

# Kenai Peninsula Borough Legal Department

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## MEMORANDUM

**TO:** Brent Johnson, Assembly President  
Members, Kenai Peninsula Borough Assembly  
Blair Martin, Planning Commission Chair  
Members, Kenai Peninsula Borough Planning Commission

**FROM:** Robert Ruffner, Planning Director  
Sean Kelley, Borough Attorney  
A. Walker Steinhage, Deputy Borough Attorney

**COPY:** Charlie Pierce, Mayor

**DATE:** August 30, 2022

**SUBJECT:** Ordinance 2022-36: Sectional Analysis

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The following provides a sectional analysis for Ordinance 02022-36, An Ordinance Amending KPB Chapter 21.25 and KPB Chapter 21.29 Regarding Conditional Land Use Permits and Material Site Permits, Updating Notice, Applicability, Permit Types, Application Requirements, Standards and Permit Conditions ("Ordinance 02022-36").

The purpose of this Sectional Analysis is to provide an easy reference to compare present KPB code with Ordinance 02022-36. Ideally it will supplement and cement the presentation to the Committee of the Whole on August 23, 2022. For the quickest summation of the changes proposed in Ordinance 02022-06, simply refer to the final column, "Highlighted Changes".

Finally, many of the features in Ordinance 02022-36—especially dimensional or durational descriptions like the 365-day period for prior-existing use abandonment—are intended to act as "springboards" for Assembly legislative policy decisions.

### ORDINANCE 02022-36 SECTIONAL ANALYSIS

Code Section	02022-36	Current Code	Highlighted Changes
<b>KPB 21.25.050</b>	30-day staff review period of an application.	21-day staff review period of an application.	Increase from 21 to 30 days.
<b>KPB 21.25.060 - Notice</b>	Notice published on KPB website; public bulletin; mailed to all owners/leaseholders within ½ mile radius of proposed site.	Requires notice published two times in newspaper, posted in the post office, copy of the notice sent by regular mail to all owners	Expressly does not apply to counter permits.  No longer requires newspaper publication but allows

		and/or leaseholders within one-half mile.	for publication on KPB website.
<b>KPB 21.29.005 - Intent and Purpose</b>	Establishes an intent and purpose section for KPB Chapter 21.29 with focus on public health, safety and general welfare, and to promote compatible, orderly development.	N/A	New code section.
<b>KPB 21.29.010 - Applicability</b>	<p><b>A.</b> Applies to all private and public lands, except as preempted by other law;</p> <p><b>B.</b> Does not apply within the incorporated cities;</p> <p><b>C.</b> Prohibits extraction within 300 feet of riparian wetlands and naturally-occurring open water bodies;</p> <p><b>D.</b> Operations must be conducted in accordance with current Alaska DEC Manual for extraction projects.</p>	N/A	New code section to clarify applicability of chapter and fact that it does apply to both public and private lands outside of the incorporated cities unless otherwise exempt.
<b>KPB 21.29.015 -Material extraction exempt from obtaining a permit</b>	<p><b>A.</b> Exempts extraction disturbing less than one acre if: -Not in floodplain; -Does not enter water table; and -Does not cross property boundaries.</p> <p>No excavation within 32' of lot line.</p> <p><b>B.</b> Exempts dewatered bars within SBCFSA/Snow River.</p>	<p>Currently 21.29.010</p> <p><b>A.</b> Exempts extraction disturbing less than one acre if: -Not in floodplain; -Does not enter water table; and -Does not cross property boundaries.</p> <p>No excavation within 20 feet of ROW or 10 feet of lot line.</p> <p><b>B.</b> Exempts dewatered bars within SBCFSA/</p>	<p>New code section.</p> <p>No excavation within 32' of lot lines.</p> <p>PEUs exempt but must provide reclamation plan &amp; comply with buffer zone requirements by 2026.</p>

	<p><b>C.</b> Exempts PEUs but by 2026 must:</p> <ul style="list-style-type: none"> <li>-Provide reclamation plan</li> <li>-Comply with buffer zone requirements</li> </ul>	<p>Snow River.</p> <p><b>C.</b> PEUs exempt but floodplain permit required within mapped special flood hazard area.</p>	
<p><b>KPB 21.29.020-Types of permits available</b></p>	<p><b>Counter permit</b></p> <ul style="list-style-type: none"> <li>-1 to 10 acres</li> <li>-No processing</li> <li>-No water table extraction</li> <li>-Only 21.29.050 conditions apply.</li> </ul> <p><b>Earth Materials Extraction CLUP</b></p> <ul style="list-style-type: none"> <li>-Activity disturbing more than 10 acres</li> <li>-No processing</li> <li>-No water table extraction</li> <li>-Only 21.29.050 conditions apply</li> </ul> <p><b>Earth Materials Processing CLUP</b></p> <ul style="list-style-type: none"> <li>-Required for all on-site processing, screening, or crushing</li> <li>-21.29.050 and 21.29.055 conditions apply</li> </ul> <p><b>Earth Materials Extraction within Water Table CLUP</b></p> <ul style="list-style-type: none"> <li>-Required for all earth materials extraction within water table</li> <li>-21.29.050 and 21.29.057 conditions apply</li> </ul>	<p>Counter permit and generic CLUP only.</p> <p>CLUP application requires all mandatory conditions and covers all uses.</p>	<p>Counter permit and three types of CLUPs.</p> <p>1 to 10 acres eligible for counter permit if no processing or water table extraction.</p> <p>Three different CLUP categories: earth materials extraction (more than ten acres), earth materials processing, and earth materials extraction within water table.</p> <p>Applicant may apply for one, two, or all three CLUP types.</p>
<p><b>KPB 21.29.030-Application procedure</b></p>	<p>Very similar to current procedure. Requires site map from professional surveyor and site plan</p>	<ul style="list-style-type: none"> <li>-Legal description</li> <li>-Life span</li> <li>-Buffer plan</li> <li>-Reclamation plan</li> </ul>	<p>Breaks apart site map (professional surveyor)</p>

	from professional engineer	-Excavation depth -Type of materials and equipment -Any voluntary permit conditions -Site plan	from site plan (professional engineer)  Application will be deemed incomplete without all items listed. (Not in current code.)
<b>KPB 21.29.040- Standards for sand, gravel or material sites</b>	Planning Director (counter permits) or Planning Commission (CLUPs) must find:  -Use is not inconsistent with applicable comp plan -Use will not be harmful to public's health, safety and general welfare -Provides sufficient setbacks, buffer zones, and other safeguards -Reclamation plan	-Protects against lowering of water sources serving other properties and damage to other properties -Minimizes off-site dust movement, noise disturbance, visual impacts & alternate post-mining land uses	All new standards/"may issue"  Focus on legitimate public purpose to protect against damage to public roads and adjacent properties as well as dust, noise and other impacts through setbacks, buffer zones, and street-level visual screening.
<b>KPB 21.29.045</b>	Applicants required to demonstrate compliance with state and federal law through written documentation from pertinent authorities: -Mining license (AK Dep't of Revenue) -Mining permit (ADNR) -Permits and plans required by DEC -Permits from USACE, if applicable -Other applicable permits from other regulatory bodies authorized to regulate mining activities or earth materials extraction  Must comply with other regulations such as air	N/A	New code section.  Requires compliance with applicable state/federal agencies prior to approval of KPB permit.  All activity must comply with state/federal regulations governing air/water quality and hazardous materials.  Violations subject to enforcement under 21.50.

	<p>and water quality, and hazardous materials</p> <p>Violations subject to enforcement under 21.50</p>		
<p><b>KPB 21.29.050</b></p>	<p align="center"><b>NINE MANDATORY CONDITIONS</b></p> <p><b>1. Buffers:</b> 32-foot buffer/may include natural vegetation for street-level visual and noise screening; 8-foot fence or berm with a 2:1 slope; 2:1 slope between buffer zone and floor on all inactive site walls. Material from slope may be removed if site plan provides removal timeframe and verification material will be replaced within 30 days.</p> <p><b>2. Water source separation:</b> No extraction below or within 4' of seasonal high-water table unless new section 21.29.057 conditions are met (Material Extraction within Water Table CLUP/see below); no off-site dewatering; no extraction within 100 feet of private well.</p> <p><b>3. Roads:</b> Operations impacting KPB roads must comply with 14.40 and subject to remedies in 14.40.</p> <p><b>4. Dust control:</b> Water or calcium chloride on haul</p>	<p><b>Buffers:</b> 50' of undisturbed natural vegetation, or 6' berm with at least 2:1 slope, or 6' fence. Material from slope may be removed if site plan provides removal timeframe and verification material will be replaced within 30 days. Planning Commission may waive where topography or placement of natural barriers make screening not feasible or unnecessary</p> <p><b>Water source separation:</b> No material extraction within 100 horizontal feet of any water source existing prior to permit issuance. Counter permits require four-foot vertical separation from seasonal high water table. CLUPs require two-foot vertical separation from seasonal high water table. No dewatering unless PC grants exemption.</p> <p><b>Roads:</b> Operations impacting KPB roads must comply with KPB 14.40.175 and subject to remedies in 14.40.</p>	<p>Allows flexibility to meet demands of a specific application vs. "one size fits all" of current code.</p> <p><b>Buffers:</b></p> <ul style="list-style-type: none"> <li>-Street-level noise and visual screening (as opposed to generic "noise and visual screening/impacts")</li> <li>-Decrease from 50' vegetation to 32'</li> <li>-Increase from 6' to 8' minimum</li> <li>-Decision-maker may waive if lot line is directly adjacent to another material site</li> </ul> <p><b>Water source separation:</b></p> <ul style="list-style-type: none"> <li>-Operations within water table governed by new section, 21.29.057 (see below) and require Material Extraction within Water Table CLUP</li> <li>-On site water movement permitted if qualified independent civil engineer provides statement under seal that dewatering will not lower any known water systems and applicant posts bond for potential accrued</li> </ul>

	<p>roads within boundaries of material site</p> <p><b>5. Hours of operation:</b> 6 am-9m but decision-maker may waive for specific seasonal project. Waiver valid for six consecutive months.</p> <p><b>6. Groundwater elevation:</b> Requires groundwater monitoring/one well 4' below proposed excavation per ten acres of excavated area.</p> <p><b>7. Setback:</b> 250' from LOZD/school/senior center/child care facility/etc.</p> <p><b>8. Boundaries:</b> Must stake buffers, ROWs, easements at visible intervals by professional land surveyor. Stakes must be placed prior to permit issuance.</p> <p><b>9. Processing:</b> Must comply with conditions in new section 21.29.055 (Earth Materials Processing CLUP/see below.)</p> <p style="text-align: center;"><b>SIX DISCRETIONARY CONDITIONS</b></p> <p><b>1. Setbacks/Buffer Areas:</b> Up to maximum of 100' if PC finds based on substantial evidence that increase is necessary for</p>	<p><b>Dust control:</b> Water or calcium chloride on haul roads within boundaries of material site</p> <p><b>Hours of operation:</b> Rock crushing equipment shall not be operated between 10 pm and 6 am.</p> <p><b>Groundwater elevation:</b> See below.</p> <p><b>Setback:</b> Not addressed.</p> <p><b>Boundaries:</b> Staked at sequentially visible intervals where boundaries are within 300' of excavation perimeter. Verification and staking by professional land surveyor.</p> <p><b>Processing:</b> See below.</p> <p><b>No provision for discretionary conditions.</b></p>	<p>damages in amount equivalent to replace each water well within 300-foot radius of site. Rebuttable presumption is each well is minimum of \$10,000.</p> <p><b>Roads/Dust control:</b> Essentially the same.</p> <p><b>Hours of operation:</b> For all extraction activities, 6 am to 9 pm but decision-maker can waive or adjust for specific seasonal project for period of six consecutive months.</p> <p><b>Groundwater elevation:</b> Requires groundwater monitoring.</p> <p><b>Setback:</b> 250' from LOZD/school/senior center/child care facility/etc.</p> <p><b>Boundaries:</b> Stakes must be placed prior to permit issuance rather than time of application.</p> <p><b>Processing:</b> Requires compliance with new section 21.29.055 and Earth Materials Processing CLUP.</p>
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	<p>public health, welfare, and safety; potential for rolling berms instead.</p> <p><b>2. Road maintenance and repair:</b> Permittee may be required to maintain/repair damaged public roads; requires consultation with RSA Director.</p> <p><b>3. Ingress/egress:</b> Decision-maker may require driveway authorization.</p> <p><b>4. Dust suppression:</b> On public ROWs when natural precipitation inadequate to suppress dust generated by material site traffic.</p> <p><b>5. Surface water protection:</b> As specified in 21.29.030(A)(8)(a).</p> <p><b>6. Street-level screening:</b> Street-level visual screening, noise mitigation, &amp; lighting restrictions as appropriate for the surrounding area and in accordance with 21.29.040 standards set to protect against attractive nuisance issues.</p>		<p>Adds discretionary conditions:</p> <ul style="list-style-type: none"> <li>-Additional setbacks or rolling berms</li> <li>-Maintenance and repair of damaged public roads</li> <li>-Driveway authorization</li> <li>-Dust suppression on public ROWs</li> <li>-Surface water protections as set forth in 21.29.030(A)(8)(a)</li> <li>-Street-level screening as appropriate for surrounding area and to protect against attractive nuisances</li> </ul>
<p><b>KPB 21.29.055- Earth materials processing</b></p>	<p>In addition to mandatory conditions in 21.29.050(A).</p> <p><b>A.</b> Conditioning or processing equipment must be operated at</p>	<p>300' setback for conditioning or processing equipment.</p> <p>PC may waive or reduce in consideration of and in accordance with</p>	<p>New code section.</p> <p>PC may waive or reduce in consideration of and in accordance with existing uses of the</p>

	<p>least 300' from parcel boundaries. PC may waive or reduce distance requirement in consideration of and in accordance with existing uses of properties in the vicinity.</p> <p><b>B.</b> Hours of operation for processing equipment between 8am and 7pm or as PC determines.</p> <p>PC may also grant exceptions (not to exceed 120 days) for:</p> <ul style="list-style-type: none"> <li>-Emergencies</li> <li>-Good cause finding that increase serves public purpose and is not harmful to public health, safety, and general welfare</li> </ul> <p>Applicant may request waiver (not to exceed six consecutive months) for specific seasonal project. PC must also find waiver is not harmful to the public health, safety and general welfare.</p>	<p>existing uses of adjacent property at the time.</p>	<p>"properties in the vicinity". Present code is "adjacent property".</p> <p>Processing equipment may only be operated between 8am and 7pm, may be increased for emergencies, to serve a public purpose or for specific, seasonal project.</p>
<p><b>KPB 21.29.057- Material extraction in water table</b></p>	<p>In addition to mandatory conditions in 21.29.050(A).</p> <p>Dewatering prohibited (21.29.050(A)(2)(b)).</p> <p><b>A.</b> Applicant must meet the following requirements prior to applying:</p>	<p>Excavation within 300' horizontal feet of water source may be permitted based on:</p> <ul style="list-style-type: none"> <li>-No negative impact to quantity of an aquifer serving existing water sources;</li> <li>-Minimum of three water monitoring tubes or well casings to determine flow direction, flow rate,</li> </ul>	<p>New code section.</p> <p>In addition to 21.29.050 conditions, sets forth additional requirements and conditions primarily to protect water quantity.</p> <p>Qualified professional must be able to characterize entire</p>



	<p>1. Installation of sufficient monitoring wells and test pits to provide qualified professional with adequate information to characterize the entire property that will be permitted for excavation.</p> <p>2. Under the supervision of a qualified professional, measurement of seasonal high-water table elevation, groundwater flow direction, hydraulic gradient and water table elevation.</p> <p>3. A qualified professional's report determining the potential adverse effects to groundwater and surface water body elevation and quality, surrounding water users and adjacent properties. Determination based upon available data, interpretations of data and knowledge of groundwater processes.</p> <p>4. Report must be submitted with CLUP application. Subsection lists what must be included in the report.</p> <p><b>B. Must also include:</b></p> <p>1. Description of proposed extent and depth of material extraction beneath</p>	<p>and water elevation; and</p> <p>-Quarterly measurements of groundwater elevation, flow direction, and flow rate for at least four quarters prior to application. Tubes or wells must be kept in place for duration of excavation in water table.</p> <p>-Operations shall not breach aquifer-confining layer. No extraction activities within 100 linear feet from waterbodies.</p> <p>Additional setback from lakes, rivers, anadromous streams and riparian wetlands may be required.</p> <p>-Permits may contain additional conditions addressing surface water diversion.</p>	<p>property permitted for excavation through sufficient monitoring wells and test pits.</p> <p>Qualified professional must supervise measurement of seasonal high-water table elevation, groundwater flow direction, hydraulic gradient and water table elevation. Based upon available data, interpretations of data and knowledge of groundwater processes, qualified professional will report potential detrimental adverse effects to groundwater and surface water body elevation and quality, surrounding water users and adjacent properties. Must be submitted with application and also include extent and depth of extraction beneath seasonal high-water table, spill prevention/control/countermeasures plan.</p> <p>Conditions: -Implementation of monitoring and spill prevention/control/countermeasures plan;</p>
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	<p>seasonal high-water table.</p> <p>2. Report 21.29.057(A)(4) report, monitoring plan and spill prevention/control/countermeasures plan.</p> <p><b>C. Conditions</b></p> <p>1. Implement monitoring plan</p> <p>2. Implement spill prevention/control/countermeasures plan</p> <p>3. Monthly measurement (during active extraction) of groundwater flow direction, hydraulic gradient and groundwater table elevation</p> <p>4. Retain water elevation monitoring data for two years after completion of reclamation activities</p> <p>5. Annual report including water table elevation monitoring data from qualified professional</p> <p>6. Operations must not breach or extract material from a confined aquifer or a confining layer beneath a perched aquifer. Subsection sets forth what must be done if there is a breach.</p> <p>7. Setbacks:</p>		<p>-Monthly measurement of groundwater and retention of groundwater data for two years after completion of reclamation activities;</p> <p>-Annual report from qualified professional;</p> <p>-No breach or extraction from a confined aquifer or a confining layer beneath a perched aquifer; and</p> <p>-Setbacks from existing drinking water sources.</p>
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	<p>-500' from nearest down-gradient drinking water source          -350' from nearest cross-gradient drinking water source          -200' from nearest up-gradient drinking water source          -Do not apply to drinking water sources constructed after permit issued</p>		
<p><b>KPB 21.29.060          -Reclamation plan</b></p>	<p><b>A.</b> Reclamation with site plan required. 5-year reclamation plan must be submitted with permit renewal request.</p> <p><b>B.</b> Applicant may re-vegetate and reclaim all disturbed land upon exhausting the material site or time determined by plan to leave land in a stable condition. 2:1 slope must be maintained. \$750 per acre bond required unless state bond. Enforcement under KPB 21.50.</p> <p><b>C.</b> Measures listed must be considered as part of every reclamation plan, 6 reclamation measures including ponding and protection against public nuisance.</p> <p><b>D.</b> Plan must list total acreage to be reclaimed.</p>	<p><b>A.</b> Reclamation Plan required.</p> <p><b>B.</b> Applicant shall vegetate and reclaim all disturbed land upon exhausting the material site or time determined by plan to leave land in a stable condition. Reclamation must occur for area exceeding 5 acres prior to 5 year renewal or as PC specifies.</p> <p><b>C.</b> Measures listed must be considered as part of every reclamation plan, 6 reclamation measures including ponding.</p> <p><b>D.</b> Plan must list total acreage to be reclaimed each year, a list of equipment and a time schedule for reclamation measures.</p>	<p>“May” rather than “shall” revegetate.</p> <p>Bonding required.</p> <p>Plan survives permit termination and must list total acreage to be reclaimed.</p> <p>Protection against public nuisance.</p>

	<p><b>E.</b> Close-out – reclamation survives permit expiration, termination or revocation.</p>		
<p><b>KPB 21.29.065</b> <b>-Effect of permit denial</b></p>	<p><b>A.</b> Applicant denied counter permit cannot reapply within same calendar year w/out new evidence or circumstances.</p> <p><b>B.</b> Applicant denied CLUP permit cannot reapply within same calendar year w/out new evidence or circumstances.</p> <p><b>C.</b> Applicant bears burden of proof.</p>	N/A	<p>An applicant cannot immediately reapply for a permit after denial.</p>
<p><b>KPB 21.29.070</b> <b>-Permit renewal, modification and revocation</b></p>	<p><b>A.</b> Renewal by application every 5 years.</p> <p><b>B.</b> Administrative approval if compliance with all conditions, no modification and no violation in prior 2 years.</p> <p><b>C.</b> Public hearing on renewal required when there is a modification, permit violation, or as determined by planning director. Permit in compliance with no violations must be approved for renewal but the commission can add additional conditions where appropriate.</p>	<p><b>A.</b> Must request permit extension every 5 years, 30 days prior to expiration.</p> <p><b>B.</b> If no modification to operations or conditions proposed, a permit extension certificate may be issued by planning director.</p> <p><b>C.</b> Extension may be denied if: (1) not in compliance with reclamation requirements; (2) non-compliance with permit conditions; (3) permit violation in last 2 years and still in non-compliance.</p> <p><b>D.</b> Modification processed per</p>	<p>Renewal application, not request in writing.</p> <p>Possibility for public hearing on renewal and additional discretionary conditions on renewal.</p>

	<p><b>D.</b> Modifications processed per KPB 21.29.030 -.050</p> <p><b>E.</b> Renewal fee is same as original permit fee.</p> <p><b>F.</b> Failure to apply for renewal = permit expiration.</p> <p><b>G.</b> Permits revoked per KPB 21.50.</p>	<p>KPB 21.29.030-.050.</p> <p><b>E.</b> No fee for permit extensions approved by planning director. The fee for a permit modification processed under KPB 21.29.070(D) requires original permit fee.</p> <p><b>F.</b> Failure to apply for renewal = permit expiration.</p> <p><b>G.</b> Permits revoked per KPB 21.50.</p>	
<b>KPB 21.29.080 -Permit Close-out</b>	<p>Requires permittee to request close-out of permit and verification of reclamation compliance.</p> <p>Bonding released at close-out.</p>	<p>Current code section is titled "Permit Termination" and provides for a termination document and verification of site reclamation.</p>	<p>Terminology change from permit "termination" to "close-out". Explicit that reclamation requirement survives permit expiration or revocation &amp; that bonds are released upon close-out.</p>
<b>KPB 21.29.100 -Recordation</b>	<p>Provides for recordation of permits, etc. issued under KPB 21.29. Owner/operator responsible for cost.</p>	<p>Similar recordation requirement.</p>	<p>Owner/operator responsible for recording costs.</p>
<b>KPB 21.29.110 -Violations</b>	<p>Violations governed by KPB 21.50.</p>	<p>Same but also has subsection (B) which provides for bonding if owner/operator has 3 violations within a 3-year period.</p>	<p>Violations governed by KPB 21.50 remain unchanged. No subsection B related to bonding requirement if there are 3 violations in 3 year period.</p>
<b>KPB 21.29.115 -Permit transfers</b>	<p>Planning director approves or disapproves permit transfers. Permits do not run with the land.</p>	<p>N/A</p>	<p>New section of code.</p>

<p><b>KPB 21.29.120</b> <b>-Prior-existing</b> <b>uses</b></p>	<p><b>A.</b> Determination – mirrors process under KPB 21.44 (LOZD) for nonconforming-use determination</p> <p><b>B.</b> Director provides notice of application and issues decision. Decision can be appealed to the Planning Commission.</p> <p><b>C.</b> Establishes 365-day period for abandonment.</p> <p><b>D.</b> Prohibits increasing, intensifying, expanding or moving the use.</p> <p><b>E.</b> Establishes standards to guide decision-making process.</p> <p><b>F.</b> Requires PEU compliance with KPB 21.29 reclamation plan and hours of operation by January 1, 2026.</p> <p><b>G.</b> Requires PEU compliance with code requirements for extraction within water table under KPB 21.29.057, except the water source separation requirements do not apply.</p>	<p><b>A.</b> Requires determination that use as a material site commenced or operated after May 21, 1986 and prior to May 21, 1996. Limited subdivision rights. PEU runs with land.</p> <p><b>B.</b> Must have applied to be registered as a PEU prior to January 1, 2001.</p> <p><b>C.</b> Abandonment if no operation as a material site between 5/21/1996 and 5/21/2011. Owner may protest finding of abandonment and may appeal decision to the Planning Commission.</p>	<p>By 1/1/2026, PEUs required to come into compliance with:</p> <ul style="list-style-type: none"><li>-Reclamation requirements;</li><li>-Hours of operation; &amp;</li><li>-Buffer area.</li></ul> <p>365 period of nonuse/ no operations = Abandonment</p>
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