

REPLY TO: KATE KEMPTON
Victoria Office
email: kkempton@woodwardandcompany.com

April 18, 2023

Via email and online comments platform

The Honourable George Pirie
Ontario Minister of Mines
Room 5620, 5th Floor
99 Wellesley St. W
Toronto, ON M7A 1W3

Dear Minister Pirie:

**Re: Proposed changes to the *Mining Act* regulations associated with Bill 71 –
*Building More Mines Act, 2023***

We are counsel for Lac La Croix First Nation (“LLCFN”). We write to express our grave concerns with the proposed amendments to the *Mining Act*¹ and associated regulations set out in Bill 71 – *Building More Mines Act, 2023*.

If enacted, the proposed amendments in Bill 71 would send Ontario law backwards. The proposed regulatory changes to closure planning would allow mining activities to commence with very little scrutiny as to their impacts and create a proponent-driven regulatory regime. The *Mining Act* and regulatory amendments proposed in Bill 71 are not environmentally sound or sustainable.

Ontario’s engagement with First Nations over mineral exploration and mining must be done with the intent of acquiring First Nations’ free prior and informed consent. Such consent cannot be prior or informed if mine construction commences before closure plans are complete, as proposed in Bill 71. Such legislative and regulatory changes would move Ontario further away from the UNDRIP requirements to obtain free prior and informed consent to projects on First Nations’ traditional territories.

¹ RSO 1990, c M.14.
{00615640.2}

Under Ontario's existing regulatory framework, private sector mining projects are not required to undergo environmental assessments under the provincial *Environmental Assessment Act*² ("EAA"). Under the federal *Impact Assessment Act*³, only large mines and those situated in certain precarious environments require impact assessments. This huge gap in environmental assessment underscores the need for robust environmental protections and Ministry oversight under the *Mining Act*. The proposed amendments in Bill 71 would significantly weaken the regulatory framework for mining in Ontario. This in turn would undermine First Nations' decision-making about projects that impact their homelands.

1. Weakened Closure Plans

A comprehensive closure plan is a crucial element of responsible mine management. At present, Part VII of the *Mining Act* requires project proponents to submit a detailed closure plan to the Ministry of Mines before advanced exploration or mine production can begin. A closure plan requires consideration of a mine's long-term impacts and the steps and expense necessary to rehabilitate the mine site at the end of its productive life. The closure plan must describe all measures the proponent will take to rehabilitate the mine site during the life cycle of the mine.

Bill 71 would greatly weaken the closure planning process. If implemented, the proposed changes would allow mining projects to proceed with incomplete closure plans and before comprehensive baseline studies are complete. This short-sighted approach will undermine the very purpose of closure planning, which is to ensure that long-term rehabilitation measures are built into a mining project's design before active production begins.

We are particularly concerned about the following proposed changes to the closure planning process:

a) Conditional Filing Order

Bill 71 proposes to amend the *Mining Act* to allow the Minister to issue a "conditional filing order", on request from a proponent, which allows the deferral of certain required elements of a closure plan. The "conditional filing order" would specify a deadline for the proponent to provide the deferred elements of the closure plan, and may include other terms and conditions as determined by the Minister.

We strongly object to the "conditional filing order" process proposed in Bill 71, and to the proposal that requests for conditional filing orders be submitted to the Minister. Project proponents should not be given the opportunity to defer any aspects of a closure plan.

² RSO 1990, c E. 18.

³ SC 2019, c 28, s 1.

Essential rehabilitation measures may become impossible to implement at a late stage if they were not contemplated as part of a forward-looking closure plan from the beginning. Certain monitoring and remediation activities may not be feasible at the end of a mine's productive life if such activities were not specifically planned for during the mine's construction and operation phases. For instance, the location and nature of waste placement will dictate which remediation options are viable; site rehabilitation options that are not considered at the outset may be impossible to "add on" at a late stage.⁴

While we object in principle to closure plan deferral, at minimum, the Ministry must obtain the consent of all potentially impacted First Nations before any aspects of a closure plan can be deferred.

b) Qualified Persons and Certifications

Bill 71 proposes to create a framework where the Ministry would rely on closure plan certification by "qualified persons", instead of the Ministry conducting its own technical review.⁵ The proposed regulatory changes to O. Reg 240/00 would permit "qualified persons" to certify "alternative rehabilitation approaches" and confirm that such alternative approaches meet or exceed the objectives of the Mine Rehabilitation Code where they do not strictly conform with the Code requirements.

In practice, this means that mining companies' own staff would be permitted to certify their closure plans. This creates a clear conflict of interest in the mining oversight process. We are concerned that the proposed lack of external review by the province will greatly undermine the effectiveness of closure planning.

Further, the proposed changes are a clear step backward from the Auditor General's recommendations in its 2015 and 2017 Annual Report on the province's mines and minerals program.⁶ The proposed changes in Bill 71 would return Ontario to a system where the individuals overseeing closure plans serve in conflicting roles, though the conflict would be even more troubling as proponents could be directly certifying their own closure plans.

⁴ Mining Watch Canada, "More, Worse Mining: Ontario's Proposed Building More Mines Act", March 7, 2023: <https://miningwatch.ca/blog/2023/3/7/more-worse-mining-ontarios-proposed-building-more-mines-act>

⁵ Ministry of Mines, Proposed regulatory changes to closure plan rehabilitation requirements for advanced exploration and mine production and adding an additional class of facilities to the list of such classes that are exclude from the definition of "mine", March 9, 2023, ERO number 019-6750 at p. 4.

⁶ Office of the Auditor General of Ontario, 2017 Annual Report (Volume 2 of 2), Mines and Minerals Program: Follow-Up Report at p. 152: https://www.auditor.on.ca/en/content/annualreports/arreports/en17/v2_111en17.pdf

c) Delayed Delivery of Baseline Studies

Mining project proponents must currently prepare technical baseline studies before submitting closure plans, which can involve complex data-gathering over multiple years. Bill 71 includes a proposed change to allow advanced exploration and mining production before a complete baseline study is available. Instead, the Ministry proposes to allow advanced exploration and production after only one year of groundwater and surface water testing and sampling is complete, with the full characterization to follow within two years of the exploration or mine production. In essence, this is a proposal to rely on incomplete data to inform closure plans for mining projects. We strongly object to this proposed change.

2. Phased Financial Assurance

At present, closure plans must be accompanied by financial assurance in an amount equal to the estimated costs of the rehabilitation work specified in the closure plan. Bill 71 would allow Ontario to accept financial assurance in phases, where approved by the Minister, so that proponents could provide financial assurance in stages that correspond with the site construction schedule. In other words, financial assurance would be paid in phases as mine construction progresses.

The proposal to permit phased financial assurance creates the very real potential that a mine will be operational where the proponent has not provided adequate financial assurance to pay for rehabilitation. The province of Ontario would then be liable for that shortfall in the event of an environmental disaster, or if the proponent suddenly abandons the project or fails to undertake the necessary rehabilitation work. Allowing phased financial assurance is a reckless proposal, particularly as the province already has a significant shortfall in financial assurance from mining proponents.⁷ We strongly object to amendments that would permit proponents to pay financial assurance in stages.

⁷ The Auditor General's 2015 Annual Report on the province's mines and minerals program found that financial assurance retained by the Ministry may not reflect actual costs to close out mines, and that one third of mine-closure plans had not had their financial assurances updated since the early 2000's. In 2015, the Auditor General found that applying a conservative inflation adjustment, the province had a potential \$63-million shortfall in financial assurance. The Auditor General also found the Ministry lacked estimates for the total cost of rehabilitating the 4,400 abandoned mine sites in the province in 2015, though rehabilitation costs for the 56 highest-risk contaminated sites alone were estimated at \$372 million and the potential costs of rehabilitating the remaining sites could range from \$163 million to \$782 million. Office of the Auditor General of Ontario, 2015 Annual Report, Mines and Minerals Program: <https://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.11en15.pdf>.

In its 2017 follow-up report, the Auditor General found that the Ministry had made little to no progress on its recommendation that the Ministry should require mining companies to regularly update their estimated mine close-out costs and the related financial assurance to reflect changing market conditions and changes to rehabilitation standards. Office of the Auditor General of Ontario, 2017 Annual Report (Volume 2 of 2), Mines and Minerals Program: Follow-Up Report at p. 153: https://www.auditor.on.ca/en/content/annualreports/arreports/en17/v2_111en17.pdf

3. **Minister's Decision-Making Role**

Bill 71, if enacted, would remove the statutory role of the Director of Mine Rehabilitation and transfer those statutory authorities to the Minister. Among other powers, the Minister would also issue conditional filing orders and provide approval for phased financial assurance.

We are deeply concerned by these proposed changes, which would improperly politicize decision-making about mine regulation, oversight and approvals. The Minister has the discretion to consider broader public interest matters than those set out in the *Mining Act*, which may not always align with the distinct considerations and objectives set out in that legislation. For these reasons, such decisions are better made by Directors of Mine Rehabilitation, who are specialized officers or employees of the Ministry appointed under the current framework.⁸

We do not support the greater decision-making role ascribed to the Minister in Bill 71 and object to the consequential amendments to Ontario regulations, including changes to the following regulations: *O. Reg. 240/00* Advanced exploration, mine development and closure under part vii of the act (Mining Act); *O. Reg. 45/11* General (Mining Act); *O. Reg. 242/08* General (Endangered Species Act); and *O. Reg. 349/98*, Work permit - disruptive mineral exploration activities (Public Lands Act).

Conclusion

Any proposed changes to the *Mining Act* and regulations must directly acknowledge Ontario's obligation to consult with Lac La Croix First Nation and obtain free, prior and informed consent prior to approving any proposed mining projects, closure plans or closure plan amendments on its traditional territory.

At present, Ontario's legislative regime does not afford sufficient regulatory oversight or opportunities for First Nations to be consulted, accommodated and provide – or withhold – their consent to mining projects and activities in their territories. The proposed legislative and regulatory amendments contained in Bill 71 would further endanger the lands, waters, climate, and the wellbeing of Indigenous peoples.

⁸ *Mining Act*, s. 153(1).

Lac La Croix First Nation vigorously opposes the proposed legislative and regulatory changes contained in Bill 71, which threaten its rights of self determination and the environmental security of its homelands.

Yours truly,
WOODWARD & COMPANY LAWYERS LLP

A handwritten signature in black ink, appearing to read 'K. Kempton', written in a cursive style.

Kate Kempton
cc