

DRAFT - Wind Generation Facility Decommissioning and Bonding Rules

NEW RULE I DEFINITIONS

For the purpose of this subchapter:

- (1) "Abandon" means failure to have a power purchase agreement in place for 90 days and decommissioning has not commenced.
- (2) "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, 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.
- (3) "Commenced commercial operation" means the signed date on the turbine completion certification for the turbine whose capacity first brings the wind generation facility's cumulative generating capacity to 25 megawatts or more.
- (4) "Decommission" or "decommissioning" means:
 - (a) the removal of aboveground wind turbine tower(s) after the end of a wind generation facility's useful life or abandonment;
 - (b) except as provided in rule II(2)(c), the removal of all buildings, cabling, electrical components, roads, or any other associated facilities; and
 - (c) except as provided in rule II(2)(c), reclamation of all surface lands to the previous grade and to comparable productivity in order to prevent adverse hydrological effects.
- (5) "Department" means the department of environmental quality provided for 2-15-3501, MCA.
- (6) "Expansion" means the act of a wind generation facility adding one or more additional wind turbines to its operation after commencing commercial operation.
- (7) "Owner" means a person(s) who owns a wind generation facility used for the generation of electricity.
- (8) "Person" means any individual, firm, partnership, company, association, corporation, city, town, or local governmental entity or any other state, federal, or private entity, whether organized for profit or not.
- (9) "Repurposed" means having made a significant investment in an existing wind generation facility to extend the useful life of the facility by more than 5 years.
- (10) "Surety bond" means an indemnity agreement in a certain sum, payable to the department, executed by the owner which is supported by the performance guarantee of a corporation licensed to do business as a surety in Montana.
- (11) "Wind generation facility" means any combination of a physically connected wind turbine or turbines, associated prime movers, and other associated property, including appurtenant land and improvements and personal property, that are normally operated together to produce electric power from wind that have a nameplate capacity greater than or equal to 25 megawatts.

NEW RULE II OWNER RESPONSIBILITIES

- (1) An owner is responsible for decommissioning its wind generation facility and for all costs associated with decommissioning. Decommissioning must be completed within twenty-four months, or according to a department approved alternative schedule, after the wind generation facility terminates operation or is abandoned.
- (2) The owner of a wind generation facility that commenced commercial operation on or before July 1, 2018 shall submit the following to the department on or before July 1, 2018:
 - (a) the date that the facility commenced commercial operation;
 - (b) a decommissioning plan in accordance with the requirements of rule III that includes the scope of work, manner in which decommissioning will be completed, and a cost estimate for completion; and
 - (c) provide copies of all agreements to the department between all landowner(s) and the owner regarding decommissioning that does not include removal, plans for reclamation, or both such as alternative restoration of buildings, cabling, electrical components, roads, or any other associated facilities, instead of removal, and alternative plans for reclamation of surface lands, and provide all other necessary information in accordance with this rule in order for the department to determine bond requirements.
- (3) The owner of a wind generation facility that commences commercial operation of the wind generation facility after July 1, 2018 shall submit to the department the information required in (2) of this rule within 6 months of commencing commercial operation.
- (4) The owner of a wind generation facility shall submit to the department a decommissioning plan that meets the requirements of 2(b) within 6 months of completing an expansion.
- (5) The owner of a wind generation facility shall submit an updated decommissioning plan 12 months before a bond is required by rule III(2) or (3), and 12 months before a bond is reviewed by the department in rule VIII(2).
- (6) The owner shall allow access in a timely manner and accompany the department for an inspection of the wind generation facility to verify the adequacy of a new or revised decommissioning plan for purposes of determining the bond amount.

NEW RULE III DECOMMISSIONING PLAN

- (1) A decommissioning plan must include:
 - (a) the manner in which the facility will be decommissioned; and
 - (b) a decommissioning schedule;
 - (c) a detailed estimate of the cost of decommissioning a wind generation facility by a professional engineer licensed in the state of Montana that shall at a minimum include:
 - (i) dismantling and removal of all towers, turbine generators, transformers, overhead cables and debris of the wind generation facility;

- (ii) removal of underground cables to a depth of twenty-four inches (60.96 centimeters);
 - (iii) removal of foundations, buildings, and ancillary equipment to a minimum depth of forty-eight inches (121.92 cm) below grade, or to the level of the bedrock if less than forty-eight inches below grade;
 - (iv) site restoration and reclamation to the approximate original topography that existed prior to the construction of the facility with grading, topsoil re-spread over the disturbed areas at a depth similar to that in existence prior to the disturbance, and reseeding to achieve the same utility of the surrounding area to prevent adverse hydrological effects, unless the department approves a signed request by the applicable landowner, identifying the surface features the landowner prefers to remain in place and a valid reason the landowner prefers those features to remain;
 - (v) repairs and reconstruction from damage to public roads, culverts and natural drainage ways resulting directly from the decommissioning of a wind generation facility;
 - (vi) all access roads shall be removed, cleared, and graded, unless a property owner agreement indicates otherwise or the county through official action of the county commissioners agrees to keep the road;
 - (vii) the current salvageable value of the facility, as determined by an independent evaluator;
 - (viii) all expenses related to the decommissioning shall be the responsibility of the wind generation facility owner, including any expenses related to releasing any easements.
- (d) copy of as-built plans including structural and electrical drawings of all facilities and all disturbances associated with the wind generation facility. The as-built plans must be certified by a professional engineer licensed in the state of Montana that the information included on depicted as-built plans is complete and accurate; and
- (e) the anticipated life of the facility, including the anticipated termination date.
- (2) The department may reject a decommissioning plan if:
- (a) it finds that the plan does not provide for decommissioning as defined in Rule I(4); and
 - (b) the plan does not adequately describe the cost of decommissioning.

NEW RULE IV DETERMINATION OF BOND AMOUNT

- (1) The department shall require submission of a bond by the owner in the amount of the estimated cost to the department if it had to perform the decommissioning and reclamation work required of an owner. This amount is based on the estimated cost to the department to ensure compliance with Title 75, Chapter 26 subchapter 3, and the rules adopted thereunder.
- (2) The bond amount must be based on:
- (a) the estimated costs submitted by the owner in accordance with rule III and costs estimated by using current machinery production handbooks and publications or other documented costs 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, operation, and maintenance of the site upon temporary or permanent operator insolvency or abandonment, until full bond liquidation can be effected;
 - (d) unless the provisions of the bond provide otherwise, 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; and
 - (e) such 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 rule V, the department shall consider:
- (a) the character and nature of the site where the wind generation facility is located; and
 - (b) the current market salvage value of the wind generation facility.

NEW RULE V BONDING DEADLINE

- (1) Except as provided in (3) and (4) below, and in accordance with rule VI, the owner shall submit to the department a bond payable to the state of Montana in a form acceptable by the department as in rule X and in a sum determined by the department, conditioned on the faithful decommissioning of the wind generation facility.
- (2) Except as provided in (3) and (4) below:
 - (a) if a wind generation 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 wind generation 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 wind generation 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 5th year of operation. The owner shall submit all revised information required in rule II(2)(b) and (c) within 6 months of repurposing the facility. Within 5 years of repurposing a facility, the facility shall submit to the department a bond payable to the state of Montana in a form acceptable by the department as in rule X and in a sum determined by the department in accordance with rule IV, conditioned on the faithful decommissioning of the wind generation facility.
- (4) The owner is exempt from the requirements of this rule if:

- (a) the owner posts a sufficient bond with a federal agency, with a state agency for the lease of state land, or with a tribal, county, or local government; or
- (b) the private landowner on whose land the wind generation facility is located owns a 10 percent or greater share of the wind generation facility at commencement of commercial operation and thereafter, as determined by the department.

NEW RULE VI PENALTIES FOR FAILURE TO SUBMIT BOND

- (1) If an owner does not submit an acceptable bond to the department within the timeframe required by rule V, the department may assess an administrative penalty of not more than \$1,500, and an additional administrative penalty of not more than \$1,500 for each day the bond is late.
- (2) An owner may appeal the department's penalty assessment to the board within 20 days after receipt of written notice of the penalty.

NEW RULE VII REPLACEMENT OF BOND

- (1) If the owner transfers ownership to a successor owner, the department shall release the bond posted by the owner in accordance with this rule within 90 days if the successor owner posts a bond with the department in an amount determined by the department.
- (2) The owner must receive approval from the department prior to replacing any bond.

NEW RULE VIII ADJUSTMENT OF BOND AMOUNT

- (1) Once every 5 years, an owner may request a reduction of the required bond amount upon submission of evidence to the department proving that decommissioning work, reclamation or other circumstances will reduce the maximum estimated cost to the department to complete decommissioning and therefore warrant a reduction of the bond amount.
- (2) The department shall review each decommissioning plan and bond amount every 5 years. The performance bond must be increased, as required by the department, if the cost to decommission a wind generation facility increases. The department shall notify the owner of any proposed bond increase and provide the owner an opportunity for an informal conference on the proposal. The owner shall increase the bond within 90 days of receiving the department's revised bond amount.

NEW RULE IX REPORTING REQUIREMENTS

- (1) While bonded, an owner shall notify the department within 30 days of:
 - (a) the facility's power purchase agreement terminating;
 - (b) the facility expanding the wind generation facility; or
 - (c) the facility signing a new or modified power purchase agreement.
- (2) While bonded, an owner shall notify the department 30 days before the start of decommissioning.

NEW RULE X FORM OF BOND

- (1) The form for the bond must be as provided by the department. The department shall allow for a surety bond or a collateral bond.
- (2) Liability under any bond, including separate bond increments and indemnity agreements applicable to a single wind generation facility, must extend to the entire bonded area.

NEW RULE XI SURETY BONDS

- (1) Surety bonds are subject to the following requirements:
 - (a) The department may not accept a surety bond in excess of 10% of the surety company's capital surplus account as shown on a balance sheet certified by a certified public accountant.
 - (b) The department may not accept surety bonds from a surety company for any owner in excess of three times the surety's maximum single obligation as provided in (a) above.
 - (c) The department may not accept a surety bond from a surety company for any owner unless that surety is registered with the state auditor and is listed in the United States Department of the Treasury Circular 570 as revised.
 - (d) A power of attorney must be attached to the surety bond.
 - (e) The surety bond must provide a requirement and a mechanism for the surety company to give prompt notice to the department and the owner of:
 - (i) any action alleging bankruptcy or insolvency of the surety or violation that would result in suspension or revocation of the license of the surety;
 - (ii) cancellation by the owner; and
 - (iii) cancellation or pending cancellation by the surety.
 - (f) Upon a determination by the department that a surety is unable to comply with the terms of the bond, the owner of a wind generation facility must be deemed to be without bond coverage. The owner shall replace the bond coverage within 90 days of notice from the department.
 - (g) Whenever operations are abandoned concurrent with cancellation of the bond, the department shall forfeit the bond and decommission the site.

NEW RULE XII LETTERS OF CREDIT

- (1) The department may accept as a bond a letter of credit subject to the following conditions:
 - (a) The letter must be issued by a bank organized or authorized to do business in the United States.
 - (b) The letter must be irrevocable prior to release by the department.

- (c) The letter must be 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 rule XV.
 - (d) The letter of credit must provide that, 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 less any previous drafts.
 - (e) The letter must not be for an amount in excess of 10% of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant.
 - (f) The department may not accept a letter of credit from a bank for any person in excess of three times the bank's maximum single obligation as provided in (e) above.
 - (g) The bank's qualifications must be reviewed by the department yearly prior to the time the letter of credit is renewed.
 - (h) The department may provide in the indemnity agreement that the amount must be confessed to judgment upon forfeiture, if this procedure is authorized by state law.
- (2) If the department determines that the bank has become unable to fulfill its obligations under the letter of credit, the department shall, in writing, notify the operator and specify a reasonable period, not to exceed 90 days, to replace bond coverage. If an adequate bond is not posted by the end of the period allowed, the owner shall cease operations and the department may access a penalty according to rule VI. Operations must not resume until the department has determined that an acceptable bond has been posted.

NEW RULE XIII CERTIFICATE OF DEPOSIT

- (1) The department may accept as bond an assignment of a certificate of deposit in a denomination not in excess of \$250,000, or the maximum insurable amount as determined by Federal Deposit Insurance Corporation(FDIC), whichever is less. The department may not accept a combination of certificates of deposit for a wind generation facility in excess of that limit.
- (2) The department may only accept automatically renewable certificates of deposit issued by a bank insured by the FDIC or a credit union insured by the National Credit Union Administration (NCAU).
- (3) The department shall require the owner to deposit sufficient amounts of certificates of deposit, to assure that the department will be able to liquidate those certificates prior to maturity, upon forfeiture, for the amount of the bond required by rule IV and rule VIII.
- (4) The department shall require that each certificate of deposit be made payable to or assigned to the department, both in writing and in the records of the bank or credit union issuing the certificate. The department shall require banks or credit unions issuing these certificates to waive all rights of setoff or liens against these certificates.

NEW RULE XIV EFFECT OF FORFEITURE

- (1) The written determination to forfeit all or part of the bond, including the reasons for forfeiture and the amount to be forfeited, is a final decision by the department.
- (2) The department may forfeit any or all bonds deposited for an entire wind generation facility. Liability under any bond, including separate bond increments or indemnity agreements applicable to a single owner must extend to the owner's entire wind generation facility.
- (3) In the event the estimated amount forfeited is insufficient to pay for the full cost of decommissioning and reclamation, the owner shall be liable for the remaining costs. The department may complete or authorize completion of decommissioning of the bonded area and may recover from the owner all costs of decommissioning in excess of the amount forfeited.

NEW RULE XV RELEASE OF BOND – USE OF BOND BY DEPARTMENT

- (1) The department shall release a bond:
 - (a) If the department is satisfied that an owner has properly decommissioned a wind generation facility in accordance with the decommissioning plan or as otherwise agreed to by the department in consultation with the land owner.
 - (b) At any time, an owner or any person authorized to act on the behalf of a wind generation facility may petition the department for release of the bond or a portion thereof, and the department shall reply with a determination within 90 days unless the weather does not permit access to the facility or a representative of the owner is not available within the 90 day period. The owner must allow and accompany the department in an inspection of the wind generation facility to verify the adequacy of demolition and reclamation proposed for bond release.
- (2) An owner shall commence decommissioning and reclamation activities within 90 days of abandonment, unless the owner receives department approval of an alternative written plan for decommissioning and reclamation.
- (3) The department may forfeit a bond in part or in full if the department finds that:
 - (a) the owner has violated any of the terms or conditions of the bond;
 - (b) if the owner fails to properly decommission its wind generation facility and has not commenced action to rectify deficiencies within 90 days after notification by the department;
 - (c) the owner refuses or is unable to perform decommissioning;
 - (d) a creditor of the owner has attached or executed a judgment against the owner's equipment or materials at the wind generating facility or on the collateral pledged to the department; or
 - (e) a wind turbine has been abandoned.
- (4) Upon forfeiture of abandoned turbines, the department, with staff, equipment, and material under its control or by contract with others, may take any necessary action to decommission the wind generation facility.
- (5) Before decommissioning is considered complete, each owner shall file a map with the local county recorder showing the location of any remaining wind turbine

foundation and its depth. A copy of the map and associated documents shall be sent to the department.

NEW RULE XVI NOTICE OF ACTION ON COLLATERAL BOND

- (1) The department shall give advanced notice of any action pursuant to a collateral bond to each person who has an interest in the collateral and who, in writing at the time the collateral was offered, requested notice of future action.

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