

CHAPTER 770.

*VIRGINIA FINANCIAL RESPONSIBILITY REQUIREMENTS FOR MITIGATION ASSOCIATED
WITH TIDAL DREDGING PROJECTS.*

PART I.

DEFINITIONS.

9 VAC 25-770-10. Definitions.

Unless a different meaning is required by the context, the following terms as used in this chapter shall have the following meanings:

"Applicant" means a person applying for a VWP individual or general permit.

~~["Aquatic resources" or "aquatic environment" mean surface waters and the habitat they provide, including both plant and animal communities.]~~

"Board" means the State Water Control ~~board~~ Board .

["Code" means the Code of Virginia.]

"Compensation" or "compensatory mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource.

"Compensatory mitigation plan" means the written plan describing the proposed compensatory mitigation activities required by 9 VAC 25-210-80 of the Virginia Water Protection Permit Program Regulation.

~~["Creation" means the establishment of a wetland or other aquatic resource where one did not formerly exist.]~~

"Director" means the Director of the Department of Environmental Quality (DEQ) or an authorized representative.

["~~Dredged material~~" means ~~material that is excavated or dredged from surface waters.~~]

"Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

["~~Enhancement~~" means ~~activities conducted in existing wetlands or other aquatic resources that increase one or more aquatic functions or values.~~]

"Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil or rock.

["~~Fill~~" means ~~replacing portions of surface water with upland, or changing the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.~~

~~"Fill material" means any pollutant that replaces portions of surface water with dry land or that changes the bottom elevation of a surface water for any purpose.]~~

"General permit" means a permit authorizing a specified category of activities.

"In-lieu fee fund" means a monetary fund operated by a nonprofit organization or governmental agency that receives financial contributions from persons impacting wetlands or streams pursuant to an authorized permitted activity and that expends the moneys received to provide consolidated compensatory mitigation for permitted wetland or stream impacts.

"Law" means the State Water Control Law of Virginia.

["~~Minimization~~" means ~~lessening impacts by reducing the degree or magnitude of the proposed action and its implementation.~~]

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"Mitigation" means sequentially avoiding and minimizing impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

"Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of mitigation banks, and is operating under a signed banking agreement.

~~*["Mitigation banking" means compensating for unavoidable wetland or stream losses in advance of development actions through the sale, purchase or use of credits from a mitigation bank.]*~~

"Permittee" means the person who holds a VWP individual or general permit.

"Person" means any firm, corporation, association, or partnership, one or more individuals, or any governmental unit or agency of it.

"Practicable" means available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.

~~*["Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.*~~

~~*"Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.*~~

~~*"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause*~~

~~a change in wetland community type resulting in the loss of more than minimal degradation of its existing ecological functions.]~~

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

"Surface water" means all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia.

"USACE" means the United States Army Corps of Engineers.

"VWP permit" means an individual or general permit issued by the board under § 62.1-44.15:5 of the Code of Virginia that authorizes activities otherwise unlawful under § 62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

PART II.

GENERAL INFORMATION.

9 VAC 25-770-20. Applicability.

This regulation applies to all persons required to obtain or modify a VWP permit pursuant to the Virginia Water Protection Permit Program Regulation, 9 VAC 25-210, for completion of dredging projects in tidal waters governed under Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

9 VAC 25-770. Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects (adding 9 VAC 25-770-10 through 9 VAC 25-770-180).

[State and federal government entities whose debts and liabilities are the debts and liabilities of the Commonwealth of Virginia or the United States have the requisite financial strength and stability to fulfill their financial responsibility obligations and are not required to comply with the requirements of this Chapter.]

9 VAC 25-770-30. Compliance date.

An applicant for a VWP permit for completion of a dredging project in tidal waters must file ~~[-a financial responsibility mechanism or]~~ proof of mitigation bank credit purchase or in-lieu fee fund donation [or a financial responsibility mechanism] with the board [~~with any required final compensatory mitigation plan~~ at least 60 days prior to onset of any activity in permitted impact areas]. The compensatory mitigation plan and financial responsibility documentation~~[or proof of mitigation bank credit purchase or in-lieu fee fund donation]~~ shall be submitted by the permittee and approved by the board prior to the onset of any dredging activities in permitted impact areas.

9 VAC 25-770-40. Revocation or suspensions.

Failure to provide or maintain adequate evidence of financial responsibility in accordance with this regulation shall be a basis for termination of a VWP permit. Termination of a VWP permit shall be in accordance with 9 VAC 25-210-180.

9 VAC 25-770-50. Forfeitures.

Forfeiture of any financial obligation imposed pursuant to this chapter shall not relieve any holder of a VWP permit from any obligations to comply with the provisions of the Virginia Water Protection Permit Program Regulation (9 VAC 25-210) and any other applicable regulations or any other legal obligations for the consequences of abandoning the project.

9 VAC 25-770-60. Transfer of permit.

The new permittee must submit[proof of mitigation bank credit purchase or in-lieu fee fund donation or] evidence of financial responsibility to the board in accordance with this chapter within 60 days of the transfer of the permit from the existing permittee to the new permittee. [If the old permittee has completed mitigation activities by filing proof of mitigation bank credit purchase or in-lieu fee fund donation before the transfer of the permit, the new permittee is not required to do so or to provide any additional evidence of financial responsibility.] When a transfer of the permit occurs, the old permittee shall continue to comply with the requirements of this chapter until the new permittee has demonstrated that he is complying with the requirements of this chapter. The new permittee shall demonstrate compliance with this chapter within 60 days of the date of the transfer of the permit. Upon demonstration to the board by the new permittee of compliance with this chapter, the board shall notify the old permittee that he or she no longer needs to comply with this chapter as of the date of demonstration.

PART III.

COMPENSATORY MITIGATION PLAN AND FINANCIAL RESPONSIBILITY CRITERIA.

9 VAC 25-770-70. *Compensatory mitigation requirements.*

A. Compensatory mitigation for any project subject to a VWP permit must include measures to avoid and reduce impacts to surface waters to the maximum extent practicable, and where impacts cannot be avoided, the means by which compensation will be accomplished to achieve no net loss of wetland acreage and function.

B. The applicable compensatory mitigation standards are described in 9 VAC 25-210-80 and 9 VAC 25-210-115 of the Virginia Water Protection Permit Program Regulation. All aspects of the compensatory mitigation plan, including documentation of financial responsibility[or proof of

9 VAC 25-770. Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects (adding 9 VAC 25-770-10 through 9 VAC 25-770-180).

~~mitigation bank credit purchase or in-lieu fee fund donation] , shall be finalized, submitted and approved by the board prior to the onset of any dredging activities in permitted impact areas.~~

~~[9 VAC 25-770-80. Cost estimate for compensatory mitigation activities other than in-lieu fee fund donations or mitigation bank credit purchases.~~

~~A. The permittee shall prepare for approval by the board a detailed written estimate of the cost of implementing compensatory mitigation activities. The written cost estimate shall be submitted concurrently with the final compensatory mitigation plan.~~

~~1. The compensatory mitigation plan cost estimate shall equal the full cost of implementation of the plan.~~

~~2. The compensatory mitigation cost estimate shall be based on and include the costs to the permittee of hiring a third party to implement the compensatory mitigation plan. The third party may not be either a parent corporation or subsidiary of the permittee.~~

~~3. The compensatory mitigation cost estimate may not incorporate any salvage value that may be realized by the sale of materials, facility structures or equipment, land or other facility assets at the time of implementation of the plan.~~

~~B. If the length of the estimated project life exceeds one year, the permittee shall add to the total cost estimate an amount to represent an appropriate forecasted rate of inflation over the period covering the life of the project.~~

~~C. During the term of the VWP permit, the permittee shall revise the cost estimate concurrently with any revision made to the compensatory mitigation plan or at any time unforeseen circumstances occur that increase the implementation cost. The revised implementation cost estimate shall be adjusted for inflation as specified in subsection B of this section.~~

~~D. The permittee may reduce the cost estimate and the amount of financial responsibility provided under this chapter, if it can be demonstrated that the cost estimate exceeds the cost of implementation of the compensatory mitigation plan. The permittee shall obtain the approval of the board prior to reducing the amount of financial responsibility.~~

~~**9 VAC 25-770-90. Cost estimates for in-lieu fee fund donations and mitigation bank credit purchases.**~~

~~A. Permittees with compensatory mitigation plans that provide for donations to in-lieu fee funds must submit to the board, proof that the entity is willing to accept the contribution along with a detailed, written cost estimate as part of the conceptual mitigation plan.~~

~~B. Permittees with compensatory mitigation plans that provide for purchase of mitigation bank credits must provide to the board, proof that the selected bank has available credits, along with a detailed, written cost estimate as part of the conceptual mitigation plan.~~

9 VAC 25-770-80. Cost estimates for in-lieu fee fund donations and mitigation bank credit purchases.

A. Permittees with compensatory mitigation plans that provide for donations to in-lieu fee funds must submit to the board as part of the final mitigation plan proof that the entity is willing to accept the contribution along with a detailed, written cost estimate.

B. Permittees with compensatory mitigation plans that provide for purchase of mitigation bank credits must provide to the board as part of the final mitigation plan proof that the selected bank has available credits, along with a detailed, written cost estimate.

9 VAC 25-770-90. Cost estimate for compensatory mitigation activities other than in-lieu fee fund donations or mitigation bank credit purchases.

9 VAC 25-770. Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects (adding 9 VAC 25-770-10 through 9 VAC 25-770-180).

A. The permittee shall prepare for approval by the board a detailed written estimate of the cost of implementing compensatory mitigation activities. The written cost estimate shall be submitted concurrently with the final compensatory mitigation plan.

1. The compensatory mitigation plan cost estimate shall equal the full cost of implementation of the plan.

2. The compensatory mitigation cost estimate shall be based on and include the costs to the permittee of hiring a third party to implement the compensatory mitigation plan. The third party may not be either a parent corporation or subsidiary of the permittee.

3. The compensatory mitigation cost estimate may not incorporate any salvage value that may be realized by the sale of materials, facility structures or equipment, land or other facility assets at the time of implementation of the plan.

B. If the length of the estimated project life exceeds one year, the permittee shall add to the total cost estimate an amount to represent an appropriate rate of inflation over the period covering the life of the project.

C. During the term of the VWP permit, the permittee shall revise the cost estimate concurrently with any revision made to the compensatory mitigation plan or at any time unforeseen circumstances occur which increase the implementation cost. The revised implementation cost estimate shall be adjusted for inflation as specified in subsection B of this section.

D. During the term of the VWP permit, the permittee may reduce the cost estimate and the amount of financial responsibility provided under this chapter, if it can be demonstrated that the cost estimate exceeds the cost of implementation of the compensatory mitigation plan. The permittee shall obtain the approval of the board prior to reducing the amount of financial responsibility.]

9 VAC 25-770-100. Payment of in-lieu fee fund donations and mitigation bank credit purchases.

A. Permittees with compensatory mitigation plans that provide for donations to in-lieu fee funds or mitigation bank credit purchases shall make the entire donation or purchase before the onset of activity in the permitted impact areas. Permittees shall submit documentation of the payment or donation to the board for approval a minimum of [~~40~~ 60] days prior to onset of activity in permitted areas.

B. A permittee may satisfy the requirements of this section, wholly or in part, by submitting a photocopy of the documentation submitted to the USACE pursuant to § 404 of the Clean Water Act (33 USC § 1251 et seq., as amended in 1987) documenting the donation or purchase for the current project along with a photocopy of the document issued by the USACE indicating approval of the documentation, if applicable. Any documentation of the in-lieu fee fund donation or mitigation banking credit purchase pursuant to this subsection must demonstrate clearly that the donation or purchase was made to provide compensatory mitigation for the project that is the subject of the VWP permit.

9 VAC 25-770-110. Allowable financial mechanisms for compensatory mitigation activities other than in-lieu fee fund donations or mitigation bank credit purchases.

9 VAC 25-770. Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects (adding 9 VAC 25-770-10 through 9 VAC 25-770-180).

A. [If a permittee does not purchase mitigation bank credits or donate to an in-lieu fee fund as part of his compensatory mitigation plan, the permittee must demonstrate financial responsibility using one of the mechanisms specified in 9 VAC 25-770-120 through 9 VAC 25-770-150.] The mechanisms used to demonstrate evidence of financial responsibility shall ensure that the funds necessary to meet the costs of completing compensatory mitigation requirements for the permitted project as described in 9 VAC 25-770-70 will be available whenever they are needed. [~~Permittees shall choose from the options specified in 9 VAC 25-770-120 through 9 VAC 25-770-150.~~] Financial responsibility mechanisms shall be in the amount equal to the cost estimate approved by the board.

B. The permittee shall provide continuous coverage to implement the compensatory mitigation plan until released from financial responsibility requirements by the board.

C. The director may reject the proposed evidence of financial responsibility if the mechanism submitted does not adequately assure that funds will be available to complete the necessary compensatory mitigation activities. The permittee shall be notified in writing within 60 days of receipt of a complete financial responsibility submission of the tentative decision to accept or reject the proposed evidence.

9 VAC 25-770-120. Surety bond.

A. A permittee may satisfy the requirements of this chapter by obtaining a surety bond that conforms to the requirements of this section and by submitting an originally signed duplicate of the bond to the board. The surety company issuing the bond shall be licensed to operate as a surety in the Commonwealth of Virginia and be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury.

B. Under the terms of the bond, the surety will become liable on the bond obligation when the permittee fails to perform as guaranteed by the bond.

C. The bond shall guarantee that the permittee or any other authorized person will:

1. Implement compensatory mitigation in accordance with the approved compensatory mitigation plan and other requirements in any VWP permit for the project;

2. Implement the compensatory mitigation plan following an order to do so issued by the board or by a court.

D. The surety bond shall guarantee that the permittee shall provide alternate evidence of financial responsibility as specified in this article within 60 days after receipt by the board of a notice of cancellation of the bond from the surety.

E. If the approved cost estimate increases to an amount greater than the amount of the penal sum of the bond, the permittee shall, within 60 days after the increase, cause the penal sum of the bond to be increased to an amount at least equal to the new estimate and submit a revised mechanism to the board. Whenever the cost estimate decreases, the penal sum may be reduced to the amount of the cost estimate following written approval by the board. Notice of an increase or decrease in the penal sum shall be sent to the board by certified mail within 60 days after the change.

F. The bond shall remain in force for its term unless the surety sends written notice of cancellation by certified mail to the permittee and to the board. Cancellation cannot occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by the board as shown on the signed return receipt. The surety shall provide written notification to the board by certified mail no less than 120 days prior to the expiration date of the bond, that the bond will expire and the date the bond will expire.

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G. The board shall cash the surety bond if it is not replaced 60 days prior to expiration with

alternate evidence of financial responsibility acceptable to the board or if the permittee fails to fulfill the conditions of the bond.

H. In regards to implementation of a compensatory mitigation plan either by the permittee, by an authorized third party, or by the surety, proper implementation of a compensatory mitigation plan shall be deemed to have occurred when the board determines that compensatory mitigation has been completed. Such implementation shall be deemed to have been completed when the provisions of the permittee's approved compensatory mitigation plan have been executed and the provisions of any other permit requirements or enforcement orders relative to the compensatory mitigation plan have been complied with.

I. The surety bond shall be worded as described in 9 VAC 25-770-190 A, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

9 VAC 25-770-130. Letter of credit.

A. A permittee may satisfy the requirements of this chapter by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section and by submitting an originally signed duplicate of the letter of credit to the board. The issuing institution shall be an entity that has the authority to issue letters of credit in the Commonwealth of Virginia and whose letter-of-credit operations are regulated and examined by a federal agency or the State Corporation Commission.

B. The letter of credit shall be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for implementation of the compensatory mitigation plan. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year. If the issuing institution decides not to extend the letter of credit beyond the

current expiration date, it shall, at least 120 days before the expiration date, notify both the permittee and the board by certified mail of that decision. The 120-day period will begin on the date of receipt by the board as shown on the signed return receipt. If the letter of credit is canceled by the issuing institution, the permittee shall obtain alternate evidence of financial responsibility to be in effect prior to the expiration date of the letter of credit.

C. Whenever the approved cost estimate increases to an amount greater than the amount of credit, the permittee shall, within 60 days of the increase, cause the amount of credit to be increased to an amount at least equal to the new estimate and submit a revised mechanism to the board. Whenever the cost estimate decreases, the letter of credit may be reduced to the amount of the new estimate following written approval by the board.

D. The board shall cash the letter of credit if it is not replaced 60 days prior to expiration with alternate evidence of financial responsibility acceptable to the board or if the permittee has failed to implement compensatory mitigation in accordance with the approved plan or other permit or special order requirements.

E. In regards to implementation of a compensatory mitigation plan either by the permittee or by an authorized third party, proper implementation of a compensatory mitigation plan shall be deemed to have occurred when the board determines that compensatory mitigation has been completed. Such implementation shall be deemed to have been completed when the provisions of the permittee's approved compensatory mitigation plan have been executed and the provisions of any other permit requirements or enforcement orders relative to the compensatory mitigation plan have been complied with.

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F. The permittee may cancel the letter of credit only if alternate evidence of financial responsibility acceptable to the board is substituted as specified in this chapter or if the permittee is released by the board from the requirements of this regulation.

G. The board shall return the original letter of credit to the issuing institution for termination when:

- 1. The permittee substitutes acceptable alternate evidence of financial responsibility for implementation of the compensatory mitigation plan as specified in this chapter; or*
- 2. The board notifies the permittee that he is no longer required by this chapter to maintain evidence of financial responsibility for implementation of the compensatory mitigation plan for the project.*

H. The letter of credit shall be worded as described in 9 VAC 25-770-190 B, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

9 VAC 25-770-140. Certificate of deposit.

A. A permittee may satisfy the requirements of this chapter, wholly or in part, by obtaining a certificate of deposit and assigning all rights, title and interest of the certificate of deposit to the board, conditioned so that the permittee shall comply with the approved compensatory mitigation plan filed for the project. The issuing institution shall be an entity that has the authority to issue certificates of deposit in the Commonwealth of Virginia and whose operations are regulated and examined by a federal agency or the State Corporation Commission (Commonwealth of Virginia). The permittee must submit the originally signed assignment and the originally signed certificate of deposit, if applicable, to the board.

B. The amount of the certificate of deposit shall be at least equal to the current compensatory mitigation cost estimate for the project for which the permit application has been filed or any part

thereof not covered by other financial responsibility mechanisms. The permittee shall maintain the certificate of deposit and assignment until all activities required by the approved compensatory mitigation plan have been completed.

C. The permittee shall be entitled to demand, receive and recover the interest and income from the certificate of deposit as it becomes due and payable as long as the market value of the certificate of deposit used continues to at least equal the amount of the current cost estimate for compensatory mitigation activities.

D. The board shall cash the certificate of deposit if the permittee has failed to implement compensatory mitigation in accordance with the approved plan or other permit or special order requirements.

E. In regards to implementation of a compensatory mitigation plan either by the permittee or by an authorized third party, proper implementation of a compensatory mitigation plan shall be deemed to have occurred when the board determines that compensatory mitigation has been completed. Such implementation shall be deemed to have been completed when the provisions of the permittee's approved compensatory mitigation plan have been executed and the provisions of any other permit requirements or enforcement orders relative to the compensatory mitigation plan have been complied with.

F. Whenever the approved compensatory mitigation cost estimate increases to an amount greater than the amount of the certificate of deposit, the permittee shall, within 60 days of the increase, cause the amount of the certificate of deposit to be increased to an amount at least equal to the new estimate or obtain another certificate of deposit to cover the increase. Whenever the cost estimate decreases, the permittee may reduce the amount of the certificate of deposit to the new estimate following written approval by the board.

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G. The board shall return the original assignment and certificate of deposit, if applicable, to the issuing institution for termination when:

- 1. The permittee substitutes acceptable alternate evidence of financial responsibility for implementation of the compensatory mitigation plan as specified in this chapter; or*
- 2. The board notifies the permittee that he is no longer required by this chapter to maintain evidence of financial responsibility for implementation of the compensatory mitigation plan for the project.*

H. The assignment shall be worded as described in 9 VAC 25-770-190 C, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.

9 VAC 25-770-150. Federal documentation.

A permittee may satisfy the requirements of this chapter, wholly or in part, by submitting a photocopy of the financial responsibility documentation submitted to the USACE pursuant to § 404 of the Clean Water Act (33 USC § 1251 et seq., as amended in 1987) for the current project along with a photocopy of the document issued by the USACE indicating approval of the financial responsibility, if applicable. Any demonstration of financial responsibility pursuant to this subsection must apply clearly to the project and compensatory mitigation activities that are the subject of the VWP permit.

9 VAC 25-770-160. Release of permittee from the financial responsibility requirements.

A. The permittee shall submit a notice that compensatory mitigation has been completed in accordance with the requirements of the approved compensatory mitigation plan, permit or other order, within 60 days of completion of all compensatory mitigation requirements. Unless the board has reason to believe that the compensatory mitigation activities have not been implemented in accordance with the appropriate plan or other requirements, the board shall notify the permittee in writing that the permittee is no longer required to maintain evidence of financial responsibility for the project. Such notice shall release the permittee only from the requirements for financial responsibility for the project; it does not release the permittee from legal responsibility for meeting the compensatory mitigation requirements.

B. Where a VWP permit for the project is no longer required under law, the board shall notify the permittee in writing that the permittee is no longer required to maintain evidence of financial responsibility for the project. Such notice shall release the permittee only from the requirements for financial responsibility for the project.

9 VAC 25-770-170. Incapacity of Financial Providers, permittees.

A. A permittee shall notify the director by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the permittee as debtor, within 10 days after commencement of the proceeding.

B. A permittee who fulfills the requirements of this chapter by obtaining a letter of credit, a surety bond, or a certificate of deposit will be deemed to be without the required evidence of financial responsibility in the event of bankruptcy of the issuing institution, or a suspension or revocation of the authority of the institution issuing a surety bond, letter of credit, or certificate of deposit to issue such mechanisms. The permittee shall establish other financial responsibility within 60 days of such event.

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9 VAC 25-770-180. Delegation of authority.

The Director of the Department of Environmental Quality or a designee acting for him may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

9 VAC 25-770-190. Wording of the instruments.

A. Wording of surety bond.

SURETY BOND

Date bond executed: _____

Period of coverage: _____

Effective date: _____

Principal: (legal name and address of owner or operator) _____

Type of organization: (insert "individual" "joint venture," "partnership," "corporation," or appropriate identification of type of organization) _____

State of incorporation (if applicable): _____

Surety: (name(s) and business address) _____

Scope of Coverage:

(List the name of the project and the physical address where the project is located and VWP permit number. List the coverage guaranteed by the bond: "for completion of compensatory mitigation activities")

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 Department of Environmental Quality, Commonwealth of Virginia, ("DEQ") 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 Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums 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 sums 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 the full amount of the penal sum.

Whereas said Principal is required under § 62.1-44.15 (5c) of the State Water Control Law of the Code of Virginia to demonstrate financial responsibility to implement a plan to complete the required compensatory mitigation activities described in a permit, order or regulations;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully implement the compensatory mitigation plan in accordance with the applicable regulations and the Director of the DEQ's instructions to implement the plan for the project described above, or if the Principal shall provide alternate documentation of financial responsibility, acceptable to DEQ and obtain the Director's written approval of such assurance, within 60 days after the date the notice of cancellation is received by the Director of the DEQ from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond when the Principal has failed to fulfill the conditions described above. Upon notification by the Director of the DEQ that the owner or operator has failed to fulfill the conditions above or that the DEQ has determined that the Principal

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has failed to complete the project described above, the Surety(ies) shall either implement the compensatory mitigation plan or forfeit the full amount of the penal sum as directed by the Director of the DEQ under 9 VAC 25-770-120.

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 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 to the Director of the DEQ, Commonwealth of Virginia, P. O. Box 10009, Richmond, Virginia 23240-0009 provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal and Director of the DEQ as shown on the signed return receipt.

In Witness Whereof, the Principal and Surety(ies) have executed this 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 surety bond is identical to the wording specified in 9 VAC 25-770-190 A as such regulations were constituted on the date this bond was executed.

PRINCIPAL

(Signature(s))

(Name(s))

(Title(s))

(Corporate seal)

CORPORATE SURETY(IES)

(Name and address)

State of Incorporation:

Liability limit: \$ _____

(Signature(s))

(Name(s) and title(s))

(Corporate seal)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

Bond premium: \$ _____

B. Wording of letter of credit.

IRREVOCABLE STANDBY LETTER OF CREDIT

(Name and address of issuing institution)

Beneficiary:

Director

Department of Environmental Quality (DEQ)

P. O. Box 10009

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629 E. Main Street

Richmond, Virginia 23240-0009

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 (permittee) of (address) up to the aggregate amount of (in words) U.S. dollars, (\$insert dollar amount), available upon presentation of

(1) your sight draft, bearing reference to this letter of credit, No. _____ and

(2) your signed statement reading as follows:

"I certify that the amount of the draft is payable pursuant to regulations issued under authority of § 62.1- 44.15 (5c) of the Code of Virginia."

This letter of credit may be drawn on to implement the compensatory mitigation plan for the project identified below in the amount of (in words) \$ (insert dollar amount). (Name and physical address of the project assured by this mechanism and VWP permit number.)

This letter of credit is effective as of (date) and shall expire on (date), but such expiration date shall be automatically extended for a period of (at least the length of the original term) on (expiration date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify the Director of the DEQ and the permittee by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that the permittee is 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 the Director of the DEQ and the permittee, as shown on the signed return receipt.

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 submit the amount of the draft directly to DEQ in accordance with your instructions.

I hereby certify that I am authorized to execute this letter of credit on behalf of (issuing institution) and I hereby certify that the wording of this letter of credit is identical to the wording required in 9 VAC 25-770-190 B as such regulations were constituted on the date shown immediately below.

Attest:

Signature _____ *Date*

Name _____ *Title*

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").

C. Wording of assignment of certificate of deposit.

ASSIGNMENT OF CERTIFICATE OF DEPOSIT ACCOUNT

City _____, 20 _____

FOR VALUE RECEIVED, the undersigned assigns all right, title and interest to the Virginia Department of Environmental Quality (DEQ), Commonwealth of Virginia and its successors and assigns the Virginia DEQ the principal amount of the instrument, including all moneys deposited now or in the future to that instrument, indicated below:

9 VAC 25-770. Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects (adding 9 VAC 25-770-10 through 9 VAC 25-770-180).

() *If checked here, this assignment includes all interest now and hereafter accrued.*

Certificate of Deposit Account No.

This assignment is given as security to the Virginia DEQ in the amount of

_____ Dollars (\$ _____).

Continuing Assignment. This assignment shall continue to remain in effect for all subsequent terms of the automatically renewable certificate of deposit.

Assignment of Document. The undersigned also assigns any certificate or other document evidencing ownership to the Virginia DEQ.

*Additional Security. This assignment shall secure the payment of any financial responsibility obligations of the **(name of permittee)** to the Virginia DEQ for compensatory mitigation activities at the **(project name and permit number)** located at (physical address).*

*Application of Funds. The undersigned agrees that all or any part of the funds of the indicated account or instrument may be applied to the payment of any and all financial responsibility obligations of **(name of permittee)** to the Virginia DEQ for compensatory mitigation activities at the **(project name and address)**. The undersigned authorizes the Virginia DEQ to withdraw any principal amount on deposit in the indicated account or instrument including any interest, if indicated, and to apply it in the Virginia DEQ's discretion to fund compensatory mitigation at the **(project name)** in the event of **(permittee name)**'s failure to implement compensatory mitigation activities to the DEQ's satisfaction. The undersigned agrees that the Virginia DEQ may withdraw any principal and/or interest from the indicated account or instrument without demand or notice.*

The undersigned agrees to assume any and all loss of penalty due to federal regulations concerning the early withdrawal of funds. Any partial withdrawal of principal or interest shall not release this assignment.

The party or parties to this Assignment set their hand or seals, or if corporate, has caused this assignment to be signed in its corporate name by its duly authorized officers and its seal to be affixed by authority of its board of Directors the day and year above written.

_____ SEAL

_____ (Owner)

_____ (Print name)

_____ SEAL

_____ (Owner)

_____ (Print name)

THE FOLLOWING SECTION IS TO BE COMPLETED BY THE BRANCH OR LENDING OFFICE:

The signature(s) as shown above compare correctly with the name(s) as shown on record as owner(s) of the Certificate of Deposit indicated above. The above Assignment has been properly recorded by placing a hold in the amount of \$ _____ for the benefit of the Virginia DEQ.

() If checked here, the accrued interest on the Certificate of Deposit indicated above has been maintained to capitalize versus being mailed by check or transferred to a deposit account.

I certify that the wording of this Assignment is identical to the wording required in 9 VAC 25-770-190 C as such regulations were constituted on the date shown immediately below.

9 VAC 25-770. Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects (adding 9 VAC 25-770-10 through 9 VAC 25-770-180).

(Signature) _____ *(Date)*

_____ *(Print name)*

_____ *(Title)*

Certified True and Accurate: _____

Robert G. Burnley, Director, DEQ

Date: _____