

**TITLE 19      NATURAL RESOURCES AND WILDLIFE**  
**CHAPTER 10    NON-COAL MINING**  
**PART 12       FINANCIAL ASSURANCE REQUIREMENTS**

**19.10.12.1      ISSUING AGENCY:** New Mexico Mining Commission.  
[19.10.12.1 NMAC - N, 05-15-2001]

**19.10.12.2      SCOPE:** All persons subject to the New Mexico Mining Act NMSA 1978, Section 69-36-1 et. seq.  
[19.10.12.2 NMAC - N, 05-15-2001]

**19.10.12.3      STATUTORY AUTHORITY:** NMSA 1978, Section 69-36-1 et. seq.  
[19.10.12.3 NMAC - N, 05-15-2001]

**19.10.12.4      DURATION:** Permanent.  
[19.10.12.4 NMAC - N, 05-15-2001]

**19.10.12.5      EFFECTIVE DATE:** February 15, 1996, unless a later date is cited at the end of a section.

**A.** All references to the Mining Act Parts 1-13 in any other rule shall be understood as a reference to 19.10 NMAC.

**B.** The amendment and replacement of the Mining Act Parts 1-13 shall not affect any administrative or judicial enforcement action pending on the effective date of this amendment nor the validity of any permit issued pursuant to the Mining Act Parts 1-13.  
[19.10.12.5 NMAC - N, 05-15-2001]

**19.10.12.6      OBJECTIVE:** The objective of Parts 1-14 of 19.10 NMAC is to establish regulations to implement the New Mexico Mining Act as directed in NMSA 69-36-7A. These regulations are designed to ensure proper reclamation through permitting for operations subject to the Mining Act, in accordance with provisions and standards outlined in the Mining Act.  
[19.10.12.6 NMAC - N, 05-15-2001]

**19.10.12.7      DEFINITIONS:** [RESERVED]  
[19.10.12.7 NMAC - N, 05-15-2001]  
[Definitions for this part can be found in 19.10.1.7 NMAC.]

**19.10.12.8 - 19.10.12.1200** [RESERVED]  
[19.10.12.8 - 19.10.12.1200 NMAC - N, 05-15-2001]

**19.10.12.1201    REQUIREMENT TO FILE FINANCIAL ASSURANCE:**

**A.** Except for existing mining operations without new units, the applicant for a permit shall provide a financial assurance proposal to the director following the director's determination that the permit application is approvable, but prior to the permit issuance. An applicant's financial assurance proposal shall be based upon estimates for a third-party contractor to complete reclamation work. The permit shall not be issued until receipt of the approved financial assurance by the director.

**B.** The permittee of an existing mining operation shall provide a financial assurance proposal in an amount adequate to complete the proposed closeout plan as soon as practicable after the permittee receives notice from the director that the closeout plan is approvable. The permittee shall provide the approved financial assurance prior to the director's approval of the closeout plan.

**C.** Financial assurance shall be payable to the state of New Mexico and conditioned upon the performance of all the requirements of the act, 19.10 NMAC, the permit, and the reclamation plan or closeout plan.

**D.** Financial assurance proposals submitted by applicants or permittees may be required to be reviewed by a third party contractor as ordered by the director. All costs for such review shall be paid by the applicant or permittee.

[7-12-94, 2-15-96; 19.10.12.1201 NMAC - Rn, 19 NMAC 10.2.12.1201, 05-15-2001; A, 10-15-03; A, 04-30-09]

**19.10.12.1202    AREA TO BE COVERED BY FINANCIAL ASSURANCE:**

**A.** The permittee or applicant shall file, with the approval of the director, financial assurance under one of the following schemes to cover the reclamation or closeout plan costs as determined in accordance with 19.10.12.1205 NMAC:

(1) financial assurance for the approved reclamation plan or closeout plan for the entire permit area;  
or

(2) financial assurance may be provided and approved to guarantee specific increments of reclamation within the permit area provided the sum of incremental financial assurance equals or exceeds the total amount required under 19.10.12.1205 NMAC and 19.10.12.1206 NMAC. The area to be reclaimed and the amount of financial assurance required for each increment shall be specified in detail, and the permittee shall comply with the following:

(a) An incremental financial assurance schedule and the financial assurance required for full reclamation of the first increment in the schedule shall be provided.

(b) Before mining, exploration or reclamation operations on succeeding increments are initiated and conducted within the permit area, the permittee shall file with the director additional financial assurance to cover such increments in accordance with 19.10.12 NMAC.

(c) The permittee or applicant shall identify the initial and successive areas or increments on a map submitted with the permit application and shall specify the financial assurance amount to be provided for each area or increment.

(d) Identified increments shall be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the director become necessary pursuant to 19.10.12.1211 NMAC.

**B.** A permittee or applicant shall not disturb any area prior to acceptance by the director of the required financial assurance.

[7-12-94, 2-15-96; 19.10.12.1202 NMAC - Rn, 19 NMAC 10.2.12.1202, 05-15-2001]

#### **19.10.12.1203 FORM OF FINANCIAL ASSURANCE:**

**A.** The director may accept the following forms of financial assurance:

- (1) cash;
- (2) trusts;
- (3) surety bonds;
- (4) letters of credit;
- (5) collateral bonds;
- (6) third party guarantees;
- (7) insurance; or
- (8) a combination of any of the above.

**B.** The director shall not accept any type or variety of self-guarantee or self-insurance for the required financial assurance.

[7-12-94, 2-15-96; 19.10.12.1203 NMAC - Rn, 19 NMAC 10.2.12.1203, 05-15-2001; A, 10-15-03]

#### **19.10.12.1204 PERIOD OF LIABILITY:**

**A.** The permittee shall maintain the financial assurance in effect, except as reduced pursuant to 19.10.12 NMAC, until such time as the director releases the financial assurance pursuant to 19.10.12.1210 NMAC. For areas to be revegetated, the director shall retain the amount of financial assurance necessary for a third party to re-establish vegetation for a period of 12 years after the last year of augmented seeding, fertilizing, or irrigation, unless a post-mining land use is approved by the director that does not require revegetation. Interseeding to establish diversity shall not be considered augmented seeding. Interseeding may not be performed within the last three years of the liability period.

**B.** For new mining operations only, no part of the financial assurance necessary for a third party to re-establish vegetation shall be released so long as the lands to which the release would be applicable are contributing suspended solids above background levels to streamflow of intermittent or perennial streams.

**C.** Isolated and clearly defined portions of the disturbed area not qualifying for financial assurance release may be separated from the original area and assured separately with the approval of the director. Access to the separated areas for remedial work may be included in the area under extended liability if deemed necessary by the director.

**D.** For exploration permits, financial assurance may be released after the permittee has submitted a termination report that meets the requirements of 19.10.4.407 NMAC and the director has determined, after

inspection, that the reclamation requirements of 19.10.3 NMAC and 19.10.4 NMAC, as applicable, and the permit have been satisfied.

[7-12-94, 2-15-96; 19.10.12.1204 NMAC - Rn, 19 NMAC 10.2.12.1204, 05-15-2001; A, 04-30-09]

**19.10.12.1205 DETERMINATION OF FINANCIAL ASSURANCE AMOUNT:**

**A.** The amount of the financial assurance shall be determined by the director and take into account, but not be limited to, the estimated cost submitted by the permittee or the applicant. This estimated cost should include at a minimum the following costs: contract administration; mobilization; demobilization; engineering redesign; profit and overhead; procurement costs; reclamation or closeout plan management; and contingencies. Credit for salvage value of building materials or abandoned equipment and supplies shall not be allowed. Equipment normally available to a third party contractor should be used in determining the estimated cost;

(1) reflect the probable difficulty of reclamation or closure, giving consideration to such factors as topography, geology, hydrology, revegetation potential and approved post-mining land use;

(2) depend on the requirements of the approved permit;

(3) not duplicate any federal or state financial requirements for the same area so long as those entities' financial assurance requirements are at least as stringent as this part; and

(4) not be less comprehensive than the federal requirements, if any.

**B.** The amount of the financial assurance shall be sufficient to assure the completion of the reclamation plan or closeout plan if the work has to be performed by the state of New Mexico or a contractor with the state in the event of forfeiture.

**C.** The director may accept a net present value calculation for the amount of financial assurance required pursuant to Subsections A and B of 19.10.12.1205 NMAC, if the scheduled completion date for the reclamation or closeout plan exceeds five years following closure, not including the 12 year period described in Subsection A of 19.10.12.1204 NMAC for re-establishing vegetation, and if the financial assurance will be provided in the form of cash or other allowable form of financial assurance to be converted into cash upon forfeiture. The director shall require an appropriate adjustment be made to the net present value calculation to exclude anticipated delays for converting financial assurance into cash.

(1) The net present value calculation shall be based upon projected inflation rates and projected rates of return over the term of the reclamation plan and shall be based upon publicly available indices and data. The director shall determine whether a proposed net present value calculation is acceptable and complies with the requirements of Subsection B of 19.10.12.1205 NMAC. The director shall issue guidance on acceptable methods for calculating net present value within one year from the effective date of this rule.

(2) The director shall review any approved net present value calculation as needed, but at least once every five years, to take into consideration additional information regarding rates of return and inflation rates.

**D.** The amount of financial assurance for a minimal impact existing and new mining operations shall be as provided for in Subsection F of 19.10.3.303 NMAC and Subsection E of 19.10.3.304 NMAC, respectively. [7-12-94, 2-15-96; 19.10.12.1205 NMAC - Rn, 19 NMAC 10.2.12.1205, 05-15-2001; A, 10-15-03; A, 12-30-03]

**19.10.12.1206 ADJUSTMENT OF AMOUNT:**

**A.** The amount of the financial assurance required and the terms of its acceptance shall be adjusted by the director from time-to-time as the area requiring financial assurance is increased or decreased or when the future reclamation or closeout costs change. The director may specify periodic times or set a schedule for re-evaluating and adjusting the financial assurance amount.

**B.** The director shall:

(1) notify the permittee, the surety, any person with a property interest in collateral who has requested notification under Subsection C, Paragraph 4 of 19.10.12.1208 NMAC and any person who has requested notification of actions concerning the mining operation, of any proposed adjustment to the financial assurance amount; and

(2) provide the permittee an opportunity for an informal conference on the adjustment.

**C.** Permittee may request reduction of the amount of the financial assurance upon submission of evidence to the director demonstrating that the permittee's methods of operation or other circumstances reduce the estimated cost for the state of New Mexico or its contractor to reclaim or complete the closeout plan for the area. Adjustments which involve undisturbed land or revision of the cost estimate for reclamation or closeout plan completion are not considered financial assurance release subject to procedures of 19.10.12.1210 NMAC.

**D.** In the event that the approved permit is revised or modified, the director shall review the financial assurance for adequacy, and if necessary, shall require adjustment of the financial assurance to conform to the permit as revised or modified.

[7-12-94, 2-15-96; 19.10.12.1206 NMAC - Rn, 19 NMAC 10.2.12.1206, 05-15-2001; A, 12-30-03]

**19.10.12.1207 GENERAL TERMS AND CONDITIONS OF FINANCIAL ASSURANCE:**

**A.** The financial assurance shall be in an amount determined by the director as provided in 19.10.12.1205 NMAC.

**B.** The financial assurance shall be payable to the state of New Mexico.

**C.** The financial assurance shall be conditioned upon performance of all the requirements of the act, 19.10 NMAC, and the approved permit, including completion of the reclamation or closeout plan.

**D.** The duration of the financial assurance shall be for the time period provided in 19.10.12.1204 NMAC.

**E. Failure of Financial Providers**

**(1)** The financial assurance shall provide a mechanism for a bank or surety company or guarantor to give prompt notice to the director by certified mail and the permittee of any administrative or judicial action filed or initiated alleging the insolvency or bankruptcy of the surety company, the bank, or the permittee, or alleging any violations which would result in suspension or revocation of the surety or bank charter or license to do business.

**(2)** Upon the incapacity of a bank or surety company or guarantor by reason of bankruptcy, insolvency, suspension or revocation of charter or license or for any other reason, the permittee shall be deemed to be without financial assurance coverage and shall promptly notify the director in writing. Upon notification, the director shall specify to the permittee in writing a reasonable period, not to exceed 90 days, to replace the financial assurance coverage. If adequate financial assurance is not provided by the end of the period allowed, the permittee shall cease mining and shall immediately begin to conduct reclamation or closeout measures in accordance with the reclamation or closeout plan. The director may, for good cause shown, grant up to two 30-day extensions. Mining operations shall not resume until the director has determined that an acceptable replacement financial assurance has been provided.

[7-12-94, 2-15-96; 19.10.12.1207 NMAC - Rn, 19 NMAC 10.2.12.1207, 05-15-2001]

**19.10.12.1208 FINANCIAL ASSURANCE MECHANISMS:**

**A. Surety Bonds**

**(1)** A surety bond shall be executed by the applicant or the permittee and a corporate surety licensed to do business in the state of New Mexico.

**(2)** Surety bonds shall be noncancellable during their terms, except that surety bond coverage for lands not disturbed may be cancelled with the prior written consent of the director. The director shall advise the surety, within 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an undisturbed area.

**(3)** Surety bond terms shall be established for a minimum of five years. One hundred and twenty (120) days prior to the expiration of the term, the operator must provide the director with evidence that the current surety bond will be continued, another surety company is to provide a financial assurance, or another form of financial assurance will replace the surety bond. Upon receiving notification, the director shall respond to the permittee within 30 days, in writing, indicating whether or not the proposed form and amount of financial assurance will be acceptable. If adequate financial assurance is not provided 30 days prior to the expiration of the term of the original surety bond, the permittee shall cease operations and shall forfeit the existing surety bond. Mining operations shall not resume until the director has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided within a time frame specified by the director, not to exceed 180 days, the forfeited funds, less any costs associated with the forfeiture, will be refunded to the surety company. If adequate financial assurance is not provided within the specified time frame, the director will authorize reclamation of the mining operation using the forfeited funds.

**B. Letters of Credit**

**(1)** The letter of credit must be issued by a bank organized or authorized to do business in the United States. The director may require an independent rating of the proposed bank and the cost of any such rating shall be paid by the applicant or permittee.

**(2)** Letters of credit shall be irrevocable during their terms. A letter of credit used as security in areas requiring continuous financial assurance coverage shall be forfeited and shall be collected by the state of New

Mexico if not replaced by other suitable financial assurance or letter of credit at least 30 days before its expiration date.

(3) Mining operations shall not resume until the director has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided within a time frame specified by the director, not to exceed 180 days, the payment amount, less any costs associated with the demand for payment, will be refunded to the bank. If financial assurance is not provided within the specified time frame, the director will authorize reclamation of the mining operation using the payment from the letter of credit.

(4) The letter of credit shall be payable to the state of New Mexico upon demand, in part or in full, upon receipt from the director of a notice of forfeiture issued in accordance with 19.10.12.1211 NMAC.

**C. Collateral Bonds**

**(1) Valuation of Collateral**

(a) If the nature of the collateral proposed to be given as security for financial assurance is subject to fluctuations in value over time, the director shall require that such collateral have a fair market value at the time of permit approval in excess of the financial assurance amount by a reasonable margin. The amount of such margin shall reflect changes in value anticipated over a period of five years, including depreciation, appreciation, marketability and market fluctuation. In any event, the director shall require a margin for legal fees and costs of disposition of the collateral in the event of forfeiture.

(b) The annual report filed by the permittee must indicate the current market value of any collateral accepted by the director pursuant to this part.

(c) The financial assurance value of collateral may be evaluated at any time, but it shall be evaluated as part of permit renewal and, as necessary, its amount increased or decreased. In no case shall the value attributed to the collateral exceed its market value.

(2) Collateral bonds, except for cash accounts and real property, shall be subject to the following conditions:

(a) the director must have custody of collateral deposited by the applicant or permittee until authorized for release or replacement as provided in this part;

(b) the director shall value collateral at its current market value, not at face value;

(c) the director shall not accept as collateral shares of stock issued by the following: applicant or permittee; an entity that owns or controls the applicant or permittee; or an entity owned or controlled by the applicant or permittee;

(d) the director shall require that certificates of deposit be made payable to or assigned to the state of New Mexico, both in writing and upon the records of the bank issuing the certificates; if assigned, the director shall require the banks issuing these certificates to waive all rights of setoff or liens against those certificates prior to the director's acceptance;

(e) the director shall not accept an individual certificate of deposit in an amount in excess of one hundred thousand dollars (\$100,000) or the maximum insurable amount as determined by the federal deposit insurance corporation or the federal savings and loan insurance corporation.

(3) Real property provided as a collateral bond shall meet the following conditions:

(a) the real property must be located in the state of New Mexico. The real property cannot be within the permit or affected area of a mining operation;

(b) the permittee shall grant the state of New Mexico a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell in accordance with state law or otherwise dispose of the property in the event of forfeiture under 19.10.12.1211 NMAC;

(c) for the director to evaluate the adequacy of the real property, the permittee must submit the following information for the real property, unless the director, for good cause, waives any of the requirements:

(i) a description of the property, which shall include a site improvement survey plat to verify legal descriptions of the property and to identify the existence of recorded easements;

(ii) the fair market value as determined by a current appraisal conducted by an independent qualified appraiser, previously approved by the director;

(iii) proof of ownership and title to the real property;

(iv) a current title binder which provides evidence of clear title containing no exceptions, or containing only exceptions acceptable to the director; and

(v) phase I environmental assessment.

(d) in the event the permittee pledges water rights, the permittee shall provide such additional information as may be required by the director to meet any additional conditions prescribed by him for accepting water rights as collateral.

(4) Persons with an interest in collateral provided as financial assurance who desire notification of actions affecting the collateral shall request the notification in writing to the director at the time collateral is offered.

**D.** Cash accounts shall be subject to the following conditions.

(1) The director may authorize the applicant or permittee to meet its financial assurance obligations through the establishment of a cash account in one or more federally-insured or equivalently protected accounts made payable upon demand to, or deposited directly with, the state of New Mexico.

(2) Any interest paid on a cash account must be retained in the account and applied to the account unless the director has approved the payment of interest to the permittee.

(3) Certificates of deposit may be substituted for a cash account with the approval of the director.

(4) The director shall not accept an individual cash account in an amount in excess of one hundred thousand dollars (\$100,000) or the maximum insurable amount as determined by the federal deposit insurance corporation or the federal savings and loan insurance corporation, unless the cash account has been deposited with the state of New Mexico.

**E.** Trusts shall be subject to the following conditions.

(1) The director may approve the use of a trust to hold and manage funds for the purpose of implementing reclamation as prescribed in the closeout plan. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency and which has been approved by the director. The director must be notified of any change of trustee and any successor trustees must be approved by the director.

(2) The trust fund is also subject to the following conditions:

(a) the initial payment into the trust must be made by the date established by the director;

(b) the trust shall be funded in accordance with the terms of the permit;

(c) investments of the trust shall be reviewed and approved by the director and may include fixed income investments such as U.S. treasury obligations, state issued securities, time deposits and other investments of similar risk as approved by the director;

(d) income accrued on trust funds shall be retained in the trust, except as otherwise agreed by the director under the terms of an agreement governing the trust;

(e) the trustee may be compensated under terms defined by the director, upon approval of the director;

(f) the trust may be terminated by the permittee only if the permittee substitutes, with the approval of the director, alternate financial assurance as specified in this section or the permittee has completed reclamation in accordance with Subsection E of 19.10.12.1210 NMAC;

(g) a copy of the trust agreement, as well as quarterly and annual reports of the trustee on the trust fund balance shall be provided to the director upon request;

(h) any disbursement of funds from the trust shall be approved by the director in writing.

**F.** Insurance

(1) The insurer must be authorized to transact the business of insurance in the state of New Mexico and a licensed carrier or a registered carrier of surplus lines of insurance or reinsurance and authorized to transact business of insurance in the state of New Mexico, and have an AM BEST rating of not less than A- or the equivalent rating of other recognized rating companies.

(2) The insurance policy shall be issued for the amount equal to the closeout plan cost estimate as approved by the director or for a lesser amount if used in conjunction with other forms of financial assurance and approved by the director.

(3) The insurance policy shall guarantee that funds will be available for reclamation in accordance with the closeout plan and that the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon direction of the director. Actual payments by the insurer will not change the face amount, although the insurer's future liability may be reduced by the amount of the payments, during the policy period.

(4) The permittee must maintain the policy in full force and effect until the director approves termination or replacement of insurance with another form of financial assurance acceptable to the director.

**G.** Third party guarantee

(1) A third party guarantee is a written agreement from a guarantor, which provides that if the permittee fails to complete the performance requirements of the permit, including closure and reclamation, the guarantor shall do so or, upon forfeiture in accordance with 19.10.12.1211 NMAC, shall fund such account(s) as the director may instruct in the full amount of that portion of the financial assurance covered by the third party guarantee.

(a) A third party guarantee may not exceed seventy-five percent of the total amount of the financial assurance for a permit established pursuant to 19.10.1205 NMAC. Any permittee with a third party guarantee in place at the effective date of this subparagraph shall meet the limitation within one year after the effective date of this subparagraph.

(b) A third party guarantee may not include any type of self-guarantee or self-insurance. The director may investigate to determine whether a sham relationship exists between the guarantor and the permittee. The director may reject a third party guarantee as a form of self-guarantee if the director concludes that substantial evidence supports a finding that either the guarantor or the permittee exercises dominion and control over the other so pervasive as to render the one a mere instrumentality of the other.

(2) The permittee or applicant shall submit financial information as requested by the director unless doing so would place guarantor in violation of an applicable legal requirement.

(3) The third party guarantee shall be signed by an authorized representative, and legal counsel of the guarantor shall certify that the guarantor can legally engage in the guarantee and shall certify the amounts and names of beneficiaries of all other guarantees for which the guarantor is obligated.

(4) If the guarantor is a corporation, the authorization documentation will include a board of directors' resolution or shareholder's vote or similar verification and proof that the corporation can validly execute a guarantee under the laws of the state or country of its incorporation, and its bylaws and articles of incorporation.

(5) If the guarantor is a partnership, joint venture, syndicate, or other business entity, each party or an authorized representative for the party with the beneficial interest, direct or indirect, shall sign the agreement.

(6) The guarantor's financial statements shall be audited by an independent certified public accountant and the accountant's certification provided to the director. All costs and fees for such audit and certification shall be paid by the applicant or permittee. If the accountant gives an adverse opinion of the financial statements, the guarantor cannot qualify for the third party guarantee. The permittee shall also pay for any evaluation and analysis by an independent reviewer selected by the director to evaluate and analyze for the director any information regarding the guarantor provided to the director or requested by the director to evaluate the guarantor's financial ability to provide a guarantee.

(7) The guarantor as well as its successors and assignees agree to remain bound jointly and severally liable for all litigation costs incurred in any successful effort to enforce the third party guarantee against the guarantor.

(8) The guarantor must demonstrate financial soundness by meeting either alternative I or alternative II soundness tests.

(a) Alternative I financial soundness test:

(i) guarantor has a tangible net worth of at least ten million dollars (\$10,000,000);

(ii) guarantor's tangible net worth and working capital are each equal to or greater than six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated;

(iii) guarantor's assets located in the United States amount to at least ninety percent of its total assets or its total assets in the United States are at least six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated; and

(iv) guarantor meets at least two of the following three financial ratios: the ratio of total liabilities to net worth is less than 2:1; the ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities is greater than 0.1:1; the ratio of current assets to current liabilities is greater than 1.5:1.

(b) Alternative II financial soundness test:

(i) guarantor's most recently issued senior credit obligation are rated "BBB" or higher by standard and poor's corporation, or "Baa" or higher by moody's investors service, inc.;

(ii) the guarantor has a tangible net worth of at least ten million dollars (\$10,000,000) and is greater than six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated; and

(iii) guarantor's assets located in the United States amount to at least ninety percent of its total assets or its total assets in the United States are at least six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated.

(9) The director may require monitoring of the guarantor's financial condition by a contractor with the state during the time that a third party guarantee is used for financial assurance. The costs of such monitoring shall be paid by the permittee. The frequency of such monitoring shall be determined by the director.

(10) At any time that the guarantor's financial condition is such that the guarantor no longer qualifies pursuant to this part, the permittee shall be deemed without financial assurance coverage. The director shall specify to the permittee in writing a reasonable period, not to exceed 90 days, to replace the financial assurance coverage. If adequate financial assurance is not provided by the end of the period allowed, the permittee shall cease mining and shall immediately begin to conduct reclamation or closeout measures in accordance with the reclamation or closeout plan. The director may, for good cause shown, grant up to two 30-day extensions. Mining operations shall not resume until the director has determined that an acceptable replacement financial assurance has been provided. [7-12-94, 2-15-96, 12-14-96, 6-30-98, 12-29-2000; 19.10.12.1208 NMAC - Rn, 19 NMAC 10.2.12.1208, 05-15-2001; A, 10-15-03; A, 12-30-03]

**19.10.12.1209 REPLACEMENT OF FINANCIAL ASSURANCE:**

**A.** The director may allow a permittee to replace existing financial assurance with other approved financial assurance mechanisms that provide equivalent coverage.

**B.** The director shall not release existing financial assurance until the permittee has submitted, and the director has approved, acceptable replacement financial assurance. Replacement of financial assurance pursuant to 19.10.12.1209 NMAC shall not constitute a release of the financial assurance under 19.10.12.1210 NMAC. [7-12-94, 2-15-96; 19.10.12.1209 NMAC - Rn, 19 NMAC 10.2.12.1209, 05-15-2001]

**19.10.12.1210 RELEASE OF FINANCIAL ASSURANCE:**

**A.** Release Application

(1) The permittee may file an application with the director for the release of all or part of the financial assurance. The permittee may file only one release application per year for each permit.

(2) The application shall describe the reclamation or closeout measures completed and shall contain an estimate of the cost of reclamation that has not been completed.

(3) At the time the release application is filed with the director, the permittee shall submit proof that the notice of application has been provided in accordance with 19.10.9.902 NMAC and 19.10.9.903 NMAC. The notice shall be considered part of any release application and shall contain: the permittee's name; permit number and approval date; notification of the precise location of the real property affected; the number of acres; the type and amount of the financial assurance filed and the portion sought to be released; the type and appropriate dates of reclamation or closeout plan performed; a description of the results achieved as they relate to the permittee's approved reclamation or closeout plan; and the name and address of the director, to whom written comments, objections, or requests for public hearings on the specific financial assurance release may be submitted pursuant to Subsection C of 19.10.12.1210 NMAC.

(4) The director shall promptly provide notice of receipt of the application for release of all or part of the financial assurance to the environment department, the office of the state engineer, the department of game and fish, the forestry division, the state historic preservation division, other agencies he deems appropriate, and if the operation is on state or federal land, to the appropriate state or federal land management agency.

**B.** Inspection by director. Upon receipt of the complete financial assurance release application, the director shall, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation or closeout measures completed. The evaluation shall consider, among other factors, the degree of difficulty to complete any remaining reclamation. The surface owner or lessor of the real property, other state and federal agencies as listed in Subsection A, Paragraph 4 of 19.10.12.1210 NMAC above, and any other persons who have requested advance notice of the inspection shall be given notice of such inspection and may be present at the release inspection as may any other interested members of the public. The director may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in the financial assurance release, for the purpose of gathering information relevant to the proceeding.

**C.** Public Hearing

(1) Within 30 days from the date of the inspection, a person with an interest that is or will be adversely affected by the proposed financial assurance release may file written objections to the proposed release with the director. If written objections are filed and a hearing is requested, the director shall inform all persons who have requested notice of hearings and persons who have filed written objections in regard to the application of the time and place of the hearing at least 30 days in advance of the public hearing. The hearing shall be held in the locality of the permit area proposed for release.

(2) The date, time and location of the public hearing shall be advertised by the director in a newspaper of general circulation in the locality of the permit area once a week for two consecutive weeks. All persons who have submitted a written request in advance to the director to receive notices of hearings shall be

provided notice at least 30 days prior to the hearing. The hearing procedures of 19.10.9.905 NMAC shall be followed.

**D.** Within 45 days from the inspection, if no public hearing is held pursuant to Subsection C of 19.10.12.1210 NMAC, or, within 45 days after a public hearing has been held pursuant to Subsection C of 19.10.12.1210 NMAC, the director shall notify in writing the permittee, the surety or other persons with an interest in the collateral who have requested notification under 19.10.12.1208 NMAC and the persons who either filed objections in writing or participants in the hearing proceedings who supplied their addresses to the director, if any, of the decision whether to release all or part of the financial assurance.

**E.** The director may release all or part of the financial assurance for the entire permit area or incremental area if the director is satisfied that the reclamation or closeout plan or a phase of the reclamation or closeout plan covered by the financial assurance, or portion thereof, has been accomplished in accordance with the act, 19.10 NMAC, and the permit.

**F.** If the director denies the release application or portion thereof, the director shall notify the permittee, the surety, and any person with an interest in collateral as provided for in Subsection C, Paragraph 4 of 19.10.12.1208 NMAC, in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release.

**G.** The director may approve an application for release of financial assurance for a minimal impact operation without public notice or hearing.

[7-12-94, 2-15-96; 19.10.12.1210 NMAC - Rn, 19 NMAC 10.2.12.1210, 05-15-2001; A, 12-30-03]

#### **19.10.12.1211 FORFEITURE OF FINANCIAL ASSURANCE:**

**A.** If a permittee refuses or is unable to conduct or complete the reclamation or closeout plan, if the terms of the permit are not met, or if the permittee defaults on the conditions under which the financial assurance was accepted, the director shall take the following action to forfeit all or part of the financial assurance for the permit area or an increment of the permit area:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety, if any, informing them of the determination to forfeit all or part of the financial assurance, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving reclamation or closeout.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to:

(a) An agreement by the permittee or another party to perform reclamation or closeout operations in accordance with the conditions of the permit, the reclamation or closeout plan, the act and 19.10 NMAC and a demonstration that such a party has the ability to satisfy the conditions; or

(b) The director may allow a surety to complete the reclamation or closeout plan, or the portion of the reclamation or closeout plan applicable to the financial assurance phase or increment, if the surety can demonstrate an ability to complete the reclamation or closeout plan in accordance with the approved reclamation or closeout plan. Except where the director approves partial release authorized under 19.10.12.1210 NMAC, no surety liability shall be released until successful completion of all reclamation or closeout under the terms of the permit, including applicable liability periods of 19.10.12.1204 NMAC.

**B.** In the event forfeiture of the financial assurance is required by this part, the director shall:

(1) proceed to collect the forfeited amount as provided by applicable laws if actions to avoid forfeiture have not been taken; and

(2) use funds collected from the forfeiture to complete the reclamation or closeout, or portion thereof, on the disturbed area or increment to which financial assurance coverage applies.

**C.** Upon default of the conditions under which the financial assurance was accepted, the director may cause the forfeiture of any and all financial assurance to complete reclamation or closeout for which the financial assurance was provided. Unless specifically limited, as provided in 19.10.12.1202 NMAC, financial assurance liability shall extend to the entire disturbed area under conditions of forfeiture.

**D.** In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation or closeout, the permittee shall be liable for remaining costs. The director may complete, or authorize completion of, reclamation or closeout of the area in accordance with the permit terms and may recover from the permittee all reasonably incurred costs of reclamation or closeout and forfeiture in excess of the amount forfeited.

**E.** In the event the amount of financial assurance forfeited was more than the amount necessary to complete reclamation or closeout and all costs of forfeiture, the excess funds shall be returned by the director to the party from whom they were collected.

[7-12-94, 2-15-96; 19.10.12.1211 NMAC - Rn, 19 NMAC 10.2.12.1211, 05-15-2001]

**History of 19.10.12 NMAC:**

**Pre-NMAC History:** Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

Rule 12, Financial Assurance Requirements, filed 07-12-94.

**History of Repealed Material: [Reserved]**

**Other History:**

Rule 12, Financial Assurance Requirements, filed 07-12-94, renumbered and reformatted as Subpart 12 of 19 NMAC 10.2, New Mexico Mining Act Implementation, filed 01-31-96.

19 NMAC 10.2, Subpart 12, Financial Assurance Requirements, filed 01-31-96 was renumbered and reformatted to 19.10.12 NMAC, effective 05-15-2001.