September 26, 2016

Comments on Securities and Exchange Commission Proposed Rule: Modernization of Property Disclosures for Mining Registrants 17 CFR Parts, 229, 239, and 249

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NEWashington, DC 20549-1090

Dear Mr. Fields:

The undersigned environmental, social, and corporate responsibility organizations welcome the opportunity to submit comments regarding Securities and Exchange Commission's (SEC) draft rulemaking for mining registrants' disclosure requirements.

We wish to associate ourselves with comments submitted by Dr. David M. Chambers with the Center for Science in Public Participation.

These comments cover two areas of interest affecting the financial viability of mining projects: technical disclosures of mineral reserves and estimates, and social and environmental risks associated with new mine projects and mine expansions.

General Comments

Generally, we are supportive of the technical disclosure requirements we believe represent a major step forward in the accuracy and level of detail during the exploration and investment phase of a mining project. The National Instruments 43-101 Preliminary Economic Assessment (PEA) system required by Canadian regulators not only provides investors with a uniform and dependable analysis of mineral estimates and reserves certified by a professionally qualified person, but also provides additional information to those interested in environmental and social impacts.

The PEA provides an holistic overview and background of a project and allows anyone to gain other pertinent information, not simply mineral reserves. Beyond the PEA, the SEC should also incorporate the same disclosure requirements used in Canada later in the process in Pre-feasibility studies and Final Feasibility studies.

Specific Requests for Comment

7. When assessing the materiality of mining operations, should we require a registrant to include, for each property, as applicable, all related activities from exploration through extraction to the first point of material external sale, including processing, transportation, and warehousing as proposed? Why or why not? Is the "first point of material external sale" the appropriate cut-off or should we use some other measure? Are there certain activities that we should exclude from the materiality determination, even if they occur before the first point of material external sale? If so, which activities, for which minerals or companies, and why? Are there certain activities after the point of first material external sale that we should include? If so, which activities, for which minerals or companies, and why?

The SEC's materiality determination should account for costs associated with mine reclamation. Therefore, the "first point of material external sale" is not the appropriate cut-off. While reclamation can, under some circumstances, occur contemporaneously with other in scope activities, in many cases the enormous liabilities registrants must incur to cover reclamation costs tend to become more tangible closer to mine closure- long after the initial sales of minerals.

As discussed below, reclamation constitutes one of the greatest environmental and social liabilities mining registrants should disclose to investors. The appropriate measure the SEC should consider is not when sales begin, but when final closure and reclamation ends.

8. Are there specific qualitative or quantitative factors relating to the environmental or social impacts of a registrant's properties or operations that a registrant should consider in making its materiality determination?

Yes. Every year, auditing firm Ernst & Young (E&Y) publishes its Business Risks Facing Mining and Metals report.[i] This year, E&Y listed the Social License to Operate (SLTO) as the fourth greatest risk mining investors face.[ii] As the report details, mining projects that generate opposition, protests, civil unrest, or riots pose challenges for mining investors and constitute additional risks for which the SEC should develop an appropriate disclosure mechanism.[iii]

33. Should we define a qualified person to be an individual, as proposed? Or should we expand the definition, in cases where the registrant engages an outside expert, to include legal entities, such as an engineering firm licensed by a board authorized by U.S. federal, state or foreign statute to regulate professionals in mining, geosciences or related fields? Why or why not?

The SEC should consider a "qualified person" to be an individual per the NI 43-101 guidelines, rather than a corporation or organization.

109. Should we require the qualified person to include in a technical report summary the 26 items, as proposed? Are there any items of information that we should include instead of or in addition to the proposed 26 sections of the technical report summary?

Yes. The information provided in the technical report summary should include the twenty-six proposed items. In particular, we urge the SEC to adopt proposed Item 601(b)(96)(iv)(B)(17) of Regulation S-K to require detailed descriptions of infrastructure needs for mining projects, especially dams, tailings disposal, water, and energy access. Tailings dam failures like the recent events in Brazil[iv] which killed 19 people and in Canada[v] – considered the worst mining disaster in Canadian history – should be evaluated from the beginning, as tailings dam design plays a key role in risk levels.

Similarly, we urge SEC to adopt Item 601(b)(96)(iv)(B)(19) of Regulation S-K requiring qualified persons to prepare technical report summaries including descriptions of the "environmental, permitting, and social or community factors related to the project".[vi] This is the SLTO.

110. Should we expand proposed Item 601(b)(96)(iv)(B)(19)(vi) to provide additional specific examples…(of) "issues related to environmental, permitting, and social or community factors" that the qualified person must include in the technical report summary?[vii]

Yes. SEC should also require registrants to disclose to investors additional material environmental and social risks associated with their mining operations.

1) Externalities

Too often, mining companies conveniently omit key factors from the public dialogue that represent enormous impact over both the short and long terms. Mostly, these are "externalized impacts", meaning they usually fall upon people detached from the mining company, yet still have the ability to make or break the long-term financial viability of a project.

2) Bonding and Financial Assurance

Technical report summaries must also include detailed descriptions of the bonds and other financial assurances registrants obtain as required by applicable state and

federal laws and regulations. The SEC should require particularized disclosure for especially risky instruments such as corporate guarantees or self-bonds.[viii]

Corporate guarantees are not backed by hard assets, cash, or cash equivalents. Many mining companies that rely on resource extraction lack diversified lines of business that can dilute the risk of market downturns. Furthermore, the metal market is too volatile to provide sufficient time for corrective action. Once market conditions decline, self-bonding creates a perverse incentive by discouraging shifts to stronger forms of financial assurance, because the shift would occur at the weakest financial moment for the company.

Next year, the Environmental Protection Agency (EPA) will finalize bonding rules for hardrock mines under Section 108(b) Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA or Superfund).[ix]

EPA has the authority to collect bonds, up front, for both new and existing hardrock mines to cover environmental mitigation, accidents, emergencies, and bankruptcy. These additional costs to a company can also lend insight into the type of environmental risk a project may carry from construction into perpetuity. The SEC should require disclosure of these bond amounts, and the bond's purpose, as soon as possible.

3) Long Term Water Treatment Risks

Another major consideration for investors is acid mine drainage (AMD) and heavy metal discharge. Mining companies have a well-documented historic trend of understating AMD risks and heavy metal discharge that can dramatically impact the bottom line of the project over time. [x] While regulators typically address these liabilities in Plans of Operations[xi] and/or Environmental Impact Statements (EIS),[xii] those steps in the process of mine development occur far too late for many investors who purchase interests earlier in the exploration phase. AMD can persist in perpetuity, and in many cases will represent a major cost to the company long after mining concludes – sometimes the projected horizon is in the thousands of years.[xiii]

Initial exploratory drilling can yield tremendous insight into AMD risks – long before an EIS is written – and this information could prove valuable to investors. The SEC should require disclosure of the potential for AMD and the probability that a facility will need water treatment in perpetuity.

Baseline surface and groundwater testing results should also be disclosed as early in the process as is possible. Indeed, without these tests, the mining registrant demonstrates a disingenuous interest in environmental protection. Disclosure of baseline tests and exploratory drilling results are the best way to inform investors, not only of potential mineral reserves, but also potential AMD risks.

4) Additional Environmental and Social Risks

The SEC should consider a system of broad disclosure regarding these and other key environmental and social risks. While some of this information may be found within a PEA, the SEC should consider additional disclosure requirements that would isolate environmental and social risks into a separate document for easy public and investor digestion. Where possible, the SEC should take precautionary steps to require that all information known by registrants regarding these risks be accessible to investors as soon as practicable. These risks should include, but not be limited to:

- Local, regional and state government resolutions for or against a mining project
- Risk of AMD and heavy metals discharge as testified by a qualified person
- Risk of tailings dam failure per the Mt. Polley Expert Panel recommendations[xiv]
- Risk of fugitive dust issues as testified by a qualified person
- Risk of losing access to water resources
- Risk of losing access to energy resources
- Risks from litigation or permit challenges, including finalized or proposed regulation

Conclusion

Much of what investors need to know about a mining project has little to do with the value of the minerals sought. Instead, most of the major liabilities stem from risks associated with a registrant's SLTO and costs for long-term water treatment, bonding, and reclamation. We therefore respectfully urge the SEC to adopt a final rule that reflects a requirement for registrants to disclose the actual costs and risks of their mining projects, especially those "externalized" costs that communities and taxpayers often absorb on their behalf.

We appreciate the opportunity to comment on these proposed disclosure requirements.

Sincerely,

Earthworks
Progressive Leadership Alliance of Nevada
Save Our Sky Blue Waters
MiningWatch Canada
The Lands Council
Great Basin Resource Watch
Energy and Conservation Law
E-Tech International
Friends of the Kalmiopsis
Interfaith Center on Corporate Responsibility
Multicultural Alliance for a Safe Environment
Voyageurs National Park Association
Greater Yellowstone Coalition
Friends of the Boundary Waters Wilderness
Environment Caucus, Minnesota Democratic-Farmer-Labor Party
Helen Jaccard
WaterLegacy
Izaak Walton League of America- Minnesota Division
High Country Conservation Advocates
Friends of the Cloquet Valley State Forest
Oblate International Pastoral Investment Trust
New Mexico Environmental Law Center
Information Network for Responsible Mining

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[i] Find the report here: http://www.ey.com/gl/en/industries/mining---metals/business-risks-in-mining-and-metals
[ii] See Earthblog: Mining Company Misbehavior Among the Largest Investment Risks
[iii] Please see below our comment to Request for Comment 109 and 110. The SLTO disclosure belongs as proposed Item 601(b)(96)(iv)(B)(19) of Regulation S-K
[iv] See Earthblog: Brazil Mine Spill: Enough is Enough
[v] See Conservation community letter to the Environmental Protection Agency related to the Mount Polley disaster
[vi] Page 156 of the proposed rule
[vii] See page 160 of the proposed rule, the question text is excerpted.

[viii] When the Office of Surface Mining Reclamation and Enforcement (OSMRE) finalized its self-bonding regulations for surface coal mining in 1983, it made clear that "[t]he purpose of establishing a self-bond program is to recognize that there are companies that are financially sound enough that the probability of bankruptcy is small." 48 Fed. Reg. 36,418 at 36,421 (August 10, 1983). Unfortunately, recent experience has conclusively established that government regulators are not capable of accurately determining, in advance, which companies are financially sound enough to be allowed to self-bond. Of the total of $3.86 billion in existing SMCRA self-bonds, over $2.4 billion are held by companies currently in bankruptcy. 81 Fed. Reg. 31,880 (May 20, 2016). OSMRE is currently reviewing their SMCRA self-bonding rules and the Senate and House have each introduced legislation clarifying they need not consider self-bonding instruments.

[ix] See Earthworks' Financial Assurance and Superfund

[x] See Kuipers, J. and Maest, A. Comparison of Predicted and Actual Water Quality at Hardrock Mines The reliability of predictions in Environmental Impact Statements (2006)

[xi] See generally 43 CFR § 3809 et seq.

[xii] Permit applicants prepare Environmental Impact Statements in accordance with the National Environmental Policy Act (NEPA) 42 U.S.C. 4321 et seq.

[xiii] See Sumi, L. and Gestring, B. Polluting The Future: How Mining Companies Are Contaminating Our Nation's Waters In Perpetuity (May 2013)

[xiv] See Chambers, David M. Ph. D. P. Geop. Post-Mount Polley: Tailings Dam Safety in British (March 2016)