MEMORANDUM

CITY & BOROUGH OF JUNEAU
155 South Seward Street, Juneau, Alaska 99801

DATE: May 15, 2003

TO: Juneau Assembly Committee of the Whole

FROM: Peter Freer, Planning Supervisor
Community Development Department

SUBJECT: Mining Ordinance Proposed Revisions

1. *When should the Allowable Use permit be issued? Concurrent with state and federal permitting, or after state and federal permits have been issued? What should the timing be for issuing an AUP? Identify a deadline for completing permit review.*

Synopsis: **Permit review should occur concurrently. The City and Borough permit should be issued with knowledge about state and federal permits. The City and Borough should participate in the Department of Natural Resources Large Mine Permit Team.**

Each City and Borough permit is reviewed for consistency with the Juneau Coastal Management Program (JCMP). Many of these consistency determinations can be handled locally, but some must undergo state consistency review when state and federal permits are involved. In these instances, the Planning Commission must approve the local consistency determination before it is sent to the state, meaning the local permit must be completed before state and federal permits are completed. In the case of an Allowable Use permit for a large mine, it seems certain that state consistency review would take place, and that the goal of issuing an Allowable Use permit after state and federal permits have been issued could not be met. This is because the state and federal permits may have to be "conditioned" to be consistent with the JCMP under the due deference allowed to the City, and would then necessarily have to follow the City and Borough permit.

A bill to revise the Alaska Coastal Management Program (ACMP) is expected to pass the legislature and become law. The bill will limit the enforceable policies of the JCMP, meaning fewer policies will be taken into account during state and federal permitting. As revisions to the state program become implemented through new regulations and revised local coastal management programs, the current relationship between permitting and coastal program consistency review will change, with fewer local permits needing state consistency review.

Regular coordination and communication between agencies during project permitting can help in keeping agencies informed of one another's efforts and knowing how the permit "picture" fits together. As long as permits are worked on concurrently and there is coordination and regular communication between permitting agencies, borough permits can be issued before state and federal permits. Coordination and regular communication should allow the Planning

Commission to condition the City and Borough permit in a manner that both avoids redundancy and "fills the gaps" without being the last in line.

Large Mine Permit Coordination. The Department of Natural Resources, under its authority in Alaska Statutes (AS) 27.05.010(b) is the responsible agency for coordinating the permitting activities for large mine projects in the state. The Department has recently organized a Large Mine Project Office and is assembling permitting teams for several developing, large mines.

AS 27.05.010 states:

> *The department is the lead agency for all matters relating to the exploration, development, and management of mining, and, in its capacity as lead agency, shall coordinate all regulatory matters concerning mineral resource exploration, development, mining, and associated activities. Before a state agency takes action that may directly or indirectly affect the exploration, development, or management of mineral resources, the agency shall consult with and draw upon the mining expertise of the department.*

Teams currently exist for the Greens Creek and Kensington mines in Juneau, as well as for the Donlin Creek project, the Fort Knox Mine, the Red Dog mine, the Illinois Creek Mine, the Pogo project and the True North Mine. Staff has spoken and met with Large Mine Project Manager Ed Fogles and Mining Section Chief Stan Foo to assure the City and Borough of Juneau's involvement in the permitting team for large mines in the borough. Our participation will promote permit coordination.

2. *What kinds of changes can be allowed under Summary Approval? How big a change in mining operations could be approved under summary approval?*

Synopsis: **Approvals under this authority must meet threshold requirements and undergo environmental review. Significant changes to mining operations meeting these thresholds could be approved through summary approval.**

Summary approval of a change in mine operating plans must meet two threshold determinations. First, the proposed change in mining operations cannot constitute a new land use or separate development.

Once a determination is made that the proposed activity is neither a new land use nor a separate development, the Director must also find that the proposed change meets four additional criteria. These are:

1. the mine is located entirely outside the roaded service area;
2. the application is complete, providing all of the information necessary for the director to make the summary approval determinations set forth in 1-4;

3. the proposed change in mining operations will have no significant impact within the roaded service area on habitat, sound, screening, drainage, traffic, lighting, safety, dust, surface subsidence, avalanches, landslides or erosion; and
4. the proposed change in mining operations will undergo environmental review and approval by one or more federal agencies, state agencies, or both.

A change in mine operations potentially addressed through summary approval might be the proposed expansion of the tailings disposal area at the Greens Creek mine. The Draft Environmental Impact Statement (DEIS) for the project states in the project abstract that the proposal is to expand the size of the tailings area at the Greens Creek Mine in order to accommodate known and projected ore reserves. The lease area for the existing tailings facility is 56 acres. The proposed action would expand the area by 84.5 acres, primarily to the west and south, for a new total of about 140.5 acres. Tailings disposal would occur on about 40 acres within the new area; the remaining 44.5 acres would be used for rock quarries, a storm-water pond system, and storage area for reclamation materials, as well as a possible new water treatment plant and other potential long-term tailings disposal needs.

This is the kind of change in mine operations that will potentially be subject to Summary Approval. Does this constitute a new land use or a separate development? The Department's ability to evaluate a request for Summary Approval would be greatly improved if the definition of these terms were clarified.

3. *Compare socioeconomic assessment in the National Environmental Policy Act and City and Borough of Juneau socioeconomic assessment side-by-side. How are they the same? How are they different? Are CBJ and federal requirements redundant, or not?*

Synopsis: **Socioeconomic impact assessment in a federal environmental impact statement (EIS) can be comparable to the assessment required in CBJ §49.65, but typically is not. Socioeconomic impact mitigation occurs only in highly specific circumstances and under very specific authorities in the EIS process, but is required in the City and Borough code.**

Socioeconomic assessment is undertaken in the National Environmental Policy Act (NEPA) process and is a requirement of the City and Borough code for large mines. While the assessments prepared under each authority could be similar, there is a key difference between them. The assessment in a federal Environmental Impact Statement cannot be tied to a mitigation agreement, while the assessment in a City and Borough assessment can be.

Socioeconomic impact assessment and mitigation are integrated concepts. The assessment is an information tool, providing an impact 'baseline' used to prepare a mitigation agreement. An

assessment is implemented through a mitigation agreement. A mitigation agreement cannot be contemplated without an assessment.

Socioeconomic Assessment under the National Environmental Policy Act (NEPA). Section 1508.8 of the Code of Federal Regulations (CFR), the regulations that implement the National Environmental Policy Act, addresses socioeconomic impacts in the following language. Socioeconomic effects are:

> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Socioeconomic impacts are routinely addressed in Environmental Impact Statements (EIS) prepared under National Environmental Policy Act, although the Act is fundamentally oriented toward environmental review. Section 40 CFR 1508.14 states that,

> *economic or social effects are not intended by themselves to require preparation of an environmental impact statement.*

Because of this fundamental orientation, EISs routinely examine environmental impacts more thoroughly than social and economic impacts.

Environmental impacts are mitigated in the NEPA process through the identification of the preferred alternative and other conditions identified in the Record of Decision prepared for each EIS. Federal regulation in CFR 1505.2 (Record of Decision) states that the lead agency for the EIS shall:

> (a) State what the decision was.
> (b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative, or alternatives, which were considered to be environmentally preferable.

NEPA regulations further state in CFR 1505.2 that:

> *mitigation and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall include appropriate conditions in grants, permits or other approvals.*

The mitigation of socioeconomic impacts is within the authority of federal agencies, but only in very specific circumstances. Some of the specific authorities under which social and economic impact mitigation may occur include:

- Executive Order 12072, that requires considering social and cultural impacts when giving preference to siting federal facilities in central business areas.
- Executive Order 11988, that requires community involvement in decisions regarding siting in or around floodplains.
- CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act, that requires working with affected groups in remediating toxic and hazardous wastes.
- Section 106 of the National Historic Preservation Act that requires considering the impacts of actions on historic places.
- The American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act and Executive Order 13007, that collectively require consultation with Indian tribes and Hawaiian groups about effects on cultural values.
- Executive Order 12898 (Environmental Justice), which mandates that federal agencies ensure that the impacts of their actions do not adversely affect minority or low-income populations any more than they adversely affect the majority population.
- Section 3161 of the National Defense Authorization Act of 1993, which mandates the U.S. Department of Energy to provide worker and community impact assistance.
- Executive Order 12072, which states that federal office space needs in urban areas shall give serious consideration to the impact a site selection will have on improving the social, economic, environmental and cultural conditions of the communities in the urban area.

Thus, while an EIS provides socioeconomic assessment, it cannot be relied on to provide the related, and critical, mitigation, except in very specific circumstances. The Record of Decision can bind federal agencies to certain actions, but it cannot require a mitigation agreement between the project proponent and a unit of local government for socioeconomic impacts identified in the EIS.

The level of analysis for a NEPA socioeconomic impact assessment varies, and can be extensive and detailed if socioeconomic impacts have been identified as significant during project scoping. More detailed assessment can also be undertaken if it has been identified as important by the project proponent, the lead agency or an affected party such as a state or unit of local government. Even a detailed assessment, however, cannot be implemented in the NEPA process through a mitigation agreement.

Socioeconomic Assessment in the City and Borough Code. CBJ §49.65 provides for both socioeconomic impact assessment and the preparation of a related mitigation agreement. The code establishes explicit requirements for socioeconomic impact assessment in §49.65.130(c)(1) and (2), and for mitigation agreements in §49.65.135(7).

4. *The basis on which an Allowable Use permit can be denied needs to be clarified. What is the Commission's authority to deny?*

Synopsis: The Assembly has limited grounds on which to deny an Allowable Use Permit

Criteria for approval are very narrow, and include (1) whether the application is complete; (2) whether the requested permit is appropriate according to the Table of Permissible Uses; (3) whether the development as proposed will comply with other requirements of Title §49 (such as setbacks, building height restrictions, parking, coastal management etc.); and (4) whether conditions are necessary for approval.

The basis for denial of an Allowable Use permit is therefore very narrow, as well. Each of the approval criteria are addressed as numbers 1 through 4 below.

1. In the case where an application submitted is not complete, it can, in most cases, be made complete. This requirement is usually settled prior to presentation to the Planning Commission.
2. The question of whether a use is appropriate according to the Table of Permissible Uses is also one that can be settled prior to a hearing before the Commission. In the case of mining, the Land Use Code is clear where this use is and is not permitted.
3. The third criterion requires that a proposal meet all other requirements of Title §49. The requirements being referred to here are not the general code provisions stipulating conformity with the public health safety and welfare, but are limited to specific code requirements. If a proposal does not meet a specific code requirement the project can be modified or a variance can be requested.
4. If the Commission finds that conditions are necessary, limited conditions can be placed on an Allowable Use permit.

Conditions of approval are also narrow, and include only the twelve items listed in CBJ §49.15.320 (f). Please note that the proposed mining ordinance would omit items 9 through 12 of this subsection, but add conditions relating to traffic, lighting, safety, noise, dust, visual screening, surface subsidence, avalanches, landslides, and erosion.

Applications can be denied, but only in rare cases where one or more of the above criteria are not met.

5. *What is the effect of deleting the Habitat condition (CBJ §49.15.320(f)(9)) from the conditions the Commission can consider when issuing an Allowable Use permit? What effect does revision of the ACMP have on habitat? If the habitat condition is deleted, will there be redundant "coverage" at the state or federal levels?*

Synopsis: **The U.S. Fish and Wildlife Service implements the Bald and Golden Eagle Protection Act. The U.S. Army Corps of Engineers regulates the discharge of dredge and fill material into U.S. waters. Proposed amendments to the ACMP will reduce the future scope of review under the Program, but are not directly related to the habitat condition in §49.15.320(f)(9).**

The habitat condition in CBJ §49.15.320(f)(9) focuses on two areas:

1. Developments within 330 feet of an eagle nest located on private land, and
2. Developments in wetlands and inter-tidal areas, including freshwater marshes, saltwater marshes and inter-tidal flats

The habitat condition in CBJ §49.65.320(f)(9) addresses the potential impacts of development on eagle trees on private land and on wetlands. It is designed not so much for large-scale development, but for residential, commercial and smaller-scale development, where local oversight is superior to state and federal oversight.

The U.S. Fish and Wildlife Service (USFWS) addresses the protection of eagle nesting trees under the authority of the Bald and Golden Eagle Protection Act and the Endangered Species Act. The USFWS maintains agreements with the U.S. Forest Service and with Native Corporations to maintain a 330-foot no-disturbance zone around eagle nesting trees in Southeast Alaska. The effect of deleting the habitat standard from the conditions the Commission can consider when issuing an Allowable Use permit for a large mine in the Rural Mining District should not create a "gap" in eagle nesting tree protection.

Development in wetlands is regulated by the U.S. Army Corps of Engineers through the "404" permit, and through the ACMP consistency review process. The JCMP has enforceable policies for coastal development, habitat and mining and mineral processing that are used to guide permit decision making. The mining policy, referenced in the JCMP from CBJ §49.55.100(a), reads:

> *Mining and mineral processing in the coastal areas shall be regulated, designed, and conducted so as to be compatible with the standards in this chapter, adjacent uses and activities, statewide and national needs, and district programs.*

The proposed revision to the ACMP (HB 191) will reduce and limit the enforceable policies of the JCMP and will reduce and limit the City and Borough's participation in coordinated permit review under the state program. In effect, the City and Borough will no longer have "due deference" for many state and federal permit actions, and will be "noticed" about state and federal permit actions through routine public notice methods.

The absence of the habitat condition does not mean that habitat cannot be considered in issuing an Allowable Use permit. CBJ §49.15.320(e)(2) states:

> *The commission shall consider the Allowable Use permit application. The commission shall review the director's recommendation with respect to whether the development as proposed will comply with the other requirements of this title.*

This includes compliance with the habitat standards in CBJ §49.70.310, which requires setbacks from eagle nesting trees, stream banks and lake shores, and with the wetlands management standards in CBJ §49.70.1000 - 1097.

6. *Provide more detail on the pre-closure notice requirements the mining companies are supposed to give to federal agencies. Are there gaps? Do we need a local requirement to fill any gaps? Provide a more complete analysis.*

Synopsis: **Pre-closure notice requirements are in place through the U.S. Forest Service Plan of Operations and under the federal WARN (Worker Adjustment and Re-Training Notification) Act to the State Department of Labor and local government. The City and Borough code requires information not submitted to these agencies.**

Pre-closure notice is required under the federal WARN (Worker Adjustment and Re-Training Notification) Act for both permanent and temporary closures. Pre-closure notice is also required under the U.S. Forest Service for mines operating on national forest lands.

WARN Notice. For permanent closures, notice must be given 60 calendar days prior to the closure when 50 or more employees will be terminated in a 30-day period. For temporary closures, the notice requirement is activated only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work of individual employees of more than 50% during each month of any 6-month period. Notice is given to the state Dislocated Worker Coordinator and to the Mayor of the municipality in which the plant is located and must contain:

A. The name and address of the plant site plus the name and telephone number of a company contact
B. Whether the closure is temporary or permanent
C. The date of the first separation and a separation schedule
D. Worker names and job titles
E. Whether bumping rights exist, and
F. A list of unions representing employees with the names and addresses of each union's chief elected official.

Neither the state nor the federal government has enforcement authority for WARN, but must pursue enforcement as a civil action in the courts.

US Forest Service. Pre-closure notice is contained in the Forest Service Plan of Operations for mines in the National Forest. For example, the Alaska Department of Environmental (DEC) Conservation Solid Waste Permit for Greens Creek, which is included as an element of the Plan of Operations, requires 30 days advance notice to the Department for planned closures of 90 days or more in duration. For unanticipated closures of 90 days or more, the Plan of Operations requires the mine operator to notify the Department within 10 days after the first day of temporary closure.

CBJ Code. The City and Borough code, in CBJ §49.65.145(d), requires a large mine to operate for at least 90 days per year or notify the City and Borough that the operation will be placed in an inactive status. The notice must advise the City and Borough of the measures to be employed to prevent hazardous or dangerous conditions, erosion or other environmental damage which may result from the operators activities, and the security measures it will employ at the mining operation during the inactive period.

Pre-closure notice requirements are redundant in the broad sense, but the City and Borough requirement for the content of the notice is more complete than its federal counterparts. It seeks closure-specific information related to hazard abatement and security, which complements the employee information required under WARN.

7. *Are state and federal reclamation bonding requirements adequate? How does the CBJ fit into the picture? Is CBJ bonding needed to fill the gaps? Provide a more complete analysis.*

Synopsis: **Reclamation bonding is required by federal law for mines on federal land and by state law for mines on state, municipal and private land. The City and Borough should participate in the bond determinations of other agencies and should consider retaining bonding for mining activities on City and Borough-owned land.**

The federal government, principally through the U.S. Forest Service and the Bureau of Land Management (as the significant land management agencies), and state government, through the Departments of Natural Resources and Environmental Conservation, provide for reclamation bonding for large mines. The City and Borough provides for reclamation bonding in CBJ §49.65.

Many factors can affect reclamation bonding amounts. These factors can include the length of post-closure monitoring and treatment for water quality; the extent to which the reclamation restores the land to a pre-mine condition; the quantity of grass seed or other vegetation or

materials proposed to be used; the cost and duration of equipment rental; and other factors. Generally, it is the length of water quality monitoring and treatment and the degree of restoration of the land to a pre-activity condition that increases bonding amounts. It may be unrealistic, even impossible, to bond to a risk-free condition.

Federal. The US Forest Service requires reclamation bonding for mining activities on the national forest. Other federal land managers, such as the Bureau of Land Management, also require reclamation bonding for mining activities under their jurisdiction. Federal agencies use a cost-estimating method very much like construction cost estimating, to determine the bonding amount. The Code of Federal Regulations does not contain an explicit requirement for inflation-proofing a reclamation bond, but the Forest Service does "re-visit" the bond amount during every five-year review of their Plan of Operations, and each time the mine operator effects a change to mine operations. The Forest Service also relies on other agencies to determine bond amounts. For example, the Forest Service used the DEC's solid waste permit to re-calculate the bond for Greens Creek mine upward.

Department of Natural Resources. The Department has bonding authority for reclamation activities on state, municipal and private land under its general authority in Alaska Statutes 27.19.010 – 27.19.100 and under the provisions of mill site leases issued for activities on state land. The Department typically uses a "best management practices" approach to determining bonding requirements, which apply to reclaiming waste rock dumps, pit areas, re-contouring and restoring topographic features, assuring slope stability and capping acid-generating rock (also addressed by the DEC). By law, reclaimed land must be returned to a stable and usable condition, though this can vary, particularly for private property, where the property owner's plans for post-reclamation land use can help determine both the reclamation plan and bond amount. By law, DNR can require only a $750 per acre for bonds, but in fact, large mine operators have voluntarily agreed to significantly higher amounts.

Department of Environmental Conservation. The Department has bonding authority on federal, state and private land for tailings and related water discharge and run-off under its regulations in the Alaska Administrative Code in 18 AAC 60.265 and 455. The DEC bond is not a reclamation bond per se, but a closure and post-closure monitoring and treatment bond for water quality. Typically, the DEC requires a 30-year water quality monitoring and treatment period in its bond calculations.

City and Borough of Juneau. A financial warranty is required under the terms of the mining ordinance before a permit can be issued or exploration authorized. The most recent large mine permit was issued to the Kensington in 1997. In the Notice of Decision for the permit, the CBJ relied on information provided by the mine operator in its August, 1997 Reclamation Plan. The plan was reviewed by Engineering staff, and determined to be adequate to address the reclamation standards in CBJ §49.65.135(b). The amount of the bond is reviewed annually under the terms of the code, and may be adjusted upward or downward on an annual basis.

The federal government has clear authority for bonding on federal land and the state government has clear authority for bonding on state, municipal and private land. State and federal agencies have worked jointly to produce a single bond at the Greens Creek Mine, in what could be a precedent for future reclamation bonds involving two or more agencies or levels of government. The City and Borough should participate in reclamation bonding for large mine projects in the proposed Rural Mining District. This could entail working jointly with other agencies in calculating reclamation bonds and assuring City and Borough interests are represented in those calculations, or, at a higher level, it could entail retaining bonding authority on CBJ-owned lands to complement the authority at other levels of government.

8. Should there be two mining districts, or one? What are the pros and cons of each choice?

Synopsis: **This is a policy determination for the Assembly. Worthwhile arguments can be made for either case. Hypothetical pros and cons are listed below to illustrate the scope of discussion. One person's "con" can be another person's "pro."**

Urban and Rural Mining Districts

Pros

- Rural mines are not in proximity to neighborhoods or urbanized areas
- The direct impacts of rural mines (glare, dust, noise) affect fewer people
- Having two districts lowers the regulatory threshold for rural mines (less impact) while it retains the regulatory threshold for urban mines (more impact).
- The mining ordinance contemplated an urban mine in its design.
- Rural mines are regulated through state and federal environmental review procedures and permits

Cons

- Mining activities can affect the borough as a whole and should be regulated under the same local authority
- Residents recreate throughout the borough.
- Visitors use boat and aircraft charters throughout the borough.
- Increased demand for facilities and services occurs largely in the urban mining district
- Impacts on City and Borough finances are areawide

9. Provide Background on the Development of the City and Borough Mining Ordinance

Synopsis: A year-by-year chronology is given below.

The 1986 mining ordinance and the 1989 mining ordinance revision follow the same basic format and section headings. The 1989 revised ordinance is more detailed and adds additional material. The 1989 additions to the ordinance are listed below following the chronology.

1979/80	The City and Borough and the Alaska Electric Light and Power Company enter into a unitization agreement combining the Treadwell and AJ mining properties for lease to a third party.
1983	The City and Borough negotiates on mining leases for the AJ and Treadwell properties.
	The City and Borough forms an Ad Hoc Advisory Committee on the preparation of mining leases.
1984	The advisory committee issues its report and recommendations.
	The City and Borough assembly adopts an ordinance approving the AJ and Treadwell leases with Barrick Resources.
1985	The Assembly establishes an Ad Hoc Mining Ordinance Committee in January.
1986	The Committee adopts a final draft ordinance in February. The ordinance is reviewed by the Planning Commission and approved by the Assembly in July.
1989	Mayor Botelho appoints a scoping committee the Spring to hold hearings and compile information on the AJ mine project for the Planning Commission, the Assembly and the Bureau of Land Management (lead agency for the EIS).
	The Assembly holds a retreat in September to review all aspects of mining and exploration activities.

The Assembly adopts a revised mining ordinance in November. The revised ordinance differs from the original ordinance in the following areas:

1989 Ordinance Revisions

1. More detailed requirements are listed for the submittal of a large mine application (CBJ §49.65.130(b).

2. The requirements for socioeconomic impact assessment are expanded and made more specific. A socioeconomic assessment is required before the issuance of a permit (CBJ §49.65.130(c)(1) and (2))

3. Fees for processing a large mine application can be increased by the Assembly if the cost of reviewing the application exceeds the original fee (CBJ §49.65.130 (f)).

4. A large mine permit application shall not be considered complete until the Draft Environmental Impact Statement is concluded (CBJ §49.65.130 (f) and (h)).

5. The Department cannot make a recommendation to the Planning Commission on a large mine permit application until publication of the Final Environmental Impact Statement (CBJ §49.65.130(h))

6. The requirement for a mitigation agreement is added. A mitigation agreement must be executed before a large mine permit can be issued (CBJ §49.65.135(7)).

7. A financial warranty can be forfeited in whole or in part for violations of the obligations or requirements of the permit or the conditions of an exploration notice (CBJ §49.65.140(a)).

8. Adds language requiring the mine operator to notify the City and Borough not less than 60 days prior to requesting placement on inactive status (CBJ §49.65.145(e)).

9. Provides for ongoing authority for the City and Borough to undertake compliance monitoring for any mining operation for which a permit has been issued and to further authorizes the City and Borough to collect an annual monitoring fee CBJ §49.65.150(c) and (d)).

10. Forbids the operation of a large mine under a small mine permit (CBJ §49.65.155 (c)).

11. Places additional requirements on successor mine operators (CBJ §49.65.175)

12. Contains a new section entitled, "Suspension or revocation of notices and permits" establishing standards and procedures for revoking or suspending mine permits and the authority to operate under an exploration notice (CBJ §49.65.185).