by the Insurer to satisfy a claim under this policy:

- A. pay into a standby trust account or standby escrow account the amount the Regulatory Agency deems necessary to bring the Permittee into compliance with the Regulatory Agency's rules and statutes;
- B. perform such construction and implementation, as directed and approved by the Regulatory Agency and in accordance with the Mitigation Bank Permit, until success is achieved as set forth in the conditions of the Mitigation Bank Permit.

Upon satisfaction of a claim in accordance with this paragraph, the limit of liability will only reduce by the amount paid into a standby trust or standby escrow account, or by the approved amount actually paid by the Insurer to perform the construction and implementation activities in accordance with the Permit.

4. The Regulatory Agency has the sole obligation, responsibility, and authority for determining compliance with the conditions of the Mitigation Bank Permit including successful performance of the construction and implementation requirements of the Permit.

5. The Regulatory Agency has the sole authority and discretion to determine whether action taken or proposed to be taken by the Insurer is sufficient to satisfy a claim made by the Regulatory Agency. The Insurer shall not be released from its obligations to satisfy a claim until the Regulatory Agency provides written notice that the claim may be closed.

VII. NOTICE OF A CLAIM

1. All claims must be reported to the Insurer in writing at the claim's notice address as identified in the Declarations of this policy.

VIII. CONDITIONS

1. **ASSIGNMENT** — This policy is not assignable except with the prior written consent of the Insurer, which consent shall be granted at our sole discretion, and with prior written approval by the Regulatory Agency of a transfer of the Mitigation Bank Permit to the new proposed permittee.

2. **BANKRUPTCY** — Bankruptcy or insolvency of the Permittee or the Permittee’s agents, contractors, or subcontractors, shall not relieve the Insurer or Permittee of the obligations under this policy, including our obligation to pay claims to the Regulatory Agency not to exceed the limits of liability.
3. **RENEWAL** — The policy will automatically renew for the same terms and conditions as this policy unless the Insurer provides written notice of nonrenewal to the Permittee, the Regulatory Agency, and the U.S. Army Corps of Engineers no less than 120 days prior to the expiration of the policy period. The Insurer shall identify the project name and Mitigation Bank Permit number in any notice of nonrenewal.
4. **CANCELLATION** — This policy shall not be cancelled during the policy period and shall remain in effect until it is terminated or released upon written approval of the Regulatory Agency unless the Insurer provides written notice of cancellation to the Named Insured, the Regulatory Agency, and the U.S. Army Corps of Engineers no less than 120 days prior to cancellation of the policy. The Insurer shall identify the project name and Mitigation Bank Permit number in any notice of cancellation.
5. **AMENDMENTS TO THE POLICY**— No change or amendment to this policy is authorized except upon prior written approval of such change by the Regulatory Agency. If approved by the Regulatory Agency in writing, such change shall not become effective until the Insurer issues an endorsement to the policy identifying the approved amendment to the policy. The Insurer shall provide all copies of endorsements to the policy to the Permittee and Regulatory Agency at the addresses identified in the Declarations page to this policy. Any endorsement to the policy issued without the prior written approval of the Regulatory Agency shall be invalid.
6. **INDEPENDENT AGREEMENT** — This policy is a separate, independent agreement between the Insurer and the Permittee for the benefit of the Regulatory Agency as a third-party beneficiary. The Insurer and the Permittee hereby agree that only the Mitigation Bank Permit, including any attachments and exhibits attached therein, and applicable Florida statutes and rules, shall be used to interpret the provisions of this policy, and this policy shall not be used to interpret any other contract or agreement.
7. **THIRD PARTY BENEFICIARY** — The Regulatory Agency identified in the Declarations of this policy is the only third party beneficiary created as a result of this Policy. This policy gives no rights by or on behalf of any other parties.
8. **WAIVER OF NOTIFICATION** — The Insurer waives notification of amendments to the Mitigation Bank Permit, applicable laws, statutes, and regulations, and agrees that no such amendment shall in any way relieve the Insurer’s obligations under this policy.
9. **ACCESS TO PROPERTY**— The Permittee shall provide reasonable access to the Mitigation Bank site for the purpose of inspecting and investigating any claims made by the Regulatory Agency. The Permittee shall also provide the Insurer, and its contractors or agents, reasonable access to perform any construction and implementation activities as directed by the Regulatory Agency in satisfaction of a claim.
10. **OTHER FINANCIAL ASSURANCE** – The Insurer acknowledges and agrees that the Permittee is authorized under Rule 62-342.700, F.A.C., to have more than one form of financial responsibility collectively covering all construction and implementation activities required by the Permit. If more than one financial responsibility mechanism is used to provide financial assurance for the construction and implementation activities of the Mitigation Bank, this policy will insure the specific construction and implementation activities indicated in the cost estimates as being covered by this policy. The existence of

more than one form of financial responsibility for the construction and implementation of the Mitigation Bank shall in no way limit the Regulatory Agency's ability to file a claim under this policy or limit the Insurer's obligation to satisfy a claim for specific construction and implementation activities covered by this policy.

11. **RELIANCE UPON REPRESENTATIONS** — It is agreed by the Insurer and Permittee that the Permit, and any modifications thereto, shall be on file with the Insurer and is deemed attached hereto as if physically attached to the policy. By acceptance of this policy, the Permittee agrees that the statements in the Declarations page and the Permit are the Permittee's agreements and representations, that this policy is being issued in reliance upon the truth of these representations and that this policy embodies all agreements existing between Permittee and Insurer. Misrepresentations by the Named Insured shall not invalidate the Insurer's obligation to the Regulatory Agency in the event of a claim.

12. **INSPECTION, REVIEW AND AUDIT** — The Insurer is authorized but is not obligated to inspect, sample, audit, review or monitor the Permittee or the Mitigation Bank site upon providing reasonable advance notice with consideration for the timing of such notice and any site access requirements. These actions by the Insurer cannot interfere with, or delay, the completion of any activities by the Permittee as set forth in the Permit.

13. **FULLY EARNED PREMIUM** — The policy premium set forth in the Declarations page is fully earned on the inception date of this policy. Any cancellation or termination of the policy under the provisions allowable in this policy, regardless of the party instituting the cancellation or termination, shall not result in the return of any policy premium.

14. **SUBROGATION** — In the event that the Insurer makes any payment under this policy, the Insurer shall be subrogated to all of the rights of recovery that the Permittee may have against any person or organization other than the Regulatory Agency or its designee. The Permittee shall execute all papers and take all necessary actions to secure such rights, including the execution of any documents necessary to enable the Insurer to effectively bring suit in the name of the Permittee. The failure of the Permittee to execute all papers and take all necessary actions to secure such rights shall not relieve the Insurer's obligation under this policy in the event of a claim by the Regulatory Agency.

15. **VENUE** — This policy is governed by the laws of Florida. It is understood and agreed that any litigation which may arise under or in connection with this policy, including any determination of the amount of loss, shall be brought only in a state court in Leon County, which shall have exclusive jurisdiction over such litigation.

16. **SERVICE OF SUIT** — Florida law requires that the Chief Financial Officer of the State of Florida be designated as the Insurer's agent for service of process. In Florida, the Insurer designates the Chief Financial Officer as the Insurer's true and lawful attorney upon whom service of process on the Insurer behalf may be made. The Insurer also authorizes the Chief Financial Officer to mail process received on the Insurer's behalf to the person named below:

{name/address of company person }

17. **WAIVER IN THE EVENT OF FRAUD OR MISREPRESENTATION** – The Insurer acknowledges and agrees that in no way shall fraud or misrepresentation by the Permittee relieve the Insurer of its obligation in the event of a claim made by the Regulatory Agency under this Policy.

18. **COOPERATION CLAUSE** – The Permittee agrees to provide the Insurer with any information, assistance, and cooperation requested in writing by the Insurer in the event of a claim made by the

Regulatory Agency. The Insurer acknowledges and agrees that any failure of the Permittee to cooperate with the Insurer shall not relieve the Insurer of its obligation to satisfy a claim made by the Regulatory Agency under this Policy.

ESCROW (STANDBY ESCROW) AGREEMENT

Regarding (Name of) Mitigation Bank, Permit No. _____

THIS ESCROW AGREEMENT ("Agreement") is made and entered into by and between the State of Florida, _____ ("Agency") _____ ("Permittee"), and the State of Florida, Department of Financial Services, Division of Treasury ("Escrow Agent"), and shall become effective upon the Agreement's execution by Escrow Agent.

WHEREAS, the Agency and Permittee desire to establish an escrow account to carry out the obligations of the Permittee under the Permit ("Mitigation Bank").

NOW THEREFORE, in consideration of the premises and the covenants contained herein, the Parties agree to the following:

1. All capitalized terms used but not defined herein shall have the meanings set forth in the Permit.

2. An initial deposit will be made into an escrow account (the "Account") established hereunder for the purpose of accomplishing the Mitigation Bank. The Account will be opened with the Escrow Agent on behalf of the Agency upon Escrow Agent's receipt and execution of this Agreement. If established as a "standby" escrow, the Account shall remain empty until funded by proceeds from a financial instrument (e.g., letter of credit, surety bond, or insurance policy) in the same amount.

3. Other deposits to the Account may be made during the term of this Agreement.

4. Deposits will be delivered by Permittee or the Agency in accordance with instructions provided by the Escrow Agent, for deposit into the Account. A wire transfer or ACH deposit is the preferred method of payment and should be used whenever possible.

5. The Agency representative or designee (in writing or by adopted directive) shall be the sole signatories on the Account with the Escrow Agent and shall have exclusive authority to authorize withdrawals from the Account. Withdrawals will only be made in accordance with the instructions provided to the Escrow Agent by the Agency representative or designee.

6. Moneys in the Account will be invested in accordance with section 17.61, Florida Statutes. The Escrow Agent will invest the moneys expeditiously following receipt. Income is only earned on the moneys while invested. There is no guaranteed rate of return. Investments in the Account will be assessed a fee in accordance with section 17.61(4)(b), Florida Statutes. All income from the investments shall accrue to the Account.

7. Unless instructed otherwise by the Agency, all income accumulated in the Account shall remain in the Account and be available for the purposes of performing the Mitigation Bank.

8. The Agency may request the Escrow Agent to provide written confirmation of receipt of funds by electronic mail, which the Agency is authorized to re-distribute, including to Permittee.

9. The Escrow Agent agrees to provide quarterly reports to the Agency by electronic mail concerning the Account, which the Agency is authorized to re-distribute, including to Permittee.

10. The Escrow Agent shall not be liable for any error of judgment or for any act done or omitted by it in good faith, or for anything which it may in good faith do or refrain from doing in connection herewith.

11. The Escrow Agent shall have no liability for any claim, cost, expense, damage or loss due to the acts or omissions of the Agency and/or Permittee, nor from any separate agreements between the Agency and Permittee and shall have no responsibility to monitor or enforce any responsibilities herein or in any separate agreements associated with this Agreement between the Agency and Permittee.

ESCROW (STANDBY ESCROW) AGREEMENT
Regarding (Name of) Mitigation Bank, Permit No. _____

12. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida, and any dispute arising hereunder shall be brought in a court of competent jurisdiction in Leon County, Florida.

13. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. In the event that any signature is delivered by facsimile transmission or by e-mail delivery of a ".pdf" format data file, such signature shall create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof.

14. This Agreement shall terminate upon disbursement by the Escrow Agent of all money held by it in the Account in accordance with the instructions given by the Agency representative or designee and notification from the Agency to Escrow Agent that the Account is to be closed.

In WITNESS WHEREOF, the parties have duly executed this Agreement on the date(s) below.

PERMITTEE: [insert name]

BY: _____

Name: _____

Title: _____

Date: _____

Address: _____

Federal Employer Identification Number: _____

AGENCY: [INSERT NAME]

By: _____

Name: _____

Title: _____

Date: _____

Address: _____

ESCROW (STANDBY ESCROW) AGREEMENT
Regarding (Name of) Mitigation Bank, Permit No. _____

ESCROW AGENT:

STATE OF FLORIDA, DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF TREASURY

BY: _____

Name: _____

Title: _____

Date: _____

Address: 1801 Hermitage Blvd., Suite 470
Tallahassee, FL 32308

Attach/insert the
AUTHORIZED SIGNATURE CERTIFICATION

STATE OF FLORIDA
MITIGATION BANK TRUST FUND AGREEMENT TO DEMONSTRATE
(CONSTRUCTION AND IMPLEMENTATION
or PERPETUAL MANAGEMENT) FINANCIAL ASSURANCE

TRUST AGREEMENT, the "Agreement," entered into as of _____ by and
Date
between _____
Name of Mitigation Banker
a _____ (the Grantor);
Name of State Insert "corporation, partnership, association, or proprietorship",
and _____
Name and Address of Corporate Trustee
_____ (the Trustee);
Insert "incorporated in the State of ____" or "a national bank"

WHEREAS, Grantor is the owner of certain real property in _____ County, Florida, and has received from the _____ ("Agency") that certain permit number _____ ("Mitigation Bank Permit"), as modified from time to time, which authorizes the construction and implementation of the _____ Mitigation Bank;

WHEREAS, the Agency, a Florida (for DEP, use: state agency created under Section 20.255) (for a WMD, use: public entity created under Chapter 373) of the Florida Statutes, has established certain regulations applicable to the Grantor, requiring that a Mitigation Bank permittee shall provide assurance that funds will be available when needed for corrective action if Grantor fails to construct and implement that Mitigation Bank,

WHEREAS, the Grantor has elected to establish this trust fund ~~agreement~~ to provide such financial assurance for the _____ Mitigation Bank identified herein,

WHEREAS, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the [insert Mitigation Banker's Name] who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means [insert Trustee's trustee's name] the Trustee who enters into this Agreement and any successor Trustee.

(c) The term "Agency" means the _____, a public entity in the State of Florida or any successor thereof.

(d) The term “investment obligations” means:

(i) United States of America Treasury and Federal agency securities or other obligations issued or unconditionally guaranteed as to principal and interest by the United States of America, in each case with maturities of not more than one year from the date acquired;

(ii) Demand deposits, certificates of deposit, banker’s acceptances and time deposits of any bank organized or licensed to conduct a banking business under the laws of the United States of America or any state thereof having capital, surplus and undivided profits of not less than \$100,000,000, and whose deposits are insured by the Federal Deposit Insurance Corporation or any successor thereof;

(iii) Securities of entities incorporated under the laws of the United States of America or any State thereof commonly known as “commercial paper” that at the time of purchase have been rated and the ratings for which are not less than “P1” if rated by Moody’s Investors Services, Inc., and not less than “A1” if rated by Standard and Poor’s Corporation, in each case with maturities of not more than one year from the date acquired;

(iv) State or local government securities, which debt obligations at the time of purchase are rated investment grade by one or more nationally recognized rating agencies, in each case with maturities of not more than one year from the date acquired;

(v) Repurchase obligations with any banking or financial institution described in clause (ii) above which are fully collateralized at all times by any of the foregoing obligations;

(vi) Corporate fixed income securities whose ratings at the time of purchase are rated not less than “A-” if rated by Standard and Poor’s Corporation and “A3” if rated by Moody’s Investors Services, Inc. in each case with maturities of not more than one year from the date acquired; and

(vii) Investments in any one or more professionally managed money market funds generally regarded as investment grade with a portfolio size of not less than \$100,000,000.

Section 2. Identification of Cost Estimates. This Agreement pertains to the cost estimate for construction and implementation of the _____ Mitigation Bank identified in the Mitigation Bank Permit or provided to the Agency in accordance with Rule 62-342.700, F.A.C., Attachment A hereto.

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund (the Fund), for the benefit of the Agency (hereafter sometimes referred to as the “Beneficiary”). The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established by the Grantor’s deposit of \$_____ into the Fund. Such monies and other monies subsequently placed in the Fund are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, for the benefit of the Agency as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the Agency.

Section 4. Additional Payments into the Fund. After the initial deposit of principal into the Fund, the Grantor shall increase the principal if so required by the Agency pursuant to its administrative regulations and the requirements of the Mitigation Bank Permit. Such deposit may be in cash or securities acceptable under Section 1(d) hereof.

Section 5. Payment for Completing Construction and Implementation. The Trustee shall make payments from the Fund as the Secretary or Executive Director of the Agency, or designee, shall direct in writing to provide for the payment of the costs of completing construction and implementation of the Mitigation Bank covered by this Agreement pursuant to the requirements of the Mitigation Bank Permit. The Trustee shall reimburse persons specified by the Agency from the Fund for construction and implementation expenditures in such amounts as the Agency shall direct in writing. In the event of conflicting instructions from the Grantor and the Agency, the Agency's instructions shall prevail. In addition, the Trustee shall refund to the Grantor such amounts as the Agency specifies in writing as unnecessary or excessive corpus for purposes of the trust. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of Grantor under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of Grantor arising from, and in the course of employment by Grantor;
- (c) Bodily injury or non-realty property damage arising from the ownership, maintenance, use, or entrustment to others by Grantor of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by Grantor that is not the direct result of the construction and implementation of the Mitigation Bank; or
- (e) Bodily injury or property damage for which Grantor is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund in one or more investment obligations and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge its duties with respect to the trust fund solely in the interest of the Agency and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations of the Grantor, or any other owner or operator of the Mitigation Bank, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a) (February 19, 2015), which is a subsection of the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq. (February 19, 2015) that is incorporated by reference in Rule 62-342.700, F.A.C. (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;
- (b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or a state government; and
- (c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-1 et seq. (February 19, 2015), which is incorporated by reference in Rule 62-342.700, F.A.C. (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>), including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Power of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even

though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or a State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation. The Trust shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Agency (to the attention of Environmental Resource Permitting Program for the (name) Mitigation Bank, Permit #) a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the Grantor or the Agency to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Agency shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. Grantor shall pay the Trustee any necessary fees for services rendered. Where the Grantor is no longer in existence, the Trustee is authorized to charge against the Trust its published Trust fee schedule in effect at the time services are rendered. However, all Trustee compensation charged against the Trust shall be paid only from trust income, unless the Agency authorizes payment from the trust principal in writing.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee, the successor is approved by the Agency, and this successor accepts the appointment. The successor Trustee shall have the same powers and duties as those conferred upon the Trustee hereunder.

Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor Trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Agency may nominate a successor. If the Agency does not act, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor Trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Agency, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 12.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by _____ or such other designees as the Grantor may designate by amendment to this agreement. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Agency to the Trustee shall be in writing, signed by the Agency's Secretary or Executive Director, or designee, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Agency hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the Agency, except as provided for herein.

Section 15. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Agency, or by the Trustee and the Agency if the Grantor dies, is legally incapacitated, is administratively or judicially dissolved or otherwise ceases to exist.

Section 16. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 15, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Agency, or by the Trustee and the Agency, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered pursuant to the written agreement terminating the trust or, if the Grantor has ceased to exist, then to the Agency.

Section 17. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Agency issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 18. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Florida.

Section 19. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

Signature of Grantor

Signature of Trustee

Title

Title

Attest: _____

Attest: _____

Title

Title

Seal

Seal

[Optional language: notary acknowledgment]

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20____, by _____, the _____ of _____, a Florida corporation, on behalf of the corporation. Such person did not take an oath and:

- _____ is/are personally known to me
- _____ produced a current Florida driver's license as identification
- _____ produced _____ as identification

Signature of Notary

(Notary Seal)

Name of Notary (typed, printed or stamped)
Commission number (if not legible on seal) _____
My commission expires: (if not legible on seal) _____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20____, by _____, the _____ of _____ Bank, on behalf of the corporation. Such person did not take an oath and:

- _____ is/are personally known to me
- _____ produced a current Florida driver's license as identification
- _____ produced _____ as identification

Signature of Notary

(Notary Seal)

Name of Notary (typed, printed or stamped)
Commission number (if not legible on seal) _____
My commission expires: (if not legible on seal) _____

ATTACHMENT A

{COST ESTIMATE FOR CONSTRUCTION AND IMPLEMENTATION}

With proposed revisions to 62-342.700(11) Financial Responsibility for Perpetual Management, Forms (5) and (6) Perpetual Management Trust and Standby will be stricken. Rulemaking will incorporate proposed new Insurance and Escrow forms.

This will be deleted

STATE OF FLORIDA

MITIGATION BANK TRUST FUND AGREEMENT TO DEMONSTRATE PERPETUAL MANAGEMENT FINANCIAL ASSURANCE

TRUST AGREEMENT, the "Agreement," entered into as of _____ by and
Date
between _____
Name of Mitigation Banker
a _____ (the Grantor,) Name of State Insert "corporation, partnership, association, or proprietorship",
and _____ Name and Address of Corporate Trustee
_____ (the Trustee.)
Insert "incorporated in the State of ____" or "a national bank"

WHEREAS, Grantor is the owner of certain real property in _____ County, Florida, and has received from the _____ ("Agency") that certain permit number _____ ("Mitigation Bank Permit") which authorizes the construction and implementation of the _____ Mitigation Bank;

WHEREAS, the Agency, a Florida (for DEP, use: state agency created under Section 20.255) (for a WMD, use: public entity created under Chapter 373) of the Florida Statutes, has established certain regulations applicable to the Grantor, requiring that a Mitigation Bank permittee shall provide assurance that funds will be available when needed for corrective action if Grantor fails to perpetually manage that Mitigation Bank pursuant to the requirements of the Mitigation Bank Permit,

WHEREAS, the Grantor has elected to establish this trust fund agreement to provide such financial assurance for the _____ Mitigation Bank identified herein,

WHEREAS, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

- (a) The term "Grantor" means the _____ who enters into this Agreement and any successors or assigns of the Grantor. [insert Mitigation Banker's name]
- (b) The term "Trustee" means _____ the Trustee who enters into [insert Trustee's name]

this Agreement and any successor Trustee.

(c) The term “Agency” means the _____, a public entity in the State of Florida or any successor thereof.

(d) The term “investment obligations” means:

(i) United States of America Treasury and Federal agency securities or other obligations issued or unconditionally guaranteed as to principal and interest by the United States of America, in each case with maturities of not more than one year from the date acquired;

(ii) Demand Deposits, certificates of deposit, bankers acceptances and time deposits of any bank organized or licensed to conduct a banking business under the laws of the United States of America or any state thereof having capital, surplus and undivided profits of not less than \$100,000,000, and whose deposits are insured by the Federal Deposit Insurance Corporation or any successor thereof;

(iii) Securities of entities incorporated under the laws of the United States of America or any State thereof commonly known as “commercial paper” that at the time of purchase have been rated and the ratings for which are not less than “P1” if rated by Moody’s Investors Services, Inc., and not less than “A1” if rated by Standard and Poor’s Corporation, in each case with maturities of not more than one year from the date acquired;

(iv) State or local government securities, which debt obligations at the time of purchase are rated investment grade by one or more nationally recognized rating agencies, in each case with maturities of not more than one year from the date acquired;

(v) Repurchase obligations with any banking or financial institution described in clause (ii) above which are fully collateralized at all times by any of the foregoing obligations;

(vi) Corporate fixed income securities whose ratings at the time of purchase are rated not less than “A-” if rated by Standard and Poor’s Corporation and “A3” if rated by Moody’s Investors Services, Inc. in each case with maturities of not more than one year from the date acquired; and

(vii) Investments in any one or more professionally managed money market funds generally regarded as investment grade with a portfolio size of not less than \$100,000,000.

Section 2. Identification of Cost Estimates. This Agreement pertains to the cost estimate for perpetual management of the _____ Mitigation Bank identified in Attachment A hereto.

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund (the Fund), for the benefit of the Agency (hereafter sometimes referred to as the “Beneficiary”). The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established by the Grantor’s deposit of \$_____ into the Fund. Such monies and other monies subsequently placed in the Fund are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, for the benefit of the Agency as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of,

nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the Agency.

Section 4. Additional Payments into the Fund. After the initial deposit of principal into the Fund, the Grantor shall increase the principal if so required by the Agency pursuant to its administrative regulations and the requirements of the Mitigation Bank Permit. Such deposit may be in cash or securities acceptable under Section 1(d) hereof.

Section 5. Payment for Undertaking Perpetual Management Activities. The Trustee shall make payments from the Fund as the Grantor or the Secretary or Executive Director of the Agency, or designee, shall direct in writing to provide for the payment of the costs of undertaking activities to provide for the perpetual management of the Mitigation Bank covered by this Agreement pursuant to the requirements of the Mitigation Bank Permit. The Trustee shall reimburse persons specified by the Grantor or the Agency from the Fund for perpetual management expenditures in such amounts as the Grantor or the Agency shall direct in writing. In the event of conflicting instructions from the Grantor and the Agency, the Agency's instructions shall prevail. The Trustee shall not make any payments from the principal of the Fund pursuant to the Grantor's direction without the Department's written consent. The Trustee shall cease honoring Grantor's instructions if so directed by the Agency in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Agency specifies in writing as unnecessary or excessive corpus for purposes of the trust. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of Grantor under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of Grantor arising from, and in the course of employment by Grantor;
- (c) Bodily injury or non-realty property damage arising from the ownership, maintenance, use, or entrustment to others by Grantor of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by Grantor that is not the direct result of the construction and implementation of the Mitigation Bank; or
- (e) Bodily injury or property damage for which Grantor is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund in one or more investments and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge its duties with respect to the trust fund solely in the interest of the Agency and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of

prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations of the Grantor, or any other owner or operator of the Mitigation Bank, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a) (February 19, 2015), which is a subsection of the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq. (February 19, 2015) that is incorporated by reference in Rule 62-342.700, F.A.C. (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;
- (b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or a state government; and
- (c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-1 et seq. (February 19, 2015), which is incorporated by reference in Rule 62-342.700, F.A.C. (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>), including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Power of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or

to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or a State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation. The Trust shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Agency a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the Grantor or the Agency to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Agency shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. Grantor shall pay the Trustee any necessary fees for services rendered. Where the Grantor is no longer in existence, the Trustee is authorized to charge against the Trust its published Trust fee schedule in effect at the time services are rendered. However, all Trustee compensation charged against the Trust shall be paid only from trust income unless the Agency authorizes payment from the trust principal in writing.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee, the successor is approved by the Agency, and this successor accepts the appointment. The successor Trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor Trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor Trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Agency may nominate a

successor. If the Agency does not act, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor Trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Agency, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 12.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by _____ or such other designees as the Grantor may designate by amendment to this agreement. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Agency to the Trustee shall be in writing, signed by the Agency's Secretary or Executive Director, or designee, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Agency hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the Agency, except as provided for herein.

Section 15. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Agency, or by the Trustee and the Agency if the Grantor dies, is legally incapacitated, is administratively or judicially dissolved or otherwise ceases to exist.

Section 16. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 15, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Agency, or by the Trustee and the Agency, if the Grantor dies, is legally incapacitated, is administratively or judicially dissolved or otherwise ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered pursuant to the written agreement terminating the trust or where Grantor has ceased to exist, then to the Agency.

Section 17. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Agency issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 18. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Florida.

Section 19. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

Signature of Grantor

Signature of Trustee

Title

Title

Attest:

Attest:

Title

Title

Seal

Seal

[Optional language: notary acknowledgment]

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20____,
by _____, the _____ of _____, a Florida corporation,
on behalf of the corporation. Such person did not take an oath and:

_____ is/are personally known to me
_____ produced a current Florida driver's license as identification
_____ produced _____ as identification

Signature of Notary

(Notary Seal)

Name of Notary (typed, printed or stamped)
Commission number (if not legible on seal) _____
My commission expires: (if not legible on seal) _____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20____,
by _____, the _____ of _____ Bank, on behalf of the
corporation. Such person did not take an oath and:

_____ is/are personally known to me
_____ produced a current Florida driver's license as identification
_____ produced _____ as identification

Signature of Notary

(Notary Seal)

Name of Notary (typed, printed or stamped)
Commission number (if not legible on seal) _____
My commission expires: (if not legible on seal) _____

ATTACHMENT A

PERPETUAL MANAGEMENT COST ESTIMATE

With proposed revisions to 62-342.700(11) Financial Responsibility for Perpetual Management, Forms (5) and (6) Perpetual Management Trust and Standby will be stricken

This will be deleted

STATE OF FLORIDA

MITIGATION BANK STANDBY TRUST FUND AGREEMENT TO DEMONSTRATE PERPETUAL MANAGEMENT FINANCIAL ASSURANCE

TRUST AGREEMENT, the "Agreement," entered into as of _____ by and
Date
between _____
Name of Mitigation Banker
a _____ (the Grantor,) Name of State Insert "corporation, partnership, association, or proprietorship"
and _____ Name and Address of Corporate Trustee
_____ (the Trustee.)
Insert "incorporated in the State of ____" or "a national bank"

WHEREAS, Grantor is the owner of certain real property in _____ County, Florida, and has received from the _____ ("Agency") that certain permit number _____ ("Mitigation Bank Permit") which authorizes the construction and implementation of the _____ Mitigation Bank;

WHEREAS, the Agency, a Florida (for DEP, use: state agency created under Section 20.255) (for a WMD, use: public entity created under Chapter 373), Florida Statutes, has established certain regulations applicable to the Grantor, requiring that a mitigation bank permittee shall provide assurance that funds will be available when needed for corrective action if Grantor fails to perpetually manage that mitigation bank pursuant to the requirements of the Mitigation Bank Permit,

WHEREAS, the Grantor has elected to establish _____ to provide the
[insert either a "surety bond" or "letter of credit"]
perpetual management financial assurance for the _____ Mitigation Bank identified herein and is required to establish a standby trust fund able to accept payments from that instrument,

WHEREAS, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means _____ the who enters into this Agreement and
[insert Mitigation Banker's name]
any successors or assigns of the Grantor.

(b) The term "Trustee" means _____ the Trustee who enters into this Agreement
[insert Trustee's name]
and any successor Trustee.

(c) The term "Agency" means the _____, a public entity in the State of Florida or any successor thereof.

(d) The term "investment obligations" means:

(i) United States of America Treasury and Federal agency securities or other obligations issued or unconditionally guaranteed as to principal and interest by the United States of America, in each case with maturities of not more than one year from the date acquired;

(ii) Demand deposits, certificates of deposit, banker's acceptance and time deposits of any bank organized or licensed to conduct a banking business under the laws of the United States of America or any state thereof having capital, surplus and undivided profits of not less than \$100,000,000, and whose deposits are insured by the Federal Deposit Insurance Corporation or any successor thereof;

(iii) Securities of entities incorporated under the laws of the United States of America or any State thereof commonly known as "commercial paper" that at the time of purchase have been rated and the ratings for which are not less than "P1" if rated by Moody's Investors Service, Inc., and not less than "A1" if rated by Standard and Poor's Corporation, in each case with maturities of not more than one year from the date acquired;

(iv) State or local government securities, which debt obligations at the time of purchase are rated investment grade by one or more nationally recognized rating agencies, in each case with maturities of not more than one year from the date acquired;

(v) Repurchase obligation with any banking or financial institution described in clause (ii) above which are fully collateralized at all times by any of the foregoing obligations;

(vi) Corporate fixed income securities whose ratings at the time of purchase are rated not less than "A-" if rated by Standard and Poor's Corporation and "A3" if rated by Moody's Investors Service, Inc. in each case with maturities of not more than one year from the date acquired; and (vii) Investments in any one or more professionally managed money market funds generally regarded as investment grade with a portfolio size of not less than \$100,000,000.

Section 2. Identification of Cost Estimates. This Agreement pertains to the cost estimate for perpetual management of the _____ Mitigation Bank identified in Attachment A hereto.

Section 3. Standby Trust. This trust shall remain dormant until funded with the proceeds from the financial mechanism listed on Attachment A. The Trustee shall have no duties or responsibilities beyond safekeeping this document. Upon funding this trust shall become active and be administered pursuant to the terms of this instrument.

Section 4. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund (the Fund), for the benefit of the Agency (hereafter sometimes referred to as the “Beneficiary”) The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as a standby to receive payments and shall not consist of any property. Payments made by the Grantor pursuant to the Agency’s instructions are transferred to the Trustee and referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, for the benefit of the Agency as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the Agency.

Section 5. Initial Payments Comprising the Fund. Initial payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee and shall consist solely of proceeds from the _____ identified in Attachment A hereto.
[Insert “Letter of Credit” or “Surety Bond”]

Section 6. Additional Payments into the Fund. After the initial deposit of principal into the Fund, the Grantor shall increase the principal if so required by the Agency pursuant to its administrative regulations and the requirements of the Mitigation Bank Permit. Such deposit may be in cash or Securities acceptable under Section 1(d) hereof.

Section 7. Payment for Undertaking Perpetual Management Activities. The Trustee shall make payments from the Fund as the Secretary or Executive Director of the Agency or designee shall direct in writing, to provide for the payment of the costs of undertaking activities to provide for the perpetual management of the mitigation bank covered by this Agreement pursuant to the requirements of the Mitigation Bank Permit. The Trustee shall reimburse persons specified by the Agency from the Fund for perpetual management expenditures in such amounts as the Agency shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Agency specifies in writing as unnecessary or excessive corpus for purposes of the trust. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of Grantor under a workers’ compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of Grantor arising from, and in the course of employment by Grantor;
- (c) Bodily injury or non-realty property damage arising from the ownership, maintenance, use, or entrustment to others by Grantor of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by Grantor that is not the direct result of the construction and implementation of the mitigation bank; or

(e) Bodily injury or property damage for which Grantor is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

Section 8. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund in one or more investments and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge its duties with respect to the trust fund solely in the interest of the Agency and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations of the Grantor, or any other owner or operator of the mitigation bank, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a) (February 19, 2015), which is a subsection of the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq. (February 19, 2015) that is incorporated by reference in Rule 62-342.700, F.A.C. (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;
- (b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or a state government; and
- (c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 9. Commingling and Investment. The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-1 et seq. (February 19, 2015), which is incorporated by reference in Rule 62-342.700, F.A.C. (<http://www.flrules.org/Gateway/reference.asp?No=Ref-05064>), including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 10. Express Power of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the

purchase money or to inquire into the validity or expediency of any such sale or other disposition;

- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;
- (d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or a State government; and
- (e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 11. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 12. Annual Valuation. The Trust shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Agency a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the Grantor or the Agency to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Agency shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 13. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 14. Trustee Compensation. Grantor shall pay the Trustee any necessary fees for services rendered. Where the Grantor is no longer in existence, the Trustee is authorized to charge against the Trust its published Trust fee schedule in effect at the time services are rendered. However, all Trustee

compensation charged against the Trust shall be paid from trust income unless the Agency authorizes payment from the trust principal in writing.

Section 15. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee, the successor is approved by the Agency and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor Trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor Trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Agency may nominate a successor. If the Agency does not act, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Agency, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 14.

Section 16. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by _____ or such other designees as the Grantor may designate by amendment to this agreement. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Agency to the Trustee shall be in writing, signed by the Agency's Secretary or Executive Director, or designee, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Agency hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the Agency, except as provided for herein.

Section 17. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Agency, or by the Trustee and the Agency if the Grantor dies, is legally incapacitated, is administratively or judicially dissolved or otherwise ceases to exist.

Section 18. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 17, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Agency, or by the Trustee and the Agency, if the Grantor dies, is legally incapacitated, is administratively or judicially dissolved or otherwise ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered pursuant to the written agreement terminating the trust or, where Grantor has ceased to exist, then to the Agency.

Section 19. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Agency issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or

conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 20. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Florida.

Section 21. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

Signature of Grantor

Signature of Trustee

Title

Title

Attest:

Attest:

Title

Title

Seal

Seal

[Optional language: notary acknowledgment]

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20____,
by _____, the _____ of _____, a Florida corporation,
on behalf of the corporation. Such person did not take an oath and:

_____ is/are personally known to me
_____ produced a current Florida driver's license as identification
_____ produced _____ as identification

Signature of Notary

(Notary Seal)

Name of Notary (typed, printed or stamped)
Commission number (if not legible on seal) _____
My commission expires: (if not legible on seal) _____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20____,
by _____, the _____ of _____ Bank, on behalf of the
corporation. Such person did not take an oath and:

_____ is/are personally known to me
_____ produced a current Florida driver's license as identification
_____ produced _____ as identification

Signature of Notary

(Notary Seal)

Name of Notary (typed, printed or stamped)
Commission number (if not legible on seal) _____
My commission expires: (if not legible on seal) _____

ATTACHMENT A

SURETY BOND OR IRREVOCABLE LETTER OF CREDIT

STATE OF FLORIDA

MITIGATION BANK PERFORMANCE BOND
TO DEMONSTRATE (CONSTRUCTION AND IMPLEMENTATION
or PERPETUAL MANAGEMENT) FINANCIAL ASSURANCE

Bond Beneficiary/Insured: Agency (specific reference to permit/section)
Address (specific reference to permit/section)

Date bond executed: _____

Period of coverage: _____

Effective date: _____

Principal:

Legal Name and Business Address of Mitigation Banker/Permittee

Type of Organization: _____ (such as individual, LLC, Corporation, etc.) Individual
_____ Joint Venture
_____ Partnership
_____ Corporation

State of Incorporation: _____

Surety(ies): _____
Name(s) and Business Address(es) of the Bonding Companies

Scope of coverage: (select Construction and implementation or Perpetual Management) of the
(name) Mitigation Bank pursuant to the requirements of permit number _____ ("Mitigation
Bank Permit") issued by the _____ (Agency) including the plans approved by said
permit.

Total penal sum of bond: _____

Surety's bond number: _____

Know All Persons By These Presents, that we, the Principal and Surety(ies) hereto are firmly bound to the Agency in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be full amount of the penal sum.

WHEREAS, said Principal is required, under Section 373.4136, Florida Statutes, as amended, to have a permit in order to construct, implement and manage the Mitigation Bank identified above, and

WHEREAS, said Principal is required by Section 373.4136, Florida Statutes, and the administrative rules of the Agency to provide financial assurance for construction and implementation of the Mitigation Bank as a condition of the permit(s) as further described in the scope of coverage above, and

WHEREAS, said Principal shall establish an account or a standby trust fund as is required for the ~~when~~ a surety bond is used to provide such financial assurance;

NOW, THEREFORE, the conditions of the obligation are such that if the Principal shall faithfully construct and implement the _____ Mitigation Bank, for which this bond guarantees construction and implementation, as required by Agency permit number _____ and the plans approved by such permit, as such permit and plans may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended,

Or, if the Principal shall provide alternate financial assurance, as specified in the administrative rules of the Agency, and obtain the Agency's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the Agency from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

(a) Any obligation of (insert banker's name) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of (insert banker's name) arising from, and in the course of, employment by (insert banker's name);

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert banker's name) that is not the direct result of a construction or implementation activity for the _____ Mitigation Bank required pursuant to Agency permit number _____;

(e) Bodily injury or property damage for which (insert banker's name) is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the Secretary or Executive Director of the Agency that the Principal has been found in violation of the requirements of permit number _____ by failing to perform the construction and implementation activities for the _____ Mitigation Bank for which this bond guarantees performance, the Surety(ies) shall, within 60 days of receiving such notice, either perform such construction and implementation in accordance with the permit and other permit requirements and pursuant to the written directions of the Agency, or place the bond amount guaranteed for the _____ Mitigation Bank (the total penal sum of this bond) into the standby trust fund as directed by the Agency.

Upon notification by the Secretary or Executive Director of the Agency that the Principal has failed to provide alternate financial assurance and obtain written approval of such assurance from the Agency during the 90 days following receipt by both the Principal and the Agency of a notice of cancellation of the bond, the Surety(ies) shall place funds in the amount guaranteed for the _____ Mitigation Bank (the total penal sum of this bond) into the standby trust fund as directed by the Department.

The Surety(ies) hereby waive(s) notification of amendments to the Mitigation Bank plans, permits, applicable laws, statutes, rules, and regulations and agree(s) that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and the Agency; provided, however that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the Agency, as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies); provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the Agency.

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond every two years so that it guarantees increased or decreased (insert: construction and implementation or perpetual management) cost provided that no decrease in the penal sum takes place without the written permission of the Agency.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this Performance Bond is substantially similar to Form No. 62-342.700(5) ~~62-342.700(1)~~ which form has been incorporated by reference as an administrative rule in Rule 62-342.700 of the Florida Administrative Code.

PRINCIPAL

CORPORATE SURETY(IES)

For each co-surety provide the following

Signature

Name and Address

Type Name and Title

State of Incorporation

Liability Limit \$ _____

Signature

Type Name and Title

Corporate Seal

Corporate Seal

STATE OF FLORIDA

MITIGATION BANK IRREVOCABLE LETTER OF CREDIT
TO DEMONSTRATE (CONSTRUCTION AND IMPLEMENTATION
or PERPETUAL MANAGEMENT) FINANCIAL ASSURANCE

_____ (Agency)	_____ (Issuing Institution)
_____ (Specify section and project)	_____
_____	_____
_____ Address of Agency	_____ Address of Issuing Institution

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of

_____ Mitigation Banker's Name and Address

up to the aggregate amount of _____ (in words) U.S. dollars \$ _____, available upon

- (1) your sight draft, bearing reference to this letter of credit No. _____, and either:
- (2) a Certificate issued by the _____ ("Agency") in the form of Certificate I attached hereto and made a part hereof; or
- (3) a Certificate issued by the Agency in the form of Certificate II attached hereto and made a part hereof.

This letter of credit may be drawn on to cover (construction and implementation or perpetual management) activities of the (name of) Mitigation Bank as authorized and required by Agency permit number _____ as such permit may be amended and including all plans approved by such permit.

This letter of credit may not be drawn on to cover any of the following:

- a) Any obligation of [insert Mitigation Banker's name] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b) Bodily injury to an employee of [insert Mitigation Banker's name] arising from, and in the course of employment by [insert Mitigation Banker's name];
- c) Bodily injury or non-realty property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert Mitigation Banker's name] that is not the direct result of the construction or implementation of the _____ Mitigation Bank pursuant to Agency permit number _____;

e) Bodily injury or property damage for which [insert Mitigation Banker's name] is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

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 both you and [insert Mitigation Banker's name] by certified mail 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 and [insert Mitigation Banker's name] as shown on the signed return receipts.

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.

Name of Trust Fund

We certify that the wording of this letter of credit is substantially similar to the wording specified in Form No. 62-342.700(6) ~~62-342.700(2)~~ which has been adopted by reference in Rule 62-342.700 of the Florida Administrative Code, as such regulations were constituted on the date shown immediately below.

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

Date

This credit is subject to _____

Insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce, " or " the Uniform Commercial Code".

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

Date: _____, 20__

Issuing Bank's Name and Address

Mitigation Banker's Name and Address

Ladies and Gentlemen:

The undersigned _____, the (insert one of the following: Secretary of the Florida Department of Environmental Protection or Executive Director of the XX Water Management District) ("Agency"), hereby certifies to (Issuing Bank's Name) (the "Bank") and (Mitigation Banker's Name), with reference to Irrevocable Letter of Credit No. _____, dated _____, (the "Letter of Credit"), issued by the (Issuing Bank's Name) in favor of the Agency as follows:

1. The Agency has heretofore provided written notice by U.S. Mail to (Mitigation Banker's Name) of the Agency's present right to draw upon the Letter of Credit in accordance with the provisions of that certain Mitigation Bank Permit # _____, dated _____, issued by the Agency in favor of (Mitigation Banker's Name).
2. (Mitigation Banker's Name) has failed to comply with the terms and conditions of the Permit.

Funds paid pursuant to the provisions of the Letter of Credit shall be transferred to an account established for this purpose ~~(Trustee's Name)~~, as ~~Trustee~~ (the "Trustee") ~~under the certain Mitigation Bank Standby Trust Fund Agreement to Demonstrate Construction and Implementation Financial Assurance, dated as of _____, between (Mitigation Banker's Name) and the Trustee~~ for the benefit of the Agency in accordance with 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____.

(choose
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
or XX WATER MANAGEMENT DISTRICT)

By: _____
Name:

CERTIFICATE II
TO
_____ OF FLORIDA
IRREVOCABLE NONTRANSFERABLE STANDBY
LETTER OF CREDIT NO. _____

Date: _____, 20__

Issuing Bank's Name and Address

Mitigation Banker's Name and Address

Ladies and Gentlemen:

The undersigned _____, the (choose: Secretary of the Florida Department of Environmental Protection or Executive Director of the XX Water Management District) ("Agency"), hereby certifies to (Issuing Banks' Name) (the "Bank") and (Mitigation Banker's Name), with reference to Irrevocable Letter of Credit No. _____, dated _____, (the "Letter of Credit"), issued by the Bank in favor of the Agency, as follows:

1. The Bank has heretofore provided written notice to the Agency and (Mitigation Banker's Name) of the Bank's intent not to renew the Letter of Credit following the present Expiration Date thereof.
2. The Agency has provided prior written notice by U.S. Mail to (Mitigation Banker's Name) of the requirement that (Mitigation Banker's Name) provide the Agency with substitute Financial Assurance in compliance with the provisions of that certain Mitigation Bank Permit # _____, dated _____, (the "Permit"), issued by the Agency.
3. (Mitigation Banker's Name) has failed to provide the Agency with substitute Financial Assurance in compliance with the provisions of the Permit within the ninety (90) days of receipt of the notice described in paragraph 1 above.

Funds paid pursuant to the provisions of the Letter of Credit shall be transferred to an account established for this purpose (Trustee's Name), as ~~Trustee~~ (the "Trustee") ~~under that certain Mitigation Bank Standby Trust Fund Agreement to Demonstrate Financial Assurance for Construction and Implementation, dated as of _____, between (Mitigation Banker's Name) and the Trustee~~ for the benefit of the Agency, in accordance with 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__.

(choose
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
or XX WATER MANAGEMENT DISTRICT)

By: _____

Name: _____