MEMORANDUM RE MINING ORDINANCE EDITING

TO: THE MINING ORDINANCE COMMITTEE
FROM: BILL CORBUS, MERRILL SANFORD, SAM SMITH, SCOTT SPICKLER, FRANK BERGSTROM, NEIL MACKINNON, AND JIM CLARK
February 22, 2018

GENERAL REMARKS

We all appreciate the challenging task you have been given by the Assembly. We also appreciate Ms. Mead's effort to clarify the Mining Ordinance to make its provisions consistent with the objective of treating an applicant's Federal and State permits as the base conditional use to which the Planning Commission would add additional conditions to further protect the environment and the community (hereinafter "objective").

This Memorandum explains why various requirements of sections 49.65.110 – 49.65.197 are inconsistent with the objective and should be clarified or removed from the Mining Ordinance.

The Mining Ordinance objective we request for mines in the roaded areas is spelled out simply and clearly in 49.65.115 (c) (setting out the process for permitting mines in rural areas): "Mines located in the Rural Mining District which will undergo environmental review by state agencies, federal agencies, or both, as determined by the director, shall not be subject to Chapter 49.65 and shall be permitted as allowable uses pursuant to CBJ 49.15.320."

Given the Planning Commission's tremendous conditional use permitting authority (recognized at page 22 of Mr. Loeffler's Report) there is no reason that the architecture of the Mining Ordinance for mines in the roaded areas should not be very similar. The number of Mining Ordinance sections that list things that the director is required to consider and conclude with a catch all provision authorizing the director and commission to include whatever they want demonstrates that nothing more than the state and federal permits and the authority of the Planning Commission to add conditions under 49.15.330 is needed to protect the CBJ. For example, subsection (d) of 49.65.155 says that the other requirements in 49.65.155 do "not limit or otherwise affect the authority of the director or the commission to condition or place stipulations on a permit pursuant to this article or the conditional use process as provided in Chapter 49.15, Article III."

It has also been our objective from the outset of this process to remove duplication both within the internal structure of the Mining Ordinance and with the federal and state processes. The Mining Ordinance requires the Planning Commission staff to perform work already performed by federal and state agencies which have the staff and specialized expertise to do that work.

It has also been our objective to eliminate the 49.65.130 requirement for the highly discriminatory socioeconomic study which applies only to mining workers and their families. A mine should mitigate the environmental and on-the-ground physical impacts of its operations. The people impacts are paid by miners and their families through property and sales taxes. The people impacts from miners and their families are no different from the people impacts from bringing jobs and families to Juneau from any other source. As it stands, this unnecessary barrier to mining violates the equal protection clause of Alaska's Constitution. At a time when Juneau has lost 500 jobs in the last three years is this a message we want to send to the mining community.

Finally, the procedures for managing, drawing down, and relinquishing the financial warranty needed to insure reclamation must be coordinated with the federal and state agencies that are holding a financial warranty. An applicant should not be required to obtain two financial warranties covering the same reclamation requirements as is the case in Subsection 49.65.150 (c).

49.65.110 PURPOSE:

1. Subsection (a)(2) reserves to the CBJ "all regulatory powers not preempted by state or federal law." More stringent standards would only be added if the department believed that state and/or federal regulators had not gone far enough in applying state and federal law, which is already stringent. This raises the question of the department's expertise to decide whether state and federal requirements are sufficient protection and the department's expertise in deciding what the more stringent standards should be and implementing such standards in the conditional use permit.

   For these reasons we request that the following proviso be added to the sentence: <u>Provided, however, that such more stringent standards be approved by the state or federal agency whose permits or laws or regulations the department proposes to more stringently apply.</u>

2. Subsection (c) allows the director to review federally approved activities on federal land "so long as the purpose of the review process is not to deny use or expressly prohibit mining." Why is this section needed? What does it mean? Why is the director given authority to review federally approved activities on federal land separate and apart from his/her activity as staff to the Planning Commission? We recommend that this subsection be deleted.

3. We request that a new subsection (e) be added that would provide as follows: "<u>The CBJ shall accept state and federal permits for the subjects they regulate in lieu of CBJ review and regulation of the same subject matter; Provided, however, that the CBJ may add conditions not preempted by state or federal authority that are approved by that state or federal authority.</u>"

49.65.120 EXPLORATION:

1. This section is written as a departmental permit. In fact, 49.65.140 (b) so states. There is no mention of Planning Commission action. As such the department's determinations are administrative decisions/final agency action subject to judicial review.

2. While the operator is required to provide the department with "copies of any prospecting permits, notice of intent to conduct exploration, or operating plans filed with any federal or state agency with all modifications, revisions and amendments thereto," this section says nothing about how the department will use such permits/operating plans.

   Like the very clear direction in 49.65.115 (c), this section should provide that if the applicant has undergone "environmental review by state agencies, federal agencies, or both, as determined by the director, shall not be subject to Chapter 49.65 … ."

   Accordingly, we request that the following be added as a second sentence to 49.65.120 (b) of Ms. Mead's draft:

   > 49.65.120 shall not apply to an applicant which has an approved Plan of Operations for exploration from the Forest Service or from the State of Alaska.

   An applicant is required to obtain a Plan of Operations pursuant to 36 CFR Part 228 to explore on federal land within the CBJ. This includes a reclamation plan (36 CFR 228.8 (g)) and a financial warranty (36 CFR 228.51). A Plan of Operations also requires at least an Environmental Assessment under the National Environmental Policy Act (NEPA).

   An applicant is required to obtain a Plan of Operations pursuant to AS 38.05.185 to explore on state land within the CBJ. This includes a reclamation plan (AS 27.19.030) and a financial warranty (36 CFR AS 27.19.040).

   As is shown on the attached matrix, all the requirements set out in 49.65.120 are already required for exploration on federal and state land within the CBJ. No purpose is served by having the department duplicate the work done by federal and state agencies in determining whether the requirements have been met, particularly since the department can (and should) participate in the federal and state processes for approving a Plan of Operations to explore.

   Requiring an applicant to obtain a separate CBJ permit issued by the director for exploration covering the same points as the federal and state Plans of Operation and

approvals/permits will result in delay and expense to the applicant, while not improving the environmental protections from exploration afforded the CBJ. In other words, what value is added to the CBJ (at what cost and delay to an applicant) to have the department conduct the same reviews as the federal and state agencies? What special expertise does it have that makes it necessary for the department to look over the shoulder of the federal and state agencies?

3. The procedures for managing, drawing down, and relinquishing the financial warranty need to be coordinated with the federal and state agencies that are holding a financial warranty. An applicant should not be required to obtain two financial warranties covering the same reclamation requirements.

4. The last sentence of subsection (d) requires the director to explain in writing the grant of a waiver from obtaining a financial warranty for exploration reclamation. The sentence should also require the director to explain in writing her/his reasons for NOT granting a waiver.

49.65.125 APPLICATIONS FOR ALL MINES:

1. Subsection (b) requires an application to mine be "on a form specified by the director." We request that the following phrase be added after the word director on line 10 at page 6: "or state and federal permit applications." The sentence would thus read: "Applications on a form specified by the director, <u>or federal and state permit applications,</u> shall be submitted to the director … ." This change is consistent with the agreed objective of duplication avoidance.

2. Subsection (b)(8) of the draft duplicates Subsection (b)(7) and should be deleted.

3. Consistent with our request that the socioeconomic study required by 49.65.130 be deleted, subsection (c)(4) should be deleted.

4. Subsection (d) allows the applicant to "rely" on its state and federal permit applications for "information required by this section." To clarify what "reliance" means we request that the following language be added to the first sentence of 49.65.125 (d) of Ms. Mead's draft:

   To the extent that the information required by this section has been provided by the applicant as part of any application submitted by the applicant to a state or federal

agency, the applicant may rely on that application **to satisfy the informational requirements of this section.**

5. Consistent with our request that the socioeconomic study required by 49.65.130 be deleted, the requirement to pay a socioeconomic fee in subsection (f) (lines 9-10 on page 8 should also be deleted.

49.65.130 SOCIOECONOMIC REPORT:

This section should be deleted for the public policy reasons set out in the General Remarks of this Memorandum.

Please clarify the interplay of the socio-economic report required by this section with 49.65.155 (b) which requires the applicant to enter a mitigation agreement with the CBJ which "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… ." Does the interplay of these sections require the applicant to pay for every direct impact on the CBJ described in the socioeconomic report as determined by the department's staff?

49.65.135 DIRECTOR'S REVIEW PROCEDURES:

1. Subsection (b)(2)(C) provides that if an EIS is required the large mine permit will not be presented to the Planning Commission "until the draft environmental impact statement (DEIS), the final environmental impact statement (EIS) and all comments and testimony have been submitted to the director."

2. Subsection (c) requires recommendations by the director "whether the proposed mining operation will mitigate adverse environmental, health, safety and general welfare impacts," and then sets forth a list of five items that must be considered. This means that neither the directors nor Planning Commission's mitigation recommendations will be included in the final EIS. Groups will thus be able to litigate the sufficiency of the EIS on the ground, among others, that reasonable mitigation measures were not included.

   Our group urges that CDD staff participate in the federal and state permitting processes and that all CBJ concerns about the project, including mitigation measures, be presented to the federal agency which is preparing the EIS at the earliest possible opportunity.

5. What happens if there is litigation concerning the EIS? Is the director's recommendation delayed until the litigation is complete? If so, even if an applicant prevails in NEPA litigation the application returns to the director who may add additional requirements before submitting her/his recommendation to the Planning Commission for review. Whatever decision is reached by the Planning Commission would itself be subject to litigation. In short, the Mining Ordinance process could extend for years after the Federal and State process.

6. Subsection (c) requires the director to consider

    a. whether air and water quality standards will be maintained in accordance with federal, state, and city and borough laws, rules and regulations;

    b. whether sewage, solid waste, hazardous and toxic materials will be properly contained and disposed of in accordance with federal, state, and city and borough laws, rules and regulations;

    c. whether the mining operation will be conducted in such a way as to minimize safety hazards to the extent reasonably practicable and … ."

    Subsection (d) says that "the director shall find that the proposed mining operation will comply with state and federal law as to any standard or subject addressed by an applicable state or federal permit issued to the applicant for the proposed mining operation." We applaud the insertion of this sentence. However, we request that the following proviso be added at the end of the last sentence in the subsection: "Provided, however, more stringent condition shall not be imposed without the concurrence of the state or federal agency which issued the permit."

7. Subsection (d) further states that the director may make "a recommendation for denial if the director deems warranted in accordance with this article." On what basis would the director decide that state and federal permits issued to an applicant are insufficient for purposes of 49.65? Is the director not preempted from making such a determination?

8. Subsection (e) says that if the department makes a favorable recommendation on the above matters, it must then make a recommendation "on the amount of the financial warranty under section 49.65.150." "The director's recommendation for approval may include ***any*** conditions or stipulations the director deems to be reasonably necessary to make it mitigate ***any*** adverse environmental, health, safety or general welfare impacts which may result from the proposed mining operation."

This gives the director total discretion to add anything that she/he desires without any criteria whatsoever. Accordingly, we request that the following proviso be added to the last sentence: "Provided, however, that the director demonstrate in writing that the financial warranties required by the state under AS 27.19.030 and by the federal government under 36 C.F.R. § 228.8(g) are insufficient to protect the CBJ from the director's concerns."

49.65.145 REQUIRED CONDITIONS FOR ALL CONDITIONAL USE MINING PERMITS

Subsection (a) directs the commission to require:

1. That mining operations be conducted in accordance with "**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."**

   This is extremely vague and provides no criteria whatever for the operator. Unlike the conditional uses which will be worked out with the director and the commission, the operator is given no notice of what the bolded language specifically requires. Whether or not the above requirements have been met will be determined after the fact. Accordingly, the above bolded language should be removed.

2. air and water quality standards must be maintained in accordance with federal, state, and City and Borough laws, rules and regulations or permits;

   We request that the following sentence be added: "Possession of state and federal air and water permits shall be deemed satisfaction of this provision."

3. sewage, solid waste, hazardous and toxic materials will be properly contained and disposed of in accordance with federal, state, and city and borough laws, rules and regulations;

   We request that the following sentence be added: "Possession of state and federal permits for sewage, solid waste, hazardous and toxic materials shall be deemed satisfaction of this provision."

4. whether the mining operation will be conducted in such a way as to minimize safety hazards to the extent reasonably practicable and … ."

The mining company must comply with federal MSHA regulations. A sentence should be added as follows: "If the applicant is subject to MSHA regulations it shall be deemed to meet the safety standards required by this subsection;"

5. Subsection (7) duplicates 49.65.155 and should be deleted. If it is not considered duplication, please explain how the two provisions differ.

49.65.149 RECLAMATION

1. On Federal land within the CBJ the mine operator is required to return the mined land to pre-existing uses or higher. (See 36 CFR 228.8 (g)). We recommend that lines 2 and 3 of page 16 be amended to say "… imposed as part of a conditional use permit under this article, as set by the Forest Service under 36 CFR 228.8 (g) or by the state under AS 27.19.030… ."

2. At line 6 on page 16 subsection (b) should be amended to say: "If not addressed in a reclamation plan approved by the Forest Service under 36 C.F.R. 228.8 (g) or by the state under AS 27.19.030;

3. A new subsection (b)(11) should be added as follows: "More stringent condition shall not be imposed without the concurrence of the state or federal agency which issued the reclamation requirements."

49.65.150 FINANCIAL WARRANTY

1. Subsection (a) says: "No permit shall be issued, or exploration authorized pursuant to this article, until any financial warranty required has been submitted by the applicant, approved by the city attorney and accepted by the director."

   We request that the following proviso be added to the end of this sentence: "Provided, however, that submission of proof of financial warranty in connection with state or federal permits shall satisfy the requirements of this subsection." This additional language is intended to assure that the applicant not be required to provide to financial warranties for the same reclamation requirements. This will simply require the CBJ to coordinate its reclamation assurance with the relevant state and federal agencies.

This process results in administrative decisions/final agency action that are subject to judicial review.

2. The last sentence of subsection (b) at lines 18 and 19 of page 17 provide: "The forfeiture shall be limited to the extent necessary to satisfy the obligations, requirements, or conditions that the applicant has violated." We request that the following additional phrase be added to the end of the sentence: "and that the CBJ had the authority to implement."

3. Subsection (c) says in part: "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 financial warranty submitted to another agency does not create a lien or sufficient interest to protect the interests of the city and borough."

   Thus, an operator will be required to have twice the amount of the financial warranty needed to protect the public - one for other agencies and another for the CBJ. This places an incredible financial burden on an operation that is attempting to start up - particularly a small mine. This section should simply require that the operator have a financial warranty sufficient to protect the public and require the CBJ to work with the appropriate federal/state agency which is holding it to obtain access to the undertaking.

   Given the level of expertise and commitment of time it would take for the CBJ to take over a mine cleanup from a federal or state agency, it is highly unlikely that the CBJ would ever do it. Accordingly, requiring an operator to obtain a second financial warranty as the price for obtaining a conditional use permit is unreasonable. This section should be rewritten to place primary responsibility for reclamation on the federal and state agencies and to require the CBJ to work out administrative arrangements with federal and state agencies to gain access to the financial warranty which they hold.

4. Subsection (c)(3) requires the applicant to install and maintain "road or highway improvements to mitigate the impact of increased traffic or heavy tracking that is measurable and directly attributable to the mining operation… ." The subsection further provides that the cost of installation or maintenance shall be borne by the applicant and the CBJ. If the CBJ lacks the funds to contributed share to the cost does that mean that the entire cost would be borne by the applicant or that the "improvement" would not be necessary?

5. Subsection (c) lists numerous examples of obligations to be covered by the financial warranty. Subsection (c) (8) then lists: "any other obligations as necessary to conform with the commissions determinations under subsection 49.15.330 and subsection 49.65.145.

   This provision makes clear that items (1) – (7) are not needed - the planning commission has full authority to add any reasonable conditions to a conditional use permit. In a larger sense it also proves that most of the requirements of the Mining Ordinance are not needed - the commission has the authority to add conditions to provide all necessary protections to the environment and the public under 49.15.330.

49.65.155 MITIGATION:

1. Subsection (a) says that the applicant for large mine permit "shall negotiate and enter into a mitigation agreement with the City and Borough." We request that the following proviso be added to the end of the sentence: "Provided, however, that mitigation provisions in a state or federal permit shall satisfy the requirements of this section." This is to prevent unnecessary duplication.

2. Subsection (d) says that 49.65.155 "does not limit or otherwise affect the authority of the director or the commission to condition or place stipulations on a permit pursuant to this article or the conditional use process as provided in Chapter 49.15, Article III."

   As with subsection (c)(8) of 49.65.150 (Financial Warranty) subsection (d) proves that subsections (a) – (c) are not needed - the planning commission has the authority to do all these things.

49.65.160 TERM OF NOTICES AND PERMITS; TEMPORARY CESSATION:

Subsection (b) says that: "During the term of any exploration notice or permit, the director may, pursuant to subsection 49.65.150 (f), revise the amount of the warranty." Based on what criteria would the director make such a revision?

49.65.165 ANNUAL REPORTS; MONITORING; MONITORING FEE:

Subsections (a) and (b) require annual exploration and operating reports respectively. In each case a sentence should be added should be added that says: "Reports submitted to state and federal agencies for this purpose shall satisfy this requirement."

49.65.170 TECHNICAL REVISIONS, SUMMARY APPROVAL, AND AMENDMENTS:

1. Subsection (a) requires the operator to notify the director of "all technical revisions to its operations." A technical revision is defined as a "change in operations which does not, in the judgment of the director, have more than a minor effect on reclamation and which does not change the total amount of disturbance or the overall environmental or social economic impact of the mining operation."

   This requirement should be deleted. It is far too intrusive and requires the director to review matters for which he/she lacks the expertise. Minor revisions to an operation are made all the time - there is actually no reason for the director to review all of them.

2. Subsection (b) says that if a change to a mining operation requires an SEIS, "or will increase the acreage of affected surface or otherwise have a significant effect on reclamation or the environmental or socioeconomic impact of the mining operation, the permit shall be amended, unless summary approval of the changes granted pursuant to (b)(2) of this section."

   We request that the word "significantly" be added between the words "will" and "increase," so that it reads: "will <u>significantly</u> increase the acreage of affected surface… ." We also request that the following sentence be added at the end of the section: "A significant increase shall be considered to be no less than a 10% increase in surface disturbance."

   Finally, we ask that the words "socioeconomic impact" be removed from the subsection for reasons previously given.

3. Subsection (b)(1) requires that the operator apply for a permit amendment in accordance with the procedures described above. We request that the phrase "so long as the approval process does not exceed 30 days" be added at line 14 on page 25.

49.65.176 APPEAL

This section allows "any person who is aggrieved by a decision of the director or the commission with respect to this article" to appeal a Mining Ordinance permit, or any provision thereof. This would allow a person living in Kansas to appeal because he/she doesn't like the issuance of the conditional use permit. Instead of a person "aggrieved" appeals should be limited to CBJ citizens injured by the issuance of the conditional use permit or by a provision thereof. In addition, the applicant should be specifically afforded the right to appeal.

49.65.180 RELEASE OF WARRANTIES FOR MINING OPERATIONS

The release of warranties by the CBJ should be coordinated with state and federal agencies so that the warranties are released at the same time or separately as reclamation requirements are met. A new subsection (d) should be added requiring the director to present a very good reason in writing for holding up a release beyond the time that a warranty is required by the state or federal agencies."

49.65.185 SUCCESSOR APPLICANTS

This section authorizes the director to allow a mining company holding a conditional use permit to transfer it to another party. However, the director may set "any additional requirements" in approving the transfer. Again, there should be criteria for setting such additional requirements. The director should not be a free agent acting independently of the planning commission.

In addition, the director may deny approval of the transfer "if the original applicant has ***any*** existing notice or permit violations at the time of the request until such time as the violations have been remedied." We request that the word "substantial" replace the word "any" at line 12 on page 29 of the draft.

CONCLUSION. Like the very clear direction in 49.65.115 (c), and consistent with the objective decided by the mining committee, this entire ordinance should be rewritten based on the principle that if the applicant has undergone "environmental review by state agencies, federal agencies, or both, as determined by the director, [it] shall not be subject to Chapter 49.65 … ." This means among other things removing requirements from the Mining Ordinance that are preempted by federal and state law, which duplicate federal and state permitting processes, and which are beyond the expertise of CBJ staff.