

ARTICLE 74:29

MINED LAND RECLAMATION

Chapter

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CHAPTER 74:29:01

PERMIT APPLICATIONS -- FILING AND REVIEW

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 not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which case the period runs until the end of the next day which 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 days after submission of an application, the department shall notify the applicant in writing whether the application 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 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~~30 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 to complete the application;
 - (b) Request in writing that the application be considered filed; or
 - (c) Withdraw the application.

If additional information is submitted to complete the application, the procedure in subdivision (2) of this section shall 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 74:29:02.

CHAPTER 74:29:10

SPECIAL, EXCEPTIONAL, CRITICAL, OR UNIQUE LANDS

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 nominating petitions received ~~during the preceding year~~ at any time by the department to update the preliminary list. ~~The notification and publication requirements of subdivision 74:29:10:17(4) shall be followed prior to the hearing.~~ The board shall publish a notice of the time, date, and location of the hearing in a newspaper of general circulation within the county where any lands being nominated to the preliminary list are located. The notice shall be published once a week for two consecutive weeks immediately 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 required financial assurance shall be in an amount sufficient to cover the costs to the Department of hiring a third-party contractor to conduct reclamation and postclosure activities. The Department shall at a minimum consider the following in calculating reclamation surety and/or 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 mine facilities such as pond liners, capping systems, water treatment facilities, and monitoring equipment;
- 12) Noxious weed control; and
- 13) Mobilization/demobilization, contingency, contractor profit and overhead, contract administration, scope and bid, engineering and consulting, and state excise tax costs.

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. Long term water treatment costs. For mine permits in which long term water treatment is required, the operator shall submit estimated capital and replacement costs of the treatment system and estimated annual treatment costs to the Department for review and verification prior to inclusion in the financial assurance calculation. A ten percent contingency cost shall be applied to the total capital and annual treatment costs. The Board may require more than a ten percent contingency cost as needed. The Department 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 shall not be allowed in a financial assurance calculation.

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 of Minerals and Environment may accept the following forms of financial assurance:

- 1) Surety bonds;
- 2) Certificates of deposit;
- 3) Irrevocable letters of credit;
- 4) Cash;
- 5) Government securities; and
- 6) A combination of any of the above.

The Board shall not accept any type of self-bond agreement or corporate guarantee for the required financial assurance.

Source:

General Authority: SDCL 45-6B-81.

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

74:29:12:05. Surety bonds. Surety bonds are 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 chapter 58-21.

(2) A surety bond may only be cancelled after approval by the Board of Minerals and Environment. The surety company must give proper written notification, mailed by certified mail return receipt requested, to the Board and the operator one hundred fifty days prior to cancellation. In the event of cancellation, the surety bond will remain in full force and effect and the surety company will not be 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 of Minerals and Environment. The Department may proceed with surety bond forfeiture if replacement financial assurance is not submitted and accepted by the Board no later than ninety days after the notice of cancellation is received by the operator. The surety company shall be liable for payment of the forfeited surety bond.

(3) The surety bond shall not constitute 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 the state of South Dakota to effectuate reclamation and environmental cleanup.

(4) The surety bond must be payable to the Department in full upon demand and receipt from the Department of a notice that the operator has failed to comply with the provisions of

Chapter 45-6B, the rules adopted thereunder, or the mine permit, the failure of which authorizes forfeiture of the surety bond.

(5) The surety company is required to have a minimum of twenty million dollars in net worth.

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

(7) The board may not accept a surety bond from a surety company for any operator, on all permits held by that operator, in excess of three times the company's maximum single obligation as provided in (6).

(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 Interior Circular 570 as revised.

(9) The operator must provide evidence that the surety company issuing the surety bond is in good financial standing and condition, as evidenced by its ratings from nationally recognized rating organizations. AM Best ratings shall be at an A- or better or its equivalent based on other organization's rating scales.

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

(11) The surety bond shall provide that the surety and the operator shall be jointly and severally liable.

(12) The surety bond must provide 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 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. Certificates of deposit are subject to the following requirements:

(1) The board may accept as financial assurance an assignment of a certificate of deposit in a denomination not in excess of \$100,000, or the maximum insurable amount as determined by FDIC and FSLIC, whichever is less. The board may not accept a combination of certificates of deposit for one operator from one institution in excess of that limit.

(2) The board may accept only automatically renewable certificates of deposit 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 shall not constitute 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 the state of South Dakota to effectuate reclamation and environmental cleanup.

(4) The board shall require that each certificate of deposit be made payable to or assigned to the state of South Dakota/Department of Agriculture and Natural Resources, both in writing and in the records of the bank issuing the certificate. The board shall require banks issuing these certificates to waive all rights of setoff or liens against these certificates.

(5) The original certificate of deposit shall be submitted to the Department and held by the Department until released by the Board of Minerals and Environment.

(6) The operator must provide evidence that the bank issuing the certificate of deposit is in good financial standing and condition, as evidenced by its rating by an appropriate rating system on an annual basis

(7) The board shall require the operator to deposit sufficient amounts of certificates of deposit, to ensure the department will be 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 shall have the option of rolling 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.

(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 will be 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. Irrevocable letters of credit are subject to the following requirements:

(1) The letter of credit must be irrevocable and automatically extended for additional periods of one year from the expiration date unless the bank 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 letter of credit shall be forfeited to the Department and collected upon by the Department.

(2) The irrevocable letter of credit must be issued by a FDIC insured bank organized and authorized to do business in the United States and located in the state of South Dakota, except that the bank need not be located in the state of South Dakota if the irrevocable letter of credit can be exercised at an affiliate or subsidiary located in the state of South Dakota, or is confirmed by a bank located in the state of South Dakota, or at the Board's discretion is determined to be an acceptable letter of credit.

(3) The irrevocable letter of credit shall be 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 must be payable to the Department in full upon demand and receipt from the Department of a notice that the operator has failed to comply with the provisions of Chapter 45-6B, the rules adopted thereunder, or the mine permit, the failure of which authorizes forfeiture of the letter of credit.

(5) The operator must provide evidence 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 board shall not accept an irrevocable letter of credit in excess of 10 percent of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant.

(8) The board shall not accept irrevocable letters of credit for any operator, on all permits held by that operator, in excess of 30 percent of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant.

(9) Using the balance sheet referenced in (7) and a certified income and revenue sheet, the bank must meet the three following criteria:

- a. The bank must be earning at least a one percent rate of return on total assets (net income/total assets = 0.01 or more);
- b. The bank must be earning at least a 10 percent return on equity (net income/total stockholders' equity = 0.10 or more); and
- c. Capital or stockholder's equity must be at least 5.5 percent of total assets ((total stockholder's equity [capital stock + retained earnings])/total assets = 0.055 or more).

(10) The board may not accept irrevocable letters of credit from a bank for any operator, on all permits held by that operator, in excess of three times the company's maximum single obligation.

(11) The bank's qualifications must be reviewed annually prior to the time the letter of credit is renewed.

(12) The irrevocable letter of credit shall provide 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 shall 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 deposits shall be subject to the following requirements:

- (1) The operator may meet financial assurance obligations by establishing a cash account with the state of South Dakota.
- (2) The Department will 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.
- (3) Any interest earned on the state account shall be 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 shall be subject to the following requirements:

- (1) Government securities are backed by the full faith and credit of the United States Government shall be purchased from a United States bank or broker.
- (2) The Government Securities shall have an approximate minimum initial maturity of 5 years from date of the Board's acceptance of the security

(3) Government Securities shall be registered to a custody agent (bank or broker) approved by the Board of Minerals and Environment and pledged to the Board of Minerals and Environment and held in a joint account with the banker or broker.

(4) All interest shall be paid to the operator.

(5) 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.

(6) The only authorized signatory on the account is the chairman of the Board of Minerals and Environment.

(7) The operator shall provide to the Board a Book Entry receipt and an assignment of the Government securities to the Board.

(8) Fees associated with the purchase and maintenance of the Government securities are the responsibility of the operator.

(9) The custody agent shall provide monthly statements of the account to the Department.

(10) If the market value of the Government securities drops below the required ninety percent of face value, the operator will 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 shall only be signed by a person or persons authorized by the operator. A notarized letter with the operator's letterhead shall be submitted to the Department which lists the person or persons authorized to sign financial assurance documents on behalf of the operator. In the event that authorized signers change, the operator shall submit a letter listing the new authorized signers within 30 days after 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 shall be 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 allowed, the Department shall issue the operator a cease and desist order. The operator shall immediately begin reclamation of the mine in accordance with this act, the regulations promulgated thereunder, and the reclamation plan. Mining operations shall not resume until the Department 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 shall be included in the calculated reclamation surety and/or postclosure 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-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. Provisions for refusal for board to accept financial assurance. The board may refuse to accept any form of financial assurance if the value of the financial assurance is dependent upon the success, profitability, or continued operation of the mine or 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. Large scale heap leach gold mines shall submit a cash bond which complies with the requirements of ARSD 74:29:12:08 to cover holding costs for a period of time until proceeds from a forfeited reclamation financial assurance instrument surety are received by the Department. Holding costs shall include costs for the Department to conduct necessary water treatment, water sampling and analysis, and mine site maintenance. The calculation for these holding costs shall be part of the reclamation financial assurance calculation, and the cash bond shall 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 inflation and discount rate projections shall be reviewed 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 shall be liable for the remaining costs. The Department 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 shall be included in the reclamation and postclosure financial assurance calculations. The Department 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 such 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 Department reserves the right to adjust financial assurance amounts at any time for changes to 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 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.