



Paula Goodman Maccabee, Executive Director and Counsel

1961 Selby Ave., St. Paul, MN 55104 (651-646-8890)
paula@waterlegacy.org or pmaccabee@justchangelaw.com

December 23, 2024

Sent electronically to GTAC@state.mn.us
Gas Resources Technical Advisory Committee

Minnesota Department of Natural Resources
Minnesota Department of Health
Environmental Quality Board
Minnesota Pollution Control Agency
Minnesota Department of Revenue

RE: Working Recommendations and Statutory Language for Permitting Gas Resources
Development Under a Temporary Regulatory Framework

Dear Commissioners and Executive Staff,

The following comments are submitted on behalf of WaterLegacy, an organization formed to protect Minnesota water resources and communities. They are summarized below.

- 1) The Legislature should refer this matter for rulemaking. Proceeding with gas resources development under a temporary legislative framework is inconsistent with the nonferrous mining process cited as an exemplar, and is unsupported by facts, premature, and would fail to protect Minnesota's environmental and financial interests.
- 2) The Legislature should require an independent assessment of the extent and types of gas resources in Minnesota; potential effects of gas exploration and commercial extraction on Minnesota's natural resources and climate sustainability; and potential state revenue that could be obtained by taxing this development. Gas Resources Technical Advisory Committee (GTAC) agencies referenced the lack of knowledge regarding gas resources in Minnesota, other than the fact that helium was discovered in an exploratory boring in northeast Minnesota in 2024. The assessment would provide the basis for rulemaking.
- 3) The Legislature should adopt several Minnesota Department of Health (MDH) recommendations as a statutory framework prior to rulemaking. They set minimum standards and do not imply immediate permit issuance.

- 4) Gas resources regulation must provide environmental review, public accountability of agency decisions, and standards to protect health, safety, natural resources and reduce taxpayer financial risk as well as addressing ownership interests before permitting gas extraction or production.

Further, WaterLegacy believes that an additional public comment period should be allowed through January 2025. Public participation has so far been limited by the brief duration of the comment period and its timing in the midst of the holiday season.

1. The Legislature Should Refer Gas Resource Exploration and Production Regulation and Permitting for Rulemaking.

The Minnesota Department of Natural Resources (DNR) repeatedly cites nonferrous mining as an exemplar for its temporary gas extraction permitting process.¹ This is a false and misleading analogy.

A. Nonferrous Mining Has Required Analysis, Rulemaking, and Public Process.

The nonferrous mining analogy would require scientific assessment of the resource and rulemaking study and proceedings to address potential harms, benefits, and design requirements specific to various types of gas exploration and extraction prior to any permitting.

The Court of Appeals restated the history of nonferrous mining rule development in *Minn. Ctr. for Env'tl Advocacy v. Minn. Dep't of Nat. Res. (MCEA v. DNR)*, A18-1956, 2019 WL 3545839 (Minn. Ct. App. Aug. 5, 2019). Nonferrous mining rules, Ch., 6132, were promulgated “pursuant to the legislature’s direction in the mine land reclamation act,” *id.* at *1, which was adopted in 1969 and authorized rulemaking. In 1973, the Legislature adopted Minn. Stat. § 93.481, which prohibited mining of metallic minerals without a permit. The DNR promulgated rules for ferrous mining in 1980 (codified in Minn. R. ch. 6130).

As explained in *MCEA v. DNR*, 2019 WL 3545839 at *2, in 1983 the Legislature precluded the DNR from issuing permits to mine nonferrous metallic minerals until it adopted rules for such mines (citing 1983 Minn. Laws ch. 270, § 5, at 1163, codified at Minn. Stat. § 93.481, subd. 6). “Over the next decade, the DNR engaged in study and rulemaking proceedings, and in March 1993, the DNR noticed adoption of final rules governing nonferrous metallic mineral mining.” *Id.* (codified in Minn. R. ch. 6132). The court detailed the process of adopting appropriate rules for nonferrous mining:

¹ See DNR recommendations DNR-3, DNR-7, DNR-9, DNR-10, DNR-13, DNR-14.

Before noticing the final rules, the DNR conducted formal rule proceedings. That process included preparing a statement of need and reasonableness (SONAR); publishing notice of intent to adopt rules; accepting public comments; holding a hearing before an administrative-law judge (ALJ), who issued a report recommending adoption of the rules; and publishing notice of the final rules in the Minnesota State Register.

Id. It is misleading, if not irresponsible, to claim that proposed gas resource development without resource assessment, evidence, rules, or a public process corresponds to nonferrous mining rulemaking or practice.

B. DNR Recommendations Fail to Protect the Environment or Tribal Rights.

Second, DNR's recommendations for the structure of gas resources permitting would fail to protect Minnesota's environment or tribal authority and treaty-reserved rights.

DNR's proposed statutory language would allow gas resource exploration or commercial extraction "activities" (so long as the surface was not disturbed by a well location) within the Boundary Waters Canoe Area Wilderness Mineral Management Corridor and within one-fourth mile of Voyageurs Park, state wilderness areas, the Agassiz and Tamarac National Wilderness areas and the Pipestone and Grand Portage National monuments, state scientific and natural areas, state parks, calcareous fens, or within national or state wild, scenic, or recreational rivers, or the area adjacent to Lake Superior's North Shore. (GTAC at 52-53). DNR's recommendations do not refer to these allowed activities, and no analysis in this report described the impacts of gas exploration and commercial extraction on groundwater, proximate surface water, or sensitive ecosystems.

The proposed permitting structure (DNR-4 through DNR-12) suggests that a permit would be granted for "gas resource development" when a proposer seeks to start exploratory drilling. However, no permit, public process, or environmental review would be required when and if a proposer seeks mass commercial production of a gas resource. (GTAC at 13). The proposed legislative language uses a phrase, "gas resource development," which does not distinguish between exploration and mass commercial production and allows a temporary exploration permit to become a permanent gas production permit if amended in a process that includes no more than DNR submittals. (GTAC 48, 49-54).

An environmental assessment worksheet (EAW), the brief screening document that does not consider alternatives, would be required before exploratory drilling for gas. It is undisputed that "Minnesota does not have a history of gas production within established well fields in the state, or even (at present) a good understanding of where gas resources might be located, or the size and shape of any gas reservoirs." *Id.* An EAW prior to gas

resource exploration might address the location of a well, but could not analyze the scope or impacts of extracting an unknown gas resource of an unknown size. Issues such as climate change impacts and safety risks could change based on the nature of the resource proposed for extraction. The gas deposit where helium was detected in northern Minnesota in 2024 is mostly carbon dioxide (CO₂), with resultant climate issues if the CO₂ is vented to the atmosphere and acidity impacts if the CO₂ mixes with groundwater. If hydrogen is found in a gas deposit, it is highly explosive and could be radioactive.

It is contrary to Minnesota policies and statutes for environmental review and administrative procedures as well as those for nonferrous mining to allow DNR to make an exploratory permit morph into a permanent commercial extraction and production permit without standards for approval or denial, contested case hearing, public process, or environmental review. (See GTAC 49-54). DNR's proposed process may protect the hypothetical owners of property and gas, but not Minnesota's natural resources or residents. Any proposed framework for gas exploration and extraction must require a permit prior to commercial production, with environmental protection and safety standards for permitting, robust environmental review, and public notice and comment.

Next, DNR's recommendations for contested case hearings fail to include tribal governments among the governments that can petition for a hearing (GTAC at 15, 55) and refer only to landowners, although impacts of gas extraction can also affect air and drinking water. DNR also proposes that constraints on gas resource drilling and extraction will be based on ownership of land. Specifically, the DNR recommends that only unleased gas interests "tied to an American Indian tribe or band owning reservation lands . . . should be shielded from pooling orders." (DNR-28). Proposed draft legislation states that the only exclusion from a pooling order is for lands *owned* by "an American Indian tribe or band." (GTAC at 45). This framework may effectively exclude tribal interests in gas resources even on its own reservation, unless the Tribe owns a particular parcel of land.

C. Proposed Recommendations Do Not Benefit or Protect Taxpayers.

The Minnesota Department of Revenue (DOR) proposed not only to tax gas using the Occupation Tax and Gross Proceeds Tax mechanisms applicable to mining, but to add oil to its recommendation. (DOR-1 through DOR-6). DOR cited no analysis of mining revenues demonstrating that they are fair, efficient, or the optimal way to benefit Minnesota taxpayers. DOR also did not examine the similarities and differences between the two industries on issues such as capital requirements, profit potential, or time horizons.

WaterLegacy believes that determination of the most beneficial way for Minnesota taxpayers to obtain revenue from gas exploration and extraction requires more than a

cookie-cutter adoption from the mining industry, which may or may not be a positive example. We are not proposing a specific method of taxation, but are strongly recommending that no tax structure be adopted in statute or rule until a detailed analysis has been done and shared with the public as well as legislators. That analysis should explain the effective rate of taxation, the timing of revenue, predicted revenue streams, and how revenue will be directed (*e.g.*, state general fund, agency, or local governments) under various potential taxing regimes.²

In a different way, the DNR's recommendations for financial assurance based on nonferrous mining are a poor fit for a potential gas industry. Current rules for nonferrous mining financial assurance pertain exclusively to costs for reclamation, which can be substantial in a mining context. The costs for sealing gas wells or reclaiming drilling sites are likely to be modest. Significant costs to taxpayers from gas exploitation could include effects of gas leaks, groundwater contamination, or explosions. To protect taxpayers from the financial risk posed by these occurrences would require a financial responsibility paradigm, not a cut-and-paste from nonferrous mining rules.

For each of these reasons and many more, Minnesota should not undertake to issue new permits for an unfamiliar industry with substantial environmental risks and the potential for substantial revenue without a thoughtful and analytical rulemaking process.

2. The Legislature Should Require a Study of Minnesota Gas Resources.

In addition to rulemaking, the nonferrous mining precedent repeatedly cited in the GTAC recommendations entailed a legislatively-directed study of environmental risks and the development potential of nonferrous mining before permitting was even contemplated. It is clear in the GTAC discussion that Minnesota agencies and lawmakers know very little about the type, extent, or location of Minnesota's potential gas resources other than that one company reported an elevated helium sample in 2024.

Different types of gas (*e.g.*, helium as compared to natural gas) not only might have different potential for development, profit, and state revenue, but are virtually certain to have different potential effects on Minnesota's air, water, land, and climate sustainability. In the mining arena, more robust regulations were enacted for nonferrous mining than for ferrous mining. It is irresponsible to assume without evidence that no distinctions should be made between regulatory requirements for different types of gas. The water-rich ecosystems in Minnesota where gas resources may be found may also require unique analysis or protections. Certainly, the types of "activities" that must be restricted in

² See *e.g.*, Headwaters Economics, *Oil and Natural Gas Fiscal Best Practices: Lessons for State and Local Governments*, Nov. 2012; available at https://headwaterseconomics.org/wp-content/uploads/Energy_Fiscal_Best_Practices.pdf.

proximity to particular resources, including drinking water sources as well as wilderness, parks, monuments, and other protection areas, should be assessed along with the geography, geology, and hydrology of Minnesota gas resources.

There are also pragmatic reasons to require assessment of Minnesota gas resources rather than speculation as to the nature and extent of the resource prior to permitting for exploration, let alone the DNR's all-in-one permanent extraction and production permit. Even the simple recommendation for spacing of wells to protect correlative rights of owners of a potentially shared resources (e.g., DNR-18 to DNR-20) requires more knowledge. It is axiomatic that prescribing well spacing without knowledge of the size, horizons, or location of a gas resources is not advisable and risks being ineffective, inefficient, and/or unfair.

Where there is a great deal at stake not only for revenue from a nascent industry, but for Minnesota's water quality, safety, and contributions to climate change, the Legislature should direct State agencies to initiate a rigorous and independent study before permitting gas exploration and extraction. Minnesota would be better off if we look before we leap.

3. The Legislature Should Adopt Basic Recommendations of the Minnesota Department of Health to Protect Health and Natural Resources.

Several Minnesota Department of Health (MDH) recommendations made in the GTAC process are fundamental to consideration of gas exploration and extraction, do not imply permit issuance prior to rulemaking, and are ripe and timely to set a policy framework for future rulemaking. The Legislature should adopt these recommendations in statute prior to rulemaking or permitting to protect Minnesota residents and water resources. The following statutory repeals would facilitate rulemaking governing regulation of gas wells:

MDH-1: Repeal Commissioner of Health's existing authority to explore and prospect for natural gas and oil.

MDH-2: Repeal natural gas from the well definition; and grant new rulemaking and fee authority to the Commissioner of Health for the regulation of gas wells.

MDH recommendations MDH-3 through MDH-6 have merit and should be considered in rulemaking. They would require licensing by MDH for work on gas wells, construction notification, fees, access by MDH, and notification of occurrences with the potential for environmental harm.

In addition, WaterLegacy requests that the following MDH recommendations be enacted by the Legislature as part of the basic framework of environmental, health, and safety protection within which rules will be adopted to regulate gas exploration and production:

MDH-7: A person must not use a gas well to inject or dispose surface water, groundwater, or any other liquid, gas, or chemical.

MDH-8: A person is prohibited from hydraulic fracturing a gas well.

MDH-9: A person must ensure that drilling fluids, cuttings, treatment chemicals, and discharge water are disposed of according to federal, state, and local requirements.

MDH-10: Drilling fluids used during the construction of a gas well must be water or air based and additives must meet the requirements of ANSI/NSF standard 60.

MDH-11: A person must meet gas well casing and grout requirements.

MDH-12: A person must meet gas well isolation distances.

MDH-13: A person must protect groundwater during the construction and sealing of a gas well.

MDH-14: A person must seal a gas well to prevent contamination of groundwater and the environment.

MDH-15: A person must submit a gas well sealing notification and fee for each proposed gas well to be sealed.

These provisions would provide a sound minimum standard for any activities pertaining to gas wells in Minnesota.

4. Gas Resources Regulation and Permitting Must Protect Health, Safety, Natural Resources, and Climate Sustainability.

Gas resources regulation must provide environmental review, public accountability of agency decisions, and standards to protect health, safety, natural resources and reduce taxpayer financial risk, as well as addressing ownership interests before permitting gas extraction or production. The following important concepts should be reflected in any rulemaking or proposed gas resources permitting regime:

- A gas resource exploration permit must be based on a detailed plan for drilling location, materials, and practices and DNR's must explicitly state that no extraction or commercial production are authorized by DNR's exploration plan approval. That exploration permit should be subject to public notice and comment and the contested case hearing process.
- A gas resource exploration permit must be preceded by a mandatory EAW with DNR as the RGU. DNR should be entitled to obtain costs for preparation of that EAW from the proposer.³

³ GTAC recommendations also support these requirements; DNR-12, EQB-1.

- Gas resource extraction or commercial production should require a separate gas extraction/production permit subject to public notice and comment and the contested case hearing process.
- Tribal governments should be listed among the governments entitled to file petitions for a contested case, and petitioners should also include “residents of Minnesota” that would be affected by the proposed operation to avoid exclusion of persons whose air or drinking water or would be contaminated by gas extraction.
- The DNR must be required to prepare an environmental impact statement (EIS) prior to issuing a gas extraction/production permit. DNR should be entitled to obtain costs for preparation of that EIS from the proposer (or potentially allocate costs among owners of the gas resource).
- Permitting standards should, in addition to the minimum requirements contained in MDH recommendations listed in Section 3, place restrictions on extraction to protect sensitive resources and require use of best available technology and design to minimize safety, climate, and environmental risks, some aspects of which may be described in rules.
- In addition to financial assurance to seal wells and reclaim drill locations (GTAC at 50), rules should require funding of financial responsibility to protect taxpayers from liability resulting from leaks, contamination of water, explosions, or other damage to health, safety, or environmental quality.
- Rules should also set forth the criteria for spacing orders; requirements for disclosure of gas exploration results, terms and protections that must be included in a pooling order application; policies related to state ownership of gas resources; and guidance to protect correlative interests of tribes on their reservations and tribal interests in exercise of treaty-reserved rights in ceded territories.

Conclusion:

WaterLegacy recommends that the Legislature take the following actions this session:

- 1) Direct the GTAC agencies to conduct a Minnesota Gas Resources Assessment of the nature, extent, and location of Minnesota gas resources; the environmental, health, and safety risks posed by their exploration and extraction/production; and methods to optimize taxpayer revenue and minimize taxpayer risk. Provide budgetary resources for this assessment.

- 2) Direct the GTAC agencies, particularly DNR and MDH, after the Minnesota Gas Resources Assessment Study is complete, to conduct a rulemaking process for regulation and permitting of gas resources exploration and extraction/production while protecting Minnesota taxpayers, health, safety, climate sustainability, and natural, historic, cultural, and treaty-reserved resources. Provide budgetary resources for this process over time.
- 3) Enact MDH recommendations in Section 3 above that enable rulemaking (MDH 1 and MDH 2) and that set appropriate minimum standards for any gas wells or drilling processes in Minnesota (MDH-7 through MDH-15).
- 4) If the Legislature decides to proceed with permitting prior to rulemaking despite recommendations to the contrary, it is requested that any legislative framework adopt the concepts described in Section 4 of these comments.

WaterLegacy appreciates the opportunity to comment in this matter, even with the time constraints that precluded a more detailed analysis. We believe that other members of the public are also interested in commenting, and request that a comment process be extended through the end of January 2025.

It would be highly regrettable if Minnesota made decisions on an important new industrial development without a thoughtful and deliberative process, including resource assessment, rulemaking, and a robust public process.

Sincerely yours,

A handwritten signature in dark ink, reading "Paula G. Maccabee". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Paula G. Maccabee

WaterLegacy Executive Director & Counsel