

ENVIRONMENTAL QUALITY

CHAPTER 86

ENERGY

Subchapter 1

Solar and Wind Generation Facility Decommissioning and Bonding

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Subchapter 1

Solar and Wind Generation Facility Decommissioning and Bonding

17.86.101 DEFINITIONS In this subchapter, the following definitions apply:

- (1) "Abandon" or "abandonment" means generating 10 percent or less of the monthly maximum generation potential, as determined by the facility's nameplate capacity, each month for 12 consecutive months.
- (2) "Board" means the Board of Environmental Review as defined in 75-26-301, MCA.
- (3) "Collateral bond" means an indemnity agreement for a fixed amount, payable to the department, executed by the owner and supported by the deposit with the department of cash, negotiable bonds of the United States (not treasury certificates), state or municipalities of the United States, negotiable certificates of deposit or an irrevocable letter of credit of any bank organized or authorized to transact business in the United States or other surety acceptable to the department.
- (4) "Commenced commercial operation" means:
 - (a) for a solar facility, the first date the facility's cumulative nameplate rated generating capacity is 2 megawatts or more and the facility delivers energy to the distribution or transmission system; or
 - (b) for a wind generation facility, the date the turbine commissioning completion certification is signed for the specific turbine whose nameplate rated capacity first brings the facility's cumulative nameplate rated generating capacity to 25 megawatts or more.
- (5) "Decommission" or "decommissioning" has the same meaning as in 75-26-301, MCA.
- (6) "Department" means the Department of Environmental Quality as defined in 75-26-301, MCA.
- (7) "Facility" means a wind generation facility or a solar facility.
- (8) "Landowner" means a person or persons who hold legal title to the real property where a facility is located.
- (9) "Owner" has the same meaning as in 75-26-301, MCA.
- (10) "Owns a 10 percent or greater share of the facility" means having ownership of 10 percent or greater in capital stock of the corporation that owns the facility or having a 10 percent or greater ownership interest in a partnership or limited liability company that owns the facility:
 - (a) for a wind generation facility that commenced commercial operation on or before May 3, 2017, on May 3, 2017, and thereafter;
 - (b) for a wind generation facility that commenced commercial operation after May 3, 2017, at commencement of commercial operation and thereafter;
 - (c) for a solar facility that commenced commercial operation on or before May 7, 2019, on May 7, 2019, and thereafter; and
 - (d) for a solar facility that commenced commercial operation after May 7, 2019, at commencement of commercial operation and thereafter.

(11) "Person" has the same meaning as in 75-26-301, MCA.

(12) "Private bonding" means the terms and conditions of a lease agreement between a landowner and an owner that incorporate bonding requirements for decommissioning a facility.

(13) "Repurposed" has the same meaning as in 75-26-301, MCA.

(14) "Significant investment" means a capital investment in an equipment project associated with a facility that the owner has demonstrated to the department will extend the useful life of the facility by more than five years. The equipment project must be completed in three years or less. If a wind generation facility removes all wind turbines and existing pads and installs new wind turbines on new pads, the facility is a new facility and not a repurposed facility. If a solar facility is removed and a new solar facility is installed in the same location, the facility is a new facility and not a repurposed facility.

(15) "Solar facility" has the same meaning as in 75-26-301, MCA.

(16) "Surety bond" means an indemnity agreement in a certain sum, payable to the department, executed by the owner, that is supported by the payment guarantee of a corporation authorized to do business as a surety in Montana.

(17) "Wind generation facility" has the same meaning as in 75-26-301, MCA. (History: 75-26-310, MCA; IMP, 75-26-301, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.102 OWNER RESPONSIBILITIES (1) An owner of a facility shall:

(a) decommission its facility according to this subchapter and pay for all costs associated with decommissioning;

(b) commence decommissioning activities within 90 days after abandonment, unless the owner receives department approval of an alternative written plan for decommissioning;

(c) complete decommissioning within 24 months after abandonment, or according to a reasonable alternative schedule proposed by the owner and approved by the department upon a showing of good cause for the extension;

(d) notify the department in writing within 30 days after abandonment; and

(e) notify the department in writing within 30 days after beginning onsite decommissioning activities.

(2) The owner of a facility that commenced commercial operation on or before May 7, 2019, shall submit in writing the following to the department on or before July 1, 2020. The department may, but is not required to, review these initial decommissioning plans and information for completeness:

(a) the date that the facility commenced commercial operation;

(b) a decommissioning plan in accordance with the requirements of ARM 17.86.105 regardless of any bond exemptions allowed under ARM 17.86.107(4) or (5);

(c) identification of each landowner; and

(d) if the landowner or landowners identified pursuant to (2)(c) are not governmental entities, whether the landowner or landowners have an ownership interest in the facility and, if so, a detailed description of the interests.

(3) The owner of a facility that commences commercial operation after May 7, 2019, shall submit to the department the information required in (2) within 12 months after commencing commercial operation. The department may, but is not required to, review these initial submissions for completeness.

(4) The owner shall submit an updated decommissioning plan at least 12 months before a bond is required by ARM 17.86.107(2) or (3), and at least 12 months before a bond is reviewed by the department in ARM 17.86.112(2). Updated plans must include an updated cost estimate and address expansions and modification, if any. Within 90 days after receipt, the department shall notify the owner of any deficiencies in the decommissioning plan. Within 90 days after receiving the deficiency notice, the owner shall address all deficiencies and resubmit the decommissioning plan.

(5) Within 12 months after purchasing a facility, the owner shall submit an updated decommissioning plan to the department. The updated plan must include an updated cost estimate and address expansions and modifications, if any.

(6) Department representatives shall comply with site safety and general access restrictions while at the facility. The department and the owner shall confer and arrange a time for an inspection. The department shall confirm the scope, date, and time of the inspection to the owner in writing at least ten business days prior to the inspection. At the date and time arranged, a representative of the department may enter and inspect a facility to evaluate the adequacy of a new or updated decommissioning plan and the associated bond amount. The owner shall allow the department's representative to inspect the facility and shall accompany the representative. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

Rules 17.86.103 and 17.86.104 reserved

17.86.105 DECOMMISSIONING PLAN (1) A decommissioning plan must include:

(a) a commitment to remove all aboveground wind turbines and towers;

(b) as-built plans, including general structural and electrical information, relative to the calculation of the bond for all facilities and all disturbances associated with the facility. The as-built plans must include an affidavit signed by an owner or any person authorized to act on the owner's behalf attesting to the completeness and accuracy of the as-built plans or be certified by a professional engineer that the as-built plans are complete and accurate. The department may allow redaction, the filing of a less detailed plan, or treatment of all or a portion of the plan as confidential information if the owner demonstrates to the department's satisfaction that the information or plan may be protected pursuant to 2-6-1003, MCA;

(c) a detailed estimate of the cost of decommissioning the facility with supporting calculations;

(d) any agreement(s) signed by all landowners and facility owners providing for alternative reclamation or the non-removal of buildings, cabling, electrical components, roads or any associated facilities. The agreement may be specific to decommissioning or it may be a more general agreement with specific provision relating to decommissioning. A general agreement may contain redactions to protect information that is not necessary for the department's review;

(e) a description of the manner in which the facility will be decommissioned and a proposed decommissioning schedule, which, except as provided in (1)(d), must include:

(i) dismantling and removal of all overhead electrical transmission lines and structures, transformers, buildings, and all other ancillary equipment and debris from operation of the facility that is not associated with interconnecting the facility into the electric grid;

(ii) removal of all underground cables and pipelines to a depth of 24 inches or deeper if necessary for the post operation land use;

(iii) removal of wind turbine and solar foundations and other concrete foundations and slabs to a minimum depth of 36 inches below natural grade or an alternative depth as approved by the department if appropriate for the post operation land use;

(iv) reclamation of the facility site to the approximate original surface topography that existed prior to the start of the construction of the facility with grading, topsoil application over the disturbed areas at a depth similar to that in existence prior to the disturbance, reseeding, and revegetation to achieve the same utility as the surrounding area at the time of decommissioning to prevent adverse hydrological effects;

(v) repair and reconstruction from damage to public roads, culverts and natural drainage ways resulting directly from operation of or decommissioning of the facility; and

(vi) removal and grading of all access roads to pre-construction or natural grade as appropriate;

(f) a detailed estimate of the current salvageable value of the facility by an evaluator who is not an employee of the owner; and

(g) an estimate of all other expenses related to decommissioning that are the responsibility of the owner. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.106 DETERMINATION OF BOND AMOUNT (1) The department shall set the bond amount at the estimated amount for the department to perform the decommissioning work required of an owner.

(2) The bond amount must be based on:

(a) estimated costs submitted by the owner in accordance with ARM 17.86.105 with such costs estimated by using current machinery production handbooks and publications or other documented or substantiated cost estimates acceptable to the department;

(b) estimated costs to the department that may arise from applicable public contracting requirements or the need to bring personnel and equipment to the facility after its abandonment by the owner to perform decommissioning and reclamation work;

(c) estimated costs to the department that may arise from management and maintenance of the facility upon owner insolvency or abandonment, until full bond liquidation can be effected; and

(d) other cost information as may be required by or available to the department.

(3) In determining the amount of a bond required in accordance with ARM 17.86.107, the department shall provide the owner with a preliminary bond determination, consult with the owner, and consider:

(a) the character and nature of the site where the facility is located; and

(b) the current market salvage value of the facility, as set forth in the decommissioning plan.

(4) The line items in the bond calculations are estimates only and are not limits on spending of any part of the bond to complete any particular task subsequent to forfeiture of the bond or settlement in the context of bond forfeiture proceedings.

(5) The department shall notify the owner of the facility by mail of any modification to the decommissioning plan and bond amount. The owner of the facility may appeal the modification of the plan to the board within 60 days after the notice of the modification of the plan was mailed. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.107 BONDING DEADLINE (1) Except as provided in (3) through (5), an owner shall submit a bond payable to the state of Montana in a form acceptable to the department under ARM 17.86.115 and in a sum determined by the department under ARM 17.86.106, conditioned on the faithful decommissioning of the facility. The owner shall submit the bond by the applicable deadline in (2).

(2) Except as provided in (3) through (5):

(a) if a facility commenced commercial operation on or before January 1, 2007, the owner shall submit the decommissioning bond to the department prior to the conclusion of the 16th year after commencing commercial operation; or

(b) if a facility commenced commercial operation after January 1, 2007, the owner shall submit the decommissioning bond to the department prior to the conclusion of the 15th year of commencing commercial operation.

(3) If a facility is repurposed, as determined by the department in consultation with the owner, the owner is not required to provide a bond and any existing bond must be released until the repurposed facility reaches its fifth year of operation. The owner shall submit all revised information required in ARM 17.86.102(2)(b) within six months after a facility is repurposed. Within five years after a facility is repurposed, the owner shall submit to the department a bond payable to the state of Montana in a form acceptable by the department under ARM 17.86.115 and in a sum determined by the department under ARM 17.86.106, conditioned on the faithful decommissioning of the facility.

(4) An owner is exempt from submitting a bond when a private landowner on whose land the entire facility is located owns a 10 percent or greater share of the facility, as determined by the department.

(5) An owner is exempt from submitting a bond for the facility or portion of the facility for which the owner:

(a) posts a bond with a federal agency, the Department of Natural Resources and Conservation for the lease of state land, or with a tribal, county, or local government; or

(b) provides documents to the department that demonstrate the owner has private bonding. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

Rules 17.86.108 and 17.86.109 reserved

17.86.110 PENALTIES FOR FAILURE TO SUBMIT BOND (1) If an owner does not submit the bond in the amount determined by the department under ARM 17.86.107 or replace a bond by the deadlines set forth in ARM 17.86.116 or 17.86.117, the department shall mail written notice to the owner that the bond is overdue. If the owner does not submit the bond within 30 days after the department mailed the notice, the department may assess an administrative penalty in an amount provided in 75-26-304(9)(a), MCA.

(2) An owner may appeal the department's penalty assessment to the board within 20 days after the department mails the owner written notice of the penalty. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.111 REPLACEMENT OF BOND (1) If the owner transfers ownership of the facility to a successor owner, the department shall release the bond posted by the owner in accordance with this rule within 90 days. The successor owner shall, within 90 days after the transfer, provide a bond that meets the requirements of this subchapter.

(2) The owner must receive approval from the department prior to replacing any bond. The department shall approve a replacement bond if it meets the requirements of this subchapter. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.112 ADJUSTMENT OF BOND AMOUNT (1) Once every five years, an owner may request a reduction of the required bond amount by submitting to the department an amended decommissioning plan. If the department finds that the amended decommissioning plan reduces the estimated cost to the department to complete decommissioning, the department may approve reducing the bond. Prior to denying the request in whole or in part, the department shall consult with the owner.

(2) The department shall review each decommissioning plan and bond amount every five years after a facility is bonded, or when a new owner submits a revised decommissioning plan. The department may increase the amount of the bond if the facility has expanded or the cost to decommission a facility has otherwise increased. The department shall notify the owner of any proposed bond increase and provide the owner an opportunity for an informal conference on the proposal. If the department determines that the bond amount must be increased, it shall mail to the owner a written justification for the increase. The owner shall increase the bond amount within 90 days after the date the written justification was mailed. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

Rules 17.86.113 and 17.86.114 reserved

17.86.115 FORM OF BOND (1) The owner shall submit either a surety bond or a collateral bond in a form acceptable to the department by the deadline in ARM 17.86.107.

(2) Liability under any bond, including separate bond increments or bonds applicable to a single facility, extends to the owner's entire facility. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.116 SURETY BONDS (1) An owner may satisfy the bonding requirements of this subchapter by submitting a surety bond that:

(a) is in an amount that does not exceed 10 percent of the surety's capital surplus account as shown on a balance sheet certified by a certified public accountant and submitted to the department;

(b) is in an amount that does not exceed three times the surety's maximum single obligation;

(c) is issued by a surety authorized by the Montana state auditor and listed in the United States Department of the Treasury Circular 570;

(d) has a power of attorney attached. The power of attorney must state that the surety has authorized the person issuing the bond to bind it to the bond's terms;

(e) provides a requirement and a mechanism for the surety to give prompt notice to the department and the owner of:

(i) any action alleging bankruptcy or insolvency of the surety or a violation that would result in suspension or revocation of the surety's authorization;

(ii) cancellation by the owner; and

(iii) cancellation or pending cancellation by the surety; and

(f) upon a written determination by the department that a surety is unable to comply with the terms of the bond, the owner is deemed to be without bond. The owner shall replace the bond within 90 days after the written determination is mailed by the department. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.117 LETTERS OF CREDIT (1) An owner may satisfy the bonding requirements of this subchapter by submitting a letter of credit that:

(a) is issued by a bank organized or authorized to do business in the United States;

(b) is irrevocable prior to being released by the department;

(c) is payable to the department in part or in full upon demand and receipt from the department of a notice of forfeiture issued in accordance with ARM

17.86.122;

(d) provides, upon expiration, if the department has not notified the bank in writing that a substitute bond has been provided or is not required, the bank shall immediately pay the department the full amount of the letter of credit less any previous drafts;

(e) is not for an amount in excess of 10 percent of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant and submitted to the department with the letter of credit;

(f) is for an amount that does not exceed three times the bank's maximum single obligation; and

(g) is automatically renewable annually on the letter of credit anniversary date.

(2) The department shall review a bank's qualifications annually before a letter of credit is renewed. If the department determines that a bank has become unable to fulfill its obligations under the letter of credit, the department shall, in writing, notify the owner and specify a reasonable period, not to exceed 90 days, in which the owner shall replace the bond. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

Rules 17.86.118 and 17.86.119 reserved

17.86.120 CERTIFICATES OF DEPOSIT (1) An owner may satisfy the bonding requirements of this subchapter by submitting proof acceptable to the department that the certificate of deposit (CD):

(a) was issued by a single institution in a denomination not in excess of \$250,000, or the maximum insurable amount as determined by the Federal Deposit Insurance Corporation (FDIC), whichever is less. The department may not accept a combination of CDs from an owner in excess of that limit from a single institution. If the issuing institution uses a system in which the issuing institution serves as custodian for the payees of multiple CDs and arranges for one or more additional institutions to issue CDs not in excess of each institution's FDIC limit, and submits those CDs to the department with proof determined acceptable to the department that the issued CDs are insured by the FDIC, the department may accept those CDs;

(b) is automatically renewable annually on the CD's anniversary date;

(c) in combination with all CDs, is in a sufficient amount to ensure that funds in the amount of the bond required in this subchapter will be paid to the department by the issuing bank if the department forfeits the bond and liquidates the CDs before maturity;

(d) is payable to the owner and the department, and the owner has assigned its interest in the CD to the department, both in writing and in the records of the bank issuing the CD;

(e) expressly prohibits the owner from withdrawing funds until the department has released the CD and assignment; and

(f) waives all rights of the issuer to a setoff or lien against the CDs. (History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.121 FORFEITURE OF BOND (1) If an owner fails to decommission a facility in either the manner or schedule set forth in the decommissioning plan under ARM 17.86.105 and did not commence action to rectify deficiencies within 90 days after the department's notification was mailed, the department may cause the bond to be forfeited for the entire facility. The department shall notify the owner and the surety by certified mail.

(2) The notification in (1):

(a) must include the reasons for forfeiture and the amount to be forfeited; and

(b) is a final decision of the department. (History: 75-26-310, MCA; IMP, 75-26-309, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)

17.86.122 RELEASE OF BOND; USE OF BOND BY DEPARTMENT

(1) The department shall release a bond if the department is satisfied that an owner has completed decommissioning of a facility in accordance with the decommissioning plan or as otherwise agreed to by the department in consultation with the landowner.

(2) At any time, an owner or any person authorized to act on behalf of the owner may make a written request to the department for release of all or a portion of a bond, and the department shall reply with a determination within 90 days unless the conditions do not permit access to the facility or a representative of the owner is not available within the 90-day period. The owner shall allow and accompany the department in an inspection of the facility to verify the adequacy of decommissioning for bond release.

(3) Upon bond forfeiture for an abandoned facility, the department, with staff, equipment, and material under its control or by contract with others, may take any necessary action to decommission the facility.

(4) Before decommissioning is considered complete, each wind generation facility owner shall record a map with the local county recorder showing the location of any remaining wind turbine foundation and its depth. The owner shall submit a copy of the map showing that it was stamped by the recorder, and associated documents, to the department. (History: 75-26-310, MCA; IMP, 75-26-308, 75-26-309, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18; AMD, 2020 MAR p. 957, Eff. 5/30/20.)