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1.0 Introduction

1.1 This policy supersedes and replaces the Operational Policy on the Taking, Disposition and Removal of Non-metallic Substances from Reserves, 2001 and any policy statements contained within the Guidelines for Unconsolidated Non-Metallic Substances on Reserve Land, 2014. For procedural information, refer to the 2014 Guidelines until new procedures are released.

1.2 Non-metallic minerals are mineral substances located at or near the surface of the land, which may be removed by an open excavation. They include: sand, gravel, clay, earth, ash, marl, peat, limestone, gypsum, granite, diamond, coal, placer deposits of non-metallic minerals and other nonmetallic substances. They do not include: a) oil, gas and bitumen as defined in the *Indian Oil and Gas Act* and its *Indian Oil and Gas Regulations*; and, b) naturally occurring metallic substances and rock containing those substances.

1.3 Minerals are considered collective assets on Band lands and allotted lands.

1.4 This policy addresses specific provisions for non-metallic mineral permits and leases. For information on other requirements for permits and leases, please see the chapters on designations, leases and permits, as applicable.

Precedents (Templates)

1.5 Precedents (available from the department) provide the basis for permits issued and leases granted under the *Indian Act*, and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. The precedents simplify drafting, allow for a streamlined process and can be tailored to meet the needs of specific projects.

1.6 A National Non-Metallic Permit Precedent is under development; however, regional offices may develop region-specific precedents to suit local contexts.

2.0 Creating a Permit or Lease

2.1 The following instruments can be used for the disposal of non-metallic minerals: permits and leases.

Permit

2.1.1 Permits for the disposal of non-metallic minerals may be authorized pursuant to s.58(4)(b) or s.53(1)(b) of the *Indian Act*.

2.1.2 Paragraph 58(4)(b) non-metallic mineral permits do not require a designation of lands.

2.1.3 Paragraph 53(1)(b) non-metallic mineral permits may be issued on designated lands. The designation must include provisions enabling the issuance of such instruments and explicit authorization for the lessee to extract the non-metallic minerals. If a pre-existing designation does not specify the extraction of non-metallic minerals, an amendment to that designation or a new designation providing for such rights is required.

2.1.4 Where the Band's consent cannot be obtained without undue difficulty or delay, the department may issue a temporary s.58(4)(b) permit for a duration not exceeding one year.

Lease

2.1.5 A s.53(1)(b) lease may be granted if the operation contemplates long-term use, exclusive occupation and/or the construction of permanent structures based on the proponent's plans for the development and at the request of the Band. A designation of the land is required and must include provisions as set out in 2.1.3 above.

General Characteristics of a Permit or Lease

Negotiations

2.2 The Band Council and the proponent negotiate the key elements including consideration (fees, whether prepaid or reviewed periodically), the proposed use of land, and duration of the permit/lease. All elements are subject to review by the department and it is the responsibility of the department to ensure all non-negotiable terms such as all applicable laws, regulations and standards are included in the final permit/lease.

Duration (Term)

2.3 Non-metallic mineral permits are usually short in duration, between one to five years. A longer permit term may be appropriate in cases where the quantity of the material to be extracted is large and/or there is a schedule for the extraction.

2.4 A non-metallic mineral lease under s.53(1)(b) of the *Indian Act* may not exceed the term of the corresponding designation.

Land Description (Survey)

2.5 The description of the land must meet the requirements contained in the Interdepartmental Agreement between the department and Natural Resources Canada.

Encumbrance Check

2.6 Prior to the issuance of any permit or grant of any lease to dispose of non-metallic minerals, an encumbrance check must be conducted to identify all surface and subsurface encumbrances, locatee interests, and Indian Oil and Gas Canada interests registered in the Indian Lands Registry System. After an encumbrance check is completed, a Land Status Report summarizing these third party interests must be generated and provided to the Band Council. It is the Band Council's responsibility to review the Land Status Report and take appropriate steps to ensure the removal of any conflicting encumbrances. If all conflicting encumbrances are not removed, a non-metallic mineral interest cannot be issued.

Access to the Permit/Lease Area

2.7 Access to the permit/lease area (e.g., road allowance, street, or lane) must be addressed in or with the permit/lease (e.g., access pursuant to s.28(2) or s. 53(1)(b) of the *Indian Act* may be included in the permit/lease or by way of a separate access instrument).

2.8 As permits authorize non-exclusive use and occupation, the permit area remains available to the Band for uses compatible with the use authorized in the permit.

Surface Consideration (Surface Fee)

2.9 A surface fee is optional and is included in the permit/lease at the request of the Band. Surface fees are compensation for the use and loss of land as a result of the operation. A surface fee can be negotiated as a condition to ensure the proponent extracts the minerals within the term of the permit/lease rather than holding the resource.

2.10 While surface fees are ultimately negotiable, they should be based upon fair market rent or current market value of the utilized lands and coverage area required for the operation.

2.11 For leases, the surface fee should be based upon fair market rent for the utilized lands. Surface fees can be for less than fair market rent if allowed in the designation and consented to by the Band.

2.12 Surface fees are to be paid to the Receiver General for Canada and placed in the Band's Revenue Account.

Royalties, Bonuses and Royalty Pre-Payments

2.13 Royalty rates may be negotiated and must reflect fair market value. Non-metallic mineral value is variable, depending on the availability and location of the resource. Sources for determining standard rate non-metallic mineral value may include local suppliers, rural municipalities and provincial rates.

2.14 Royalties are calculated by weight or volume of non-metallic minerals removed from the reserve. Royalties must be paid periodically, usually quarterly or as negotiated, and stipulated in the terms and conditions of the permit/lease. Payment of royalties must be accompanied by a statement of account showing the quantity in weight or volume of material removed during the period to which the royalty payment corresponds. All royalties must be deposited into the Band's Capital Trust Account.

2.15 An annual Statutory Declaration by the permittee/lessee showing the total amount removed in previous years is also required as royalties result from a one-time sale of a resource.

2.16 A bonus payment or royalty pre-payment (i.e., an advance) may be negotiated to secure the arrangement. Such funds can be paid in the form of a lump sum or on an agreed schedule of payments.

Goods and Services Tax/Harmonized Sales Tax

2.17 The department must charge, collect and remit to the Canadian Revenue Agency, all applicable taxes. Permits and leases must contain a provision requiring permittees/lessees to pay all applicable taxes.

3.0 Environmental Considerations

3.1 Before the initiation of any mineral activity, an environmental review in accordance with the department's Environmental Review Process and the *Impact Assessment Act* must be carried out.

For more information on environmental considerations, please see the Environmental Management Processes on Reserve chapter.

4.0 Insurance

4.1 The permittee/lessee must provide proof of liability insurance before a permit is issued or a lease is granted. His Majesty the King in Right of Canada must be on the policy as an additional insured. The requirement for insurance can be waived in certain circumstances, such as when municipal and provincial departments or Crown-owned corporations/agencies are the permittee or the lessee.

5.0 Security Deposits

5.1 The permit/lease must contain a provision requiring a security deposit. Security deposits ensure there is money for site reclamation or remediation. They must be:

a) made payable to the Receiver General for Canada;
b) in the form of money, bonds or promissory notes (such as irrevocable letters of credit, safekeeping agreements) and must be verified for validity; and
c) sufficient in size to pay for remediation.

5.2 Security deposits are calculated at a minimum rate of 20% of the estimated royalties payable. If it is anticipated that the operation will cause significant damage to the land and environment, a surplus levy may be required. The surplus levy shall be remitted at various intervals during the operation based upon a pre-determined schedule.

5.3 Security deposits must be held by the department and handled in accordance with the *Financial Administration Act* and its Government Contract Regulations.

5.4 Upon termination of the permit/lease, the security deposit(s) is/are refunded, without interest, provided the permittee/lessee has complied with all the terms and conditions of the permit/lease.

5.5 If there is non-compliance with the terms and conditions of the permit/lease, the security deposit will be used to pay for work required.

6.0 Operational and Restoration Plan

6.1 The permit/lease must require an Operational and Restoration Plan. It is recommended that the Operational and Restoration Plan be prepared and signed by a registered professional engineer who is licensed to practice in the applicable province. The Operational and Restoration Plan must be submitted by the proponent and approved by the department before the permit/lease can be executed. The permittee/lessee must receive written approval of the department before making any alterations and changes to this Plan.

6.2 The Operational and Restoration Plan outlines the proponent's intended operation and use of land. It may also include a Geotechnical Evaluation Report in cases where commercial operations, building of structures and/or sale of excess materials are contemplated. The level of restoration of the site must be in accordance with federal, provincial and municipal environmental regulations.

For more information on Operational and Restoration Plan models, please see the procedures section.

7.0 Approval and Consent

Ministerial Approval

7.1 All permits/leases require ministerial approval. Departmental officials authorized by the Delegation of Authority Instrument under the *Indian Act* and related regulations must authorize all permits/leases. The Ministerial Declaration in relation to s.24(2)(d) of the *Interpretation Act*, *Indian Act* and related statutes and regulations sets out the positions the Minister considers appropriate to exercise various ministerial powers. Please consult the department's most current version of the Delegation of Authority Instrument to ensure the permit/lease is authorized by the appropriate departmental official.

Bands with Delegated Authority under the *Indian Act*

7.2 Approval of permits/leases is subject to the terms, conditions and restrictions contained in the Order in Council and/or Ministerial Letter delegating authority to the Band to exercise control and management over their reserve lands. At a minimum, the permit/lease must be based on an approved national or regional

departmental permit/lease precedent. Any terms that differ from the permit/lease precedent on which it was based must be approved by the department.

7.3 Where a Band has delegated authority and wishes to issue a permit/lease to its own Band-owned corporation, the department must approve the terms and conditions of the permit/lease and assume responsibility for all monitoring and compliance provisions in the permit/lease.

Band Council Consent

7.4 A Band Council Resolution consenting to the non-metallic minerals permit/lease must be obtained prior to the permit being issued or the lease being granted.

Locatee Consent

7.3 Locatee consent must be obtained prior to a permit/lease on locatee lands being issued or granted.

8.0 Assignments

8.1 Non-metallic mineral permits/leases are not assignable unless expressly allowed in the instrument. If ownership of an operation changes, the permit/lease is assignable at the request of the permittee/lessee if the Band approves the assignment. If assignability was not included in the terms and conditions of the permit/lease but the Band consents to an assignment, the department and current permittee/lessee must first amend the permit/lease to allow an assignment. Then the assignment can be finalized with a new security deposit being paid to the Receiver General of Canada, if necessary.

9.0 Unauthorized Removal of Non-metallic Minerals

9.1 Non-metallic mineral permits/leases allow an activity which would otherwise constitute an offence under s.93 of the *Indian Act*. Under this section, it is an offence for anyone to remove, or allow the removal of, minerals from a reserve without permission of the Minister or his duly authorized representative, or for anyone to be in possession of any minerals so removed.

9.2 Paragraphs 103 and 104 of the *Indian Act* address situations where minerals may be seized if there are reasonable grounds to believe an offence has been committed under s.93.

10.0 Compliance with other Laws and Regulations

10.1 In addition to those in the *Indian Act*, compliance with related federal laws and regulations, provincial laws, municipal by-laws and Band by-laws relevant to the removal and/or transportation of non-metallic minerals is required.

11.0 Cancelling a Permit/Lease

11.1 The department has the authority to cancel a permit/lease; however, the cancellation of a permit/lease has important consequences. As such, legal advice must be obtained and the Band Council must be consulted prior to initiation of any steps for cancellation or early termination.

11.2 In general, Bands with delegated authority may not cancel a permit; however, this should be confirmed through a review of the Band's specific delegated authorities.

12.0 Registration in the Indian Lands Registry

12.1 Permits/leases and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry System and must, in accordance with s.55 of the *Indian Act*, be sent for registration in accordance with the requirements of the Indian Lands Registration Manual.

Annex A: Authorities for Non-metallic Mineral Permits and Leases

The relevant sections of the ***Indian Act*** are as follows:

Authorizing a permit

58(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation

> *(b) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.*

Proceeds

58(5) The proceeds of the transactions referred to in subsection (4) shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

Transactions re surrendered and designated lands

53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

> *(a) manage or sell absolutely surrendered lands; or*
>
> *(b) manage, lease or carry out any other transaction affecting designated lands.*

Removal of material from reserve

93 A person who, without the written permission of the Minister or his duly authorized representative,

> *(a) removes or permits anyone to remove from a reserve (i) minerals, stone, sand, gravel, clay or soil, or(ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or*
>
> *(b) has in his possession anything removed from a reserve contrary to this section, is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.*

Annex B: Relevant Case Law

These are considered the leading cases pertaining to natural resources on reserves. This is not intended to be all inclusive or exhaustive:

a. Guerin v. The Queen, [1984] 2 S.C.R. 335
b. Sparrow v. The Queen, [1990] 1 S.C.R. 1075