

## **CHAPTER 85-04-02 CONSTRUCTION AGGREGATE**

### Section

85-04-02-01	Application
85-04-02-02	Construction Aggregate Lease Term
85-04-02-03	Commissioner Authorization
85-04-02-04	Notice of Construction Aggregate Leasing
85-04-02-05	Auctioned Construction Aggregate Leases
85-04-02-06	Use of Construction Aggregate Leased Premises
85-04-02-07	Advance Royalties
85-04-02-08	Royalties
85-04-02-09	Testing
85-04-02-10	Mining and Reclamation Plan
85-04-02-11	Bond
85-04-02-12	Theft of Construction Aggregate
85-04-02-13	Records and Inspections
85-04-02-14	Construction Aggregate Mining Operations
85-04-02-15	Reserved Rights and Termination
85-04-02-16	Board Review
85-04-02-17	Surrender by Lessee
85-04-02-18	Conditions on Expiration, Termination, or Surrender
85-04-02-19	Surface Owner Consent
85-04-02-20	Surface Lessee Protection
85-04-02-21	Protection of Cultural Resources

### **85-04-02-01. Application.**

An applicant shall submit a request for a construction aggregate lease, amendment, assignment, or extension using the electronic application available on the department's website or a paper application provided upon request. The application must clearly state whether the request is for a construction aggregate lease, amendment, assignment, or extension. An application submitted on any other form may not be accepted. An application fee may be charged as determined by the board. Each application and construction aggregate lease is limited to a maximum of one hundred sixty contiguous acres [64.75 contiguous hectares] of like net construction aggregate interest. An application must be made as follows:

1. Construction aggregate lease. An applicant shall provide all information required by the application and any supplemental information requested by the department. An application must designate the type of construction aggregate desired. An application is deemed filed and complete when the department receives an application, the application fee, and any supplemental information requested by the department.
2. Amendment. A lessee may submit a request for an amendment to a construction aggregate lease for a specific purpose. If the request for an amendment is granted, the department shall mail the amendment to the applicant for signature.
3. Assignment. A construction aggregate lease may be assigned upon written consent of the commissioner. Assignments must be granted by the commissioner through written notification to both the assignor and assignee. The commissioner may refuse to assign a construction aggregate lease for good cause. The assignor remains responsible for compliance of all construction aggregate lease terms and this chapter until the assignment is approved by the commissioner. Upon approval, the assignee is responsible for compliance with all construction aggregate lease terms and this chapter. If the request for an assignment is granted, the department shall mail the assignment to the applicant for signature.

4. Extension. A lessee may submit a request for an extension of a construction aggregate lease for up to an additional five-year term to be granted at the discretion of the commissioner. The department may adjust the royalty rate if an additional term is granted. If the request for a construction aggregate lease extension is granted, the department shall mail the construction aggregate lease extension to the applicant for signature.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-02. Construction aggregate lease term.**

1. A construction aggregate lease term may not exceed five years.
2. When the lessee is a state agency or a political subdivision, the royalty rate must be fixed for a construction aggregate lease term of one year or less. For a construction aggregate lease term greater than one year, the royalty rate must be based on fair market value with an annual adjustment based on the current fair market value.
3. When the lessee is a private entity requesting less than five thousand cubic yards [3822.77 cubic meters] of construction aggregate, the term of the construction aggregate lease must be for one year or less.
4. A construction aggregate lease to any entity other than a state agency or a political subdivision for a term greater than one year must be offered at public auction.
5. When construction aggregate is requested for an emergency, the term of the construction aggregate lease may not exceed one year.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-03. Commissioner authorization.**

1. The commissioner is authorized to approve and issue a construction aggregate lease on the board's behalf in accordance with this chapter.
2. If an application does not comply with this chapter, or if the commissioner determines board review is desirable, the application may be brought before the board for its consideration.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-04. Notice of construction aggregate leasing.**

Upon receipt of an application for a construction aggregate lease and a determination that the application covers a tract the commissioner is willing to lease, the department shall post on the department's website a notice of the application for construction aggregate lease, any supporting documentation, and instructions for submitting public comments. Comments must be received by the department no later than five p.m. central standard time fourteen days after posting the notice of the application for a construction aggregate lease to be considered. All comments must be in writing and contain the following:

1. Name and address of the interested person;
2. Applicant's name and address;

3. The legal description of the proposed construction aggregate leased premises as shown on the published notice; and
4. A detailed statement as to whether the interested person supports or opposes the issuance of the construction aggregate lease.

Those comments must be brought to the board along with the department's recommendations.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-05. Auctioned construction aggregate leases.**

Notice of an auction must be published in the official newspaper of the county where the proposed construction aggregate leased premises is located and in the Bismarck Tribune. The notice must be published once at least ten days prior to the day of the auction. The notice must contain the legal description of the proposed construction aggregate leased premises, the construction aggregate lease term, and the time and place where the auction will be held. Bidding must be on a royalty per yard basis. Immediately after the bidding session, comments as to whether a construction aggregate lease should be issued can be presented to the department.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-06. Use of construction aggregate leased premises.**

A lessee may use as much of the construction aggregate leased premises as necessary for prospecting, mining, removal of construction aggregate, and reclamation subject to the requirements of this chapter.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-07. Advance royalties.**

1. As consideration for a construction aggregate lease with a term greater than one year, the lessee shall pay on the date a construction aggregate lease is issued an advance on the yearly royalty, as determined by the commissioner, but not less than one thousand dollars.
  - a. The advance payment is due each year in which the construction aggregate lease is in force and is due prior to the construction aggregate lease anniversary date.
  - b. The advance payment may be credited against construction aggregate mined during the term of the construction aggregate lease. Advance royalty payments for which a credit is not claimed must be forfeited.
  - c. The commissioner may adjust the advance royalty payment amount. Any adjustment takes effect on the anniversary date of the construction aggregate lease following notice to lessee.
2. The commissioner may require an advance royalty deposit for a construction aggregate lease with a term of one year or less. The deposit must be credited against construction aggregate mined during the term of the construction aggregate lease.

3. If payment is not timely received, a notice of intent to terminate the construction aggregate lease must be issued by the department.

**History:** Effective January 1, 2020.  
**General Authority:** NDCC 15-05-18  
**Law Implemented:** NDCC 15-05-18

#### **85-04-02-08. Royalties.**

Royalties must be received by the department by five p.m. central standard time on the last business day of the calendar month following sale, utilization, stockpiling, or removal from the construction aggregate leased premises of the construction aggregate mined. If payment is not timely received, a notice of intent to terminate the construction aggregate lease must be issued. Royalties must be paid in full on any stockpiled construction aggregate remaining on the construction aggregate leased premises ninety days prior to the expiration of the construction aggregate lease.

**History:** Effective January 1, 2020.  
**General Authority:** NDCC 15-05-18  
**Law Implemented:** NDCC 15-05-18

#### **85-04-02-09. Testing.**

The department may require a lessee to conduct drilling tests on the construction aggregate leased premises prior to mining. If required, sufficient test holes must be drilled to outline the boundaries, thickness, and depth of the construction aggregate deposit and estimate the quality, quantity, and type of construction aggregate located on the construction aggregate leased premises. The lessee shall furnish the department a map of the construction aggregate leased premises showing the boundaries of the construction aggregate deposit and furnish the department a written report estimating the thickness, depth, quality, quantity, and type of construction aggregate. All test holes must be reclaimed to the satisfaction of the department at the conclusion of testing. Failure to conduct test drilling when required or failure to furnish the required information must result in a notice of intent to terminate the construction aggregate lease being issued.

**History:** Effective January 1, 2020.  
**General Authority:** NDCC 15-05-18  
**Law Implemented:** NDCC 15-05-18

#### **85-04-02-10. Mining and reclamation plan.**

1. Prior to issuance of a construction aggregate lease, the department, in consultation with the lessee, will develop a mining and reclamation plan for the commissioner's approval. Mining must not begin on the construction aggregate leased premises unless the mining and reclamation plan is approved by the commissioner.
2. The intent of the reclamation plan is to reclaim the construction aggregate leased premises to its previous potential use and productivity. The reclamation plan may be modified by the commissioner and the lessee shall comply with any modifications to the plan. In the event the lessee does not comply with the modified reclamation plan, the construction aggregate lease may be terminated.
3. The reclamation plan must indicate the location of the construction aggregate mining operation in relation to the construction aggregate deposit and a plan for the reclamation once the construction aggregate has been removed. The reclamation plan must include the leveling of the disturbed surface at the close of the construction aggregate mining operations to as close to its original contour as is reasonably possible taking into consideration the amount of construction aggregate removed, the preservation and respreading of topsoil, and the revegetation of the surface with appropriate flora.

4. Special reclamation plans for the propagation of wildlife habitat, the creation of a nature preserve, or other alternate land use may be required by the commissioner, provided the costs of such reclamation do not unreasonably increase the cost of reclamation.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-11. Bond.**

1. Payment of all royalties and reclamation of any portion of the construction aggregate leased premises disturbed by the lessee is the responsibility of the lessee. To assure payment of royalties and satisfactory reclamation, the lessee must obtain and retain in force a surety bond, in an amount determined by the commissioner.
2. The lessee, in lieu of a surety bond, may file another form of security subject to the commissioner's approval.
3. The commissioner shall set the initial surety bond amount at a minimum of five thousand dollars per acre for the initial mine area, with no initial surety bond amount being less than ten thousand dollars.
4. The commissioner may adjust the amount of the surety bond annually, with the adjustment based on the estimated cost to reclaim the remaining disturbed site and the amount of stockpiled construction aggregate. If the commissioner determines an additional surety bond or other security is required, the lessee shall submit the additional surety bond or other security within thirty days after request by the commissioner as required by this section.
5. The lessee may submit a written request for a full or partial release of the surety bond to the commissioner. At the commissioner's discretion, the surety bond may be released in whole or in part.
6. Upon the payment of all outstanding royalties and satisfactory completion of the reclamation, the commissioner shall release the surety bond. The surety bond may be forfeited to pay outstanding royalties or to complete reclamation. The commissioner shall give final approval of the reclamation before the surety bond is released. The forfeiture of the surety bond by the lessee does not release the lessee of the duty and responsibility to reclaim the construction aggregate leased premises.
7. Upon written request, the commissioner may waive the bonding requirement for a political subdivision or other state agency.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-12. Theft of construction aggregate.**

The lessee shall be responsible for the loss or theft of any construction aggregate from the construction aggregate leased premises and such loss or theft does not relieve the lessee from the responsibility to pay royalties for the construction aggregate.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-13. Records and inspections.**

The lessee shall keep an accurate record of the quantity, quality, and type of construction aggregate mined. The department may audit, examine, and copy any records as may be necessary to assure the lessee is complying with all provisions of the construction aggregate lease, board rules and policies, and applicable laws, and may examine all samples, logs, assays, or cores. All construction aggregate mining operations and reclamation operations may be inspected by the department.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-14. Construction aggregate mining operations.**

The lessee shall conduct construction aggregate mining operations in a good and workmanlike manner and in accordance with the construction aggregate lease terms, board rules and policies, and applicable laws, and a construction aggregate lease may be terminated by the lessor for a failure to comply. The lessee shall take reasonable steps to prevent construction aggregate mining operations from unnecessarily causing or increasing soil erosion or drainage and damage to crops, pasture, or trees.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-15. Reserved rights and termination.**

1. Failure to comply with construction aggregate lease terms, board rules and policies, and applicable laws may result in construction aggregate lease termination by the commissioner. Before a construction aggregate lease is terminated, the department personally shall serve the lessee with the notice of intent to terminate construction aggregate lease specifying the reason for termination.
2. The lessee may file with the department a written request for waiver of the notice of intent to terminate the construction aggregate lease, which must include a statement of the specific grounds for the request. A request must be filed with the department within ten business days after service on the lessee of the notice of intent to terminate the construction aggregate lease. A request for a written waiver is deemed filed when personally delivered to or when received by the department. The commissioner may waive any breach except a breach in violation of applicable laws, or the commissioner may allow the lessee time to cure the breach. Termination does not release the lessee from liability for royalty owed the board, damages resulting from a breach of a construction aggregate lease term, or to reclaim the construction aggregate leased premises.
3. The board reserves the right to use, rent, lease, sell, or encumber the construction aggregate leased premises and reserves all historical, archaeological, and paleontological materials on or beneath the surface of the construction aggregate leased premises. Leases for the production of coal, oil and gas, uranium, potash, or other valuable minerals have priority over any lease for the mining of construction aggregate.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-16. Board review.**

Within thirty days of a decision under these rules, an aggrieved party may request the commissioner review the decision. The aggrieved party seeking review shall submit any information required by the commissioner as part of this request. Within thirty days of the commissioner's review, the aggrieved party may request board review and the commissioner shall recommend if board review is warranted.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-17. Surrender by lessee.**

The lessee may surrender a construction aggregate lease upon payment of all outstanding royalties and other debts owed the board. Surrender of a construction aggregate lease does not release the lessee from its responsibility to reclaim the construction aggregate leased premises.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-18. Conditions on expiration, termination, or surrender.**

At the expiration, termination, or surrender of a construction aggregate lease and, upon the completion of reclamation, unless otherwise waived, the lessee shall remove its property from the construction aggregate leased premises within one hundred twenty days from the date of expiration, termination, surrender, or the date reclamation is completed. The lessee is liable to the board for the costs of removal of any property remaining on the construction aggregate leased premises after the deadline for removal. If the lessee does not remove all stockpiled construction aggregate from the construction aggregate leased premises by the construction aggregate lease expiration, termination, or surrender date, it is considered abandoned and becomes the property of the board.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-19. Surface owner consent.**

Where the surface of the construction aggregate leased premises is not managed or owned by the board, the lessee shall give the surface owner a written description of the specific locations of any land disturbance contemplated by the lessee, accompanied by a map, at least one hundred twenty days prior to the commencement of any construction aggregate mining. The lessee shall provide the department with proof of consent to mine from the surface owner. If there is a change in the nature of the land disturbance contemplated, an updated written description must be provided to the surface owner as soon as possible.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

#### **85-04-02-20. Surface lessee protection.**

Where the surface of the construction aggregate leased premises is managed or owned by the board and is leased to a person other than the construction aggregate lessee, the construction aggregate lessee shall restore all fences that have been damaged, moved, or removed as a result of

construction aggregate mining operations and shall further compensate the surface lessee for any damage to or loss of other improvements owned by the surface lessee.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18

**85-04-02-21. Protection of cultural resources.**

If any historical, archaeological, paleontological, or other cultural artifacts, vestiges, or remains are found prior to, during, or after any exploration, testing, production, mining, or reclamation operations on the construction aggregate leased premises, the director of the state historical board and the commissioner must be notified immediately and the site and the materials must be protected by the lessee from further disturbance until a professional examination can be made or until some other form of clearance to proceed is authorized by the commissioner. Upon written request, the commissioner may grant an extension of the construction aggregate lease term for delays in operations caused by the requirements of this section. If no further disturbance is allowed, the construction aggregate lease may be terminated and the lessor shall refund to the lessee any advance royalties not already credited or forfeited as provided in this chapter. The department and the director of the state historical board may inspect the construction aggregate leased premises at all times to determine compliance with this section.

**History:** Effective January 1, 2020.

**General Authority:** NDCC 15-05-18

**Law Implemented:** NDCC 15-05-18, 55-02-07