

Northwatch Submission



In Response to

Modernizing Ontario's Mining Act: Finding A Balance Discussion Paper

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1. Introduction

On August 11th, 2008 the Province of Ontario released a discussion paper on the “modernization” of Ontario’s Mining Act. The release of the discussion paper followed an announcement during the previous week of public consultations in five cities on the “modernization” of the Act, which – according to the news releases at the time, were in support of the Premier’s statements of the previous month.

In a July 14th announcement of a land use planning process for Ontario’s far north, Premier Dalton McGuinty announced his intentions to create a new system of Resource Benefits Sharing, and to reform and modernize Ontario’s Mining Act.

Reforming And Modernizing Ontario's Mining Act

Our plan will ensure that mining potential across the province is developed in a sustainable way that benefits and respects communities.

We will ensure that our mining industry remains strong — but we also need to modernize the way mining companies stake and explore their claims to be more respectful of private land owners and Aboriginal communities. The Ontario government believes exploration and mine development should only take place following early consultation and accommodation of Aboriginal communities.

To ensure that mining practices are up to date in the far North and across the province, we will review the Mining Act.

Consultations will begin early next month. We will introduce legislation in the upcoming session and new rules would be in place for later next year.

Northwatch is a coalition of environmental and social organizations in northeastern Ontario. Founded in 1988, Northwatch’s primary purposes are to advocate for the incorporation of environmental considerations into all instances of social and economic decision-making, and to support public participation in environmental and natural resource planning and decision-making.

Northwatch has a long history of involvement in mineral policy development, mine project reviews, and public interest research related to mining activities and impacts. Northwatch’s contributions include membership in the Whitehorse Mining Initiative Leadership Council, the Ontario Ministers’ Mining Act Advisory Committee, and numerous multi-stakeholder initiatives, primarily at the federal level. Northwatch has also authored several mining-related reports, and provides information resources to members of the public with an interest in mining and the environment concerns.

2. Scope and Purpose of the Review

Ontario is modernizing its Mining Act to ensure that this legislation promotes fair and balanced development that benefits all Ontarians in a sustainable, socially appropriate way, while supporting a vibrant, safe, environmentally sound mining industry.

Modernization will bring the Mining Act into harmony with the values of today's society while maintaining a framework that supports the mineral industry's contribution to Ontario's economy.

"Finding a Balance: Discussion Paper on Modernizing Ontario's Mining Act"

The above stated intention, ie of modernizing Ontario's Mining Act to ensure that the Act "promotes fair and balanced development that benefits all Ontarians in a sustainable, socially appropriate way" is an appropriate goal, and one that is consistent with the Premier's messages of July 14th, and indeed is consistent with the values and expectations of the people of Ontario. However, the review as framed by the Discussion Paper is much narrower, and inappropriately so.

While we agree with the Discussion Paper's assertion that "the purpose of the Mining Act, which applies throughout Ontario, is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario" we do not agree with the very narrow interpretation of the Act's application, ie being limited to activities that occur before and after mineral production, nor with any supposition that, because the Act has limited application, this review should be of extremely limited scope.

Several sections of the Act have a direct bearing on the impacts of a mining activity – in the exploration, development, operation or closure phases – on land or water. Further, closure activities, at least in cases of responsible mining, are not delayed until after mineral production but rather happen concurrent with mineral production. Finally, what is required is a review that will modernize mining itself, not just the Mining Act, and that is less likely to be achieved with a very narrowly scoped review, such as the one framed by the Discussion Paper released on August 11th.

3. Northwatch's Response

"Finding a Balance: Discussion Paper on Modernizing Ontario's Mining Act"

3.1 Mineral tenure system and security of investment

Potential adjustments to the mineral tenure system, including free entry, to assure investment security while taking into account other interests, including Aboriginal community concerns and private landowners issues

The following are key elements of a revised tenure system:

- environmental assessments at each stage of the mining sequence; the "level" of environmental assessment should be matched to the "level" of mining activity / disturbance; for example, while an environmental screening may suffice for very early exploration – in the context of a permitting system similar to that outlined above – a full environmental assessment (EA) would be required for advanced exploration, and a full EA with a public hearing prior to the opening of a mine
- a permitting system must be established for early exploration activities, ie any activities beyond the initial staking of a mineral claim
- an inventory of natural, cultural and social values within a claim block must be a pre-requisite of any application for an exploration permit (a system is already in place in forest management planning; the Natural Resource Values Information System could be adopted and expanded to meet permitting requirements for mineral exploration)
- a rehabilitation plan – reflective of the inventory of natural, cultural and social values that have been identified – must be developed and used as the basis for any applications for exploration permits and financial assurances must be posted as security that the rehabilitation work will be done according to the rehabilitation plan and standards
- the permitting process must be sequential and tied to each step in the exploration and development process; failure to implement the rehabilitation plan would result in no further permits being issued
- public consultation is an important element of the review of permit applications including proposed rehabilitation plans and measures and financial assurances
- shared decision-making processes with First Nations must be developed on a government-to-government basis
- land disturbances, including early and more advanced exploration activities, should not take place without the prior informed consent of the Aboriginal communities' with an interest and/or surface rights holders

3.2 Aboriginal rights and interests related to mining development

Potential approaches to consultation and accommodation related to the broad range of mineral sector activities as they affect Aboriginal and treaty rights.

The following are key elements of an approach to the accommodation of Aboriginal rights and interests:

- shared decision-making processes with First Nations must be developed on a government-to-government basis
- revenue-sharing with Aboriginal peoples must be based on fairness and a recognition of the inherent land rights of indigenous peoples, in addition to constitutional and case law and obligations flowing from treaties between the Crown and First Nations

3.3 Regulatory processes for exploration activities on Crown Land

Potential approaches to regulating exploration activities, including consultation and accommodation with Aboriginal communities.

The following are key elements of a regulatory system for exploration activities:

- a permitting system must be established for early exploration activities, ie any activities beyond the initial staking of a mineral claim
- an inventory of natural, cultural and social values within a claim block must be a pre-requisite of any application for an exploration permit (a system is already in place in forest management planning; the Natural Resource Values Information System could be adopted and expanded to meet permitting requirements for mineral exploration)
- a rehabilitation plan – reflective of the inventory of natural, cultural and social values that have been identified – must be developed and used as the basis for any applications for exploration permits and financial assurances must be posted as security that the rehabilitation work will be done according to the rehabilitation plan and standards
- the permitting process must be sequential and tied to each step in the exploration and development process; failure to implement the rehabilitation plan would result in no further permits being issued
- public consultation is an important element of the review of permit applications including proposed rehabilitation plans and measures and financial assurances
- shared decision-making processes with First Nations must be developed on a government-to-government basis
- environmental assessments at each stage of the mining sequence; the “level” of environmental assessment should be matched to the “level” of mining activity / disturbance; for example, while an environmental screening may suffice for very early exploration – in the context of a permitting system similar to that outlined above – a full environmental assessment (EA) would be required for advanced exploration, and a full EA with a public hearing prior to the opening of a mine

3.4 Land use planning in Ontario’s Far North

Potential approaches to the requirement that new mines in the Far North would need community land use plans supported by local First Nations.

The following are key elements of a land use planning system:

- community interests and land uses should be the drive for the land use planning system, rather than mineral development
- community or local land use plans should be developed in the context of regional land use plans
- ecological objectives and values should be identified in the earliest stages of the land use planning process

3.5 Private rights and interests relating to mining development (mineral rights/surface rights issues)

Potential approaches to address mineral rights and surface rights issues.

The following are key elements of a resolution of surface rights issues:

- the process must recognize natural heritage values as well as built values in the development of an exploration program, or determination of compensation
- the system must require the consent of surface rights holders prior to any disturbance as a result of prospecting or mineral exploration on private property, and consent and a compensation package prior to any mining on or under land where the surface rights are privately held

3.6 Elements of the Review

The government identified five critical policy issues must be addressed in this review of Ontario's Mining Act (Mineral tenure system and security of investment; Aboriginal rights and interests related to mining development; Regulatory processes for exploration activities on Crown Land; Land use planning in Ontario's Far North; Private rights and interests relating to mining)

The following key elements should be included in the review of the Mining Act:

- Financial assurances; the system of financial assurances for mine closure has been in place since the early 1990's, with major changes implemented without prior public consultation in the late 1990s; numerous weaknesses have been identified, including a lack of transparency, but there has been no comprehensive review done of this important mechanism for insuring that mines are rehabilitated responsibly and that mines that are currently operating or under development do not become the abandoned and orphaned mines of the future, for which the environment and taxpayers will bear the burden
- Exit Tickets; under Section 183(1) of the Mining Act companies can apply to "surrender" their mining lands to the Crown, "*upon such terms as are acceptable to the Minister*"; to the best of our knowledge there has only been once such application made, and that application process was never completed; during that period (2001-2002) we made comments on the application as posted on the Environmental Bill of Rights electronic registry, met with Ministry staff, and raised concerns at the staff and Ministerial level about the absence of any clear criteria for "terms" being "acceptable to the Minister" and our concerns about

liabilities being transferred to the Crown and the people of Ontario; this mechanism needs a careful examination if it is to be retained in a “modernized” Mining Act, and several changes must be made, including the development of criteria for decision-making and improved public notice and comment opportunities

- Public consultation; the requirements for public consultation and engagement during the exploration, development and operating stages of a mine are extremely limited, particularly in comparison to the requirements of other sectors, such as forestry, energy or waste management; these provisions should be reviewed and expanded to bringing mining into the 21st century in terms of public oversight
- Mine Reporting; reporting requirements – such as for mine closure activities – have been reduced through a series of amendments made the Act outside of a comprehensive review; the current level of reporting should be reviewed, its adequacy assessed, and mechanisms to make the reporting process more transparent should be explored
- Approvals Process; there are numerous agencies involved in the issuing of permits or approvals for a mineral development, including the Ministry of Natural Resources and the Ministry of the Environment; however, the Ministry of Northern Development and Mines is generally regarded as the “lead” ministry, but there is no coordinated approach to the review process(es) and permitting requirements, which can lead to both inefficiencies and reduced effectiveness as well as serious inconsistencies (Northwatch has reviewed mine proposals for which the proponents provided very different descriptions of the “project” for Environmental Protection Act approvals than for the closure plan); the review should include means by which approvals process can be improved, including through increased public involvement, better coordination, and checks and balances for consistency and continuity

4. Conclusions and Next Steps

In our view, the stated goal of having the changes to the Mining Act tabled in the upcoming session is inadvisable, and will result in a result which not only fails to meet the potential to greatly improve the current situation but could potentially result in worsened conditions.

Alternatively, the broader objective of “modernizing” the Mining Act – and mining – is a worthy one, and one which should be allowed an adequate amount of time and consideration. Certainly the voices of many concerned parties – including municipalities, First Nations, and industry organizations – have been raised in protest in recent months over what many have perceived and experienced as a rushed and exclusive consultation process on the Mining Act and its potential revisions.

In light of the above, and as a reflection of our commitment to sound process and open and transparent development of public policy, we recommend the following steps be taken:

- comments received in response to the “Finding a Balance” Discussion paper in particular and the review of the Mining Act more generally be consolidated and made available as a means of building understanding among the various interested parties and the public at large
- an Options Paper be developed which outlines various changes that have been proposed, and invites an evaluation of the strengths and weaknesses of the various options; consultations throughout the province, including bilateral and multi-stakeholder sessions and written comments
- a more substantive Discussion Paper be developed which outlines the Government of Ontario’s preferred options for “modernizing” the Mining Act and the associated regulatory regime (including other Acts and Regulations which govern mining activities)
- legislation is developed based on responses to the Discussion Paper, and is subject to public comment through the normal channels

In conclusion, we welcome the opportunity to continue to participate in this important discussion, and look forward to being part of the deliberations in the coming months and beyond.