

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 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 meaning as defined in 75-26-301, MCA.

(6) "Department" means the Department of Environmental Quality as defined in 75-26-301, MCA.

(7) "Landowner" means the person or persons who hold legal title to the property.

(8) "Owner" has the meaning as defined in 75-26-301, MCA.

(9) "Owns a 10 percent or greater share of the wind generation 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 corporation that owns the facility:

(i) for a facility that commenced commercial operation on or before May 3, 2017, on May 3, 2017, and thereafter; and

(ii) for a facility that commenced commercial operation after May 3, 2017, at commencement of commercial operation and thereafter.

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

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

(12) "Significant investment" means a capital investment in property associated with a wind generation facility that the owner has demonstrated to the department will extend the useful life of the wind generation facility by more than 5 years. The equipment project must be completed in three years or less. Should a facility remove all wind turbines and existing pads and install new wind turbines on new pads, the facility is a new facility and not a repurposed facility.

(13) "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.

(14) "Wind generation facility" or "facility" has the meaning as defined in 75-26-301, MCA.

17.86.102 OWNER RESPONSIBILITIES

(1) An owner is responsible for decommissioning its facility and for all costs associated with decommissioning. Decommissioning must be completed within 24 months of 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.

(2) The owner of a facility must notify the department in writing within 30 days of abandonment.

(3) An owner shall notify the department in writing within 30 days after beginning onsite decommissioning activities.

(4) The owner of a wind generation facility that commenced commercial operation on or before July 1, 2018, shall submit in writing the following to the department on or before July 1, 2018. 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;

(c) identification of the landowner on which the wind generation facility is located; and

(d) if the landowner or landowners identified pursuant to (4)(c) are not governmental entities whether the landowner or landowners have an ownership interest in the wind generation facility and, if so, a detailed description of the interests.

(5) The owner of a facility that commences commercial operation after July 1, 2018, shall submit to the department the information required in (4) within six months of commencing commercial operation. The department may, but is not required to, review these initial submissions for completeness.

(6) The owner of a facility shall submit an updated decommissioning plan 12 months before a bond is required by ARM 17.86.107(2) or (3), and 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 of receipt, the department shall notify the owner of any deficiencies in the decommissioning plan. Within 90 days of receiving the deficiency notice, the owner shall address all deficiencies and resubmit the decommissioning plan.

(7) The owner shall allow access in a timely manner and accompany the department for an inspection of the facility to verify the adequacy of a new or updated decommissioning plan for purposes of determining the bond amount. The department shall propose in writing, the scope and schedule of any such inspection at least two weeks in advance of the inspection. Department representatives shall comply with site safety and general access restrictions while at the facility.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

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) 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;

(d) a description of the manner in which the facility will be decommissioned and a proposed decommissioning schedule, which, except as provided in (1)(c), 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 wind generation 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 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;

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

(f) an estimate of all other expenses related to decommissioning that are the responsibility of the owner.

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 and reclamation 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 wind generation facility, as determined by an evaluator who is not an employee of the owner.

(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.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.107 BONDING DEADLINE

(1) Except as provided in (3) and (4), and in accordance with ARM 17.86.110, the owner shall submit to the department a bond payable to the state of Montana in a form acceptable by the department as provided in ARM 17.86.115 and in a sum determined by the department in accordance with ARM 17.86.106, conditioned on the faithful decommissioning of the facility.

(2) Except as provided in (3) and (4):

(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 fifth year of operation. The owner shall submit all revised information required in ARM 17.86.102(4)(b) within six months of finishing repurposing activities. Within five 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 provided in ARM 17.86.115 and in a sum determined by the department in accordance with ARM 17.86.106, conditioned on the faithful decommissioning of the facility.

(4) The owner is exempt from the requirements of this rule if:

(a) the owner posts a 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) a private landowner on whose land the wind generation facility is located owns a 10 percent or greater share of the wind generation facility, as determined by the department.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.110 PENALTIES FOR FAILURE TO SUBMIT BOND

(1) If an owner does not submit the full bond amount required by the department within the timeframe required by ARM 17.86.107, 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 receipt of written notice of the penalty.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.111 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 calendar days. The successor owner shall, within 90 days of 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.

17.86.112 ADJUSTMENT OF BOND AMOUNT

(1) Once every five 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. 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. The department may increase the amount of the bond if the facility has expanded or the cost to decommission a facility otherwise 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. If the department determines that the bond amount must be increased, it shall provide the owner with a written justification for the increase. The owner shall increase the bond within 90 days of receiving the department's revised bond amount.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.115 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 facility, must extend to the entire facility.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.116 SURETY BONDS

(1) Surety bonds are subject to the following requirements:

(a) the department may not accept a surety bond in excess of 10 percent 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 a surety bond from a surety company for any owner in excess of three times the surety's maximum single obligation;

(c) the department may not accept a surety bond from a surety company for any owner unless that surety is registered with the Montana 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; and

(f) upon a determination by the department that a surety is unable to comply with the terms of the bond, the owner of a facility must be deemed to be without bond coverage. The owner shall replace the bond coverage within 90 days of notice from the department.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.117 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 the 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 ARM 17.86.122;

(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 percent of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant;

(f) the amount of the letter of credit may not exceed three times the bank's maximum single obligation; and

(g) the bank's qualifications must be reviewed by the department yearly prior to the time the letter of credit is renewed. 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 owner and specify a reasonable period, not to exceed 90 days, to replace bond coverage.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.120 CERTIFICATES OF DEPOSIT

(1) The department may accept as bond an assignment of a certificate of deposit from 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 certificates of deposit from a facility in excess of that limit from a single institution.

(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 ARM 17.86.106 and 17.86.112.

(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 certificate of deposit assignment must expressly prohibit the owner from withdrawing funds until the department has released the assignment.

(5) The department shall require banks or credit unions issuing these certificates to waive all rights of setoff or liens against these certificates.

History: 75-26-310, MCA; IMP, 75-26-304, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

17.86.121 FORFEITURE OF BOND

(1) The department may forfeit any or all bonds deposited for an entire facility. Liability under any bond, including separate bond increments or indemnity agreements applicable to a single owner must extend to the owner's entire facility.

(2) A 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.

History: 75-26-310, MCA; IMP, 75-26-309, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.

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 properly decommissioned a facility in accordance with the decommissioning plan or as otherwise agreed to by the department in consultation with the land owner.

(2) At any time, an owner or any person authorized to act on behalf of the 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 facility to verify the adequacy of decommissioning and reclamation proposed for bond release.

(3) 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.

(4) The department may forfeit a bond in part or in full if the department finds that the owner fails to decommission the facility in accordance with the decommissioning plan and has not commenced action to rectify deficiencies within 90 days after notification by the department.

(5) 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.

(6) 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.

History: 75-26-310, MCA; IMP, 75-26-308, 75-26-309, MCA; NEW, 2018 MAR p. 94, Eff. 1/13/18.