Preliminary Economic Assessments for Mining Projects – New Guidance from the Canadian Securities Administrators

Author(s): Douglas Bryce, James R. Brown, Jeremy Fraiberg

The Canadian Securities Administrators (CSA) recently published a new staff notice clarifying its position on several issues regarding the use and disclosure of preliminary economic assessments (PEAs) by Canadian reporting issuers in the mining sector (Staff Notice 43-307 Mining Technical Reports – Preliminary Economic Assessments). The full Notice is available here.

The Notice comes in the wake of a number of recent high-profile situations involving mining issuers which had run into difficulty with their technical disclosure, particularly as it related to PEAs – see our Osler Update, Failed Public Financings in the Mining Sector – Use of Economic Analysis and Confusion Around Preliminary Economic Assessments.

USE OF PEAS

One of the key attractions of a PEA is the specific exemption for PEAs from the normal prohibition on economic analysis disclosure that includes or is based on inferred mineral resources, the weakest of the various CIM categories of mineralization. That exemption is subject to certain conditions, including the use of a prominent disclaimer and the inclusion of disclosure regarding the impact of the PEA on the results of any pre-feasibility study (PFS) or feasibility study (FS) that exists in respect of the same project, but nonetheless provides an opportunity to provide a portrait of a project’s potential based on inferred resources. That opportunity disappears once the project advances to a PFS, which must be based solely on higher categories of mineralization. As a result, there may be a temptation to retain what is nominally a PEA in place notwithstanding the progression of the project to a more advanced stage, in order to retain the ability to provide economic analysis based on inferred resources.

The securities regulators have recently indicated that they believe there is some confusion in the marketplace regarding the use of PEAs. This confusion may have arisen as a result of the fact that the applicable definition was amended as part of the recent overhaul of National Instrument 43-101 so as to remove the requirement that a PEA had to be in respect of an early stage property and prior to the completion of a PFS. As a result, the new instrument provided additional flexibility with respect to the use of PEAs on properties that had previously advanced to a further stage (e.g., to assess alternative
development options or allow for a possible project reset where a PFS or FS had become obsolete), while perhaps inadvertently providing some room for behaviour that the regulators consider to be problematic.

In the Notice, the CSA has clarified its position on the rules governing the use of PEAs as follows:

**PEA AS A PROXY FOR A PFS**

The CSA notes that certain issuers have made representations that a PEA, or components of it, have been or will be done at or close to the level of a PFS, and, in certain cases, have represented that the study would constitute a PFS, but for the inclusion of inferred mineral resources.

The Notice therefore reminds issuers of the distinction between a PEA and more comprehensive studies such as a PFS, and serves notice that the regulators may challenge whether a study meets the definition of a PEA in that context. In particular, the CSA has recommended 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 mineral resources.

The Notice also reiterates that a PEA by definition can only demonstrate the potential viability of mineral resources. CSA staff may take the position that an issuer is treating the PEA as a PFS if the issuer, among other things, states or implies that the economic viability of the mineral resources has been demonstrated.

**PEA DONE IN CONJUNCTION WITH A PFS OR FS**

The Notice identifies PEAs done in conjunction with a PFS or FS as an area of concern, since they may result in issuers indirectly including inferred mineral resources in their PFS or FS, in contravention of NI 43-101. This issue has arisen in part in the wake of revisions to NI 43-101 that came into effect in June 2011 noted above, which permit PEA disclosure relating to a project that had previously been the subject of a PFS or FS.

The Notice clarifies the purpose of the change as responding 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. In this context, the revised definition is based on the premise that the issuer is contemplating a significant change in the existing or proposed operation that is materially different from the previous mining study. The Notice appears to reflect a concern that this premise is not always borne out, and states that in the view of the CSA, 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 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 notes that some issuers are disclosing results of potential economic outcomes for their material
mineral properties that are not supported by a technical report. This disclosure could trigger a technical report filing obligation depending on the materiality of the information to the issuer. Issuers are reminded that a technical report filing obligation could be triggered through disclosure 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

Another area of concern is the use of overly optimistic or highly aggressive assumptions in a PEA, or methodologies that diverge significantly from industry best practice guidelines and standards for exploration and mineral resources. These practices could result in disclosure that is misleading if it is inconsistent with the comparable work of other qualified persons.

Assumptions that are contained in a PEA are subject to the requirements for forward-looking information in National Instrument 51-102 - Continuous Disclosure Obligations, which requires that the issuer must have a reasonable basis for the forward-looking information. The CSA has confirmed that it may challenge an issuer or qualified person to explain or justify their assumptions where they are overly optimistic or aggressive or require them to revise the PEA to take a more conservative or reasonable approach.

PEA DISCLOSURE THAT INCLUDES BY-PRODUCTS

The CSA notes that issuers are disclosing the results of a PEA that includes projected cash flows for by-product commodities that are not included in the mineral resource estimate. The inclusion of such by-products in the PEA is considered misleading and contrary to the definition of a PEA by the CSA because these commodities are not part of the mineral resource. The Notice cautions issuers not to 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.

QUALIFIED PERSON – RELEVANT EXPERIENCE

The CSA also highlights circumstances where qualified persons may be 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. Where the CSA has concerns that a qualified person does not have relevant experience, it will challenge the qualified person to explain or justify their relevant experience, or failing that, ask for a revised technical report from additional qualified persons.

POTENTIAL CONSEQUENCES OF DISCLOSURE DEFICIENCIES

The Notice also highlights the potential consequences of material disclosure deficiencies, which may include a request that the issuer correct the deficiency by restating and re-filing the documents, placing the issuer on a reporting issuer default list, seeking a commission order requiring the issuer to re-file the documents or issuing a cease trade order until the issuer corrects the deficiency (as illustrated by the recent cease trade order issued against Barkerville Gold Mines Ltd., which is discussed here). Further, the CSA reiterates that in the context of a prospectus offering, in the event of material deficiencies, the CSA may recommend against issuing a receipt for the prospectus (as has occurred in a number of recent
failed public offerings, highlighted in our earlier Osler Update).

Part of the Mining Review - September 2012
Preliminary Economic Assessments for Mining Projects – New Guidance from the Canadian Securities Commission

The Notice comes in the wake of a number of recent high-profile situations involving mining issuers which failed to follow guidance on disclosure and reporting of economic assessments. The Notice is intended to provide issuers, consultants and their legal representatives with a summary of the key changes to guidance on preliminary economic assessments (PEAs) in Canada, with a particular focus on PEAs that include by-products.

One of the key actions of a PEA is the specific example for PEAs from the normal prohibition on non-dealers using economic analysis based on inferred resources. The Notice states that issuers are not prohibited from using PEA results in corporate presentations, fact sheets, investor relations materials or any statement on the issuer’s website, as long as the disclosure is consistent with the PEA guidelines and the issuer provides a prominent disclaimer and disclosure regarding the impact of the PEA on the project.

The Notice also reiterates that a PEA by definition can only demonstrate the potential viability of mineral resources. It notes that some issuers are disclosing results of potential economic outcomes for their material mineral resources that is done concurrently with or as part of a PFS or FS is not a PEA if it: (a) is not a material project; (b) is not a material mineral resource; (c) is not a material monetary resource; or (d) does not meet the legal requirements of the securities legislation.

The Notice provides a list of potential consequences of disclosure deficiencies, including the CSA may recommend against issuing a receipt for the prospectus (as has occurred in a number of recent situations), the issuer may be required to keep the PEA up to date by filing a revised technical report from additional qualified persons, the CSA may require the issuer to conduct a review or investigation, and the issuer may be required to take a step back and re-scope advanced stage projects based on new information or alternative assumptions.

The Notice also notes that some issuers are disclosing results of potential economic outcomes for their material mineral resources that is done concurrently with or as part of a PFS or FS, which is not a PEA if it: (a) is not a material project; (b) is not a material mineral resource; (c) is not a material monetary resource; or (d) does not meet the legal requirements of the securities legislation. The Notice states that issuers are not prohibited from using PEA results in corporate presentations, fact sheets, investor relations materials or any statement on the issuer’s website, as long as the disclosure is consistent with the PEA guidelines and the issuer provides a prominent disclaimer and disclosure regarding the impact of the PEA on the project.

© Osler, Hoskin & Harcourt LLP. This content is for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. You can subscribe to receive updates on a range of industry topics at osler.com/subscribe.