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THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

AND

THE CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

TO THE

MINISTRY OF NORTHERN DEVELOPMENT AND MINES

REGARDING PART VII OF THE *MINING ACT*

AND THE MINE REHABILITATION CODE

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1. Introduction

The purpose of this brief is to provide the Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy's comments on the Ministry of Northern Development and Mines (MNDM) proposed Mining Act's Part VII regulation ("draft regulation") and the Mine Rehabilitation Code ("Code"). The proposal was posted on the Environmental Bill of Rights Registry on August 8, 1999, EBR Registry Number RD9E1001[1] with a sixty day comment period.

The Canadian Environmental Law Association is a public interest group founded in 1970 for purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens'groups before trial and appellate courts and administrative tribunals on a wide range of environmental issues. CELA also undertakes public education, community organizing and law reform.

CELA has extensively researched and commented on mining issues. Over the past few years CELA has been actively involved with developing links with environmental organizations in Canada, United States and Latin America to address concerns over the adverse ecological impacts caused by mine and mineral development. CELA also has published a comparative report on the environmental controls of the mining industry in Canada and Chile.[2] In early 1998, CELA collaborated with the Environmental Mining Council of B.C. to develop a national organization focused on mining. CELA sits on the Board of Director's of this new organization called Mining Watch Canada/Mines Alerte Canada, a pan-Canadian initiative, supported by environmental, social justice, aboriginal and labor organization from across Canada.

The Canadian Institute for Environmental Law and Policy (CIELAP), is an independent, not for profit, environmental law and policy research and education organization, founded in 1970 as the Canadian Environmental Law Research Foundation. CIELAP has commented extensively on

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[1] EBR Registry Number RD9E1001.

[2] J. Castrilli, Environmental Control of the Mining Industry in Canada and Chile: A Comparative Review of Legal and Regulatory Requirements (CELA Toronto, 1998).

environmental law and policy issues related to mining at the provincial, federal and international levels over the past few years.[3]

2. General Comments on the Ministry's Proposals.

According to recent announcements from MNDM state the Ministry's mine closure plan requirements under the *Mining Act* are to be "streamlined and improved in many way by cutting costs and reducing bureaucracy. MNDM has assured the public these changes will make it easier for mining companies to do business in Ontario, while at the same time preserve the province's high enviromental standards" [4]

Our review of the proposed Regulation and Code lead us to conclude that while the changes may make it easier for mining companies to do business in Ontario, this would be achieved at the cost of significantly weakening the environmental safeguards in the *Mining Act*. In particular, the proposed changes would substantially erode regulatory oversight over closure plans. In addition, the changes to the financial assurance requirements would increases the public's financial exposure to cleanup costs for environmental degradation caused by mining activities.

Mining activities have major impacts on the environment. These impacts can include irremediable environmental damage, which may require perpetual care to control. These problems are particularly acute in areas, such as large sections of Northern Ontario, which are susceptible to acid mine drainage. Steps need to be taken to ensure that adequate measures are taken in the operation and closure of mines to protect public health and safety, and the quality of the environment. Recent events in Canada and elsewhere in the world have demonstrated that the remediation costs to the public arising from improper mine operation and closure can run into the billions of dollars.[5]

The Bill 71 Amendments to the Mining Act

Major amendments were made to the *Mining Act*[6] through Bill 71, enacted by the Ontario Legislature in 1989. Part IX of the Mining Act [7] contained numerous provisions intended to minimize adverse environmental effects caused by mining activities. Part IX and the regulation related it to Part IX became law on June 3, 1991, shortly after an environmental catastrophe involving the breach of a tailing disposal dam at the mine site operated by Matachewan Consolidated Mines in Northern Ontario. The spill resulted in the contamination of the drinking

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[3] M.Winfield, Comments on Metals, Minerals and Sustainable Development (to Natural Resources Canada), March 1995; M. Winfield and P. Muldoon, Submission to the House of Commons Standing Committee on Natural Resources, Mining and Canada's Environment, CIELAP and CELA April 1996; M. Winfield, Waste Prevention and the Front-End of the Materials Cycle: Perspectives from Canada, OECD workshop on Waste Minimization Policy in Support of Sustainable Development, May 1999).

[4] Changes to Part VII of the Mining Act at http:/www.gov.on.ca/MNDM/MINes/ MG/REHAB/ change.htm).

[5] A. Robinson, "Taxpayers left with Giant cleanup cost" The Globe and Mail, April 29, 1999).

[6] S. Q. 1989, C.62.

[7] R.S. O. 1980 c.268

water supply of three northern communities with lead and other toxic substances. The provincial government incurred approximately two million dollars for clean up costs in relation to the event. Ministry officials have commented that the legislative amendments made through Bill 71 were intended to prevent the kind of incident, which occurred in the Matachewan case from taking place again.[8]

Bill 71 contained numerous provisions to strengthen the *Mining Act* by ensuring that mining companies carried out programs of environmental protection and reclamation. In addition, Bill 71 imposed, for the first time in Ontario, a requirement for mining companies to post realizable securities in support of mine closure plans. These provisions were intended to ensure that in the event that a mine operator were to go bankrupt, or to abandon a facility, funds would be available to carry out the closure and remediation work without cost to the taxpayer.[9] The imposition of the financial assurance requirement was regarded as an example of the adoption by the province of the "polluter pays" principle.[10]

The Bill 26 Amendment to the Mining Act

On November 29, 1995 the government introduced Bill 26, *An Act to achieve Fiscal Savings and to Promote Economic Prosperity, Public Service Restructuring, Streamlining and Efficiency and to implement other aspects of the Government's Economic Agenda.* The Bill made major changes to more than 40 provincial statutes, including the *Mining Act*. In their submissions to the Standing Committee on General Government regarding Bill 26, both CELA[11] and CIELAP[12] raised serious concerns over the amendments proposed to the *Mining Act*.[13] Particular concerns were raised over the amendments that seemed designed to reverse many of the elements of the Act regarding mine closure added through Bill 71. The specific issues raised by the organizations in this regard included following:

- The provision to mining companies of the option of simply filing closure plans without obtaining the acceptance from Director of Mines Rehabilitation, removing the requirement that MNDM review and approve closure plans with a view to assessing the adequacy of the environmental protection provided by these plans;

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[8]H.Frawley, Environmental Law Development Affecting Ontario's Mining Industry 2 J.E.L.P. at pg. 115.

[9] Bill 71, An Act to Amend the Mining Act.

[10] In 1975 the Council of Ministers of the European Economic Community recommended approval of the polluter pay principle. The Canadian government endorsed the principle in 1992. The "polluter pays" principle shifts the responsibility for cost of remediating pollution from society at large to those who profit from creating the pollution.)

[11] The Environmental Implications of Bill 26, (Toronto: CELA, Brief 276, 1995).

[12] M. Winfield and G. Jenish, Submission to the Standing Committee on General Government on Bill 26, the Savings and Restructuring Act, 1995, (CIELAP, December 1995).

[13] The Enviromental Implications of Bill 26, (Toronto: CELA, Brief 276, 1995).

- The removal of the annual reporting requirements to MNDM of the steps taken to satisfactorily fulfill the rehabilitation requirements;

- The exemption of information regarding financial assurances with respect to mine closure from the *Freedom of Information and Protection of Privacy Act*;

- The exemption from liability of mining companies who voluntarily surrender mining lands to the Crown after reclamation activities are complete from future environmental liability; and

- The permitting of mining companies that pass a "corporate financial test" to escape the requirement that they post a realizable financial security in support of their closure plans.

The Bill 26, including these amendments to the *Mining Act*, was enacted in January 1996.

The Proposed Mine Closure Regulation and Mine Rehabilitation Code

The proposed Mine Closure Regulation and Mine Rehabilitation Code are intended to implement the Bill 26 amendments to the *Mining Act*. The draft Regulation is founded upon two basic principles: 1) that mining companies will be able to approve their own mine closure plans; 2) the requirement for the posting of a realizable financial assurance in relation to closure plans would be replaced with requirements that companies meet a "corporate financial test." These proposals cannot be supported for the following reasons.

Closure Plan Self Approval

Bill 71 required that mining companies obtain the acceptance of the Director of Mines Rehabilitation for closure plans. Closure plans are a mandatory requirement in most provinces and the Territories for metal mines and are an integral part of the mine planning, permitting and monitoring requirements.[14] The closure plan requires proponent to identify sensitive environmental and land uses associated with mine operation and specify the rehabilitation measures to remediate the site for adverse impacts resulting from mining activities As a result of a Memoranda of Understanding, MNDM's practice was to co-ordinate review of closure plans between the Ministry of Environment, Ministry of Labor and the Ministry of Natural Resources before its acceptance and implementation through MNDM. [15] The multi-agency review ensured that ministry staff with a full range of expertise in environmental, health and safety issues were available to review and assess the adequacy of the closure plans.

The proposed regulation, however, would permit mining companies to regulate themselves with respect to satisfying the closure plan requirements. In particular, the draft regulation would allow mining companies to have the option of simply filing the closure plan, with the Ministry, as opposed to obtaining the Director's acceptance. MNDM would no longer be required to review and approve closure plans with a view to assessing their adequacy. Rather, section 12(2) allows a

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[14] C. Chambers (Draft) Pollution Prevention in Mining in the Americas (CIELAP: Toronto.) at pg.44.

[15] *Rehabilitation of Mines Guidelines for Proponents Ministry of Northern Development and Mines* (Ministry of Northern Development and Mines, 1995 at pg.1).

closure plan to be filed provided it is certified by the proponent's chief financial officer and the senior officer. In addition, section 12(1) of the draft regulation states that a proponent in solely responsible for ensuring the measures contained in the closure plan filed or approved are carried out in accordance with it.

Certain aspects of the closure plan are required to be approved by a professional engineer, or other qualified professional, although there is no requirement that these individuals not be employees of the company in question or under contract to it. This raises the potential for conflict of interest. Nor are any provisions made regarding the potential liability of these individuals should the closure plan not be implemented, or certain aspects of it prove inadequate to protect human health and safety and the environment. It is unlikely that such individuals would carry liability insurance adequate to cover the potential damages and clean-up costs associated with a significant failure within a closure plan.

The proposed move towards self-approval of closure plans must also be viewed in conjunction with the reductions in MNDM's inspection staff. The number of inspectors at MNDM has been reduced from fourteen to two[16]. Consequently MNDM's ability to verify compliance with a closure plans has been significantly reduced.

Recommendation

We strongly recommend that the requirement for MNDM approval of all closure plans be maintained. This would ensure that the government would be able to take preventive measures to ensure the protection of the safety, health and environment of Ontario residents by ensuring that appropriate elements are incorporated the closure plans. Accordingly, we recommend that the Director of Mines Rehabilitation be required to approve all closure plans. In addition, mining companies should be required to consult with MNDM and other government agencies at the outset of the preparation of the closure Plan.

The draft regulation should also include a provision that requires proponents to keep closure plans current by means of an annual report outlining compliance with their elements. The report should be submitted to MNDM and include, at a minimum, a description of the rehabilitation efforts carried out in previous years, results of any monitoring program and any anticipated changes in conditions of the mine project that may affect the closure plans during the coming year, including rehabilitation revision costs.

The "Corporate Financial Test"

The draft regulation would permit companies to meet the financial assurance requirements in relation to mine closure plans by satisfying credit rating criteria,[17] rather than posting a realizable financial security, as required by the Bill 71 amendments to the *Mining Act*. The use of credit

[16] A. Robinson, "Ontario to shut mine closing arm," The Globe and Mail, October 25, 1995.

[17] Sections 15, 16 and 17 of the draft regulation made under the Mining Act, Mine Development and closure under Part VII of the Act.

rating has been described as a "soft security instrument" since it provides less assurance the funds will be available. Hard securities, on the other hand, ensure that funds (which are reasonably liquid and of defined value) will be available for remediation upon termination of mining operations, should the operator be unable to pay for the implementation of a closure plan, go bankrupt, or abandon the site.

Currently, there are over 6,000 known abandoned mine sites in the province, 40 percent which belong to the Crown.[18] Published estimates of the costs of remediating abandoned mines in Ontario range from $300 million[19] to $3 billion. [20] The use of a "corporate financial test" in lieu of hard security will increase the public's potential financial exposure for the cleanup costs of abandoned mining sites.

The proposed arrangement is unsatisfactory from a number of perspectives. It is important to note that the financial position of mining companies and the value of the reserves they may hold is almost entirely contingent on the international commodities market. This is unpredictable, volatile and may be affected by political and economic events far beyond the control of the governments of Ontario or Canada [21] on the impact of the decisions of European central banks regarding the sale of their gold reserves on prices.

In contrast, hard security instruments such as cash, bonds or letters of credit ensure that funds, which are reasonably liquid and certain in value, will be available for clean up cost, in the event of financial distress, bankruptcy or abandonment on the part of the operator. Ontario's shift in its financial assurance policy is at odds with the trend in other provinces, such as British Columbia. The B.C Ministry of Energy, Mines and Petroleum has been gradually amending reclamation permits to increase the security required from existing mines. The B.C government intends to continue to do this as a means of achieving a full security policy for long-term operations by 1997.[22]

British Columbia's experience with the 1992 bankruptcies of Cassiar Asbestos Corporation and Westar Mining Limited served as a warning to the government of the risks of having unsecured funds for mine rehabilitation.[23] As noted earlier, Ontario's experience with abandoned mines under the pre-Bill 71 mine closure regime is not significantly different. The Minister of MNDM

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[18] J. Ibbetson, The Globe and Mail, Potholes, Creaky buildings to cost $40-billion, October 7, 1999.

[19] A. Robinson, "Ontario to shut mine closing arm" The Globe and Mail, October 25, 1995.

[20] T. Spears, "Waste clean-up will need $3 billion and 20 years, The Ottawa Citizen, October 25, 1990.

[21] P. Kennedy and A. Robinson, "A gold bonanza" The Globe and Mail, September 19, 1999.

[22] Mine Reclamation Security Policy in British Columbia – A Paper for Discussion (British Columbia Ministry of Energy Mines, and Petroleum Resources, February 1995 at pg. 27).

[23] Mine Reclamation Security Policy in British Columbia – A Paper for discussion (British Columbia Ministry of Energy Mines, and Petroleum Resources, February 1995 at pg. 25)

recently announced that Ontario's it will provide $27 million to rehabilitate abandoned mine sites.[24]

MNDM's September 1999 announcement noted that "some of Ontario abandoned mines are more than a century old and while companies may not have closed the site in a manner which meets today's standard, the land had already reverted to the Crown. Other privately held land *may become the Crown's responsibility in extreme circumstances such as business failure or receivership*" (emphasis added.) Despite the large costs associated with remdiating mine sites, it appears that the Ontario government is intending to expand the risk that mining companies will effectively transfer responsibility for the rehabilitation costs to reclaim mine sites to the Ontario taxpayer.

Other recent events, such as the assumption of the remediation costs for the Giant Gold Mine in Yellowknife, Northwest Territories, by the federal and territorial governments, following the bankruptcy of Royal Oak Mines Ltd., highlight the need for the posting of adequate and realizable financial securities in relation to mining operations. The remediation costs with respect to the Giant mine have been estimated to be as high as $1 billion[25]

Recommendation:

The requirements for the posting of realizable financial securities in relation to mine closure plans should be maintained. Cost estimates regarding mine closure and remediation should be reviewed by the MNDM to ensure the adequacy of the financial assurances which are provided.

If the requirement for realizable financial securities are not maintained, then other mechanisms to protect the public from having to assume the costs of mine closure or remediation must be established. These might include the establishment of a mine remediation fund through the reallocation of existing subsidies and tax expenditures to the mining industry,[26] or the imposition of mine remediation surtax on the Mining Tax.

3. Comments of the Proposed Mine Rehabilitation Code

CIELAP and CELA also have a number of specific comments regarding the proposed Mine Rehabilitation Code. These include the following:

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[24] Ontario Provides $27 million to Rehabilitate Abandoned Mine Site. http:/www.gov.ca/MNDM/Newrel/nr99/e221_99.htm

[25] A. Robinson, "Taxpayers may face giant cleanup bill" the Globe and Mail, April 29, 1999.

[26] These would include the Ontario Prospectors' Assistance Program, "Operation Treasure Hunt" subsidies announced March 29, 1999, and the Mining Tax Exemption and the Mining Tax Holiday under the Ontario Mining Tax.

Part 4: Dams and Other Containment Structures.

The elements of the proposed Code in this area are wholly inadequate. Structures of this nature require perpetual care. Tailings dam failures have been central to a number of recent mine disasters involving Canadian mining companies including Matatchewan in Northern Ontario[27] Omai in Guyana , Marcopper in the Philippines[28] Boliden in Spain.[29] The proposal as currently drafted merely requires "due regard" for the Dam Safety Guidelines of the Canadian Dam Safety Association. The Code should require compliance with the Guidelines, and make provision of annual inspections of dam structures.

Part 5: Surface Water Monitoring.

Section 38 of the proposed Code defines "Mixing Zones" as the area where surface water doesn't meet provincial water quality objectives as a result of discharge, drainage or seepage. Such an area could be almost infinite. The proposal to permit operators to achieve "background" levels of contaminants as opposed to water quality objectives in the mixing zone is not acceptable and likely not practicable [30].

Section 38(3) would allow proponents to claim that it is "not practicable" to meet the Provincial Water Quality Objectives (" PWQOs") in the mixing zone, and not have to meet requirements. The term is also used in s.39 (3) regarding compliance with Certificate of Approval conditions, or effluent limits prescribed under Ontario Regulation 560/94 for quality of water draining from a facility The term "not practicable" is not defined. We recommend criteria for an objective to be "not practicable" must be established within the Code.

Sections 44 and 45 should require compliance with section 36 of the federal *Fisheries Act.* Operators should be required to ensure that discharge, drainage or seepage from a site ultimately meets PWQO's.

Part 6: Groundwater.

We note that no actual standards are established for groundwater contamination at a mine site. These should be set within the Code.

Part 7: Acid Generation Potential and Testing

The provisions of this section are extremely weak. Acid mine drainage is a major problem associated with metal mining operations, particularly in Northern Ontario. Acid mine drainage can cause serious damage to water quality and the environment in general in virtual perpetuity.

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[27] P. Gorrie "Elk Lake pollution disaster could repeat minister warns, "The Toronto Star, Oct 25, 1995.

[28] A. Robinson, "Dam failure strikes placer mine, "The Globe and Mail, April 28, 1998.

[29] CP and Reuters, "Toxic spill savages Spain," The Globe and Mail, April 28, 1998.

[30] S.38(2) Draft mine rehabilitation code of Ontario, 1999. Mine Development and closure under Part VII of the Act.

Section 59(4)(b) of the proposed Code merely requires measures to "ensure quality of the environment." This term is not defined and is not consistent with language used in the Ontario's *Environmental Protection Act* and *Ontario Water Resources Act* or the Federal *Fisheries Act*. This section should establish requirements for specific outcomes in terms of effluent or drainage quality, such at meeting the requirements of the more stringent of the PWQOs, or the MISA Metal Mining Sector Regulation.

4. Conclusions

CIELAP and CELA have major concerns regarding the MNDM's proposed Mine Closure Regulation and Mine Rehabilitation Code. The Ministry's proposals would significantly weaken requirements for mine closure and care in Ontario. Their implementation as proposed would have the potential to expose Ontario residents and taxpayers to significant environmental, health, safety and financial risks.

Rather, ministry needs to take steps to ensure that adequate requirements are in place to protect of the interests of the public in mining development. In particular, the Ministry must accept responsibility for approval and monitoring of the implementation of mine closure plans, particularly as the ownership, responsibility and liability for closed or abandoned mine sites that may ultimately revert to the Crown. In addition, adequate and realizable financial securities must be required from mine developers and operators, and appropriate standards for mine closure and post-closure care established.