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FINANCIAL ASSURANCES Under the MINNESOTA WETLAND CONSERVATION ACT

Chuck Holtman
Smith Partners PLLP
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This presentation provides a general introduction and overview of the subject. Neither the presentation nor any related discussion constitutes legal advice or creates an attorney-client relationship. You are advised to consult with your legal counsel on all matters relating to managing and using financial assurances in WCA permitting

FINANCIAL ASSURANCE

- Funds
- Held by LGU or reliable third party
- LGU can use on LGU assertion of non-compliance
- NOT a right to enter & do work



FORMS OF FINANCIAL ASSURANCE

- Cash escrow
- Standby letter of credit (LOC)
- Permit bond

CASH ESCROW

- Cash
- LGU holds in trust account
- Landowner's property
- Escrow agreement
 - Property of landowner
 - When LGU may use
 - Notice & opportunity to cure
 - Right to enter property
 - Accounting & release of funds



STANDBY LETTER OF CREDIT

- Issued by bank
- Obligation is bank to LGU
- LGU has essentially absolute right to funds on demand
- Bank has right to repayment by landowner
- No risk of landowner insolvency
- Must meet technicalities of presentation
- Funds within 7 business days
- Notice of cancellation
- Like money



BOND

- Issued by insurance company
- Landowner indemnifies issuer
- Complete work vs. provide funds
- Presentation of demand
- Issuer may investigate, request meeting
- State obligation to pay promptly



BANKRUPTCY

- Escrow: Subject to automatic stay
- LOC/Bond: Remains available to LGU



WCA FINANCIAL ASSURANCE RULE: Minnesota Rules 8420.0522, Subpart 9

- LGU decides need
- LGU decides amount (construction, maintenance, monitoring, repair)
- May reduce amount after construction
- Landowner opportunity to cure before LGU uses
- Release within 60 days after replacement plan completion

ASSURANCE REQUIRED? AMOUNT?

- LGU judgment
- Considerations:
 - Replacement wetland size
 - Ecological setting & complexity
 - Partly done?
 - Landowner history & reliability
 - Third party to assume responsibility
- Amount: worst case or probable case?

PROCURING the ASSURANCE

- Delegation to staff
- Written policy: when required, amount
- Create & maintain templates
- Must receive originals
- Obtain before notice of approval issued

MANAGING the ASSURANCE

Storing:

- Escrow: Trust account & escrow agreements
- LOC/Bond: Lock & key

Tracking:

- Maintain log
- Expiration date
- Extension/replacement notice (60 days)
- Request that counsel initiate draw (30 days)
- Lapse is replacement plan violation
- Accounting for expenditures



Return LOC/bond to issuer

SECTION 404

- 33 CFR 332.3(n)
- Regulatory Guidance Letter No. 05-1 (February 14, 2005)
- Allows for judgment
- Risk assessment: technical complexity, landowner reliability
- Miscellaneous Receipts Statute
 - Cannot receive funds
 - Surety must perform
- Agreement with third party (e.g., LGU)
- Possibility of single financial assurance (USACE or LGU)

ENTERING PROPERTY

- Financial assurance provides for funds but does NOT create authority to enter property and do work
- Permit or escrow agreement may do so
- Otherwise will need court order
- LGU liability exposure
- Consult with legal counsel

