

MNDM Policy: CONSULTATION and arrangements WITH ABORIGINAL COMMUNITIES AT EARLY EXPLORATION

The following is operational policy describing MNDM's approach to implementation of the consultation requirements, including consideration of arrangements, found in section 78 of the Mining Act and its Regulations.

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I. INTRODUCTION/CONTEXT

The *Mining Act*, R.S.O. 1990, Chapter M.14, provides the statutory authority and framework for mineral staking, exploration and development in Ontario. MNDM is committed to meeting the Crown's obligation to consult with Aboriginal communities where actions or decisions authorized by the Act and its regulations have the potential to adversely affect existing or asserted Aboriginal or treaty rights (of either First Nations or Métis communities). In fulfilling its obligations, MNDM has delegated certain procedural aspects of the consultation process to project proponents through its statutory scheme, further explained in the direction that follows.

This Policy is specific to early stages of mineral exploration that may occur after a mining claim has been staked and recorded. These early exploration activities can range from simply walking a grid and taking grab samples, to drilling with large, mechanized equipment. Claim staking is a speculative activity -- the prospector thinks there may be minerals located within the claim, but that can only be determined by exploration. Not all mining claims are explored and where exploration work does not occur, claims will expire and revert to the Crown. Early exploration activities require significant investment and spending in hopes of discovering potential that will later result in revenue opportunities. Early exploration work done on a claim may never lead to advanced exploration or mine development.

Accordingly, consultation processes will vary with each project and its unique circumstances, just as processes will vary depending on the project proponent and communities involved. MNDM has adopted regulations and policies pursuant to the *Mining Act* which will facilitate flexibility and responsiveness and ensure that MNDM is able to direct appropriate consultation processes and to address concerns raised, where necessary.

Early exploration proponents and Aboriginal communities should not underestimate the importance of their role in the process. While MNDM's specific expectations are outlined in Part II of this Policy, early efforts to engage with one another, beyond the minimum processes required pursuant to the *Mining Act* and this Policy, will lead to more effective and timely results later. Building relationships and goodwill may lead to mutual commitments and arrangements and provide the certainty and stability for a project that permitting processes alone cannot achieve. Aboriginal communities and industry proponents must be willing to work constructively to understand one another's interests and perspectives and to find practical ways of addressing concerns and realizing opportunities that mineral exploration may have to offer.

a. What is consultation?

The Crown has a duty to consult with, and where appropriate, accommodate, Aboriginal communities. This duty flows from the honour of the Crown. In all its dealings with Aboriginal peoples, the Crown must act honourably. The fundamental objective of the modern law of treaty and Aboriginal rights is reconciliation: of the rights and interests of Aboriginal peoples with the Crown. This requires that the Crown consult with Aboriginal communities when considering decisions or actions which have the potential to adversely affect treaty and Aboriginal rights as recognized by section 35 of the *Constitution Act, 1982*.

While the duty to consult is the Crown's duty, courts have confirmed that the Crown may delegate "procedural aspects" of consultation to third party proponents.

Canadian courts have provided much guidance with regard to the process of consultation with Aboriginal communities. The courts have told us that consultation with Aboriginal communities involves a process of timely information exchange that focusses on the specific nature of the proposed activity and its potential to cause adverse impacts to treaty and Aboriginal rights. The extent of consultation required falls along a spectrum - from notice to deeper consultation - depending on the nature of the rights in question and the seriousness of potential impacts on those rights. It must begin early enough in the planning process that concerns raised can be considered and, where appropriate, responses to those concerns can be incorporated into project plans.

Regardless of the extent of consultation required, courts have been clear that meaningful consultation always requires that the Crown provide for a process that enables:

- Starting the process in a timely way, when information can still be effectively considered and incorporated into a project plan, as appropriate;
- sharing information on the proposed action or activity;
- obtaining information from the community on their rights and assertions and any perceived impacts;
- considering the potential impacts and determining how to proceed, including proposals to address concerns raised, where appropriate;
- providing feedback during the consultation process and after a decision is made.

b. Who does what?

While courts have confirmed that the Crown may delegate procedural aspects of consultation to third party proponents, the Crown will continue to:

- Identify which communities should be notified and consulted about proposed activities, based on the best available information provided by those communities about where they have or assert Aboriginal or treaty rights;
- Provide direction on the scope of consultation required in the circumstances;
- Assess assertions made about rights and the scope of accommodation required, if any;
- Provide ongoing direction, oversight and supervision of the process;
- Assess the sufficiency of consultation and accommodation, where required, and make a decision.

In turn, courts have confirmed that proponents can be expected to participate directly in the consultation processes of information exchange and discussion as follows:

- Providing further details to Aboriginal communities about their proposed exploration activities;
- Gathering information from those communities about whether or how the proposed activities have the potential to adversely affect the communities' Aboriginal or treaty rights;
- Discussing with the communities, and MNDM if appropriate, ways to avoid, eliminate or minimize any concerns raised;

- Seeking further direction or advice from MNDM, if needed; and
- Documenting the process and decisions made and reporting to MNDM.

Courts have also stated that **aboriginal communities** need to participate directly and:

- outline concerns about impacts to their Aboriginal or treaty rights with clarity regarding the nature of their rights and the potential impacts - with sufficient detail and specificity that the Crown and proponents can consider and assess that information and address it, where required;
- not frustrate reasonable, good faith efforts to consult;
- not take unreasonable positions to thwart government from making decisions or in an attempt to prevent projects from proceeding.

Part II below describes in detail the respective roles of proponents, Aboriginal communities, and ministry staff as they participate in consultation processes established under the *Mining Act* for early exploration activities.

c. Differing Perspectives

Aboriginal communities and provincial and federal governments do not always share the same perspective which can create challenges in consultation processes. These differing perspectives may raise issues that go to the broader and ongoing process of reconciliation and treaty interpretation which MNDM does not expect proponents to resolve when discussing specific mineral exploration proposals. These perspectives can include:

- First Nations view treaties as agreements with the Crown to share the land and its resources. They also may assert an inherent right to self-government, under s. 35 of the *Constitution Act, 1982*, and/or rely upon the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), in relation to their asserted rights to manage, to control access through permits and fees, and to exercise a veto over development in their traditional lands.
- Canadian courts have generally not recognized a legal right of First Nations to regulate activities of third parties off reserve or to otherwise require First Nation consent to proposed activities. Ontario is responsible for managing Crown lands and the province's natural resources while at the same time meeting its constitutional obligations to consult with Aboriginal communities.
- Project proponents are also often confronted with demands for Crown resource revenue sharing or for resolution of historic grievances. These are issues that are not appropriately addressed by proponents in the context of early exploration but which are better addressed by the Crown in more appropriate forums.

Aboriginal peoples expect to have the opportunity to share in the economic benefits of natural resource development in their traditional land use areas - whether through employment opportunities, training and capacity development, or revenue streams where those exist (for instance, at mine development as opposed to early exploration).

The differing views on Aboriginal peoples' jurisdictions and rights do not diminish the need for all parties - Crown, Industry and Aboriginal peoples - to work constructively together to achieve practical outcomes.

Through its regulations and this policy, MNDM intends to provide clarity with regard to the roles of the Crown, proponents and Aboriginal communities in meeting any duty to consult and, where appropriate, accommodate at early exploration. MNDM will continue to work with project proponents and Aboriginal communities to ensure that consultation processes are conducted appropriately. At the same time, MNDM will continue to support broader government initiatives to advance resolution of, for example, historic grievances and resource benefits sharing.

In addition, and as described more fully in Part III, the willingness of project proponents and Aboriginal communities to formalize commitments through arrangements or agreements at appropriate stages can often help bridge the gap between the differing perspectives and result in an effective tool for proponents to achieve more certainty and long term support for a project.

II. CONSULTATION PROCESS STEPS/REQUIREMENTS

MNDM has a responsibility to ensure that any duty to consult with Aboriginal communities that may exist is fulfilled. Through the Exploration Plans and Exploration Permits regulation, MNDM has prescribed processes that represent a reasonable and appropriate way to ensure meaningful consultation occurs at early exploration stages.

MNDM is aware, for instance, that many communities have concerns about the impact of early exploration activities on burial or other culturally significant sites that can be related to their constitutionally protected Aboriginal or treaty rights. MNDM also recognizes that some early exploration activities - like walking a grid or taking grab samples - will typically have little or no potential impact on known Aboriginal and treaty rights such as hunting, fishing, trapping, and gathering, while other activities, particularly as early exploration progresses, may have more potential to impact these rights.

The amended *Mining Act* and associated regulations therefore provide for a graduated approach to consultation, ensuring that appropriate notice and opportunity to express concerns is provided, particularly as activities advance and potential for impacts increases. The regulatory scheme also ensures that there is flexibility to provide for additional efforts in cases where an assessment of rights and assertions suggests deeper consultation may be required.

The MNDM, project proponents, and Aboriginal communities all have roles to play in this process. As outlined below, MNDM has retained the responsibility to notify First Nation and Métis communities, as appropriate, and to solicit their input with regard to potential impacts of a proposed project to their existing or asserted treaty or Aboriginal rights.

Proponents, as delegates of the Crown for purposes of consultation and for their own business reasons, also have an important role to play in consultation processes. They are in the best position to describe the project for which they are seeking government approval and to discuss ways to adjust their plans to address concerns raised by Aboriginal communities while still preserving the feasibility of their project.

Proponents and communities will continue to be encouraged to engage early, build relationships and, where appropriate, formalize commitments through arrangements.

Proponents should be aware that MNDM will continually assess assertions made regarding Aboriginal and treaty rights and areas of interest which may, in turn, affect the communities to be notified and the direction and information provided to proponents in any given circumstance.

MNDM's approach to implementation of the processes prescribed through the Exploration Plans and Exploration Permits regulation, including the roles of MNDM, proponents, and Aboriginal communities, is as follows:

a. *MNDM to identify Aboriginal communities to be notified and consulted:*

- At all stages, where a proponent is notifying or engaging with Aboriginal communities, proponents should first confirm with MNDM which communities MNDM expects the proponent to notify - MNDM will identify communities based on the best information the ministry currently has available, relative to the nature of potential impacts on the ground;
- Where available, MNDM will provide proponents with specific contact information for individuals within a community who have been identified as a consultation contact; in lieu of such an individual, notification and consultation efforts should typically be directed to Chief and Council (or Métis community equivalent - MNDM will provide direction);
- If a proponent has questions about the communities identified by MNDM, proponents should discuss those questions with MNDM prior to proceeding;
- If at any point a community that has not been identified by MNDM requests to be consulted, proponents should contact MNDM to discuss and confirm approach;
- Proponents should also be mindful that, as rights continue to be clarified with new information, including court decisions, direction as to which communities should be consulted is subject to change. Aboriginal communities have an important role to fulfill to ensure that MNDM has the best information available on which to base decisions with regard to their areas of interest.

b. *Expectations at recording of mining claims:*

- MNDM will continue to provide written notification to claim holders of Aboriginal communities in the area of recorded claims and subsequent regulatory requirements;
- MNDM will continue to provide written notification to Aboriginal communities of claims that have been recorded in their known area of interest, including contact information for the claim holder, and that notification will include information about subsequent approval and consultation processes they can anticipate;
- MNDM will continue to encourage both proponents and communities to communicate and build relationships at these very early stages - where a community proactively contacts a proponent after receiving MNDM's notice of

recording, proponents should be prepared to answer questions, discuss concerns, and seek further direction or advice from MNM as required (eg; where specific assertions about impacts to rights are made, etc.).

c. Expectations at submission of exploration plans:

- The exploration plan is an approved form designed to be comprehensive in terms of describing, in non-technical language, the proposed activities that require a plan and where and when those activities are proposed to occur;
- MNM will circulate submitted exploration plans to potentially impacted Aboriginal communities to ensure communities are aware of activities that may be occurring in their known area of interest (the ``circulation date`` for the purposes of the Exploration Plans and Exploration Permits regulation). Although activities that may be subject to an exploration plan are anticipated to be of low potential for impact, Aboriginal communities will be invited to identify concerns, if any, about potential adverse impacts to their Aboriginal or treaty rights;
- Communities will be requested to detail concerns in writing to MNM, within three weeks of circulation;
- MNM will consider concerns received and respond to Aboriginal communities. In considering comments, MNM may discuss the concerns with proponents and may encourage proponents to adjust their plans to address concerns, if appropriate;
- If, in the anticipated rare case, concerns are raised that cannot be addressed through the exploration plan or associated process timeframe, MNM may require the proponent to apply for an exploration permit instead.
- As always, proponents are encouraged to notify communities and address their concerns or questions prior to submitting an exploration plan to avoid unexpected delay or objections.

d. Expectations at application for an exploration permit:

- Permit applications are designed to provide non-technical but detailed information about the nature of proposed activities that require an exploration permit and when and where those activities are proposed to occur;
- MNM will circulate submitted applications to potentially impacted Aboriginal communities based on known areas of interest (the ``circulation date`` for purposes of the Exploration Plans and Exploration Permits regulation) and ask them to identify to MNM and the proponent their concerns, if any, about potential adverse affects to their Aboriginal or treaty rights;
- Once communities have been notified by MNM, proponents will be expected to be responsive to questions or concerns and to engage directly with communities, proactively or as further directed by MNM (through this policy or otherwise), to ensure appropriate exchange of information;

- Consultation processes at this stage, depending on the activities and communities involved, could require exchange of information (achieved through letters and phone calls) or could require more time and effort (meetings, site visits) to share and gather necessary information and discuss mitigation measures - proponents should be prepared to be flexible according to the circumstances - MNM will provide further guidance and direction, as necessary, intended to help manage expectations and keep processes proportional and reasonable to the circumstances;
- While proponents are expected to be proactive and responsive to community questions and concerns, with or without MNM's direction or participation in the information exchange, MNM will continue to assess rights and obligations, as required as new information is brought forward, and provide additional direction, guidance or facilitation where necessary to ensure timelines can be met;
- If required, MNM will utilize available tools to "stop-the-clock" on the permit approval process to facilitate further consultation or dispute resolution ;
- At this stage, proponents are strongly encouraged to make efforts to reach arrangements with communities in advance of submitting an application - arrangements that address concerns of Aboriginal communities related to consultation and mitigation will enable more timely decision-making by MNM and provide more certainty for the project (see Part III);
- Proponents will report on their consultation efforts to MNM, including with regard to efforts made to reach arrangements with Aboriginal communities.
- MNM must be satisfied that consultation with Aboriginal communities has been appropriate and reasonable in the circumstances prior to making a decision whether or not to issue a permit. MNM will consider both the efforts and responses of the proponent, MNM, and the Aboriginal communities consulted.

e. When no response received from Aboriginal communities

If there is no response from a community after notice or other efforts to engage have been provided, proponents should seek direction from the MNM. MNM may require that proponents take certain steps to follow-up with a community to encourage their response or may take such steps directly. As always, proponents should document any steps they take and responses, including lack of response, they receive. Lack of response will not prevent a decision by the MNM.

Where good faith efforts have been made to consult and a community fails to provide comment with respect to any potential adverse impacts from an activity on their treaty or Aboriginal rights, MNM will make a decision based on its existing understanding of the rights and interests that may be impacted by a proposed activity.

f. Capacity, Mitigation and Accommodation

Proponents should recognize that many communities have capacity challenges that can hinder participation in consultation. Proponents should be prepared to contribute to community capacity needs with regard to consultation about specific proposals and should consider capturing these contributions in any arrangements that might be reached. Such contributions should be reasonable, relevant and proportional to the scope of consultation that may be required in any given circumstance. Specifically, proponents should be prepared to contribute, as appropriate, for instance:

- direct reimbursement to communities for their specific expenses related to the process, or
- financial support for technical or other advice depending on the complexity of the project.

MNDM will support these contributions by ensuring they are eligible expenses for assessment credit under the *Mining Act*.

Addressing capacity needs will lead to more effective consultation processes. The information exchanged during consultation processes should then lead to measures that will avoid, eliminate or minimize or otherwise accommodate potential impacts to existing or asserted Aboriginal or treaty rights (as discussed above, proponents should seek direction from MNDM, where necessary, for an assessment of rights and assertions that may require accommodation).

Proponents should consider ways to avoid, eliminate or minimize potential impacts through, for example:

- Geographic or timing adjustments to a project - eg: relocating a drill location to avoid impacts to a gathering site or seasonal restrictions to avoid, eliminate or minimize impacts to hunting or trapping;
- Incorporating applicable best practices advocated through industry or other organizations' statements - such as PDAC's e3 Plus;
- Commitments to use other methods of exploration than those proposed, where feasible;
- Modifying the scale and scope of a project to, for example, differently sequence activities;
- Monitoring impacts as the project unfolds to address issues as they may arise (rather than trying to anticipate all possible impacts from the outset).

These measures should be discussed with Aboriginal communities and, ideally, reflected in arrangements reached. In the absence of agreement otherwise, MNDM will use terms and conditions on a permit, as appropriate, to ensure mitigation and accommodation of identified impacts to existing or asserted Aboriginal or treaty rights.

g. Record Keeping and Reporting

Proponents should keep a detailed record of any and all efforts they take to notify and consult with Aboriginal communities, including:

- The project information that has been provided and in what form;
- A log of communications, whether written or oral, with whom and when, including attempts to communicate that have received no response;
- Detailed records of responses received about rights and their potential to be adversely affected;
- Proposed strategies to avoid, eliminate or minimize any adverse effects and community input to the development of those strategies;
- Project specific direction received from MNDM;
- Concerns that were not addressed and why.

MNDM will require reporting of a summary of these efforts on an approved form and may ask to review a proponent's detailed records at any time.

Consultation processes can often result in arrangements being reached between proponents and affected Aboriginal communities. As discussed in Part III that follows, MNDM strongly encourages such arrangements, particularly as projects reach permitting stages under the *Mining Act*. Among other purposes, these arrangements can reflect commitments the parties have made to one another with regard to ongoing consultation and mitigation of potential impacts. Those commitments may address MNDM's reporting requirements, as discussed above. Accordingly, while a copy of any arrangement reached is not required to be filed with the ministry, in reporting to MNDM, sufficient information, including from the Aboriginal communities involved, will need to be provided to confirm to the ministry the commitments made with regard to consultation and mitigation.

III. CONSIDERATION OF ARRANGEMENTS IN PERMITTING DECISIONS

a. Introduction

The amended *Mining Act* provides that, in making a decision whether to issue an exploration permit, the Director of Exploration will consider whether consultation has been carried out pursuant to any prescribed requirements, including consideration of arrangements reached between Aboriginal communities and early exploration proponents. In making a permitting decision, MNDM's interest in arrangements reached will be focussed on the extent to which those arrangements address consultation processes and mitigation measures (see discussion above in *Part II, section f. Capacity, Mitigation and Accommodation*).

In addition, MNDM acknowledges that Aboriginal communities have an interest in advancing mechanisms that enable their participation in, and benefit from, the mineral exploration and development sector. As a reflection of relationships and goodwill built between the parties, arrangements can also provide the certainty and stability for a project that permitting processes alone cannot achieve.

Finally, arrangements that formalize commitments and opportunities between project proponents and Aboriginal communities have become common as projects advance past early exploration and have greater potential for impact. Increasingly, arrangements are

also being reached at early exploration stages but these arrangements have varied widely and resulted in inconsistencies. Through this operational policy, MNDM is articulating an approach intended to help manage expectations and bring a level of certainty and consistency to the field.

The approach that follows is intended to support the objectives discussed above. Industry proponents and Aboriginal representatives, along with MNDM, continue to discuss this approach and alternatives to achieving these various objectives (including, for example, a best practices document). Until further progress is reached otherwise, MNDM will approach arrangements as follows:

b. MNDM's Approach

At very early stages, after a claim has first been recorded and projects involve low level exploration activities (such as hand sampling, geophysical surveys, or backpack drilling) formal arrangements are not expected and, where entered, should typically be restricted simply to processes for ongoing information sharing.

Once projects reach the stage of requiring an exploration permit, MNDM strongly encourages proponents to make efforts, including through the regulated consultation process, to reach arrangements with communities. Those arrangements should, ideally, reflect the following principles:

- be proportional to the nature, scale and duration of the project and its potential impacts;
- not place an excessive burden on the proponent or undermine the feasibility of the project; and
- be sufficiently transparent to satisfy MNDM's reporting requirements while also helping to manage expectations and bring a level of certainty and consistency to the field.

With regard to specific content, this approach proposes certain considerations and commitments, appropriate to, and consistent with, the above principles. MNDM recognizes that commitments arise from processes of consultation and negotiation and that circumstances may vary and result in very different commitments that serve different objectives. In making a permitting decision, MNDM will specifically consider whether an arrangement has been reached, or whether efforts have been made to reach an arrangement, that address the following in relation to consultation and mitigation:

- *Ongoing monitoring and information sharing* - commitments to monitor impacts and share information as projects unfold, involving the community, as possible, in that monitoring.
- *Specific mitigation measures* - commitments made to mitigate specific impacts identified by communities - seasonal restrictions on activities, etc.
- *Financial component related to consultation and mitigation* – commitments of a financial nature directly related to a community's participation in the ongoing consultation process and to participate in mitigation and monitoring measures, where appropriate.

Although the nature of early exploration projects can be quite diverse, where appropriate to the circumstances proponents may also wish to consider commitments that could otherwise foster goodwill and positive working relationships by addressing economic and other interests of communities. These commitments are not necessarily required to address MNDM's consideration of consultation and mitigation in making a permit decision. These additional commitments could include:

- *Employment and training* - where feasible, direct employment targets for qualified individuals or training and internship opportunities for community members.
- *Goods and services* - commitments to rely on goods and services supplied by the community, where available and cost competitive.
- *Future opportunities* – commitments to a framework for ongoing dialogue (including the potential for later negotiation of IBAs or other arrangements appropriate to advanced exploration or mine development) dependent on feasibility results.

For greater certainty, MNDM does not expect nor recommend that proponents:

- make commitments to pay fees or monies purely by way of “access” or “application” to a community;
- make commitments for payments per drill hole or per metre drilled (unless this is used as a means to otherwise quantify contributions to capacity and mitigation as discussed above).

Proponents may also have securities reporting and other good governance requirements and, in making commitments and formalizing arrangements should, of course, conduct their own due diligence and structure any arrangements and associated accountabilities appropriately.

Where a matter is referred to dispute resolution during the consultation process pertaining to an application for an exploration permit, the third party to whom the matter is referred will consider the parties' efforts to resolve outstanding issues and to reach arrangements consistent with the principles discussed above.

Similarly, when making a permitting decision, the Director of Exploration will review the consultation record and, in considering whether he or she is satisfied that appropriate consultation has occurred, will also consider the efforts made to reach an arrangement, consistent with the principles and content discussed above as they relate to consultation and accommodation. While a copy of any arrangement reached is not required to be filed with the ministry, in reporting to MNDM, sufficient information, including from the Aboriginal communities involved, will need to be provided to confirm to the ministry the commitments made with regard to consultation and mitigation.

c. Looking forward - advanced exploration and mine development

Consultation processes, timelines, and expectations for arrangements or agreements necessarily increase at more advanced stages where projects are more complex, impacts are potentially greater and longer lasting, and opportunities more diverse.

O.Reg 240 - *Mine Development and Closure under Part VII of the Act* and accompanying operational policy provide further detail of the process steps MNDM will require of proponents at these later exploration and development stages, including submission of notices to MNDM, preparation of consultation plans, and periodic reporting of consultation efforts prior to submission of a certified closure plan or amendment.

Arrangements or agreements at these later stages, particularly mine development - from Impact Benefit Agreements to Joint Ventures to various other forms of agreements that generate an ongoing revenue stream to communities - have largely become the norm. MNDM will continue to encourage such arrangements deferring to the parties to negotiate and structure their relationship and form of commitments.

Keeping these longer term requirements and opportunities in mind will help to frame discussions and manage expectations and proportionality at earlier stages.