

ARTICLE 74:29

MINED LAND RECLAMATION

Chapter

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74:29:01:02. Computation of time. In computing any time period prescribed by this article, the day of the act from which the designated period of time begins to run ~~shall~~ may not be included. The last day of the period ~~shall be~~ is included unless it is a Saturday, Sunday, or legal holiday, in which case the period runs until the end of the next day ~~which~~ that is not a Saturday, Sunday, or legal holiday. ~~When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.~~

Source: 14 SDR 111, effective March 3, 1988.

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-5, ~~45-6B-15~~, ~~45-6B-17~~, 45-6B-28, 45-6B-30.

74:29:01:07. Determination of procedural completeness. The department shall determine the procedural completeness of a permit application as follows:

(1) Within ~~30~~ thirty days after submission of an application, the department shall notify the applicant in writing whether the application is procedurally complete. An application is considered filed on the final day of this thirty-day review period if it is procedurally complete;

(2) ~~An application is considered filed on the final day of the initial 30-day review period if it is procedurally complete; if~~ If the application is procedurally incomplete, the department shall identify in the notification the items required to complete the application. The department shall determine the adequacy of the applicant's response to the notice of deficiencies and shall notify the applicant in writing of the adequacy of the response within ~~7~~ thirty days after receipt of the response. If the response is adequate, the application is considered filed;

(3) If the response is inadequate, the applicant may do one of the following:

- (a) Submit additional information ~~necessary~~ required to complete the application;
- (b) Request in writing that the application be considered filed; or
- (c) Withdraw the application.

If, as provided in subsection (3)(a) of this section, additional information is submitted to complete the application, the procedure ~~in~~ beginning at subdivision (2) of this section ~~shall~~ must be followed.

Source: 14 SDR 111, effective March 3, 1988.

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-5, 45-6B-11, 45-6B-15, 45-6B-16.

Cross-Reference: Permit applications -- Completeness requirements, ~~ch~~ chapter 74:29:02.

74:29:10:19. Board update of preliminary list. Following the establishment of the initial preliminary list, the board shall ~~annually~~ hold a hearing to consider any petition nominating petitions received during the preceding year lands for inclusion on the preliminary list. The board shall hold the hearing within one hundred twenty days of receiving the petition. The notification and publication requirements of subdivision 74:29:10:17(4) shall be followed prior to the hearing.

Source: 17 SDR 86, effective December 25, 1990.

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-33.4.

CHAPTER 74:29:12

RECLAMATION AND POSTCLOSURE FINANCIAL ASSURANCE

Section

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74:29:12:01. Financial assurance cost elements. The financial assurance required by SDCL 45-6B-20, 45-6B-21, and 45-6B-91 must be in an amount sufficient to cover the costs to the department of hiring a third-party contractor to conduct reclamation and postclosure activities. Board staff shall consider the following in calculating reclamation financial assurance and postclosure financial assurance amounts:

(1) The amount of disturbed and reclaimed acreage and volume of material to be hauled or moved;

(2) Backfilling, slope reduction, contouring, regrading, and topsoil placement;

(3) Seedbed preparation, seeding, mulching, and fertilizing;

(4) Drainage, sedimentation, and erosion control;

(5) Removal and disposal of buildings, foundations, chemicals, and debris;

(6) Fencing and other site access control;

(7) Water treatment;

(8) Water quality and other monitoring;

(9) Heavy equipment normally available to a third-party contractor;

(10) Heavy equipment, labor, and supervision costs;

(11) Maintenance and replacement of pond liners, capping systems, monitoring equipment, water treatment systems, and other mine facilities;

(12) Noxious weed control;

(13) Mobilization and demobilization, contingency, contractor profit and overhead, contract administration, contract scoping and bidding, engineering and consulting, and state excise tax; and

(14) Other factors determined necessary to include in the calculation during review of the mine permit application or inspection of the proposed mine site.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-25, 45-6B-26, 45-6B-27, 45-6B-55, 45-6B-91.

74:29:12:02. Postclosure water treatment costs. For mine permits in which postclosure water treatment is required, the operator shall submit estimated capital and replacement costs of the treatment system and estimated annual treatment costs to board staff for review and verification prior to inclusion in the reclamation financial assurance and postclosure financial assurance calculations as provided in § 74:29:12:01. A ten-percent contingency cost must be applied to the total capital and annual treatment costs. The board may require more than a ten-percent contingency if the board determines additional contingency is warranted based on review of water treatment data. Board staff shall use its own estimate if it cannot verify the accuracy of the operator's estimate.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-55, 45-6B-91.

74:29:12:03. Building salvage value not allowed. Credit for salvage value of buildings and other structures or abandoned equipment and supplies is not permitted in reclamation financial assurance and postclosure financial assurance calculations as provided in § 74:29:12:01.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-21, 45-6B-55, 45-6B-91.

74:29:12:04. Forms of financial assurance. The board may accept the following forms of financial assurance:

- (1) Surety bonds;
- (2) Certificates of deposit;
- (3) Irrevocable letters of credit;
- (4) Cash; and
- (5) Government securities.

The board may not accept as financial assurance any type of self-bond agreement or corporate guarantee.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20,45-6B-20.1, 45-6B-21, 45-6B-22, 45-6B-23.

74:29:12:05. Surety bonds. A surety bond as financial assurance is subject to the following requirements:

(1) The operator shall submit a fully executed corporate surety bond on a form provided by the department and signed by the operator as principal and by a surety insurer certified under SDCL chapter 58-21;

(2) The surety bond may only be cancelled after approval by the board. The surety company must give proper written notification, mailed by certified mail return receipt requested, to the board and the operator at least one hundred fifty days prior to cancellation. In the event of cancellation, the surety bond remains in full force and effect and the surety company is not relieved of its liability to cover all reclamation and postclosure liabilities and obligations accrued prior to the date of cancellation unless the operator submits replacement financial assurance that is accepted by the board. If replacement financial assurance is not submitted by the operator and accepted by the board within ninety days after the notice of cancellation is received by the operator, the board may proceed with surety bond forfeiture. The surety company is liable for payment of the forfeited surety bond;

(3) The surety bond is not an asset of the operator and may not be canceled, assigned, revoked, disbursed, replaced, or allowed to terminate without board approval. The surety bond may not be assigned for the benefit of creditors, attached, garnished, levied, or executed on, or subject to process issued from any court except for the purpose of enabling this state to effectuate reclamation and environmental cleanup;

(4) The surety bond is payable to the department in full upon demand and receipt from the board of a notice that the operator has failed to comply with the provisions of SDCL chapter 45-6B, the rules adopted thereunder, or the mine permit;

(5) The surety company must have a minimum of twenty million dollars in net worth;

(6) The surety bond is not in excess of ten percent of the surety company's capital surplus account, as shown on a balance sheet attached to the surety bond, and certified by a certified public accountant for the most recent annual reporting period;

(7) The sum of all surety bonds issued by a surety company as financial assurance for one or more permits held by an operator is not in excess of three times the surety company's maximum single obligation as established by the United States Department of the Treasury;

(8) The board may not accept a surety bond from a surety company for any operator, on all permits held by that operator, unless the surety company is licensed with the South Dakota Division of Insurance and is listed in the United States Department of the Treasury Circular 570 as revised;

(9) The operator shall provide evidence to board staff at the time a surety bond is submitted that the surety company is in good financial standing and condition, as evidenced by the surety company's A- or better rating from AM Best, or its equivalent from a similar organization;

(10) A power of attorney and a notarized attorney-in-fact acknowledgement must be attached to the surety bond;

(11) The surety bond provides that the surety and the operator are jointly and severally liable; and

(12) The surety bond provides a mechanism for the surety company to give prompt notice to the department and the operator of any action alleging bankruptcy or insolvency of the surety company or a violation that would result in suspension or revocation of the license of the surety company.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-55, 45-6B-91.

74:29:12:06. Certificates of deposit. A certificate of deposit as financial assurance is subject to the following requirements:

(1) An assignment of a certificate of deposit may not exceed a denomination of one hundred thousand dollars, or the maximum insurable amount as determined by the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation, whichever is less. Any combination of certificates of deposit for one operator from one institution may not be in excess of that limit;

(2) An automatically renewable certificate of deposit is from a United States bank insured by the Federal Deposit Insurance Corporation, or a United States credit union insured by the National Credit Union Administration;

(3) The certificate of deposit is not an asset of the operator and may not be canceled, assigned, revoked, disbursed, replaced, or allowed to terminate without board approval. The certificate of deposit may not be assigned for the benefit of creditors, attached, garnished, levied, or executed on, or subject to process issued from any court except for the purpose of enabling this state to effectuate reclamation and environmental cleanup;

(4) The certificate of deposit is made payable to or assigned to the department, both in writing and in the records of the bank issuing the certificate. The bank waives all rights of setoff or liens against the certificate;

(5) The original certificate of deposit must be submitted to the department and held by the department until released by the board;

(6) Upon submittal of the certificate of deposit and at the subsequent request of board staff the operator shall demonstrate that the bank issuing the certificate of deposit is in good

financial standing and condition, as evidenced by the bank's rating by an appropriate rating system;

(7) The operator shall deposit sufficient amounts of certificates of deposit, to ensure the department is able to liquidate those certificates prior to maturity, upon forfeiture, for the amount of financial assurance required;

(8) In addition to the financial assurance amount, the certificate of deposit must include the amount of the maximum early withdrawal penalty rounded up to the next higher hundred dollars;

(9) The operator may roll any accrued interest back into the certificate of deposit principal to cover any increases in the face value due to any financial assurance increases. Otherwise, any accrued interest may be deposited into the operator's individual account and is free of encumbrance by financial assurance liability; and

(10) In the event of forfeiture of a certificate of deposit, the face value of the certificate plus any accrued interest that has been rolled back into the certificate's principal is subject to bond liability and expenditure in the performance of reclamation.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-22, 45-6B-23, 45-6B-24, 45-6B-55, 45-6B-91.

74:29:12:07. Irrevocable letters of credit. An irrevocable letter of credit as financial assurance is subject to the following requirements:

(1) The letter of credit is irrevocable and automatically extended for additional periods of one year from the expiration date unless the bank providing the letter of credit notifies the department in writing at least one hundred fifty days prior to the expiration date that it elects not to renew the letter of credit. If the letter of credit has not been replaced by suitable financial assurance at least ninety days prior to the expiration date, the board may proceed with forfeiture of the irrevocable letter or credit;

(2) The irrevocable letter of credit must be issued by a bank that is insured by the Federal Deposit Insurance Corporation, organized and authorized to do business in the United States, and located in this state, except that the bank need not be located in this state if the irrevocable letter of credit:

(a) Can be exercised at an affiliate or subsidiary located in this state;

(b) Is confirmed by a bank located in this state; or

(c) Is otherwise determined to be an acceptable letter of credit by the board;

(3) The irrevocable letter of credit is executed on the issuing bank's letterhead using the language provided by the department. The department is required to be listed as the beneficiary on the letter of credit;

(4) The irrevocable letter of credit is payable to the department in full upon demand and receipt from the board of a notice that the operator has failed to comply with the provisions of SDCL chapter 45-6B, the rules adopted thereunder, or the mine permit;

(5) The operator must demonstrate at the time of submittal of the irrevocable letter of credit to the department that the bank issuing the irrevocable letter of credit is in good financial standing and condition, as evidenced by its rating by an appropriate rating system;

(6) The irrevocable letter of credit must provide that, upon expiration, if the department has not notified the bank in writing that substitute financial assurance has been provided or is not required, the bank will immediately pay the department the full amount of the irrevocable letter of credit less any previous drafts;

(7) The irrevocable letter of credit is not in excess of ten percent of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant;

(8) The sum of multiple irrevocable letters of credit issued by a bank as financial assurance for multiple permits held by an operator is not in excess of thirty percent of the bank's maximum single obligation as shown on a balance sheet certified by a certified public accountant;

(9) As evidenced by the balance sheet referenced in subdivision (7) of this section and a certified income and revenue sheet, the bank must meet the following criteria:

(a) The bank is earning at least a one-percent rate of return on total assets (net income/total assets = 0.01 or more);

(b) The bank is earning at least a ten-percent return on equity (net income/total stockholders' equity = 0.10 or more); and

(c) Capital or stockholder's equity must be at least five and one-half percent of total assets ((total stockholder's equity [capital stock + retained earnings])/total assets = 0.055 or more);

(10) The bank's qualifications, as provided in this section, must be reviewed by board staff annually prior to the time the letter of credit is renewed; and

(11) The irrevocable letter of credit provides that:

(a) The bank will give prompt notice to the operator and the department of any notice received or action filed alleging the insolvency or bankruptcy of the bank or operator, or alleging any violations of regulatory requirements which could result in suspension or revocation of the bank's charter or license to do business; and

(b) In the event the bank becomes unable to fulfill its obligations under the letter of credit for any reason, notice must be given immediately to the operator and the department.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-22, 45-6B-23, 45-6B-24, 45-6B-55, 45-6B-91.

74:29:12:08. Cash deposits. Cash deposited in an account with this state as financial assurance is subject to the following requirements

(1) The board may only accept cash in the form of a cashier's check in the name of the operator. Individuals may not submit a cashier's check on behalf of a corporation; and

(2) Any interest earned on the account is payable to the state.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-23, 45-6B-24, 45-6B-55, 45-6B-91.

74:29:12:09. Government securities. Government securities as financial assurance are subject to the following requirements:

(1) The government securities are backed by the full faith and credit of the United States government and must be purchased from a United States bank or broker;

(2) The government securities have an approximate minimum initial maturity of five years from date of the board's acceptance of the security;

(3) The government securities must be registered to a bank or broker approved as a custody agent by the board;

(4) The government securities must be pledged to the board, and held in a joint account with the approved custody agent;

(5) All interest from the government securities must be paid to the operator;

(6) The board shall accept the value of the government securities at one hundred percent, applied to the lower of the face value or the market value of the government securities on an annual basis;

(7) The only authorized signatory on the joint account is the board chairperson;

(8) The operator shall provide to the board a book entry receipt and an assignment of the government securities to the board;

(9) Fees associated with the purchase and maintenance of the government securities are the responsibility of the operator;

(10) The custody agent shall provide monthly statements of the account to the department; and

(11) If the market value of the government securities drops below the required ninety percent of face value, the operator must submit additional funds or post additional financial assurance up to the required financial assurance amount.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-23, 45-6B-24, 45-6B-55, 45-6B-91.

74:29:12:10. Authorized signers. A certificate of deposit, surety bond, or letter of credit may only be signed by a person authorized by the operator. The operator shall submit a notarized letter with the operator's letterhead to the department, which lists the person or persons authorized to sign financial assurance documents on behalf of the operator. In the event that an authorized signer changes, the operator shall submit a letter listing the new authorized signer within thirty days of the change.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-55, 45-6B-91.

74:29:12:11. Insolvency or bankruptcy of surety company or bank. If the department determines that a surety company or bank, by reason of bankruptcy, insolvency, or suspension or revocation of its license, has become unable to fulfill its obligations, the operator is deemed to be without financial assurance. The department shall notify the operator in writing of the absence of financial assurance and specify a reasonable period, not to exceed ninety days, to replace financial assurance coverage. If adequate financial assurance is not posted by the end of the period, the department must petition the board to issue the operator a cease-and-desist order in accordance with SDCL 45-6B-49 and schedule a hearing before the board in accordance with SDCL 45-6B-50 and 51. During the hearing, the board may require the operator to immediately begin reclamation of the mine in accordance with SDCL chapter 45-6B, the rules promulgated thereunder, and the reclamation plan. Mining operations may not resume until the board has determined that acceptable financial assurance has been posted.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-48, 45-6B-49, 45-6B-50, 45-6B-51, 45-6B-55, 45-6B-66, 45-6B-67, 45-6B-91.

74:29:12:12. Provisions for recovery of forfeiture costs. The board shall recover the costs involved, including attorney's fees, in the forfeiture of financial assurance. Estimated forfeiture costs must be included in the calculated reclamation financial assurance and postclosure financial assurance amounts.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-48, 45-6B-49, 45-6B-50, 45-6B-51, 45-6B-55, 45-6B-66, 45-6B-67, 45-6B-91.

74:29:12:13. Board refusal to accept financial assurance. The board may refuse to accept any form of financial assurance if:

(1) The value of the financial assurance is dependent upon the success, profitability, or continued operation of the mine; or

(2) The board determines that the financial assurance offered cannot be reasonably converted to cash within one hundred eighty days of forfeiture.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-22, 45-6B-55, 45-6B-91.

74:29:12:14. Provisions for large-scale heap leach gold mine holding costs. A large-scale heap leach gold mine shall submit a cash deposit that complies with the requirements of § 74:29:12:08 to cover holding costs for a period of time until proceeds from a forfeited reclamation financial assurance instrument are received by the department. Holding costs include costs for the department to conduct necessary water treatment, water sampling and analysis, and mine site maintenance in the interim period between bankruptcy of the operator and the payment of proceeds from the forfeiture to the department. The calculation for these holding costs must be part of the reclamation financial assurance calculation as provided in § 74:29:12:01, and the cash deposit must be submitted at the same time as the reclamation financial assurance.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-23, 45-6B-55, 45-6B-91.

74:29:12:15. Net present value calculations for postclosure financial assurance. The board shall use a net present value calculation for postclosure financial assurance. The board may utilize inflation and discount rate projections provided by the South Dakota Investment Council. The board shall review inflation and discount rate projections at least once every five years.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-91.

74:29:12:16. Recovery of reclamation and postclosure costs. In the event the amount of financial assurance forfeited is insufficient to pay for the full cost of reclamation or postclosure care and maintenance, the operator is liable for the remaining costs. The board may recover from the operator all reasonably incurred reclamation and postclosure costs in excess of the amount forfeited.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-48, 45-6B-49, 45-6B-50, 45-6B-51, 45-6B-55, 45-6B-66, 45-6B-67, 45-6B-91.

74:29:12:17. Water treatment equipment cost and availability -- First-priority lien on equipment. Costs of acquiring and installing any water treatment equipment that may be removed by creditors prior to or during bankruptcy proceedings must be included in the reclamation and postclosure financial assurance calculations. The board may, at its discretion, accept a first-priority lien on any water treatment equipment that must remain in order for the department to conduct required water treatment during final reclamation and postclosure care and maintenance in lieu of the calculations. An operator providing a lien on the equipment shall file an annual report with the department in sufficient detail to fully describe the condition, value, and location of all pledged equipment. The operator shall also immediately notify the department of any other interest that arises in the pledged equipment.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-24, 45-6B-48, 45-6B-49, 45-6B-50, 45-6B-51, 45-6B-55, 45-6B-66, 45-6B-67, 45-6B-91.

74:29:12:18. Review of calculated financial assurance amounts. The board may adjust financial assurance amounts at any time if the amounts inadequately cover current reclamation costs because of inflation or discount rate projections, unanticipated conditions, increases or decreases in disturbed or reclaimed acreage, and modifications made to the permit through permit amendments or technical revisions. Calculated financial assurance amounts may also be evaluated during the review of annual reports for each mine permit to determine whether the calculated amount adequately covers current reclamation costs and if any adjustments are needed.

Source:

General Authority: SDCL 45-6B-81.

Law Implemented: SDCL 45-6B-20, 45-6B-20.1, 45-6B-21, 45-6B-55, 45-6B-91.