

SUMMARY OF COMMENTS ON ADMINISTRATIVE RULES

Public Hearing Held August 28, 2019

Comment Period Ending September 9, 2019

| ADMIN. RULE SECTION | DATE RECEIVED | COMMENTS RECEIVED | | COMMENT | DISCUSSION | ACTION TAKEN |
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| | | ORAL OR WRITTEN | COMMENTS RECEIVED | | | |
| 85-01-01-01 Definitions | 8/28/19 | Oral & written* (*written comments of Ron Ness dated August 28, 2019 read aloud at the public hearing) | Brady Pelton, ND Petroleum Council | NDPC recognizes the majority of definitions proposed for adoption into Title 85 mirror the definitions currently codified in Land Board policy manuals. Codifying these definitions in the North Dakota Administrative Code is appropriate. Given pending litigation surrounding Board rules on gas royalties, proper definition of terms including "arm's length transaction" and "fair market value" is critical to correct interpretation of oil and gas leases. NDPC is still evaluating these two definitions in particular, and will supplement these comments if necessary. | Due to pending litigation, we cannot make changes to the definition of "arm's length transaction". The definition of "fair market value" relates to surface land management. | The Department of Trust Lands (DTL) recommends the definition of "fair market value" be modified to clarify it relates only to surface land management issues as follows: "Fair market value" means the price set by the commissioner after an analysis of prices paid for similar products or services in the local area <u>under article 85-04.</u> " |
| 85-01-01-02 Exception | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | NDPC supports extending Land Board discretionary exception authority to include the ability to grant exceptions to ND Administrative Code articles on surface land and mineral management. At times, exceptions are an important tool the Board may use to best manage the various public trusts. | No changes requested. | DTL recommends the Board of University and School Lands (Board) make no changes. |
| 85-04-01-09 | | | DTL | Changes should be made to keep the rules consistent with rules for oil and gas and coal. | DTL proposed changes to the language to clarify the process for seeking Board Review for oil and gas and coal. Changes were incorporated herein for consistency purposes. | DTL recommends the Board replace the language with the following: 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 |

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| | | | | | | request. Within thirty days of the commissioner review, the aggrieved party may request board review and the commissioner shall decide if board review is warranted. |
| 85-04-02-16 | | | DTL | Changes should be made to keep the rules consistent with rules for oil and gas and coal. | DTL proposed changes to the language to clarify the process for seeking Board Review for oil and gas and coal. Changes were incorporated herein for consistency purposes. | DTL recommends the Board replace the language with the following: 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 review, the aggrieved party may request board review and the commissioner shall decide if board review is warranted. |
| 85-04-04-01 Application | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | NDPC has identified issues with this section, which formalizes certain requirements for obtaining encumbrances across Trust lands. In particular, there does not appear to be a concrete timeline for review or approval of encumbrances. The absence of a structured process by which a request for an encumbrance, amendment, assignment, extension, or renewal may be approved creates uncertainty as to the time that may be expected for review of such a request by the Department of Trust Lands and the timeline for issuance by the Commissioner once an application is complete. Unclear guidance on the approval process for | Oftentimes we are not provided complete applications. Applications are processed in the order of receipt of full applications. A strict timeline is not appropriate in this type of review process. | DTL recommends the Board make no changes. |

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| | | | | applications made under this section creates cause for concern about potential delays in process. | | |
| 85-04-05 – Public access and use | 8/29/19 | Written | Terry Steinwand, Director ND Game and Fish | 1. Who, and under what statutory/jurisdictional authority, will enforce these new rules? | DTL will use all available resources to enforce these rules. | DTL recommends the Board make no changes. |
| 85-04-05 – Public access and use | 8/29/19 | Written | Terry Steinwand, Director ND Game and Fish | 2. What are the penalties for violations of 85-04-05, and where may they be found? | Penalties are available under statute, depending on the infraction. | DTL recommends the Board make no changes. |
| 85-04-05 – Public access and use | 8/29/19 | Written | Terry Steinwand, Director ND Game and Fish | 3. Is there penalty for unauthorized posting of trust lands? | There is no penalty. DTL addresses these issues when found and takes appropriate action. | DTL recommends the Board make no changes. |
| Index to Chapter 85-06-01 | | | DTL | 85-04-01-11 Board review should be changed to 85-06-01-11 Board Review. | Typographical error. | DTL recommends 85-04-01-11 Board review be changed to 85-06-01-11 Board Review. |
| 85-06-01-05 Form and Term of Oil and Gas Lease | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | NDPC believes the terms of an oil and gas lease to be extremely important, especially when considering the importance of consistency to contractual agreements. The rule proposed in this section, while relatively clear on the form of oil and gas leases between industry operators and the State of North Dakota, is conspicuously lacking in detail pertaining to the royalty rate of oil and gas produced on State-leased mineral acres. NDPC believes that such an | There are varying royalty rates based on the date the lease was entered into and depending on the county in which the leased premises is located. The royalty rate is reflected in each individual lease. The proposed rules adequately cover items included in the suggested language. | DTL recommends the Board make no changes. |

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| | | | | <p>important lease term as royalty rate should be codified in the ND Administrative Code and made subject to public input. NDPC therefore suggests the Land Board simply adopt the existing lease and royalty provisions set forth in Section 85-06-06-05 of the 1979 Oil and Gas Rules, which contains the current royalty rates and other provisions as set forth [in the suggested language].</p> <p>Suggested language was provided.</p> | | |
| 85-06-01-06 Assignment, Amendment, or Extension | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | <p>NDPC appreciates the proposed rules regarding assignment, amendment, or extension of a State-owned mineral lease. The proposed rules require approval from the Department of Trust Lands for assignment, amendment, or extension of an oil and gas lease, as compared to the rules in place since 1979 where Land Board approval is required. NDPC believes the proposed rule will be beneficial to the processes subject to this section and that the Department has the necessary resources available to properly ensure decisions regarding the assignment, amendment, or extension of State oil and gas leases. As noted below in NDPC's comments on Section 85-06-01-11, however, a process by which the decision of the Department or the Land Commissioner can be further reviewed by the Board is necessary to preserve proper elements of due process.</p> | <p>The authority to make these decisions has been delegated to the Commissioner by the Board.</p> <p>The issue raised concerning Board review will be addressed in the discussion on Section 85-06-01-11.</p> | DTL recommends the Board make no changes. |

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| 85-06-01-07 Voluntary Release | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | <p>NDPC believes the language of the rules in place since 1979 to be adequate in ensuring that all lease obligations are current prior to a voluntary release of that lease. Though NDPC understands the interest by the Land Commissioner and Department of Trust Lands in having all obligations of a lease continue until approved by the Commissioner, those obligations and liabilities of a lease that is voluntarily released should more appropriately cease at the time of release.</p> <p>Suggested language was provided.</p> | DTL approval is required before a voluntary release can be completed. Once DTL receives a request for voluntary release, DTL will review to determine if all lease obligations are current. | DTL recommends the Board make no changes. |
| 85-06-01-08 Royalties | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | <p>NDPC recognizes that the issue of royalties on production within State-held oil and gas leases is currently pending legal review in State court. Consequently, NDPC is still evaluating this section and will provide supplemental comments to the Land Board if necessary.</p> | No changes requested. | DTL recommends the Board make no changes. |
| 85-06-01-08 Royalties | 9/9/19 | Written | Ron Ness, ND Petroleum Council | <p><i>Supplemental comment:</i> As with many contractual agreements used within the oil and gas industry, those between a lessee and a third party gas processor require a particular degree of confidentiality. This is especially true when that information is brought into the public record. For gas processing agreements required to be furnished "upon lessor's request" in subsection 2, paragraph c, of this section, however, no confidentiality protections appear to exist. The 66th Legislative Assembly passed House Bill 1392 in 2019, codifying required protections for records from a private entity to the Land Board "for purposes of the board's audit of the entity's [. . .] oil, gas, or other royalty payments to the</p> | The Department cannot determine that it will only need these documents during an audit and therefore, does not want to limit its ability to request these documents only as part of audits. | DTL recommends the Board make no changes. |

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| | | | | <p>board.” N.D.C.C. 44-04-18.29. This confidentiality protection extends to those records provided to the Land Board that are furnished by the Board to third parties.</p> <p>NDPC believes the appropriate time for the Land Board to request gas processing agreements is in the event of an audit. NDPC further believes “any and all third party gas processing agreements pertaining to the plant” can be properly considered a “record” under N.D.C.C. 44-04-18.29 and that those agreements should be subject to the confidentiality protections of that section of the Century Code when furnished to the Land Board. Therefore, NDPC respectfully recommends the added language [in the suggested language] in subsection 2, paragraph c, for consideration.</p> <p>Suggested language was provided.</p> | | |
| 85-06-01-08 Royalties | | | DTL | <p>Sections 2 and 3 were bulleted for the methods used in calculating royalties. Royalties are owed on the greater of the 2 or 3 methods. The reference to the greater of is in the last option in both sections. It would be easier to read/understand if you start out by saying it’s the greater of the various methods instead of leaving it buried in the last potential valuation method.</p> | <p>DTL proposed changes to the language to clarify what the phrase “the greater of” refers to.</p> | <p>DTL the Board make the following changes to 85-06-01-08(2) & (3):</p> <p>Respective royalties on residue gas and on liquid hydrocarbons where the requirements for using third party transactions cannot be met shall be determined by <u>the greater of</u>:</p> <p>a. The highest market price paid for any gas (or liquid hydrocarbons) of comparable quality and quantity under comparable conditions of sale in the general area F.O.B. at the plant after processing;</p> |

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| | | | | | | <p>b. The gross proceeds of sale for such residue gas (or the weighted average gross proceeds of sale for the respective grades of liquid hydrocarbons), F.O.B. at the plant after processing; or</p> <p>c. The gross proceeds of sale paid to a third party processing gas through the plant whichever is greater. Lessee shall furnish copies of any and all third party gas processing agreements pertaining to the plant upon lessor's request.</p> <p>3. On carbon black, sulfur or any other products produced or manufactured from gas (excepting liquid hydrocarbons), whether said gas be "casinghead", "dry" or any other gas, by fractionating, burning or any other processing, is based on the gross production of such productions, or the market value thereof, at the option of lessor. Such market value is to be <u>the greater of:</u></p> <p>a. The highest market price paid for each of the products of comparable quality and quantity under comparable conditions of</p> |
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| | | | | | | <p>sale in the general area during the same month in which such products are produced; or</p> <p>b. The average gross proceeds of sale for each of the products for the same month in which such productions are produced, whichever is greater, provided that if a third party transaction is used to determine royalty in accordance with subsection two, the royalty due under this subsection shall be determined in accordance with such transaction.</p> |
| 85-06-01-10 Breach of Oil and Gas Lease | 8/28/19 | Oral & written* | Brady Pelton, ND Petroleum Council | NDPC believes it to be of benefit to the State Trusts to allow a lessee of State minerals to drill out its leaseholds and attain production of minerals. In the event of a breach of an oil and gas lease, working with the operator holding the lease has value in the form of an established relationship between the parties. To advance the objectives of that relationship, NDPC recommends allowing a total of thirty (30) days for a lessee to request for a waiver or Commissioner review of a notice of intent to cancel an oil and gas lease. A thirty-day period for a request for a waiver or review is consistent with the time period allowed in the 1979 Oil and Gas Rules. NDPC sees little value in straining the relationship between | DTL reviewed and determined thirty days is a reasonable amount of time. | <p>DTL recommends the Board make the following changes to 85-06-01-10(3):</p> <p>A request must be in writing and filed with the commissioner within twenty<u>thirty</u> days after the date of notice of intention to cancel the oil and gas lease is received or the date of publication.</p> <p>And the following changes to 85-06-01-10(4): If lessee has not requested waiver or commissioner review or remedied the default within twenty<u>thirty</u> days after receipt of a notice of intention to cancel or the date of publication, the commissioner shall cancel the oil and gas lease.</p> |

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| | | | | <p>lessees and the State by narrowing that window.</p> <p>Suggested language was provided.</p> | | . |
| 85-06-01-11 (Incorrectly numbered as 85-04-01-11) | | | DTL | Incorrectly numbered. Change from 85-04-01-11 to 85-06-01-11. | Typographical error. | DTL recommends 85-04-01-11 be changed to 85-06-01-11. |
| 85-06-01-11 Board Review | 8/28/19 | Oral & written | Brady Pelton, ND Petroleum Council | <p>NDPC appreciates the inclusion of a process by which a decision of the Commissioner may be brought before the Land Board for its consideration. However, under the language of the proposed rule, that opportunity for Board review is subject only to the determination of the Commissioner. Absent any requirements pertaining to adjudicative proceedings under the ND Administrative Agencies Practice Act (N.D.C.C. 28-32-21 through N.D.C.C. 28-32-51), there exists no opportunity for an aggrieved party to seek further review by the Land Board itself. To ensure proper due process and to allow access of such an aggrieved party to the highest decision-making body holding jurisdiction over these administrative rules, NDPC strongly recommends adding language to this section creating an administrative adjudicative procedure for those in actual or potential contractual privity with the Land Board. Such procedures will ensure the proper exhaustion of remedies by those holding leases with the State by allowing access to final review by the Board. Because Board oversight of the State Trusts is a</p> | DTL proposed changes to the language to clarify the process for seeking Board Review. | <p>DTL recommends the Board replace the language with the following:</p> <p>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 review, the aggrieved party may request board review and the commissioner shall decide if board review is warranted.</p> |

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| | | | | <p>critical function of the Board, it is imperative that it have the ability to receive petitions for final review from parties seeking relief. As the individuals collectively responsible for overseeing the Trusts, Board members themselves should have the codified ability to bring Commissioner decisions forward for further Board considerations as well.</p> <p>NDPC stands willing to work with the Commissioner and the Board in amending the proposed language of this section to ensure due process rights are preserved. A suggested potential alternative to the proposed language may include the ability of an aggrieved party seeking or holding contractual privity with the Board to submit a petition to the Board for its consideration of any decision made by the Commissioner to that party's detriment. Such a request could potentially be submitted to the Board and the Commissioner within thirty days of an adverse Commissioner decision, creating a timely process by which that decision could be reviewed at the Land Board level.</p> | | |
| 85-06-01-11 Board Review | 9/9/19 | Written | Ron Ness, ND Petroleum Council | <p><i>Supplemental comment:</i> NDPC continues to view the proposed language related to Land Board review of a decision made by the Commissioner to be restrictive to procedural due process rights. The opportunity of a party aggrieved by a decision of the Commissioner to be heard by an overseeing decision making body is fundamental to preserving that right. As stated in NDPC's original comments, there exists no such opportunity under the current proposed language of this rule.</p> | DTL proposed changes to the language to clarify the process for seeking Board Review. | <p>DTL recommends the Board replace the language with the following:</p> <p>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 review, the</p> |

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| | | | <p>NDPC therefore strongly recommends adding language to this section creating an administrative adjudicative procedure for those in actual or potential contractual privity with the Land Board. Such procedures will ensure the proper exhaustion of remedies by those holding leases with the State by allowing access to final review by the Board itself. Because Board oversight of the State Trusts is a critical function of the Board, it is imperative that it have the ability to receive requests for final review from directly affected parties seeking relief. As the individuals collectively responsible for overseeing the Trusts, Board members themselves should have the ability to bring Commissioner decisions forward for further Board considerations as well.</p> <p>NDPC respectfully suggests edits to this section as provided [in the suggested language]. First, it is recommended that an individual Land Board member have the ability, along with the Commissioner, to determine whether a decision by the Commissioner may warrant further consideration by the Board as a whole. NDPC also recommends adding language creating the opportunity for an aggrieved party seeking or holding contractual privity with the Board to submit a petition to the Board for its consideration of any decision made by the Commissioner to that party's detriment. NDPC proposes that such a request be submitted to the Board within thirty days of the adverse decision being communicated by the Commissioner.</p> <p>NDPC understands the concern for allowing any party to challenge a decision of the Commissioner. However, the importance of adequate procedural due</p> | | <p>aggrieved party may request board review and the commissioner shall decide if board review is warranted.</p> |
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| | | | | <p>process rights far outweighs the potential burden having such access to a final oversight body may have.</p> <p>Suggested language was provided.</p> | | |
| 85-06-01-12 Reports of Lessee-Delinquency Penalty | 8/28/19 | Oral & written | Brady Pelton, ND Petroleum Council | <p>NDPC believes the automatic thirty percent (30%) assessment for penalties and interest on delayed royalty payments, as proposed in Subsections 4 and 5 of the rules, is clearly excessive in today's economic environment. The thirty percent assessment should be reserved for only the most egregious cases involving fraud or intentional misconduct. NDPC believes there are many situations where there exists good cause for assessing penalty and interest at more standard rates, particularly where there are good faith disputes over title or other complex legal issues.</p> <p>As compared to the Oil and Gas Rules that have been in place since 1979, provisions related to penalties and interest for delinquent amounts have been separated into separate subsections. This separation creates an appearance that penalties and interest are mandatory. To clarify this, NDPC recommends using the language in the 1979 Oil and Gas Rules [and suggested language was provided].</p> <p>Regarding the waiver limitation on penalty and interest amounts, NDPC commends the proposed level of twenty-five thousand dollars (\$25,000). This cap allows for a more appropriate waiver in the event good cause can be shown for delayed royalty payments.</p> | This is already in place for all existing leases. The Commissioner has discretion to assess and waive the penalties. | DTL recommends the Board make no changes. |

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| | | | | Suggested language was provided. | | |
| 85-06-01-13 Audit and Examination | 8/28/19 | Oral & written | Brady Pelton, ND Petroleum Council | NDPC questions whether the sixty (60) day time period for a payor to comply with, respond to, or request Commissioner review of audit findings is adequate in length to allow for a proper and adequate response. NDPC encourages the Land Board to consider increasing that time period to ninety (90) days. At a minimum, NDPC recommends that language be added to this section allowing for an extension request to be made to the Commissioner on a showing of good cause. | DTL feels 60 days is adequate time to respond to audit findings. However, DTL will consider extensions under extenuating circumstances. | DTL recommends the Board make the following changes to 85-06-01-13(4): A payor shall have sixty days from the date of the receipt of the audit findings to comply, <u>request an extension,</u> respond to the findings, or request commissioner review. A <u>request for an extension or for commissioner review must be made in writing, and</u> <u>A request for commissioner review must</u> include a statement of the reasons for disagreement with the audit findings. If a payor fails to comply with the audit findings, respond to the findings, or request commissioner review within sixty days, the oil and gas lease is subject to cancellation under section 85-06-01-10, Breach of oil and gas lease. |
| 85-06-01-14 Request for Shut-In Status for Oil | 8/28/19 | Oral & written | Brady Pelton, ND Petroleum Council | NDPC is unclear as to what types of oil and gas drilling, production, and operational situations are contemplated by the Department as requiring or encouraging a lessee to apply for shut-in status. Guidance on what activities are eligible for shut-in status would be helpful, be it through a guidance document or by administrative rule. Understanding when the Board deems shut-in status of a well appropriate will allow applicants for shut-in status to | Companies are encouraged to apply for a shut in whenever it is anticipated that a well will be offline for more than 60 days from the cessation of production. Listing the circumstances for basis limits the lessee/operator's option to exercise this clause. | DTL recommends the Board make no changes. |

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| | | | | better assess under what circumstances such a request should be made. | | |
| 85-06-02-03 | 8/28/19 | Oral | David Straley, North American Coal | Considering the nature of the business, would perhaps like to keep the information confidential with the commissioner and her staff. Understand may be public information but would not like the rates broadcast, and how they present the information. They would like a confidentiality agreement. | This information is subject to open records under N.D.C.C. ch. 44-04. | DTL recommends the Board make no changes. |
| 85-06-02-04 | | | DTL | Should 85-06-02-04(3) be modified to read "The legal description of the proposed coal leased premises as shown on the published <u>posted</u> notice; and") | DTL does not publish this information and only posts to our website. | DTL recommends 85-06-02-04(3) be modified to read "The legal description of the proposed coal leased premises as shown on the published <u>posted</u> notice; and" |
| 85-06-02-06 | 8/28/19 | Oral | David Straley, North American Coal | Considering the nature of the business and for proprietary reasons, would like to keep where the drill holes are being put confidential with the information being kept between the commissioner and staff. They are willing to share but would not want the information broadcast. They would like a confidentiality agreement. | This information is subject to open records under N.D.C.C. ch. 44-04. | DTL recommends the Board make no changes. |
| 85-06-02-09 (Incorrectly numbered as 85-04-01-09) | | | DTL | Incorrectly numbered. Change from 85-04-01-09 to 85-06-02-09. | Typographical error. | DTL recommends 85-04-01-09 be changed to 85-06-02-09. |
| 85-06-02-09 (incorrectly numbered as 85-04-01-09 – should be 85-06-02-09 Relating to coal) | 8/28/19 | Oral | David Straley, North American Coal | In addition to the commissioner being able to bring a decision to the board, they would like it included that the coal lease applicant could also bring it to the board if they did not feel they were not being heard adequately. They would like "or the coal lease applicant" put in after commissioner. It would give them an opportunity for a vetting in a public setting before the board. | DTL proposed changes to the language to clarify the process for seeking Board Review. | DTL recommends the Board replace the language with the following: Within thirty days of a decision under these rules, an aggrieved party may request the commissioner review the decision. The aggrieved party |

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| | | | | | | seeking review shall submit any information required by the commissioner as part of this request. Within thirty days of the commissioner review, the aggrieved party may request board review and the commissioner shall decide if board review is warranted. |
| N/A | 8/28/19 | Oral | David Straley, North American Coal | They want to make sure that the Department is maintaining its existing practice of developing mineral rights and that coal leases have priority over existing surface leases. Believes the lease covers it but is unsure where it is in the policies and practices. | This is addressed in our surface land lease: "This lease is subject to all existing and future coal, oil, natural gas, uranium, gravel, scoria, clay, and other mineral leases and exploration permits covering the land. LESSEE agrees that the holders of such leases or permits may enter upon the land and conduct exploration and mining operations. This lease is further subject to all existing and future easements, rights-of-way, and other servitudes covering the land and LESSEE agrees to honor same. LESSEE shall not be entitled to any compensation by reason of such leases, permits, easements, rights-of-way, or servitudes unless otherwise provided for by LESSOR." | There is no need to include this provision in the rules and DTL recommends the Board make no changes. |