



Southeast Alaska Conservation Council

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Dear A-J Mine Advisory Committee,

I am an attorney with the Southeast Alaska Conservation Council (SEACC), and last Thursday, I testified at the Committee's public hearing on behalf of the organization. My testimony focused on enforceability. If the A-J Mine does re-open, SEACC believes a strong role for citizen oversight is absolutely necessary. In particular, we asked the Committee to recommend that the A-J Mine not be reopened unless a third party citizen oversight group is empowered, by contract, to enforce the various operating conditions imposed on the mine. Because I wanted to give some more thought to several of the questions you asked me, I said that I would submit additional testimony in writing. This is that testimony.

Regulatory capture is a real risk, and one that Juneau must take seriously going forward. Regulatory capture occurs when a regulatory body created to act in the public interest becomes dominated by the very industry it is charged with regulating. Regulatory capture occurs because industry interests have the greatest financial stake in regulatory activity, and are therefore more likely to be motivated to influence the regulatory body than dispersed members of the general public. This problem is exacerbated when industry pushes government to relax regulations aimed at guarding against occurrences that are perceived to be improbable "black swan events," so that industry may achieve relatively concrete short-term goals. Regulatory capture results in government making imprudent decisions that favor industry at the expense of the public interest. Recent American history is riddled with examples, including, but not limited to: capture of the Minerals Management Service which led to last year's Deepwater Horizon oil spill (See <http://online.wsj.com/article/SB124580461065744913.html>), capture of the New York Fed which gave rise to the 2008 financial crisis (See <http://www.nber.org/~wbuiter/NAcrisis.pdf>), and capture of the Federal Aviation Agency (See <http://online.wsj.com/article/SB124580461065744913.html>).

With respect to the A-J, we are very concerned that regulatory capture will be a problem for CBJ. We foresee a day, some years after the mine has reopened, when the price of gold drops. The mining company will present CBJ with an ultimatum: unless certain costly conditions are dropped, it will no longer be able to make a profit, and will have to shut down and lay off its employees. Thus, our concern is that even if the current City Assembly comes up with a satisfactory list of conditions on the front-end, those conditions will not actually be enforced as originally written. Those with a

financial stake at issue – the mine’s investors, as well as the 200-some employees and their families – will focus their resources and energy on achieving the short-term concrete goal of keeping the mine open, while the general public will likely remain diffuse and relatively silent. For the City Assembly to prioritize guarding against various events that *might* happen (the contamination of our drinking water supply, irreversible ecological damage, etc.) over one that *will* happen unless the City changes course (the closing of the mine and loss of 200 jobs) would be incredibly unpopular politically. As elected officials concerned with re-election, City Assembly members are unlikely to withstand such political pressure, even if it would be more prudent to keep conditions that protect our health and environment in place. Because of CBJ’s position as primary owner of the mine, the problem is exacerbated. CBJ’s financial stake in the A-J’s profitability makes it even more vulnerable to capture by industry interests, putting the Assembly in the inherently conflicted position of simultaneously acting as a profit-focused fiduciary and the representative of the general public interest.

Because regulatory capture is a real risk, we believe that if the Assembly does decide to re-open the A-J, it must put an enforceability back-stop in place. In particular, we think a third-party citizen oversight group, empowered to independently enforce the mine’s operating conditions, is the best answer. In fact, Coeur d’Alene Mines agreed to just this kind of third party enforcement for Kensington. Although the tentative agreement embodying that third-party enforcement mechanism was never implemented for unrelated reasons, it exemplifies the willingness of some mining interests to work with conservation interests to ensure compliance. That agreement included both a Citizens Advisory Committee (CAC) and the Kensington Coalition. The CAC was to be six to nine members, with reps from different industries and environmental groups, serving staggered terms, and authority to review and evaluate mine performance. The Kensington Coalition was a coalition of environmental groups, who would have given up their right to litigate permit terms in exchange for the authority to examine records, take independent samples, make independent site visits, and most importantly, enforce permit terms and other agreements with the mine operator. The Kensington Coalition would have had independent enforcement authority via the courts, much like citizens do under environmental statutes like the Clean Water Act – where the government fails to ensure compliance, citizens have the right to do so. (The Clean Water Act’s citizen suit provision is itself recognition of the reality of regulatory capture; Congress delegated enforcement authority to citizens in recognition of the fact that the government does not always have the resources or the political will to enforce the law. The number of successful citizen suits brought under the Clean Water Act is testimony to the existence of regulatory capture, and the need for such enforcement back-stops.)

In this case, we envision a single group that shares characteristics of both the CAC and the Kensington Coalition. Like the CAC, it would be composed of citizens, rather than groups. But like the Kensington Coalition, a contract between the mining company and the citizens’ group would grant the citizens’ group independent inspection and enforcement authority. The group would have free access to records and the site, and

any information the group receives or generates would be made available to the public. In exchange for enforcement authority, each individual member of the group would give up his right to litigate regarding anything other than the very conditions the citizens' group is authorized to enforce.

Most importantly, this group would be *entirely independent* from CBJ government. Members would not be appointed by the mayor or the Assembly; rather, they would be appointed by very same interests the conditions were meant to protect. We envision an 11-member group. Three of the members would represent environmental interests, and be selected by local and regional environmental groups. Three of the members would represent business interests, with one spot reserved for a representative of the tourism industry. These members would be chosen by the Downtown Business Association and/or the Chamber of Commerce. Three of the members would represent resident interests – one selected by Thane, one selected by the Downtown Neighborhood Association, and one selected by Douglas. Finally, two of the members would be scientists with expertise in geology, water science, and/or ecology. One of the scientists would be chosen by the environmental interests, and the other by business interests. The hope is that keeping the selection process entirely separate from city government would insulate the group from any regulatory capture of CBJ that does occur. Although the citizens oversight group is bound to face political pressure, as well, because they will represent those interests most directly protected by the mine's operating conditions, they will be better able to withstand such pressure.

The members of the group would serve staggered terms. Appointees from each of the major groups would be designated for one, two, and three year terms. One of the scientists would serve a two-year term, and the other would serve a three-year term. Any appointee could be re-appointed for consecutive terms. With respect to voting, most group actions would only require a majority vote of the whole. However, in order to change the conditions themselves, the group would need a super-majority.

Although the specific details are somewhat flexible, we believe that a group like the one envisioned here is absolutely necessary. During my testimony, CBJ Engineering Director Rorie Watt asked whether third party oversight like this had ever been employed where the mine was owned by a governmental entity. Unfortunately, I was unable to locate any examples. However, the fact that this back-up enforceability mechanism is not yet widespread enough to offer a diverse set of examples should not deter the Committee. First and foremost, this option is absolutely legally viable. CBJ would enter into a mining lease with the mining company, and in that lease would be a provision stating that: (1) the mining company must also enter into an independent contract with the citizens group, and (2) that that independent contract would include all the conditions expressed in the lease. Once the mining company enters into the contract with the citizens group, it is bound by the contract. The requirement that the mining company enter into a contract with the citizens' group is a condition of the lease just like any other condition – legally, it is no different than the condition that all tailings be disposed

underground or that there be limited noise and light interference. They are all simply conditions of the lease. Moreover, the fact that a governmental entity partially owns the mine is legally irrelevant to the validity of this independent contract.

Second, the fact that this mechanism is innovative should not, in and of itself, deter the Committee from recommending it. According to the draft recommendations, the Committee is already planning to recommend *two* innovative and relatively untested mining techniques (all milling underground, and all tailings-disposal underground) in order to protect our environment and way of life. Why shouldn't it also consider an innovative legal mechanism for achieving the same outcome?

It is our sincere hope that the Committee take the risk of regulatory capture seriously, and include in its recommendations a provision for third-party oversight and enforcement.

Thank you for all of your hard work.

Sincerely,

Olivia Sinaiko
Legal Fellow
Southeast Alaska Conservation Council (SEACC)