

Canadian Securities Administrators issue guidance on disclosure of preliminary economic assessments under NI 43-101

On August 16, 2012, the Canadian Securities Administrators (CSA) published CSA Staff Notice 43-307 *Mining Technical Reports – Preliminary Economic Assessments* (the Notice) which sets out staff's position on several issues regarding the use and disclosure of preliminary economic assessments (PEAs) under National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (NI 43-101).

Under NI 43-101, a PEA is defined 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. The definition of a PEA was broadened last year to allow issuers to disclose results of PEAs that were completed after a PFS or FS was done on the same property. This change was in response to concerns that issuers needed to be able to take a step back and re-scope advanced stage projects based on new information or alternative production scenarios.

But the important part of the change regarding disclosure of PEAs under NI 43-101 that it appears many mining issuers missed or were confused about, is that something fundamental must have changed to the existing or proposed operation on the property to make the company go back and assess it at the level of a PEA. Such changes may include using a different mining method,

different scale or scope of operation, inclusion of different kinds of mineralization, alternative mining methods, or alternative processing technology.

The CSA have noticed a pattern of mining issuers completing a PEA at the same time as a PFS or FS without anything changing on a conceptual basis about the property to justify another study done at the PEA level. The CSA published the Notice to provide some guidance on how disclosure of PEAs should be treated under NI 43-101. The following is a brief summary of the issues raised in the Notice.

PEA as proxy for pre-feasibility studies

The CSA note that they are seeing issuers represent that their PEA, or parts of it, have or will be done at the level of a PFS, that the PEA is a PFS but for the inclusion of inferred mineral resources, or that the PEA is a substitute for a PFS. By definition, a PEA cannot be a PFS or FS, and only demonstrates the *potential* viability of mineral resources. PFSs and FSs are more comprehensive studies that are sufficient to demonstrate the technical and economic viability of a mineral project. The CSA may challenge whether a study meets the definition of a PEA if issuers blur the boundary between a PEA and a PFS by stating some or all of the PEA is done at the level of a PFS, and recommend that issuers do not describe a study as a PEA unless it clearly falls into the definition of a PEA or compare their PEA to the standards of a PFS if it includes inferred mineral resources.

Similarly, the CSA may take the position that a PEA is being treated as a PFS if it: does not include the mandatory cautionary language set out in section 3.4(e) of NI 43-101 with equal prominence each time it discloses the economic analysis of the mineral resources; uses the PEA as a basis to justify 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 mineral reserves; or otherwise

states or implies that economic viability of the mineral resources has been demonstrated.

Therefore, if a study is truly treated as a PEA by the mining issuer, contains all required cautionary language, and is not potentially misleading by implying a PEA is a PFS, the disclosure of the PEA should be acceptable. The problem arises when an issuer treats a PEA as a PFS, and the disclosure of the results of the PEA can be construed as being misleading.

Issuers must also be careful when disclosing a PEA after a PFS or FS has been completed on the same property. For example, if the PEA significantly modifies the key variables in a FS, including metal prices, mine plan, and costs, the FS and mineral reserves on the property may no longer be considered current.

PEAs done in conjunction with a PFS or FS

The Notice states that the CSA are concerned that issuers are indirectly including inferred mineral resources into their PFS or FS, contrary to NI 43-101, by explaining that they have only completed the analysis of the inferred mineral resource to the level of a PEA. The CSA generally consider that two parallel studies done concurrently or in close time proximity to each other are not in substance separate studies, but components of the same study. Therefore, 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 is not, in the view of the CSA, 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.

PEA disclosure and technical report triggers

The CSA note that in some cases, issuers are disclosing the results of potential economic outcomes for their material mineral properties that are not supported by a technical report. Depending on the materiality of the information, such disclosure could trigger the filing of a technical report under section 4.3(j) of NI 43-101, if it is included in corporate presentations, fact sheets, investor relations materials, any disclosure on an issuer's website, or any such disclosure posted or linked from any third party documents, reports or articles or otherwise adopted and disseminated by the issuer.

potentially misleading PEA results

A hot topic these days is the CSA cracking down on qualified persons that are using overly optimistic or highly aggressive assumptions or methodologies that diverge significantly from industry best practice guidelines and standards for exploration and mineral resources, leading to disclosure that is misleading. The Notice also mentions the CSA's concern with this topic regarding PEAs.

The Notice states that the results of a PEA include, or are based on, forward-looking information that is subject to the provisions in National Instrument 51-102 *Continuous Disclosure Obligations* that require issuers to have a reasonable basis for disclosing forward-looking information. The CSA may ask the qualified person to justify the assumptions, or failing that, revise the PEA, if the CSA have concerns about the assumptions used in a PEA.

other issues

by-product disclosure: The CSA consider the inclusion in a PEA of projected cash flows for by-product commodities not included in the mineral resource estimate to be misleading and contrary to the definition of a PEA.

qualified person experience: The CSA are seeing individuals taking responsibility for all or parts of technical reports supporting the results of a PEA, while not fully complying with the requirement to have experience relevant to the subject matter of the project and the report. Where the CSA have concerns about a qualified person's relevant experience, the CSA will challenge the qualified person to explain and justify their relevant experience, or failing that, request a revised report from additional qualified persons.

consequences of material deficiencies or errors: The CSA will generally request that an issuer correct any material disclosure deficiencies identified by the CSA in required documents by restating and re-filing the documents. Failure to do so may result in being placed on the defaulting issuer list, an order from a commission requiring the issuer to re-file the documents, or a cease trade order being issued. A correction to the deficiency may still result in enforcement or other regulatory action. The CSA also highlight that a review of a prospectus could take more time if issues such as those noted in the Notice are present, and the CSA may recommend against issuing a receipt for the prospectus.

how to disclose a PEA and PFS or FS in the same technical report

Under NI 43-101, an issuer should only have one current technical report on its material property. Therefore, if an issuer has both a PEA and a previous PFS or FS to disclose on the same property, what is the best way to present a summary of both studies in the same technical report? This was not addressed in the Notice by

the CSA, however as long as both studies are kept separate, required cautionary language is included, and it is clear what disclosure in the technical report is a summary of the PFS or FS, and what disclosure is a summary of the PEA, it should be acceptable.

by David Mendicino and Laurel Petryk

For more information on this topic, please contact:

Toronto	David Mendicino	416.307.4053	david.mendicino@mcmillan.ca
Vancouver	Laurel Petryk	604.691.7480	laurel.petryk@mcmillan.ca

about the authors

David Mendicino is an Associate in the [mining](#) and [capital markets](#) groups of the [Toronto office](#) of McMillan. In addition to advising clients on disclosure obligations generally, he has particular expertise in NI 43-101.

Laurel Petryk is a Partner in the [mining](#) and [capital markets](#) groups of the [Vancouver office](#) of McMillan. She has published many articles on NI 43-101, and regularly advises clients on a wide range of NI 43-101 issues. She also provides general mining, corporate, and securities advice. Laurel has particularly good insight to assist mining companies to comply with their regulatory requirements under NI 43-101 from her previous experience working at the British Columbia Securities Commission.

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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