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8 May 2015

RE: Renewal of Ontario's Mineral Development Strategy - EBR Registry No. 012-3609

Dear Mr. St. Louis,

Thank you for the opportunity to provide comments on the Renewal of Ontario's Mineral Development Strategy (MDS) being led by Ontario's Ministry of Northern Development and Mines (MNDM). We are submitting comments as scientists specializing in wildlife ecology, conservation biology, and landscape ecology in Ontario on behalf of WCS Canada. We have conducted surveys in the Ring of Fire for large mammals and fish, surveys in the Victor Diamond Mine study area, and developed cumulative effects models of current and future industrial development, including mining, in the James Bay ecoregion¹. We have engaged with the government and industry on federal and provincial environmental assessments for Noront's Eagle's Nest Project and Cliffs Chromite Project in the Ring of Fire and De Beers Canada Ltd. Victor Diamond Mine in the Hudson Bay Lowlands, and commented on permits for mineral exploration (e.g., Gold Canyon, Resources Inc., EBR Registry Number 011-9719). Finally, we have provided expert testimony on potential direct and cumulative impacts to fish, wildlife, and ecosystems on behalf of Matawa First Nations to support a judicial review of the federal environmental assessment process established for Cliffs Chromite Project (2012) and on behalf of Kitchenuhmaykoosib Inninuwug First Nation in their defense and counter claim against Platinex Inc. (2006). We have also participated in meetings and provided scientific and technical advice in reviewing materials for Attawapiskat First Nation in association with large mammal monitoring at the De Beers Canada Ltd. Victor Diamond Mine since 2006.

In response to the Discussion Paper on the MDS, we make the following recommendations, all of which are intended to advance the future development of the mining sector in an equitable way with First Nations and on behalf of the general public, particularly in Ontario's Far North:

- Address the region-opening role of mining, particularly remote mines proposed for the Ring of Fire.

¹ <http://www.wcsCanada.org/Portals/96/Documents/alces-lowres.pdf>

- Address society's expectations around environmental assessment of the direct and cumulative impacts of mining on the biophysical, social, and economic systems in Ontario.
- Address ongoing concerns about working with First Nations and public engagement with the mining sector.
- Review and modernize Ontario's mining taxation regime and provide more transparency in reporting on subsidies to the mining sector.

We recognize that there are documents and online materials that describe the positive contributions of mining to Ontario, particularly in terms of jobs, revenues, training, research and development, and supporting First Nations capacity in planning and engagement. The current discussion document provides a good overview of the progress made by Ontario, through the MNM including amending mining legislation (e.g., Ontario's *Modernized Mining Act*), creating economic incentives for mining (e.g., exemption from mining taxes in the first 3 years² of production on profits below \$10 million, Ontario's diamond royalty, reduced electricity rates), and education, training, and capacity for First Nations to engage with the mining sector.

The current MDS, however, focuses entirely on the promotion of mining in Ontario, under the implicit assumption that any impacts from mining, which are known to occur at all stages of the mineral development process, will be addressed under project-by-project environmental impact assessment and regulations administered by other ministries. Accordingly, the current renewal draft shows little or no consideration for the broader responsibilities of the mining sector to the environment or the government ministries responsible for environmental planning and protection³. As such, the current vision of "maximizing Ontario's mineral potential" falls short on a number of strategic and key issues in developing the mining sector that must be acknowledged, especially in Ontario's Far North. Our comments and recommendations focus on the following areas to improve the MDS:

- Risks and opportunities associated with the "opening" of a region through remote mines, particularly in the Ring of Fire.
- Address expectations of environmental assessment, under Ontario's *Environmental Assessment Act* (EAA), of the *full extent* of mining projects.
- Address Ontario's role in how Free, Prior and Informed Consent (FPIC) is operationalized on the ground with First Nations with the mining sector.
- Review and modernization of the mining taxation regime in Ontario.

Recommendation 1. Address the role of region-opening mines, particularly in remote areas like the Ring of Fire.

Ontario's Far North is unique and contains globally significant and intact ecosystems including peatlands, wetlands, and boreal forest (Far North Science Advisory Panel 2010). In addition, it is a stronghold for species at risk such as caribou, wolverine, polar bears, and lake sturgeon, which have legislated management and recovery

² The period is extended to 10 years for mines in remote locations with a 5% tax rate (compared to the provincial income tax rate of 10%) for new mines in remote locations.

³ We noted a similar response by the ECO when the MDS was first launched in 2006 (see ECO 2007: 64-67).

processes under Ontario's *Endangered Species Act*. Conservation of these systems, species, functions and processes are also mandated under Ontario's *Far North Act, 2010*. Ecosystem services including provisioning of food for First Nations, climate and water quality regulating services, as well as cultural and supporting services (Webster et al. 2015, Brandt et al. 2013) offer significant value to the region and Ontario⁴. Mineral discoveries, particularly in the Ring of Fire, also attest to the world-class deposits of non-renewable minerals in the region (Smith 2015, Hjartarson et al. 2014, Dadgostar et al. 2013) in addition to two existing mines (Mussewhite Mine, Victor Diamond Mine).

While plenty of advice has been provided to Ontario on how environmental planning can consider these various values at regional scales (e.g., Far North Science Advisory Panel 2010, Far North Planning Advisory Council 2010⁵, ECO 2013), there are no regional-scale planning processes in the Far North. For example, the draft Far North Land Use Strategy being developed by Ontario's Ministry of Natural Resources and Forestry (MNRF) only provides guidance to emerging community land use plans in the Far North, while environmental assessment, regulated by Ontario's Ministry of the Environment and Climate Change (MOECC), is focused on project-by-project assessments (from which private sector projects, like mining are exempt; see below). The main population in the Far North are First Nations who are engaged in various planning processes with Government. While generally not opposed to resource development⁶, First Nations have expressed concerns about the long-term impact of development activities on the environment, and the land that is inseparable from traditional and cultural values and their rights. First Nations generally seek partnership, shared resource agreements, and expect consultation and acknowledgement from government and industry in accordance to their rights protected under Canada's Constitution and Treaty No. 9. While First Nations are engaged in various government-led environmental planning processes, there is a general lack of integration and capacity to engage on regional-scale issues.

The lack of regional-scale planning is an important consideration for MNDM as it attempts to "maximize Ontario's mineral potential" in the Far North, particularly given the region-opening nature of new mining proposals in the Ring of Fire. This is in part due to fact that individual mining projects in this remote region will require infrastructure and have to consider both planning and cumulative impacts (ecological and social) given other land uses, climate change, and First Nations interests in the Ring of Fire and downstream from this development. While the Regional Framework Agreement under development with Ontario may address revenue sharing and infrastructure for the Matawa First Nations⁷, the current version falls short by not considering cumulative environmental and social impacts on Matawa communities and Mushkegowuk communities downstream and relies on monitoring to consider impacts from development. We have detailed elsewhere the necessity for a more strategic approach to planning in the Far North⁸ due to the current fragmented and piecemeal approaches to land use planning and environmental impact assessment of development projects. We recommend that the MDS consider more explicitly the unique risks and

⁴ Unfortunately, these values are invisible in current Ontario-led environmental planning process and remain secondary to the primacy afforded to non-renewable resource extraction.

⁵ <http://wildlandsleague.org/attachments/274245.pdf>

⁶ For example, see various public statements from First Nations and political tribal organizations; <http://www.matawa.on.ca/wpcontent/uploads/2013/12/Media-Releases-2011-2012.pdf>; <http://www.defendersoftheland.org/sites/www.defendersoftheland.org/files/release-matawa-2011-10-11.pdf>; <http://www.afn.ca/index.php/en/national-chief/highlights-from-the-nationalchief/communiquedfrom-thenational-chief-shawn-atleo-october-2013>.

⁷ http://www.mndm.gov.on.ca/sites/default/files/rof_regional_framework_agreement_2014.pdf

⁸ http://wcscanada.org/Portals/96/Documents/RSEA_Report_WCSCanada_Ecojustice_FINAL.pdf

opportunities of developing mines in the Ring of Fire in the absence of regional-scale planning and assessment processes.

Recommendation 2. Address society's expectations of environmental assessment, under Ontario's *Environmental Assessment Act* (EAA), of the *full extent* of mining projects.

Mining creates a number of known biophysical, social, and economic impacts (MiningWatch Canada 2014, Kreutzweiser et al. 2013, Johnson and Miyanishi. 2012, Gibson and Klinck 2005, MiningWatch and Pembina Institute 2002). These impacts are typically addressed through environmental assessment (EA) processes at either the federal/provincial level or through a harmonized approach. Environmental assessment is a planning tool that is regarded as integral to sound decision making about impacts of development on the environment (biophysical and social) (Boyd 2003).

In practice, EA processes works best when:

- EA laws and policies are grounded in sustainability (Gibson et al. 2005).
- They apply to all plans, decisions, and actions that affect the environment.
- They include assessment of all impacts (environmental, economic, and social) including cumulative impacts.
- They identify the best option by evaluating needs and alternatives.
- They include the public in an open and transparent process.
- They assign decision-making to an independent agency or appropriate tribunal panel.
- They require monitoring and enforcement.

Finally, Boyd (2003:150) noted that EA should "form part of a broader land use and planning regime."

While there have been a number of criticisms and concerns about environmental assessment processes and decision making under EAA (Chetkiewicz and Lintner 2014, Lindgren and Dunn 2010, ECO 2008: 28), Ontario remains the only jurisdiction in Canada to not mandate its EA process on the full extent of mining projects (Lindgren and Dunn 2010: 296). Currently, mining companies *volunteer* to have the *full extent* of their mining projects be assessed under EAA - with some notable exceptions such as De Beers Victor Diamond Mine⁹. We do not see how excluding private sector projects, with important social, ecological, and economic impacts like mining, from EA is in the public interest nor in the best interests of Indigenous peoples on whose territories where mining occurs. More recently, the Environmental Commissioner of Ontario (ECO) recommended that "MOE conduct a comprehensive public review of the *Environmental Assessment Act* and related regulations" (ECO 2014: 132). While this review and reform would be timely indeed, we recommend that in the meantime MNDM consider a renewed MDS that addresses more explicitly how mineral exploration and mining in Ontario in the 21st century will meet society's expectations for robust assessments under the EAA.

⁹ While the EA followed a comprehensive study process under the Canadian Environmental Assessment Act (CEAA), the Ontario (provincial) class EA for minor transmission facilities was used to assess the new transmission line (SNC-Lavalin, 2005 cited in Whitelaw et al. 2009).

Recommendation 3. Address Free, Prior and Informed Consent (FPIC) with First Nations about mineral exploration and mining.

The MNDM progress report, in support of the MDS, highlights that the modernization of Ontario's *Mining Act* "encourages prospecting, staking and exploration 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".

We acknowledge that the modernization of the *Mining Act* provides more clarity around process for consultation. However, the MDS offers an important opportunity for Ontario to consider a higher standard with Indigenous peoples, specifically FPIC. Aboriginal and treaty rights cannot be significantly affected by federal or provincial decisions (e.g., conservation, development) without clear justification, and then only if it furthers a substantial and compelling legislative objective (e.g., public safety), governments have obligations to First Nations for meaningful consultation when activities, including the development of laws, policies, plans, and projects, have the potential to infringe on these rights. The duty to consult Aboriginal peoples on these kinds of activities are based on the "honour of the Crown". Clarification on what this means in practice has been described by the Supreme Court of Canada, specifically the 2004 decisions on Haida Nation¹⁰ and Taku River Tlingit¹¹ and the 2005 Mikisew Cree decision¹².

Many of the laws, policies, and associated processes that affect First Nations in Ontario are inconsistent with international standards, particularly those articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹³. Key rights articulated in UNDRIP include the rights of Indigenous peoples to self-determination; to their lands, territories and resources; to the maintenance of their cultures, including their cultural heritage and recognition of their distinct identities; and, to be asked for their free, prior and informed consent in decisions that may affect them and their traditional territories (Barelli 2012, Esteves et al. 2012).

The Boreal Leadership Council (2012:4-5) highlighted the Canadian context for FPIC, including:

- Canada's economy is the most reliant on natural resource development of the high-income OECD countries, with about 11% of GDP linked to the development of natural resources. The majority of oil and gas, metal and mineral resources, forestry, and hydroelectrical power generation resources are based in the boreal region.
- Canada's boreal region represents one of the largest intact forest ecosystems left on the Earth and includes the traditional territories of more than 600 Aboriginal communities.
- The rights of Aboriginal peoples are protected under Section 35 of the *Constitution Act, 1982* and means the Crown has a 'duty to consult and accommodate' the interests of Aboriginal groups and this obligation cannot be delegated¹⁴.

¹⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511. (Available online at: <http://canlii.ca/t/1j4tq>.)

¹¹ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 SCR 550. (Available online at: <http://canlii.ca/t/1j4tr>.)

¹² *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388. (Available online at: <http://canlii.ca/t/1m1zn>.)

¹³ Canada endorsed UNDRIP in 2010. UNDRIP is available online at: <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>.

¹⁴ <http://www.aadnc-aandc.gc.ca/eng/1309374807748>

- The determination of Aboriginal rights is evolving rapidly through settlement of land claims and treaties and a growing body of case law.

The federal government position is that FPIC is already managed through existing federal policy on Aboriginal Consultation and Accommodation¹⁵ as free, prior and informed *consultation*. As such, it does not recognize the rights of Aboriginal communities to require consent for development (Boreal Leadership Council 2012: 5). However, the Supreme Court of Canada's 2014 *Tsilhqot'in* decision is an historic decision in Canadian law in that it is the first time in Canadian history that a court has declared Aboriginal title to lands outside of the "postage stamp" sized reservations¹⁶. For the First Nation, this includes jurisdiction to determine: how the land will be used; authority over the economic benefits of the land; and, authority to proactively use and manage the land. Where Aboriginal title has been proven or is likely to exist, this decision has significant implications for FPIC since it will limit the rights of Crown governments to authorize developments on these lands.

In the mining industry, several key guidance documents exist on FPIC:

- The International Council of Metals and Mining (ICMM) recommends that companies obtain the consent of Indigenous peoples for new and revised projects on lands traditionally owned by, or under customary use of, Indigenous peoples¹⁷.
- The Mining Association of Canada (MAC) developed a protocol that provides guidance on consultation with communities and requires companies to self-report on this process¹⁸.
- The Prospectors and Developer's Association (PDAC) has prepared guidance on Aboriginal engagement and manuals for exploration companies¹⁹.

In Ontario, consultation processes with First Nations vary, but those with historic treaties have specific provisions and rights²⁰ and there are significant risks of failure to address FPIC in resource development projects such as mining. For proponents, this can include legal action, advocacy campaigns, project delays, increased expenses, loss of resource access, and reputational and financing risks. For Aboriginal communities, risks can include loss of lands and cultural impacts, failure to participate in economic and developmental opportunities, and division within and among communities. We think the renewal of the MDS offers an important opportunity for Ontario to consider FPIC and how it can be applied to mineral development in the province.

Recommendation 4. Review and modernize Ontario's mining taxation regime and provide more transparency on subsidies to the mining sector.

Economic efficiency is an urgent issue when it comes to how the mining industry is taxed compared to other non-mining industries. In their 2012 review of mining taxation regimes, Chen and Mintz (2012) found Ontario's system—specifically its provincial resource allowance—to be "redundant, expensive and wasteful"; mainly

¹⁵ AANDC, Aboriginal Consultation and Accommodation. Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. Ottawa: Minister of the Department of Indian Affairs and Northern Development, 2011.

¹⁶ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 26 June 2014 (para. 92)

¹⁷ <http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>

¹⁸ <http://mining.ca/sites/default/files/documents/TSMABoriginalandCommunityOutreachProtocol.pdf>

¹⁹ <http://www.pdac.ca/programs/aboriginal-affairs/information/aboriginal-information/2014/03/03/trainer-s-manual>

²⁰ The terms of treaties are mostly always contested in part because of differences between oral and written treaties and the intent/purpose of the treaties between two peoples (e.g., Long 2010).

because the provincial resource allowance almost doubles the mining-tax deduction under the federal income tax. Because the federal income tax already provides enough support to shield the risk in mining investment, Ontario's system is potentially distortive, and can lead to investments toward mining projects that might otherwise be economically inefficient. Chen and Mintz (2012) also considered Ontario's mining taxation system to be unnecessarily complex and recommended reform. Similarly, the Drummond Commission on the Reform of Ontario's Public Services called for the elimination of the Ontario resource tax credit and a review of Ontario's mining tax system²¹.

Direct and indirect subsidies for primary resource extraction have been identified as a key barrier to moving towards more sustainable patterns of material use (MiningWatch Canada and Pembina Institute 2002:4). They tend to distort investments and public understanding of the true costs and benefits of mining in Ontario. For example, the \$1 billion commitment to infrastructure by Ontario could be viewed as a quasi-subsidy for remote mines. We could find little or no publicly-accessible information from the Ontario government on the extent of subsidies provided to the mining sector. We urgently need a more complete picture of the benefits and the costs of the Ontario mining sector to the public and recommend the MDS, in addition to promoting how attractive its tax and fiscal policies are for mining, initiate a review and modernization of Ontario's mining taxation regime to show how their mining tax and fiscal regimes deliver on the full value of the resources to the public.

In conclusion, we see the renewal of the MDS as a real opportunity for Ontario, through MNDM, to address a number of important issues associated with some real consequences of facilitating growth in this societally-important sector, particularly in the Far North. These include region-opening remote mines in the Ring of Fire, the application of environmental assessment to the full extent of mining projects, FPIC and consultation with First Nations throughout the mining lifecycle, and addressing current distortions in the mining taxation regimes.

Thank you again for this opportunity to comment. We are open to discussing any of these points further, and look forward to seeing a revision of the MDS.

Sincerely yours,



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²¹ <http://www.fin.gov.on.ca/en/reformcommission/chapters/report.pdf>

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