CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

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Leigh Boynton
Policy Advisor
Ministry of Northern Development and Mines
Deputy Minister's Office
Corporate Policy Secretariat
99 Wellesley Street West
Suite 5630, Whitney Block
Toronto Ontario M7A 1W3

Sent by email to leigh.boynton@ontario.ca
and miningact@ontario.ca

Dear Ms. Boynton,

Re: Proposed Legislative Amendments to the *Mining Act*, EBR Registry # 010-6559

I am writing on behalf of the Canadian Institute for Environmental Law and Policy (CIELAP) to provide comments on the of Northern Development and Mine's (MNDM's) proposed legislative amendments to Ontario's *Mining Act*. CIELAP was founded in 1970, with the mission to provide leadership in the research and development of environmental law and policy that promotes the public interest and sustainability. CIELAP produces balanced, evidence-based research, and works to bring together a diverse range of stakeholders for constructive dialogue on environmental issues.

In November 2008, CIELAP released *Balancing Needs/Minimizing Conflicts – A Proposal for a Mining Modernization Act, 2008*, a report coauthored with Ecojustice. This report offered specific recommendations for amending Ontario's *Mining Act* with a focus on the following principles:

1. Land use planning mechanisms that put a pause on mining activities while land use planning takes place;
2. Environmental assessment at each stage of the mining cycle and rules for uranium mining;
3. Protection for Aboriginal rights, including rights to consultation, accommodation and free, prior and informed consent;
4. Increased regulatory oversight of mining activities (permitting and reporting);
5. Increased rights for surface rights only landowners;
6. Increased transparency of mining operations, including public notice, consultation and reporting;
7. Financial security for 100% of clean-up and reclamation costs; and
8. A self-funded regulatory scheme.

CIELAP commends MNDM for addressing some of the recommendations put forward by CIELAP and Ecojustice through the proposed amendments included in Bill 173, the *Mining Amendment Act, 2009*. For example, Bill 173 introduces some improvements to Ontario's mining regime by allowing for prioritizing land use planning in the far north region of Ontario, and increasing permitting and monitoring of mining.

However, in CIELAP's opinion, further substantial amendments to the *Mining Act* are necessary to respond to a number of other concerns that have not been addressed in the proposed legislation. As currently drafted, Bill 173 does not: provide adequate standards for Aboriginal consultation and accommodation; require environmental assessment for mining; develop rules for uranium mining; prioritize land use planning throughout the entire province; or reduce the potential for significant public liability from abandoned mines.

Along with Ecojustice, CIELAP recommends that the following six issues be addressed through the legislative amendments in Bill 173:

1. Consent of Aboriginal peoples;
2. Prioritizing land use planning;
3. Environmental assessment;
4. Improved permitting;
5. Rules for uranium mining; and
6. Financial security for 100% of clean-up costs.

1. Consent of Aboriginal peoples

Bill 173 provides in the proposed new purpose section of the *Mining Act* that it is intended to "encourage prospecting, staking and exploration … in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult."[1] This purpose section is missing the concomitant duty to accommodate and the Bill itself does little to operationalize these two duties within the *Mining Act*.

Section 35 of the *Constitution Act, 1982* requires that when Ontario makes any decisions that may have an impact on an established or asserted Aboriginal right or interest that the Crown must, at a minimum, carry out meaningful consultation with all Aboriginal peoples who may be impacted in order to identify and accommodate their interests. Where the strength of a right and the potential threat to that right warrants it, Courts have found that accommodation may take the form of consent of the affected peoples but in all cases, accommodation will be necessary.

Courts in Ontario have held that Ontario's implementation of the existing *Mining Act* has been inadequate to meet the Crown's duty to Aboriginal peoples in Ontario and that consultation must start at the very beginning of the mining cycle when prospecting begins. If Bill 173 is enacted as is, the *Mining Act* will still allow for prospecting absent consultation and accommodation. Consultation would only be required at the exploration level leaving Ontario open to continued conflict over mining and the *Mining Act* subject to challenge as remaining unconstitutional.

[1] Section 2, Bill 173

In *Balancing Needs/Minimizing Conflict* we highly recommended that Ontario go beyond minimum consultation and accommodation requirements and honour the emerging international law requirement recognizing Aboriginal peoples' free, prior and informed consent as a precondition to allowing development that will impact their interests at each stage of mining as set out in The Declaration on the Rights of Indigenous Peoples. The Declaration was adopted by the UN General Assembly in September 2007 and was endorsed by the Canadian Parliament on April 8, 2008.

Further, the Bill may effectively delegate the duty to consult and accommodate to industry through permitting. Although Courts have held that delegation to industry is possible, they have further held that the Crown must always maintain an oversight role over the process to ensure the process and outcomes meet the Crown's duty. It is concerning that a consultation process for exploration permitting has been left to discretionary regulatory development.[2]

Although the incorporation of cultural training for prospectors[3] and a dispute resolution process[4] is laudable and certainly an improvement over the existing *Mining Act*, Bill 173 still does not meet the bare minimum consultation and accommodation requirements under the *Constitution Act, 1982*. Given that the stated intent of the Ontario government in developing Bill 173 was to minimize conflict with Aboriginal people, it is highly questionable why the legislation does not yet meet standards set by the Courts and why the Bill still allows for prospecting absent consultation and accommodation.

RECOMMENDED AMENDMENTS:

We recommend that section 2 of Bill 173 be amended to refer to the necessity of consultation with Aboriginal peoples and accommodation of their interests as follows:

> 2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult and accommodate, and to minimize the impact of these activities on public health and safety and the environment.

We also recommend that a definition of consultation be included in the Act rather than being left to regulatory development:

> [Section] "Consultation" is a process of good faith negotiations by the Minister that determine whether and how Aboriginal interests should be addressed through accommodation.

We recommend section 12 of the Bill be amended to allow Aboriginal communities to withdraw areas from prospecting as follows:

[2] Section 40, Bill 173
[3] Section 7, Bill 173
[4] Section 80, Bill 173

> 29.1(1) An Aboriginal community may designate an area in which they have an interest as withdrawn from prospecting and exploration by writing to the Minister in the prescribed form.
>
> (2) Any claims staked in an area withdrawn under subsection 29.1(1) section remains valid if they were staked previous to a withdrawal being made.

We recommend section 40 be amended to include reference to accommodation as follows:

> 78.1 (1) No person shall carry out an activity prescribed for the purposes of this section on a mining claim, mining lease or licence of occupation for mining purposes unless the person has submitted an exploration plan, in accordance with any prescribed requirements, including any Aboriginal community consultation and accommodation that may be prescribed.

We also recommend that wherever the Bill refers to consultation that accommodation be added as well to reflect honour of the Crown duty as set out by Supreme Court of Canada jurisprudence.

To ensure Aboriginal communities have a role in choosing individuals responsible for dispute resolution processes, section 80 of the Bill ought to be amended to add subsection 170(3) to the Act as follows:

> (3) The Minister shall designate the individuals or body under subsection (1) only if the Aboriginal community agrees to the individual or members of the body being considered by the Minister for designation.

2. Prioritizing land use planning

Bill 173 is a slight improvement in terms of land use planning as it confers power[5] on the Minister to withdraw areas from prospecting to allow a land use planning process to move forward. Further, Bill 173 provides that once a community land use plan in the Far North is finalized it can designate where mining may take place[6] and prevents new mines from being developed prior to a land use plan being finalized.[7] However, existing claims and mining would be grandfathered. Also, the Minister's power to withdraw is only explicitly provided for in relation to the Far North and the all-important detail of when the Minister will exercise his discretion is left to regulation development. Further, the definitions of "community based land use plans" and "Far North" are also left to regulation development.[8]

In *Balancing Needs/Minimizing Conflict*, we recommended that automatic withdrawals be made where a land use planning process is underway in either the far or near north areas of Ontario in order to avoid claim staking rushes experienced in the past where land use planning processes were announced. For southern Ontario, we recommended that municipalities be given the powers to decide where mining may take place as part of their official planning.

[5] Subsection 14, Bill 173
[6] Section 12, Bill 173
[7] Section 100, Bill 173
[8] Subsection 1(2), Bill 173

Bill 173 does not confer any powers on municipalities to decide where mining activities will take place within their boundaries. Nor does the Bill provide mechanisms that give priority to land use planning over mining in the far and near north areas of the province as it deserves.

RECOMMENDED AMENDMENTS:

We recommend that section 12 of the Bill be amended to prevent staking of claims in the areas subject to community land use planning in the Far and Near North and in areas where a municipal plan has designated such areas as off limits to staking as follows:

> 30 (g) that is located in the Far North or Near North, if a community based land use plan has designated the lands for a use inconsistent with mineral exploration and development.
>
> (h) that is designated as an area withdrawn from mining activities as part of a municipal official plan approved under the *Planning Act*.

We recommend that section 14 be amended to add reference to natural heritage as a reason for a withdrawal by the Minister and additional subsections to require that the Minister withdraw certain areas from prospecting:

14. (1) Subsections 35 (1), (2), (3) and (4) of the Act are repealed and the following substituted:

> **Withdrawal of lands**
> (1) The Minister may, by order signed by him or her, withdraw from prospecting, staking, sale and lease any lands, mining rights or surface rights that are the property of the Crown, and the lands, mining rights or surface rights shall remain withdrawn until reopened by the Minister.
>
> **Factors to consider**
> (2) In making an order under subsection (1), the Minister may consider any factors that he or she considers appropriate, including,
>
> (a) whether the lands, mining rights or surface rights are required for developing or operating public highways, renewable energy projects or power transmission lines or for another use that would benefit the public, whether the order would be consistent with any prescribed land use designation that may be made with respect to the Far North and whether the lands meet the prescribed criteria as a site of Aboriginal cultural significance or area of natural heritage; and
>
> (b) any other factors that may be prescribed.
>
> **Pre-existing rights and tenure**
> (3) A withdrawal order issued under subsection (1) does not affect pre-existing mining rights and tenure such as mining claims, mining leases or licences of occupation.

Minister to withdraw
(3.1) The Minister shall, by order signed by him or her, withdraw from prospecting, staking, sale and lease any lands, mining rights or surface rights that are the property of the Crown in areas:

(a) subject to active land use planning by Aboriginal communities in the Far North and Near North;

(b) withdrawn by Aboriginal communities which the Minister has received written notification under subsection 29.1(1).

3. Environmental Assessment

In *Balancing Needs/Minimizing Conflict* we recommended that environmental assessments be required for all stages of mining, beginning early in the mining cycle with low-level EAs at the prospecting stages and then progressively more rigorous EAs as impacts become more significant. We recommended that specific environmental assessment requirements be adopted in the *Mining Act*, so that an application for a prospecting permit or exploration permit would have to include an environmental assessment report, and an application for a permit for advanced exploration or mining would include an environmental assessment under Part II of the *Environmental Assessment Act*.

We also urged that, when a project reaches the mining stage, participant funding be provided to interested stakeholders to ensure members of the public are given the opportunity to participate in a meaningful way in the environmental assessment process.

The report also recommended that the most recent version of the Declaration Order exempting mining from environmental assessment in Ontario should not be renewed in 2009.

Bill 173 is still completely lacking in any environmental assessment requirements. While the proposed purpose statement for the Act includes minimizing the impacts of mining activities on public health and safety and the environment, there is no mention in the Bill of environmental assessment requirements. Further, the Ministry of the Environment has recently granted MNDM's request for extensions of the two declaration orders that exempt mining activities from environmental assessment. Although the Ministry of the Environment has indicated that no further extensions will be granted to MNDM of the Declaration Orders, we are not confident that an extension will not be provided once again in 2012.

RECOMMENDED AMENDMENTS:

We recommend that a new section be added to the Bill that amends the *Environmental Assessment Act* as follows:

Consequential Amendment

104. The *Environmental Assessment Act* is amended to add the following subsections:

3.2 (3) Declaration Orders MNDM-3 and MNDM-4 which expire on December 31, 2012 shall not be extended or renewed by the Minister.

(4) For additional clarity, by December 31, 2012, environmental assessment shall be required under this Act or under a class environmental assessment approved by the Minister for prospecting, exploration, advanced exploration, mining and closure activities permitted or otherwise approved by the Ministry of Northern Development and Mines under the *Mining Act*.

4. Improved permitting

Bill 173 introduces requirements that those carrying out mining activities be required to submit an exploration plan or obtain an exploration permit, depending on the nature of the mining activities.

The proposed amendments would require that an exploration plan be submitted before a person carries out a prescribed activity on a mining claim, mining lease or licence of occupation for mining purposes. However, because regulations have yet to be proposed, it is not known which activities will be included. The exploration plan would have to be submitted in accordance with any prescribed requirements, including any Aboriginal community consultation that may be prescribed by regulation. All activities described in an exploration plan would have to be carried out in accordance with any prescribed requirements in the regulations.

The proposed amendments would further require that an exploration permit be submitted before a person carries out a prescribed activity on a mining claim, mining lease or licence of occupation for mining purposes. Again regulations have yet to be proposed, so it is not known which activities will be included. In deciding whether to issue an exploration permit, and what terms and conditions should apply to the permit, the Director would be required to consider: the purpose of this Act; whether Aboriginal consultation has occurred in accordance with any prescribed requirements, including consideration of any arrangements that have been made with Aboriginal communities that may be affected by the exploration; and any arrangements that may have been made with surface rights owners.

In *Balancing Needs/Minimizing Conflict* we recommended that permit requirements be introduced for each stage of mining activity – prospecting, exploration, advanced exploration and mining. A prospecting permit would be issued to allow for prospecting within a defined region for a specified period of time so that a person in possession of a prospecting permit would be entitled to stake a mining claim; once a mining claim has been staked, the holder of the claim would have security of tenure against other potential miners. However, further permits would be required to continue with exploration, advanced exploration and mining activity.

Key features of the proposed permitting regime would include consent to the permit by affected Aboriginal peoples, as well as more stringent application requirements than currently exist, such as:

- submission of proposed work plans;
- proof of financial security and payment of security deposit;
- proof of adequate training and technical capability;
- conditions for agreement of Aboriginal peoples, environmental assessments and reporting; and

- Ministerial discretion to refuse and revoke permits, issue penalties for infractions and cancel mining claims.

RECOMMENDED AMENDMENTS:

Permitting is needed at the prospecting phase that ensures Aboriginal peoples and the Minister are aware of planned prospecting activities. As a result, we recommend that at least the following amendments be included in the Bill that also ensure competitiveness amongst prospectors:

Directors of Prospecting Plans and Permits
41.2 The Minister may appoint one or more officers or employees in the Ministry as Directors of Prospecting and Exploration.

Prospecting plan
41.3 (1) No person shall carry out prospecting unless the person has submitted a prospecting plan, in accordance with any prescribed requirements, including Aboriginal community consent to the activity.

Activities to comply with requirements
(2) All activities described in a prospecting plan that are carried out shall be carried out in accordance with any prescribed requirements.

Transfer to prospecting permit
(3) If a prospecting plan includes a prospecting activity prescribed for the purposes of section 41.3, or if the prescribed circumstances apply, the person shall not carry out any such activity unless the person has obtained an exploration permit.

When prospecting permit required
41.4 (1) No person shall carry out an activity prescribed for the purposes of this section within a prospecting area unless the person has applied for and been issued a prospecting permit.

Application for prospecting permit
(2) An application for a prospecting permit shall be made to a Director of Prospecting and Exploration, and in deciding whether to issue a permit and what terms and conditions should apply to the permit, the Director shall consider,

(a) the purpose of this Act;

(b) whether Aboriginal community consent has been obtained, which may include consideration of any arrangements that have been made with Aboriginal communities that may be affected by the prospecting;

(c) any arrangements that may have been made with surface rights owners; and

(d) any other prescribed circumstances.

Conditions
(3) A prospecting permit is subject to the prescribed standard terms and conditions and to any additional terms and conditions that the Director determines are appropriate.

Activities to comply with requirements
(4) All activities described in a prospecting permit that are carried out shall be carried out in accordance with the terms and conditions of the permit and the regulations.

Amendment of permit
(5) The Director may amend a prospecting permit if, in his or her opinion, there is a change in circumstances that warrants an amendment.

Exclusive right to prospect and stake claims
(6) A prospecting permit shall grant the prospector exclusive rights to prospect and stake claims in the prospecting area designated in the permit.

Prescribed prospecting areas
(7) The Minister may prescribe prospecting areas through regulations or through individual permits in any manner the Minister decides.

Contravention
41.5 (1) Where it is found that a prescribed activity is being carried out in contravention of this Act or the regulations relating to prospecting plans or prospecting permits, an inspector or a Director may by order,

(a) require that the prospecting activities cease until the contraventions are addressed to the satisfaction of a Director and the order to cease activity has been revoked; or

(b) where the contravention is with respect to a prospecting permit, cancel the permit.

Other permits
(2) A person who submits a prospecting plan or obtains a prospecting permit under this section is not exempt from complying with any other requirements that are set out under this Act or any other Act.

Offence continues
(3) A person who continues an activity or causes an activity to be continued in contravention of an order made under clause (1) (a) is guilty of an offence and, in addition to any other penalty imposed under this Act, is liable on conviction to a fine of not less than $25,000 for each day the activity is continued in contravention of the order.

We also recommend that section 78.2 of the Bill in relation to exploration plans and permits be amended to mirror the changes set out above for prospecting plans and permits.

We also recommend that section 80 of the Bill be amended to ensure that a dispute resolution process be put in place in relation to consultation and accommodation for mining claims, including existing claims, where disputes may exist on top of exploration permits, advanced exploration and mining as follows:

170.1(1) The Minister may designate one or more individuals, or a body, to hear and consider disputes arising under this Act relating to consultation and accommodation with Aboriginal communities, Aboriginal or treaty rights or the assertion of Aboriginal or treaty rights, including disputes that may occur,

(a) in relation to decisions on the issue, amendment, renewal or cancellation of, or the terms and conditions imposed on, a prospecting permit issued under section 41.4;

(b) in relation to decisions on the issue, amendment, renewal or cancellation of, or the terms and conditions imposed on, an exploration permit issued under section 78.2;

(c) under clause 140(1)(c) or 141(1)(c); and

(d) in any other prescribed circumstance.

5. Rules for Uranium Mining

In *Balancing Needs/Minimizing Conflict* we recommended that a prohibition be placed on uranium mining until the Ontario government has studied the health and safety implications, including environmental considerations, and established appropriate rules for this specific sector of exploration and mining activity, including consideration of the option of a long term prohibition. Bill 173 does not include any provisions dealing specifically with uranium mining.

RECOMMENDED AMENDMENTS:

We recommend the following section be added to the Bill:

[Section] No one shall prospect, explore or mine for uranium in Ontario.

Or alternatively, to protect drinking water in a precautionary fashion, the following amendment be added to the Bill:

[Section] No prospecting, exploration or mining for uranium shall be undertaken by any person in an area identified as a source of drinking water through the *Clean Water Act*.

Or alternatively, until a process is created to assess risk, the following amendment be added as an additional consequential amendment to the *Environmental Assessment Act* under s.104 of the Bill:

3.3 No prospecting, exploration or mining for uranium shall be undertaken by any person until environmental assessment requirements are in place for the activities referred to in subsection 3.2(4) that are permitted or otherwise approved by the Ministry of Northern Development and Mines under the *Mining Act*.

6. Financial security for 100% of clean-up costs

1996 changes to the *Mining Act* introduced a scheme of self-certified mine closure plans. In *Balancing Needs/Minimizing Conflict*, we recommended that amendments be made to require the Minister to collect a security deposit corresponding to 100% of the reclamation costs when a

permit is issued to ensure that funding is in place for adequate closure and rehabilitation should a permit holder walk away from a project. Bill 173 does not address this important public liability issue.

RECOMMENDED AMENDMENTS:

We recommend the following section be added to the Bill to remove the corporate financial test option to meet financial assurance requirements under the Act:

> [Section] Subsection 145(1) of the Act is repealed and the following substituted:
>
> 145. (1) The financial assurance required as part of a closure plan shall be in one of the following forms and shall be in the amount specified in the closure plan filed with the Director or any amendment to it:
>
> 1. Cash.
>
> 2. A letter of credit from a bank named in Schedule I to the *Bank Act* (Canada).
>
> 3. A bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance.
>
> 4. A mining reclamation trust as defined in the *Income Tax Act* (Canada).
>
> 5. Any other form of security or any other guarantee or protection, including a pledge of assets, a sinking fund or royalties per tonne, that is acceptable to the Director.

Thank you for the opportunity to provide input on the proposed amendments to the *Mining Act*. Please contact me if you wish to discuss any of these comments further.

Yours sincerely,

Maureen Carter-Whitney
Research Director

Cc: Hon. Michael Gravelle, Minister of Northern Development and Mines
Premier Dalton McGuinty
Hon. John Gerretsen, Minister of the Environment
Hon. Brad Duguid, Minister of Aboriginal Affairs
Hon. Donna Cansfield, Minister of Natural Resources
Hon. Jim Watson, Minister of Municipal Affairs and Housing
Gord Miller, Environmental Commissioner of Ontario