

NMED DRAFT
(SEPTEMBER 13, 2012)

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 6 WATER QUALITY
PART 8 GROUND WATER PROTECTION – FINANCIAL ASSURANCE REQUIREMENTS FOR COPPER MINE FACILITIES

20.6.8.1 ISSUING AGENCY: Water Quality Control Commission.

20.6.8.2 SCOPE: All persons subject to the Water Quality Act, NMSA 1978, Sections 74-6-1 et. seq. and specifically copper mine facilities and their operations.

20.6.8.3 STATUTORY AUTHORITY: Standards and regulations are adopted by the commission under the authority of the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17.

20.6.8.4 DURATION: Permanent.

20.6.8.5 EFFECTIVE DATE: **??/??/???**, unless a later date is cited at the end of a section.

A. All references to the copper mine rule in any other rule shall be understood as a reference to 20.6.7 NMAC.

B. The amendment and replacement of the copper mine rule shall not affect any administrative or judicial action pending on the effective date of this amendment nor the validity of any permit issued pursuant to the copper mine rule.

20.6.8.6 OBJECTIVE: The purpose of 20.6.8 NMAC is to establish financial assurance regulations for copper mine facilities pursuant to the New Mexico Water Quality Act. These regulations are designed to prevent and abate water pollution through discharge permit closure of copper mine facilities that are subject to the permitting requirements of 20.6.2.3000 through 20.6.2.3114 NMAC and 20.6.7.1 through 20.6.7.39 NMAC. To the maximum extent feasible, the department shall work with other federal and state agencies to streamline the financial assurance process and shall avoid duplication of financial assurance requirements for permittees.

20.6.8.7 DEFINITIONS: [RESERVED]
[Definitions for this part can be found in the Water Quality Act, 20.6.2.7 NMAC and 20.6.7 NMAC

20.6.8 – 20.6.8.1200 [RESERVED]

20.6.8.1201 REQUIREMENT TO FILE FINANCIAL ASSURANCE:

A. An applicant for a new, renewed, or modified discharge permit for a copper mine facility shall provide a financial assurance proposal to the secretary at the time that a discharge permit is deemed technically complete but prior to the secretary deeming the administrative record complete and that all required information is available. An applicant's financial assurance proposal shall be based upon the estimates for a third-party contractor to complete all closure work for the prevention and abatement of water pollution, including long-term maintenance, water treatment and monitoring

B. A permittee shall provide the secretary with financial assurance for a copper mine facility as follows:

(1) New copper mine facility. The permittee of a new copper mine facility shall provide the approved financial assurance authorized by a discharge permit before commencing construction of department regulated facilities covered by a secretary approved discharge permit issued pursuant to the copper mine rule

(2) Existing copper mine facility. The permittee of an existing copper mine facility shall provide the approved financial assurance authorized by a discharge permit renewal or modification within 30 days of secretary approval of a discharge permit renewal or modification.

C. Financial assurance shall be payable to the state of New Mexico and conditioned upon the performance of all the requirements of the Water Quality Act, the copper mine rule, and the discharge permit, including long-term maintenance, water treatment and monitoring.

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

20.6.8.1202 AREA TO BE COVERED BY FINANCIAL ASSURANCE:

A. The permittee or applicant shall file, with the approval of the secretary, financial assurance under one of the following schemes to cover the discharge permit closure costs as determined in accordance with 20.6.8.1205 NMAC:

(1) financial assurance for the approved discharge permit closure plan for all areas covered by the discharge permit, including long-term maintenance, water treatment and monitoring; or

(2) financial assurance may be provided and approved to guarantee specific increments of discharge permit closure within the area covered by the discharge permit, including long-term maintenance, water treatment and monitoring, provided the sum of incremental financial assurance equals or exceeds the total amount required under 20.6.8.1205 NMAC and 20.6.8.1206 NMAC. The area to be closed pursuant to the discharge permit 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 discharge permit closure of the first increment of the schedule shall be provided.

(b) Before mine discharge or discharge permit closure operations on succeeding increments are initiated and conducted within the area covered by the discharge permit, the permittee shall file with the secretary additional financial assurance to cover such increments in accordance with 20.6.8 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 discharge permit closure operations should closure by the secretary become necessary pursuant to 20.6.8.1211 NMAC.

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

20.6.8.1203 FORM OF FINANCIAL ASSURANCE:

A. The secretary 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 secretary shall not accept any type or variety of self-guarantee or self-insurance for the required financial assurance.

20.6.8.1204 PERIOD OF LIABILITY:

A. The permittee shall maintain the financial assurance in effect, except as reduced pursuant to 20.6.8 NMAC, until such time as the secretary releases the financial assurance pursuant to 20.6.8.1210 NMAC.

B. Isolated and clearly defined portions of the discharge permit area not qualifying for financial assurance release may be separated from the original area and assured separately with the approval of the secretary. Access to the separated areas for discharge permit closure work may be included in the area under extended liability if deemed necessary by the secretary.

20.6.8.1205 DETERMINATION OF FINANCIAL ASSURANCE AMOUNT:

A. The amount of financial assurance shall be determined by the secretary and shall 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; discharge permit closure plan management; and contingencies. Credit for the 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; and shall:

- (1) reflect the probable difficulty of discharge permit closure, including long-term maintenance, water treatment and monitoring, giving consideration to such factors as topography, geology, and hydrology;
- (2) depend on the requirements of the copper mine rule and approved discharge permit;
- (3) not duplicate any federal or state financial requirements for the same area so long as the secretary approves of a joint financial instrument to meet the requirements of this Part;
- (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 discharge permit closure 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 secretary may accept a net present value calculation for the amount of financial assurance required pursuant to Subsections A and B of 20.6.8.1205 NMAC, if the scheduled completion date for the discharge permit closure plan exceeds five years following closure 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 secretary 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 the projected inflation rates and projected rates of return over the term of the discharge permit closure plan and shall be based upon publicly available indices and data. The secretary shall determine whether a proposed net present value calculation is acceptable and complies with the requirements of Subsection B of 20.6.8.1205 NMAC. The secretary shall issue guidance on acceptable methods for calculating net present value with one year from the effective date of this rule.

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

20.6.8.1206 ADJUSTMENT OF AMOUNT:

A. The amount of the financial assurance required and the terms of its acceptance shall be adjusted by the secretary from time-to-time as the area requiring financial assurance is increased or decreased or when the future discharge permit closure costs change.

B. The secretary shall:

(1) notify the permittee, the surety, any person with a property interest in collateral who has requested notification under Paragraph (4) of Subsection C of 20.6.8.1208 NMAC and any person who has requested notification of actions concerning the discharge permit, of any proposed adjustment to the financial assurance amount; and

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

C. The permittee may request reduction of the amount of the financial assurance upon submission of evidence to the secretary 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 complete the discharge permit closure plan for the area covered by the discharge permit. Adjustments which involve lands on which no discharge has occurred or revision of the cost estimate for discharge permit closure plan completion are not considered financial assurance release subject to procedures of 20.6.8.121 NMAC.

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

20.6.8.1207 GENERAL TERMS AND CONDITIONS OF FINANCIAL ASSURANCE:

A. The financial assurance shall be in an amount determined by the secretary as provided in 20.6.8.1205 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 Water Quality Act, the copper mine rule and the approved discharge permit, including completion of the discharge permit closure plan.

D. The duration of the financial assurance shall be for the time period provided in 20.6.8.1204 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 secretary 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 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 secretary in writing. Upon notification the secretary 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 permittee by the end of the period allowed, the permittee shall cease all discharges and shall immediately begin to conduct closure measures in accordance with the discharge permit closure plan. The secretary may, for good cause shown, grant up to two 30-day extensions. Discharges shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided.

20.6.8.1208 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 non-cancellable during their terms, except that surety bond coverage for areas on which no discharge has occurred may be cancelled with the prior written consent of the secretary provided that the financial assurance does not cover any discharge permit closure activities related to prevention or abatement of water pollution in that area. The secretary shall advise the surety, with 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an area on which no discharge has occurred.

(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 permittee must provide the secretary 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 secretary 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 all discharges and shall forfeit the existing surety bond. Discharges shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided with a time frame specified by the secretary, 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 secretary will authorize closure of the copper mine facility 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 secretary 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.

(3) Discharges shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided with a time frame specified by the secretary, not to exceed 180 days, the payment amount, less any costs associated with the demand for payment, will be refunded to the bank. If adequate financial assurance is not provided within the specified time frame, the secretary will authorize closure of the copper mine facility 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 secretary of a notice of forfeiture issued in accordance with 20.6.8.1211 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 secretary shall require that such collateral have a fair market value at the time of discharge 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 secretary 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 secretary 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 discharge 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. Collateral bonds except for cash accounts and real property, shall be subject to all of the following conditions:

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

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

(c) the secretary shall not accept as collateral shares of stock issued by the following:

(i) the applicant or permittee;

(ii) an entity that owns or controls the applicant or permittee; or

(iii) an entity owned or controlled by the applicant or permittee;

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

(e) the secretary 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. Real property provided as 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 discharge permit or affected area of a copper mine facility;

(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 20.6.8.1211 NMAC.

(c) for the secretary to evaluate the adequacy of the real property, the permittee must submit the following information for the real property, unless the secretary, 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 secretary;

(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 secretary; and

(v) a 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 secretary 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 notification in writing to the secretary at the time collateral is offered.

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

(1) The secretary may authorize the 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 secretary 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 secretary.

(4) The secretary shall not accept an individual cash account in an amount in excess of one hundred thousand (\$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. Trusts shall be subject to the following conditions:

(1) The secretary may approve the use of a trust to hold and manage funds for the purpose of implementing discharge permit closure as prescribed in the discharge permit closure plan, including long-term maintenance, water treatment and monitoring. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated by a federal or state agency and which has been approved by the secretary. The secretary must be notified of any change of trustee and any successor trustees must be approved by the secretary.

(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 secretary;
- (b) the trust shall be funded in accordance with the terms of the discharge permit;
- (c) investments of the trust shall be reviewed and approved by the secretary 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 secretary;
- (d) income accrued on the trust funds shall be retained in the trust, except as otherwise agreed by the secretary under the terms of an agreement governing the trust;
- (e) the trustee may be compensated under the terms defined by the secretary, upon approval of the secretary;
- (f) the trust may be terminated by the permittee only if the permittee substitutes, with the approval of the secretary, alternate financial assurance as specified in this section or the permittee has completed discharge permit closure in accordance with Subsection E of 20.6.8.1210 NMAC.;
- (g) a copy of the trust agreement, as well as quarterly and annual report of the trustee on the trust fund balance shall be provided to the secretary upon request;
- (h) any disbursements of funds from the trust shall be approved by the secretary 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 discharge permit closure plan cost estimate as approved by the secretary or for a lesser amount if used in conjunction with other forms of financial assurance and approved by the secretary.

(3) The insurance policy shall guarantee that funds will be available for discharge permit closure in accordance with the discharge permit closure 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 secretary. 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 secretary approves termination or replacement of insurance with another form of financial assurance acceptable to the secretary.

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, the guarantor shall do so or, upon forfeiture in accordance with 20.6.8.1211 NMAC, shall fund such account(s) as the secretary 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 discharge permit established pursuant to 20.6.8.1205 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 secretary may investigate to determine whether a sham relationship exists between the guarantor and the permittee. The secretary may reject a third party guarantee as a form of self-guarantee if the secretary 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 secretary unless doing so would place guarantor in violation of an applicable legal agreement.

(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 secretary's resolution or shareholders 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 secretary. 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 secretary to evaluate and analyze for the secretary any information regarding the guarantor provided to the secretary or requested by the secretary 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 United States 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 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 United States 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 ration 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 United States 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 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 United States for which the guarantor is obligated

(9) The secretary 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 secretary.

(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 secretary 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 secretary may, for good cause shown, grant up to two 30-day extensions. Mining operations shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided.

20.6.8.1209 REPLACEMENT OF FINANCIAL ASSURANCE:

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

B. The secretary shall not release existing financial assurance until the permittee has submitted, and the secretary has approved, acceptable replacement financial assurance. Replacement of financial assurance pursuant to 20.6.8.1209 NMAC shall not constitute a release of the financial assurance under 20.6.8.1210 NMAC.

20.6.8.1210 RELEASE OF FINANCIAL ASSURANCE: The following requirements apply to the release of discharge permit closure plan financial assurance for a copper mine facility except that the provisions of Paragraphs (3) and (4) of Subsection A of this section and Subsections B, C and D of this section do not apply if the area for which release of financial assurance is sought is subject to the mining and mineral division provisions of 19.10.12.1210 NMAC.

A. Release application.

(1) The permittee may file an application with the secretary 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 discharge permit closure measures completed and shall contain an estimate of the cost of discharge permit closure, including long-term maintenance, water treatment and monitoring, that has not been completed.

(3) At the time the release application is filed with the secretary, the permittee shall submit proof that the notice of application has been provided in accordance with 20.6.2.3108 NMAC. The notice shall be considered part of any release application and shall contain: the permittee's name; discharge 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 discharge permit closure plan performed; a description of the results achieved as they relate to the permittee's approved discharge permit closure plan; and the name and address of the secretary, to whom written comments, objections, or requests for public hearings on the specific financial assurance release may be submitted pursuant to Subsection C of 20.6.8.1210 NMAC.

(4) The secretary shall promptly provide notice of receipt of the application for release of all or part of the financial assurance to the mining and mineral division, 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 secretary. Upon receipt of the complete financial assurance release application, the secretary shall within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the discharge permit closure measures completed. The evaluation shall consider among other factors, the degree of difficulty to complete any remaining discharge permit closure. The surface owner or lessor of the real property, other state and federal agencies as listed in Subsection A, Paragraph 4 of 20.6.8.1210NMAC 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 secretary may arrange with the permittee to allow access to the discharge 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 secretary. If written objections are filed and a hearing is requested, the secretary 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 secretary 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 secretary to receive notices of hearing shall be provided notice at least 30 days prior to the hearing. The hearing procedures of 20.6.2.3110 NMAC shall be followed.

D. Within 45 days after the inspection, if no public hearing is held pursuant to Subsection C of 20.6.8.1210 NMAC, or, within 45 days after a public hearing has been held pursuant to Subsection C of 20.6.8.1210 NMAC, the secretary shall notify in writing the permittee, the surety or other persons with an interest in the collateral who have requested notification under 20.6.8.1208 NMAC and the persons who either filed objections in

writing or participants in the hearing proceedings who supplied their addresses to the secretary, if any, of the decision whether to release all or part of the financial assurance.

E. The secretary may release all or part of the financial assurance for the entire discharge permit area or incremental area if the secretary is satisfied that the discharge permit closure plan or a phase of the discharge permit closure plan covered by the financial assurance, or portion thereof, has been accomplished in accordance with the Water Quality Act, the copper mine rule and the discharge permit.

F. If the secretary denies the release application or portion thereof, the secretary shall notify the permittee, the surety, and any person with an interest in collateral as provided in Subsection C, Paragraph 4 of 20.6.8.1208 NMAC, in writing stating the reasons for disapproval and recommending corrective actions necessary to secure the release.

20.6.8.1211 FORFEITURE OF FINANCIAL ASSURANCE:

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

(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 discharge permit closure operations in accordance with the conditions of the discharge permit, discharge permit closure plan, the Water Quality Act and the copper mine rule and a demonstration that such a party has the ability to satisfy the conditions; or

(b) The secretary may allow a surety to complete the discharge permit closure plan, or the portion of the discharge permit closure plan applicable to the financial assurance phase or increment, if the surety can demonstrate an ability to complete the discharge permit closure plan in accordance with the approved discharge permit. Except where the secretary approves partial release authorized under 20.6.8.1210 NMAC, no surety liability shall be released until successful completion of all discharge permit closure under the terms of the discharge permit, including applicable liability periods of 20.6.8.1204 NMAC

B. In the event forfeiture of the financial assurance is required by this part, the secretary 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 discharge permit closure, or portion thereof, on the area covered by the discharge permit or increment to which financial assurance coverage applies.

C. Upon default of the conditions under which the financial assurance was accepted, the secretary may cause the forfeiture of any and all financial assurance to complete discharge permit closure for which the financial assurance was provided. Unless specifically limited, as provided in 20.6.8.1202 NMAC, financial assurance liability shall extend to the entire area covered by the discharge permit under conditions of forfeiture.

D. In the event the estimated amount forfeited is insufficient to pay for the full cost of discharge permit closure, the permittee shall be liable for remaining costs. The secretary may complete, or authorize completion of discharge permit closure of the area in accordance with the copper mine rule and the discharge permit terms and may recover from the permittee all reasonably incurred costs of discharge permit closure 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 discharge permit closure and all costs of forfeiture, the excess funds shall be returned by the secretary to the party from whom they were collected.