**Improving the graduated regulatory approach to mine closure: A proposal to review requirements for low-impact mining projects**

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1. **Introduction**

The purpose of this proposal is to discuss opportunities to update aspects of the regulatory framework for mineral development in Ontario for activities that are identified as having a lower potential for environmental impact which in turn may correlate to a lower potential for impact to Aboriginal and/or treaty rights. In reviewing these opportunities, the Ministry of Northern Development, Mines, Natural Resources and Forestry (the Ministry) is considering how it can create a more flexible regulatory environment for exploration and development for all proponents including for early-stage and startup proponents and/or proponents targeting newer commodity markets, 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 that minimizes the impact of these activities on public health and safety and the environment.

This proposal outlines the Ministry’s preliminary thinking on opportunities to improve Ontario’s graduated approach to advanced exploration and mine production rehabilitation and closure requirements. Proposed elements for public consideration and feedback include:

Rehabilitation and regulatory requirements for closure, and

Financial assurance

For each element, we pose a series of questions on important policy issues. Your feedback on these elements is critical as Ontario considers how it will proceed with the development of the framework. We welcome additional feedback on any part of this proposal, whether or not it responds to the specific questions posed.

1. **Context**

Over the past decade we have seen a shift, not just in Canada but across the world, in how projects are developed, built, mined, and rehabilitated. These shifts have been occurring in large part because companies, governments and consumers are increasingly carrying out supply chain due diligence to ensure social, environmental and economic principles and best practices are followed by those producing raw materials and end-use products for global consumption.[[1]](#footnote-1) Companies need to adapt to stay competitive and maintain their markets and regulatory processes need to respond to the current practices of the mining sector.

The focus of mineral development in Ontario has broadened from exchange traded commodities such as gold, to an exploding market demand for minerals considered critical to the modern world. These minerals are used in new technologies and high-growth sectors, like renewable energy, electric vehicles, high-end consumer electronics and information and communications technologies. The mining industry in Ontario is seeing a fundamental shift both in the type of mineral projects being developed, and how these projects are being developed. Many of these projects may be smaller in scale than traditional mining projects and/or may have a lower potential for environmental impacts. We have heard that the current structure of the *Mining Act* (the “Act”) may not be graduated or flexible enough to respond to these new trends.

The *Act* is the provincial legislation that governs and regulates prospecting, mineral exploration, mine development and rehabilitation of mines and mine hazards in Ontario. The legislative purpose of the Act is to encourage prospecting, registration of mining claims 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 to minimize the impact of these activities on public health and safety and the environment. Mining involves several stages which typically occur in a sequence. As such, the current regulatory framework is graduated, with the later-sequence projects (which are generally larger and pose the potential for more significant environmental impacts) being subject to more extensive regulatory oversight.

[Part VII of the Act](https://www.ontario.ca/laws/statute/90m14) and [O. Reg. 240/00](https://www.ontario.ca/laws/regulation/000240) provide Ontario’s framework for the rehabilitation of mining lands, including the requirement for advanced exploration and mine production closure plans and associated financial assurance.[[2]](#footnote-2) Schedule 1 of O. Reg. 240/00 (the Mine Rehabilitation Code) provides the minimum rehabilitation standards for mine hazards and Schedule 2 sets out the items and information that must be provided in a closure plan.

As the needs and practices of Ontario’s mineral exploration and development industry evolve, particularly as they relate to new commodity markets and new exploration, development, and rehabilitation technologies, it is essential that Ontario’s regulatory framework stays up to date.

As a result, we are engaging the public on opportunities to innovate and update our regulatory framework. We are particularly looking for opportunities to build on the existing graduated and scalable approach in the Act and reduce the burdens of advanced exploration and mine production closure planning for projects that are identified as having a lower potential for environmental impact which in turn may correlate to a lower potential for impact to Aboriginal and/or treaty rights.

* 1. **Summary of Engagement to Date**

The government of Ontario released its [Critical Minerals Framework Discussion Paper](https://prod-environmental-registry.s3.amazonaws.com/2021-03/CM_StrategyFramework_DiscussionPaper_02032021_Accessible_EN%20FINAL.pdf) (the discussion paper) in March of 2021. In the discussion paper Ontario committed to explore policy, regulatory and legislative approaches to reduce regulatory burden and improve regulatory certainty to advance critical minerals exploration and development in the province. Ontario recognizes that to be truly competitive, its regulatory framework must keep pace with the changing demands of the exploration and mining industry 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 to minimize the impact of these activities on public health and safety and the environment.

Through the critical minerals discussion paper, the Ministry engaged on five key areas of focus, one of which was about opportunities for regulatory and policy reform. Feedback was sought via posting to the Environmental Registry of Ontario, through virtual engagement sessions, written submissions to the Ministry and direct engagement with individuals, organizations and Indigenous communities. The Ministry held meetings and virtual engagement sessions with over 200 people representing 85,000 people and businesses. Forty (40) submissions were received through the Environmental Registry of Ontario and 17 submissions were received via e-mail.

The Ministry asked key questions including:

* Are there any additional areas of the regulatory system that are creating barriers for critical minerals projects?
* Are there specific areas of policy guidance that industry and partners would find beneficial?
* What key considerations would you want looked at in a review of bulk sample thresholds?
* What are some of the challenges related to advanced exploration and mine closure planning with respect to the development of critical minerals?

Several key themes emerged in response to these questions:

* Smaller projects, particularly those for critical minerals, are disproportionately burdened by the existing regulatory framework.
* More regulatory flexibility is required to accommodate critical minerals markets and the demands of a changing global economy.
* More efficiency is required in permitting and approvals processes.
  1. **Progress to Date**

The Ministry has taken steps to bring clarity to its regulatory framework and improve processes, including:

Enabling a “permit by rule”[[3]](#footnote-3) model for recovering costs from the sale or disposition of minerals extracted for the purpose of testing from unpatented mining claims.

Introducing a 45-day review period for closure plan amendments to provide a more predictable and consistent timeline for the submission and review of closure plan amendments.

Proposing changes to the Act that would, if enacted (and in the event that supporting regulatory changes are made):

* + Provide proponents with the opportunity to recover costs from the sale of minerals extracted for the purpose of testing without the requirement to file a mine production closure plan; and
  + Establish a regulatory framework that would promote the recovery of minerals from tailings and other mine wastes.
  1. **Principles**

The Ministry appreciates the significance of mining regulation, and will keep the following principles in mind when making decisions:

* Any impacts on public health and safety, and the environment must be minimized.
* New global investment, and expansion of the mining industry, which will create new jobs and support economic opportunities for Indigenous communities must be promoted.
* There must continue to be transparent, meaningful engagement of Aboriginal communities, the public, and stakeholders.
* The Crown must continue to meet its constitutional obligations to Aboriginal peoples.
  1. **Elements of the Proposed Policy Approach**

In developing the proposed policy approach the Ministry will consider the following:

* + Refining definitions: the Ministry will need to consider amending existing definitions in the Act, or create new ones, to accommodate a separate regulatory framework for low-impact projects.
  + Rehabilitation requirements: requiring rehabilitation and potentially requiring a simpler form of rehabilitation plan than an advanced exploration or mine production closure plan, but still commensurate to the potential impacts and supported by sufficient financial assurance.
  + Consultation: the framework for approvals will be 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.
  + Additional order-making authority may be required and the Ministry could consider the addition of other, more streamlined and simpler compliance tools (i.e. tickets or administrative and monetary penalties) as appropriate. As identified by Indigenous communities in the engagement sessions, should the Ministry look to streamline the permitting process for proponents, we will need to have the tools to ensure compliance, have better oversight, and to enforce the limits set forth within the Act.

To this end, the Ministry is seeking input on: :

* rehabilitation and regulatory requirements for closure, and
* financial assurance
  + 1. **Rehabilitation and Regulatory Requirements for Closure**

In the context of mine exploration and development, rehabilitation means repairing the disturbance caused by mineral exploration and development activities to restore lands to their former use or condition, or to make a site suitable to an appropriate future use. In Ontario, rehabilitation is required throughout the mining sequence. The legal minimum standards for rehabilitation are prescribed by either the [**Provincial Standards for Early Exploration**](http://www.mndm.gov.on.ca/sites/default/files/null/provincial-standards-for-early-exploration-nov1.pdf) (which applies for early exploration activities) or the [**Mine Rehabilitation Code**](https://www.ontario.ca/laws/regulation/r00240) (which applies to advanced exploration and mine production activities).

The global economy has changed significantly in the last 20 years with rapid shifts in demand for certain minerals such as critical minerals; these changes present new opportunities for the mining sector. The Ministry recognizes that the regulatory framework must remain flexible to allow companies to remain competitive while continuing to ensure protection of public health and safety and the environment and 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. As such, regulatory requirements should be proportional to the nature and potential environmental impacts of a project’s proposed hazards and associated risks.

In exploration and mining, various types of hazards may be created that pose varying levels of risk. The existing regulatory framework has been developed based on the nature of activities at various phases in the mining sequence and their associated potential impacts to public health, safety and the environment, as well as the potential impact on the exercise of constitutionally-protected Aboriginal and treaty rights. However, when it comes to advanced exploration and mine development, proponents have stated that smaller projects are disproportionately impacted by the regulatory requirements. Although we recognize that this may be the case in some small projects, other small-scale projects have the potential to create significant environmental impact. Considering this, the Ministry is suggesting a risk-based approach to mine closure requirements for lower-impact projects.

**What are we considering?**

***Rehabilitation requirements***

Ontario will continue to require rehabilitation for all mineral exploration and development activities to ensure mining lands are returned to near pre-development conditions and to minimize impacts to public health and safety, and the environment. Rehabilitation requirements will continue to rely on sound environmental planning that recognizes mining as a temporary land use, which may be replaced in the long-term with alternative natural, recreational or commercial land use. Mitigation strategies to address long-term effects on the environment will continue to be considered as appropriate.

***Regulatory Requirements for Closure***

The Ministry is considering a framework for a staged approach whereby the complexity and required content of regulatory requirements for closure are proportionate to the hazards proposed and their associated risks. Regardless of the proposed project, Ontario will continue to act 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.

It is important to consider the overall risks posed by projects on a case-by-case basis as a project with a small footprint could still potentially cause significant environmental impacts. Similarly, project duration should not be used as an arbitrary determinant of requirements as a project with a short duration could have long-term risks while a small mine with a long-term operation could result in lower risks. We are proposing a screening mechanism by which projects may be deemed as low risk. Closure plan requirements for low risk projects would vary based on the nature of the risks present.

Preliminary considerations for screening criteria include:

* Geochemistry (low risk projects should not have potential for acid rock drainage or metal leaching).
* No on-site milling and refining (i.e. tailings generation) although crushing and screening may be acceptable.
* No presence of tailings dams.
* Developing a definition for certain projects that could have more scoped closure planning requirements.

We are also proposing to build in additional flexibility to avoid duplication of regulatory requirements among ministries. For example, where there are overlapping baseline study requirements for different permits/authorizations, we are proposing to align closure plan baseline study requirements to requirements of other ministries where appropriate.

***Legacy hazard rehabilitation***

At the advanced exploration stage, a proponent is only required to provide a closure plan and associated financial assurance for the hazards the proponent creates or materially affects. At the mine production stage, a proponent is required to provide a closure plan and associated financial assurance for all mine hazards on site, including pre-existing hazards known as legacy hazards. The Ministry is considering whether certain mine production projects with low potential for impacts to public health, safety and the environment should be required to provide a closure plan and financial assurance for all mine hazards, and, if not, what the alternatives should be.

**We want to know**

1. Are the existing rehabilitation standards under the Act and its regulations for early exploration, advanced exploration and mine development appropriately scaled? Please describe.
2. Do the current closure plan requirements sufficiently account for different types of projects, particularly critical minerals projects? Please describe.
3. Do the current closure plan requirements sufficiently account for site-specific considerations in undertaking mine rehabilitation? Please describe.
4. Should certain mine production projects be exempt from the requirement to provide a closure plan and financial assurance for all mine hazards? If yes, under which circumstances?
5. What types of screening criteria should Ontario use to assess the risk of a proposed project? For example, size, disturbance, duration, environmental impacts, etc.
6. Should Ontario assign projects to different categories having different regulatory requirements based on the level of risk they pose? Please describe.
7. Should Ontario consider commodity-specific requirements? Please describe.
8. What types of risks should Ontario consider through this framework? (i.e. environmental, safety, financial).
9. What other more streamlined types of compliance tools would you suggest to help enforce the limits set out within the Act?
10. Is there anything else you want to add?
    * 1. **Financial Assurance**

The primary function of financial assurance is to ensure that, in the event that a mine operator is unable or unwilling to rehabilitate the site, the Crown can complete the work. Proponents must include financial assurance with the submission of a closure plan. The Ministry proactively discloses of the amount and form of financial assurance held for all filed closure plans on its [website](https://www.mndm.gov.on.ca/en/news/mines-and-minerals/financial-assurance-table).

Financial assurance can be provided in several forms, as prescribed by the Act. Once rehabilitation is completed in accordance with the closure plan, a proponent may apply to the Ministry for a reduction in the amount of financial assurance that the Ministry holds.

**What are we considering?**

The proposed framework will continue to require in current or new forms, the submission of adequate financial assurance for rehabilitation work.

**We want to know**

1. Should the low impact regime build additional flexibility to the phasing of financial assurance. If so, what should the additional flexibility consider?
2. Should the Ministry provide an opportunity to use a contingency factor to account for information that may not available at the time of closure plan filing? What is a reasonable size for a contingency allowance?
3. How, in your view, should financial assurance be calculated for low impact projects?
4. Should Ontario consider alternative models of financial assurance for all mining projects - not just low impact projects - and if so, what alternative models should Ontario consider?
5. Is there sufficient clarity in the *Mining Act* or Mine Rehabilitation Code regarding the estimation of rehabilitation costs? If not, what additional clarification or tools are required to ensure sites are providing adequate financial assurance for their projects?
6. Is there anything else you want to add?
7. **We want to hear from you**

The Ontario government is accepting feedback on this proposal during a 60-day period. All comments will be considered as we consider future changes to the closure planning regime. Though specific questions are included herein, all comments with respect to the proposal are welcome and encouraged.

Please submit your comments on the Environmental Registry or email us at [criticalminerals@ontario.ca](mailto:criticalminerals@ontario.ca) . You may attach your submission as a PDF or Word document. While we encourage electronic submissions, we recognize the need to accept hard copy submissions where electronic submissions are not possible. If you are sending a letter, please include the name of your organization (if applicable), and address it to:

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1. Susan van den Brink, et al, “Approaches to responsible sourcing in mineral supply chains,” Resources, Conservation and Recycling 145 (2019); 389-398. [↑](#footnote-ref-1)
2. Financial assurance ensures that, in the event that a mine operator is unable or unwilling to rehabilitate the site, the Crown can complete the required rehabilitation. [↑](#footnote-ref-2)
3. Permits by rule (PBR) are mechanisms whereby an authorization is not required for an activity as long as the rules set up for the activity are followed. Activities covered under a PBR system tend to have predictable outcomes that are minimal in impact and therefore lend themselves to straightforward rules. [↑](#footnote-ref-3)