

Corporate Securities and Mining Law

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Canadian Securities Administrators Issue Guidance on Use of Preliminary Economic Assessments

Earlier this month the Canadian Securities Administrators (“**CSA**”) released Staff Notice 43-307 *Mining Technical Reports – Preliminary Economic Assessments* in order to clarify staff’s position on several issues regarding the use and disclosure of a “preliminary economic assessment” (“**PEA**”), as defined in the revised National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (“**NI 43-101**”) that came into effect in June 30, 2011.

NI 43-101 defines a PEA as a study, other than a pre-feasibility study (“**PFS**”) or feasibility study (“**FS**”), that includes an economic analysis of the potential viability of mineral resources. A PEA will be less detailed or precise than a PFS, with a lower level of confidence, and cannot be used to define mineral reserves (i.e., resources that can be economically mined).

The CSA expanded the PEA concept in June 2011 by removing a previous restriction that precluded issuers from using a PEA in respect of a project after completing a PFS – this change was in response to industry concerns that issuers sometimes needed to be able to take a step back and re-scope advanced stage projects based on new information or alternative production scenarios. While the CSA recognized the need for greater flexibility in the use of PEAs, they also emphasized that issuers should not interpret this flexibility as an opportunity to disclose economic information that would typically be found in a PFS based on PEA level analysis.

The notice highlights the importance of keeping a PEA separate and distinct from a PFS and provides further

guidance on other aspects of PEA preparation and disclosure where potential compliance problems have been observed.

PEA as a proxy for PFS

The notice expresses concern that some issuers blur the boundary between a PEA and a PFS by representing that their PEA, or components of it, have been or will be done at or close to the level of a PFS. In other words, staff believes that issuers sometimes use the more flexible requirements associated with a PEA (e.g., the ability to include economic analysis based on inferred resources) to state or imply that economic viability of mineral resources has been demonstrated without having conducted PFS level work otherwise required to support that kind disclosure.

Accordingly, staff recommends that issuers do not:

- describe a study as a PEA unless it clearly falls into the definition of a PEA, or
- compare their PEA or any components of it to the standards of a PFS if the study includes inferred mineral resources.

In addition, the notice provides that staff may take the position that an issuer is treating a PEA as a PFS if the issuer:

- does not include the cautionary statement required by NI 43-101 with equal prominence each time it discloses the economic analysis of the mineral resources;
- uses the PEA as a basis for any next step other than a PFS, such as going directly to a FS or a production decision;
- discloses mining or mineable mineral resources or uses the term “ore”, which is essentially treating mineral resources as if they had demonstrated economic viability; or
- otherwise states or implies that economic viability of the mineral resources has been demonstrated.

PEAs prepared in conjunction with a PFS or FS

The notice expresses concern with the practice of using PEAs as an add-on or update to a PFS or FS. Specifically, the notice indicates that a study that includes an economic analysis of the potential viability

of mineral resources that is done concurrently with or as part of a PFS or FS will not be a PEA if it:

- has the net effect of incorporating inferred mineral resources into the PFS or FS (even as a sensitivity analysis);
- updates, adds to or modifies a PFS or FS to include more optimistic assumptions and parameters not supported by the original study; or
- is a PFS or FS in all respects except name.

Technical report triggers

Issuers are reminded that they can trigger the requirement to file a technical report to support disclosure of economic analysis for a material mineral project contained in corporate presentations, fact sheets, investor relations materials or any statement on the issuer's website (or posted or linked from third party documents), reports or articles or otherwise adopted and disseminated by the issuer.

Potentially misleading PEA results

Staff has noted that some PEAs contain overly optimistic or highly aggressive assumptions or methodologies that diverge significantly from industry best practices and standards, potentially resulting in misleading disclosure. The notice reminds issuers that they must have a reasonable basis for all forward-looking information and assumptions in a PEA. Issuers are cautioned that where the CSA has concerns about assumptions, the CSA may challenge the qualified person to explain or justify the assumptions, or ask the issuer to revise the PEA to take a more conservative approach.

PEA disclosure that includes by-products

In some cases, issuers disclose the results of a PEA that includes projected cash flows for by-product commodities that are not included in the mineral resource estimate. The CSA considers the inclusion of such by-product commodities to be misleading and contrary to the definition of PEA because these commodities are

not part of the mineral resource. Issuers should not include cash flow projections for any commodity or part of a commodity that has not been properly categorised as a measured, indicated or inferred mineral resource.

Relevant experience for qualified person

The CSA has expressed concern that individuals are taking responsibility for technical reports or parts of reports that support the results of a PEA while not fully complying with the requirement to have experience relevant to the subject matter of the mineral project and the technical report. If a qualified person does not have relevant experience, the CSA will challenge the qualified person to explain or justify their relevant experience, or ask for a revised technical report from additional qualified persons.

Consequences of material deficiencies or errors

Finally, the notice provides guidance to issuers on the consequences of material NI 43-101 deficiencies or errors. In such circumstances, the CSA will generally request that the issuer correct the deficiency by restating and re-filing the documents. Where the issuer does not comply, the CSA may place the issuer on its reporting issuer default list, seek a commission order requiring the issuer to re-file the documents, or issue a cease trade order until the issuer makes the necessary corrections. Even where the issuer corrects the deficiency, the CSA may pursue enforcement or other regulatory action. The notice also emphasizes that if NI 43-101 deficiencies or errors come to light in the context of a prospectus filing, the issuance of a receipt could be delayed or even withheld. Issuers are also reminded that correcting material deficiencies or hiring additional qualified persons to certify deficient parts of a technical report can be complex, costly and time-consuming for the issuer.

Please contact any member of our Mining and Natural Resources Group to discuss the Staff Notice.