

**An Analysis of the Overlap/Duplication  
Between the CBJ's Mining Ordinance and  
State and Federal Laws Rules, and Regulation**

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**Introduction**

Agency/governmental discretion is fundamental to regulatory oversight, review, and enforcement. Regulatory discretion is obvious in the regulatory process itself, where advocates for one opinion/goal or another try to push regulators towards regulatory decisions that serve their interests, beliefs, goals, etc. A mining company may seek to lower its costs by not using an impermeable liner beneath the waste rock pile or under a tailings impoundment. Community advocates may push regulators to require the liner because it may better protect water resources from mine contamination. The regulator has discretion in how to interpret the various laws and apply them to the specific mine site - and may or may not require the liner.

Administrative and court challenges further demonstrate the breadth and depth of regulatory discretion. The mine or community advocates may ask the regulator to reconsider a decision that they do not like. The mine or community advocates may then ask a court to conclude that the regulator erred when it determined that the liner was required - or was not required. Many regulatory decisions are challenged by entities and interests that do not agree with the regulator's interpretation of the law (or regulation or ordinance) or its interpretation of the facts/conditions on the ground, or its application of the law to the conditions on the ground, etc. These all reveal some of the discretion inherent in regulation mining.

These also demonstrate the need for the CBJ to maintain its own mining Ordinance. If the CBJ abandons its regulatory authority then it gives up its fundamental ability to apply ITS discretion to mining within its jurisdiction.

Two separate government entities regulating the same mine and applying the same law (and regulations and ordinances) would probably yield two very different mine permits and regulatory histories. Each could emphasize the myriad regulatory components differently, interpret and respond to mine features differently, listen to advocates positions differently, etc. More specifically, if the state and CBJ separately enforced the exact same laws, rules, and regulations there would probably be significant differences in their regulation of mining and in the mine's operations and outcomes. But the CBJ cannot enforce the exact same laws as the state. The CBJ established a regulatory rubric for mining that prioritizes CBJ discretion and decision making. That is the theme resulting from this review: The CBJ has recognized that its interests may not

be fully served by Alaska (or federal<sup>1</sup>) regulation of mining within the CBJ's jurisdiction. To remedy deficiencies in state discretion the CBJ has developed its own Ordinance requirements.

**The overlap between state and/or federal laws/rules/regulations and the CBJ's Ordinance does not diminish the need for or importance of any law/rule/regulation/ordinance.** Rather, the CBJ ordinance provides discretionary control to the CBJ. This is functionally additive and as discussed in detail below helps ensure that state/federal regulatory limits and discretion will not result in mining or mining-related activities that are not acceptable to the CBJ.

**Finally, one of the discretionary powers reserved to the CBJ in the Ordinance is inherent: The CBJ is not obligated to employ every requirement.** As discussed below, the CBJ can conclude that state or federal regulation of a component is sufficient and not regulate those items. This is not an abrogation of its duties but yet one more important discretionary element.

### **Ordinance Process**

The CBJ's Ordinance establishes a unique process to make actual regulatory decisions. Most federal and state regulatory decisions are made directly by the respective agency's administrative staff or appointed administrative management. The CBJ's Ordinance most often requires that the Department makes recommendations to the CBJ Planning Commission - after which the matter is placed on the agenda for a regularly scheduled Commission meeting.<sup>2</sup> In other words, the CBJ's elected officials make a determination in a meeting like all other Commission decisions. This is a uniquely public and participatory process compared to related federal or state mining regulatory decision. It is arguably more democratic and public than state/federal mining regulatory decision-making. This further distinguishes the CBJ's Ordinance from federal or state regulation which may share comparable or related topical issues but are not nearly as transparent, democratic, and accountable.

### **Juneau Ordinance Review**

#### **49.65.110 Purpose.**

(a). Section (a) establishes the purpose of the CBJ ordinance and is more about establishing purposes than expressing goals. What is most important in terms of CBJ consideration of amending the Ordinance is that it is under the auspices and control of the Borough instead of the state or federal agencies. These auspices and control form the backbone of this analysis because they distinguish most the entity that can or will regulate mines and make relevant decisions and conclusions as compared to the content of those decisions and conclusions. In other words, by establishing the CBJ as the regulatory entity the CBJ ensures that the CBJ controls mining outcomes and legacies. Without this control and provisions the CBJ cedes these decisions and

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<sup>1</sup> While the report seeks to include federal regulation of mining it focuses on state regulation because there are limited federal lands within the CBJ's jurisdiction. Actual federal mining regulation happens mostly on federal lands (such as BLM and FS for subsurface and surface regulation on federal lands). Federal laws such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act (RCRA) establish a federal nexus to mine permitting but most mining regulation is for mining on federal lands. Because the CBJ's jurisdiction includes only limited federal elements the role of the federal government on lands within CBJ's jurisdiction is small.

<sup>2</sup> For example, after a specified time or event such as after completion of a final EIS - Section 49.65.130(h).

outcomes to state and/or federal regulators (or nobody in the case where there is no CBJ, state, or federal regulation). The section's express exclusions indicate those things that the CBJ determined that local control is never needed.

(b). Section (b) is fundamental to the ordinance, identifying that the city seeks to regulate areas of concern to the CBJ. This is also critical to this analysis because it underscores that the existence of state or federal regulation on a topic does not render the CBJ regulation unnecessary, moot, duplicative, or extraneous: **The ordinance ensures local authority to regulate areas of local concern. That state or federal regulators may also regulate these areas does not diminish or lessen the CBJ's governmental needs, rights, or propriety (nor do the CBJ's regulations diminish or lessen state or federal governmental regulators or regulation).**<sup>3</sup> It simply means that the CBJ regulators should effectively coordinate with the state and federal regulators to prevent/resolve conflicts with one another should they arise.

#### **49.65.115 General applicability.**

(a). Excluding areas from mining is not uncommon in mining regulation. Examples exist in state and federal regulations, such as protecting parks, high quality waters, areas of special concern, etc. As applied in the CBJ Ordinance it is fundamentally a zoning provision.

(b). **This is also akin to a zoning provision. It excludes subsurface regulation of mining except to the extent to prohibit subsidence. State and/or federal regulations may regulate subsidence but in this instance the city has expressly prohibited underground mining activity that will yield subsidence. This does not prohibit mining - but prohibits subsidence. In practice this would require the CBJ to engage with proposed underground mines such that the CBJ ensures that subsidence cannot reasonably occur.** Federal and state regulations do not provide a similar blanket prohibition on subsidence. Therefore, state and federal regulations could arguably seek to limit or prevent subsidence but neither actually prohibits subsidence.

(c). This section limits CBJ powers under specified circumstances. This cedes certain regulatory control where state and federal regulators will perform environmental reviews. This uniquely establishes geographies where state and/or federal regulation is considered sufficient but still reserves/maintains control for regulating certain mining impacts (*CBJ 49.15.320(f)(1)-(8)*) that are considered to have unique or important local impacts (e.g. noise, dust, erosion, lighting).

There can be overlap between some of these reserved regulatory authorities and state and federal regulators but the implementation by those agencies may be limited by statutory authority. For example, state regulation may evaluate blasting at certain times of day but the state may not actually regulate mining blasting to satisfy CBJ goals for noise (which can impact rural areas as well as travel great distances to urban areas). Other examples such as erosion, landslides, and avalanches can impact lands far from the rural areas covered under this section. Thus, there may be overlap with state or federal regulation but for limited, specified activities the CBJ maintains the right to regulate.

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<sup>3</sup> It is suggested that the public and regulated mine would benefit from coordination between the different regulating entities.

#### **49.65.120 Exploration notices, financial warranties and procedures, release of financial warranties for exploration notices.**

As discussed in more detail below (in the general financial warranties section, 49.65.140), the importance of financial warranties cannot be overstated. When something goes wrong at a mine or with the operator, the financial warranty is the last resort safety net to protect the government and taxpayers from financial liabilities and to protect human health and the environment from suffering degradation in the first place and from suffering greater subsequent degradation caused by delayed regulatory and governmental engagement. Where there is overlap in financial warranty regulations or operations the CBJ can exercise its own discretion to best regulate mining within CBJ's jurisdiction and protect CBJ resources.<sup>4</sup>

(a). The majority of this section involves process requirements for exploration permitting. State and federal regulations may require exploration plans and schedules and various bonding requirements. What distinguishes this section in terms of this review is that the CBJ maintains the right to establish its own financial surety and amount in order for exploration to proceed. For example, Alaska may limit financial sureties to \$750/acre<sup>5</sup> which the CBJ may determine is not sufficient to actually ensure reclamation. Further, mines may join the Department of Natural Resources' "bond pool" which itself is only as sufficient as the pool's size, draws, and regulation/application. Both of these state bonding mechanisms are only as sufficient as the state's regulatory implementation. By maintaining its own financial surety determinations the CBJ may require supplemental financial surety or not - but it is within the CBJ's purview and not solely that of state and/or federal regulators.

The last sentence of this subsection<sup>6</sup> underscores the further opportunity for the CBJ to pass new laws, rules, or regulations necessary to protect the CBJ. This allows the CBJ to maintain ongoing control over activities that it may deem are insufficient in state or federal regulation. For example, with the US EPA being reduced (budget, personnel, and arguably mission) the need for local control may be desirable where federal regulation and/or enforcement is diminished.

(b). Beyond the process portions of this subsection, it reserves to the CBJ the right to solely determine whether reclamation of exploration activities has been satisfactory. It further allows the CBJ to declare (subject to appropriate process requirements) that all or a portion of the exploration reclamation financial surety is forfeited to allow the CBJ to complete necessary reclamation. State and federal regulators may also require their own financial warranty, notably Alaska 27.19, but the amount, form, and release of these sureties are subject to state regulatory discretion. As described above and below, this discretion can mean the difference between

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<sup>4</sup> An independent summary of Alaska Reclamation Bonding by David Chambers is available at: Alaska Reclamation Bonding (Summary). This report underscores the discretion and variability in calculating financial warranties and helps demonstrate how this discretion can be exercised for greater or lesser protectiveness. This exercise is a notable example of the need for the CBJ Ordinance.

<sup>5</sup> AS Sec. 27.19.040

<sup>6</sup> "In conducting exploration operations, the operator shall comply with all applicable federal, state and City and Borough laws, rules and regulations, and such compliance shall be a condition of the effectiveness of the authority to operate under an exploration notice."

successful reclamation and reclamation failure - and potential continued and possibly long term or permanent environmental and financial liabilities to the CBJ.

(c). If the CBJ seeks to ensure a locally controlled level of reclamation compliance then these provisions are particularly important. As a practical matter, at a minimum the subsection is a “satisfaction clause” empowering the CBJ to determine when reclamation is satisfactory to CBJ. Without this power the CBJ, if the CBJ was concerned about reclamation failure it could tell the state or federal regulators that it (the CBJ) thinks reclamation is not satisfactory but those regulators have no obligation to go beyond their independent discretion. As with many if not most provisions in the Ordinance, without express language reserving and preserving CBJ authority, state and federal regulators would probably consult with the CBJ but are under no (or very little) obligation to resolve or satisfy any CBJ concern.

The details of the subsection further promote the CBJ’s interests by such provisions as allowing CBJ site inspections, calendar control, and specified control of financial sureties.

(d). Like the previous provision and many within the Ordinance, the CBJ may choose to exercise its regulatory authorities or it may choose to waive them where it determines that state and/or federal regulatory activities are sufficient. In this section, the provision is essential to ensure that the CBJ is satisfied with the bonding requirements imposed by state and/or federal regulators.

#### **49.65.125 Small mine permits, financial warranties and procedures.**

As discussed in more detail below (in the general financial warranties section, 49.65.140), the financial warranties for mining - whether for exploration or a small or large mine - is critical and subject to significant discretion, interpretation, and judgment. This underscores the importance of the CBJ’s Ordinance affording the CBJ its own discretion, interpretation, and judgement for financial warranty calculation and management - and for all mining regulation.

(a)-(b). Subsection (a) simply establishes jurisdiction/authority and its timing. Subection (b) establishes the requirements for a small mine permit. Like most similar Ordinance requirements, it allows for information required by other regulators to be not only referenced but potentially satisfy CBJ informational requirements.

(c). Subsection (c) establishes the process for CBJ review, including the primary elements to be reviewed. As described for numerous other provisions, this subsection establishes that the CBJ review will determine whether the mine is compliant for many factors with federal, state, and CBJ laws, rules, and regulations. This is integral to the purpose and need for the CBJ Ordinance: It establishes the CBJ’s power to regulate. Arguably this CBJ regulation is for compliance with not only Borough laws, rules, and regulations but with those at the federal and state level. In other words, the CBJ is empowered to interpret and regulate any law relevant to mines within its jurisdiction.

The CBJ may conclude that a mine is not compliant with the federal Clean Water Act, or a state mining provision. Most important, of course, the CBJ may pass its own laws, rules, and regulations to ensure that mining impacts are measured, mitigated/minimized, and reclaimed to

the satisfaction of the CBJ (as compared to federal or state satisfaction with respective federal or state laws, rules, and regulations). This CBJ's discretion and authority is arguably the most critical component of the Ordinance. It also negates arguments that topical overlap with federal or state laws, rules, and regulations somehow renders the CBJ Ordinance unnecessary (or overly redundant, duplicative, etc.). The power to regulate vests as much in the regulatory discretion applied to the law (and rule and regulation) as it does in the letter of the law.

Subsection (c) also establishes the CBJ's authority to establish financial warranty amounts. This is a critical component of regulation and the amount of warranty; its form; the terms for its release/forfeiture; how, when, and by whom it is spent; etc. are all subject to regulatory discretion. In this instance it is appropriately entrusted with the local governmental entity that knows the area best and is most directly responsible to protect local human health and the environment.

(d). Section (d) is another process section to manage proposed mining plans that do not meet CBJ's requirements. Its relevance to federal and state rubrics is only procedural.

#### ***49.65.130 Large mines, financial warranties and procedures.***

(a)-(b). Subsections (a) and (b) are similar in intent and relevance to federal and state regulations as 49.65.125 (a-b) is. Subsection (a) simply establishes jurisdiction/authority and its timing. Subsection (b) establishes the requirements for a large mine permit - which are topically and procedurally greater than for small mine permits. Like most similar Ordinance requirements, these subsections allow for information required by other regulators to be not only referenced but potentially to satisfy CBJ informational requirements. Based on the topics included it is reasonable to expect that much if not most of the material would be found in an environmental impact assessment/statement. All of the requirements have a strong nexus to a local government seeking to assess human health, environmental, social, and economic impacts and should not be surprising. There is overlap between the CBJ Ordinance and the state financial warranty requirements. However, the discretionary interpretation and application of the respective state and CBJ requirements is as important as (and can be more important than) the letter of the requirements themselves.

(c)(1). Paragraph (c)(1) specially requires a socioeconomic impact assessment. As described above, this is a reasonable topical concern for a local government. The only way a local government could evaluate what is sought is for the local government to complete or partner in the completion of the assessment. A separate federal or state regulatory entity could reasonably complete such an assessment but no federal or state entity could interpret or apply it to or for the CBJ.

(c)(2). This paragraph waives the above socioeconomic requirements when that information is *“not essential to evaluate what impact the mining operation will have on the City and Borough; or such information has been previously provided; or such information is adequately presented in another report previously submitted to the department or another agency.”* In other words, as with many Ordinance provisions, the CBJ requirements add minimal, if any, burden to mining applicants.

(d-f). Subsections (d), (e), and (f) are ministerial and procedural requirements (timing, fees, extensions). Subsection (f) uniquely allows that the mine applicant (“operator”) may decline to grant the CBJ an extension to the 90-day timeframe for the CBJ to complete its application review. It is fairly uncommon for a regulatory requirement to be based on a permit applicant’s discretion. More importantly, subsection (f) establishes that the CBJ’s laws, rules, and regulations must be included in any Environmental Impact Statement (EIS) required by the National Environmental Policy Act (NEPA). As described above - this underscores the importance of CBJ’s laws, rules, and regulations in the process - underscoring the CBJ’s need to regulate to protect *local* human health and the environment and to interpret how CBJ’s laws, rules, and regulations are interpreted and applied. These topics include, but are not limited to, air, water, sewage, hazardous and toxic material management, mining impacts (such as noise, light, traffic, and dust), etc. All of these topics are included in various federal and state requirements (whether required for assessment, express management, numeric regulation, etc. That they are included in other regulatory rubrics does not render the CBJ’s requirements as duplicative, moot, onerous, etc. The CBJ’s requirements are what it deems necessary to protect local human health and the environment and regulatory discretion (again) can equal or exceed the letter of the requirements.

This provision stresses the real merit of the CBJ’s requirements. The final sentence of subsection (f) allows the CBJ to establish “*such conditions or stipulations as the department deems to be reasonably necessary to mitigate any adverse environmental, health, safety or general welfare impacts which may result from the proposed mining operation.*” These conditions or stipulations are not something that federal or state regulators could develop - and federal and state regulators are not required to accept, adopt, or approve them.

Subsection (f)’s process for the Department’s recommendations to be heard as a conditional use application (49.15, article III; discussed in more detail below) should not be confused with diminishing the importance of the process established in the rest of the Ordinance. Nor should it be interpreted to suggest that a different method to achieve a conditional use application/permit somehow ensures that the CBJ’s regulatory interests are satisfied.

(g). Subsection (g) provides the CBJ’s process when a proposed mining operation/plan does not meet the CBJ’s standards for issuance of permits or conduct of operations, allowing for withdrawal or revision and resubmittal.

(h). Subsection (h) focuses on reducing/preventing duplication of studies required by the CBJ Ordinance. This is similar to NEPA/EIS requirements above in that it provides for notice to the CBJ so that the CBJ may participate in that process. This participation could be seen as rendering unnecessary related CBJ Ordinance provisions because the CBJ can participate in state or federal NEPA processes (whether or not the CBJ maintains a robust mining Ordinance). However, such an interpretation/conclusion misses the distinction between participation and decision making. A participant has no clear control or governance over the process itself, in the document’s/assessment’s outcomes, or how those outcomes are applied.

This once again is the focal distinction between the CBJ maintaining its own Ordinance and the

CBJ's topics simply being "covered" by federal or state regulators. Any person/entity - like the CBJ - can participate in a regulatory process, submit comments, identify concerns, and even propose solutions and regulatory outcomes. But in those situations the federal or state regulators have the final discretion and authority to adopt or reject any or all of the person's/entity's concerns. The CBJ Ordinance assures that the CBJ has specified discretion and authority to regulate mining within CBJ jurisdiction.

As discussed near the top of this review, Subsection (h) implements a unique *ordinance process* whereby the Department makes recommendations to the CBJ Commission - after which the Commission places the matter on the next regularly scheduled Commission agenda. This allows for an open, public, decision-making process unparalleled in federal or state mining regulatory decision-making. It helps ensure the ultimate decision is transparent, democratic, and accountable.

#### ***49.65.135 Standards for issuance of permits and conduct of operations.***

Section 49.65.135 sets the standards to be used by the Department for its recommendations and thereby for the CBJ Planning Commission's regulatory decisions. As discussed throughout this analysis, the overlap of these issues with federal or state laws, rules, and/or regulations is not the main or only relevant point to the regulatory decisions made by the federal, state, or CBJ. Equal to the letter of the laws is the regulatory discretion inherent in the regulatory process. The federal, state, and CBJ regulators may make significantly different recommendations and decisions based on the exact same scientific and other data. This discretion is a key to mine regulation and highlights the importance of the CBJ Ordinance.

(a). Subsection (a) establishes seven general standards. Each of them is included in part or whole in federal and/or state regulatory rubrics and form the basis of the sections that follow.

(1). Paragraph (a)(1) is a general requirement establishing applicability of all CBJ code sections to mine regulation within the CBJ's jurisdiction and highlights the primary goal to "*mitigate adverse environmental, health, safety and general welfare impacts.*"

(2). Alaska law, rules, and regulations include extensive air and water quality protections. The US EPA has delegated extensive programmatic authority to Alaska under both the Clean Water Act and Clean Air Act.<sup>7</sup> Both of these include provisions allowing local governments to implement regulations that are stricter (more protective) than the respective federal and state programs. The CBJ Ordinance references "City and Borough laws, rules and regulations" which could include specific CBJ air and water regulations or other CBJ regulations, such as zoning and conditional use requirements. Implementation by the CBJ would benefit from coordination between the regulating agencies. Local governments do not usually directly issue Clean Air Act and Clean Water Act permits but the CBJ can indirectly or directly do so for a mining permit. This could be done alone, in coordination with federal and state regulators, with assistance from federal or state regulators and/or private experts (e.g. contractors), etc. The CBJ could further

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<sup>7</sup> Examples of Alaska's current regulations include the Alaska Point Source Discharge Elimination System (APDES), Stormwater Pollution Prevention Plan (SWPPP), and Air Quality Control permitting.

enhance its effectiveness thru zoning and other provisions - which could both complement the CBJ's mining regulations or act independently.

(3). Paragraph 3 applies to containing and disposing hazardous and toxic materials, sewage, and solid waste. The analysis is generally the same as for water and air in paragraph (1). Notably, hazardous and toxic materials are generally regulated under the federal Resource Conservation and Recovery Act (RCRA).

(4). Paragraph (4) may include federal or state provisions common in reclamation plans such as noise (e.g. blasting) or stormwater pollution prevention measures (e.g. diversions and berms). There are no express legal or regulatory conflicts regarding the CBJ's general goals or requirements. They are commonly managed through project-specific provisions developed by regulators, the mining company, and public participants. Based on the CBJ's process of the Department making recommendations to the Planning Commission, the public could have multiple opportunities to participate in these local issues.

(5). Paragraph 5 ensures consideration of appropriate historic sites. At the federal level these may be covered by the National Historic Preservation Act and at the state level they are managed by Office of History and Archaeology (OHA)(which serves as Alaska's State Historic Preservation Office (SHPO)). It is not uncommon for a site to be of interest to federal and/or state and/or local interests and regulators. There are no inherent conflicts to protecting a resource that is also protected by another (historic) regulatory entity, as long as the most protective requirement is ultimately enforced. From the historical preservation perspective, if the CBJ wanted to protect something that a federal or state entity did not it would be no more of a conflict for the CBJ to protect it than if the federal or state entity wanted to protect a site that the CBJ was not concerned about. The only likely conflict between the jurisdictions would occur if one of the regulatory entities wanted to permit destruction of a historic resource that another wanted to protect. This conflict seems highly improbable.

(6). This paragraph simply includes the requirements for a reclamation plan in subsection (b), below, in the list of required issues.

(7). Paragraph (7) considers the socioeconomic impacts mining will have on the CBJ. It is not uncommon for a federal or state mining assessment to consider socioeconomic impacts to the local community - but neither federal or state regulators usually consider such impacts as a primary consideration.

(b). Subsection (b) establishes provisions for reclamation. Alaska has detailed reclamation provisions - but the state's reclamation requirements expressly allow local governments to supplement state reclamation requirements.<sup>8</sup> Therefore, the CBJ's reclamation provisions may add provisions and/or be more stringent than Alaska's reclamation provisions. This overlap also comes with discretion in its interpretation and regulatory application.

(1). Paragraph (1) refers to cleanup and disposal of dangerous, hazardous or toxic materials - which are regulated under the RCRA (discussed above). However, the CBJ is unlikely to

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<sup>8</sup> AS 27.19.010(d).

conflict with this federal regulation and it is even possible that an existing or new CBJ disposal facility could be used for disposal - specially lending itself to CBJ regulation.

(2-5). Paragraphs (2)-(5), (7)-(8) parallel Alaska requirements and are unlikely to conflict with Alaska's regulation. However, the CBJ and state could interpret or apply (or require of a mine) different things and this regulatory jurisdiction makes the CBJ's provisions unique. The application is once again as critical as the letters of the law.

The subsidence provisions in paragraph (4) are a specific example where the CBJ Ordinance is more restrictive than state requirements. Alaska could allow it in a situation where such subsidence did not compromise (or acceptably compromised) human health or the environment.

The erosion provisions in paragraph (6) are a unique example where Alaska's provisions to avoid "undue and unnecessary degradation of the land and water resources"<sup>9</sup> are arguably more strict than the CBJ's requirement to take "*adequate steps to control or avoid soil erosion or wind erosion*". Both share similar goals through differently worded approaches. How they interpret and apply the provisions could further separate their regulatory approaches and the mining results on the ground.

Paragraph (9) requires "Rehabilitation of fisheries and wildlife habitat" which is not expressly required in state reclamation provisions. But state revegetation goals/requirements may include goals for revegetation that benefits (creates habitat for) fish and wildlife. Therefore there would be at least some overlap between the CBJ and state. But in practice the discretion in both the CBJ's fish and wildlife habitat requirements and the state's revegetation requirements renders them different (and both are (yet again) subject to agency discretion)

Paragraph 10 is a catch-all that allows the Commission to establish additional reclamation provisions as it sees fit.<sup>10</sup> Federal and state regulators arguably have similar opportunities to require reclamation provisions where there is no express requirement (at a minimum by working with mining companies and/or negotiating permit terms) - underscoring the regulatory discretion inherent in all of the governmental regulatory rubrics.

(c). Subsection (c) is a process provision allowing the CBJ to manage violations by mining companies. CBJ, federal, and state response and enforcement of permit violations may vary widely. It is not uncommon for different agencies to respond differently (even within a level of government, let alone between them). It is recommended that the different governmental entities coordinate on such responses to the extent practicable to ensure that violations are completely and fairly resolved.

#### ***49.65.140 Financial warranty.***

As described above financial warranties are essential to ensuring the CBJ has sufficient funds to maintain, preserve, and/or reclaim a mine should a mine operator go bankrupt or otherwise not perform required operations, reclamation, and protections to human health and the environment.

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<sup>9</sup> AS 27.19.020.

<sup>10</sup> Which provisions would presumably be allowed by AS 27.19.010(d), described above.

It is essential that the financial warranty is at all times sufficient to perform then-existing required tasks. It should not be tied to mine cash flow or other factors and should include reasonable worst-case scenarios, inflation, and overhead costs necessary for a government to take-over and dispose of the site.

The CBJ's financial warranty rubric could clearly result in overlap with state (or federal if federal lands fell within the CBJ's jurisdiction) financial warranty requirements. As described below, these could be avoided if the mining company elects to use a financial warranty (amount(s) and form(s)) that satisfied both state and CBJ requirements. This could result in the CBJ concluding that the financial warranty held by the state satisfied CBJ's requirements. If it did not then this overlap should be considered a cost of business because of the importance of ensuring that financial warranty amounts, forms, and terms are sufficient to actually achieve permitting and reclamation goals and protect human health and the environment.

As a sovereign regulator, the state could choose a financial warranty form, amount, or terms that the CBJ could conclude did not satisfactorily protect the CBJ's interests. Without its own regulations the CBJ would not be able to remedy the deficiencies (except by asking the state to do so, which resolution would be solely at the state's discretion).

There are many examples of instances where financial assurance amounts are insufficient.<sup>11</sup> There are also many examples of potentially avoidable mining impacts that happened because there was insufficient financial warranty to prevent something from happening; the form of financial warranty rendered it unavailable or insufficient; and/or the warranty language itself was deficient and caused delay or stopped money from flowing to the government and thereby limiting the government's initial or ultimate responses. Determining these elements can be subjective, which underscores the importance of the CBJ's ordinance - ensuring that even if there is overlap in financial warranty regulations or operations the CBJ can exercise its own discretion to best regulate mining within CBJ's jurisdiction and protect CBJ resources.

(a). In Subsection (a) the code expressly requires the CBJ to take "*into account the financial warranties which the operator must submit to other agencies.*" This may help reduce overlap with other agencies - but the simple dollar amounts are not the whole story (nor should it be). The CBJ expressly "*reserves the right to seek forfeiture of the financial warranty, in whole or in part, in the interest of protecting the environmental, health, safety and general welfare requirements of the City and Borough if it determines that the operator has violated the*

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<sup>11</sup> Independent reviews of the financial warranties for the Kensington, True North, Greens Creek, Fort Knox, and Pogo Mines underscore the great discretion involved in establishing a financial warranty and the great range of dollar values that can come from this discretion and the calculation processes. The results in the above studies often varied from tens of millions to over one hundred million dollars. This underscores the importance of the ability for the CBJ to establish its own financial warranty formulas and apply those formulas for the CBJ. These reports and others are available at CSP2's website - <http://csp2.org/technical-reports#category-id-financial-assurance>. The individual report links are: [Kensington FA Review.pdf](#); [True North FA Review.pdf](#); [True North Mine Financial Assurance Review](#); [Greens Creek Mine Financial Assurance Review\(1\).pdf](#); [Pogo FA Review.pdf](#); and [Fort Knox Financial Assurance Review](#).

Note that in addition to the reports themselves, some of the reports have appendices and related attachments, which are listed separately below the primary links. They can be seen and downloaded at: <http://csp2.org/technical-reports#category-id-financial-assurance>.

*obligations or requirements of the permit or the conditions of an exploration notice.”* This could overlap or conflict with a state action/inaction, such as where both the CBJ and state seek forfeiture or where one seeks forfeiture and the other does not. This is somewhat moderated by the CBJ provision that *“The forfeiture shall be limited to the extent necessary to satisfy the requirements or conditions that the operator has violated.”* Forfeiture would therefore require coordination between the CBJ and other agencies with an interest in overlapping or related financial warranties.

(b). Subsection (b) authorizes the Department to establish the financial warranty amount for exploration notices but requires the Commission to establish the financial warranty amount for small and large mines. The provisions for formulating the financial warranty expressly require the CBJ to *“take into consideration the amount and scope of any financial warranties which have been submitted to other agencies.”* This helps reduce or eliminate overlap between the CBJ and other warranty-requiring regulators. That said, the CBJ Ordinance further requires that *“When the performance of such obligations is guaranteed by financial warranties that have been submitted to other agencies, 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.”* The Ordinance then lists eight examples where such additional financial warranty may be required. These include common mining features (e.g. mining operations and reclamation) and also mining facilities that could more uniquely impact a local government (e.g. runoff and erosion, grading and tree planting, traffic and road issues).

All of these financial warranty features could overlap with state or federal regulations. It is not common for a mine to post multiple warranties for the same features (for example, a state financial warranty may be required for state resources, lands, and state-regulated features and a federal financial warranty may be required for federal resources, lands, and federally-regulated features). However, there is no reason that such overlap would become unmanageable or unduly burden a mine because the CBJ provisions expressly require that the warranty amount consider other agencies’ coverages and financial warranties.

More importantly, the CBJ reserves the right to require financial warranty where another agency’s financial warranty is deficient. Such financial warranty deficiency is not uncommon. There are many examples of insufficient financial warranty leaving a governmental entity - and ultimately taxpayers - responsible for cleanup and other costs caused by an abandoned or bankrupt mine.<sup>12</sup>

(c). Subsection (c) provides that financial warranties may be in the form of cash, certificate of deposit, irrevocable bank letter of credit, or surety bond. Most CBJ and state provisions are similar so if there was any overlap or conflict it could potentially (probably) be avoided by the company electing to use a financial warranty forms and amounts for the state that also satisfies the requirements of the CBJ. In other words, if a notable conflict or overlap arose and the company accepted financial warranty form(s) - and amount - common to both then that would satisfy both CBJ and state requirements and the company would not have to post separate

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<sup>12</sup> Insufficiency of the financial warranty also means that reclamation may not be completely or adequately performed, impairing human health and/or the environment.

financial warranties. While such coordination is valuable and available, the issue spotlights the importance/liability (may be good or bad, depending on one's perspective) of regulatory discretion and therefore the importance of the CBJ's Ordinance.

(d). Subsection (d) allows small mines and exploration notices to utilize a property bond under certain circumstances and subject to certain restrictions. This recognizes that such projects may need only a limited financial warranty. This could still also yield a situation where the state and CBJ had different financial warranty requirements for one project.

(e). Subsection (e) provides administrative components regarding the form of financial warranty. These are not uncommon and are consistent with state requirements. If anything these requirements do not go far enough to ensure that the CBJ can readily access funds, such as by requirements that the financial warranty's form include provisions for rapid turnover of funds upon CBJ determination of warranty default or operator failure to comply with required provisions. It is imperative that such funds be readily available.

(f-g). Subsections (f) and (g) establish that the financial warranty should be reviewed annually and the process for increasing or decreasing the financial warranty amount. An annual review period is more frequent than most jurisdictions, including Alaska, but a more frequent review ensures that the state requirement will be satisfied and that the funding amount will be sufficient at all times.

#### ***49.65.145 Term of notices and permits; temporary cessation.***

(a-e). Subsections (a) - (e) provide for terms and durations for permits and operations and notices required by mining operations to the CBJ. They are similar to Alaska's requirements. The terms and notice requirements are sufficiently similar in both Alaska regulations and in the CBJ to ensure no substantial conflict or burden on mining operations to satisfy both. The terms are necessary for basic mine and compliance administration and for coordination between CBJ provisions related to - or dependent on - Alaska's requirements.<sup>13</sup>

#### ***49.65.150 Annual reports; monitoring; monitoring fee.***

(a-e). Subsections (a) - (e) require mine activity and status reports, CBJ access to the site, and annual fees paid to the CBJ. They are similar to Alaska's requirements. The activity and status reports are sufficiently similar in both Alaska regulations and in the Mining Ordinance to ensure no substantial conflict or burden on mining operations to satisfy both (likely with the same or substantially similar documents). The CBJ's requirements for site access are particularly relaxed - even providing notice to the mining company and are certain not to conflict with those of state or federal regulators. Finally, the fees required are limited but would clearly be additive to fees charged by state regulators.

#### ***49.65.155 Technical revisions, summary approval, and amendments.***

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<sup>13</sup> An example would be the CBJ's reliance on an Alaska financial warranty amount. The CBJ would need to know about changes to mine operations and changes to the mine's financial warranty held by Alaska. Likewise if a mine stopped operations for any of the durations identified it would have to notify both CBJ and state regulators.

(a). Subsection (a) provides for minor changes to mine permits and subsection (b) provides for major changes to mine permits. These processes are administrative and comparable to Alaska's requirements. Therefore there is overlap between them but mine operators should not have any difficulty complying with both because the overlaps are of ministerial requirements (not operational/mining requirements).

***49.65.160 Enforcement***

***49.65.165 Appeal.***

Both of these sections provide for enforcement and are CBJ-specific processes. There are comparable provisions for enforcement and appeal in Alaska's laws but they are functionally unrelated. The CBJ's provisions apply to CBJ decisions and Alaska's provisions apply to Alaska's decisions. While there is conceptual comparability, the rubrics do not really overlap. Further, a mine operator exercising under both rubrics would effectively be involved in separate processes.

***49.65.170 Release of warranties for mining operations.***

(a-c). Subsections (a) - (c) establish the process and criteria for releasing financial warranties to mining operations. They are specific to the CBJ but Alaska has similar provisions and processes for when Alaska releases financial warranties to mining operators. The processes are similar in concept and overlap in concept and goal. The materials that a mine operation would submit respectively to the CBJ and Alaska are topically similar - and mine operators should not have a difficult time complying with both sets of requirements. What is different between the CBJ and Alaska is the discretion and priorities each could bring to its respective analysis of the minesite and interpretation of the requirements. Once again, the distinction is not so much about the law or the laws' goals but how the law is interpreted and applied.

***49.65.175 Successor operators.***

***49.65.180 Confidentiality.***

Both of these sections provide for ministerial processes relevant to management of the mining permit (as compared to actual mining matters). There are comparable provisions for transferring ownership and confidentiality in Alaska's laws but they are functionally unrelated. The CBJ's provisions apply to CBJ decisions and Alaska's provisions apply to Alaska's decisions. There is conceptual comparability but the rubrics do not really overlap. It would benefit mining for the CBJ and state to at least similarly apply requirements for these items to ensure consistency in governmental management.

***49.65.185 Suspension or revocation of notices and permits.***

(a-f). Subsections (a) - (f) establish processes and criteria for suspending or revoking mining permits and notices. Both the CBJ and Alaska have suspension and revocation processes and procedures. The overlap between these is conceptually high but there is a great deal of latitude

in interpretation of various mining activities and how the provisions could be exercised and applied. This discretion underscores the different priorities and needs in the respective governments.

***49.65.190 Effect of article on operations in annexed territory.***

***49.65.195 Severability.***

Both of these provisions relate to legal operations regarding the applicability and interpolation of the CBJ Ordinance. These provisions apply how the laws themselves operate and are interpreted not to regulation of mines specifically. They are not relevant to this analysis.

**Allowable Use Permit**

49.65.115 (c) provides for Urban and Rural Mining Districts. Mines located in the Rural Mining District which will undergo environmental review by state and/or federal agencies are regulated by CBJ 49.15.320. CBJ Section 49.15.320, *et. seq.* provides for (possible) permitting outside the Urban District, of land uses “allowed in a particular zoning district but which, due to size, intensity or particular characteristics must be reviewed and approved by the planning commission.” The goal is to ensure compatibility of the proposed use with the location - and the Commission may impose (limited) conditions to help mitigate impacts.

*(a-d). Purpose and Process.* Section (a) describes the purpose and sections (b)-(d) are ministerial requirements for application processes and procedures for both the developer and CBJ. Their procedural nature makes overlap moot but some of the applications of these permits could conceivably overlap with state or federal regulation. In spite of this overlap the purpose is local analysis and control over rural developments that may impact the CBJ.

*(e). Decisions on Allowable Use Permits.* Section (e) requires the Director to make a recommendation based on whether the application is complete, the requested use is appropriate based on the table of permissible uses, whether the development will comply with other requirements, and whether conditions are necessary for approval. The Commission applies the “preponderance of evidence” standard to determine whether required criteria are met. This discretion forms the foundation for CBJ regulation outside of the Urban District and again underpins the importance of local control. The areas under these sections are outside of the Juneau’s urban area but still within the community and CBJ jurisdiction and their impacts/results are reasonably likely to directly and indirectly impact the CBJ.

*(f). Rural District Conditions.* The Planning Commission may impose conditions on mines in the Rural Mining District pursuant to CBJ 49.15.320(f)(1-8) - plus additional conditions relating to traffic, lighting, safety, noise, dust, visual screening, surface subsidence, avalanches, landslides, and erosion. These include: schedules/timing; land use; creation of an owners’ association (for legal holding or maintenance purposes); conveying title, easements, licenses or other property interests to various entities; posting performance sureties (e.g. bond, collateral, etc.); public agency or utility commitment to serve the proposed development; covenants,

servitudes, or other instruments to ensure permit compliance by future owners; and permit revocation conditions.<sup>14</sup>

Some of these provisions (such as owners associations, dedications/property interest conveyances, and commitments for services) are not likely to be relevant to mining. Most of the rest of the provisions are specific to local control and are unlikely to significantly overlap with state or federal regulation - with the exception of considering posting performance bonds which are also required by the State. The ramifications of overlap or duplication of financial warranties are discussed in detail in Section 49.65.140 (Financial warranty), above. What matters in this instance is the CBJ has again recognized the importance of appropriate, local determination for financial amounts, forms, and terms for lands mined within CBJ's jurisdiction.

It is reasonable to expect that all or most of the other conditions provided by 49.65.115 (c)<sup>15</sup> will be included in some form or another in state or federal analysis and permitting. For example, blasting regulation and heavy equipment operations pertain to noise and most mine permits establish requirements (or separate or additional permits) for safety, dust, stability, and drainage/erosion. But these issues are also commonly regulated by local entities (independent of mining or state/federal permitting). The fact that a mine will be permitted by a state or federal agency(s) is not a reason for the local regulators to abrogate or abandon their regulatory obligations.

All of these components are essential to ensuring land uses are consistent with local land uses and addressing local human health and environmental concerns. Further, their inclusion is essential to ensuring local control. The proximity and unique nature of Juneau's Rural District(s) underscores the need for local control to blend CBJ's urban and rural rubrics. In many ways the rural districting provides a buffer to the Urban District and as a part of the CBJ the Rural District(s) warrants its own local protection and control.

### **Conditional Use Permit**

A conditional use permit allows the CBJ some flexibility within existing zoning regulations. CBJ Section 49.15.330, *et. seq.* provides the Commission with "flexibility necessary to make determinations appropriate to individual sites" by permitting 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." Essentially this allows the CBJ to consider uses which may be necessary or desirable but which are limited by zoning.

*(a)-(e). Purpose and Process.* Sections (a) describes the purpose and sections (b)-(e) are ministerial requirements for application processes and procedures for both the developer and CBJ. Their procedural nature makes overlap moot but some of the applications of these permits

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<sup>14</sup> These sections do not include CBJ 49.15.320(f)(9-12) which requires conditions for development to minimize environmental impacts (including eagle nests, wetlands and intertidal areas) and impacts to/from sound, screening, and drainage. The conditions (exceptions) apply only when state or federal agencies complete an environmental impact assessment - which would include these elements but they are also captured by the additional conditions found in 49.65.115 (c) which allows conditions for noise, screening, and erosion (among other items). This seems consistent with the CBJ's apparent goal of not requiring more regulation than is necessary.

<sup>15</sup> Traffic, lighting, safety, noise, dust, visual screening, surface subsidence, avalanches, landslides, and erosion

could conceivably overlap with state or federal regulation. In spite of this overlap the purpose is local analysis and control over rural developments that may impact the CBJ.

The conditional use permit procedure is intended to afford the commission the flexibility necessary to make determinations appropriate to individual sites. Sections (e) and (f) provide for the Director's review and conclusions and the Commissions review and decisions.

The commission is empowered to attach to the permit those conditions listed in subsection (g) and further conditions necessary to mitigate external adverse impacts. If the commission determines that these impacts cannot be satisfactorily overcome, the permit would be denied.

*(f). Commission Standards and Determinations.* Section (f) empowers the Commission to adopt the Director's determinations pursuant to section (e) and still deny or condition the conditional use permit based on the Commission's independent review of materials submitted at hearing if the Commission concludes that the development "will more probably than not" materially endanger the public health or safety; substantially decrease the value of or be out of harmony with property in the neighboring area; or lack general conformity with the comprehensive plan, thoroughfare plan, or other officially adopted plans. This is broad discretionary power that is important to any review.

*(g). Specific conditions.* Section (g) allows the Commission to alter the Director's proposed permit conditions, impose its own permit conditions, or a combination of both. This section then lists seventeen specific conditions that the Commission may consider plus an eighteenth condition that is essentially empowers the Commission to impose any "other conditions as may be reasonably necessary pursuant to the standards listed in subsection (f) of this section."

This CBJ's authorities for Allowable Use Permits and Conditional Use Permits are powerful tools and offer the Commission fairly broad powers. But to fully and properly regulate mining they are not sufficient to fully and properly regulate mining. These AUP and CUP provisions are limited as a stand-alone set of authorities as applied to mining. They really only offer full governance when combined with the actual regulatory powers available through CBJ 49.65.110 to 195.

## **Proponents Arguments**

There are many ways to analyze and review the various primary arguments and reasoning advocated by the proponents of removing most of the regulatory provisions from the CBJ's mining ordinance (CBJ 49.65.110-195). A particularly compelling question raised by the proposed changes asks whether the CBJ wants to be a regulatory government or whether the CBJ wants to be a mining partner.

In this context, a regulatory government would regulate activities within its jurisdiction to protect the interests of the CBJ. It includes authorities to issue and enforce permits, engage with other regulatory entities (such as state and federal regulators), and exercise its other powers as a sovereign. In this context a mining partner is an entity that seeks to negotiate provisions and conditions for mining. This is more business than regulator. The proposed amendments seek to

use a lease or similar negotiated instrument to regulate the CBJ's regulatory interests. It is unclear what advantage they offer to the citizens or government of the CBJ. Its remedies would not be review and permitting (and monitoring and enforcing permits) but rather if the CBJ had a problem with the way a mine operated the CBJ could seek administrative or court remedies, such as are available to any contracting entities.

Ultimately, this can be viewed as a matter of whether the CBJ seeks to maintain its mining regulation within its jurisdiction or whether it wants to abrogate/abandon its right to fully regulate mining within its jurisdiction. If it abrogates/abandons the regulations then it loses much of its regulatory discretion as discussed throughout this review. The state and federal governments will be the regulators and CBJ will be closer to a partner with the mining company than a government or regulator. This is ultimately a choice for the CBJ and may be characterized as asking whether the CBJ seeks to govern or be governed.

