

**Analysis of the City and Borough of Juneau
Mining Ordinance**

**CBJ 49.65.110-195;
CBJ 49.15.320; and 49.15.330**

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Municipal Attorney**

Prepared by

**Bob Loeffler
Jade North, LLC**



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I. Introduction and Summary

A. Introduction

The City and Borough of Juneau (CBJ) requested an analysis “of the intersection and relationship between the CBJ mining code” and the mining laws under both state and federal statute. Specifically, this report analyzes CBJ Code at Chapter 49.65 Article I. Exploration and Mining, CBJ 49.65.110 – 195, which references CBJ 49.15.320 Allowable Use Permits and 49.15.330 Conditional Use Permits.

Two chapters follow this introduction and summary. Chapter II describes typical state and federal mining authorizations used to regulate hard-rock mines. It also describes how those authorizations may interact with the CBJ mining ordinance. Chapter III goes about the task in the reverse fashion: it analyzes the standards of the CBJ mining ordinance and describes any overlap or duplication between the mining ordinance and federal or state programs.

The meaning of the word “overlap,” as used in this report is important. It is used for a different purpose than the word “duplicate.” If the CBJ ordinance addresses issues that are addressed by state or federal permitting, they overlap. But the two governments could address different parts of the subject. For example, both the CBJ and state/federal law address mine reclamation. The state usually does not address using vegetation to visually screen a site from neighboring properties. If a CBJ condition on a mining permit to addresses visual screening, actions under the CBJ ordinance could complement state regulation. However, if the two governments have the same standard for requiring stable slopes, then the two governments are likely to “duplicate” each other; that is, each having separate standards to achieve the same result.

Therefore, “overlap” means that the CBJ ordinance addresses a similar subject to state/federal regulation. Because much of the CBJ ordinance is general, one cannot tell until a specific CBJ permit condition is written whether the overlap conflicts with, complements, or duplicates state/federal regulation. However, when the CBJ ordinance “duplicates” or “mirrors” state or federal regulation, then the two are likely to be essentially the same – or be intending to accomplish the same result.

This report also contains five appendices. Chapter III analyzes four important sections of the CBJ Mining Ordinance. Appendix A lists all sections of the ordinance, along with a short conclusion on the potential for overlap or duplication. Appendix B describes some legal limitations with respect to local ordinances which overlap or duplicate state and federal law. Appendix C and D provide review comments and responses made on the draft of this report. Appendix E provides land ownership maps for the City and Borough.

Agency Acronyms used in this report. This report uses acronyms to describe the different agencies involved in mine regulation.

- CBJ – City and Borough of Juneau
- DEC – Alaska Department of Environmental Conservation
- DF&G – Alaska Department of Fish and Game
- DNR – Alaska Department of Natural Resources
- EPA – U.S. Environmental Protection Agency
- BLM – U.S. Bureau of Land Management

- USFS – U.S. Forest Service
- COE – U.S. Army Corps of Engineers

Caveat. This report takes no position on the adequacies of federal or state regulation, or on the costs and benefits of the CBJ Mining Ordinance.

B. Summary of Conclusions

For purposes of understanding the relationship between the CBJ Mining Ordinance and state/federal mining regulation, it is useful to divide federal/state/local regulation into three types of authorities:

- Criteria-based federal/state programs that apply to all landowners, such as the Clean Water Act and Clean Air Act;
- Local land-use regulation, such as noise ordinances, or requirements to mitigate traffic impacts; and
- Landowner authorities. The landowner has far-reaching authority to regulate activities on the land they manage. DNR, USFS, and BLM all use their authorities as land manager to regulate mining. If CBJ owns the mineral rights or land estate, as it does with the AJ deposit, then it too has extensive authority and ability to regulate mining on its land.

Criteria-based Federal/State Programs (Clean Water Act, Clean Air Act, etc.).

The state and federal governments administer certain environmental protection programs for a subject of state or national interest: clean air, clean water, preservation of wetlands, etc. These apply to all landowners. With respect to mining, the most important programs of this type are:

- Clean Water Act (federal but delegated to Alaska DEC)
- Clean Air Act (federal but delegated to Alaska DEC)
- Dam Safety program (state, administered by Alaska DNR)
- Reclamation (state, administered by Alaska DNR, USFS, or BLM)
- Wetlands permit (federal, administered by the U.S. COE)

For each of these programs, the federal or state government is the lead but a local municipality may, in theory, enact requirements that are more stringent but not less stringent than the federal/state requirements. In practice, these programs, are complex and difficult to administer: the laws are complex, there are frequently voluminous regulations, many guidance documents, etc. The programs take personnel and institutions with specialized expertise. While the issues may be understandable by CBJ and the public, devising a regulatory scheme that functions with the complex state/federal program is difficult and could encounter potential legal difficulties. The complexities are much greater for DEC point-source air and water discharge permits authorized by the Clean Water Act and Clean Air Act. Local regulations that interact more directly with reclamation or wetlands requirements are likely to be much easier. For these reasons, the municipalities usually defer to the lead state/federal agency for these programs. A review of some potential issues involving the local v. state and federal permit programs is provided in Appendix B.

Municipalities do have rules on subjects which complement the federal/state program. Examples include ordinances to protect water quality such as building setbacks from waterbodies,

watershed protection areas, and stormwater flow restrictions. As another example, municipalities may regulate wetland impacts for certain types of wetlands, or have locally inspired reclamation requirements that are in addition to state reclamation requirements. Therefore, while there is state/federal leadership for these programs, municipal rules are neither prohibited nor necessarily duplicative; municipal rules may address different portions of the issues than the state/federal programs.

The CBJ Mining Ordinance addresses all of these programs, except dam safety, and there is potential for overlap between the CBJ ordinance and state/federal programs. In some cases, the potential overlap is quite general: “Air and water quality [must] be maintained in accordance with federal, state and City and Borough laws, rules and regulations [CBJ 45.65.135(a)(2)];” or “control of water runoff [§135(b)(7)].” It is possible to administer the CBJ ordinance to respect the federal/state lead and focus on Juneau-specific mine effects that complement state federal regulation, or the CBJ could duplicate or conflict with the federal/state programs. That is, the extent of overlap depends on how the ordinance is administered. In a few cases, the ordinance is quite specific, and in some of those specific cases the CBJ ordinance duplicates state/federal requirements. For example, the CBJ reclamation standards requires an operator to regrade steep slopes to “create a stable slope [§135(b)(2)]” which duplicates the state reclamation require to leave the site in “a stable condition [AS 27.19.020].”

Also, these programs apply to all landowners: federal, state, municipal, and private (including Native Corporation land and Native Allotments). They are also criteria-based programs: operations which meet the regulatory criteria are awarded the permit. While the decisions are criteria-based, all regulatory schemes are implemented with some agency discretion.

Local land-use regulation

In contrast to the federal and national programs, land-use regulation is generally administered by a local government, and addresses issues such as traffic, noise, lights, zoning, etc. These impacts are local, and generally the province of local government. In many areas mining areas within Alaska, there is no local government. In those cases, the federal or state landowner may address these local issues under their landowner authority (see below).

The CBJ Mining Ordinance includes provisions focused on typical local government concerns. Examples include requirements to mitigate such impacts as traffic overloading, noise, dust, unsightly visual aspects, etc. In some locations, the state has agreed to regulate some of these issues under their landowner authorities on public land, but they are stepping in when there is no local regulation. For these areas, the local government is an appropriate regulator, and could be the lead if there were overlap with state or federal regulation. One particular area included in the CBJ Mining Ordinance is the requirement for socioeconomic mitigation, including the requirement to mitigate fiscal effects to city and borough government. State and federal agencies generally do not have authority to directly mitigate socioeconomic effects on local communities, and this is typically an appropriate role for local government.

Local land-use regulation applies to Borough and private landowners, and to federal and state land to the extent allowable. Frequently, the stipulations applied to a permit are criteria-based: an operation must meet the criteria. For example, if an operation meets the noise-levels allowed by Borough code, then the activity can be permitted. Some local ordinances are balancing – the

government must balance adverse impacts to neighboring properties against the property rights of the mineral property owner. The balancing-type rules usually provide a greater range of agency discretion than do the criteria-based rules.

Landowner Authorities

Landowner authorities are not specifically included in the CBJ Mining Ordinance. Nevertheless, they are frequently an important part of mining regulation. Landowner authorities are applied by the landowner (or land manager) only to activities on their land. In Alaska, the landowner is frequently a government: the state (DNR), the federal government (the USFS and BLM), or the City and Borough of Juneau (AJ Mine).

Landowners have broad authority to prohibit or condition activities on their own land. A landowner may regulate beyond federal or state, or local requirements. For example, it may be legally permissible to cut-down trees, fill a wetland, or pave a portion of your property, but if you own the land, you have the right to decide not to allow those activities on your land, or to avoid leasing it to someone who will.

With respect to mining, state and federal landowner authorities are usually expressed in a Plan of Operation approval, which applies only to state or federal land, respectively. These authorities may also be expressed through terms in a mining lease, surface lease, or similar agreement.

The landowner usually must balance its wishes to develop the land, earn royalty, or its responsibility to the mineral owner against its wishes to protect resources on the land. For example, a mine's desire to keep the public off a mine road for public safety might be balanced against the public's right to access state land. There is not necessarily a specific criterion that will resolve the issue, so it is a matter of the public landowner, for example DNR, balancing the two values with help from the public. The broader mandate also typically creates the opportunity for greater discretion for the regulating agency and the public.

A Note about Juneau and the AJ Mine. Because CBJ landowner approval would only apply to CBJ-owned land, authority based on CBJ's ownership is not specifically included in the CBJ Mining Ordinance. However, as CBJ owns the mineral and land estate of the AJ Mine, CBJ can implement essentially anything in the Mining Ordinance through its landowner authorities. Powers and authorities not given within the ordinance can be applied to the AJ Mine, because CBJ owns the land. CBJ can stipulate specific activities at the site through a Plan of Operation approval, which gives CBJ approval for activities on its own land, through a mining lease, or through some similar method. The stipulation or agreement can be more site-specific and detailed than can occur with an ordinance which must apply to many situations. With respect to the AJ Mine, CBJ has extremely broad powers to approve, deny, or condition a mining operation, and this authority is independent of the Mining Ordinance.

II. State and Federal Regulation of Mining

This section of the report lists the authorizations that would likely be needed for a large hard-rock mine subject to CBJ 49.65. It discusses the typical interaction between these permits and municipal regulation. It is divided into four sections, “major authorizations,” “second-level” authorizations, “other” authorizations, and a short section explaining the analysis under the National Environmental Policy Act which frequently come to the public as an Environmental Impact Statement (EIS).

A. Major Authorizations

“Major” authorizations, as used in this report, are the authorizations that require significant background studies and expense before issuance, are most influenced by agency discretion and public comment, have the most potential for controversy, and have most influence on the operation of a mine. If an EIS is required, “major” authorizations are frequently applied for, reviewed, and processed concurrent with the EIS. An example of a “major” authorization is the authorization for the mine’s Plan of Operation, or the DEC Water Discharge Permit.

Landowner Approval: Plan of Operations Approvals. The Plan of Operations approval is an authorization issued by the landowner. While public land managers have regulations concerning a Plan of Operation approval, the authority for the authorization comes from the fact that the manager owns the land. It is a broad, far-reaching authority that addresses the general operation of the mine on public land. The Plan of Operations approval balances the applicant’s right to extract the minerals with the effect on public resources. For example, when an applicant owns the mining claim, the applicant has property rights to the minerals. But the land manager – generally DNR, USFS, or BLM – owns the land surface. The landowner has broad authority under the plan of operations to stipulate changes in the design and operation of the mine to protect public resources. For state or federal land management agencies, this approval is named a Plan of Operations approval and balances the agency’s responsibility to protect public resources with the rights of the private mineral owner – typically the owner of the mining claim. For private landowners, criteria of approval may become a part of a mining lease, an owner may structure a separate plan of operations approval, or use some other method. For land owned by CBJ, DNR would not issue a plan of operations approval; the authorization would be issued by CBJ.

Effect on CBJ Mining Ordinance. The CBJ Mining Ordinance does not address landowner approvals such as the DNR (or USFS or BLM) Plan of Operations approval because these authorities are not based on an area-wide statute, but on the landowner owning, or managing, the land. CBJ would be the organization with this authority for the AJ Mine site, which is owned by CBJ.

Reclamation Plan. The Reclamation Plan provides DNR authority to review mining operations to ensure that they comply with state’s law, AS 27.19.20: “A mining operation shall be conducted in a manner that prevents unnecessary and undue degradation of land and water resources and the mining operation shall be reclaimed as contemporaneously as practical with the mining operation to leave the site in a stable condition.” The requirement to preventing “unnecessary and undue degradation of land and water resources” is a broad mandate which

gives DNR the ability to condition a mining operation to protect the land and water, and return the land to a post-mining land use. This DNR authorization applies to all landowners in Alaska: public and private. Federal reclamation requirements are similar, but apply only to federal land.

Effect on CBJ Mining Ordinance¹. State law is clear that CBJ may establish reclamation requirements, in addition to those of DNR, for mining within its boundaries.

AS 27.19.010: “(d) This chapter does not alter or diminish the authority of another state agency, a state corporation, the University of Alaska, or a municipality under its laws and regulations. (e) The owner of private land may establish requirements for reclamation in excess of those established by this chapter.” If CBJ establishes reclamation plan requirements in addition to those required by DNR, CBJ’s requirements should be coordinated with DNR to avoid conflicting or duplicate requirements. Examples of a municipally required addition to a state-approved reclamation plan would be the requirement for vegetative screening of the site (which is addressed in the CBJ ordinance).

DEC Solid Waste Permit. A Solid Waste Permit is required for the tailings facility whether tailings are dry stacked or disposed in a tailings lake. DEC has the authority under the Solid Waste Permit to require financial assurance from the company. This requirement overlaps DNR’s authority to require a reclamation bond under its reclamation authorities, and its authorities under its Dam Safety Program. DNR and DEC jointly determine the bond and DNR typically administers the bond.

DEC also has the authority but not the mandate to require a solid waste permit for the placement of waste rock. DEC typically only requires a solid waste permit for waste rock if the rock has the potential to generate acid rock drainage or significant metals leaching. If DEC determines that the waste rock will not likely cause these affects, DEC may determine that other mine authorizations provide adequate oversight for the waste rock placement. For the True North Mine, DEC declined to require a solid waste permit for these reasons. For other mines, they have required it.

DEC also requires a solid waste permit for the disposal of inert wastes from construction, ash from incineration, etc. This authorization is usually a separate permit from the tailings or waste rock permits and is typically much less controversial fewer and less important compliance issues.

Effect on CBJ Mining Ordinance. The agency discussion leading up to a tailings or waste rock Solid Waste Permits is detailed and technical. Because of the complex nature of the data, agency discussion, and the permit itself, municipalities usually defer to DEC. To the extent that the CBJ ordinance targets disposal of solid waste beyond the boundaries of the mine – in a CBJ landfill, or as fill elsewhere in the municipality, for example – CBJ regulation of solid waste is expected.

Reclamation Bond. What is commonly called a “Reclamation Bond” has different titles in different organizations. It is titled “financial assurance” in state statutes and “financial warranty” in the CBJ Mining Ordinance. The Reclamation Bond is not a separate authorization. It is required by DNR (or the federal land manager) under its Reclamation Plan and Dam Safety

¹ This analysis focuses on state law, because it applies to private and municipal land. USFS and BLM regulations, which applies only to federal land, are similar.

authorities, and by DEC under the authority of the Solid Waste Permit. DNR and DEC jointly calculate the financial assurance necessary to reclaim the site and to complete post-mining water quality treatment, water quality monitoring, and site maintenance. According to DNR statute, the agency “shall require an individual financial assurance in an amount not to exceed an amount reasonably necessary to ensure the faithful performance of the requirements of the approved reclamation plan.” DEC and federal requirements are generally similar. DNR typically holds the bond for both agencies, and sometimes for the federal government. The size of the bond is usually driven by any required water quality treatment. USFS regulations for federal land are similar to DNR’s.

Effect on CBJ Mining Ordinance. To the extent that DNR (or the federal land manager) and DEC require financial assurance for activities at a mine, CBJ would not likely require duplicate financial assurance for the same activity. The bond provides financial assurance that the operator will fully complete the tasks required of a permit. The agency with authority over the permit therefore has authority over that portion of the bond. If there were activities at a mine which were required by CBJ in addition to those anticipated in the agency permits, CBJ could require a bond for those CBJ-required activities, and CBJ would presumably have authority over the that portion of the bond.

DEC Water Discharge Permit. DEC authorizes effluent discharges under its Alaska Pollutant Discharge Elimination System Permit (commonly called APDES Permit). Alaska has primacy for surface discharge permitting under delegated authority from the EPA. All discharge must comply with Alaska Water Quality Standards, established by DEC with review by EPA. Not all mines have a discharge. In Alaska, the Illinois Creek, Fort Knox², and Nixon Fork Gold Mines were zero-discharge and did not require an APDES permit.

Effect on CBJ Mining Ordinance. APDES permits are complex and are the focus of long, involved discussion, baseline data, review, and analysis during mine permitting. It is theoretically possible but in practice it is difficult for a municipality to establish requirements that duplicate or are in addition to the requirements of a DEC waste discharge permit. However, municipalities frequently establish land-use requirements that are intended to decrease water pollution. Common examples include building setbacks for streams, drainage requirements, or requirements for vegetation or vegetated buffers. These requirements usually target stormwater, rather than a point discharge. In addition, municipalities commonly establish requirements for industrial discharge into a municipal wastewater system. For more information concerning limitations interactions between local and state law, see Appendix B.

DEC Air Quality Permit(s). The construction, modification, and operation of mining facilities that potentially produce air contaminant emissions require a DEC Air Quality Control Permit to Construct, and a separate Air Quality Control Permit to Operate. DEC administers the air program under authority of the Clean Air Act, with delegation and oversight from EPA. The determination to require a permit is based on the source location, total emissions, and changes in emissions for sources specified in regulation. Generally, air quality must be maintained at the lowest practical concentrations of contaminants specified in the Ambient Air Quality Standards of 18 AAC 50.020(a). Many air quality emissions are driven by a mine’s need to generate electricity. A mine within the CBJ’s urban district would presumably be connected to the CBJ

² Fort Knox was originally permitted without a discharge. It currently has a discharge permit.

power grid and not generate its own electricity. In that case, the permit would likely focus mostly on fugitive dust emissions.

Effect on CBJ Mining Ordinance. DEC Air Quality permits are complex and frequently require detailed and technical modelling. It would be impractical or inappropriate, but not necessarily impossible, for CBJ to add stipulations on a subject covered by the DEC air quality permit. Nevertheless, municipalities frequently have ordinances that affect air quality such as requiring trucks be covered. For more information, see Appendix B.

U.S. Army Corps of Engineers Wetlands Permit. The U.S. Army Corps of Engineers (COE) permit under Section 404 of the Clean Water Act authorizes discharge of dredged or fill material into waters of the United States, including wetlands. It is commonly called a Wetlands Permit.

Activities that may require a Wetlands Permit include road or bridge construction, construction of dams for tailings or water storage, stream diversion structures, and fill on which to build facilities. The COE is responsible for determining consistency of the proposed action with Clean Water Act, Section 404 guidelines.

The COE provides detailed methodology for identification of wetlands under federal jurisdiction. The Alaska Department of Environmental Conservation must certify that the COE permit meets state water quality standards. This certification is called a DEC 401 certification (after that section of the Clean Water Act).

The COE also requires expensive mitigation for wetlands during mine development, even if the reclamation plan will restore the wetlands after mining. Mitigation is proportional to the wetland disturbance area, and can be expensive.

Effect on CBJ Mining Ordinance. Municipalities often have a wetlands plan which functionally substitutes for a COE permit in some situations. For example, the COE may issue a general permit allowing the municipality to issue permits for certain wetlands which therefore qualify for a COE general permit. For wetlands outside that subset, the COE would retain permit authority. In the situation where the COE is issuing a permit and requiring mitigation, municipalities could, but generally do not retain a permit requirement nor issue more stringent stipulations for the same wetlands impacts. Many municipalities have their own wetlands plan which may complement the US Army COE authority.

B. Second-Level Authorizations.

What are termed “Second-level” authorizations in this report are more technically oriented, and most of them do not require public notice. While they may require some technical information, the information is typically site-specific for that authorization and often may have been gathered for one of the major permits described earlier. These authorizations can become controversial or problematic but only in situations where some specific issue is involved — for example, if an endangered species is found within the area of the mine site.

An example of this “second level” authorization is the DEC stormwater pollution prevention plan. The permit is technical and has not generally been the focus of mine controversy. While available to the public, DEC statute does not require public notice for this permit.

DNR Dam Safety Permit. DNR’s Division of Mining, Land and Water must issue a “Certificate of Approval to Construct” and a separate “Certificate of Approval to Operate” a dam. These authorizations are required for dams that are greater than 10 feet higher and hold back more 50 acre-feet of water; any dam more than 20 feet high; or any dam that the department determines may pose a threat to lives or property. The certificates are typically required for tailings facilities or a water supply dam. These certifications involve a detailed engineering review of the dam’s design an operation.

Effect on CBJ Mining Ordinance. Dam safety regulation is a complex engineering determination generally requiring specialized expertise. Municipalities do not generally regulate dams, and the subject is not addressed in the CBJ Mining Ordinance.

DNR Water Right or Temporary Water Use Authorization. A water right or temporary water use authorization from DNR is required before an operation may withdraw a significant amount of water from a lake, a stream, or groundwater. DNR conditions these authorizations to protect other water right holders, other water users, or the environment — typically fish habitat. A water right is a long-term or permanent property right to the water.³ A temporary water use authorization is for a use of less than 5 years, but a new permit may be issued after the first one expires. Typically, a mine will require temporary water use authorizations for exploration and some construction needs such as road building, and water rights for operating the mine.

Effect on CBJ Mining Ordinance. A water right is not a typical authorization in that it is not regulatory authorization; rather, it grants a property right to the water. Only the owner of a resource can grant a property right to the resource. In this case, the owner is the people of Alaska and property rights are granted by the people’s manager: DNR. As the citizens of Juneau do not own the water, they cannot grant a property right. Not surprisingly, the CBJ Mining Ordinance does not address water rights.

DEC Stormwater Plan. The Clean Water Act requires control of stormwater. A mine (or exploration site) is required to have a stormwater plan to control the discharge of stormwater. Stormwater includes runoff from roads, and other locations within the mine that are not a part of the active mine area and do not have mine leachate or other chemicals. Water from adits, tailings piles, mine areas, etc. is classified as process water and may only be discharged under the APDES discharge program –a “major” permit and described earlier. A stormwater plan has less stringent requirements than does an APDES permit. DEC administers the program under the supervision of the federal EPA.

Effect on CBJ Mining Ordinance. While DEC manages the state’s stormwater system, CBJ has its own stormwater requirements, and municipalities often make use of local ordinances in addition to the state’s requirements. Examples include stream setbacks, vegetation requirements, or stormwater flow limits. A local government may be more restrictive but not less restrictive than the state.

³ DNR may revoke the property right after 5 years of non-use.

DF&G Fish Habitat and Fish Passage Permits. The Alaska Department of Fish and Game issues fish habitat permits under AS 16.05.871 for activities within the ordinary high water mark of a catalogued anadromous fish stream, and passage permits under AS 16.05.841 for work within the ordinary high water mark of fish stream that is *not* listed in the agency's Anadromous Fish Stream Catalog. For Alaska's existing large mines, these have not been controversial permits.

Effect on CBJ Mining Ordinance. Municipalities generally leave the management of fish habit and fish passage at mines to DF&G; however, municipalities often require land-use practices such as building setbacks, riparian buffers, or zoning that limits intensity of development in areas that contribute to important fish habitat.

U.S. Army Corps or DNR Cultural Resources Authorizations. The state and federal government have overlapping jurisdiction over protection of cultural resources. For activities authorized by the state, this work is the responsibility of the State Historic Preservation Office (SHPO) within DNR's Division of Parks and Outdoor Recreation. For federally authorized activities (i.e., activities that require a federal Wetland Permit), the lead agency is the COE. The COE will coordinate evaluation of cultural resources with SHPO.

The state mitigation required under the Cultural Resources authorizations will most likely be applied to the DNR Plan of Operations. Federal mitigation would be likely applied to the Corps of Engineers Wetlands Permit or the USFS Plan of Operations approval.

Effect on CBJ Mining Ordinance. Municipalities generally do not duplicate these processes. However, municipalities commonly have historic preservation components to their land-use plans and may propose their own sites or requirements that complement these programs.

NMFS Essential Fish Habitat. The National Marine Fisheries Service (NMFS), under authority of the federal Magnuson-Stevens Act, may require that federal agencies condition their permits to protect essential fish habitat. The Act requires cooperation among the National Marine Fisheries Service and other federal agencies to protect, conserve, and enhance "essential fish habitat." Congress defined essential fish habitat for federally managed fish species as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." NMFS does the essential fish habitat consultation as a part of a federal permit evaluation. Thus, it is done concurrently with the major federal permits, and any recommendations become part of these permits (eg. A COE wetland permit).

The NMFS requirement is a substantial overlap of ADF&G and other state and federal authorities.

Effect on CBJ Mining Ordinance. The CBJ mining ordinance does not address essential fish habitat, as administered by NMFS.

USF&WS Bald Eagle Protection Act, Migratory Bird Treaty, and Threatened and Endangered Species Act. The USF&WS, under authority of the federal Bald Eagle Protection Act, will require identification of eagle nest, roost and perch trees, and their protection.

Under authority of various migratory bird treaties, the USF&WS may advise federal agencies to condition their permits to ensure that a project is consistent with various treaties concerning migratory birds. The most common stipulation is to prohibit felling trees during certain times of the year.

Finally, the USF&WS has authority over certain upland threatened and endangered species. NMFS has similar authority over marine threatened and endangered species,

Effect on CBJ Mining Ordinance. CBJ is in the process of amending the code to eliminate the eagle-protection provisions. If this occurs, there is no overlap between the code and the Bald Eagle Protection Act. No portion of the CBJ ordinance references the U.S. Migratory Bird treaty or the Threatened and Endangered Species Act.

C. Other Typical Authorizations

The next pages provide tables of other authorizations which are frequently required of large mine operations. The right-hand column of the tables indicates whether there is potential overlap with the CBJ large mine ordinance.

Other Authorizations

These are primarily technical permits, not requiring public notice.

Agency	Permit Title	Description	CBJ?
DEC	401 Certification of Corps 404 Permit	DEC certifies that Corps Wetland permit meets state water quality standards. (Only required if Corps Wetlands permit is needed).	Yes
DEC	Approval to construct and Operate a Water Supply System	DEC must approve plans and specifications for a public water supply system	No
DEC	Food Sanitation Permit	Necessary to operate camp kitchen	No
DEC	Industrial Wastewater Discharge not covered by NPDES	Permit to discharge water into water of the State (i.e., not covered by NPDES). Only required for point source discharges not subject to NPDES permit.	Yes
DEC	Plan review for Domestic Sewage System	Required for non-NPDES domestic wastewater (i.e., septic systems).	Yes
DEC	Plan review for non-domestic Wastewater Treatment System	Plan review of discharge from the man-camp.	Yes
DEC	Spill Contingency Plan	DEC requires a spill contingency plan for storage of more than 10,000 barrels of fuel (440,00 gallons).	No
DNR or USFS	Millsite Lease	Confirms surface rights to the applicant	No
DNR or USFS	Mining Lese	Consolidates mining claims into a single authorization.	No
DNR	Burn Permit	Required from Division of Forestry for opening burning between May and September (may be required for incinerator).	No
EPA	Hazardous Waste Generator and Transporter	Management of Hazardous Waste	Yes

Agency	Permit Title	Description	CBJ?
EPA	SPCC Plan (Spill Prevention Control and Countermeasure)	EPA requires a SPCC plan to be developed by owners or operators of any facility storing a total capacity of 1,320 gallons of fuel in above-ground storage tanks. If there is a spill contingency plan is required (see above) a SPCC plan is not also needed.	No
EPA	UIC (Underground Injection Control)	Regulates Class I and Class V injection wells in Alaska for injection of non-hazardous and hazardous waste.	No
Landowner: DNR/USFS/BLM/CBJ	Material Sale	Sale of Sand and Gravel	No
Landowner: DNR/USFS/BLM/CBJ	Right-of-way	Required for a road, pipeline or powerline on public land.	No
State or Local Fire Marshall Review	Fire Marshall Review	Reviews building plans for compliance with fire code.	No
US Army COE	Section 10	Dredge, fill and Structures in or over Navigable Waters	No
US BATF	License to Transport Explosives	License to transport explosives.	No
US Coast Guard	USCG Permit	Construction Permit for a Bridge Across Navigable Waters	No
US DOT	Hazardous Materials Registration Number	Transportation of Hazardous Materials	No
US FAA	Notice of Controlled Firing Area for Blasting	File notice with FAA of the proposed use and location of explosives	No
US FAA	Notice of Proposed Landing Area	Required to notify FAA of proposed landing strip(s)	No
US FCC	Radio License	FCC Radio License.	No
US MSHA	MSHA Mine ID Number	MSHA must review and approve specific programs for education, training and re-training of all employees.	No

D. The National Environmental Policy Act and an Environmental Impact Statement

An EIS or an Environmental Assessment is a document required by the National Environmental Policy Act for a major federal action. The public may be used to seeing an EIS accompany the government's permit evaluation of a mine. However, an EIS (or its lesser form, an Environmental Assessment) is not a permit, or even an authorization of any kind. By itself, it does not authorize a mine to do anything. Rather, an EIS is a full-disclosure document. The EIS analyses the environmental impacts of a proposal and alternatives that could decrease the adverse impacts. The permitting agencies, – DNR, DEC, USFS, COE, and others – use the information in the EIS to write their permits. However, the EIS is not, itself, an authorization to do anything. That is, why this and the next section of the report do not analyze any overlap between the CBJ Mining Ordinance and an EIS.

The typical federal action that triggers NEPA (and therefore an EIS) for a mine is that the mine occurs on federal land or that it needs a COE Wetlands Permit. Most mines in Alaska have required an EIS. However, the Illinois Creek Gold Mine was on state land and did not impact wetlands; it did not require an EIS or Environmental Assessment.

III. The CBJ Mine Ordinance

The CBJ Mining Ordinance, CBJ 49.65.110-195, includes numerous procedural and substantive requirements. This report does not address the procedures within the CBJ mining ordinance. It does address the standards that would be applied to large mines in a CBJ permit. The ordinance has two separate regulatory schemes, depending on whether a mine is in the Juneau's Urban District or in its Rural District.

Within the Juneau's Urban District, the standards for approval/denial or stipulation for operations at a mine are included in three sections:

- §135. Standard for issuance of permits and conduct of operations.
- §140. Financial Warranty. This section provides the method and categories for which CBJ may require financial warranty, what is frequently called a “reclamation bond.”
- CBJ 49.15.330. Conditional Use Permit. This section is generally for more typical zoning issues but provides general authority for mine regulation.

Outside the Urban District, mines are evaluated according to CBJ 49.15.320, Allowable Use Permit. In addition, the applicability section of the Mining Ordinance CBJ 49.65.115(c) adds some issues to the evaluation which are not otherwise a part of the Allowable Use Permit discussion.

A. CBJ 49.65.135. Standards for issuance of permits and conduct of operations. This section provides the standards by which CBJ decides to issue permits for large mines.

(a) This subsection lists seven general standards.

(a)(1) *“The mining operations be conducted in accordance with this article, section 49.15.330, and any other applicable provisions of the City and Borough Code in such a way as to mitigate adverse environmental, health, safety and general welfare impacts;”*

Analysis: This paragraph references other sections in the borough code.

(a)(2) *“Air and water quality be maintained in accordance with federal, state and City and Borough laws, rules and regulations;”*

Analysis: Alaska DEC administers extensive air and water quality protection with federally delegated programs under the Clean Air Act and Clean Water Act. For these programs, municipalities have the legal right to be more restrictive than the state requirements, but have practical difficulties applying stipulations to the complex state permits. Rather, they usually address the issues in zoning or other ordinances that may complement the federal program. CBJ has not adopted point-source air or water quality rules or regulations. Therefore, paragraph appears to indicate that CBJ is relying on federal and state standards for point-source air and water discharge.⁴ (See discussion in Appendix B.)

- Water Discharge; Point Source. DEC permits for point-source discharges are issued under the Alaska Point Source Discharge Elimination System (APDES) under delegation from the federal EPA. APDES permits are complex and preceded by months of discussion between the agency and applicant, involving baseline data, appropriate methods of discharge, interpretation of standards, etc. A municipality’s role in water discharge discussion is usually focused on zoning issues such as watershed protection or similar land-use concerns. While the environmental issues can be understood by CBJ staff and the public, Municipalities usually lack the scientific expertise and institutional knowledge to issue permits that overlap DEC permits issued under the Alaska Point Source Discharge Elimination System (APDES).
- Stormwater Discharge. DEC requires a Stormwater Pollution Prevention Plan (SWPPP) for mining and other ground-disturbing activities. Municipalities more frequently enact their own stormwater provisions, and CBJ has adopted stormwater requirements. Other municipal examples include: zoning watershed protection areas, building setbacks from waterways, etc.
- Air Discharge. DEC administers an air permitting program under delegation from the federal EPA. It is an often complex process frequently involving months of modelling and discussion. As with point-source water discharge, municipalities do not usually issue permits that overlap the DEC air permit. However, municipalities more frequently focus on air quality issues not addressed by a point-source air permit. One example is requiring trucks to be covered to prevent fugitive dust.
- Summary. The State of Alaska, DEC, is lead with respect to these issues. However, the CBJ ordinance language concerning “City and Borough laws, rules and regulations” may

⁴ Note that stormwater is not a point-source discharge.

reference municipal related stormwater, zoning, or land-use codes affecting water or air quality.

(a)(3) *“Hazardous and toxic materials, sewage, and solid waste be properly contained and disposed of in accordance with applicable federal, state and City and Borough laws, rules and regulations;”*

Analysis: Sewage and solid waste are standard municipal issues. Solid waste, however, could also refer to waste rock or tailings piles which are regulated by DEC under their authority to issue a Solid Waste Permit. Like the air and water programs, municipalities may adopt standards which are more stringent than DEC’s; however, municipalities usually defer to the DEC solid waste permit, except for municipal issues not addressed by DEC. Hazardous and toxic materials are similar in that they are regulated by the federal EPA under the federal Resource Conservation and Recovery Act (RCRA).

(a)(4) *“The operator [shall] conduct all mining operations according to the standards of the City and Borough as contained in this article, section 49.15.330, the permit and any other applicable provisions of the City and Borough Code, so as to minimize to the extent reasonably practicable safety hazards and to control and mitigate adverse impacts on the public and neighboring properties, such as from traffic overloading, noise, dust, unsightly visual aspects, surface subsidence, avalanches, landslides and erosion;”*

Analysis: These concerns – traffic overloading, noise, dust, unsightly visual aspects, surface subsidence, avalanches, landslides and erosion – are typical local government concerns. Federal and state landowners may address these issues through their landowner authorities; however, in some cases they are doing so where local government is absent or lacks expertise or authority over these issues. In the previous sections, the state and federal government are the lead, municipalities usually defer to the state and federal agencies, but may include provisions on their own, typically in areas that do not overlap state/federal actions. In this case, the local government is appropriately the lead and may implement their requirements through cooperation with the state/federal agencies or on their own. In addition, some portions of the code, particularly public safety and erosion may be a part of other non-landowner authorizations, such as a reclamation plan or stormwater pollution prevention plan in which the agency is lead.

(a)(5) *“Appropriate historic sites designated as significant by the City and Borough be protected;”*

Analysis: To the extent the CBJ sites are eligible for the National Historic Register, this provision overlaps the authorities of the State Historic Preservation Officer and the U.S. Army Corps of Engineers. To the extent these are sites particular to the values of the citizens of CBJ, this provision has no state/federal overlap.

(a)(6) *“Reclamation of the affected surface be in accordance with the approved reclamation plan of the operator;”*

Analysis: This section acts as a reference to the reclamation discussion in §135(b).

(a)(7) *“With respect to a large mine permit application, the operator [may] negotiate and enter into a mitigation agreement with the City and Borough, which agreement shall establish responsibility for the mitigation of reasonably foreseeable and demonstrable adverse impacts, including direct impacts and indirect impacts. The operator shall be responsible for mitigating the direct impacts. The City and Borough shall be responsible for mitigating indirect impacts except where the costs of mitigating specific indirect impacts are found by the manager to:*

(A) Exceed the amount of any City and Borough nonproprietary revenue increase attributable to the mining operation; and

(b) Require a direct and significant increase in local taxes or fees to adequately mitigate the impact.”

[Remainder of the section omitted.]

Analysis: This section addresses a mine’s socioeconomic impacts to Juneau. Socioeconomic impacts, especially mitigation of socioeconomic impacts, are an area not covered by other authorities. This area is uniquely addressed by CBJ.⁵

(b) *“Reclamation of all affected surfaces shall be completed as soon as is reasonable after affected surface areas are no long being used in exploration and mining operations. Reclamation shall include the following:”*

Analysis: Most of the specific reclamation stipulations in paragraph (b) overlap state/federal authorities. However, as noted in Section II, the state’s reclamation law expressly provides that local government may add to state reclamation requirements [AS 27.19.010(d)].

Therefore, there is explicit authority to be more stringent than DNR’s requirements on the same subject. In addition, there is a potential role for CBJ in determining that reclamation is consistent with the needs of the community, specifically in aspects of reclamation that may not be covered by state evaluation such as visual effects or eventual community use of the CBJ-owned land.

However, some of the requirements in the individual subsections explained below significantly overlap state statute. For example, the specific requirement in the opening language, above, that reclamation “shall be completed as soon as is reasonable,” mirrors state language that “a mining operation shall be reclaimed as contemporaneously as practical” [AS 27.19.020].

The analysis compares the CBJ Mining Ordinance to Alaska’s reclamation statute AS 27.19 and implementing regulations at 11 AAC 97. The analysis uses state law, because state reclamation law applies to federal, state, municipal and private land. Federal reclamation standards are generally similar but only apply to federal land.

⁵ One reviewer pointed out that the requirement for a socioeconomic report on which to base the socioeconomic mitigation agreement is unusual for Alaska and applicable only to the mining industry. To the knowledge of this author, within Alaska, only the Lake and Peninsula Borough (the Borough with jurisdiction over the Pebble Project) requires a similar report.

(b)(1) *“Cleanup and disposal of dangerous, hazardous or toxic materials;”*

Analysis: As noted in the discussion about subparagraph (a)(3), hazardous and toxic materials are regulated by the federal EPA under the federal Resource Conservation and Recovery Act (RCRA). To the extent that hazardous and toxic chemicals are taken to municipal facilities, there is specific CBJ interest not necessarily addressed by state/federal authorizations.

(b)(2) *“Regrading of steep slopes of unconsolidated material to create a stable slope;”*

Analysis: This language mirrors the state reclamation standard that the mining operation must “leave the site in a stable condition” [AS 27.19.020]. Thus, the regulation essentially duplicates state law.

(b)(3) *“Backfilling underground shafts and tunnels to the extent appropriate;”*

(b)(4) *“Adequate pillaring or other support to prevent subsidence or sloughing;”*
and

(b)(5) *“Plugging or sealing of abandoned shafts, tunnels, adits or other openings;”*

Analysis: The language of these three subsections mirror state requirements at 11 AAC 97.220: “A miner shall stabilize and properly seal the openings of all shafts, adits, tunnels, and air vents to underground mine workings after mine closure to ensure protection of the public, wildlife, and the environment.” The only difference is that (b)(4) could be read to prevent any subsidence, whereas the state standard could be read to allow for planned subsidence in a manner that protects the public, wildlife, and the environment. Thus, the section substantially duplicates state requirements.

(b)(6) *“Adequate steps to control or avoid soil erosion or wind erosion;”*

Analysis: The language of the state requirements is somewhat different. State law requires the miner to avoid “undue and unnecessary degradation of the land and water resources” [AS 27.19.020] and to “return waterborne soil erosion to pre-mining levels within one year after the reclamation is completed” [11 AAC 97.200(a)(1)]. In practice, the activities required to meet state standards would likely be similar to requirements to meet CBJ standard at §135(b)(6).

(b)(7) *“Control of water runoff;”*

Analysis: The language of (b)(7) overlaps the combination of the requirements of the required DEC Stormwater Plan (SWPPP) and the state reclamation requirements that the site be left in a “condition that can reasonably be expected to return waterborne soil erosion to pre-mining levels within one year after the reclamation is completed” [11 AAC 97.200(a)(1)]. However, municipal stormwater requirements may complement the state regulation.

(b)(8) *“Revegetation of tailings and affected surface areas with plant materials that are capable of self-regeneration without continued dependence of irrigation and equipment where appropriate;”*

Analysis: The requirement overlaps state language that the site be left in a condition that “can reasonably be expected to achieve revegetation, where feasible, within five years after the reclamation is completed, without the need for fertilization or reseeded. If rehabilitation of a mined site to this standard is not feasible because the surface materials on the mined site have low natural fertility or the site lacks a natural seed source, the department recommends that the miner fertilize and reseed or replant the site with native vegetation to protect against soil erosion; however, AS 27.19 does not require the miner to do so. Rehabilitation to allow for the reestablishment of renewable resources is not required if that reestablishment would be inconsistent with an alternate post-mining land use...” [11 AAC 97.200(a)(1)].

(b)(9) *“Rehabilitation of fisheries and wildlife habitat; and”*

Analysis: The state and federal governments require revegetation. Re-establishment of wildlife habitat, to the extent it is different than revegetation would be required by the state/federal landowner authorities on state/federal land (unless another post-mining land use is allowed). The state would not require re-establishing wildlife habitat on private land.⁶ Mitigation or rehabilitation of fisheries habitat would be obtained by the Department of Fish and Game under AS 16.05.841 and 16.05.871.

(b)(10) *“Any other conditions imposed by the commission.”*

This provides the general authority contemplated by the state reclamation law that allows municipalities to exceed state reclamation standard [noted above in AS 27.19.010(d)]. It is a catch-all standard that allows CBJ to address issues that would be otherwise missed in the ordinance.

Note: §135(c) is procedural and not analyzed in this report.

B. CBJ 49.65.140 – Financial Warranty

This section of the code sets out the requirement for a financial warranty, often referred to as “financial assurance”, or a “reclamation bond.” The federal land-managing agencies, the USFS and BLM, require financial assurance for operations on federal land, and the state requires a reclamation bond for operations on state, private, and municipal land. Therefore, there is a large overlap between the requirements of this section and state and federal mine permitting. The code recognizes the overlap by requiring CBJ to “take into consideration the amount and scope of any financial warranties which have been submitted to other agencies.” CBJ has the mechanism to coordinate its requirements with those of other agencies. However, the code also provides that “the operator may be required to post a separate financial warranty with the City and Borough if the city attorney determines that the financial warranty submitted to another agency does not create a lien or interest sufficient to protect the interests of the City and Borough.” Thus, the code provides for cooperation with the state or federal government, for independent action by CBJ, or potentially for a duplicative and conflicting bond.

Perhaps a discussion of the function of a bond is appropriate. A bond is required to ensure that the operator faithfully and fully performs tasks required by a permit. Therefore, the agency with

⁶ The federal government does not have reclamation jurisdiction over private land.

authority over the permit holds the authority over the bond.⁷ Where CBJ permit requires a mining company to complete an activity and requires a bond for that activity, CBJ would presumably retain authority over that portion of a company's bond: the decision to require, seize, or release a bond would presumably be made by CBJ. The same for the state or federal government.

(a) & (b) These subsections set out the basic requirements for a financial warranty, along with the method of cooperation discussed above. In (b)(1) through (b)(8), the code outlines examples of the obligations in a reclamation plan that would be covered by the financial warranty.

The examples of reclamation obligations in these subsections generally parallel §135(b)(1)-(10). Many of the examples are activities for which a municipal government would be the most appropriate lead such as that in (b)(3), "installation and maintenance of road or highway improvements to mitigate the impact of increased traffic or trucking..." Other examples, would list reclamation obligations that would almost certainly be included in a state or federal reclamation bond: e.g., (b)(7) "removal of buildings, structures, or equipment where appropriate;" or "(b)(6) "Installation of facilities required to prevent or reduce degradation of air or water quality or to contain or control toxic or hazardous wastes;

(c) This section sets out the form of financial security. The forms acceptable to CBJ are similar to those acceptable to the state.⁸

(d) This section sets out a property bond for a small mine permit or exploration notice. The details of CBJ code for a small mine permit and exploration notice are not analyzed under this report.⁹

(e) This subsection describes that the financial warranty provides that the funds may be used by CBJ to satisfy reclamation obligations. To the extent that the financial warranty is coordinated with state and federal agencies, and applies to that portion of a bond held by CBJ, there is no conflict with state/federal warranties. However, if the subsection is used to require that the entire reclamation obligation be useable at the discretion of CBJ, then there is a conflict with state and federal law. Thus, as noted above, this portion of the financial warranty ordinance, reinforces the opportunity for cooperation with the state or federal government, for independent action by CBJ, or potentially for duplicative and conflicting bonds.

⁷ Agencies such as DNR and DEC may cooperate on which agency holds the bond and may calculate the bond together, but the authority for determining the bond, and determining when it is seized or released does not change. CBJ could also cooperate with state or federal agencies, but again the cooperation would not have to undermine which government or agency has authority of the amount, or the release of the bond.

⁸ State law at AS 27.19.040(e)(4) also allows "a corporate guarantee that meets the financial tests set in regulation by the commissioner;" This is not listed in the CBJ code. However, the state has never drafted regulation for this type of bond, and there is no indication they intend to do so soon. Thus, a corporate guarantee is not currently legal under Alaska law; it is not used in federal law. So there is no conflict at present. Further, at AS 27.19.040(e)(5) the state allows payment to a state-managed trust fund. This is an innovative type of financial assurance that has yet to be used for an operating mine. If used, it could be accommodated under CBJ code using the coordinating mechanism discussed previously.

⁹ However, the bonding for small permits and exploration notice overlaps state requirements. In addition, it does not take account of the DNR bond pool, which is the typical bonding mechanism for these operations, and, for small operations, potentially gives greater protection than an individual bond.

(f) Requires the financial warranty to be reviewed annually. To the extent this applies to the state/federal portion of the bond, there is a potential conflict as the state and federal government review the bond amounts at permit renewal, which is typically every 3-5 years.

(g) Describes procedures to increase or decrease the bond.

C. CBJ 49.15.330. Conditional Use Permit. The conditional use ordinance allows CBJ to regulate a use “that may or may not be appropriate in a particular zoning district according to the character, intensity, or size of that or surrounding uses.” It is a general ordinance that allows CBJ to deny or condition the use to minimize adverse impacts to the public and surrounding properties. Most of the ordinance is procedural, but there are two sections with standards and conditions that could be applied to a mine.

Subsection (f) provides three general standards for approving or denying a permit. That the development will “more probably than not:

- (1) Materially endanger the public health of safety;
- (2) Substantially decrease the value of or be out of harmony with property in the neighboring area; or
- (3) Lack general conformity with the comprehensive plan, thoroughfare plan, or other officially adopted plans.”

Analysis. These are general standards that do not necessarily overlap specific state or federal statutes or regulations, but they are broad enough that they could be implemented in a ways that do.

Subsection (g) provides 18 conditions that the planning commission may use to condition a use – in this case a mine – to meet the standards of subsection (f). Of relevance to a large mine are conditions 9-14, and 16-18 (for brevity, only the titles of these paragraphs are listed below):

- (9) Landslide and avalanche areas
- (10) Habitat
- (11) Sound
- (12) Traffic mitigation
- (13) Water access
- (14) Screening
- (16) Drainage
- (17) Lighting
- (18) Other Conditions.

Analysis. It is possible to implement any general requirement in a manner that overlaps state/federal mining authorities. However, the topics are typically the subject of municipal regulation with little or no overlap, with two possible exceptions.

Paragraph (10), Habitat, provides that development may be required to minimize environmental to wetlands and intertidal areas.¹⁰ Stipulations applied under this paragraph

¹⁰ The ordinance also currently requires activities to minimize impacts within 330 feet of a bald eagle nest on private land. This requirement is being removed from the ordinance.

could overlap U.S. Army Corps of Engineers regulation of wetlands. Paragraph (5) allows the Commission to require a performance bond. For a large mine, the amount and procedures for a bond, or financial warranty would presumably be implemented according to CBJ 49.65.140, discussed previously, not under the much more general language of the Conditional Use Permit.

Paragraph (18) includes “Such other conditions as may be reasonably necessary pursuant to the standards listed in subsection (f) of this section.”

Analysis: This paragraph is a grant of general authority in that it gives the Planning Commission authority to apply whatever other stipulations are necessary to achieve the standards in subsection (f). The standards in subsection (f) are general enough that this section gives CBJ broad authority to condition an operation to protect the public (subject to conflict with state and federal rules). Essentially, this broad authority to condition an operation provides the authority for CBJ to address most, if not all, the subjects spelled out in the mining ordinance: CBJ 49.65.110-195. In this sense, it is a catch-all standard which allows CBJ to address issues which would otherwise be missed.

D. CBJ 49.15.320 - Allowable use permit. Sections A, B, and C, above, discuss the CBJ ordinance that applies to large mines within Juneau’s Urban District. In the Rural District, these ordinances do not apply. Instead, CBJ 49.15.320, Allowable Use Permit, applies, plus some additions given in the Section §115(c) of the Large Mine Ordinance. While the Conditional Use Permit, directs CBJ to analyze uses that “may or may not be appropriate in a particular zoning district...”, the Allowable Use Permit, is for “uses allowed in a particular zoning district but which, due to size, intensity or particular characteristics must be reviewed and approved [and potentially conditioned] by the planning commission.”

The Allowable Use Permit ordinance limits the subjects of permit conditions that CBJ may attach to those listed in subsection §320(f). However, CBJ 49.65.115 further limits the consideration to “(f)(1)–(f)(8) plus additional conditions relating to traffic, lighting, safety, noise, dust, visual screening, surface subsidence, avalanches, landslides and erosion.”

Of these conditions, most of the stipulations applied in (f)(1)–(f)(8) have limited application to a large mine except the general authority in (f)(5) to require “posting of a bond or other surety or collateral...” As indicated previously, this has the potential to overlap with state/federal requirements, but if applied in cooperation with the state or federal agencies, or if applied to CBJ-specific requirements for traffic, lighting, etc. should pose no duplication. Further, stipulations concerning “traffic, lighting, safety, noise, dust, visual screening, surface subsidence, avalanches, landslides and erosion” appear to focus on areas of typical municipal concern rather than items typically regulated by the state or federal government.

Appendix A.
Summary of CBJ Mining Ordinance & Relationship
to State/Federal Requirements

The next pages summarize the potential overlap or duplication for each part of the mining law.

CBJ 49.65. Article I. – Exploration and Mining

Section & Part	Explanation	Related Federal/State Authorization
§110 - Purpose	Explains purpose of the Mining Ordinance	Internal to CBJ
§115 General applicability		
(a)	Introduces Surface Exclusion District where mining prohibited	Zoning powers; Unrelated to fed/state authorizations
(b)	CBJ does not regulate "subsurface mining" except that subsidence prohibited within Exclusion District	Zoning powers; Unrelated to fed/state authorizations
(c)	Urban/Rural District Maps. Rural District regulated by CBJ 49.15.320 Allowable Use Permit plus list of local concerns	List of local concerns are usually not regulated by state/fed except erosion which is subject to reclamation plan; SWPPP and similar authorizations.
§120 Exploration notices		
(a)	Exploration application process and provides that CBJ may require a reclamation bond	Overlaps with DNR Reclamation Statutes AS 27.19 (assuming not on federal land). Under state reclamation statute, exploration reclamation bond limited to \$750/acre except that operations frequently join the DNR bond pool
(b)	Procedure for CBJ to determine if area is reclaimed and bond can be returned. However, references standards of §135(b)	Mostly Internal to CBJ. However, see Section III discussion of §135(b)
(c)	Ability for CBJ to waive bond requirement	Internal to CBJ
§125 Small mine permits, financial warranties and procedures		
(a)	Requirement for a permit	Internal to CBJ
(b)	Application requirements	Internal to CBJ.
(c) & (d)	Must meet requirements of §135 (Standards), §140 (Reclamation Bond); and 49.15.330, Conditional Use Permit	See analysis of those sections

CBJ 49.65. Article I. – Exploration and Mining

Section & Part	Explanation	Related Federal/State Authorization
§130 Large mines, financial warranties and procedures		
(a)	Requirement for a permit	Internal to CBJ
(b)	Application requirements	Internal to CBJ. See also Note 1 at the end of this appendix.
(c)	Requirement for socioeconomic assessment & procedures for CBJ waiving the assessment	A socioeconomic impact assessment is not required by state/federal statutes except that all, or more likely a portion, may be done as part of a federal EIS. See Note 2 at the end of this appendix.
(d)	CBJ review procedures including coordination with fed/state	Internal to CBJ
(e)	CBJ fee & ability for CBJ to hire experts	Internal to CBJ
(f)	Review procedures. Includes standards which are those of §135 and §140, and Conditional Use Permit (49.15.330)	Internal to CBJ, except that for review of standards, see analysis of those sections.
(g)	Procedures if recommendation is to deny permit	Internal to CBJ
(h)	Coordination with EIS Process	Internal to CBJ
(i)	Procedures if approved.	Internal to CBJ
§135 Standards for issuance of permits and conduct of operations		
(a)	The list below essentially provides general standards for permitting and conduct of operations	Introduces list below.
(a)(1)	Requires operations to be consistent with Conditional Use Permit 49.15.330	See 49.15.330 for analysis
(a)(2)	Air/water quality must be consistent with federal, state, & CBJ rules	Overlaps with DEC point source (APDES) permits; DEC stormwater; and DEC air quality permitting
(a)(3)	Hazardous and toxic materials, sewage, solid waste be consistent with fed, state, and CBJ rules	Overlaps with DEC Solid Waste Permit; possibly federal RCRA statute.
(a)(4)	Control/Mitigate public safety, & adverse impacts on public and neighboring properties, such as traffic, noise, dust, visual, subsidence, avalanches, landslide & erosion	Typical local government concerns. Erosion concern may overlap with DEC SWPPP and DNR (or federal) Reclamation plan

CBJ 49.65. Article I. – Exploration and Mining

Section & Part	Explanation	Related Federal/State Authorization
(a)(5)	Protect appropriate CBJ historic sites	Potential overlap with DNR State Historic Preservation Office, and U.S. Corps of Engineers historic preservation requirements
(a)(6)	Operation must reclaim per approved reclamation plan	For analysis, see §135(b)
(a)(7)	Requirement for mitigation of socioeconomic effects	State and federal agencies do not have this requirement.
(b)	Reclamation shall include the list of subsections below.	An introductory section. See (b)(1)-(10), below.
(b)(1)	Cleanup dangerous, hazardous or toxic materials	Potential overlap with federal RCRA, potential for overlap with DEC Solid Waste Permit. See discussion in main report.
(b)(2)	Unconsolidated material must be in stable slope	Mirrors state language in state reclamation statute, AS 27.19.020
(b)(3), (4), and (5)	Backfilling & sealing underground workings, preventing subsidence	Mirrors state reclamation regulations at 11 AAC 97.220.
(b)(6)	Control soil and wind erosion	State and federal statutes get at same issue with different language. [AS 27.19.020 & 11 AAC 97.200]
(b)(7)	Control Water Runoff.	Overlaps DEC stormwater regulation and DNR reclamation requirements
(b)(8)	Standards for revegetation	Overlaps DNR Reclamation requirements
(b)(9)	Rehabilitation of fish and wildlife habitat	Fish habitat overlaps DF&G requirements agency implements through AS 16.05.841 & 871; For wildlife habitat, overlaps federal/state and owner authority only on state or federal land.
(b)(10)	Any other conditions imposed by CBJ	CBJ essentially reserve to itself all powers not prohibited. This may or may not overlap with federal/state regulation, depending on how its implemented.
(c)	Compliance procedures	Internal to CBJ

CBJ 49.65. Article I. – Exploration and Mining

Section & Part	Explanation	Related Federal/State Authorization
§140 Financial Warranty		
(a)	General requirement for financial warranty, conditions for foreclosure, etc.	Internal to CBJ
(b)	Procedures for amount of bond, considering amounts submitted to other agencies	Internal to CBJ
(b)(1)	Facilities to control runoff, or to divert water	Overlaps DEC Solid Waste Permit for waste/tailings piles; Overlaps DEC Stormwater,
(b)(2)	Landscaping, for visual or sound.	While overlaps Reclamation Plan; these issues are typically municipal issues.
(b)(3)	Road or hwy improvements to mitigate traffic or trucking.	Typical municipal issue
(b)(4)	Reclamation of affected surfaces for exploration and mining	Overlaps DNR/BLM/USFS Reclamation Plan
(b)(5)	Regrade steep slopes of unconsolidated material to make stable.	Mirrors reclamation language (AS 27.19.20)
(b)(6)	Installation of facilities to reduce degradation of air or water quality, or to contain or control toxic or hazardous waste.	Overlaps DEC Solid Waste Permit; Reclamation Plan; DEC Wastewater Permit DEC Air Permit
(b)(7)	Remove buildings, structure or equipment when appropriate.	Mirrors reclamation language (11 AAC 97.210)
(b)(8)	Anything needed to comply with §135, or 49.15.330(f) [public health, harmony with neighborhood, or comply with comprehensive plan].	General reference to other CBJ Mining Ordinance Sections.
(c)(1)-(4)	Type of financial warranties accepted	CBJ and State/Federal accept similar bonding instruments.
(d)(1)	Small Mine Property Bond. For small mine permit or exploration, operator may use property.	Overlaps state requirements. State allows use of reclamation bond pool.
(d)(2)	Financial warranty must say CBJ can use it if needed (if violation, or etc.)	Potential conflict with state/federal requirements, as those agencies will also require their first use for state/federal requirements.

CBJ 49.65. Article I. – Exploration and Mining		
Section & Part	Explanation	Related Federal/State Authorization
(d)(3)	Reviewed annually	State/fed review every 3-5 years.
(d)(4)	Procedures after annual review.	Internal to CBJ
§145. Term of notices and permits; temporary cessation		
(a)	Conditions for permits to remain in force	Internal to CBJ
(b)	Ability of CBJ to revise financial warranty	Potential conflict with state/federal bond requirements if CBJ bonds for same activities as state/federal regulator
(c)	Operator notifies CBJ if other agencies revise bond	Internal to CBJ
(d)	Temporary cessation	Internal to CBJ
(e)	Additional requirements for temporary cessation	Internal to CBJ
§150. Annual reports; monitoring; monitoring fee.		Internal to CBJ
§155. Technical revisions, summary approval and amendments		
(a)	Definition of technical revision; procedures	Internal to CBJ
(b)	Major Revision; coordination with supplemental EIS and Summary Approval	Internal to CBJ
§160. Enforcement	References CBJ enforcement powers and procedures	Internal to CBJ
§165. Appeal	References CBJ appeal procedures	Internal to CBJ
§170 Release of warranties for mining operations.		Potential conflict with state/federal bond requirements if CBJ bonds for same activities as state/federal regulator
175. Successor Operators.		
	Successor operator has same obligations as original. CBJ can deny if violations	Internal to CBJ
180. Confidentiality.	Operator can request certain info to be confidential.	Internal to CBJ

CBJ 49.65. Article I. – Exploration and Mining

Section & Part	Explanation	Related Federal/State Authorization
185. Suspension or revocation of notices and permits.		Internal to CBJ
190. Effect of article on operations in annexed territory.	Effect of CBJ annexation on existing mining operation	Internal to CBJ
195. Severability.	Legal effect if portion of law struck down	Internal to CBJ

CBJ 49.15.320 Allowable Use Permit

Subsection & Part	Explanation	Related Federal/State Authorization
(a)	Purpose: use is allowed in zoning district but due to size, etc. needs to be reviewed and conditions may be attached.	Internal to CBJ
(b)	Preapplication conference	Internal to CBJ
(c)	Submission requirements	Internal to CBJ
(d)	Application review procedures	Internal to CBJ
(e)	Decision Criteria	See below
(e)(1)	Whether application is complete	Internal to CBJ
(e)(2)	Whether permit is within table of permissible uses	Internal to CBJ
(e)(3)	Whether development complies with other requirements	Subsection references standards elsewhere
(e)(4)	Whether necessary stipulations are attached & criteria met	Subsection references standards elsewhere
(f)	Conditions on approval; allowable uses. Commission may condition upon:	Into section to the standards below.
(f)(1)	Development schedule	Not relevant to mining
(f)(2)	May restrict to use in apln.	Not relevant to mining
(f)(3)	Can require owners' association	Not relevant to mining
(f)(4)	Dedications (i.e., easements, licenses, to public utilities, etc.)	Not relevant to mining
(f)(5)	Performance bond. May require it to improvements built.	Assume CBJ would use procedures and standards in CBJ 49.65.140, rather than this subsection.
(f)(6)	Commission letter. May require a letter from public utility or agency with commitment to service.	Not relevant to mining

CBJ 49.15.320 Allowable Use Permit

Subsection & Part	Explanation	Related Federal/State Authorization
(f)(7)	Convenants, May require convenants	Not relevant to mining
(f)(8)	Revocation of permits. Can include automatic revocation upon occurrence of specific events	Internal to CBJ
(f)(9)	Habitat. Habitat restrictions may be given for wetlands, 330' of eagle next	CBJ is removing bald eagle regulation from code. If so, CBJ ordinance does not address these issues except for potential overlap with COE Wetlands Permit.
(f)(10)	Sound. Discourage sound > 65 dBa day; > 55 dBa night.	Typical municipal concern
(f)(11)	Screening. Can require construction of screening to keep from view	Typical municipal concern
(f)(12)	Drainage.	Overlap with DEC Stormwater requirements.

CBJ 49.65.115(c)	Subsection adds other subjects to consideration of allowable use permit. Specifically: issues of "traffic, lighting, safety, noise, dust, visual screening, subsurface subsidence, avalanches, landslides and erosion."	Most of these issues are areas of municipal expertise. However, surface subsidence could be different than state requirements (see discussion in main report under §135(b)(4)). Also erosion may overlap with reclamation requirements (see discussion in main report).
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CBJ 49.15.330 Conditional Use Permit

Subsection & Part	Explanation	Related Federal/State Authorization
(a)	Purpose: use may or may not be appropriate in zoning district based.	Internal to CBJ
(b)	Pre-app conference.	Internal to CBJ
(c)	Submission requirements	Internal to CBJ
(d)	Directors review procedures	Internal to CBJ
(e)	Review by Planning Commission. Includes general standards that reference other sections of title	Internal to CBJ
(f)	Commission determinations; standards. May deny if use will:	Introductory language to (f)(1)-(3)
(f)(1)	Endanger public health or safety	Municipal concern (assuming accept state/federal determination on dam safety/wastewater discharge, etc.). But Also see Note 3 at the end of this appendix.
(f)(2)	Substantially decrease value or be out of harmony with property in the neighborhood.	Municipal concern
(f)(3)	Whether conform to comprehensive or other CBJ plans.	Municipal concern
(g)	Specific Conditions. Commission may add one or more of:	Introductory language to (f)(1)-(18)
(g)(1)	Development schedule	Not relevant to mining
(g)(2)	May restrict to use in application	Not relevant to mining
(g)(3)	May require formation of owners' association	Not relevant to mining
(g)(4)	Dedications (i.e., easements, licenses, to public utilities, etc.)	Not relevant to mining
(g)(5)	Performance bond. May require it to improvements built.	Assume CBJ would use procedures and standards in CBJ 49.65.140, rather than this subsection.
(g)(6)	Commission letter. May require a letter from public utility or agency with commitment to service.	Not relevant to mining

CBJ 49.15.330 Conditional Use Permit

Subsection & Part	Explanation	Related Federal/State Authorization
(g)(7)	May require covenants	Not relevant to mining
(g)(8)	Revocation of permits. Can include automatic revocation upon occurrence of specific events	Internal to CBJ
(g)(9)	Landslide and avalanche area. If in area, minimize risk to life and property	Typical municipal concern
(g)(10)	Habitat. Habitat restrictions may be given for wetlands, 330' of eagle next	CBJ is removing bald eagle regulation from code. If so, CBJ ordinance does not address these issues except for potential overlap with COE Wetlands Permit.
(g)(11)	Sound. Discourage sound > 65 dBa day; > 55 dBa night.	Typical municipal concern
(g)(12)	Traffic mitigation.	Typical municipal concern
(g)(13)	Water access. May require dedication of access to public	Typical municipal concern
(g)(14)	Screening. Can require construction of screening to keep from view	Overlaps with Reclamation requirements; except that it is an area typically not addressed by fed/state and is an area of typical municipal concern.
(g)(15)	Lot size or dvp size. May restrict lot size or total dvpt size	Typical municipal concern
(g)(16)	Drainage. Can require on- and off-site drainage improvements > required by title.	Overlaps DEC Stormwater requirements
(g)(17)	Lighting. Can control type and extent.	Typical municipal concern
(g)(18)	Other stipulations as needed to comply with (f)	General provision allowing CBJ to stipulate whatever needed.

Notes to Appendix A

Note 1. CBJ 49.65.130(b) requires an applicant to provide “information normally prepared by the operator for its feasibility studies and mining plan...” The phrase “feasibility study” has a specific definition for the mining industry, based on definitions for Canadian mining regulations. Used in this way, feasibility study information is not available until the end of the permitting process, whereas the ordinance requires the information at the beginning of the process – as part of the application. However, if the words are used in a more conventional fashion, ordinance requires only feasibility-type information in a useable level of detail.

Note 2. CBJ 49.65.130(c) requires that a socioeconomic assessment be prepared. This document is unusual, in that it is not required by other jurisdictions or for other industries. To the author’s knowledge, the Lake and Peninsula Borough (the local jurisdiction where the Pebble prospect is located) is the only other local government to require one. The assessment is used as the basis for a socioeconomic mitigation agreement in §135(a)(7). A similar agreement is also required by the Lake and Peninsula Borough.

Note 3. The standards in CBJ 49.15.330(f) are quite general. Paragraph (g)(18) provides a broad authority to condition a project according to these standards. That paragraph provides authority for “Such other conditions as may be reasonably necessary pursuant to the standards listed in subsection (f)...” Together, the two parts provide CBJ with broad authority to address most, if not all, subject spelled out in the remainder of the mining ordinance: CBJ 49.65.110-195. In a sense, it is a catch-all provision which allows CBJ to address issues which would otherwise be missed.

Appendix B

Prevailing law in the Case of Local/State/Federal Differences

There are many opportunities for local government to regulate mining in a manner that does not conflict with state or federal law. However, there are also opportunities for CBJ and the state to regulate the same activity. In this case, it is important to know, in case of differing rules to an operator, which government prevails? Both individuals who reviewed the draft report brought up this question in some form.

In general, a local government may enact rules that are more strict than state or federal laws. However, there are four categories when the “higher” law prevails (“higher” defined as federal law is higher than state law; state law is higher than local law). An explanation of these categories follow.¹¹

An express local prohibition. Some federal or state laws expressly prohibit localities from legislating on the same subject. This prohibition does not occur with any of the mining laws at issue in the CBJ Mining Ordinance.

Conflict preemption. Local or state law may be pre-empted when it conflicts with a federal (or state law). In a conflict situation, the higher level prevails. For example, an EIS could include multiple alternatives for water discharge. If DEC chose one alternative as the best way to meet water quality standards and DEC regulations, a borough would not have the authority to contradict DEC’s choice. A borough could work with DEC, comment to it, administratively appeal DEC’s decision, or litigate. But it would not be free to require another alternative which conflicted with DEC’s choice. In such a conflict, DEC would have an implied conflict pre-emption of the local choice.

Field preemption. A federal (or state) regulatory scheme may be so comprehensive that it “occupies the field” and leaves no room for local law. While the author is not aware of legal cases directly related to mining discharges, it is possible that the state/federal scheme for setting water and air quality standards are so comprehensive that it may be difficult for a local government to set different, more stringent standards. While this author has not done a search of all American mines or for all states, he is unaware of a municipality in a western state that has established a mining-related point-source discharge permit that overlaps or duplicates the state/federal NPDES or air quality permit.

Some examples may illustrate the way that federal/state preemption affects CBJ’s ordinance. CBJ’s ordinance at 49.65.135(a)(2) mandates CBJ to require that “Air and water quality be maintained in accordance with federal, state, and City and Borough laws, rules and regulations.” DEC has complex laws and regulations for point source air and water quality. CBJ has not adopted rules for point-source air or water discharge. Therefore, this portion of the code appears to indicate that CBJ is relying on federal and state standards for point-source air and water discharge. This section does not provide CBJ with independent authority to decide whether an operation should or should not have gotten a state permit, or whether the state permit should

¹¹ Federal/state preemption of local laws is a complex area of law. The author of this report is not a lawyer. The information here is based on his 30+ years of land management, journal articles on the subject, and information developed for his teaching at UAA.

have additional conditions to meet the state’s air and water standards. That decision belongs to the state. CBJ can work closely with the state on the state’s determination, it may comment on the state’s decision, file an administrative appeal, or may sue the state if it disagrees. But it cannot independently assess state regulations. However, CBJ is free to address air and water quality issues that are not addressed in the state’s regulatory mechanism, or in a manner that does not conflict with the state’s regulatory mechanisms.

With respect to water quality, CBJ does have stormwater standards. Many municipalities require setbacks from waterbodies to protect water quality. These are typical local concerns and do not conflict with the state’s regulatory methods to protect water quality. With respect to air quality, DEC’s air quality permit might not address the issue of dust from ore trucks travelling through town. If DEC’s permit did not address this issue, a CBJ permit could require that trucks be covered.

The discussion above focuses on water and air point-source discharges. With respect to regulation of storm-water, reclamation, or even to some extent wetlands permitting, there appears to be more room for local rules.

Despite the examples described above, because conflict and field pre-emption are dependent on the individual facts of the situation, it is difficult to generalize. While it may be true that conflicts in the regulation of an activity are usually decided in favor of the “higher” government, the answer would greatly depend the details of a CBJ permit condition, and on how a law is applied in an individual case. There may be opportunities for CBJ to impose a rule that is more stringent than the state’s rules – it would depend on the circumstances of the situation and the specifics of the rule.

Land Management Preemption. There is a fourth situation where local rules may be pre-empted involves federal/state land. There is a limit to the extent with which local laws may restrict mining state and federal land. In a 2015 court decision¹², the Alaska Supreme Court struck down a law, passed by initiative, in the Lake and Peninsula Borough “because the initiative purports to give the Borough veto power over mining project on state lands within its borders.” The court ruled that it could not give a Borough the authority to “veto project [on state land] otherwise authorized by state and federal regulators.” The local law in question was extreme in that it effectively prevented any large-scale mining on state land within the Borough. Some lesser level of regulation may have prevailed before the court. Nevertheless, it appears that there is some limit to the extent of local regulation of state and federal land. This limit is important in Alaska and in Juneau where there is so much state and National Forest land, but is not relevant to the AJ Mine, which is CJB land.

¹² *Jacko et al. v. State et al.*, No. S-15516, (Alaska Supreme Court July 17, 2015).

Appendix C

Review and Changes to Report: Guy Archibald, SEACC

Introduction. Guy Archibald, Mining and Clean Water Coordinator for the Southeast Alaska Conservation Council was asked to review the draft report. His comments are below. A response to his comments indicating what changes were made to the draft report is inserted within his comments.

Review by Guy Archibald

Amy,
Thank you for the opportunity to respond to the Jade North analysis of the Juneau Mining ordinance.

We think Mr. Loeffler's draft report underscores and supports the importance of local control and governance, not its abdication in order to reduce the regulatory burden on a potential mine developer. It is clear that Current Ordinance gives CBJ the authority to protect its interests as both a landowner and regulator. The Current Ordinance recognizes that the regulatory processes may overlap and minimizes the duplication of efforts while preserving the CBJ's authority and opportunity "to regulate of local concern [and] reserving to the City and Borough all regulatory powers not preempted by state or federal law." CBJ Code 49.65.110(b). The Current Ordinance provides CBJ with the authority to step in and act as necessary. It does not impose process for process sake. Instead, it serves to ensure that CBJ has the information necessary to make informed decisions about whether the net public benefits from further mine development under Juneau's core outweigh those of not mining.

Response: No change requested.

The Jade North report fails to acknowledge the substantial regulatory discretion afforded all the regulatory agencies when regulating mining development. Almost every regulatory component under both state and federal law contains substantial regulatory discretion, both qualitative and quantitative. CBJ itself has the discretion whether it implements or not many aspects of the current ordinance. Whether or not there are regulatory overlaps when various authorities exercise their authorities is the wrong question. Instead, what is relevant is how that authority is implemented on the ground. The wide discretion afforded CBJ and state/federal agencies in their decision-making assure wide variability in the ultimate permitting decisions. This is precisely why CBJ needs to retain its authority.

As an example, language such as "A mining operation shall be conducted in a manner that prevents unnecessary and undue degradation of land and water resources and the mining operation shall be reclaimed as contemporaneously as practical with the mining operation to leave the site in a stable condition," is subject to a high degree of interpretation. State and federal agency discretion in interpreting their authorities underscores the value of the Current Ordinance (and/or Juneau's interests in maintaining a robust regulatory process).

Response: Change to clarify. The draft report implied discretion by the agencies, though it did not say it as directly as Mr. Archibald wishes. That is, in several places the report

indicates that agencies have a broad mandate or broad far-reaching authority. In the example used above concerning unnecessary and undue degradation, the report describes that has providing broad authority to stipulate changes and design, which implies substantial discretion. Nevertheless, Mr. Archibald's point is well taken, and the final report is changed to discuss agency discretion as he suggests. In several places, in the first chapter of the report, the role and extent of agency discretion is briefly discussed.

Mr. Loeffler does not analyze what risks CBJ faces if it revokes its inherent authority to regulate mines as appropriate within the Borough or suggest there is any inherent risk to Juneau from retaining the mining ordinance as is. Neither does his analysis indicate that the risk of driving off potential mine investors outweighs the benefits to CBJ from retaining the Current Ordinance.

Response: No change requested. Mr. Archibald is correct. The analysis he discusses was not requested as part of the report and is not included.

The Jade North Report assumes that state and federal regulations are sufficient by themselves. The use of adjectives such as "expansive" or "extensive" in references to state and federal regulatory programs gives a false sense of completeness. A wastewater permit or wetland certification may be rigorous but it not guaranteed that their application will be complementary or even coordinated. Sufficiency of a regulation and its implementation is also relative to the expected duration of the impact on the ground. This is a critical point where issues of perpetual maintenance may arise and dwindling state and federal budgets over the long term.

The Jade North Report also assumes that state and federal actions are too complex for scrutiny by CBJ staff, its leaders and residents. For instance, in the Air Quality section: "It would be impractical or inappropriate for CBJ to add stipulations on a subject covered by the DEC air quality permit." This is simply not accurate. Certainly, concern over fugitive dust from roads, blasting, underground workings, etc., is not so complex and detailed as to be beyond the grasp of the Planning Department (and/or their consultants). The same comment is true for Mr. Loeffler's characterization of water regulatory processes.

Response concerning adequacy of state and federal regulations: Change.

Mr. Archibald indicates that the report assumes state and federal regulations adequately protect the environment. In fact, the report does not make that assumption, nor does it assume they are not strict enough. It takes no position on whether state and federal rules are adequate, overly loose or overly strict. However, the adjectives cited by Mr. Archibald could leave that impression. Therefore, the adjectives such as "expansive" or "extensive" have been removed, and a paragraph has been added to the first section clearly stating that the report takes no position on these issues.

Response concerning ability of CBJ or the public to understand complex federal regulations. Change. Mr. Archibald indicates that the report or its author believes state/federal rules are beyond the grasp of CBJ or the public. This author emphatically does not believe that. While some state/federal rules are complex, they are not beyond the understanding of a curious, interested public nor of CBJ. Language to that effect has been added to Chapter II.

However, the intricacy of these permits and their supporting documents make it difficult or, depending on how it's done, potentially illegal for a municipality to duplicate the state

permit. While this author has not done a search of all American mines or for all states, he is unaware of any municipality in any western state that has established a mining-related point-source discharge permit for air quality permit that overlaps or duplicates the state/federal NPDES or air quality permit. The report does not declare it impossible – one cannot know that without considering a specific proposal; however, the report’s description as “difficult or potentially illegal” remains accurate. The report also makes clear that municipalities do regulate the subjects of water or air quality, but they typically do so in a way that complements rather than duplicates state/federal requirements. Thus, Mr. Archibald’s example of fugitive dust would not necessarily be beyond the ability of CBJ to regulate. However, it might be difficult – depending on the specifics – for CBJ to regulate in a way that duplicates or conflicts with the DEC Air Quality Permit. Whether it is impossible would depend on the facts of the DEC permit and a proposed CBJ permit condition. However, complementary regulation such as addressing fugitive dust outside the scope of the air permit, for example from trucks traversing the community, would not be subject to the same difficulties. This is an important point. Therefore, a new Appendix B has been added to clarify the relationship between local and state/federal authorities.

Jade North’s section on Reclamation Bonding misses another critical element. The state and federal agencies may set the amount of financial assurance but another aspect is the form of the bond. The question of the final bond amount is moot if the form of the bond imposed does not ensure ready availability to the appropriate regulatory authorities if there is a default by the mining company (abandonment, bankruptcy, etc.). The CBJ could need and want regulatory authority relating to both the form and the amount of bonding imposed.

Response: The author does not completely understand this suggestion. The report, in the discussion of §140(c) observes that CBJ and the state accept similar forms for a bond. Perhaps a discussion of the function of a bond is appropriate. A bond is required to ensure that the operator faithfully and fully performs tasks required by a permit. Therefore, the agency with authority over the permit holds the authority over the bond.¹³ Where CBJ issues a permit that requires an operation complete an activity, and requires a bond for that activity, one assumes that CBJ retains authority over that portion of a company’s bond: the decision to require, seize, or release a bond would presumably made by CBJ. The same for the state or federal government. It would not make sense, for example, for the state to be prohibited from seizing a bond without CBJ’s approval for activities needed to comply with the state’s permit. Nor would the opposite make sense: if the state determines that an operator has completed the tasks required by a state permit, CBJ could, of course, argue that question with the state, appeal the state’s determination and, if necessary, litigate. But CBJ could not retain authority over whether an operator has complied with the state’s permit, and therefore hold up bond release.

The Current Ordinance does not impose process for process sake. Instead, it serves to ensure that CBJ has all the information necessary to make informed decisions about whether the net public benefits from further mine development under Juneau’s core outweigh those of not

¹³ Agencies such as DNR and DEC may cooperate on which agency holds the bond and may calculate the bond together, but the authority for determining the bond, and determining when it is seized or released does not change. CBJ could also cooperate with state or federal agencies, but again the cooperation would not necessarily undermine which government or agency has authority of the amount, or the release of the bond.

mining. The areas of overlap between the Current Ordinance and federal/state laws was intentional not to create duplication but to fill gaps. Juneau can enforce regulatory oversight over any or all portions of potential mine development within the Borough. Jade North incorrectly implies that any duplication of authorities is inherently a bad thing. Nothing in the Current Ordinance requires the CBJ to exercise all its regulatory authorities. However, without the CBJ Ordinance, it cannot exercise any of them.

Response: No change. CBJ asked Jade North to describe the intersection between the Juneau mining ordinance and state/federal laws, which includes duplication and overlap. Whether some level of duplication or overlap is a good or bad thing is not the intent of this report: it is up to the City and Borough of Juneau. The report intentionally does not make any recommendation about changes to the ordinance, nor does it conclude whether the ordinance good or bad.

Please forward this to Mr. Clark.

Thank you,
Guy

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Southeast Alaska
Conservation Council

Guy Archibald
Mining and Clean Water Coordinator

Appendix D

Review and Changes to Report: Jim Clark

Introduction. Jim Clark was asked to review the draft report. His comments are below. A response to his comments indicating what changes were made to the draft report is inserted within his comments.

Review by Jim Clark

COMMENTS ON MR. LOEFFLER’S DRAFT ANALYSIS OF CBJ MINING ORDINANCE

Summary: This is a very good analysis. It does the hard work of going through the Mining Ordinance and comparing what the Ordinance requires to what is already in State and Federal law. Mr. Loeffler did a terrific job of explaining the authority of the CBJ to regulate the AJ Mine through its ownership of the Mine. (Page 4). That said, the comments below request consideration by Mr. Loeffler of some of the points he made and particularly of what would be required to reform the Mining Ordinance. In short, our group requests that he do more work. Our specific requests and reasons are set out below.

Response: See Below. Responses to individual comments are at the end of each comment.

Comments:

1. **Objective.** Mr. Loeffler was asked to analyze the “intersection and relationship between the CBJ mining code” and the mining laws under both state and federal statute.” (Page 1).

Consistent with his instructions, Mr. Loeffler demonstrates that the Mining Ordinance covers the same environmental concerns as state and federal law (pages 14 – 18). He goes on to correctly point out at pages 2 - 4 and 14 – 18 of the draft Report that federal and state laws allow a municipality to cover the same things as state and federal law, including more stringent provisions than state and federal law. Respectfully, it is because the Mining Ordinance does so that it is a barrier to mining development within the CBJ.

Respectfully, it is not our group’s understanding that the Assembly commissioned Mr. Loeffler’s Report to determine what provisions can legally remain in the Mining Ordinance. Rather, Mr. Loeffler should be instructed that the Assembly’s objective is to revise the Mining Ordinance (i) to remove substantive provisions of the Mining Ordinance already covered by state and federal law; (ii) to remove substantive provisions of the Mining Ordinance that, although not covered by state and federal law, are not realistic or fair to the mining industry (i.e. the requirement to submit a feasibility study with a permit application and the requirement to perform a socioeconomic study to bring mining jobs to the CBJ); and (iii) to remove unnecessary, time consuming, and expensive procedures from the Mining Ordinance (i.e. having CBJ personnel determine whether state and federal official properly issued state and federal permits).

This objective is more consistent with Alaska’s mineral policy (AS 44.99.110 (2)):

The legislature, acting under Article VIII, section 1 of the Constitution of the State of Alaska, in an effort to further the economic development of the state, to maintain a sound economy and stable employment; and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state, including metals, industrial metals and coal, declares as the mineral policy of the state that

(2) mineral development be encouraged through reasonable and consistent nonduplicative regulations and administrative stipulations;

Response: Mr. Clark requests that the scope of the report be expanded. However, the report’s purpose is not to provide a recommendation for change to the assembly but to provide information to the CBJ assembly for their policy decisions.

- 2. Substantive Provisions of The Mining Ordinance Already Covered by State and Federal Law.** Mr. Loeffler divided the intersecting provisions of state and federal law with the Mining Ordinance into duplicating and overlapping provisions. He did so “Because much of the CBJ ordinance is general, one cannot tell until a specific CBJ permit condition is written whether the overlap conflicts with, complements or duplicates state/federal regulation.” (Page 1).

This observation is correct because many state and federal permitting rules are not written as absolutes, but require that certain general environmental goals be met (e.g. fishable swimmable waters) and leave it up to the permit writers to determine how to apply the goals to a particular situation in the permit. As Mr. Loeffler points out, the CBJ Ordinance also sets out general objectives and leaves it up to CBJ employees to determine how to implement them. So, Mr. Loeffler is correct that one cannot know whether the objective stated in a CBJ Mining Ordinance provision will be met until the state and federal requirements that covers the same ground as the Ordinance have been written and compared to the way the CBJ might implement the same general requirement.

The Mining Ordinance thus has CBJ employees going through substantially the same process as federal and state permit writers – reviewing the goals of the Ordinance and writing a CBJ permit. The results are then reviewed by the CBJ Planning Commission which can add any conditions to the permits through the Conditional Use Permitting (CUP) process. So, such overlapping CBJ Mining Ordinance requirements just add another step to the overall permitting process and duplicate the regulatory power of the CUP.

Because, as Mr. Loeffler has found, the objectives of the Mining Ordinance and the objectives of state and federal law overlap, the regulatory outcome sought by the Mining Ordinance will most likely be achieved in whole or in part by state and federal law. Should state and federal permit stipulations fail to do so, the Planning Commission can add strengthening conditions to the CUP. The Mining Ordinance provisions that are

similar to state and federal requirements thus add no environmental protections – just another process step.

Accordingly, the provisions of the Mining Ordinance that Mister Loeffler has identified as overlapping federal and state requirements (see pages 11 – 12; 14 – 18; and the Appendix) should be considered duplicative in operation and removed from the Mining Ordinance because they are not needed to protect the environment. This would reduce three permitting steps to two without any change to environmental protection.

Response: No change requested.

3. **The Reach of the CBJ Conditional Use Permit.** In *Zenk v. CBJ*, S-16118 (Alaska) the CBJ took the position (correctly) that a CUP (CBJ 49.15.330(f)) is a discretionary permit that can be denied for any reason, including no reason. Using the CUP process, the Planning Commission attached 154 conditions to the AJ CUP. Accordingly, to the extent the Planning Commission finds it desirable to place a more stringent or missing standard on a mine than provided by state or federal law, it doesn't need a provision of the Mining Ordinance that overlaps a state and/or federal law to do so.

While correctly recognizing the absolute authority that the CUP vests in the Planning Commission to “deny or condition a permit” (see pages 19 - 20), Mr. Loeffler's Draft Report does not sufficiently explain how the CUP will be/can be used by the Planning Commission to render an overlapping CBJ Mine Ordinance provision unnecessary. We request that Mr. Loeffler be asked to go back through the Draft Report and point out every overlapping CBJ Mine Ordinance provision that could be removed because the Planning Commission could add a condition to account for any CBJ environmental need not filled by an overlapping state and/or federal permit provision.

Response: Change. Mr. Clark is correct in that the Conditional Use Permit gives CBJ broad authority address broad goals. Essentially, this broad authority to condition an operation provides the authority for CBJ to address most, if not all, the subjects spelled out in the mining ordinance: CBJ 49.65.110-195. The report is changed to point that fact out. New language is inserted in the discussion of the relevant discussion of the Conditional Use Permit in Chapter III: CBJ 49.15.330(g)(18), and in table of Appendix A which discusses that chapter.

4. **Substantive Provisions of The Mining Ordinance That Are Not Realistic or Fair to Mining.** The Mining Ordinance requires two things *not* required by federal and/or state law: a detailed **socio-economic assessment** describing the impacts on CBJ resources of brining a mine into Juneau (49.65.330(c)) and that a **feasibility study** be filed with the application for a CBJ Large Mine permit(49.65.330(b)).
 - a. Our group removed the socio-economic report because Juneau has lost 445 jobs in the last two years (Rain Coast Data) and has the prospect for losing more as the State budget and employees are cut. There is room in Juneau to bring in new folks – that was demonstrated by the ease with which Juneau has accommodated workers from the Kensington and Greens Creek Mines. No other industry coming into Juneau is required to prepare such a report. Would Mr. Loeffler comment on

this point and the extent to which other Alaska municipalities require such a study?

Response: Information and Change. To the knowledge of the author, no other industry in Alaska is required to complete a socio-economic assessment as part of the permitting process. With respect to mining project, the only other municipality that includes a socio-economic assessment requirement as part of its mine permitting process is the Lake and Peninsula Borough, where the proposed Pebble prospect is located.¹⁴ A footnote has been added to Chapter III for the discussion of CBJ 49.65.135(a)(7), and in Appendix A at the discussion of §130(c).

Also, the mining industry is a leader in developing project benefit agreements with local, frequently indigenous, groups. These are often completed for Canadian First Nations and in 3rd-world countries where local taxing authority is absent. The project benefit agreements may require an understanding of potential local socioeconomic effects, though a report and formal assessment may not be required.

- b. A feasibility study necessarily comes at the very end of the process – after the permits have been issued – to let a company know whether on the basis of the quantity and grade of the ore found, the mining method to be employed, the cost of constructing the mine, the cost of complying with the permits, and the cost of mine operations going forward whether the mine would meet the company’s financial “hurdle” criteria. Would Mr. Loeffler comment on whether a feasibility study could be submitted with the Permit application?

Response: Information. The mining industry uses a specific definition of the term “feasibility” study. It uses the term as defined in Canadian mining regulations which have become an industry standard for reports of this nature. A mining “feasibility” study is not ordinarily completed until the end of permitting, rather than at the beginning as the CBJ ordinance requires. Viewed this way, the requirement in CBJ 49.65.130(b) to supply “feasibility studies and mining plans” is out of sync with a typically mining development schedule: it requires information at the beginning of a permitting process that is not known until the end. However, if the word “feasibility” is used in the more general sense familiar to the public, it could easily mean to provide feasibility-type information in a useable level of detail.¹⁵

¹⁴ The Lake and Peninsula Borough Code 9.08 provides their socioeconomic impact analysis requirement. The code is available at <http://www.lakeandpen.com/common/pages/DisplayFile.aspx?itemId=1277351>. The author for this report is a consultant to the Lake and Peninsula Borough and was involved with drafting that portion of their code.

¹⁵ The definitions of the term “feasibility study” for the mining industry has come into widespread use because of its use in Canadian mining regulations. According to the Canadian Institute of Mining, a feasibility study, sometimes referred to as a bankable feasibility study, is “a comprehensive study of a mineral deposit in which all geologic, engineering, legal, operating, economic, social, environmental and other relevant factors are considered in sufficient detail that it could reasonably serve as the basis for a final decision by a financial institution to finance the development of the deposit for mineral production.” The final detail is not known until the final government requirements are known: i.e., at the end of permitting.

Also, this author reads the feasibility information requirement somewhat differently than does Mr. Clark. Mr. Clark reads §130(b) to require the company's feasibility study be submitted. However, the CBJ ordinance does not require a specific study be submitted, only feasibility information. The way in which the CBJ ordinance uses that information is as an input to the socioeconomic assessment required by CBJ 49.65.130(c)(1). This socioeconomic assessment, in turn, becomes the basis for the CBJ action under §135(a)(7), the negotiated socioeconomic mitigation agreement with CBJ. Therefore, this author reads the CBJ ordinance as requiring socioeconomic information in a detail that is useful in negotiating the mitigation agreement, rather than in the detail required for a mining industry feasibility report that would comply with industry standards and Canadian mining regulations.

5. **Remove Unnecessary, Time Consuming, and Expensive Procedures from The Mining Ordinance.** Mr. Loeffler says at page 13 that the Draft Report does not address procedures in the Mining Ordinance. One of our biggest complaints is that the Mining Ordinance requires separate CBJ staff and Planning Commission determinations of “whether air and water quality standards will be maintained in accordance with federal, state, and City and Borough laws, rules and regulations; whether sewage, solid waste, hazardous and toxic materials will be properly contained in dispose of in accordance with federal, state and City and Borough laws rules and regulations.” (See 49.65.120 (c), 49.65.130 (f), and 49.65.135 (a)(2) and (3)). Having the CBJ determine whether state and federal permits have been properly issued is inconsistent with Alaska's mineral policy (AS 44.99.110 (2)): “mineral development [should] be encouraged through reasonable and consistent **nonduplicative** regulations and administrative stipulation.”

Moreover, because the CBJ staff does not have the expertise to make determinations regarding the providence the issuance of state and federal permits, the proposed mining operation would have to pay for the experts to advise CBJ staff and the Planning Commission on whether federal and state regulators properly issued the federal and state permits – just as Echo Bay was required to do.

Not only is this process costly, it causes delay and adds another layer of litigation. For example, if a Federal Court decides that a federal or state permit was properly granted, a Plaintiff could never-the-less bring a claim in State Court that the CBJ staff was arbitrary and capricious in deciding that the federal or state permit was properly granted.

Finally, the Mining Ordinance directs the CBJ staff to determine “whether air and water quality standards will be maintained in accordance with federal, state, and City and Borough laws, rules and regulations; whether sewage, solid waste, hazardous and toxic materials will be properly contained in dispose of in accordance with federal, state and City and Borough laws rules and regulations.” (See 49.65.120 (c), 49.65.130 (f), and 49.65.135 (a)(2) and (3)). However, there are no such separate CBJ air and water quality

laws and regulations. How does Mr. Loeffler propose that this procedural requirement be met?

Our group requests that Mr. Loeffler be asked to comment on the Mining Ordinance procedures. Does he recommend that there be separate CBJ staff and Planning Commission determinations of “whether air and water quality standards will be maintained in accordance with federal, state, and City and Borough laws, rules and regulations; whether sewage, solid waste, hazardous and toxic materials will be properly contained in dispose of in accordance with federal, state and City and Borough laws rules and regulations?”

Is he aware of Alaska municipal planning departments that have the expertise to determine whether federal and state air quality, water quality, hazardous and toxic materials laws and regulations will be met by a company attempting to permit a mine? Can he suggest what the potential budget would be for hiring personnel with such expertise?

How does he recommend that the CBJ Assembly proceed and what models should the CBJ Assembly use in enacting CBJ air quality, water quality, hazardous and toxic materials Ordinances?

In short, we request that Mr. Loeffler review and make recommendations, if any, regarding changes to the Mining Ordinance procedures.

Response: Change, in part. CBJ does not have the legal authority to separately determine whether an operator has met state/federal law and regulations. That is a determination for the appropriate state/federal agency. CBJ, as a municipality, has the opportunity to work closely with the state/federal agency as those agencies apply their laws and regulations to an operation. Further, like any organization, CBJ may comment, appeal, and if necessary the litigate a state or federal permit or decision. For example, if DEC issued a Waste Management Permit for tailings, CBJ could not make a separate determination that DEC’s permit was illegal. If it believed DEC was wrong, it can comment to DEC, administratively appeal DEC’s decision. If still unhappy, CBJ could sue DEC, but it does not have the authority to make a separate determination under DEC’s regulations.

Given the legal reality explained above, this author would interpret CBJ 49.65.135(a)(2) as follows. That paragraph of the ordinance mandates CBJ to require that “Air and water quality be maintained in accordance with City and Borough laws, rules and regulations.” This author would interpret that requirement as requiring CBJ to determine that the operation had all the required federal and state permits; complies with applicable borough rules; and provides authority for CBJ to address any air and water quality issues not addressed by the federal and state permits. CBJ is not required, nor does it have the authority, to make a separate interpretation as to whether the state and federal government followed their own rules. An interpretation of 49.65.135(a)(3) would be similar.

The question of the interaction between CBJ's legal authority and state/federal laws is an important issue. Guy Archibald also brought it up. Therefore, the final report adds a new Appendix B to address the question.

6. Questions for the CBJ Law Department Related to Recommendations Requested from Mr. Loeffler Regarding Mining Ordinance Procedures.

- a. May a third party sue under the Mining Ordinance on the ground that the CBJ staff and/or the Planning Commission upheld or denied a determination by a federal and/or state regulator to issue or deny a Federal or State permit?
- b. May a third party sue under the Mining Ordinance on the ground that the CBJ has failed to promulgate such separate CBJ requirements and standards?
- c. Does the Mining Ordinance require the CBJ to enforce compliance with Federal and State permitting requirements? If so, could a third party sue under the Mining Ordinance on the ground that the CBJ has failed to enforce compliance with Federal and State permits?

Response to a, b, and c: No. For the reasons given in the response to Comment 5, above, a lawsuit of this type would be unlikely to prevail.

7. Mr. Loeffler's Report Should Include Maps Showing Federal and State Management Areas Within the CBJ. The Forest Service manages a significant amount of land within the CBJ to which its management regulations (36 C.F.R. Part 228) apply. The Forest Service should have maps showing these areas. Except for the CUP and the socio-economic report required of mining operations, the Mining Ordinance simply duplicates Forest Service mineral management regulations.

Article VIII, Section 11 of the Constitution reserves to the people of the State minerals that were subject to location under federal mining laws as of the ratification of the Constitution in 1956. State mining law applies to minerals within these areas and is extensive. Displaying such areas would show scope of state requirements within the CBJ.

Response: Change as indicated. The requested maps are provided in Appendix D.

CONCLUSION: This is a thoughtful, well organized, and well written Report for which Mr. Loeffler should be commended. He was asked to point out areas where state and federal law and the Municipal Ordinance intersect, which is exactly what he did. He correctly stated that the CBJ Ordinance could legally duplicate and require more stringent provisions than state and federal law. But his Report does not analyze how the Mining Ordinance could be reformed to *remove* redundant/overlapping provisions and procedures without reducing environmental protection. Accordingly, we request that he be instructed to advise the Committee how to revise the Mining Ordinance based on the following objectives (i) removal of substantive provisions of the Mining Ordinance already covered by state and federal law without removing substantive environmental requirements; (ii) removal of substantive provisions of the Mining Ordinance that, although not covered by state and federal law, are not realistic or fair to the mining industry (i.e. the

requirement to submit a feasibility study with a permit application and the requirement to perform a socioeconomic study to bring mining jobs to the CBJ); and (iii) removal of unnecessary, time consuming, and expensive procedures from the Mining Ordinance (i.e. having CBJ personnel determine whether state and federal official properly issued state and federal permits).

Response: As indicated in a response to Comment 1: The comment requests that the scope of the report be expanded to provide recommendations for changes to the assembly. However, the report's purpose is to provide information to the CBJ assembly for their policy decisions.

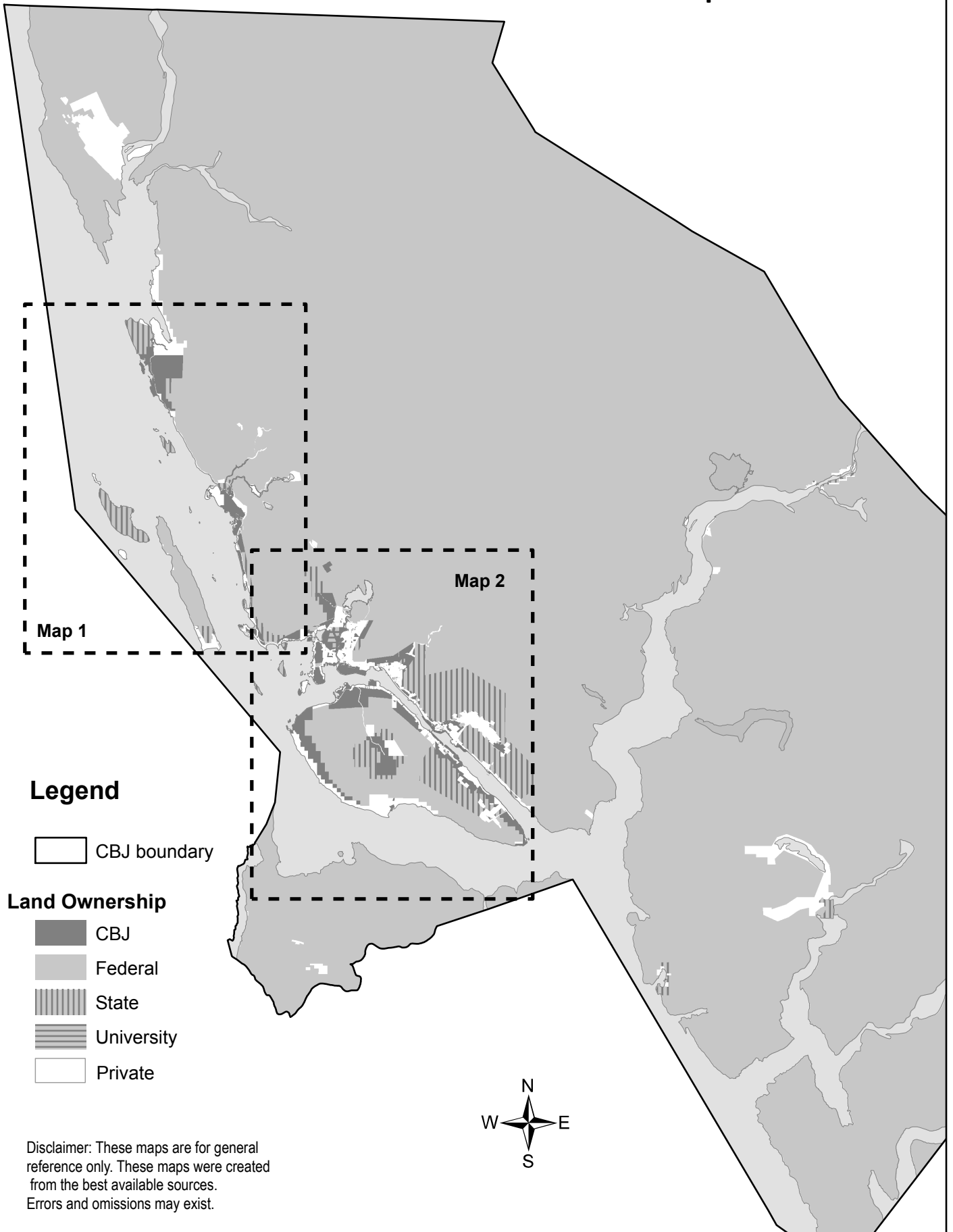
Thank you for the opportunity to comment on the draft Report.

Appendix E.

Land Ownership within the City and Borough of Juneau

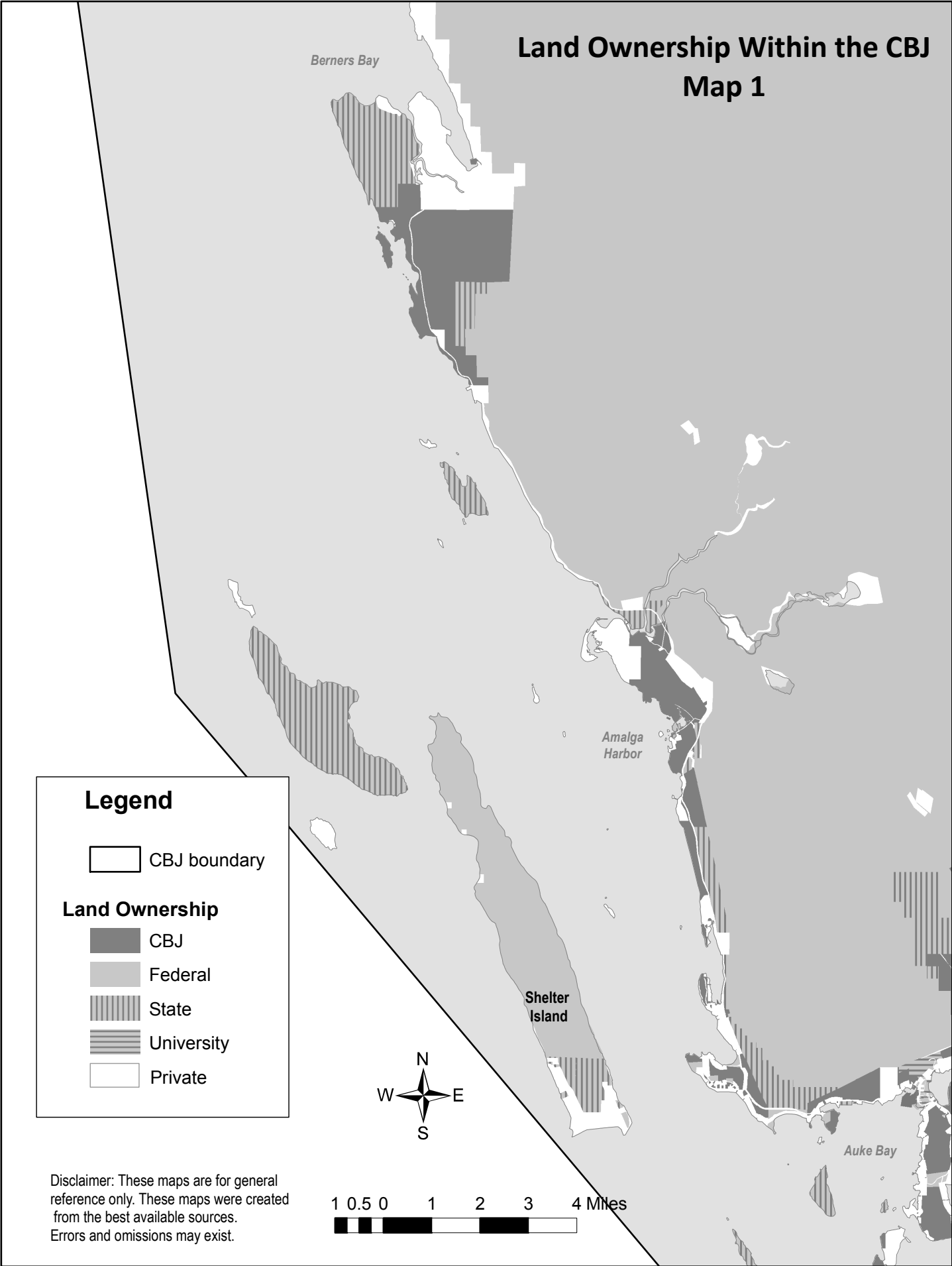
The USFS and the State have significant regulatory authority over mining on their respective lands. One individual who reviewed the draft report asked for maps of land ownership within CBJ to show the extent of State and USFS land and therefore the extent of this additional regulatory authority. The following three pages provide that information.

Land Ownership Within the CBJ



Disclaimer: These maps are for general reference only. These maps were created from the best available sources. Errors and omissions may exist.

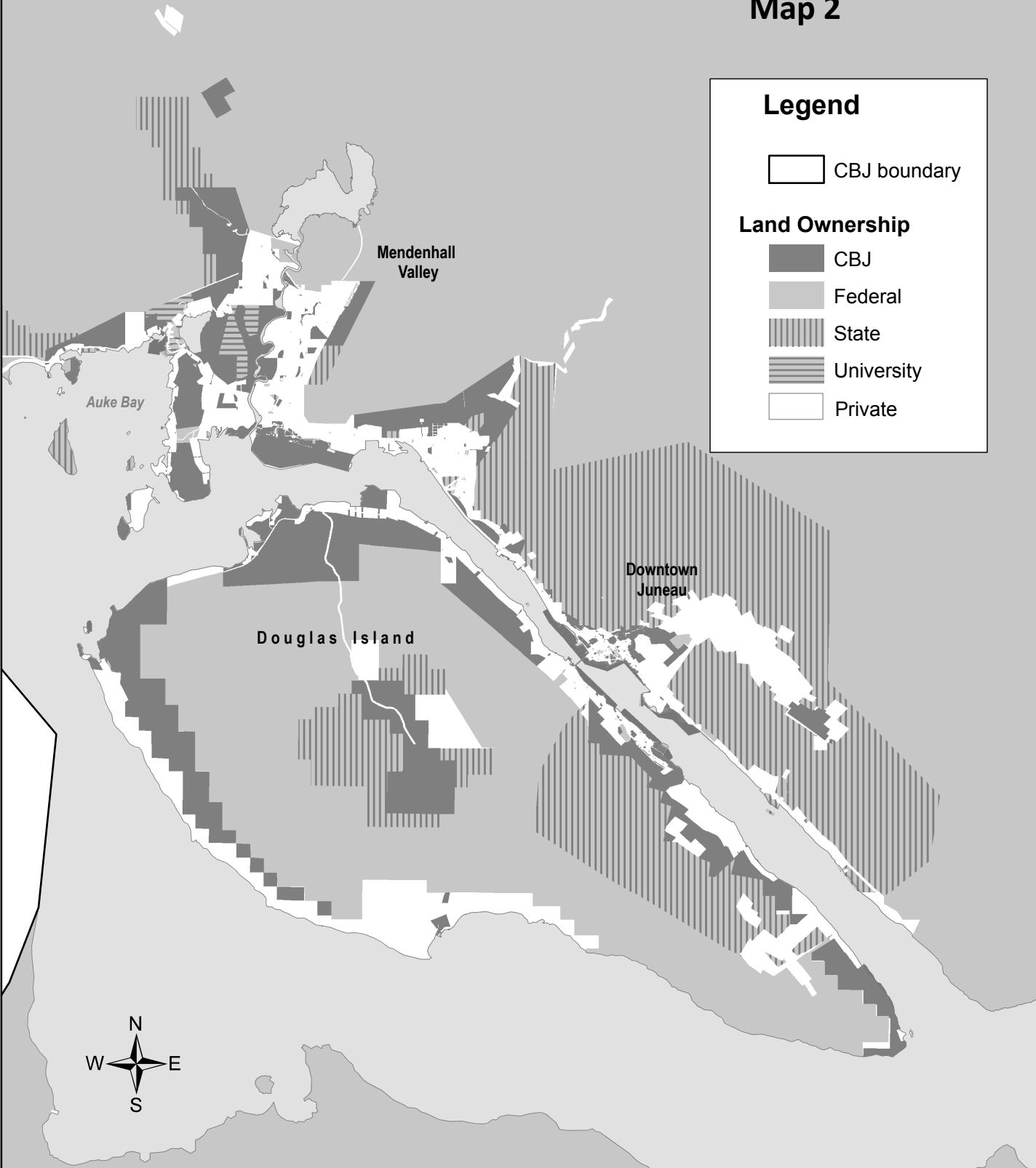
Land Ownership Within the CBJ Map 1



Land Ownership Within the CBJ Map 2

Legend

- CBJ boundary
- Land Ownership**
 - CBJ
 - Federal
 - State
 - University
 - Private



Disclaimer: These maps are for general reference only. These maps were created from the best available sources. Errors and omissions may exist.

