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MiningWatch Canada's Response to Modernizing Ontario's Mining Act, Finding A Balance

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MiningWatch Canada welcomes the opportunity to provide input to the efforts of the Ontario Government to bring Ontario's mining legislation into the 21st Century. We have been recommending revisions to the Mining Act and other legislation that relates to mining for the last 10 years and we appreciate the current Government's commitment to progressive change.

MiningWatch is a pan-Canadian alliance of eighteen environmental, social justice, Aboriginal and labour organisations from across the country. It provides a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat and community interests posed by irresponsible mineral policies and practices in Canada and around the world.

In 1850, a conflict over mineral development between the Anishinabe of Batchewana and the Crown, lead to the signing of the Robinson-Huron Treaty. Unfortunately, this and other treaties did not fully resolve the conflict between those who wanted access to the mineral resources and the First Nations who occupied the land they were on, so history has continued to repeat itself over the past 150 years. Recently the province has suffered high-profile conflicts between the Crown and mineral exploration companies on one side, and First Nations, surface-rights holders, other users of the land and local communities on the other.

These conflicts have created a great amount of stress (organizational, financial and personal) for the communities involved and have negatively affected the climate for mineral development in the province. We offer the following recommendations with the intention of ensuring that Ontario's mining industry can develop in a way that protects the environment and is responsible and accountable to First Nations and to all citizens of the province. Preventing conflict with First Nations and stakeholders such as surface rights owners and municipalities, will be fundamental to the industry's future and a cornerstone for creating the security that industry seeks.

In November 2005, Nishnawbe Aski Nation, representing 49 First Nations in Ontario's North, stated:

> We are facing a multitude of First Nation grievances triggered by mining exploration that could at any time lead to an explosive conflict. A number of NAN First Nations have declared moratoriums on mining exploration and development. The immovable object of mining company shareholders and mining act assessment requirements will one day meet the irresistible force of Treaty rights with predictable consequences. At issue is the so-called free entry system. The ownership of the land itself is in dispute.

The recommendations we make below align closely with the proposed regulatory amendments in *Balancing Needs, Minimizing Conflict*- a submission to the Mining Act consultation process from Ecojustice and the Canadian Institute for Environmental Law and Policy (CIELAP). MiningWatch and several other prominent environmental and social justice organizations have provided input to the authors from Ecojustice and CIELAP during the development of this document. MiningWatch endorses their recommendations and would like to add to and highlight certain aspects of the document in the following submission.

This submission addresses the five themes identified in the Government's discussion paper, though the order has been changed to demonstrate the progressive steps necessary adequately to reform the legislative and policy framework for mining in Ontario.

The Need For Comprehensive and Integrated Reform

To modernize operations of the mining industry in Ontario, there is a need for comprehensive and integrated reform of a number of current laws and policies. The Government's discussion paper, however, focuses exclusively on changes to the Ontario Mining Act. This narrow focus is problematic as the mining industry operates under a variety of legislation, regulations and policies. Changes are required to the full regulatory framework, rather than just the Mining Act.

We recommend a "Mining Modernization Act" that will encompass changes to the Mining Act, the Environmental Assessment Act, the Planning Act and to related policies under these acts.

Under the current regulatory and policy framework for mining, mineral development is assumed to be the most important and best use of an area's resources. At the core of our proposal for a *Mining Modernization Act* is the assertion that mining is but one of many potential land uses. While in some areas of the province, mining maybe the preferred land

use, it should not be given automatic precedence over conflicting land use options, especially those that are sustainable and renewable.

In December 2007 the Environmental commissioner of Ontario wrote:

> The existing regulatory structure treats public land as freely open to mineral exploration. The consideration of other interests, such as the protection of ecological values, is only dealt with in the later stages of the approvals process. The ECO believes that this system is reactionary and fails to determine upfront where mineral development may be inappropriate. Instead, it assumes that mineral development is appropriate almost everywhere and that it is the "best" use of Crown land in almost all circumstances.
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> This century-old system continues to rely on principles that do not reflect modern land use planning nor does it adequately safeguard environmental values.
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> The ECO believes that Ontario's Mining Act and its assumption of free entry for mineral development impedes comprehensive land use planning.
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> The ECO believes that significant ecological values deserve protection and they should be proactively identified by MNR. Further, lands with significant ecological values should be withdrawn from eligibility for prospecting and staking by MNDM. This approach would give greater certainty to the mining industry, afford better protection for ecological values, and reduce the complexity of the development approvals process.

As noted in a recent legal review by West Coast Environmental Law: "Once mine exploration has occurred, and there is a desire to build a mine, industry pressure is such that it is virtually impossible to prohibit this development in order to respect other land uses and objectives."

Although the mining industry constantly asserts that "mining is a temporary use of the land", this is not the case. Mining has a huge long-term footprint, and after closure, most mines have to be monitored in perpetuity.

In addition to the mine, there is usually a mill, tailings (the rock that is ground up to extract the ore, usually mixed with chemical reagents), overburden and waste rock, roads and or railroads, airstrips, borrow pits, dams, reservoirs and power lines. Most of the mine's waste rock and tailings are toxic, leaching heavy metals and sulphuric acid into water, air and soil. Over 1 billion tons of waste rock and 950,000 tonnes of tailings are produced annually by the industry in Canada, more than 20 times the amount of municipal solid waste generated annually. One gold wedding band leaves behind over 20 tonnes of waste rock and tailings, depending on the grade of the ore.

Mining is a major user of water. Water is pumped from open pits and underground to "dewater" them to allow mining to proceed. In muskeg, this can cause the release of methyl mercury into water systems. Water is used to wash the ore, and in milling and refining processes. Water is used to slurry tailings from the mill to tailings management areas, and is frequently used as a water cover for acid-generating tailings. Clean water goes in, and a lesser amount of contaminated water is discharged, often to a different water system. In a survey of water taking permits in one district in north eastern Ontario, 77% of the permits issued within one year were for mining purposes. Not all the permits included limits for the amount of water used, but, of those that did, average water taking was 6.4 million litres per day. North American Palladium had a permit to take water at a rate of 30 million litres per day, for a period of five years. At a national level, the mining and metal sector consumes over 2 billion cubic metres of water annually, most of this free of charge.

Mining companies are also major contributors to climate change, because of their extensive use of energy for extraction and refining. For example, a tonne of aluminium produces four tonnes of greenhouse gases and a tonne of steel produces 0.8 tonnes of GHG's. At least 8% of all energy used in Canada is for mining, milling and smelting.

Aboriginal Rights

The Royal Commission on Aboriginal Peoples found, in 1995:

> Land is absolutely fundamental to Aboriginal identity. [It] is reflected in the language, culture and spiritual values of all Aboriginal peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect. Unfortunately, those concepts have not been honoured in the past, and Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment.
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> This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land-use areas, the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished. The history of these losses includes the abject failure of the Indian affairs department's stewardship of reserves and other Aboriginal assets. As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.

> Aboriginal peoples have not been simply the passive victims of this process. They have used any means at their disposal to halt the relentless shrinkage of their land base. From an Aboriginal perspective, treaties were one means to that end. But Aboriginal people insist that the Crown has failed to uphold those agreements and has generally broken faith with them. And since the nineteenth century, they have continuously protested—to government officials, to parliamentary inquiries, and in the courts—what they see as the resulting inequity in the distribution of lands and resources in this country. …[C]onflict over lands and resources remains the principal source of friction in relations between Aboriginal and other Canadians. If that friction is not resolved, the situation can only get worse.

The Crown - as represented by the Ontario Government - has a constitutional duty to consult and accommodate First Nations with regards to all phases of the mining cycle that occur within their territories. The new regulatory framework for mining must put in place a mechanism to cooperate with First Nations to develop, in a timely manner, consultation and accommodation agreements.

As stated by the Nishnawbe Aski Nation (NAN) Grand Chief Stan Beardy, and the Oski-Machiitawin Chiefs Steering Committee in a press release of September 26, 2008 the current consultation process is not adequate to effectively develop a government-to-government protocol.

We recommend that the Act include a provision and parameters for a protocol with First Nations communities, prior to any mineral activity on their traditional land. . Such government-to-government agreements for mineral exploration and development have been developed in Manitoba and are currently being recommended in British Colombia by the BC First Nations leadership .

Such government-to-government agreements will be meaningless if they do not include the right of First Nations to say "no". The UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in September 2007, and endorsed by the Canadian Parliament on April 8, 2008, states:

> **Article 18**
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
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> **Article 19**
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in

> order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

We recommend that the Act include recognition of Free Prior and Informed Consent as described in the United Nations' Declaration on the Rights of Indigenous Peoples

Land Use Planning

The Ontario Government has made a commendable decision to undertake extensive, community-based land use planning and seek agreement of First Nations prior to allocating additional mineral leases and permitting of mine operations in the Far North.

We believe that the same opportunity should be given to communities in the southern regions (Near North and Southern Ontario) including First Nations and Municipalities. In areas that are not within the traditional territory of a First Nation or within a municipal boundary, the Ministry of Natural Resources should take the lead in land-use planning. During the public and stakeholder consultation sessions in Toronto, Kingston and Sudbury, recommendations for land-use planning in advance of mineral development were broadly supported by industry, municipal, community and NGO representatives.

In December 2007 the Environmental Commissioner of Ontario wrote:

> The mineral development strategy all but ignores that mining is but one of many possible land uses in northern Ontario. The strategy is silent on the need for planning beyond asserting that MNDM, in conjunction with MNR, is "exploring potential approaches for land-use planning in Ontario's Far North…Mineral development does have an important role to play in Ontario, but the ministry must ensure that the 'sustainability' component of its mandate extends beyond solely economic interests, and that it dovetails with the broader responsibilities of the Ontario government.

Municipalities and First Nations must be able to determine the lands within their responsibility that should be withdrawn from mineral exploration and development.

Currently, the Provincial Planning Policy (under the Municipal Act) effectively sterilizes areas of Provincially Significant Mineral Potential (PSMP) from other forms of development. As the PSMP is tied to volatile commodity prices, it is a very problematic method of allocating long-term land-use. Although there is nothing wrong with knowing which lands may have high mineral potential, municipal decisions about the most

effective long-term uses of land have to take many other factors into consideration. This is, and should be, the role of the Official Plan.

We recommend that municipalities and First Nations be made "competent authorities" under Section 27 of the Mining Act, enabling them to withdraw lands from mineral exploration. We further recommend that the sections sterilizing lands of PSMP from other development be removed from the Provincial Planning Policy.

Environmental Assessment

In 2006, MiningWatch Canada and Wildlands League filed a petition with the Auditor-General, challenging a Declaration Order which exempted mines and mining permits from the Environmental Assessment and Planning Act. In December 2007, the ECO found that the petition had merit and stated that:

> The existing regulatory structure for mining does not adequately assess the cumulative impacts of development. The various existing approvals processes, such as Class EAs or permits under other legislation, are highly compartmentalized. The ECO expressed a similar concern in our 2003/2004 Annual Report with regard to mineral development, stating, "Each of the ministries followed their formal approvals processes. However, the system's current checks and balances did not prevent a result with potentially distressing environmental consequences.
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> In addition, the ECO is concerned that MOE has repeatedly extended MNDM's "interim" Declaration Order based on MNDM's failure to prepare a Class EA. When initially granted in 2003, MOE specifically issued the Declaration Order for just one year, recognizing the fact that more comprehensive EA coverage was needed. The ECO does not believe that MOE should be rewarding MNDM's failure to complete the Class EA in a timely manner by repeatedly extending this exemption. Based on MNDM's assertion that a new Class EA will be completed by the winter of 2009, the existing Declaration Order will have to be extended a third-time beyond its current expiry in 2008.

We recommend that the current Declaration Order be lifted and that Environmental Assessment for all mining permits and leases be instituted.

Regulatory Processes

Though industry often claims that prospecting and early exploration are relatively benign activities, the high profile conflicts over uranium exploration in North Frontenac and platinum exploration in Kitchenuhmaykoosib Inninuwug show that this is not necessarily the case. In addition to these cases there are numerous other examples of lower-profile conflicts including impacts on the environment, First Nations rights, agriculture and tourism operations.

The Environmental Commissioner of Ontario agrees with this view and in December 2007 – addressing a petition filed by MiningWatch Canada and Wildlands League – wrote:

> There are strong arguments that reforms to the *Mining Act* and its associated legal mechanisms are needed. The existing regulatory structure treats public land as freely open to mineral exploration. The consideration of other interests, such as the protection of ecological values, is reactionary, and the question of whether mineral development may be inappropriate is not answered upfront. Instead, it is assumed that mineral development is appropriate almost everywhere and that it is the "best" use of Crown land in almost all circumstances.

We recommend a permitting process for each stage of the mining cycle (prospecting, early exploration, advanced exploration and mining). The permitting process would include a requirement for consent from First Nations, municipalities and the Provincial Government (including MNDM and MNR) before the permit is issued. The permitting process would also require environmental review at the prospecting and early exploration phases, and full environmental assessments at the advanced exploration and mining phases.
We recommend that, prior to exploration, an assessment of the natural and cultural values of the site be required as part of the environmental screening. At the advanced exploration stage, the Environmental Assessment should include the application of a sustainability test similar to that developed by Panels in the Voisey's Bay, Kemess North and Whites Point Joint Panel Environmental Assessments..

Permits should be granted for progressively smaller areas as the intensity and impacts of the work increase, with a prospecting permit granted at the district level.

The Government should retain the right to assign conditions for avoidance or mitigation of environmental and social impacts when granting permits. The permits could be revoked and charges laid for non-compliance of conditions of a permit.

Of the potential impacts associated with prospecting, the Wildlands League and a northern First Nation have identified disturbance to wildlife from repeated aerial surveys as a particular concern.

We recommend that a separate permitting and tracking system be established for aerial surveys and that the MNDM facilitate research into the impacts of frequent over flights on the short-term and long-term behaviour of wildlife such as caribou.

The MNDM has identified map staking as a possible solution to some of the problems associated with the current claims staking process. We do not feel that map staking would alleviate the core problems associated with consultation and consent, and would eliminate an important avenue for land-users to learn about the staking of a given parcel of land. It could also negatively affect employment in the industry. Based on the experience in British Colombia, a map staking process would likely result in a rush of highly speculative claims being made. This kind of broad speculative staking is not in the best interest of the industry and only serves to delay the potential for conflict from outstanding environmental and social issues. Ground staking is also a source of employment for local people.

We recommend the continued use of ground-staking within the context of the permitting process described above. To reduce the environmental impacts of staking we recommend the adoption of lower-impact staking procedures that eliminate the need for felling trees while clearing boundary lines.

We recommend that -in order to improve the accountability and responsibility of prospectors- an enhanced training and licensing system be established.

Mineral Tenure and Certainty

The recommendations above do not fundamentally change the process by which companies acquire a mineral lease from the Crown. They establish a comprehensive series of safeguards which ensure that environmental impacts are avoided or mitigated and that concerns of local communities and First Nations are addressed, including an option not to proceed with a project.

Despite industry's assertion that additional regulatory instruments such as those we propose would decrease the security and certainty associated with mineral exploration and development, the fact is that the industry is inherently uncertain. This uncertainty is

not, however, due to regulatory processes; we are not aware of any mine proposal in Ontario that has been denied development through regulatory processes

The uncertainty inherent in the industry comes from the ability or inability of junior mining companies to locate economically viable ore bodies and secure financing for project development in a world of volatile commodity prices and shifting capital markets.

Establishing consultation and consent protocols with First Nations, conducting land-use planning and increasing the requirements for consideration of potential social and environmental impacts in the early stages of the mineral development process would have the advantage of weeding out problematic projects before substantial investments are made. Under the current system, problematic projects are likely to be identified and addressed through either public protest and civil disobedience or at the later stages of mineral development where closure plans and federal EA processes are required. None of these scenarios are good for the industry . Addressing issues earlier in the process will go a long way to improving the investment security, public perception and overall investment climate for Ontario's mining industry.

Private Rights and Interests

One of the sources of conflict over mineral development is the separation of surface rights from mineral rights on a small percentage of the land in the province. Though the total area may be limited, the conflicts have been intense and their impact wide-spread.

The permitting process described above would help to alleviate some of the issues around mineral development where surface rights are privately owned and the Crown holds the mineral rights.

To further reduce the potential for conflict we recommend improved notification requirements for private property owners, giving surface rights owners the right to veto mining activities occurring on their land, and creating an improved and more equitable process for mediating conflicts and compensating surface rights holders for the loss of material or other values from their property.

Addressing Mine Closure and Abandoned Mines

There are 5,600 known abandoned mines on file in Ontario. Although there are some partnership agreements with the Ontario Mining Association, securing the safety of these sites has fallen overwhelmingly on the Provincial government.

After considerable public outcry, Ontario's Abandoned Mine Rehabilitation Fund (AMRF) was established in 1999 as a four year, $27 million fund to rehabilitate Crown-

held abandoned mine sites. The fund was extended in 2003 for another four years, with an additional investment of $41 million. In March 2006, the Ontario Government's budget announced a further $60 million and the fund will now run until at least 2012.

Between 2002 and 2007, $51 million was been spent on rehabilitating the highest priority crown-held mine sites in Ontario. This includes $39 million rehabilitating the Kam Kotia Mine located in the Timmins area, which had long been regarded as one of the worst abandoned mines sites in Canada.

In 2005, the Ontario Auditor General found that at least 250 of the abandoned mine sites are toxic waste dumps, leaching acidic, metals contaminated drainage into watercourses and aquifers. Many have open adits and shafts, or are contaminated with asbestos. The Auditor-General's findings showed that not only is Ontario doing little to clean up these sites, it is not taking adequate actions to prevent the creation of new abandoned mines.

The Auditor-General also found that:

- The Ministry had no idea of the extent of chemical contamination at more than 4000 abandoned mine sites, nor does it know what the costs of clean-up will be.

- The Ministry has no long-term strategy for managing, monitoring and rehabilitating abandoned mines.

- Of the 144 mines for which a plan to remediate the mine after closure should be in place, 18 had no plan at all.

The Auditor-General was most concerned with the financial assurance requirements in the Mining Act. The Ministry relies on mining companies to assess and certify the amount of security they must post. "Consequently, the Ministry has little evidence to substantiate the sufficiency of the financial insurances posted".

Since amendments in 1996, companies with a Triple B or better credit rating are allowed to self-assure; that is, they post no bond at all. "The Ministry is effectively assuming the status of unsecured creditor". The Auditor-General noted that one company kept its Triple B rating even though it had been placed on a credit watch. In 19 cases, companies have been allowed to contribute to a "sinking fund" instead of posting a bond. Four of these companies went bankrupt after paying less than $600,000 into the fund.

The assumption behind the self assurance policy is that the largest, most established companies are unlikely to go bankrupt and will always have adequate resources to implement their mine closure plans. Given the failure of giants in the energy, technology and financial sector in recent years, this assumption is clearly not accurate

We recommend that an abandoned mine rehabilitation fund be established through a levy on production.

We recommend that the current self-assurance system be abandoned and replaced with financial guarantees representing 100% of the estimated costs of rehabilitation and these securities should take the form of realizable assets such as cash or bonds.

Given the changes in rehabilitation costs and our evolving knowledge of mine rehabilitation techniques, the estimated costs and associated financial securities should be reviewed every 2 years.

Increased public input and transparency in assessing the costs of rehabilitation should also be included in the reforms to existing legislation and policies on abandoned mines.

Mining Taxes and Revenue Sharing

Ontario's royalty regime is one of the most generous in the country. It sets the royalty or "Mining Tax" based on company profits. As a result - in lean years - companies pay no tax at all, and in fact, accumulate tax credits to use in profitable years.

Ontario calls its royalty, the Mining Tax. The Mining Tax is fixed at 10% of taxable profits in excess of $500,000, derived from mining operations in Ontario. For a three year exempt period, the first $10 million of cumulative profits generated by a new mine or a major expansion of an existing mine is exempt from tax. This period is extended for ten years to new mines opened in "remote" Ontario locations. For remote mines, a 5% rate applies to profits once the holiday period is over.

The tax return is filed by an operator for all their mining activity in which they "have an interest" in Ontario, not mine by mine.

Profit for the purpose of the Mining Tax is determined by taking the gross revenue from the sale of mine output (including revenues from futures hedging), either in a primary or processed state, and deducting specific costs and expenses, including:

- all costs of production
- most processing costs and transportation costs
- depreciation at prescribed rates (up to 100% in one year for new mines and major expansions)

- exploration and development expenses (including EA and Aboriginal consultation)- which may be carried forward indefinitely
- processing allowance at prescribed rates (up to 65% if smelter or refinery in Ontario, and higher if a semi-fabricating plant is built in northern Ontario)
- operation and maintenance costs of certain social assets (eg, townsites)
- reclamation expenses incurred after mine closure which can be carried back to the last full year of production

No deductions are allowed for:
- interest expenses and other financing charges
- income, profit or capital taxes
- royalties paid to resource owners
- depletion
- administrative expenses not directly related to earning mining profits.

The upshot of this very generous regime, is that many mine operators in Ontario pay no mining tax whatsoever. After all the tax holidays, and liberal profit calculations, when the operator does start paying tax, the effective tax rate is 4.9% on non-remote mines, and much lower on remote ones.

According to the Ontario Mining Association, the total of all taxes (federal, provincial, municipal) paid by the mining industry in Ontario in 2003 was only $131.9 million. In 2001, it was as low as $59.9 million. The 2003 figure represents 0.03% of mining sales in Ontario.

First Nations have been asking for "revenue sharing" from mining for some time. In Ontario, there are no participation agreements with First Nations or municipalities where the most profitable mines are located: Sudbury, Timmins, Red lake/Lac Seul, Pic River/Hemlo. There are some agreements between First Nations for other mines, but they are confidential and we do not know the nature of the revenue sharing arrangements. In 2008, Whitefish Lake First Nation filed lawsuit asking for compensation for over one half the resources taken from their territory over the last 100 years - an estimated $550 billion.

We recommend that the Mining Act be amended to shift the Mining Tax based on Net Profits, to a Net Smelter Return Royalty.

We further recommend 50% revenue sharing of Net Smelter Return with affected First Nations be negotiated and instituted.

Adequate Resources for Implementation

Despite growth in the mineral sector, the amount of staff and resources allocated to permitting and monitoring the Ontario's mining industry continues at inadequate levels following the substantial cuts made in 1996. MiningWatch Canada is very concerned about the trend towards greater self-monitoring and regulation and recommends that the government increase its capacity for regulatory oversight. Additional funding will be required to develop this capacity.

We recommend that funds to support increased regulatory oversight of the mining industry be generated through a fee system that is combined with the permitting system described above.