



THE STATE
of **ALASKA**
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August 2, 2012

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RE: Ten-Day Notices (TDNs) numbered #X11-141-182-005 and #X11-141-182-006 regarding Usibelli Coal Mine, Inc.'s Wishbone Hill Mining Permits

Mr. Walker:

This letter serves as our response to your correspondence dated July 19, 2012. In that correspondence, you stated that you had completed an initial evaluation of the response by the Alaska Department of Natural Resources (DNR) to your Ten-Day Notices (TDNs) numbered #X11-141-182-005 and #X11-141-182-006. You requested that DNR conduct a permit file review and advise the federal Office of Surface Mining Reclamation and Enforcement (OSM) if additional pertinent permitting information was available for OSM evaluation.

DNR has conducted a record search in response to your request. By doing so it does not concede that the OSM has the authority to conduct this TDN process to review alleged permit defects in the Wishbone Hill permits.

OVERVIEW

OSM's issuance of the two TDNs were a result of citizen's complaints filed with OSM regarding surface coal mining operations and permits at the Wishbone Hill coal mine near Sutton, Alaska.¹ Advocacy groups and the Chickaloon Village Traditional Council (collectively "the complainants") have asked OSM to invalidate permits approved for the mine 20 years ago.

¹ Attachment A, Letter from K. Strong, B.Brisson to A.Klein dated December 14, 2011; Letter from T.Waldo to A.Klein dated December 14, 2011.

The regulatory issues involving the Wishbone Hill mine, which began surface coal mining operations in 2010 under operator Usibelli Coal Mine, Inc. (UCM), are complex. DNR has reviewed its permit files for months and consulted extensively with the Alaska Department of Law. We have also reviewed similar permit challenges that have been made in the Lower 48.

The procedural issues are also complex. While OSM and DNR have been examining questions regarding the underlying validity of the Wishbone Hill permits, DNR has also been reviewing a 2011 request from UCM to renew the permits. OSM's intervention on a matter for which it has questionable oversight authority has added complications. Recently, the complainants and UCM filed lawsuits in both federal and state courts to block mining operations and preemptively declare the permits valid, respectively.

The Wishbone Hill permits have been renewed three times in the past two decades. OSM has been fully informed of the State's decisions, has inspected the mine site on several occasions, and has issued favorable reports related to the mine and the regulatory oversight of it. This is the first time in over two decades that the underlying validity of the permits has been questioned, either by OSM or the advocacy groups seeking to block the mine. Indeed, the complainants—some of which provided public comments on the permit renewals—did not appeal DNR's issuance of the three previous permit renewals. Their contention is not that the permits were not renewed properly in previous years, but that the procedure for requesting an extension of time to begin surface coal mining operations was not done properly.

This letter seeks to clarify these issues.

The public process over the past year for the 2011 Wishbone Hill mine permit renewal application has been open, transparent and conducted in accordance with state and federal law. During the public process, DNR heard from citizens and advocacy groups who were very supportive of the mine as well as those who had concerns about the mine. In particular, those concerned about the mine requested that the State undertake a study of the potential impacts to those near the mine through a formal Health Impact Assessment (HIA). These groups also requested that no further mining activity be allowed at Wishbone Hill until the environmental baseline data underlying the permits is fully updated.

DNR has taken these concerns seriously and has already taken steps to address them. As shown in the attached letter to UCM,² we are requesting additional information from the company—including updates to the permits' baseline data and portions of the operation and reclamation plan—in order to assist DNR in determining whether to grant, condition, modify, or deny UCM's applications for renewal.

² Attachment B, August 2, 2012 Letter from B. Goodrum, DMLW, to R. Brown, re: Renewal Application for the Wishbone Hill Mine Permits (Permit Numbers 01-89-796 and 02-89-796).

In addition, DNR requested that a HIA for the Wishbone Hill area be conducted, which resulted in the “Draft Health Impact Assessment for Proposed Coal Mine at Wishbone Hill, Matanuska-Susitna Borough, Alaska” being released by the Alaska Department of Health and Social Services, Health Impact Assessment Program on March 5, 2012. As stated in its introduction, the “HIA provides decision makers with a review of potential positive and negative human health impacts related to the proposed Wishbone Hill Mine.”³

On the matter of the validity of the permits, we conclude that the permits are valid. A key issue is how extensions of time to begin surface coal mining must be documented in the permit file. This is an issue of first impression in Alaska. This letter explains the basis for DNR’s conclusion and includes additional supporting information.

A proper legal interpretation and common understanding of state and federal coal mining statutes by OSM and the states is critical. Examining other jurisdictions’ interpretation of this issue supports the conclusion that surface coal mining permit extensions can be implicit rather than explicit. Moreover, we believe OSM is exceeding its statutory authority to use the TDN process to invalidate long-standing coal permits issued by states. The State of Alaska is not the only state that holds this view. Indeed, our analysis and conclusions are informed by a recent, similar case between OSM and the state of West Virginia, where West Virginia forcefully argues that OSM does not have the authority to invalidate permits through the use of a TDN. As explained more thoroughly below, we agree.

Finally, it is important to recognize the troubling and far-reaching consequences of OSM’s intervention in this case. OSM is seeking to invalidate permits decades after their approval by the State, which holds primacy over the coal regulatory program in Alaska, and two years after surface coal operations began— all with OSM’s prior knowledge. The result is to create uncertainty for any coal permit in Alaska and other states due to providing perpetual opportunity to appeal and overturn state permitting decisions. This puts companies, workers, and the public in the difficult position of never knowing that a decision on a coal mining permit is truly final. Neither Congress nor the Alaska Legislature intended for their federal and state coal mining statutes to operate in this manner.

I. PROCEDURAL HISTORY OF WISHBONE HILL PERMITS

A. State Primacy Over Surface Coal Mining and Permit Processing

The federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) was established to regulate surface coal mining and reclamation. The act provides that each state may assume and retain exclusive jurisdiction over regulation of the surface coal mining and reclamation

³ See HIA at <http://www.epi.alaska.gov/hia/>.

operations in that state if the state’s program (statutes and regulations) provides for the regulation of surface coal mining and reclamation in accordance with the requirements of the federal statute.⁴ With the enactment of the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA), the State of Alaska assumed exclusive jurisdiction over the regulation of Alaska surface coal mining and reclamation operations in 1983,⁵ while OSM maintains a limited oversight role.⁶ Alaska has maintained exclusive jurisdiction since that time and, as noted by OSM in 2009, “is effectively maintaining and administering the coal regulatory program in accordance with the Alaska Surface Coal Mining and Reclamation Act.”⁷

A correct understanding of how permits are processed for surface coal mining in Alaska helps inform the current situation. In order to conduct a surface coal mining and reclamation operation in the State of Alaska, a person must apply for and obtain a permit from the Commissioner.⁸ A permit must contain all the information required by AS 27.21 and associated regulations as well as any site specific requirements determined by the Commissioner. A permit is generally issued for five years, although the Commissioner may grant a permit for a longer term if the application is complete for that term and the applicant demonstrates the longer term is necessary to obtain financing for equipment or opening the operation.⁹ The decision concerning the completeness of the permit application and the final decision to issue the permit are noticed to the public.¹⁰

At the end of the permit term an operator may submit a request to renew the permit for an additional five year period. An ASCMCRA permit includes a “right of successive renewal upon expiration” pursuant to AS 27.21.080(a). An application for permit renewal must be received by the Commissioner at least 120 days before the expiration of the permit.¹¹ If an application is timely received, and the bond requirements of AS 27.21.160 are fulfilled, then the permittee is able to continue surface coal mining operations under the permit even after that permit expires while an administrative decision on the renewal is made.¹² The decision concerning the completeness of the permit application and the final decision to issue the permit are noticed to the public.¹³

In addition to renewals, under ASCMCRA, there is a requirement to begin surface mining operations within three years of permit issuance. Under AS 27.21.070(b):

⁴ 30 U.S.C. § 1253(a).

⁵ AS 27.21; 30 C.F.R. § 902.10 (State Regulatory program approval) (stating that beginning on May 2, 1983, “the Alaska Department of Natural Resources shall be deemed the regulatory authority in Alaska for all surface coal mining and reclamation operations and all exploration operations on non-Federal and non-Indian lands”).

⁶ See *e.g.*, 30 U.S.C. § 1271.

⁷ Attachment C, OSM 2009 Annual Report for Alaska, Section IV at 13 found at, <http://www.wrcc.osmre.gov/programs/oversight/alaska/evaluation.shtml> (containing most reports from 2008 through 2010).

⁸ AS 27.21.060(a).

⁹ AS 27.21.070(a).

¹⁰ 11 AAC 90.113; 11 AAC 90.117.

¹¹ AS 27.21.080(d).

¹² AS 27.21.080(e).

¹³ 11 AAC 90.113; 11 AAC 90.117.

A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued.

There are exceptions to the requirement that surface coal mining begin within the first three years of a permit. AS 27.21.070(b) continues by stating:

The commissioner may grant reasonable extensions of time if the permittee shows that the extensions are necessary (1) because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee. With respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee is considered to have begun surface mining operations at the time that the construction of the synthetic fuel or generating facility is begun.

The Alaska statutes and regulations do not contain more specific requirements regarding the request or grant of an extension.

B. Permit History

Issuance to Idemitsu

The Wishbone Hill surface coal mining permits (permits 01-89-796 and 02-89-796) were originally issued to Idemitsu Alaska Inc. on September 5, 1991.¹⁴ These permits were issued for a five-year permit term ending on September 4, 1996.¹⁵ The first request for an extension under AS 27.21.070(b) was submitted on August 24, 1994, by McKinley Mining Consultants on behalf of the permittee.¹⁶ This extension request included an explanation of ongoing litigation that had delayed the start of mining and requested that the deadline to begin surface coal mining operations be extended to September 4, 1996, which also coincided with the end of the first permit term.¹⁷ DNR granted the extension request, finding that the extension was warranted under AS 27.21.070(b) and that the time for the extension was reasonable.¹⁸

Transfer to NPMC and First Renewal and Related Extension

On September 19, 1995, DNR approved the transfer of the Wishbone Hill permits from Idemitsu Alaska Inc. to North Pacific Mining Corporation (“NPMC”).¹⁹

Prior to the deadline of the first extension, on January 31, 1996, NPMC sent a letter to DNR stating that it would “like to extend the existing permits without any major revision.”²⁰ A

¹⁴ Attachment D, permit cover letter.

¹⁵ *Id.*

¹⁶ Attachment E, 1994 Request for extension.

¹⁷ *Id.*

¹⁸ Attachment F, DNR grant of 1994 extension request.

¹⁹ Attachment G, Transfer Approval Cover Letter.

²⁰ Attachment H, January 31, 1996 letter from NPMC to DNR.

contemporaneous DNR memorandum to the Director of the Division of Mining and Water Management (now the Division of Mining, Land and Water) indicated that a second extension of time to begin coal mining would be required with renewal, but that the January 31, 1996 letter did not contain the information necessary to meet the requirements of AS 27.21.070(b) to extend the time required to start surface mining operations.²¹ Under AS 27.21.070(b), the permittee must make a showing that an extension is necessary. In a letter dated February 7, 1996, DNR relayed this concern to NPMC.²² The concern was also noted in internal DNR memoranda dated May 13, 1996 and May 14, 1996.²³ On July 9, 1996, a draft copy of a renewal cover letter was faxed to DNR.²⁴ The letter explained why operations had not yet begun at Wishbone Hill, noting a “depressed international steaming coal price” and the Mental Health Trust Lands litigation.²⁵ The letter also stated that both NPMC and operator UCM “recognize the importance of maintaining the existing SMCRA permits for the project,” and also that the author, Thomas Crafford, “hop[ed] this letter and the accompanying forms satisfy the remaining requirements for renewing the SMCRA permits.”²⁶ The letter also explained that NPMC had signed a Letter of Intent with UCM to operate and develop the mine. Handwritten on the fax letter were the words “Looks ok to me, Jules, 7/10/96.”²⁷ Mr. Jules Tleson was the Director of DNR’s Division of Mining and Water Management at the time.

The renewal application was submitted with a signed version of the cover letter dated July 11, 1996.²⁸ On October 23, 1996, DNR approved the permit renewal and stated in the cover letter to the renewal decision that, “should mining not commence within this renewal term, then due to the length of time since the original permit application work was completed no further renewals will be considered without an extensive review of the original applications and the baseline information they were based on.”²⁹ The public notice for the 1996 renewal contained a statement that an extension request had been received to allow for “continued marketing efforts.”³⁰ This statement was followed by a statement that the permits were renewed for an additional five-year term.³¹

Pursuant to the terms of 11 AAC 90.117(c), this decision was sent to OSM (Glenn Waugh, OSM, Olympia, WA).³²

²¹ Attachment I, 1996 Contemporaneous Memorandum dated February 6, 1996 from “Brian” to “Jules.”

²² Attachment J, Letter dated February 7, 1996 from DNR to NPMC.

²³ Attachment K, DNR Internal Memoranda.

²⁴ Attachment L, Draft Letter faxed July 9, 1996 from T. Crafford, NPMC to B. Novinska, DNR.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Attachment M, Cover letter for permit renewal dated July 11, 1996.

²⁹ Attachment N, 1996 Permit Renewal, Public Notice.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Transfer to Usibelli Coal Mine, Inc.

A request to transfer the Wishbone Hill permits to UCM pursuant to 11 AAC 90.119 was received by DNR on July 22, 1997.³³ The transfer request was noticed to the public on August 13, 1997.³⁴ After review of the transfer request and posting of the required reclamation bond, DNR approved this transfer on December 1, 1997, stating in the transfer permit terms that, “due to the length of time since the original permit application work was completed, no further renewals will be considered without a review of the original applications and the baseline information they were based on.”³⁵

Subsequent Renewals

Requests to renew the permits for additional five-year terms were submitted by UCM on April 30, 2001 and April 14, 2006.³⁶ Both renewals were public noticed and granted by DNR (background data was stated to be updated in the public notice for both renewal requests).³⁷ Both renewals were also sent to OSM pursuant to 11 AAC 90.117(c). Further, contemporaneous OSM annual reports indicate that OSM was aware of the renewal process.³⁸

As stated in OSM’s annual reports, surface coal mining operations had not yet begun within the permit areas. The annual reports, as well as additional contemporaneous documentation, indicate that it was well known by UCM, OSM, DNR, and the public that coal mining had not begun because of market conditions.³⁹

Based on a review of the Wishbone Hill file, the DNR Coal Program concluded that, extensions of time to begin coal mining operations for both permit renewals were implicit prior to the commencement of surface coal mining operations in 2010.

Renewal Processes

From a review of the records, each renewal of the Wishbone Hill permits under 11 AAC 90.129 and transfer of permit under 11 AAC 90.119 met all requirements of ASCMCRA, including public notices, informal conferences, responses to agency and public comments, and the collection of an application fee.

³³ Attachment O, 1997 Request for Transfer; 1997 Request for Transfer Public Notice

³⁴ *Id.*

³⁵ *Id.*

³⁶ Attachment P, 2001, 2006 Permit Renewal Requests and Public Notices.

³⁷ *Id.*

³⁸ *See, e.g.*, Attachment C, 2004 OSM Oversight Report (stating that “UCM has not yet initiated any activity at the Wishbone Hill location”); 2005 OSM Oversight Report (same); 2009 Oversight Report (same).

³⁹ *See, e.g.*, Attachment Q, UCM Submission, Letter from UCM to DNR dated January 3, 2012; *Friends of Mat-Su Fall 2006 Newsletter* (stating that at a meeting UCM “explained their intent for renewing the permit and why they have not developed the coal to date”); Attachment C, 2010 Oversight Report (containing a one-page analysis of the Wishbone Hill project and stating that “UCM had planned since 1997 to develop this area when the economics and coal market were right” and that the area “remained idle until mid-2009, when UCM became more active in attempting to find a market for its coal”).

Public Outreach for 2001 and 2006 Renewals

Participation in the public process and informal conferences included some of the same groups as those who filed citizens' complaints. The concern that UCM did not have a valid permit was not raised during these two previous renewal proceedings.

2011 Renewal Application and Public Outreach and Input

UCM filed a request to renew the permits for an additional five years on May 9, 2011, pursuant to AS 27.21.080(d) and 11 AAC 90.129(b).

Public notice of this permit renewal application was given for the period starting on August 24, 2011 and ending on October 14, 2011. Legal ads were placed in the Anchorage Daily News on August 24, 2011, and were noticed for four consecutive weeks. On August 24, 2011, the notice was mailed directly to the DNR, Division of Mining, Land and Water mailing list of affected persons and agencies. An extension of the public comment period was publically noticed and given for the period beginning September 29, 2011 and ending November 15, 2011. An informal conference was held on November 15, 2011 in Sutton, Alaska, which was attended by 300 members of the public, as well as Mr. Ken Walker (manager of the Denver Field Division for OSM), a representative from the Alaska Department of Fish and Game, the Director of DNR's Division of Mining, Land and Water, the Mining Section Chief for the Division of Mining, Land and Water, and the Manager of Alaska's Coal Regulatory Program. DNR received a total of 1,588 comment submittals (letters, comment forms, e-mails and other transcripts) containing numerous individual comments.

In addition to the outreach listed above, on March 14, 2011, DNR Commissioner Dan Sullivan as well as DNR permitting staff traveled to Sutton, Alaska, at the invitation of the Chickaloon Village Traditional Council and members of the Sutton Community Council to discuss views and opinions of coal mining at Wishbone Hill.

Members of the Sutton Community Council spoke about the benefits that a coal mining operation at Wishbone Hill would bring to the area, including the creation of good jobs that would enable families to spend more time together and less time commuting, economic benefits for the region, and strengthening community connectivity.

In juxtaposition, members of the Chickaloon Village Traditional Council and Castle Mountain Coalition shared their concerns that a coal mining operation in the Wishbone Hill area would negatively impact anadromous salmon, stream water quality, well water quality, trails and recreation, moose habitat, health of area residents, property values, traditional activities, families, and the sense of community.

While members of the Sutton Community Council urged DNR to support coal mining at Wishbone Hill, members of the Chickaloon Village Traditional Council and Castle Mountain

Coalition requested that baseline water and air quality data be updated, tribal and archaeological studies be integrated into the permitting process, and that a health impact assessment, public interest determination and new best interest finding be completed before coal mining at Wishbone Hill be considered.

C. Activities Conducted Under the Permits and DNR Inspections

Usibelli Coal Mine, Inc. Activities

UCM has conducted activities and collected baseline data required by DNR in order to maintain its permits over the years. It has maintained a ground water monitoring network, collected surface water quality data, studied and maintained vegetation and reclamation test plots, conducted wetland studies, and conducted fish and wildlife studies within the project area.

For example, during 1999 through 2001, and again in 2008 and 2009, quarterly water quality samples were collected on Moose Creek. During 1998 through 2001, and again in 2007 through 2009, quarterly discharge/flow measurements were also collected on Moose Creek.

Additionally, discharge/flow and stream morphology assessments were collected on Buffalo Creek during 2008. Water quality assessments for groundwater as well as piezometer readings were collected between 2008 and 2009. Aquatic biologic resource studies were conducted for Moose Creek and Buffalo Creek in 2008. UCM also completed an updated wetlands jurisdiction report in 2009.

2010 Road Construction

As OSM is aware, with the knowledge and approval of DNR, and pursuant to UCM's approved operation and reclamation plan, UCM initiated construction under the Surface Coal Mining Permit of a pioneer road into the mine area in June of 2010. Since then, UCM has completed one condemnation hole (summer 2010), constructed a gravel pad to be used for staging equipment (summer 2010), constructed and paved the initial 200 feet of the haul road (summer-fall, 2010) and has completed clearing trees and vegetation along the entire length of the haul road (fall 2011 and winter 2012). DNR considers this road construction to be the initiation of surface coal mining operations under the approved permit.

Inspections

As part of the requirements of 11 AAC 90.601, DNR has conducted numerous inspections of the permit site and active surface mining operations. Between 1993 and 2011, DNR conducted over 70 inspections of the permitted areas with monthly inspection continuing in 2012. These included inspections of monitoring wells status, review of reclamation test plots, and review of baseline data collection activities. Further, DNR was fully aware of the road construction in 2010, and has documented inspections of the ongoing work. After initiation of surface coal mining operations in 2010 DNR conducted site visits to the Wishbone Hill coal project *with*

OSM in June of 2010 and July of 2011. This included site visits to the staging area along the Glenn Highway and the pioneer road. The most recent inspection was conducted on July 18, 2012.

II. PROCEDURAL HISTORY OF RECENT CHALLENGES TO THE VALIDITY OF THE WISHBONE HILL PERMITS

On November 28, 2011, 13 days after the public comment period for the renewal application period closed, Trustees for Alaska, on behalf of Friends of Mat-Su, Castle Mountain Coalition, Alaska Center for the Environment, Cook Inlet Keeper, Alaska Community Action on Toxics, Pacific Environment, the Chickaloon Village Traditional Council, and the Alaska Chapter of the Sierra Club (complainants) submitted a letter to the DNR Commissioner entitled “Citizen Complaint and request for inspection under 11 AAC 90.607.”⁴⁰ The complainants alleged that surface coal mining operations at Wishbone Hill were being conducted by UCM without a valid permit in violation of the ASCMCRA. As noted above, in the decades of permit renewals involving this project and the associated public comment periods relating to such renewals, no group has challenged the underlying validity of the UCM permits.⁴¹ But last November, the complainants argued that the Wishbone Hill permits had terminated in 1996 due to a failure to begin surface coal mining operations or to gain an extension of time to do so under AS 27.21.070(b) and asked for the department to issue UCM a cessation order until permits were obtained.

DNR responded to this letter on December 13, 2011, finding that the permits were valid and denying the complainants’ demand for a state inspection of the mine.⁴² The December 13, 2011 response concluded by saying that if the requestors did not agree with the findings in the letter that they could request an informal review by the DNR Commissioner under 11 AAC 90.611. At the same time, a copy of DNR’s response was forwarded to the Regional Director of the Western Region OSM and the Chief of the Denver Field Division of OSM.

Trustees for Alaska did not follow this administrative remedy and instead, along with Earthjustice,⁴³ submitted “citizen complaints” to OSM on December 14, 2011, making the same allegations raised in the Trustee’s November 28, 2011 letter to DNR. These complaints requested that OSM take action under 30 CFR § 842.11 (Federal Inspections and Monitoring). In response to these complaints, OSM did not inform the complainants that there is an

⁴⁰ Attachment A, November 28, 2011 letter.

⁴¹ Indeed, as noted in Attachment C, OSM’s 2002 Annual Evaluation Summary Report for Alaska Regulatory Program at page 9, although “DMLW has actively sought to increase public awareness and involvement,” particularly in the Wishbone Hill area, “the public did not show much interest in the permitting process” in 2002.

⁴² Attachment A, DNR response to November 28, 2011 letter.

⁴³ Representing the Chickaloon Village Traditional Council; Attachment A.

established State administrative procedure that they needed to follow, but instead issued two Ten-Day Notices (TDNs) (X11-141-182-005 and X11-141-182-006) to the State of Alaska.⁴⁴

The TDNs informed the State that OSM had reason to believe that there was a violation of the federal Surface Coal Mining Act and that if the State regulatory authority failed within ten days of receipt of the notice to take appropriate action to correct the violation or show cause for failure to correct, then a federal inspection of the surface coal mine where the alleged violation occurred would be conducted and appropriate federal enforcement action as required by section 521(a)(1) of the federal act would be taken.

Prior to both the December 13, 2011 letter from DNR to the complainants denying their request for a State inspection, and DNR's response to the TDNs, UCM submitted a letter to DNR which contained information and documentation in support of the validity of its permits, including additional information about historical market conditions as well as information already contained in the administrative record.⁴⁵

In its January 6, 2012 response to OSM's TDNs, the DNR Coal Program concluded, based on a review of the Wishbone Hill file, that extensions of time to begin coal mining were implicit in the successive renewals granted previous to the commencement of surface coal mining operations in 2010, and that therefore, they considered the Wishbone Hill permits to be valid.

Since DNR's January 6, 2012 response to OSM, several of the complainants have filed a federal court lawsuit alleging that UCM is operating without a valid permit.⁴⁶ Additionally, UCM has filed a lawsuit in state court requesting declaratory judgment on the validity of the permit.⁴⁷

On July 20, 2012, DNR received OSM's letter explaining that it had completed an initial evaluation of DNR's response to the TDNs and concluded that:

“Based on OSM's analysis of documents submitted to date by DNR in response to the TDNs, OSM cannot make the determination that the standards for appropriate action or good cause for failure to take action have been met because information is missing from the record that may be available from your office. Because the record that OSM reviewed has significant gaps in permitting information, we are requesting your office to conduct a

⁴⁴ A ten-day notice is issued pursuant to 30 U.S.C. § 1271(a)(1), which states that:

“[if] the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation”

⁴⁵ Attachment Q, UCM Submissions (January 3, 2012 letter to DNR).

⁴⁶ See, e.g., Attachment R, *Friends of Mat-Su et al. v. Usibelli Coal Mine, Inc.*, Case No. 3:12-cv-00093-JWS, United States District Court for the District of Alaska, Complaint for Declaratory and Injunctive Relief (30 U.S.C. §§ 1256, 1270; AS 27.21.060), filed on May 1, 2012.

⁴⁷ See e.g., Attachment S, *Usibelli Coal Mine Inc. v. State of Alaska*, Case No. 3AN-12-07324 CI in Superior Court for the State of Alaska, Third Judicial District, Complaint (AS 22.10.030(g)) (requesting declaratory relief) filed May 18, 2012.

permit file review and to advise OSM if additional pertinent information is available for our evaluation. This supporting information, if available for these renewal actions and the related decision for the extension of time to commence mining in the required time frame is necessary to provide clarity with regard to the validity of the Wishbone Hill permits.”

Furthermore, OSM stated that it would proceed with its final determination if DNR does not submit any additional pertinent permitting information within ten days from receipt of the July 19, 2012 letter.

DNR has conducted a review of its files in response to OSM’s request, but by doing so it does not concede that OSM has the authority to conduct this TDN process to review alleged defects in the Wishbone Hill permits. DNR also reviewed OSM’s annual reports that address mining activities on the Wishbone Hill permits (permit numbers 01-89-796 and 02-89-796), that are the subject of the TDNs.⁴⁸

DNR is continuing to search archived information. Additional updates to this response will be made if appropriate upon review of archived information. DNR has also requested that UCM, the permit-holder, provide any additional pertinent information it might have in its files. UCM submitted several documents, which have been added to the administrative record.⁴⁹

III. THE WISHBONE HILL PERMITS ARE VALID UNDER ALASKA STATE LAW

A. ASCMCRA Requirements for Renewal

The process for a permit renewal is interrelated but different from a request for an extension of the time to begin surface coal mining operations. Permits are issued for five-year periods of time. Successful coal mining operations often continue for more than five years. Thus, a permit issued under ASCMCRA includes the right of successive renewal:

A permit issued under this chapter includes the right of successive renewal upon expiration, for areas within the boundaries of the permit area. An opponent of renewal of a permit has the burden of proving that the permit should not be renewed.⁵⁰

Similarly, under 11 AAC 90.129(b)(1), a “valid, existing permit issued under AS 27.21.180 carries with it the right of successive renewal upon expiration.” Permits may be renewed for additional five-year terms.⁵¹ The successive renewal process is outlined in AS 27.21.080 and related regulations. This process is accompanied by certain rights and responsibilities.

⁴⁸ Available at <http://www.wrcc.osmre.gov/programs/oversight/alaska/evaluation/AlaskaEvaluation.shtm#2001>.

⁴⁹ Attachment Q, UCM Submission.

⁵⁰ AS 27.21.080(a).

⁵¹ AS 27.21.080(d).

An application for permit renewal must be received by the commissioner at least 120 days before the expiration of the permit.⁵² If an application is timely received, and the bond requirements of AS 27.21.160 are fulfilled, then the permittee is able to continue surface coal mining operations under the permit even after that permit expires while an administrative decision on the renewal is pending.⁵³

Once a renewal application is deemed complete, it is opened for public comment for 51 days.⁵⁴ After the close of the public comment period and the conclusion of any informal conference, the commissioner has 60 days to make written findings and a decision.⁵⁵ The procedures for permit renewals outlined in 11 AAC 90.117 include the requirement to adjust the performance bond as needed to comply with 11 AAC 90.201.⁵⁶

Substantively, under AS 27.21.080(a), the Commissioner “shall” renew a permit unless he finds in writing that:

- (1) the terms and conditions of the permit have not been satisfactorily met, and the permittee has not demonstrated to the satisfaction of the commissioner that the permittee is meeting and will continue to meet a schedule set by the commissioner under AS 27.21.240(a) or (b) for correcting a permit violation;
- (2) the surface coal mining and reclamation operation of the permittee is not in compliance with the environmental protection standards of this chapter and regulations adopted under it;
- (3) the requested renewal substantially jeopardizes the permittee's continuing responsibility on existing permit areas;
- (4) the permittee has not either
 - (A) provided sufficient evidence that the performance bond under AS 27.21.160 in effect for the operation will continue for the renewal period requested in the application, and that any additional bond required by the commissioner under AS 27.21.160 will be obtained; or
 - (B) when seeking to use the statewide bonding pool for mining operations established under AS 27.19.040 (b), complied with all requirements of the bonding pool; or

⁵² AS 27.21.080(d).

⁵³ AS 27.21.080(e).

⁵⁴ 11 AAC 90.113.

⁵⁵ AS 27.21.140(c); 11 AAC 90.907(h).

⁵⁶ 11 AAC 90.117(b).

(5) information required by the commissioner in accordance with this chapter has not been provided by the permittee.⁵⁷

In sum, unless the commissioner makes a finding as set out in AS 27.21.080(a)(1) through (5), a permit shall be renewed for an additional five-year permit term.

Thus, a permit *renewal* extends the term of a permit another five years. Successive renewal is a right which accompanies a valid permit, as long as the conditions discussed in AS 27.21.080 are met. In contrast, the *extension* process addresses only the timeframe in which a permittee must begin surface mining operations or be subject to termination of the permit.

In the present case, the complainants are raising challenges that relate to the validity of the permits based on the argument that the time to begin mining has not been properly *extended* in the past, although after surface coal mining operations actually began two years ago. This is the first time in the long history of this project (or any Alaska coal project) that such an argument has been made. More specifically, the Wishbone Hill permits are being challenged for UCM's failure to meet the requirement to begin surface coal mining operations within three years or to obtain a valid *extension* of time to fulfill this requirement. There has been no challenge to the validity or propriety of the successive *renewals* of the Wishbone Hill permits, except to the extent that it is argued that there cannot be a renewal if there is no valid underlying permit to renew. As mentioned earlier, the concern that UCM did not have a valid permit was not raised during the previous renewal and transfer proceedings—by either the requestors or OSM—even though participation in the public process and informal conferences for the previous three permit renewals included some of those represented by the requestors.

B. Extensions of Time to Fulfill the Requirements to Begin Surface Coal Mining Operations Within Three Years

There are exceptions to the requirement that surface coal mining begin within the first three years of a permit. Under AS 27.21.070(b):

The commissioner may grant reasonable extensions of time if the permittee shows that the extensions are necessary (1) because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee. With respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee is considered to have begun surface mining operations at the time that the construction of the synthetic fuel or generating facility is begun.

C. Analysis of the Extension Issue

The complainants assert that the permits terminated in 1996 because, “no additional extensions

⁵⁷ AS 27.21.080(a).

of time [to commence mining operations] were requested or granted by the September 4, 1996 deadline.”⁵⁸ OSM’s letter to DNR points to procedural ambiguities and omissions in documentation dating as far back as 16 years ago. The July 19, 2012 letter indicates that OSM finds that the permit expired even *before* UCM obtained them in 1997.

First, a consideration of the permit file shows that there is documentation that an extension was granted to UCM’s predecessor, NPMC, in connection with the 1996 permit renewal. The permit holder, NPMC, submitted a request for renewal letter dated July 11, 1996, which listed reasons that “show[ed] that the extensions are necessary.”⁵⁹ Reasons listed included litigation and the coal market (“steaming coal prices”).⁶⁰ This letter was previously approved by the DMLW Director in the record as “okay.”⁶¹

Second, the public notice for the 1996 permit renewal contains a statement that there was a request for an extension of the AS 27.21.070(b) requirement.⁶² To read this language in the public notice, in conjunction with other documents from 1996 discussing the extension provision, as anything other than an acknowledgement, albeit indirect, that an extension was requested and granted would be illogical. If an extension were denied, a renewal could not have been granted.⁶³ The 1996 renewal document does not indicate a definitive extension end date. Instead, the accompanying cover letter stated that in light of the fact that surface coal mining operations had not yet begun, DNR would conduct an extensive review of any further renewal requests. Therefore, it is reasonable to conclude that the extension was meant to extend at least until the end of the five-year permit renewal term. DNR has concluded that an explicit extension was requested and granted in 1996.

Furthermore, there are no explicit requirements in the Alaska Statute that the reasons for an extension must set forth in writing or that the grant of an extension be in writing.⁶⁴ While the renewal decisions of 2002 and 2006 did not contain a discussion of extensions of the AS 27.21.070(b) requirements, DNR considers that by granting a renewal of the permit with full knowledge of the status of UCM’s operations (*i.e.*, that coal mining operations had not begun) and the status of the spot coal market,⁶⁵ DNR was implicitly granting an extension when it

⁵⁸ Attachment A.

⁵⁹ AS 27.21.070(b).

⁶⁰ Attachment M.

⁶¹ Attachment L.

⁶² Attachment M.

⁶³ AS 27.21.070(b).

⁶⁴ There is however, a requirement in the Alaska regulations at 11 AAC 90.117(c) that extensions should be documented in permit renewal public notices. However, the failure by DNR to include a reference to extensions of time to begin mining in a renewal public notice does not invalidate a permit.

⁶⁵ This lack of a market for coal is also documented in OSM’s annual oversight reports concerning Wishbone Hill. For example, from, the 2002 oversight evaluation:

“UCM plans to develop this area when the coal market improves. The permits are located in an area known as Wishbone Hill, about 1 hour northeast of Anchorage, near the town of Sutton. Considering that transportation concerns and costs often make Alaska coal economically unfeasible, the location of UCM’s Wishbone Hill permits could trigger increased mining activity in the State. Although UCM has not actively

granted renewals in 2002 and 2006.

The record and documentation submitted by UCM supports the idea that DNR, UCM, OSM, and the public were aware that mining operations were on hold due to market conditions, and that DNR still considered the permits to be valid. Throughout the 1990s and early 2000s, fluctuations and low prices in the Alaskan coal market adversely affected other coal projects in the State.⁶⁶ This was a well known issue to both the industry and State of Alaska. Alaska is distant from most large markets for coal. These market issues are documented in OSM's annual oversight reports concerning Wishbone Hill:

UCM plans to develop this area when the coal market improves. The permits are located in an area known as Wishbone Hill, about 1 hour northeast of Anchorage, near the town of Sutton. Considering that transportation concerns and costs often make Alaska coal economically unfeasible, the location of UCM's Wishbone Hill permits could trigger increased mining activity in the State. Although UCM has not actively pursued production at the Wishbone Hill Mine, they renewed both permits associated with that area during this evaluation year.⁶⁷

Additionally, the record regarding inspections, the activities conducted under the permit, and the revisions made over time to the permit all evidence a clear understanding by DNR, UCM, and OSM that the Wishbone Hill permits were valid, even if UCM had not yet commenced coal mining operations due to market conditions. DNR has been aware of activities conducted pursuant to the permit and has monitored and inspected these activities on an ongoing basis.⁶⁸ This indicates that with each renewal subsequent to 1996, DNR was implicitly extending the deadline to begin coal mining operations.

As indicated by numerous annual reports that OSM completed, OSM received all copies of the permit renewal documents and was well aware of the fact that mining had not yet commenced

pursued production at the Wishbone Hill Mine, they renewed both permits associated with that area during this evaluation year." Attachment C.

⁶⁶ See e.g., Attachment R UCM Document Submission, including contemporaneous news articles discussing coal prices, chart of global coal prices; submitted to DNR on July 31, 2012; letter from UCM to DNR dated January 3, 2012; Friends of Mat-Su Fall 2006 Newsletter (stating that at a meeting UCM "explained their intent for renewing the permit and why they have not developed the coal to date"); Internal UCM Memo dated November 27, 2001 (discussing the 2001 permit renewal and stating that UCM told Bruce Buzby, DNR employee, that the Wishbone Hill project "will not be developed until a market is secured"); correspondence between UCM and DMLW regarding request for permit extension on water permits due to litigation (Mental Health Lands Trust litigation) and market for coal; Attachment P, Transcript of Wishbone Hill Public Meeting at 2 ("[w]e don't have a market"). These documents show that UCM, DNR, and interested members of the public were aware that coal mining had not yet begun due to market conditions.

⁶⁷ Attachment C, OSM's 2002 Annual Evaluation Summary Report for Alaska Regulatory Program.

⁶⁸ Therefore, contrary to assertions made in the Request for Inspection which triggered the TDN process, there is not the same danger of "significant, imminent environmental harm to land, air, or water resources" which may exist where an operator is conducting coal mining operations without the knowledge and full oversight of the regulatory authority. Here, any coal mining operations were conducted with the express approval and awareness of DNR.

due to coal prices.⁶⁹ OSM was aware as early as 1998 that mining had not begun under the permit and made no indication that it found this to be a problem.⁷⁰ Further, OSM explicitly stated in 2000 that, “based upon OSM’s findings,” the State “properly processed the [1997] transfer application,” including making “the appropriate written findings in accordance with the Alaska statute and regulations.”⁷¹ OSM also noted in its report that “DMLW also notified the new permittee, that due to the lack of mining activity at this site, the transferred permits would not be renewed beyond the current expiration date of September 4, 2001, without a complete technical reevaluation.”⁷² OSM noted in the same report that “[t]he DMLW is effectively administering the Alaska Surface Coal Mining and Reclamation Act.”⁷³

D. Implicit versus Explicit Extensions

In its July 19, 2012 letter, OSM indicates that an implicit extension is *per se* invalid under the Alaska statute, and that it is arbitrary and capricious to find otherwise. But as noted above, there are no explicit requirements in the Alaska Statute that the reasons for an extension must be set forth in writing or that the grant of an extension be in writing.⁷⁴ And no Alaska court has considered or ruled on the issue of the distinction between an explicit and implicit extension. However, Alaska is not alone in finding that implicit extensions are allowed under the extension provision. At least one other state court where the state has primacy over their coal program—as allowed under the Surface Mining Control and Reclamation Act of 1977 (see Section I (A))—has addressed this question in interpreting state primacy programs that are implementing extension statutes similar to Alaska’s extension statute, AS 27.21.070(b). That court found that that implicit extensions granted by an agency with a transfer of a permit were valid.⁷⁵ Somewhat

⁶⁹ See, e.g., Attachment C, OSM’s 2004 Annual Evaluation Summary Report for Alaska Regulatory Program (stating that “UCM has not yet initiated any activity at the Wishbone Hill location”); 2005 Annual Evaluation Summary Report for Alaska Regulatory Program (same); 2009 Annual Evaluation Summary Report for Alaska Regulatory Program (same); 2010 Annual Evaluation Summary Report for Alaska Regulatory Program (containing a one-page analysis of the Wishbone Hill project and stating that “UCM had planned since 1997 to develop this area when the economics and coal market were right” and that the area “remained idle until mid-2009, when UCM became more active in attempting to find a market for its coal”). See also Attachment T, *Railroad Comm’n of Texas v. Coppock*, 215 S.W. 3d 559, 556-71 (Tex. Ct. App. 2007) (finding it appropriate to extend the time to begin surface coal mining due to unfavorable market conditions).

⁷⁰ Attachment C. Alaska 1998 Oversight Report, and Supporting Data, Office of Surface Mining (noting that UCM had recently assumed the Wishbone Hill permits and that “the location of UCM’s recent acquisitions might trigger increased interest in Alaska coal, especially for export markets” even though “no coal removal has occurred at the Sutton location”).

⁷¹ Attachment C. Office of Surface Mining Reclamation and Enforcement, Annual Evaluation Summary Report for the Regulatory Program Administered by the State of Alaska, Evaluation Year 2000, at AK-11.

⁷² *Id.*

⁷³ *Id.* At AK-7.

⁷⁴ There is however, a requirement in the Alaska regulations at 11 AAC 90.117(c) that extensions should be documented in permit renewal public notices. However, the failure by DNR to include a reference to extensions of time to begin mining in a renewal public notice does not invalidate a permit.

⁷⁵ Attachment U, *C & T Evangelinos v. Div. of Mineral Res. Mgm’t*, 2004 W.L. 2980346 at *7 (Ohio App. 7 Dist. 2004) (finding that three year extensions were automatic for new permit transferees); but see *Montco v. Simonich* 947 P.2d 1047, 1051 (Mont. 1997) (interpreting different language present in the Montana Strip and Underground Mine Reclamation Act to indicate that a permit may be “reasonably extended for up to two years”).

similarly, West Virginia has a policy (recently also questioned by OSM) of allowing extensions to be retroactively granted.⁷⁶ How can a decision to allow implicit extensions be determined arbitrary and capricious, meaning “[w]ithout a rational basis” and “[i]nconsistent with applicable law,” where two states (including one state court) that considered this issue have allowed implicit extensions?⁷⁷ It is OSM’s conclusion that deviates in its interpretation from other regulating entities.

It appears instead that here, OSM is failing to apply the deferential “arbitrary and capricious” legal standard mandated by OSM’s own regulations and Directives System INE-35 (INE-35),⁷⁸ and is instead is using a standard that relies upon what OSM “would have done in the circumstances.”⁷⁹ While OSM might itself not come to the same conclusion as DNR, it does not follow that implicit extensions are *per se* invalid.

E. Fairness, Equity, and the Legality of the Ten-Day Notices

A Perpetual Right to Appeal or Challenge State Permitting Decisions Undermines Regulatory Certainty

As described above in Section I, the State of Alaska has exclusive jurisdiction over surface coal mining and reclamation operations in the State.⁸⁰ Use of the TDN process to overturn State permitting decisions, especially where there is a pending renewal decision, is improper. Concerns about the issuance of renewals to UCM were not raised contemporaneously with the 1996, 2001, or 2006 renewal decisions. Further, those challenging the validity of this permit through the TDN process began, but never exhausted, their administrative remedies with the State of Alaska—a state that has primacy over the surface coal regulatory program—when they submitted “citizen complaints” to OSM on December 14, 2011.

The absence of appeals of these previous decisions should exhibit that there was no public concern over the validity of the permits, the renewal procedure, or the State’s actions implementing ASCMCRA. For OSM to interject at this stage to question the validity of permits issued by DNR 20 years ago, where the permit holder has *operated* pursuant to the permits, with express knowledge and consent of the State regulator, sets a troubling precedent that would

⁷⁶ Attachment V, June 18, 2012, West Virginia Department of Environmental Protection letter *Re: Ten Day Notice NO. X12-111-391-002, Marfork Coal Company Inc.’s Eagle No. 2 Permit Extension*

⁷⁷ Attachment W, Directives System INE-35, January 31, 2011, re: Ten-Day Notices, at 2.

⁷⁸ 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); Attachment W, INE-35. As described in INE-35, the “arbitrary and capricious” standard applied looks to whether the state regulatory authority (RA) acted:

- (1) Irrationally in that the RA’s interpretation of its program is inconsistent with the terms of the approved program or any prior RA interpretation recognized by the Secretary of the Interior (Secretary);
- (2) Without adhering to correct procedures;
- (3) Inconsistent with applicable law; or
- (4) Without a rational basis after proper evaluation of relevant criteria.

⁷⁹ Attachment X, *Danny Crump*, 163 IBLA 351, 358 (2004).

⁸⁰ AS 27.21.030(14).

invalidate the notion of exclusive jurisdiction that primacy states are supposed to have under SMCRA.

There is also the important issue of providing certainty to permittees seeking to make investment decisions based on final permit decisions. If such decisions by state government entities can be reopened by federal authorities five, ten or fifteen years after they have been made by state permitting agencies with primacy authority, then the certainty and finality of state permitting approvals can be perpetually called into question. Such an outcome would likely have a negative impact on the investment climate in states with primacy over their coal programs. Further, it appears contrary to the spirit of the federally approved ASCMCRA program, which provides that a permit may only be revoked for failure to comply with an order of the commissioner to take action required by the statute or its regulations “after opportunity for a due process hearing.”⁸¹

OSM is Using the TDN in a Manner That Exceeds its Oversight Authority

Through its issuance of the TDNs in response to the December 14, 2011 citizen complaint, OSM is using the TDN process in a manner that exceeds its oversight authority. Use of the TDN in this matter allowed the complainants a perpetual alternative administrative appeal of a state permitting decision, essentially enabling them to bypass the administrative procedures and remedies provided to them through the State’s regulatory program. This is an overreach of OSM’s authorities in regard to the State’s primacy over coal regulatory program.

The statutory basis for TDN notice procedures is found in Section 521(a) of SMCRA, which states:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that an person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring. . . .⁸²

The issue of whether or not a permit is valid if no explicit extension for surface coal mining operations has commenced within a three-year period is not the type of issue that a TDN is

⁸¹ AS 27.21.030(6). A company could have no certainty about the validity of its permit under OSM’s interpretation, unless OSM has put a stamp of approval on the permit. Instead, as has occurred here, a company operating under a permit issued by the state would be operating at the risk that its permit could be declared invalid *sixteen years* after transfer of the permit to the company, meaning that its operations, conducted under a permit issued by the state, would be considered operations without a permit (a potentially serious offense under ASCMCRA).

⁸² 30 U.S.C. § 1271(a).

designed for. TDNs are intended to notify states of potential violations occurring on the site of mining operations, such as those relating to environmental violations, not procedural issues. Nevertheless, OSM has begun a national campaign to dramatically expand the reach of its TDN authority, by, among other things, applying its TDN process to the review of state permitting procedures and decisions.⁸³ In a recent challenge to a state's interpretation of an extension to begin mining statute, OSM issued a TDN to the State of West Virginia declaring that its retroactive extension of time to begin mining under a state coal permit was arbitrary and capricious, and that therefore the West Virginia permit was invalid. West Virginia responded to OSM and argued that OSM does not have the authority to use a TDN process for such purposes, stating that "TDNs may be issued only when a person, as that term is used in the applicable provisions of SMCRA, is currently in violation of performance standards or permit requirements," and that the "allegation contained in the TDN is not the type of allegation that Congress intended to be addressed by the TDN process."⁸⁴

The State of Alaska has an established mechanism to allow affected parties to timely appeal state permitting decisions, both through the executive and judicial branches. The TDN in this case is tantamount to a back-door appeal of a permit decision made 16 years ago and an attempt to circumvent the State's statutorily established process and authority. If this use of a TDN is allowed to stand, it would invalidate the notion of exclusive jurisdiction that primacy states rely upon under SMCRA and essentially deem that permits are really only valid when OSM explicitly says they are. It would allow groups opposed to mining activities the right to ignore the State's primacy and permit authorization procedures and have a perpetual right of appeal by ignoring State authorities and going to the federal government whenever they desired, as has happened in this case.

The problematic nature of OSM's current use of the TDN process has significant consequences that are of growing concern to a number of states. Here, primacy over the coal program, particularly the issuance of permits, was granted to the State of Alaska in 1983. While other programs regulated by both state and federal entities provide for federal veto power over state permitting decisions,⁸⁵ SMCRA is not such a statute. Thus, a permit holder need only obtain a permit from the state authority. "Administrative and judicial appeals of permit decision are matters of state jurisdiction in which the Secretary plays no role."⁸⁶ OSM has exceeded its TDN authority to conduct a *post hoc* review of DNR permitting decisions made 6 to 20 years ago. In order for a permit holder to be able to rely on a permit in this scenario, it would need OSM to

⁸³ See, e.g., Attachment V, June 18, 2012, West Virginia Department of Environmental Protection letter *Re: Ten Day Notice NO. X12-111-391-002, Marfork Coal Company Inc.'s Eagle No. 2 Permit Extension*; Attachment Y, *Farrell-Cooper Mining Company v. Department of Interior et al.*, Case No. 6:11-cv-00428-FHS, Complaint filed on November 29, 2011, Answer and Cross-claim of Defendant Oklahoma Department of Mines, filed January 31, 2012; Notice of Appeal (to Tenth Circuit) filed on July 5, 2012.

⁸⁴ Attachment V, June 18, 2012, West Virginia Department of Environmental Protection letter *Re: Ten Day Notice NO. X12-111-391-002, Marfork Coal Company Inc.'s Eagle No. 2 Permit Extension*, pgs 2-3 (emphasis added).

⁸⁵ See, e.g., *Clean Water Act* 33 U.S.C. §1251 et seq., 33 U.S.C. §1344(c) (federal veto power).

⁸⁶ Attachment Z, *In re: Permanent Surface Mining Litigation*, 653, F.2d 514, 519 (D.C. Cir. 1981) (*en banc*).

approve each permit after the State approved a permit in order to ensure that OSM would not invalidate a permit years later after operations had begun.

In its June 18, 2012 letter to OSM, the State of West Virginia essentially makes the same point:

An extension of the concept of granting exclusive regulatory jurisdiction to primacy states is Congress' decision in SMCRA to also provide exclusive adjudicatory jurisdiction to the states as well. As the District of Columbia observed: '[a]dministrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role.'... INE 35 and the use of the TDN process in this case subverts the exclusive judicial appeal process established in Section 526 of SMCRA. *The allegation in the citizen complaint amounts to nothing more than the citizen's dissatisfaction with WVDEP's handling of the citizen inspection and approval of the permit extension. Essentially, the TDN is being used as an alternate means of appealing the WVDEP's permitting decision. SMCRA simply does not provide for alternate avenues to seek relief from a permit decision outside of the framework for the appeal process.* The provisions of SMCRA mandate that:

Action of the State regulator authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law[.]⁸⁷

Here, use of the TDN process allows parties to bypass State administrative and judicial remedies entirely. The havoc that can result is clearly demonstrated in this matter. In addition to the request for inspection, there is also a federal court case pending regarding the validity of the Wishbone Hill permits, a state court case filed by the company alleging there is uncertainty regarding its permit, as well as a pending renewal decision which contains its own state court right of appeal. Surely Congress did not intend for there to be a state court renewal proceeding at the same time as two concurrent federal processes regarding the permit.⁸⁸

⁸⁷ Attachment Y, June 18, 2012, West Virginia Department of Environmental Protection letter *Re: Ten Day Notice NO. X12-111-391-002, Marfork Coal Company Inc.'s Eagle No. 2 Permit Extension*, at 3 (citing 30 U.S.C. § 1276(e)) (emphasis added).

⁸⁸ Indeed, even OSM's own TDN guidance indicates that use of the TDN in this instance is improper. Attachment W, INE-35 states that:

OSM will not review pending RA permitting decisions and will not issue a TDN for an alleged violation involving a permit defect until the RA has approved the relevant permitting action (e.g., permit issuance, permit revision, permit *renewal*, or transfer, assignment, or sale of permit rights), and the permittee has the RA's approval to mine under the permit.

Even pursuant to OSM's policy, use of the TDN here is at best premature as there is still a decision on the renewal of the permit pending, and no final approval to mine has been granted.

Here, instead of addressing on-the-ground violations,⁸⁹ the TDN is being misused. This is not an instance where mining is occurring without knowledge or oversight of the State. The permit holder is not operating without a permit. Instead, it is operating with a valid Alaska State permit which is being enforced and inspected regularly. Accordingly, the State of Alaska does not believe that OSM has the statutory authority to challenge the validity of State permits through the use of the TDN procedure.

IV. OTHER ISSUES RAISED DURING THE RENEWAL PROCESS REGARDING THE WISHBONE HILL PERMITS

In addition to their request to invalidate the permits, the parties who requested inspection, as well as others who commented during the public process, raised concerns and made requests regarding the baseline permit data and made requests for a Health Impact Assessment to be completed for the permit area. As indicated herein and in a letter sent today to UCM (Attachment A), the State has already taken steps to address many of these concerns.

A. State of Alaska Conducted a Health Impact Assessment

In response to concerns raised about potential health impacts from coal mining at Wishbone Hill, DNR requested in 2011 that a HIA for the Wishbone Hill area be conducted. The “Draft Health Impact Assessment for Proposed Coal Mine at Wishbone Hill, Matanuska-Susitna Borough, Alaska” was released by the Alaska Department of Health and Social Services, Health Impact Assessment Program, on March 5, 2012. As stated in its introduction, the “HIA provides decision makers with a review of potential positive and negative human health impacts related to the proposed Wishbone Hill Mine.”

We believe Alaska’s Health Impact Assessment Program is the most comprehensive and innovative HIA program in the country. The program evaluates the potential human health effects of proposed major development projects in Alaska through the use of existing public health surveillance data, medical literature reviews, and field studies.

HIAs are not required by state law but are seen as one aspect of a “best practices” approach to responsible development in Alaska. The public comment period for the HIA ended on April 30, 2012, and it is being finalized.

B. Updates to Background Data Have Been Requested of the Permit Holder in Conjunction with the Renewal Process

As mentioned in Section I, UCM has updated its data numerous times since the Wishbone Hill permits were first issued in 1991. It has maintained a ground water monitoring network,

⁸⁹ *Id.* at 2-3.

collected surface water quality data, studied and maintained vegetation and reclamation test plots, conducted wetland studies, and conducted fish and wildlife studies within the project area. DNR has enforced these permits as valid for many years and continues to uphold the validity of the Wishbone Hill permits.

However, pursuant to AS 27.21.180(b), DNR may request additional information from a renewal applicant if “the requirement is based on good cause and on a written finding that the additional information is necessary for the commissioner to determine whether the proposed operation will meet the requirements of ASCMCRA and the regulations adopted under it.”

After careful review of the permit renewal application and the approved operations and reclamation plan (including existing baseline environmental monitoring data), DNR has concluded that additional baseline information and revisions to the approved operation and reclamation plan is required in order to determine whether the proposed operation will meet the requirements of this chapter and the regulations adopted under it and therefore whether to grant, condition, modify, or deny UCM’s applications for renewal (see Attachment A for detailed information regarding the type of information to be required).

V. CONCLUSION: OSM SHOULD RETRACT THE TDNs AND DOES NOT NEED TO TAKE FURTHER ACTION

OSM indicated in its letter to DNR dated July 19, 2012 that despite all evidence to the contrary, the Wishbone Hill permits likely expired in 1996. OSM asserts that procedural inadequacies in a 20-year-old record are sufficient cause to show that the Wishbone Hill permits automatically terminated. In doing so, OSM ignores 16 years of DNR permit renewal decisions, inspections, and recent operations conducted under the permit. OSM also ignores that OSM itself has previously this permit and knew that operations did not begin until 2010. Even though operations have now begun, OSM asserts that it has the authority to reassess inadequacies in DNR’s documentation of compliance with AS 27.21.070(b) and to invalidate the Alaska-issued permit.

OSM does not have the authority to use a TDN process here. Additionally, even assuming it did have the authority, OSM should retract its TDNs pursuant to OSM’s own TDN policy, which states “OSM will not review pending Regulatory Authority (RA) permitting decisions and will not issue a TDN for an alleged violation involving a permit defect until the RA has approved the relevant permitting action.”⁹⁰ Here, there is a pending permitting decision (the 2011 renewal) with the RA (Alaska DNR) and a TDN process is inappropriate under INE-35.

Although UCM has the ability to continue operations and maintain a valid permit until a final

⁹⁰ Attachment W, INE-35 at 5.

decision is made (AS 28.21.080(e)), that final decision has not yet occurred, and therefore this TDN is premature. Further, OSM does not need to take further action here because no operations besides reclamation and ongoing monitoring are occurring until UCM updates environmental monitoring data, including a detailed comparison to historic data and updates to the operation and reclamation plan, and addresses the concerns regarding outdated permit information (see Attachment A).

Sincerely,



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