TRUSTEES FOR ALASKA

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January 11, 2019

David Berry, Regional Director
Office of Surface Mining, Reclamation, and Enforcement
Western Region
1999 Broadway, Suite 3320
Denver, CO 80202-3050
dberry@osmre.gov

Sent via email

Re: Citizen Complaint regarding the surface coal mining operations of Usibelli Coal Mining, Inc. at Wishbone Hill conducted without a valid permit in violation of the Alaska Surface Coal Mining Control and Reclamation Act and the State's failure to administer program in compliance with federal requirements

Dear Regional Director Berry:

Trustees for Alaska submits the following citizen complaint on behalf of Castle Mountain Coalition, the Alaska Center,[1] Cook Inletkeeper, Alaska Community Action on Toxics, and the Sierra Club (collectively "CMC"). For the reasons explained below, CMC realleges the violations set out in the citizen complaint filed on December 14, 2011.[2] The Alaska Department of Natural Resources ("DNR") recently issued a Final Determination on Review of Wishbone Hill Permit Validity (November 29, 2018).[3] That decision makes clear that the State of Alaska has reaffirmed its prior flawed determination. The State continues to premise its decision on an incorrect interpretation of Surface Mining Control and Reclamation Act ("SMCRA"), implementing regulations, and the Alaska Program. DNR's determination continues to conflict with federal court decisions and relevant federal Office of Surface Mining Reclamation and Enforcement ("OSM") decisions.

In response to CMC's first citizen complaint, DNR indicated that it needed until early 2018 to determine the validity of the Wishbone Hill Permits. In its December 14, 2017 decision, OSM found that DNR had "good cause" for not taking action on the Ten-Day Notice ("TDN").[4] That is, OSM decided that DNR's statement that it needed more time was reasonable as a procedural matter; OSM did not decide that DNR's response or administration of its program

[1] Formerly the Alaska Center for the Environment.
[2] Attached as Exhibit 1.
[3] Attached as Exhibit 3.
[4] Attached as Exhibit 2.

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was reasonable or permissible in substance. DNR, however, took substantially longer than OSM expected. DNR issued its decision on November 29, 2018, finding that the permits are valid. This decision lifts the stay that prevented Usibelli Coal Minine, Inc. ("UCM") from operating at Wishbone Hill while DNR's decision was pending.

DNR's decision contradicts previous decisions and directions from OSM as well as the District Court of Alaska. DNR is interpreting and implementing its program inconsistently with the federal program such that DNR is once again allowing UCM to operate without a valid permit.[5] Accordingly, CMC submits this citizen complaint. The violations originally complained of have not been remedied, DNR has issued a final determination representing the agency's full and complete understanding of the facts and interpretation of the law, and DNR has no good cause for failing to declare the Wishbone Hill permits invalid.[6]

CMC hereby provides notice of this complaint to both DNR and OSM. Should DNR fail to take appropriate action within 10 days, CMC requests that OSM issue a notice of violation to UCM and that the notice require UCM to cease any operations at Wishbone Hill and to refrain from any surface coal mining activities until it obtains a new, valid permit. In accordance with 30 C.F.R. § 842.12(c), CMC requests that OSM report the results of any inspections within 10 days from the date of the inspection or, if OSM chooses not to conduct an inspection, to explain the reasons for that decision within 15 days from the date on which this letter is received.

In previous correspondence, OSM indicated that CMC and other interested parties should appeal DNR's decision administratively and to state court rather than involving OSM. But because DNR's Final Determination directly conflicts with several legal findings in a recent decision by OSM's Acting Director Glenda Owens on similar issues at a West Virginia mine, OSM must take action to ensure that SMCRA is correctly and consistently applied across all states. Acting Director Owens' July 26, 2018, decision on the Eagle No. 2 Mine in West Virginia represents OSM's most recent interpretation of the automatic termination provisions, including interpretation and application of the U.S. District Court for the District of Alaska's *Castle Mountain Coalition* decision on issues related to the Wishbone Hill permit. Although it came more than four months later, DNR's November 2018 Final Determination on the Wishbone Hill permit contained no discussion of or reference to OSM's July 2018 Eagle No. 2 decision.

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[5] CMC notes that UCM is currently in "voluntary cessation mode" and cannot begin operating until it first completes "at least six months of additional groundwater sampling." Ex. 3 at 2. There is, however, no longer an agency order prohibiting operations.

[6] DNR's decision seeks to reestablish OSM's Nov. 4, 2014 decision, rejected by the District Court of Alaska, where OSM incorrectly found the appropriate remedy to be DNR fixing implementation of its program by no longer issuing implicit extensions. Ex. 6 at 17; *see also id.* at 18–19 (requiring DNR to work with OSM to prepare and implement a written Action Plan to fix DNR's program). But OSM has a responsibility beyond fixing programmatic issues. *See infra* at n. 9.

OSM's request that the groups pursue relief through state courts is also legally incorrect. As the District Court of Alaska stated in its decision in *Castle Mountain Coalition*, "it is now the task of OSM, *in the first instance,* to determine whether Alaska's program is in accordance with SMCRA, applying the interpretation of law as set forth in the Court's July 7, 2016 order."[7] The court also noted that "SCMRA plainly contemplates continuing federal oversight"[8] and that "OSM must review the state's response — including its contention that there is no violation under state law — for arbitrariness, capriciousness, or an abuse of discretion."[9] OSM cannot abdicate its oversight responsibility or otherwise take away a statutorily-provided avenue of relief from citizens.

As set out below, DNR erroneously concluded that the Wishbone Hill permit did not terminate. The agency based its conclusion on its theory — already rejected by both OSM and the District Court of Alaska — that permit renewals can function as implicit extensions, or as evidence that extensions were granted verbally. DNR also purported to grant a retroactive extension, but failed to comply with the procedures for granting extensions and arbitrarily found that the statutory reasons for granting an extension have been met, despite contradictory findings by OSM. For these reasons, the Wishbone Hill permit is invalid, and DNR is failing to administer its program in compliance with the federal program.

I. The only reasonable interpretation of the Alaska Program is that the termination provision operates automatically.

As CMC has explained, and as the Court in *Castle Mountain Coalition* found, SMCRA's termination provision operates automatically.[10] OSM has also recognized that the only interpretation of the Alaska Program that is as protective as the federal program and consistent with the District Court's order is that the Alaska Program termination provision also operates automatically unless an extension is explicitly granted for one of the specified reasons. But DNR fails to address whether the Alaska Program "provides for automatic termination of permits by operation of law."[11] DNR asserts that it "need not address [this] legal question" because the agency found that — despite the complete lack of evidence in the record — it had issued

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[7] Order Re Mot. to Alter or Amend J. at 7, *Castle Mountain Coalition, et. al. v. Office of Surface Mining Reclamation and Enforcement*, Case No. 3:15-cv-43-SLG (Oct. 26, 2016) (emphasis added) (attached as Exhibit 7).

[8] Ex. 7 at 4.

[9] Ex. 7 at 6; *see also id.* at 5 (rejecting the contention that OSM's oversight responsibilities do not extend beyond programmatic review, but rather finding that OSM has the obligation to review a state's individual permitting decisions when presented with citizen complaints), *citing Coteau Prop. Co. v. Dep't of Interior*, 53 F.3d 1466, 1474 (8th Cir. 1995).

[10] Order on Cross-Mot's for Summ. J. at 34, *Castle Mountain Coalition, et. al. v. Office of Surface Mining Reclamation and Enforcement*, Case No. 3:15-cv-43-SLG (July 7, 2016) (attached as Ex. 8).

[11] Ex. 3 at 28.

extensions.[12] As discussed below, it is arbitrary and capricious for DNR to find either that it had contemporaneously issued extensions or that UCM qualifies for a retroactive extension. Without valid, explicitly granted extensions, the termination provision comes into operation and serves to terminate the permit.

The U.S. District Court held in *Castle Mountain Coalition* that SMCRA is "unambiguous, in that a surface mining permit terminates by operation of law if mining operations have not timely commenced under the statute unless an extension has been granted pursuant to the statute's terms."[13] While the court was addressing the requirements of SMCRA, it noted that "because SMCRA sets the floor to which state programs must comply, Alaska's statute must be in accordance with the termination provision of § 1256(c)."[14] The court further explained that the Alaska Program "must necessarily comply with the minimum standards set by federal law"[15] and that "Alaska's termination provision must also mean that permits terminate automatically unless a valid extension is granted."[16]

OSM has also found that the Alaska Program's termination provision must operate automatically: "any interpretation of AS 27.21.070(b) that is not in accord with the interpretation of section 506(c) of SMCRA as set forth in *Castle Mountain Coalition* is arbitrary, capricious, and an abuse of discretion."[17] In short, there is no room to interpret the Alaska Program's termination provision to not operate automatically. As a result, it is arbitrary for DNR to fail to find or otherwise indicate that the termination provision operates automatically. Because this is a legal conclusion required by SMCRA, OSM should not remand this issue to DNR for DNR to decide, as OSM has already found that the Alaska Program's termination provision must be interpreted to operate automatically.[18]

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[12] *Id.*

[13] Ex. 8 at 34.

[14] Ex. 8 at 30–31; *see also* Ex. 7 at 6 ("As the Court held in its previous decision, 'SMCRA sets the floor to which state programs must comply, [and] Alaska's statute must be in accordance with' the SMCRA.").

[15] Ex. 7 at 4.

[16] Ex. 8 at 31 n.110 (rejecting DNR's argument that the Alaska Program can be interpreted to "reduce some of the burdens imposed by the federal legislation" as "contrary to law" because "Alaska coal mining regulations may not 'reduce' the burden of SMCRA.").

[17] Ex. 4 at 4; *see also id.* at 4 n.3 ("[S]tate programs must be 'no less stringent than' and 'no less effective than' SMCRA and the implementing federal regulations. Contrary to Alaska's argument [in *Castle Mountain Coalition*], this requirement is not limited to the substantive protections of SMCRA, including those provisions related to permits.") & 5 ("Because the court in *Castle Mountain* held that section 506(c) of SMCRA is unambiguous in its meaning and AS 27.21.070(b) is practically identical, DNR has no gap to fill with a contrary interpretation").

[18] On informal review where OSM found that DNR had good cause for not acting, OSM did not disturb any of its prior findings regarding automatic termination, implicit extensions, or any

II. DNR cannot reasonably rely on permit renewals to find that extensions were implicitly granted or that verbal extensions were granted.

DNR incorrectly found that extensions were granted for the Wishbone Hill permits. There is no evidence in the record that such extensions were requested, publicly noticed, evaluated under the statutory requirements, memorialized in writing, or actually granted by DNR. DNR bases this finding on another version of its implicit extension theory,[19] which OSM and the court have rejected. In the alternative, DNR finds, without any legal support, that any doubt about the extensions should be resolved in the permittee's favor. Both approaches are arbitrary and capricious.

It is important to note that — despite DNR's multiple reviews of agency documents, the extensive additional time afforded to it to do so by OSM, and the state agency's repeated requests to the permittee for any additional documentation — no new records demonstrating that an extension was requested or granted have been produced. It should be well accepted by now that no such records exist. The only reasonable conclusion to draw from this is that no extensions were requested or granted after 1996.

As detailed in previous submissions by CMC and set out in findings by OSM, and as recognized by the court in *Castle Mountain Coalition*, there is no evidence that UCM requested any extensions past 1996.[20] DNR relies on UCM's requests for permit renewals as evidence that extensions were verbally requested and granted.[21] This is a new version of DNR's implicit extension theory, which has been rejected by OSM numerous times and should be rejected

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of the legal findings beyond the limited finding that DNR had good cause for not yet acting. Ex. 2; *see also id.* at 4 ("I expect that the DNR will continue to act in accordance with the provisions of the Alaska law and regulations as well as the Court's decisions on the meaning of the federal SMCRA.").

[19] *See* Ex. 3 at 18 (claiming that the statute does not require a written decision and, as such, "it is impossible to infer from silence that no extensions were granted in the situation here . . . the permit renewals were effectively findings that the permits were valid at the time of renewal"); *see also id.* at 20–21 (arguing that the permit renewals are evidence of extensions).

[20] *See* Ex. 1 at 4 (describing permitting history); *see also* Ex. 8 at 7 ("Neither Usibelli's 2001 permit renewal request nor its 2006 permit renewal request contained a request for an extension of time to commence mining operations; likewise, each permit renewal by DNR was silent in that regard."); Ex. 6 at 11 ("It is not disputed that Idemitsu Alaska, NPMC and Usibelli all failed to commence mining operations within three years of permit issuance. It is also not disputed that Usibelli did not, as required at AS 27.21.070, request an extension as part of both its permit renewal applications.").

[21] *See* Ex. 3 at 18 ("Because a written decision is not required, the only inference that can reasonably be drawn from these facts is that extensions of time were granted.").

again.[22] The court in *Castle Mountain Coalition* also rejected the theory that extensions can be granted without a written determination.[23] Most recently, OSM explained in its decision on the Eagle No. 2 permit in West Virginia that it "reject[s] the proposition that the regulatory authority can make implicit extensions" and "that granting extensions without making the necessary findings is impermissible."[24] OSM determined that reasonable extensions can only be granted "if the permittee provides a written statement" and "any extension of time granted must be set forth in the permit, and notice of the extension must be made public."[25] Failure by the regulatory agency to affirmatively make a written decision on how an operator qualifies under either of the two limited grounds for an extension "effectively cause[s] [a] permit to terminate."[26] DNR's attempt to use the lack of evidence in the record to assume or infer that extensions were granted is arbitrary and capricious.

In reaching this conclusion, DNR also ignores its own regulatory requirement that extension requests be subject to public notice.[27] As OSM has previously noted, without that public notice and without any written decision from DNR, the public has no idea that extensions

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[22] *See, e.g.*, Ex. 9 at 9 n.3 ("[T]here is no merit to DNR's 'implied extension' theory for the 2002 and 2006 renewals."); Ex. 6 at 2 ("[G]ranting extensions by implication is not an acceptable practice."); *id.* at 3 ("Both federal and Alaska law also provide for the regulatory authority to approve permit renewals, a matter that is distinct from extensions of time to commence mining."); *id.* at 13 ("[W]e sharply disagree with the State's arguments . . . on the adequacy of granting implicit extensions"); Ex. 2 at 2 ("granting extensions by implication is not an acceptable practice"); Ex. 8 at 11 ("OSM then reaffirmed its prior determination that DNR had not followed the appropriate procedures in connection with extensions of the time for the permit holders to commence mining operations. In this regard, OSM again rejected DNR's implicit extension theory."). OSM has also expressed doubt about DNR's veracity on this point. Ex. 4 at 6 n.7 ("DNR's position that it granted implicit extensions at the time of permit renewal is also undercut by DNR's November 17, 2016 letter to Usibelli requesting information about the date of commencement of mining activities and the reasons for the delay at the Wishbone Hill Mine. If DNR did not have this information, it could not have implicitly granted extensions in accordance with AS 27.21.070(b).")

[23] Ex. 8 at 31 ("Congress has spoken to the precise question and has provided that a surface coal mining permit terminates by operation of law when mining operations have not commenced within three years unless the agency has affirmatively granted an extension for one of the two specified reasons allowed in the statute."); *id.* at 5 ("A regulatory authority can also renew permits — which is distinct from extending the time to commence mining.").

[24] Ex. 5 at 13.

[25] Ex. 5 at 2, *citing* 30 C.F.R. §§ 773.19(e)(2) & 773.19(e)(4).

[26] Ex. 5 at 13.

[27] 11 AAC 90.1117(c) ("All notices under this subsection will specifically identify any extensions of time granted under AS 27.21.070.").

are being granted, for how long, or why.[28] "Maintaining" permits through permit renewals is insufficient.[29] Further, Alaska administrative law requires that an agency "must at a minimum establish a record that reflects the basis for [the] decision" even where an applicable statute does not require a formal written decision.[30] Here, because there is no record supporting a contention that any extension was explicitly granted after 1996, and because DNR's regulations require that extensions be publicly noticed, it is unreasonable for DNR to infer from silence that extensions were granted. The regulatory requirement counsels that the opposite inference be drawn — that the lack of records or evidence means that no extensions were granted.

DNR bases its argument that the lack of evidence of extensions being granted should be interpreted in UCM's favor because doing so is fair to the permittee. This is not warranted. As the court found in *Castle Mountain Coalition*, SMCRA's termination provision is clear and operates automatically, and UCM could not reasonably rely on an interpretation of the Alaska Program's termination provision as being less stringent.[31] OSM also has found that "Usibelli is a sophisticated operator that had or should have had knowledge of the facts and the law when it acquired the permits" such that any reliance by Usibelli on the validity of the permits in the absence of any validly granted extensions is "insufficient to overcome the serious nature of operating without a permit, which is considered under both the federal regulations and the Alaska program to be a de facto imminent harm situation."[32] Further, any equity concerns fail to recognize the limited effect of permit termination: it is not a ban on mining for all time, but merely a requirement that the company applies for a new permit when it is ready to commence operations, including compliance with all baseline monitoring and additional disclosures.

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[28] DNR argues that citizens should be barred from raising the permit termination issue now because of the intervening permit renewals and intervening time. Ex. 3 at 18–20. But the purported extensions were never public noticed, and CMC raised the issue with DNR and OSM as soon as it became aware when conducting a review of the Wishbone Hill permit documents on file with DNR. *See* Ex. 8 at 7 ("Castle Mountain asserts that it 'became aware of the invalidity of the permits and unpermitted coal mining operations' in September 2011 when reviewing DNR's 2011 proposal to renew the permits. In November 2011, Trustees for Alaska submitted a citizen complaint to DNR on behalf of several groups including Plaintiffs, asserting that the permits had terminated by operation of law on September 4, 1996, because no mining operations had commenced by that date.").

[29] Ex. 5 at 8–9.

[30] *Moore v. State*, 553 P.2d 8, 35–36 (Alaska 1976).

[31] Ex. 7 at 4 ("An operator such as Usibelli cannot reasonably rely on a state law that is less stringent than federal law.").

[32] Ex. 4 at 6 n. 6.

III. When granting a retroactive extension, DNR failed to comply with procedural requirements regarding extensions and arbitrarily concluded that the statutory requirements justifying an extension were met.

DNR asserts that, even if it had not previously issued permit extensions, it is now retroactively extending the time for UCM to commence mining to June 2010, when UCM began operations.[33] In so doing, DNR again fails to comply with procedural requirements: UCM has not requested a retroactive extension or provided the justification necessary to support any extension, nor can DNR make any of the findings necessary to support the grant of an extension.[34] For these reasons alone, the extension is invalid. Also, OSM has not previously found that retroactive extensions could be granted in states — such as Alaska — that lack a policy allowing for such retroactive extensions.[35] And even if Alaska were to establish a formal policy authorizing retroactive extensions, that policy could only apply to permits that have not yet terminated; it could not be used to justify extension of a permit that terminated before the policy took effect. Finally, CMC notes that the issue of whether retroactive extensions are permissible has not been ruled on by any federal court in light of the proper interpretation of the termination provision.[36]

Regardless, a retroactive extension cannot be granted here because neither of the two limited statutory bases for an extension was present. DNR first argues that the Alaska Mental Health Land Trust ("AMHLT") litigation had lasting effect beyond when the case actually settled. DNR provides no citations or explanation of what that effect was, nor does DNR explain how far beyond the settlement date it believes the uncertainty of that litigation continued to affect the Wishbone Hill permits. This lack of clarity or explanation once again confirms the need for written extension requests and determinations. As OSM noted in a previous decision, "[t]he Mental Health Trust Lands litigation might have satisfied the first prong of the regulatory standard if this litigation did indeed 'preclude[] the commencement of the operation or threaten[] substantial economic loss to the permitee.' That litigation however was settled on June 10, 1994, so it is hard to see how it could still have been precluding the commencement of mining or

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[33] Ex. 3 at 23–24.

[34] *See* Ex. 6 at 3 (citing 30 C.F.R. § 733.19(e)(2) and (4) to explain that extensions can only be granted if the permittee provides a written statement to the regulatory authority demonstrating why an extension is necessary for one of the two statutory reasons, the extension of time is included in the permit, and notice of the extension is made public).

[35] *See* Ex. 5 at 13 (allowing for retroactive extensions where a state regulatory authority has a policy allowing for them and requires permitees to make timely extension requests).

[36] *See, e.g.*, Ex. 8 at 34 ("[I]t may be that under SMCRA the regulatory authority can extend the time to commence mining even after a permit has terminated, provided the statutory grounds for extension have been met. This Court need not determine that issue in this proceeding."); *but see R.R. Comm'n of Texas v. Coppock*, 215 S.W.3d 559, 562 (Tex. App. 2007) ("The permittee must request the extension of time prior to the expiration of the three-year time period.").

threatening economic loss some two years later in 1996."[37] Tellingly, UCM acquired the permits after that litigation came to a close, indicating that UCM did not regard the litigation as a cloud on the permits.[38] Also, in correspondence with DNR, and in response to direction questions from DNR, UCM has never asserted that the AMHLT litigation was the reason it did not begin mining operations until 2010.[39]

DNR also asserts that economic forces outside of Usibelli's control made development not feasible and, therefore, extensions were warranted. Again, a prior OSM finding contradicts this assertion. In the context of the Wishbone Hill permits, OSM has found it "highly questionable" that economic factors would be a valid reason for an extension, as "it would allow permits to remain dormant for years awaiting better market conditions in contravention of Congressional intent."[40] It would also eliminate the statutory requirement that extensions be "reasonable" because, under DNR's reasoning, any length of extension would be reasonable so long as the project's economics are not favorable, as determined by the permittee. More recently, in its July 2018 Eagle No. 2 Mine decision, OSM determined that financial harm to the permittee does not provide a permissible basis for an extension.[41]

In purporting to grant a retroactive extension to the termination period, DNR has failed to provide any justification for the extraordinary proposition that an extension may be validly issued more than twenty years after permit termination. The automatic termination provision codified in SMCRA would be rendered meaningless if regulators could reach back and grant retroactive extensions at any time. A retroactive extension to a permit that expired more than twenty years prior cannot be valid.

Even if a retroactive extension could be granted over twenty years later, which CMC disputes, UCM did not request such an extension, and the statutory criteria for granting an extension are not met here. As OSM has previously determined, "a regulatory authority cannot

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[37] Ex. 6 at 12.

[38] *See* Ex. 10 at 10–11 (the MHT litigation was resolved in May 1997, and UCM acquired the WBH permits in December 1997).

[39] *See* Ex. 10 at 10–11 ("UCM did not acquire the WBH project until December 1997, after the resolution of the MHT litigation." And noting that the impact of the MHT litigation only continued into 1997.).

[40] Ex. 6 at 12.

[41] Ex. 5 at 14 ("The sole rationale advanced by [the permitee] in its 2016 extension request is that it would lose its investment in the permit if the time for commencing operations is not extended and the permit is terminated. Allowing an extension for this reason would make the statutory criteria meaningless because any permittee can make this argument: all permits require a substantial investment, and termination of a permit necessarily results in loss of the investment. . . . To give meaning to the statutory provision, the loss of investment in the permit alone cannot be the basis for an extension. To find otherwise would allow the exception to swallow the rule itself.").

make a decision that is inconsistent with applicable law or without a rational basis after proper evaluation of relevant criteria."[42] DNR's decision to grant a retroactive extension is arbitrary and capricious.

IV. Conclusion

Thank you for your prompt attention to this matter. I look forward to a response within the required time.

Sincerely,

/K.Strong
Senior Staff Attorney

CC:

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[42] Ex. 5 at 14.

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December 14, 2011

Al Klein, Regional Director
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Sent via email

Re: Citizen Complaint regarding the surface coal mining operations of Usibelli Coal Mining, Inc. at Wishbone Hill conducted without a valid permit in violation of the Alaska Surface Coal Mining Control and Reclamation Act

Dear Regional Director Klein:

Trustees for Alaska submits the following citizen complaint on behalf of Friends of Mat-Su ("FoMS"), Castle Mountain Coalition ("CMC"), Alaska Center for the Environment ("ACE"), Cook Inletkeeper, Alaska Community Action on Toxics ("ACAT"), Pacific Environment, and the Sierra Club (collectively "Friends of Mat-Su") pursuant to 30 C.F.R. § 842.12. Friends of Mat-Su have reason to believe that Usibelli Coal Mining, Inc. ("Usibelli") is conducting surface coal mining operations at Wishbone Hill near Sutton, Alaska without a valid mining permit in violation of the Alaska Surface Coal Mining Control and Reclamation Act ("ASCMRA"). In accordance with 30 C.F.R. § 842.12(a), the state regulatory authority, the Alaska Department of Natural Resources ("DNR"), has been notified in writing of this violation and has failed to take appropriate action. *See* November 29, 2011, Citizen Complaint Letter to DNR (included here as Attachment A). Friends of Mat-Su hereby request that OSM immediately issue a cessation order pursuant to 30 C.F.R. § 843.11 to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit for those activities.

1. *Friends of Mat-Su are or may be adversely affected and are proper parties to raise ASCMCRA compliance issues at the Wishbone Hill Mine Area to OSM.*

Friends of Mat-Su are or may be adversely affected by unpermitted operations at Wishbone Hill and are proper parties to bring these issues to the attention of OSM. Conducting surface coal mining operations without a permit "causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." 11 AAC 90.613(c). Therefore, the unpermitted operations at Wishbone Hill threaten to adversely affect Friends of

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Mat-Su, who have numerous members living, recreating, and otherwise using the region in and around the mine site.

CMC is a small nonprofit community organization based in the Matanuska Valley. CMC has approximately 300 supporters; most live or own property in Chickaloon, Sutton, or Palmer. CMC's mission is to preserve the economic sustainability, ecological integrity, and quality of life within the Matanuska River watershed. Coal mining will have a significant impact on all aspects of life in the Matanuska Valley. Since the time when historic coal mining ceased, the population of the Valley has increased ten-fold, including a population influx into the communities of Chickaloon, Sutton, and Palmer. The vast majority of Valley residents have never known this as a coal mining area. Unpermitted coal mining operations will negatively impact CMC's supporters who live, recreate, and otherwise use and enjoy the Matanuska Valley by causing numerous environmental, social, and economic impacts to the region.

FoMS is a nonprofit organization that works to provide land use information, advocate for sustainable borough-wide planning, promote citizen involvement, and offer tools and support needed to develop healthy and vibrant communities in the Matanuska-Susitna ("Mat-Su") Borough. FoMS has approximately 300 members, many of whom live, own property, do business, recreate, hunt, fish, and enjoy a high quality of life in the vicinity of Wishbone Hill. These members reside in communities throughout the Borough that are and will be adversely affected by operations at Wishbone Hill. Some members live in the Buffalo-Soapstone Community and Sutton, which are directly adjacent to the Wishbone Hill site. Other members live downwind and downstream of the site in Palmer and Wasilla. Operations at Wishbone Hill will have lasting environmental, social, and economic impacts on the quality of life of FoMs' members throughout the Mat-Su Valley and the larger region; the continuation of unpermitted operations will have particularly egregious effects. Specifically, unpermitted operations will harm human health, private property values, air and water quality, fish and wildlife populations, recreational access, future economic activities, and traffic and safety.

ACE is Alaska's largest grassroots organization with over 6,000 members. More than 250 of those members reside in the Mat-Su Valley and will be negatively impacted by the continuation of Usibelli's unpermitted operations. ACE's organizational mission is to enhance Alaskans' quality of life by protecting wild places, fostering sustainable communities, and promoting recreational opportunities. An open pit strip coal mine is in direct conflict with ACE's mission, as the environment around the mine will be significantly impacted, the surrounding communities will suffer harm from coal dust exposure and noise, and recreational opportunities in and around the mine area will be lost indefinitely. In addition to these immediate impacts to members of ACE living in the Valley, many of ACE's members take advantage of the Valley's numerous recreational opportunities and enjoy the scenic and intrinsic value of the environment throughout the year in and around the mine area. These uses are threatened by surface coal mining operations, particularly operations conducted without a permit. Furthermore, ACE members who reside in Anchorage along the rail line will suffer negative impacts associated with transporting coal from Wishbone Hill to Seward, including exposure to coal dust from open train cars, increased diesel fumes, and increased noise and vibrations.

Cook Inletkeeper is a community-based nonprofit corporation formed in 1995 that works in the public interest to protect the Cook Inlet watershed and the life it sustains. Cook Inletkeeper members use and enjoy the lands and waters in the vicinity of the proposed project. Specifically, Cook Inletkeeper members hike, fish, and otherwise rely on the area around Wishbone Hill for recreational, aesthetic, and economic uses. These interests will be adversely affected if large-scale coal strip mining commences in the region, especially if unpermitted mine operations are allowed to continue.

ACAT is a statewide non-profit public interest environmental health research and advocacy organization dedicated to protecting environmental health and achieving environmental justice. ACAT believes that everyone has a right to clean air, clean water, and toxic-free food. ACAT opposes coal development primarily because toxins from coal have been linked to lung disease, heart disease, strokes, reproductive damage, and other health problems. Unpermitted mining activities at Wishbone Hill threatens the health of over 200 ACAT members in Anchorage and the Mat-Su Valley from blasting, air and water contamination, and fugitive toxic coal dust that is spread along the transportation corridor from Wishbone Hill, through Palmer and Anchorage, and eventually to Seward. Additionally, coal exported and burned in Asia increases the mercury content of subsistence foods that sustain many communities across the State where ACAT works to reduce the human health impacts of toxic chemicals.

Pacific Environment is an international non-governmental organization that works to protect the living environment of the Pacific Rim by promoting grassroots activism, strengthening communities, and reforming international policies. Pacific Environment has over one hundred supporters in Alaska, many of whom depend on the Matanuska Valley for subsistence and recreation. Unpermitted operations at the Wishbone Hill coal mine threaten Pacific Environment and its supporters' ability to continue to use the area for these activities.

The Sierra Club is the nation's oldest and largest grassroots environmental organization with a mission to explore, enjoy, and protect the planet. The Sierra Club has 1,500 members throughout Alaska, including approximately 60 who live in the Matanuska-Susitna Borough and will be directly impacted by activities at the site; these impacts will likely be much greater if operations are conducted in the absence of a valid permit. The closest Sierra Club member lives within a mile of the Wishbone Hill project site. As this coal is transported, it could have dust impacts along the rail corridor and at export facilities similar to coal dust impacts in Seward, Alaska. When this coal is shipped overseas and burned, it will contribute to global climate change, thereby harming Sierra Club and its members.

2. *Friends of Mat-Su have reason to believe Usibelli is violating ASCMCRA's permitting requirement at Wishbone Hill.*

A fundamental requirement of ASCMCRA is that a person may not conduct surface coal mining operations without a permit. AS 27.21.060(a); *see also* 30 U.S.C. §1256(a) (stating that "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program"). Like permits issued under the federal Surface Mining Control and Reclamation Act ("SMCRA"), ASCMCRA

permits terminate "if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued." AS 27.21.070(b); *see* 30 U.S.C. 1256(c). The regulatory authority 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." AS 27.21.070(b); *see* 30 U.S.C. 1256(c).

Numerous activities fall within the definition of "surface coal mining operations," including road building and other mining-related development activities. AS 27.21.998(17); 30 U.S.C. § 1291(28). *See also Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1243-44 (Alaska 1992) ("[T]he definition of 'surface coal mining operations' in ASCMCRA is broad, and includes more than the actual mining activities.").

DNR originally issued the Wishbone Hill mine permits on August 2, 1991. *See* DNR Decision and Findings of Compliance Related to Surface Mining Permits, Idemitsu Alaska Incorporated, Wishbone Hill Mine, 01-89-796 and 02-89-796 (on file with DNR, Anchorage, Alaska). Those permits were issued on September 4, 1991, upon fulfillment of the bonding requirements by the applicant. Despite the broad array of activities that would qualify, surface coal mining operations did not commence at Wishbone Hill until June 2010, almost nineteen years after the permits were originally issued. *See* Permit Application at D-91 ("Surface coal mining operations, as defined in AS 27.21.998(17), began under mining permit numbers 01-89-796 and 02-98-796 in June 2010."); *see also* DNR Inspection Reports from July 29, 1993 – June 10, 2010 (no activity taking place at Wishbone Hill (except exploration activities, which do not qualify as "surface coal mining operations") until June, 2010 when Usibelli began construction of the mining road).

When originally issued, the permittee delayed commencing operations and requested an extension of time to start operations until the expiration of the original permit term on September 4, 1996, which DNR granted. *See* Letter from DNR to McKinley Mining Consultants, Inc., dated 8/24/1994 ("The Division of Mining and Water Management has reviewed your request to extend the time for starting the mining operations at Wishbone Hill to September 4, 1996. … The Division agrees that an extension is warranted and that the September 4, 1996 date is reasonable. The request for extending the start time to begin mining operations at the Wishbone Hill mine to coincide with the end of the original permit term of September 4, 1996 is approved.").

Surface coal mining operations, however, did not commence within this extended time and no additional extensions of time were requested or granted by the September 4, 1996, deadline. Thus, the permits terminated by operation of law on September 4, 1996.[1] AS 27.21.070(b); *see also* 30 U.S.C. 1256(c). Accordingly, any subsequent "surface coal mining

[1] Despite this, DNR has continued to renew these invalid permits and is currently considering issuing yet another renewal. As OSM is aware, the public comment period regarding DNR's preliminary decision to renew the Wishbone Hill permits closed on November 15, 2011 at the end of the Informal Conference in Sutton, AK, which an OSM representative attended. If DNR renews the permits, it will not be acting in compliance with the requirements of ASCMCRA and SMCRA.

operations" at the site have been, and are being, conducted without a valid ASCMCRA permit, in violation of AS 27.21.060(a). *See also* 30 U.S.C. §1256(a). Those illegal operations began in June 2010, almost nineteen years after the issuance of the original permits and almost fourteen years after the expiration of the granted time extension for beginning operations. *See* DNR Inspection Reports dated 6/10/2010, 6/15/2010, and 6/17/2010 (construction of the road to the mine begins).

3. *OSM must investigate this complaint and issue a Cessation Order to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit.*

Because conducting surface coal mining operations without a valid permit "constitute[s] a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources," 30 C.F.R. § 843.11(a)(2), OSM must investigate this issue immediately and issue a cessation order to Usibelli to prevent further operations at Wishbone Hill until Usibelli obtains a valid mining permit. *Id.* at § 843.11(a)(1) ("An authorized representative of the Secretary shall immediately order a cessation of surface coal mining and reclamation options…if he or she finds…any violation of…any applicable program…which…is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources."); *see also Sierra Club v. Kempthorne,* 589 F. Supp.2d 720, 724 (W.D. Va. 2008) ("[T]he Secretary has a *nondiscretionary duty* to issue a cessation order if, based on a federal inspection, the Secretary or his authorized representatives determine that surface coal mining operations are being conducted without a valid permit.") (emphasis added) (*citing* 30 U.S.C. § 1271(a)(2)).

OSM must take immediate action and waive the ten-day notice period to the State because the State has failed to take appropriate action in response to the November 29, 2011, letter sent on behalf of Friends of Mat-Su. *See* 30 U.S.C. § 1271(a)(1). DNR's defense of its repeated permit renewals—set forth in a letter dated December 13, 2011 (Attachment B)—does not comply with SMCRA or ASCMCRA. DNR concedes that surface coal mining operations did not commence for nineteen years, until 2010. *See* Attachment B at 4. DNR also does not dispute the fact that no permit extensions were granted after 1996. *See id.* at 2, 4. Rather, DNR contends that serial renewals without the commencement of mining operations were appropriate because the agency ensured in each case that the renewals were subject to "an extensive review of the original applications and the baseline information they were based on." *Id.* at 4.

The "extensive review" standard applied by DNR is found nowhere in SMCRA or ASCMCRA and is not consistent with them. It was invented by DNR in a 1996 letter to the permittee, *see id.* at 2, and does not have the force of law. The applicable standards for extensions to commence operations are provided in AS 27.21.070(b) and 30 U.S.C. § 1256(c). Those standards were plainly not met here, and DNR does not argue otherwise. Where an operator has not been granted an extension and not commenced operations, the permit terminates by operation of law. AS 27.21.070(b); 30 U.S.C. § 1256(c). There is no provision in the law for renewing a terminated permit, and to do so would inappropriately circumvent the standards established for extensions in AS 27.21.070(b) and 30 U.S.C. § 1256(c).

Thus, the only option the law provides after a permit terminates is to apply for a new permit, which did not occur here. Even if DNR granted its renewals based on "an extensive review of the original applications and the baseline information they were based on,"[2] that is no substitute for a new application, with up-to-date baseline information, accompanied by a complete analysis of all the requirements for a new permit. While renewals are granted as a matter of right and may be denied only if the commissioner makes specified findings, AS 27.21.080(a), an applicant for a new permit has no such right. DNR does not contend that the renewals of the Wishbone Hill permits were subject to the same exacting showings and findings required for a new permit. Indeed, the complete Decision and Findings of Compliance for the 2006 renewal was only eight pages, six of which were responses to public comments. For these reasons, the permit renewal under which Usibelli is operating is not valid.

The cessation order issued by OSM must remain in effect until Usibelli obtains a valid mining permit for surface coal mining operations at Wishbone Hill. *Id.* at § 1271(a)(2) ("Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated…"). Friends of Mat-Su request that OSM respond in conformance with the timelines set forth in 30 C.F.R. § 842.12(d) ("Within ten days of the Federal inspection or, if there is no Federal inspection, within 15 days of receipt of the person's written statement, the Office shall send the person the following. (1) If a Federal inspection was made, a description of the enforcement action taken, which may consist of copies of the Federal inspection report and all notices of violation and cessation orders issued as a result of the inspection, or an explanation of why no enforcement action was taken").

Thank you for your prompt attention to this matter. We look forward to a response within the required time. If you have any questions, please do not hesitate to contact Brook Brisson at bbrisson@trustees.org or (907) 276-4244, ext. 112, or Katie Strong at kstrong@trustees.org or (907) 276-4244, ext. 108.

Sincerely,

/s/_____
Brook Brisson
Staff Attorney

/s/_____
Katie Strong
Staff Attorney

CC:

Ken Walker, Division Manager of Denver Field Division
Office of Surface Mining, Reclamation, and Enforcement
kwalker@osmre.gov

Glen Waugh,
Office of Surface Mining, Reclamation, and Enforcement

[2] DNR's subsequent renewal decisions do not reflect that such a standard was actually applied. As far as those decisions reflect, DNR simply applied the standards for presumptive renewal contained in AS 27.21.080.

gwaugh@osmre.gov

Dan Sullivan, Commissioner
Alaska Department of Natural Resources
Daniel.Sullivan@alaska.gov

Russell Kirkham, Manager, Coal Regulatory Program
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United States Department of the Interior

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December 14, 2017

Mr. Russell Kirkham
Program Manager
Coal Regulatory Program
Department of Natural Resources
State of Alaska
550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501-3577

Certified Mail/Return Receipt

Re: Request for Informal Review of January 18, 2017 Determination on Ten-Day Notices #X11-141-182-005 and #X11-141-182-006 – Wishbone Hill Mine

Dear Mr. Kirkham:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) received your January 30, 2017, request for informal review of a January 18, 2017, decision by the Chief of the Denver Field Division in the above-referenced matter. In the January 18 decision, the Chief of the Denver Field Division determined that the State of Alaska, Department of Natural Resources (DNR) had failed to take "appropriate action" in response to Ten-Day Notices (TDNs) #X11-141-182-005 and #X11-141-182-006 or to demonstrate that it had "good cause" for not taking action.

After a preliminary review of your informal review request, OSMRE issued a letter dated August 24, 2017 that sought additional information from the DNR. The DNR responded to OSMRE's request for additional information by letter dated October 2, 2017. Based upon the information, actions and commitments provided by the DNR, I hereby modify the January 18, 2017 decision issued by the Chief of the Denver Field Division as explained below.

Summary of the Instant Matter

As the Denver Field Division's TDN decision noted, the facts of this matter have been summarized often, and an exhaustive restatement of the matter is not necessary at this time. In sum, in 2011, OSMRE received two citizen complaints from public interest groups alleging that Usibelli Coal Mine, Inc. (Usibelli) was conducting surface coal mining operations at the Wishbone Hill Mine without valid permits. Specifically, those complaints alleged that, pursuant to Alaska's counterpart to 30 U.S.C. § 1256(c), Usibelli's permits should have automatically terminated when mining had not commenced within three years without a valid extension granted by DNR. After receiving these citizen complaints, OSMRE issued the two TDNs listed above. OSMRE

initially found that DNR had demonstrated "good cause" based on OSMRE's interpretation of 30 U.S.C. § 1256(c).

This decision was challenged by the citizen complainants in the U.S. District Court for the District of Alaska. On July 7, 2016, the Court determined that OSMRE's interpretation of 30 U.S.C. § 1256(c) was contrary to the plain language of SMCRA, vacated OSMRE's TDN decision, and remanded the matter to OSMRE. *Castle Mountain Coalition v. OSMRE*, 2016 U.S. Dist. LEXIS 87953 (D. Alaska July 7, 2016). In that decision, the Court reviewed the language of the federal statute (30 U.S.C. § 1256(b)(6)) and held that: "a surface coal mining permit terminates by operation of law when mining operations have not commenced within three years unless the agency has affirmatively granted an extension for one of the two specified reasons allowed in statute." *Id.* at *43. The Court also concluded that OSMRE and the State of Alaska "must give effect to the unambiguously expressed intent of Congress" as set forth in the plain language of the statute. *Id.*

On August 18, 2016, Usibelli filed a motion requesting the Court clarify its decision in a number of respects. On October 26, 2016, the Court issued an order in response to Usibelli's motion, where it clarified, among other things, that it reviewed OSMRE's prior informal review decision and "did not evaluate the validity of Usibelli's permits." The litigation has now concluded.

On November 17, 2016, Alaska submitted a supplemental response to the TDNs. After reviewing these materials, the Chief of the Denver Field Division, by decision dated January 18, 2017, found that DNR had not taken "appropriate action" in response to the TDNs and that it did not have "good cause" for taking no action. On January 30, 2017, the DNR requested an Informal Review of the Denver Field Office finding. On August 24, 2017, I issued a letter to the DNR requesting additional information to better inform my Informal Review decision.

On October 2, 2017, the DNR provided an update of their position in this matter. The DNR response of October 2, 2017 included a description of specific DNR actions and commitments critical to my determination below. In particular, the DNR reiterated that:

> [I]n its November 17, 2016 submission of supplemental information, and its January 30, 2017 request for informal review, AKDNR ordered Usibelli Coal Mine, Inc to cease any activity beyond maintenance activity, pending AKDNR's review of the status of its surface coal mining permits. This order, made pursuant to Alaska Statute 27.21.030(4) and AS 27.21.030(14), has remained in place continuously since November 17. The order to cease all mining operations will remain in place until AKDNR makes a determination on its review of the permit in light of the recent court decisions and Usibelli's response to requests for information from DNR.

Letter from DNR to OSMRE Providing Clarification (Oct. 2, 2017). DNR further stated that "[w]hen DNR issues its determination, the determination will then be an appealable AKDNR decision." *Id.*

Informal Review Decision

After review of the information in the record, I am modifying the previous January 18, 2017 Denver Field Division decision. In particular, section I of the Denver Field Division's decision concludes that Alaska has not demonstrated "good cause" for not taking enforcement action. I disagree.

The federal regulations provide that a state demonstrates good cause if one of five circumstances exists. 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*). Although the Denver Field Division found that DNR did not demonstrate good cause, it came to this conclusion without explaining why the DNR's actions did not satisfy any of the requirements of 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*). After a review of the factors, I find that the state has demonstrated good cause for not taking action to correct the alleged violation because this circumstance fits squarely within 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*)(*ii*), which provides that good cause can be demonstrated if the "State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist[.]"

Since the Court's July 7, 2016 decision, the DNR has begun reviewing Usibelli's permits in order to help it determine how to apply the Court's decision on the federal SMCRA to Alaska state law. *See, e.g.*, Letter from DNR to OSMRE Providing Clarification, p. 2 (Oct. 2, 2017) (DNR reiterating that it "is conducting its review of the Wishbone Hill permits"); Letter from DNR to OSMRE Requesting Informal Review, p. 1 (Jan. 30, 2017) (stating that DNR "had begun a review of the permits and its administration of the permits in light of recent decisions by the United States District Court for the District of Alaska"); Letter from DNR to OSMRE in Response to TDNs, p. 10 (Nov. 17, 2016) (stating that it is reviewing the "administration of the permit in light of the recent court decisions and Usibelli's response to the request for information issued to Usibelli"). Part of DNR's review has included attempts to receive more information from Usibelli so that it can develop the facts to support any action it may take. *See, e.g.,* Letter from DNR to Usibelli (Oct. 2, 2017); Letter from DNR to Usibelli (Nov. 17, 2016).

This evidence shows that DNR is taking steps to determine whether a violation of the State program exists within a reasonable and specified period of time. DNR is trying to sort out the facts and history of this matter and apply the Court's decision on the federal SMCRA to its unique state program. Alaska should be commended for this approach, which has also ensured that no mining will occur while the review is completed. Letter from DNR to OSMRE Providing Clarification, p. 1 (Oct. 2, 2017) ("AKDNR ordered Usibelli Coal Mine, Inc. to cease any activity beyond maintenance activity, pending AKDNR's review of the status of its surface coal mining permits"). Moreover, DNR has recently notified OSMRE that it will complete its review of the Wishbone Hill permits by

January 2018 if not sooner. Letter from DNR to OSMRE Providing Clarification, p. 2 (Oct. 2, 2017).

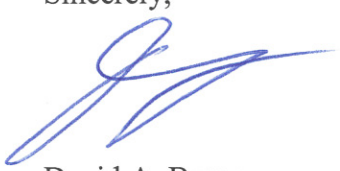
My decision is also informed by the principles of cooperative federalism and state primacy. SMCRA clearly puts the state regulatory authorities in charge of managing regulatory matters within their jurisdiction and provides only for limited federal oversight. *See, e.g.*, 30 U.S.C. § 1201(f) ("the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to [SMCRA] should rest with the States"); 30 U.S.C. § 1253(a) (describing state primacy as "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" with limited exceptions). To this end, the federal regulations specify that "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so." 30 C.F.R. § 842.11(b)(1)(ii)(B)(*2*).

Given the level of deference afforded to the state under SMCRA, the decades-old evidence that must be considered, and the legal analysis required to apply the Court's decision on the federal SMCRA to this Alaska matter, I find that early 2018 is a reasonable and specific amount of additional time for DNR to take to reach a decision. As such I am modifying the Denver Field Division's decision to find that DNR has established good cause under 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*)(*ii*) for not taking appropriate action. Thus, no federal inspection is warranted.

Conclusion

For the reasons indicated above, I hereby modify the Denver Field Division's determination and direct this matter to the Alaska DNR for diligent and expeditious resolution. I expect that the DNR will continue to act in accordance with the provisions of the Alaska law and regulations as well as the Court's decisions on the meaning of the federal SMCRA.

Sincerely,



David A. Berry
Regional Director

Cc: Glenda Owens, Acting Director
Jeffrey Fleischman, Denver Field Division, Chief

THE STATE
of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
COMMISSIONER'S OFFICE
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November 29, 2018
Fred Wallis
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, AK 99743

RE: REVIEW OF WISHBONE HILL PERMIT VALIDITY AND CESSATION OF ACTIVITY PENDING REVIEW: WISHBONE HILL MINE PERMITS #X11-141-182-005 AND 11-141-182-006

Dear Mr. Wallis,

On November 17, 2016, the Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW) sent a letter ordering Usibelli Coal Mine, Inc. (Usibelli) to cease any activities at the Wishbone Hill (Wishbone) mine site beyond approved maintenance activities, pending a review by DNR of its administration of the Wishbone Hill permits in light of recent federal court decisions and Usibelli's response to a contemporaneous request for information from DMLW to Usibelli.

The permits under review were originally issued in 1991 and have continuously been treated as valid by DNR since issuance. They have been the subject of regular inspection, review, renewal, findings of validity, and oversight throughout the decades since issuance. The current review was prompted by the suggestion that despite this long and large record representing many hundreds of hours of work by department employees, and multiple renewal decisions confirming that those permits are in good standing such that they could and should be renewed, the permits lapsed at the end of the initial permit term in 1996 and have been void ever since. Each of these renewal decisions issued over the decades was the subject of public notice, each was appealable, and each could have been appealed on the basis that the renewal decision was really an *ultra vires* attempt to revive a lapsed permit. Those appeals could have been made to the Commissioner of Natural Resources and, if the decision on the appeal from the Commissioner was unsatisfactory, to the Alaska court system. No successful appeal was made on these grounds and the time for appeal has long since passed.[1]

DNR has completed its review and has determined that despite procedural issues with the prior administration of the Wishbone Hill permits numbered #X11-141-182-005 and 11-141-182-006, the Wishbone Hill permits are valid and in good standing, and have been since issued in 1991. As a result of its review, DNR has found the following, summarized below and discussed in detail in part II below:

1. The Wishbone Hill permits cannot be presumed to be invalid on the basis of the existing written record.

[1] Indeed, until 2014, no appeal of a public-noticed renewal decision occurred at all.

2. The identified issues in the administration of the Wishbone Hill permits were programmatic and not a result of Usibelli's failure to comply with the terms of its permit or to actively seek development of its permitted rights. Despite documentation issues, the record evidences a clear understanding and intent on DNR's part that extensions of time to commence mining would be granted with the renewals in 1996, 2001, and 2006, for the term of the renewal. Nothing in the record evidences a contrary understanding.
3. Extensions of time within which to begin mining could be validly granted in this instance.
4. DNR did have the authority, at the time it issued each renewal decision, to renew the Wishbone Hill permits and those permits, therefore, remain valid notwithstanding any failure to document an extension of time to begin mining.
5. To the extent there remains any question of the adequacy of prior extensions and validity of the permits, DNR grants a retroactive extension of time to commence coal mining operations effective until the time these operations commenced in June of 2010.

The DMLW order to cease activities dated November 17, 2016 is therefore **terminated**, although DNR notes that Usibelli may not currently commence mining for at least 6 months because (1) Usibelli is in voluntary cessation mode and (2) pursuant to the 2014 renewal decision, Usibelli may not resume activities at the Wishbone Hill site because it must first complete at least six months of additional groundwater sampling required by the renewal.[2]

I. INTRODUCTION

Pursuant to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, et seq., Alaska administers its own federally-approved regulatory program governing surface coal mining and reclamation in the state through implementation of the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA at AS 27.21.010, et seq.) and related regulations (11 AAC 90). Thus, Alaska has primacy jurisdiction over regulation of coal mining in the state, and the federal oversight agency, the Office of Surface Mining Reclamation and Enforcement (OSMRE) maintains a limited oversight role.[3]

The Wishbone Hill permits were issued in 1991 by the Alaska DNR pursuant to Alaska's primacy program and were considered valid, existing permits by DNR since that date. DNR's current review of the Wishbone Hill permits was triggered in November, 2016 by two decisional documents in a federal court case in the District of Alaska where questions about validity of the permits were raised by the plaintiffs.[4]

In *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement,* plaintiffs challenged an OSMRE administrative decision regarding the Wishbone Hill permits issued as part of a "ten-day notice" (TDN) process set out in 30 U.S.C. § 1271 and 30 C.F.R. § 842.11. OSMRE

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[2] Attachment 1, Wishbone Hill Mine Permit Renewal, October 3, 2014 at 3.

[3] 30 C.F.R. § 902.10; 30 U.S.C. § 1271.

[4] *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement*, Case No. 3:15-cv-00043-SLG (Dist. Alaska).

issued the TDNs as a result of allegations by several of the plaintiffs in the litigation that Usibelli was mining without a valid coal mining permit when it commenced construction of a road at the project site in the summer of 2010. Several of the plaintiffs had alleged in "citizen's complaints" to OSMRE that the state and federal coal regulatory statutes mandate that coal mining permits terminate automatically after three years if "surface coal mining" had not yet commenced under the permits and if extensions of time to commence mining were not granted.[5] The relevant state statutory provision states that:

> A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. 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.[6]

The federal statute referenced in the "citizen's complaints" states:

> A permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit: Provided, That the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee[.][7]

The citizen complaints alleged that the Wishbone Hill state permits, originally issued in 1991, had terminated by operation of law by the time that surface coal mining commenced with construction of a road in 2010 because extensions of time to commence mining were not granted beyond 1996. As part of OSMRE's administrative determination regarding DNR's response to the ten-day notices, OSMRE determined that the phrase "shall terminate" as used in the federal statute did not mandate automatic permit termination.[8] OSMRE concluded that therefore Alaska's position, as articulated in its TDN responses, "that its statute does not result in automatic termination when a permittee misses the three-year deadline" was "no less stringent" than the federal statute and was consistent with the language of the Alaska statute.[9]

In a decision on summary judgment dated July 7, 2016, the Court disagreed with OSMRE's determination, and found that the phrase "shall terminate" in the "permit termination" provision[10] of the

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[5] Attachment 2, Citizen Complaints to OSMRE (citing to AS 27.21.070(b) and 30 U.S.C. § 1256(c)).

[6] AS 27.21.070.

[7] 30 U.S.C. § 1256(c).

[8] Attachment 3, November 4, 2014 OSMRE decision on TDNs.

[9] Attachment 3, November 4, 2014 OSMRE decision on TDNs at 18.

[10] 30 U.S.C. § 1256(c).

federal Surface Mining Control and Reclamation Act of 1977 was unambiguous "in that a surface mining permit terminates by operation of law if mining operations have not timely commenced under that statute unless an extension has been granted pursuant to the statute's terms."[11] The Court remanded the matter to OSMRE for further proceedings consistent with the decision. In a subsequent order on a motion to alter or amend the judgment, dated October 26, 2016, the Court further clarified that on summary judgment, because "the basis for [OSMRE's] decision was its interpretation of federal law, the Court reviewed [OSMRE's] interpretation of that law," and that the Court did not "evaluate the validity of Usibelli's permits."[12]

Shortly after the October 26 order, the federal oversight agency, OSMRE, sent DNR another "ten-day-notice" letter dated November 2, 2016, indicating that OSMRE believed that the "implication" of the July 7, 2016 decision regarding the proper interpretation of the federal statutory provision was that Usibelli was "currently mining without a valid permit at the Wishbone Hill Mine...."[13] DNR responded on November 17, 2016 to OSMRE, noting, *inter alia*, that it was initiating a review of the administration of its permits and had ordered cessation of activities at the Wishbone Hill mine site pending that review.[14] After subsequent TDN proceedings, OSMRE issued a determination on informal review finding that Alaska DNR had established good cause under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(ii) to not take "appropriate action" to remedy a violation because DNR was taking steps to determine whether a violation of the State program existed within a reasonable period of time.[15]

In a letter to Usibelli dated November 17, 2016, DMLW ordered cessation of activities at the Wishbone Hill mine site "pending a review by DNR of its administration of the permit[s] in light of the recent court decisions" and in light of Usibelli's future responses to a concurrent request for more information from Usibelli regarding activities under the Wishbone Hill permits and extensions of time to commence mining under the permits.[16] The November 17, 2016 letter to Usibelli stated:

> The Court's July 7 order vacated OSMRE's original TDN decision, and today DNR provides a supplemented response to its original TDN response, for OSMRE's consideration on remand. DNR maintains that the Wishbone Hill permits remain valid state-issued permits, for the reasons articulated in the TDN responses and the Commissioner's June 22, 2015 decision. But OSMRE has indicated in language of its November 2, 2016 letter that it believes that the Wishbone Hill permits could be invalid, stating that the "implication of the Court's decision is that Usibelli is currently mining without a valid permit at the Wishbone Hill Mine." Therefore, pursuant to its general powers as articulated in AS 27.21.030(4) and AS 27.21.030(14), Usibelli is ordered to

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[11] *CMC v. OSMRE*, No. 3:15-CV-00043-SLG, 2016 WL 3688424, at *14 (D. Alaska July 7, 2016).

[12] *CMC v. OSMRE*, 3:15-CV-00043-SLG, Doc. 93, Order re Motion to Alter or Amend at 2.

[13] Attachment 4, November 2, 2016 Letter from J. Fleischman to R. Kirkham.

[14] Attachment 5, November 17, 2016 letter from R. Kirkham to J. Fleischman.

[15] Attachment 6, letter from D. Berry to R. Kirkham dated December 14, 2017. OSMRE indicated that a decision was anticipated "early 2018."

[16] Attachment 7, November 17, 2016 letter from B. Goodrum to F. Wallis.

cease any activities at Wishbone Hill beyond maintenance activities approved by DNR in any future orders. Further, Usibelli is requested to provide the additional information describe below within 30 days. DNR is issuing this order to allow it to review its administration of the permit in light of the recent court decisions and Usibelli's response to this request for information. DNR reiterates that it has not made a determination that the existing permit terminated by operation of law or is otherwise invalid at this point in time.[17]

Usibelli responded to DMLW providing additional information on December 2, 2016.[18] After additional requests for information by DMLW on December 9, 2016 and October 2, 2017, Usibelli provided additional supplementation on November 28, 2017.[19]

DNR has now reviewed the permit file (including documentation of the 2015 renewal decision and subsequent appeal and Commissioner's decision), relevant court orders in *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement (CMC v. OSMRE)*,[20] correspondence and supporting documentation from the TDN process with OSMRE, and the additional information submitted by Usibelli in response to inquiries from DMLW. This review has also included an examination of Usibelli's activity at the site, the reasons for the timing of that activity, the nature of the market for the coal, Usibelli's efforts to market the coal from the Wishbone Hill site, and Usibelli's communication with the Department about its activities relating to Wishbone Hill project. As part of its review, DNR also reviewed the federal and Alaska surface coal mining statutes, including their history and purpose.

As a result of its review, particularly of the review of permit administration between 1995 and 2007, DNR has identified procedural issues and incomplete documentation regarding DNR administration of extensions of time to commence mining pursuant to AS 27.21.070(b) for the Wishbone Hill permits. As a general matter, DNR cannot, given the passage of time, changes in personnel, and the limits of memory, ascertain definitively whether there was, or was not, any oral correspondence on the topic of extensions of time to commence mining. Nor can DNR determine definitively whether there is any written correspondence regarding extensions of time to commence mining that was misfiled or otherwise not in the current files. In other words, an absence of documentation regarding communications about extensions of time to commence mining does not signify that such communications never occurred. And, on the contrary, the documentation that does exist in the record

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[17] Attachment 7, November 17, 2016 letter from B. Goodrum to F. Wallis.

[18] Attachment 8, Letter dated December 2, 2016 from F. Wallis to B. Goodrum.

[19] Attachment 9, November 28, 2017 letter from F. Wallis to R. Kirkham; December 9, 2016 letter from R. Kirkham to F. Wallis, and October 2, 2017 letter from R. Kirkham to F. Wallis.

[20] Attachment 10, *CMC v. OSMRE*, No. 3:15-CV-00043-SLG, 2016 WL 3688424 (D. Alaska July 7, 2016). Relevant orders attached include the Order on Cross Motions for Summary Judgment; Order re: Motion to Alter or Amend Judgment; and Order on Motion to Certify a Question of Law for Appeal (Attachment 5).

regarding every approval and action taken by the Department suggests that extensions of time to commence mining were granted.

II. Review of Permit History and the Surface Coal Mining and Reclamation Act

A. Background: Administrative History of Permits

1. Permit Renewals and Requests for Extension of Time to Begin Mining

DNR has reviewed its relevant files regarding administration of the Wishbone permits. The Wishbone Hill permits were first issued to Idemitsu Alaska Inc. on September 5, 1991. Therefore, the Wishbone Hill permit history spans *twenty-seven years*, back to the early days of Alaska's coal regulatory program. Any verbal discussions or decisions regarding the permits that occurred 10 to over 20 years ago may not be captured in the administrative documentation. In addition, it is impossible for DNR to know whether there has been a loss, over this extended period, of relevant communications or documentation regarding extensions of time to commence mining. This is one reason that DNR requested that Usibelli submit any additional documentation it might have regarding the topic of permit extensions. As a result of this uncertainty, a key question that arose during DNR's review was the question of whether, particularly in the event that termination occurs automatically by operation of law, the absence of documentation from 10 to over 20 years ago that an extension was granted should be construed in favor of the permittee, or, in favor of termination of a permit. Here, while documentation regarding decisions on extensions is imperfect, there is documentation of repeated affirmative renewals of the permits, indicating a contemporaneous understanding that the permits were valid and in existence. DNR concludes that here, where all documentation that does exist indicates an understanding that the permit was considered valid and to have not terminated, any lack of written documentation regarding extensions of time to commence mining, or lack of clarity in agency documentation, should be construed in favor of the permittee. DNR believes this should be particularly true in the event that the state statute were to be read to mandate termination by operation of law. The record of the Wishbone Hill permits shows that the actions of the State, the permittee, and the federal oversight agency were all consistent with the belief, intent, and understanding that the Wishbone Hill permits were valid.

The original term for the permits issued in 1991 was five years. At that time of application for the permit in 1989, the permittee, Idemitsu Alaska, Inc. (Idemitsu) was engaged in negotiations to provide coal to Japanese utilities and hoped to begin shipments from Wishbone Hill in the fourth quarter of 1991.[21] According to a contemporaneous news article, issuance of the permit was delayed as a result of an injunction by the Superior Court preventing mineral development on Alaska Mental Health Land Trust (Mental Health Trust) lands.[22] Though a settlement was agreed to in 1991, that settlement was subject to court approval and any changes to the settlement had the potential to change the economics of the project.[23] The settlement was approved in a decision that was appealed to the Alaska Supreme

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[21] Attachment 11, Letter from J. Helling to G. Gallagher, dated September 11, 1989.

[22] Attachment 12, DNR Press release dated Sept. 6, 1991.

[23] Attachment 13, Daily News article dated 9.12.91.

Court, where it was not finally affirmed until May of 1997.[24] Legal uncertainty surrounding the settlement continued however until November of 1997, when a petition for *certiorari* to the United States Supreme Court was denied.[25] However, even after that, there was administrative uncertainty about Mental Health Trust lands administration which continued for several years beyond 1997.

Idemitsu, through McKinley Mining Consultants, Inc., requested an extension of time to begin mining due to the pending Mental Health Trust litigation, and that request was found reasonable and approved in 1994.[26] The time to commence mining was extended until September 4, 1996. In 1996, while the Mental Health Trust litigation was still pending, the permits were transferred from Idemitsu to North Pacific Mining Corporation (NPMC).[27] On July 11, 1996, NPMC sought renewal of the permits and, acknowledging the delay in commencement of mining through the previous permit term as a result of the litigation, indicated that NPMC wished to advance the project but was seeking an experienced coal mine operator.[28] Correspondence in the record prior to the July 11 submission indicates that DNR recognized that NPMC needed to acquire another extension of time to commence mining, and that this concern was relayed to NPMC.[29] On January 31, 1996, Thomas Crafford with NPMC wrote to Jules Tileston, DNR, that NPMC was "continuing its efforts towards obtaining a partner to assist in the development of the Wishbone Hill coal project," but that "the necessary project reviews and engineering studies will not have been completed in time to meet the September 1996 deadline for renewal."[30] NPMC noted that it would "simply like to extend the existing permit without any major revision," indicating possible conflation of the renewal requirements with the extension of time to commence mining.[31] A contemporaneous DNR memorandum indicates that DNR was aware of the extension requirement,[32] and DNR sent NPMC a letter dated February 7, 1996 stating that "[i]n regards to AS 27.21.070(b), your justification for the extension needs to address the requirements in statute," and that

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[24] *Weiss v. State*, 939 P.2d 380 (Alaska 1997).

[25] *Weiss v. Alaska*, 522 U.S. 948 (1997).

[26] Attachment 14, Letter granting extension of start time from S. Dunaway, Jr. to J. Helling, dated August 24, 1994; Attachment 15, Letter from J. Helling to S. Dunaway, Jr. dated August 3, 1994.

[27] Attachment 16, Transfer Approval Cover Letter dated September 19, 1995, from S. Dunaway, Jr. to T. Crafford, dated September 19, 1995.

[28] Attachment 17, July 11, 1996 Permit Application Cover Letter from T. Crafford to B. Novinska.

[29] Attachment 18, January 31, 1996 Letter from T. Crafford to J. Tileston; Attachment 19, February 6, 1996 Memorandum from "Brian," to "Jules,"; Attachment 20, February 7, 1996 Letter from Sam Dunaway, DNR, to Tom Crafford, NPMC.

[30] Attachment 18, January 31, 1996 Letter from T. Crafford to J. Tileston.

[31] Attachment 18, January 31, 1996 Letter from T. Crafford to J. Tileston.

[32] Attachment 19, February 6, 1996 Memorandum from "Brian," to "Jules." Other DNR memoranda further discuss the extension issue. Attachment 21, DNR Memoranda.

"[w]e will work with you on this issue."[33] In a draft letter (later finalized as the July 11 cover letter for the permit renewal application), NPMC explained that operations had not yet begun because of the depressed international steaming coal price and the Mental Health Trust lands litigation, but that it had signed a letter of intent with Usibelli.[34] The letter also stated, "I hope this letter and the accompanying forms satisfy the remaining requirements" for renewing the permits.[35] This language, in the context of the January 1996 letter from DNR regarding extension requirements, is a clear attempt to meet all requirements, including those relating to time to begin mining, to ensure the permits were in good standing and could be renewed. Notations in the administrative record from the Director stating that a prior-submitted draft of the NPMC letter "looks okay to me," as well as a notation in the public notice of the renewal that an extension of time to commence mining was requested, coupled with the fact that the renewal was ultimately granted, indicate that DMLW granted an extension of time to commence mining when DMLW approved the permit renewal on October 23, 1996.[36] That decision indicated the Department's expectation that mining would commence within the permit term.[37] The public notice of the decision noted the request for an extension of time to begin mining and, naturally, though perhaps somewhat confusingly, appears to treat the extension term and the permit renewal term as identical, writing:

> The applicant has again requested an extension for beginning mining due to ongoing marketing efforts. The Division is approving a 5-year permit term for the renewal and has agreed to continue the $10,000.00 bond ....[38]

The cover letter to the renewal decision stated 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."[39] This language shows that DNR contemplated, with its renewal, a five year period – coinciding with the permit term – within which the permittee was to begin mining.

In December 1997, just over one year later, DNR approved transfer of the permits from NPMC to Usibelli. The permit transfer decision also contains language that indicates DNR intended to further link extensions of time to commence mining with any future permit extensions. The permit transfer

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[33] Attachment 20, February 7, 1996 Letter from Sam Dunaway, DNR, to Tom Crafford, NPMC.

[34] Attachment 22, July 9, 1996 Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR.

[35] Attachment 22, July 9, 1996 Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR.

[36] Attachment 22, July 10, 1996 "draft" letter from T. Crafford to B. Novinska; Attachment 22, 1996 Renewal (including public notice).

[37] Attachment 23, 1996 Renewal (including public notice).

[38] Attachment 23, 1996 Renewal (including public notice).

[39] Attachment 23, 1996 Renewal (including public notice).

decision repeated language from the recent renewal which conflates or couples renewals with extensions. The cover letter stated that:

> "The permit term remains unchanged, and ends on September 4, 2001. However, should mining not commence within this term, 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."[40]

This language reinforces that DNR considered the extension of time to commence mining to have been granted to the end of the permit term, and further indicates that any future extensions of time to commence mining would be linked to renewals. In its review of DNR's program at the time, OSMRE noted the increased public interest in the Sutton area regarding the mine. It noted that as a result, during the 1997 transfer, DNR had posted information flyers in the Sutton area, and continued to keep the Sutton Community Council informed of coal related activities in the area.[41] It also noted the language in the DNR approval regarding the fact that mining had not commenced and the conditioning of further renewals on additional technical review.[42] Usibelli sought renewal of the permits in 2001.[43] In the cover letter transmitting the application, Usibelli noted coal exploration that it conducted in 1998 and 1999 at the site, but acknowledged that it was not yet prepared to immediately commence mining.[44] In other words, Usibelli explicitly informed DNR in its renewal request that it had neither begun mining within the permit term nor contemplated an immediate commencement of mining. Further, it listed reasons for the delay. It noted that "[i]n conjunction with marketing efforts, Usibelli continues to evaluate methods for extracting and transporting the coal; however, because of the present uncertainty in pricing for energy commodities, operational plans for the project have not been revised at this point."[45] Usibelli also noted that it "trust[ed] that [its] application for renewal of the Wishbone Hill surface coal mining permits is complete," and that it stood "ready to work with you and answer any questions that may arise during your review of our renewal application."[46]

DNR next gave public notice of the renewal application.[47] Indeed, DNR increased its efforts to inform the public of the status of the Wishbone Hill mine. OSMRE noted in its 2001 oversight report that the Wishbone permits were "due to be renewed in early 2002," and that DNR continued increased

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[40] Attachment 24, 1997 Transfer documents.

[41] Attachment 25, Excerpts from OSMRE Oversight Reports.

[42] Attachment 25, Excerpts from OSMRE Oversight Reports.

[43] Attachment 26, 2001 Renewal.

[44] Attachment 26, 2001 Renewal.

[45] Attachment 26, 2001 Renewal.

[46] Attachment 26, 2001 Renewal.

[47] Attachment 26, 2001 Renewal.

informational efforts with the community beyond public notice in newspapers.[48] DNR posted informational flyers in the Sutton community and "continues to keep the Sutton Community Council, the Chickaloon native community, and the Buffalo Mine Road Community Council informed of all coal related activities," by methods that also included site visits for interested parties and attendance by DNR at "Council meetings," in addition to informational flyers and use of the internet to publicize permitting actions.[49] OSMRE noted in 2001 that "active mining" had not yet commenced at Wishbone, and that the State was scheduled to process a renewal.[50]

DNR granted the renewal, recognizing that operations had not yet commenced.[51] The public notice also reported that "[p]arts of the permit application have been revised to provide current environmental background information."[52] It noted, in responses to comments, that "[t]he Division has carefully reviewed the proposed plan of operation and has determined that the impacts to the environment from the proposed activity are within the scope allowed by 11 AAC 90.301-501."[53] The renewal decision also contained responses to public comments received.[54] Finally, DNR found that the "applicant meets the criteria of AS 27.21.180 and the renewal of the surface coal mining permits 01-89-796 and 02-89-796 can be approved."[55]

In 2004, OSMRE noted that Usibelli had exploration and mining permits at Wishbone and that it "plans to develop this area when the coal market improves," although Usibelli "has not yet initiated any activity at the Wishbone Hill location."[56]

Usibelli again sought renewal of the permits in 2006.[57] The public notice stated that "[t]his renewal is for an additional five-year term" and reported DNR's conclusion that "[p]arts of the permit application have been revised to provide current information as required by 11 AAC 90.021 through 11 AAC 90.065," and that "[t]he application meets all of the requirements of the Alaska Surface Coal Mining Program[.]" During the comment period, a public meeting was held on August 25, 2006, where

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[48] Attachment 25, Excerpts from OSMRE Oversight Reports.

[49] Attachment 25, Excerpts from OSMRE Oversight Reports.

[50] Attachment 25, Excerpts from OSMRE Oversight Reports.

[51] Attachment 26, 2001 Renewal (noting that the contemplated reclamation bond was "sufficient to guarantee obligation for the first year of activity once operations commence").

[52] Attachment 26, 2001 Renewal.

[53] Attachment 26, 2001 Renewal.

[54] Attachment 26, 2001 Renewal.

[55] Attachment 26, 2001 Renewal.

[56] Attachment 25, Excerpts from OSMRE Oversight Reports.

[57] Attachment 27, 2006 Renewal.

a representative from Usibelli explained that mining would not begin immediately as Usibelli had to first develop a market.[58] OSMRE noted in its 2007 oversight report that Usibelli had not yet initiated any activity at the Wishbone Hill location, and that Usibelli planned to possibly develop the area "when the economics are right."[59]

At the time of each renewal decision issued prior to Usibelli's commencement of mining, it was clear first, that DNR was aware that Usibelli had not commenced mining at the Wishbone Hill site; second, that the public was informed that Usibelli had not commenced mining at the Wishbone Hill site; third, that OSMRE was also aware that Usibelli had not commenced mining at the Wishbone Hill site. Each renewal, nevertheless, was granted after DNR found that Usibelli was in compliance with Alaska law and that the permits could be renewed.

As discussed below in subsection (2), after a thorough review of the record and requests for additional information from Usibelli, it appears that while numerous activities occurred at the mining site, including bulk sampling, pursuant to Usibelli's exploration permits, there is little dispute that mining commenced no later than June of 2010 when Usibelli began construction of a road into the mine area. In November 2014, DNR issued a decision on a timely submitted renewal request. This decision was appealed, in part based on allegations that the permits had terminated by operation of law for failure to commence mining activities. In 2015, Commissioner Myers issued a decision on appeal of the renewal, affirming the validity of the Wishbone permits.[60] The appellants chose not to appeal the decision to state court.

2. Activity at the Mine Site

An overflight inspection of the mine site by DNR was first conducted on May 10, 1991 to record the pre-mining condition of the site. Following this inspection, DNR conducted regular flight and ground inspections of the site. Subsequent inspection reports through March 25, 1994, indicate that no development activity had taken place and that the project was on hold as a result of the Mental Health Trust litigation and project economics until 1994.[61] A July 29, 1994 inspection report indicates that the operator did not intend to begin mining and was looking for a buyer.[62] The next inspection report, dated August 24, 1994, indicated that the operator had sought an extension of time to begin mining until September 4, 1996, and that this request was approved.[63] The inspection reports note no further activity until October 16, 1998. In October of 1998, Usibelli had identified eight drilling sites, cleared vegetation on six of them and surveyed a seventh. Usibelli had begun drilling at three of the sites, lined

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[58] Attachment 27, 2006 Renewal.

[59] Attachment 25, Excerpts from OSMRE Oversight Reports.

[60] Attachment 28, 2014 Renewal, Attachment 29, 2015 Decision on Appeal re: Renewal.

[61] Attachment 30, Inspection reports.

[62] Attachment 30, Inspection reports.

[63] Attachment 30, Inspection reports.

one in preparation for geophysical testing, plugged another and was actively drilling the third at the time of the inspection.[64] This drilling was conducted pursuant to Usibelli's coal exploration permit.

Prior to Usibelli, Idimitsu was issued an exploration permit in 1986 and the permit was revised each year between 1987 through 1992. The exploration permit and its revisions included authorizations for bulk sampling and exploration drilling. Idimitsu also created vegetation and reclamation test plots under those exploration permits.

Exploration permits were also issued to Usibelli in 1997 (revised 1998), 1999, 2001, 2003, 2008, 2010, and 2012. The last exploration permit was issued in 2012 and expired in 2014. The 1997-2001 permits specifically authorized a new bulk sample site. A second bulk sample was collected sometime in 2010 and sent to the Electric Power and Development Co., Ltd (JPower) in Japan for testing.

While "surface coal mining" as defined by AS 27.21.998(17) did not commence pursuant to authorization of the Wishbone Hill mining permits prior to 2010, significant activities did occur at the Wishbone Hill mine site under the coal exploration permits issued to Usibelli and its predecessors, in furtherance of development of coal mining at Wishbone Hill. These activities included, but are not limited to, the following:

- bulk sampling (mined and reclaimed in the late 1980s);
- baseline studies including the installation and maintenance of vegetation and reclamation test plots, wetland studies, and fish and wildlife studies within the project area;
- drilling of exploratory and monitoring wells from 1980 – 2000, which were inspected by both DNR and OSMRE;
- a second bulk sample site started in 1998 and completed in 2000 (inspected by DNR and OSMRE);
- two test trenches/pits which have been open to allow for additional bulk samples to be collected for potential analysis;
- monitoring wells which have been retained to allow for long term monitoring of ground water conditions;
- quarterly water quality sample collection on Moose Creek (1999 through 2001);
- quarterly discharge/flow measurements on Moose Creek (1998 through 2001);
- quarterly water quality samples collected on Moose Creek (2008 and 2009);
- quarterly discharge/flow measurements on Moose Creek (2007 through 2009);
- discharge/flow and stream morphology assessments on Buffalo Creek (2008);
- water quality assessments for groundwater and piezometer readings (2008 and 2009); and
- aquatic biologic resource studies for Moose Creek and Buffalo Creek (2008).

In sum, Usibelli has conducted activities and collected baseline data as required by DNR in order to maintain its permits over the years. It has maintained a ground water monitoring network, collected

[64] Attachment 30, Inspection reports.

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.

In 2010, with the knowledge and approval of DNR, and pursuant to Usibelli's approved operation and reclamation plan, Usibelli initiated construction under the Surface Coal Mining Permit of a pioneer road into the mine area in June of 2010. Since then, Usibelli 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 pioneer road (summer-fall, 2010) and has completed clearing trees and vegetation along the entire length of the pioneer road (fall 2011 and winter 2012). DNR has previously considered this road construction to be the initiation of surface coal mining operations under the approved permit, and confirms that understanding here.

3. Inspections by DNR and OSMRE

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. DNR was aware of the road construction in 2010, and inspected the construction. After initiation of surface coal mining operations in 2010, DNR conducted site visits to the Wishbone Hill coal project with OSM in both June of 2010 and July of 2011. This included site visits to the staging area along the Glenn Highway and the pioneer road. Since 2011, DNR has conducted 53 inspections at the Wishbone Hill site (123 inspections total since issuance of permits in 1991).

4. Revisions to the Wishbone Hill Mine Permits

Various updates to information for permits were made over the years, and in 2009, Usibelli submitted an extensive revision to the operation and reclamation plan. Starting in 2008, DNR worked with Usibelli to identify what was needed to be included in this revision request. Usibelli hired a company to come in and redraft all of the plats and figures of the mine plan onto an updated high quality topographic base and air photo. Most of the original mining plan was kept but additional details were added such as location of the facilities and a detailed design for the haul road. This revision was approved by DNR in July of 2009[65]. Additional revisions were made as part of the renewal process in 2011-2014.

5. Factors contributing to delay in commencement of mining

What has been clear from the beginning to both the permittees and DNR is that this project could not be developed in a way consistent with the principles encoded in the statute without long term supply contracts, and those contracts were never expected to be local. Alaska is geographically remote, has a smaller population than most states, and Healy power plant continued to be well supplied by Usibelli's Healy mine as of 2006.[66] From the beginning, the permittees looked to Asia for a coal market. Idemitsu

[65] Attachment 31, July 22, 2009 revision.

[66] Attachment 27, 2006 Renewal.

hoped to market its coal to Japanese utilities.[67] Idemitsu seems to have been in advanced negotiations to supply coal to these utilities and this drove its desire to have the permits approved in time to begin producing coal for delivery in the last quarter of 1991.[68] An injunction prohibiting development of the lease made this impossible. Due to the Mental Health Trust litigation delay, much of the market demand Idemitsu sought to meet was filled by Australian producers.[69] Idemitsu lost interest and sought to liquidate its holding as a result.[70]

Usibelli's interest in the property was also founded on plans to market to Asia.[71] As Usibelli explained to the Department in a letter dated May 15, 2000, development of a grass roots coal mining project can take ten years or more.[72] Alaska's limited population density has real consequences for the marketability of Alaskan coal. So, too, do transportation costs. High transportation costs can make it expensive to ship raw materials (such as coal) to existing markets and high costs for shipping finished products from Alaska can make it difficult to entice coal dependent industries to locate in Alaska. The security of a long-term supply contract, therefore, can be critical to development of coal resources in Alaska.

More importantly, the security of such a contract in itself works to further the goals of the surface coal mining statutes. Where there are supply contracts, a company can gauge demand and decide to produce only if contracts in hand match the coal resource in such a way that the coal can be produced efficiently, financially, continuously, and completely. Situations where land is partially mined then reclaimed and later re-disturbed for additional mining are avoided as are situations in which a company begins mining but unexpectedly loses a market and stops mining. Further, in the Wishbone Hill context, the Mental Health Trust litigation had an impact that went far beyond the years of litigation and conclusion of litigation in 1991. Any long-term contract opportunities established before or at the time of issuance of the permits in 1991 were lost as a result of the litigation and resulting uncertainty leaving the company at square one again in terms of obtaining such a contract once litigation resolved. In the context of the Wishbone Hill mine permits and the regulatory program for surface coal mining, a delay in commencement of mining while attempts are made to obtain such contracts could be a reasonable delay if the efforts made to obtain such contracts are reasonable, as the record indicates they were here.

B. Background on Intent and the Purpose of SMCRA

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[67] Attachment 11, Letter from J. Helling to G. Gallagher.

[68] Attachment 11, Letter from J. Helling to G. Gallagher.

[69] Attachment 13, Daily News article dated 9.12.91.

[70] Attachment 27, 2006 Renewal.

[71] Attachment 32, Mining News article Dated April 29, 2012.

[72] Attachment 33, May 15, 2000 Letter from A. Renshaw to B. Kuby.

Because the purpose of this review is to ensure compliance with the federally-approved state surface coal mining and reclamation acts, it is a worthwhile exercise to examine the purpose of the federal and state acts for principles that can serve to guide the review. The federal act was adopted first and the state program, including the state statute, was adopted in accordance with the requirements of the federal act.

Of special note in the federal act is 30 U.S.C. § 1201(f), which reports Congress's finding that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States." This finding sets out the core principle of cooperative federalism underlying the Act. It recognizes that geographic factors unique to each state will affect the development of the industry in the state and that each state, therefore, is better positioned to understand the impact of surface coal mining on the landscape and the impact of the landscape on surface coal mining. Accordingly, Congress created a statute that was designed to "assist the States in developing a program to achieve the purposes of this chapter." 30 U.S.C. § 1202(g). It is important to note that the new set of environmental standards put forth in SMCRA were meant to be the "floor," and states were free to adapt to local circumstances, as long as state programs were no less stringent, or protective, than the federal program. The federal program also provided for steps the federal agency would take if it found inadequate state enforcement. 30 U.S.C. § 1271(b). That provision explicitly provides that if the Secretary of the Interior finds that a state has failed to enforce all or part of the state program effectively, and that the state has not adequately demonstrated its capability and intent to enforce such State program, the Secretary will enforce SMCRA requirements. *Id.* However, as part of that enforcement, if a state permittee "met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation" to SMCRA requirements before "suspending or revoking the state permit." *Id.* This language shows the clear intent of Congress to provide a path to bring a good faith permittee's operations into compliance where state programmatic issues occur.

The purposes of the Act most relevant to this review includes protecting society and the environment from the adverse effects of surface coal mining; protecting the rights of landowners; ensuring that surface coal mining is not conducted where reclamation of the land following mining is infeasible; ensuring that coal mining operations are conducted so as to protect the environment; ensuring that reclamation takes place "*as contemporaneously as possible with surface coal mining operations;*" ensuring that "*the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided*" while striking a balance between the need for that coal and protection of the environment and agricultural productivity; and, where necessary, exercising the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.[73]

The italicized quotations are emphasized here because together they illustrate a pair of fundamental principles that drive the restrictions on permit term in the federal program, set out in 30 U.S.C. § 1256(b). The state program is modeled on the federal program, and is required to be "in

[73] 30 U.S.C. § 1202(e)-(f).

accordance with" the federal program.[74] The Alaska Legislature made findings very similar to the federal findings when it created the Alaska Surface Coal Mining Control and Reclamation Act. The Alaska Legislature emphasized the "unique environmental conditions the state is best equipped to understand," and included a list of purposes of the state act that mirrored the list of purposes for the federal act, including "to assure that reclamation of land on which surface coal mining takes place is accomplished as contemporaneously as practicable" and "to assure that the coal supply essential to the nation's energy requirements and to its economic and social well-being."[75] The permit term restrictions in the state and federal statutes help ensure that where coal can be mined consistently with the environmental requirements of the act, it is brought to market and that the impact of mining is addressed through reclamation as contemporaneously as possible with that mining.

These principles are in tension with each other. Behind one is a desire to bring coal to market promptly, behind the other is a desire to ensure that coal is developed when the environmental impacts of developing it can be minimized. This tension is reflected in the federal regulations regarding permanent program performance standards at 30 C.F.R. § 810.2(j), which requires "[s]triking a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." To help strike that balance, the regulations set, as an objective for the program, that it achieve "[m]aximum use and conservation of the solid fuel resource being recovered so that reaffecting the land through future surface coal mining operations can be minimized."[76] A compliant program must provide for mining of coal where that can be done in a way sufficiently protective of environmental and agricultural interests, it requires that where mining is conducted it be conducted thoroughly and completely so as to avoid repeated disturbance to the land, and it requires reclamation as nearly contemporaneously as possible with mining so as to minimize the time the land is disturbed.

There are important reasons to commence mining promptly, but also important reasons to ensure that mining takes place only when that mining can be completed sensitively, efficiently, promptly, and fully.

It is also significant that the requirement to begin mining within three years is a threshold one, not a continuing one. Once mining has commenced, the requirement has been satisfied and there is no further requirement that mining be pursued with diligence or a permit will be terminated. Instead, there are provisions in the state and federal programs providing for companies to go into voluntary cessation of mining upon notice to the state or federal regulatory authority and with appropriate measures taken to secure or stabilize the site during cessation.[77] Thus, the permit term provision in both statutes requiring that mining commence within three years is consistent with a purpose to cut short neglected mining interests, but not with a purpose to force development to continue at a particular schedule or pace regardless of circumstances.

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[74] 30 U.S.C. § 1253(a)(1).

[75] AS 27.21.010(b)(5) and (7).

[76] 30 C.F.R. § 810.2(b).

[77] 11 AAC 90.471; 30 C.F.R. § 817.131.

III. Discussion of Findings

With the intent of the state and federal regulatory programs and the history of the Wishbone Hill permits in mind, we now consider the state's administration of these permits.

DNR's review of its permit administration for Wishbone Hill has revealed that the documentation of decisions to extend time to begin mining over the administration of this permit has been problematic, and sometimes sparse. However, DNR believes that the conclusion to be drawn from these programmatic issues is not that the permits have lapsed, automatically or otherwise, as a result. First, there is no requirement in the statute that a written decision be issued for extensions of time to commence mining. DNR, therefore, cannot conclusively establish that no extensions were granted merely from any lack of explicit written evidence that they were granted, or that the permits had terminated automatically or otherwise, particularly given the continued inspections and renewals of the permits, the 1997 permit transfer, as well as the 2009 revision approval, which bolder and support that there was an understanding by DNR and the permittee that the permits continued to exist. To the extent that (preserved) written documentation of extensions is sparse, contemporaneous documentation regarding inspections, renewals, and the maintenance of financial assurance all evidence that extensions of time to commence mining were granted. It was not until late 2010, *after* mining had commenced, that the validity of the permits for failure to commence mining was questioned in citizen complaints.[78] Second, the identified issues in the process were programmatic and not a result of Usibelli's or its predecessors' failure to comply with the terms of its permit or to actively seek development of its permits. Finally, the contention that the permits lapsed ignores the fact that the permits were repeatedly renewed, and that these renewal decisions were granted with DNR's knowledge that mining had not yet commenced and knowledge why it had not commenced. In other words, all of the evidence in the record indicates that extensions of time to commence mining were granted.

A. Usibelli began coal mining in 2010.

As previously noted, DNR found evidence of mining related activities, but no clear evidence that "coal mining operations" pursuant to the activities authorized by the Wishbone Hill Surface Coal Mining permits had occurred before June of 2010.

Despite the fact that "surface coal mining operations" as authorized by the mining permits had not commenced, Usibelli and its predecessors have conducted numerous activities for the purposes of development of Wishbone Hill at the mine site. One reason why DNR requested additional information from Usibelli and re-examined its record was to confirm that none of the previously conducted activities qualified as "surface coal mining" under its statutes or regulations. While Usibelli was active in the Wishbone Hill area during the time the permits span (1991 to present), with activities such as conducting various environmental baseline studies and bulk sampling, DNR has confirmed that Usibelli did not appear to have conducted any activity that constituted surface coal mining pursuant under AS 27.21.998(16), and as authorized under the mining permits (versus exploration permits), until access road construction in June 2010.

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[78] Attachment 2.

B. Because no written decision is required, no presumption of permit invalidity can be drawn from limited and potentially flawed written record.

The lack of a requirement in statute or regulation for a written request for or decision on an extension of time to begin mining makes it impossible to infer from silence that no such extensions were granted or exist. The lack of a requirement for a written decision here contrasts with explicit requirements elsewhere in the coal statutes for written decisions.[79] If a written decision regarding extensions of time to commence mining were required, such that failure to obtain such a decision in writing would result in a permit expiring by operation of law or otherwise, the legislature would have included a requirement for a written decision in the statute, as it knew to do so in other instances. Because no written decision is required, it is impossible to infer from silence that no extensions were granted in the situation here. This is particularly true, where the record otherwise displays a clear understanding by the agency (1) that mining had not commenced but that (2) the permits continued to exist over the years. That DNR knew that mining at the Wishbone Hill site had not commenced and that DNR repeatedly renewed the permits are not matters in dispute and clear record evidence exists to support both conclusions. Because a written decision is not required, the only inference that can reasonably be drawn from these facts is that extensions of time were granted. Any inference otherwise is inconsistent with the explicit findings in each permit renewal decision that the renewal of the Wishbone permits could be approved.[80] Even if permits terminate by operation of law based on failure to commence mining within the time required and the time to commence mining passed, if the agency affirmatively renewed a permit, then the clear inference is that the agency granted an extension of time to commence mining. Therefore, I conclude that because no written decision is required, no presumption of permit invalidity can be drawn from the record at hand. As discussed below, while the record regarding extensions is imperfect, the permit renewals were effectively findings that the permits were valid at the time of renewal, such that the permits could be renewed. Those findings could have been challenged at the time, but they were not.

C. The time to challenge the validity of the Usibelli permits has passed.

SMCRA was designed to provide for state regulation, with federal oversight, of surface coal mining. The ten day notice process is an important part of that federal oversight. It allows interested parties to call the attention of federal regulators to potential program violations and sets out a process for federal regulators to notify state regulatory authorities of that information and for states to report back to federal regulators their conclusions or actions relating to that information. The ten day notice process is not meant, however, to be a mechanism through which old decisions of state regulatory authorities could be revisited and collaterally attacked. Nothing in SMCRA creates a process by which renewal decisions can be attacked years or even decades after they are made. At the time of each renewal decision before 2011, the public was informed that Usibelli had not yet commenced mining and any person could have

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[79] *See, e.g.,* AS 27.21.180(a) AS 27.21.180 (a) "...application for a permit or for revision or renewal of a permit, the commissioner shall grant, condition, modify, or deny the application and notify the applicant in writing of the commissioner's action" and AS 27.21.190(e) "...A revision under this subsection must be based on a written finding of the commissioner relating to the need for the revision...." Written decisions are of course best practice, but the coal statutes are very clear where one is mandated.

[80] *See* Attachments 26, 27, 28 and 29.

sought review of each decision on the basis that Usibelli had not yet commenced mining. Those challenges were not made, the renewal decisions were issued and became final. To the extent that each renewal decision was a decision that a valid permit existed that could be renewed, and that at least one of the decisions (the 1996 renewal) indicates that it also was a decision to extend the time to commence mining, the time to appeal these decisions is now passed. Each renewal decision represented a decision that the permits were valid and to remain so throughout the renewal period specified in the permit. Usibelli has now commenced mining and had commenced mining at the time of the last renewal decision. That decision was appealed to the Commissioner based on arguments of failure to timely commence mining, and these arguments were rejected. That decision was not appealed to the superior court. DNR finds nothing in the text, history, or purpose of SMCRA or ASCMCRA to suggest that even if a valid timely challenge to prior renewal decisions might have been made, it may now, let alone *must* now, disregard those decisions, the decisions having been made and the appeal period having passed.

ASCMCRA provides that the Commissioner may, after a due process hearing, revoke a permit where a permittee has failed to take action required by this chapter.[81] It may also, "within a time limit established by regulation, review the permit and may, for good cause, require reasonable revisions of the permit during the term of the permit."[82] It may conduct inspections to evaluate compliance with the statute.[83] At any time it may adopt or modify performance standards by regulation and require the permittee to abide by the current performance standards.[84] It may issue cessation orders where it finds a person is in violation of the statute.[85] It does not, however, provide a process or require DNR to summarily rescind a previously issued decision that a permit is valid.

Unless, therefore, Alaska's most recent decision renewing the permit can be said to be *ultra vires*, there is no basis for finding that Usibelli is in violation of the statute. DNR issued a renewal decision in 2014 and at that time Usibelli had begun mining as required by the statute. A decision is *ultra vires* when it is not just technically or procedurally flawed, but it must be wholly beyond the scope of the agency's authority under any circumstances and for any purpose.[86]

As will be explained in more detail below, DNR does not find that its decisions were wholly beyond the scope of the agency's authority. First, as discussed below, DNR finds that extensions of time could validly have been granted at each renewal date. Therefore, each renewal cannot be said to exceed the scope of the agency's authority under the statute regardless of any technical failure to notice its decision to grant renewal. Second, Alaska courts have typically asked, before finding an agency grant of right valid, whether the grant seriously impairs the purpose of the statutes under which it is

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[81] AS 27.21.030(6).

[82] AS 27.21.190(a).

[83] AS 27.21.230(a).

[84] AS 27.21.210.

[85] AS 27.21.240.

[86] *See Earthmovers of Fairbanks, Inc. v. State*, 765 P.2d 1360, 1368 (Alaska 1988).

granted.[87] A review of the statute quickly establishes that far from impairing the purposes of the statute, permitting the agency to renew can only further the purposes of the statute.

D. The 1996, 2001, 2006, and 2014 were effective to renew the Wishbone Hill Permits Notwithstanding Any Failure to Document and Extension of Time to Begin Mining.

The Department granted successive renewals of the Wishbone Hill permits in 1996, 2001, 2006, and 2014. Any finding that the permit has lapsed would be inconsistent with those public-noticed grants of renewal. It was argued in the context of an appeal of the 2014 renewal that the Wishbone Hill permits had terminated by operation of law by the time operations commenced in 2010, and that the permits were therefore not eligible for renewal in 2014 or presumably, in 2006 (the last renewal before operations commenced).[88] The difficulty with this position is twofold. It ignores first the fact that while DNR was not required to make any affirmative finding beyond the fact that a renewal application was complete,[89] numerous findings were, in fact, made in the 1996, 2001, and 2006 renewals. In the 1996 renewal, DNR noted that an extension was requested (as the time to commence mining was lapsed), that the renewal was granted, but that if mining did not commence by the next renewal, any further renewals would only be granted with an extension review of the background information and the mine plan. In 2001 and 2006, it was similarly clear that DNR acknowledged that mining had not commenced, but that DNR had conducted a review of the mine plan and underlying information, and made an affirmative finding of compliance. The second difficulty is that while issuance of a new permit or renewal must be made pursuant to a specific decision-making process pursuant to statutes and regulations, the grant of an extension of time to begin mining requires no such process besides a requirement to public notice any extensions in a renewal notice. However, there is no indication in the regulation that a failure to public notice an extension in a renewal notice would invalidate either the extension or the renewal. The Commissioner's discretion to grant extensions is limited only by requirements that such extensions be temporally reasonable and that they be necessary because of litigation or any other reason beyond the control of the permittee.

The renewal decisions made affirmative findings. For example, in the 2006 renewal, affirmative findings were made regarding the adequacy of the bond, that the activities proposed meet the requirements of AS 27.21 and 11 AAC 90, that the permit areas are not in an area designated unsuitable for mining, that the proposed plan would not affect known threatened or endangered species or their critical habitat, that the criteria of AS 27.21.180 – 180– are met *and that renewal can be approved.*[90] The 2014 decision similarly found that "the application for renewal *meets the criteria of AS 27.21.180* and the renewal of the Surface Coal Mining Permits 01-89-796 and 02-89-796 *can be approved.*[91]

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[87] *Id. at 1369.*

[88] Attachment 29, June 22, 2015 Commissioner's Decision on Renewal attaching Hearing Officer Decision.

[89] AS 27.21.080; 11 AAC 90.129(b).

[90] Attachment 27.

[91] Attachment 28.

There is an explicit finding in the renewals that the subject permits *can be renewed* – this is effectively a rejection of the position that the permits have lapsed and are no longer renewable.

Moreover, an opponent of the permit bears the burden to show that a permittee has failed to meet the requirements of the state act and that the permit cannot, therefore, be renewed.[92] No person at any point has met that burden. No attempt was even made to meet that burden in a renewal process – in the matter of the requirement that mining begin within three years – until the beginning of the last renewal process when Castle Mountain Coalition and the Chickaloon Village Traditional Council made this argument. That argument, however, was rejected in an agency administrative decision process culminating in a final Commissioner-level decision which was not appealed to the Alaska Superior Court.[93] The renewal of the permits, therefore, represents affirmative decisions of the Commissioner that the permits were valid at each renewal date such that they could be renewed. Those decisions have not been challenged in court and, the time for such challenges having long past, must therefore be treated as valid.[94]

While the grants of renewal may have been procedurally flawed in that they may not have been preceded by a grant – at least a preserved written grant– of an extension of time to begin mining, they were still decisions that were within the power of the Commissioner to make at the time. This is because at the time of each renewal, the Commissioner had the power to find that an extension of time to begin mining could validly be granted. Therefore, it was within the power of the Commissioner (or his delegates) to grant a renewal.

1. **Extensions of time within which to begin mining could be validly granted in this instance.**

The Department is aware of no facts tending to show that an extension of time to begin mining could not have been granted and was not, therefore, effectively granted by virtue of the valid renewal of the permits. Because extensions of time could have been granted, the renewed grant of a permission to

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[92] AS 27.21.080(a).

[93] The Commissioner based the decision on a determination that the state statute did not mandate automatic termination. Attachment 29, 2015 Renewal Decision. As acknowledged earlier, the decisional documents in *CMC v. OSMRE* have called this interpretation into question, however no state or federal court at this point has provided a definitive ruling on this issue or the validity of the Wishbone permits such that this decision is affirmatively vacated or overturned by a court.

[94] It is worth noting that ratification of the permits through renewals is consistent with case law from other primacy states. For instance, one state court has found that it was reasonable and consistent with a state program that a transfer of a permit would include an automatic three year extension of time to commence mining. C. & T. Evangelinos v. Div. of Mineral Res. Mgmt., 2004-Ohio-7061, ¶ 72 (finding that [a]lthough there is no written record of Oxford's extension, this Court cannot conclude that the Division's practice of granting extensions to permit transferees is arbitrary, capricious, or contrary to law").

mine inherent in a renewal effectively allowed the applicant time to begin mining in compliance with the terms of the renewed permit.

As explained above, it has been understood, throughout the history of these permits, the development of this coal could only be conducted, consistent with the requirements of the statute, through a long term supply contract, likely to a global market. It has similarly been understood, throughout the history of these permits, that the conditions under which this coal could be developed had not yet occurred. This was through no fault of Usibelli. DNR has never questioned or been given reason to question Usibelli's diligence in attempting to find a market for this coal; nor has DNR any basis for finding that Usibelli has control over the state of global coal markets.

An extension may be granted for *any reason or reasons* beyond the control of the permittee.[95] At least one state court has found market conditions to be a reason "beyond the control of the permittee" in the context of extensions of time to commence mining under a state regulatory program.[96] It is worth noting again the discretionary nature of extensions. DNR is not *required* to grant an extension for reasons beyond the control of the permittee, but it *may*.

To require mining to begin where it cannot be pursued to completion so as to minimize the time during which the land is disturbed, however, is something the statute is clearly designed to prevent. A reading of the statute to prevent extensions of time to commence mining based on market conditions would not support timely and complete development of the site and would be contrary to that purpose and, therefore, must be rejected. As summarized above, the Department has reviewed the economic conditions prevailing during the time since the permits were issued and the efforts the permittees have made to market the coal. It can, and does, affirmatively find that it would not have been reasonable to begin mining at Wishbone Hill at any point before 2010.

2. At the time of each renewal decision, DNR had the authority to grant an extension of time to begin mining.

The 1996 renewal decision, as explained above, quite clearly tied its extension of time to begin mining with the permit term. In 2001, therefore, DNR could validly grant an extension of time to begin mining and renew the permit. Had it neglected to extend the time to begin mining, it seems to have been free, as the court in *CMC v. OSMRE* indicated, to retroactively extend the time to commence mining at the time of renewal.[97] If a retroactive extension of time to commence mining is permissible, then a regulatory authority (here, DNR) has the authority to ratify a decision that might have been procedurally flawed (renewals or past extensions) by granting a retroactive extension, if the requirements of the statute are met. Where DNR had the power to validly renew a permit and did, in fact, renew a permit,

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[95] AS 27.21.070(b).

[96] R.R. Comm'n of Texas v. Coppock, 215 S.W.3d 559, 571 (Tex. App. 2007)
(stating "we conclude that the Commission's interpretation of section 134.072 as allowing for a permit extension due to unfavorable market conditions "beyond the control and without the fault or negligence of the permit holder" is consistent with the plain language of the statute").

[97] OSMRE letter re: Decision on Request for Informal Review, TDN Marfork Coal Co., dated July 26, 2018.

and that renewal decision was not successfully appealed, it would be inappropriate for DNR to now summarily decide that the renewal decision was invalid.

This finding is entirely consistent with the history and purpose of the statute. A determination, now, that the permits at issue are invalid could only delay the development of the Wishbone Hill coal. There has been no suggestion that existing performance standards are inadequate or that DNR lacks the power to revise performance standards at any time, nor has there been a suggestion that development of this coal cannot take place consistent with the requirements of the statute. Given this, a finding that Usibelli must cease operations would frustrate the requirement that mining begin promptly with no counterbalancing advancement of any other statutory purpose. A determination that the Wishbone permits are invalid would also have the effect of penalizing the permittee for programmatic failures without the possibility of bringing the permit into compliance. This appears to be inconsistent with the structure of SMCRA, which provides a path for permittees to come into compliance where noncompliance was as a result of programmatic deficiencies.[98]

It is appropriate, therefore, to find that DNR could and did validly renew the permits.

E. To the extent there remains any question of the adequacy of prior extensions and validity of the permits, DNR grants a retroactive extension.

Failure of the state regulatory authority to properly implement an approved program is not the same question under the federal act as the question of validity of a state-issued permit. In 30 U.S.C. § 1235(d), the act provides for approval of a state program and for withdrawal of that approval. The statute distinguishes between violation by a person of the act and improper implementation, by a state regulatory authority, of its program. The statute recognizes that inadequate State enforcement of its program should not result in suspension or revocation of a state permit but that the permit should be brought into conformance with the requirements of the Act.[99] The interests of the permittee in the permit were intended, by Congress, to be protected from attacks on permit validity based on the programmatic errors of a state regulator. This includes the right to successive renewal of a permit.[100] Congress further sought to protect the permittee by designing the citizen suit provisions to "prevent private operators from being sued for errors that really stem from the regulating authority's improper implementation of the law."[101] An interpretation of the statute that would allow, through action of the state regulatory agency, a permit to lapse despite the understanding of the regulatory authority and the permittee, without at least the possibility of revival, would be inconsistent with the purposes of Congress as made apparent in the statutory text. In addition, it would be inconsistent with the express purpose of

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[98] 30 U.S.C. § 1271(b).

[99] 30 U.S.C. § 1271(b).

[100] AS 27.21.080(a); 30 U.S.C. § 1256(d).

[101] *Friends of Mat-Su v. Usibelli Coal Mine, Inc.*, 2012 WL 12871632 (D. Alaska Sept. 13, 2012).

SMCRA to assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided.[102]

In light of the clear intent of the federal statute to protect permit holders from invalidation of permits as a result of programmatic errors, and the legislative purposes of the state and federal statutes, DNR finds that to the extent any administrative deficiencies in prior extensions of time to commence mining for the Wishbone Hill permits would negate the fact that the extensions occurred, a retroactive extension of time to commence mining is warranted in this instance. An extension of time to commence mining, retroactive to expiration of the first, never-challenged extension in September 1996, is appropriate here given the totality of the circumstances and the equities of the situation.

First, in this unique situation, under AS 27.21.070(b), it was "beyond the control and without the fault or negligence of the permittee" that DNR, with the federal oversight agency's full knowledge and oversight, continued to affirmatively renew the Wishbone Hill permits and treat the permits as valid, representing to the permit holder and the public that the permits existed. Because DNR finds no fault or negligence in Usibelli's effort to begin mining at the site, that the time taken to begin mining was reasonable as discussed earlier in this document, and in light of Usibelli's efforts to keep DNR informed of its progress toward commencement of mining, DNR has determined that it would be inequitable, unjust, and contrary to the intent of ASCMCRA and SMCRA to treat the permits as terminated. DNR continued to review and renew the permits despite being on notice from Usibelli that mining operations had not commenced, and despite Usibelli's good faith attempts with each renewal to provide DNR with the information required to maintain the permits' validity. To the extent that the prior renewals indicated an understanding by the agency that extensions were granted and that the permits were valid, then based on a review of the administrative record, DNR believes that all inferences should be drawn in favor of the permittee assuming (as here) there has been no evidence of bad faith on the permittee's behalf. The equitable circumstances here justifying a retroactive extension are unique,[103] and unlikely to be repeated under the Alaska program, particularly since DNR instituted procedures in 2014 to avoid such repetition. Although DNR notes that AS 27.21.070 does not contain any language prohibiting retroactive extensions, it considers prospective extensions to be best agency practice and procedures for Alaska.

F. Programmatic failures do not undermine the validity of an existing permit.

The concept that the renewals implied, and essentially constituted, extensions of time to commence mining is supported by a review of the renewal decisions in the context of the statutory requirements for renewal. Permit renewal is provided for in AS 27.21.080, and the process for renewal is set out in the same place. A permit includes a right of successive renewal such that where a permittee seeks renewal of a permit, an opponent of the permit bears the burden of proving that the permit should not be renewed.[104] Renewals are not granted if the Commissioner makes, in writing, a finding that the

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[102] 30 U.S.C. § 1202(f).

[103] Some might say that circumstances where a permit's very existence is questioned over 10 years after the alleged termination are not just unique, they are extraordinary.

[104] AS 27.21.080(a).

terms and conditions of the permit have not been satisfactorily met, that the surface coal mining operation is not in compliance with the standards of the act, that the renewal substantially jeopardizes the permittee's continuing responsibility on existing permit areas, that the permittee has not shown that it has maintained its performance bond, or if the permittee has failed to provide required information.[105] No "affirmative" findings, however, are required to grant a renewal.

Separately, the statute regarding permit term provides that a permit "terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued."[106] Because a permit by default is issued for five years and may be issued for longer,[107] it is implicit in the statute that this termination requirement may cut short a valid permit with time remaining on its term. The permit term and the requirement to commence surface mining within three years are independent requirements of the statute. The statute also grants the Commissioner authority to make reasonable extensions of the time to begin mining where the permittee shows such extensions are necessary either "because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee" or "for reasons beyond the control and without the fault or negligence of the permittee."[108] Because under AS 27.21.070(b) the term of the permit can be cut short by failure to commence mining, and because the grant of an extension of time to begin mining carries its own standard different from the standard for renewal (or, indeed, issuance) of a permit, these are independent requirements under the statute.

Neither the statute nor the associated regulations require that the permittee submit a written application for an extension of time to begin mining or that the Commissioner issue a written decision regarding extensions of time.[109] DNR does by regulation require that notice of a renewal decision sent to the applicant and interested parties (e.g., commenters) will identify any extensions of time granted under AS 27.21.070.[110]

In 1994, DMLW quite explicitly extended the time to begin mining under the Wishbone Hill permits until September 4, 1996, the end of the original permit term.[111] In January 1996, as time for renewal approached, then permittee North Pacific Mining Corporation entered into correspondence with DMLW seeking permit renewal and extension.[112] DMLW reminded North Pacific of the AS

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[105] AS 27.21.080(a)(1)-(5).

[106] AS 27.21.070(b).

[107] AS 27.21.070(a).

[108] AS 27.21.070(a).

[109] This is contrasted with the requirement that DNR must make certain findings, "in writing," if a renewal is not granted.

[110] 11 AAC 90.117(c).

[111] Attachment 14.

[112] Attachments 17, 19, 20, 21, 22, and 23.

27.21.070(b) extension process and noted that all required information – including information pertaining to extension of time to begin mining, should be submitted at least 120 days prior to the permit's end as required by the renewal statute.[113] In a May 13, 1996 intra department memo, the need for a basis for an extension was noted and the handwritten notes of the surface mining manager indicate the manager's inclination to grant the extension because of economics, the Mental Health Land Trust litigation, and a potential deal with Usibelli Coal Mines.[114] The public notice for the permit renewal decision stated that a request to extend time to commence mining had been received "due to ongoing marketing efforts."[115] When communicating to the permittee the DNR's decision on the renewal, DNR renewed the permit for a five year term and noted "[h]owever, should mining not commence within this renewal term [5 years], 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."[116] This language indicates that DNR understood that it was granting an extension for the permit term with the renewal decision, and that if mining did not commence by the end of the term, then any future renewal of the permit would need to include a future extension of time to commence mining. The document makes clear that further extension of time to commence mining would only be granted based on an extensive review of the original applications and the baseline information. This statement is particularly important, because, as noted above, a renewal does not typically require such review of this information (See AS 27.21.080). While this extra review is unnecessary for permit renewal it does indicate that the close examination DNR gave to subsequent renewal decisions was in part driven by its recognition that commencement of mining at the site had been and continued to be delayed.

DMLW gave, as required, notice that the applicant "has once again requested an extension for beginning mining due to ongoing marketing efforts" and that it was "approving a five year permit term for the renewal," therefore, once again, extending the time to begin mining for the duration of the permit.[117] A year later, it approved transfer of the permit to Usibelli under the same conditions.[118]

In April of 2001, Usibelli began correspondence with DMLW seeking renewal of the permit. Usibelli again noted that it had no updated operational plan for the project and that was because of the present uncertainty in pricing for energy commodities.[119] It noted continuing marketing efforts, which were also described in the OSMRE 2001 oversight report.[120] DMLW was informed that mining had not

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[113] Attachment 19.

[114] Attachment 21.

[115] Attachment 23.

[116] Attachment 23

[117] Attachment 23.

[118] Attachment 23.

[119] Attachment 24.

[120] Attachment 26.

and would not presently commence. Following what had become a standard course of action with this permit, DMLW again granted the permit renewal, making no distinction between the renewal term and the time within which to begin mining. DMLW noted that it had "carefully reviewed" the plan of operations as part of its renewal, and affirmatively determined that the impacts to the environment "are within the scope allowed by 11 AAC 90.301-501."[121] Similarly, the 2006 renewal public notice noted updates Usibelli made to provide current information, and discussions in the record for that decision (from the public) included discussion of timing of commencement of mining and marketing efforts.[122] The final 2006 renewal decision dated November 27, 2006 also stated in a response to comment that DMLW "has carefully reviewed the proposed plan of operation and has determined that the impacts to the environment from the proposed activity is within the scope allowed by 11 AAC 90.301-501 [performance standards]."[123] In other words, to the extent that the 1996 renewal coupled extension of time to begin mining with renewals, dependent on an additional continued review of original applications and baseline information (not ordinarily required for renewal alone), these written decisions indicate such review did occur.

Further, as discussed above, the Department has been continually informed of and aware of Usibelli's anticipated operations timeline and the reasons for the delay in commencement of mining. The Department chose to grant permit renewals in 2001 and 2006 after having been explicitly informed by Usibelli that mining had not commenced, as required by AS 27.21.070(b), and of the reasons for the delay in commencement of mining. The Department treated the permit renewal term and the extension of time to begin mining as identical questions. These permit renewals were effectively findings by the DMLW that the permits were valid at the time of renewal, such that they could be renewed. The permit renewals in 1996, 2001, and 2006 were not challenged, and the time to challenge these decisions has long since passed.

In its November 4, 2014 TDN decision on the issue (now vacated), OSMRE found that this was not an acceptable practice for permit extensions as it leaves neither the OSMRE, the public, nor the permittees any way of ascertaining the rationale behind DNR's decision. DNR agrees that best practice is to document grants of extension of time to commence mining in written decisions, and in 2015 developed internal procedures to ensure this occurs. However, even if it is determined that state law should be interpreted to mandate that permits terminate automatically by operation of law if an extension of time to commence mining has not been explicitly granted in a separate written decision regarding extensions, it does not necessarily follow that therefore an extension previously granted under heretofore flawed agency procedures could be deemed void 10, 20, or more years later. Such an interpretation of the state statutes, or of the federal statutes, would mandate that permits could be deemed invalid years after operations began in a "gotcha" moment based on insufficient agency procedures or perceived inadequacies in acceptability or documentation of extensions granted years

[121] Attachment 27.

[122] Attachment 27.

[123] Attachment 27.

previous.[124] The invalidation of the permits would occur despite an operator's good-faith attempts to maintain the permits and despite an understanding from the regulatory agency that the permits are valid. Such an interpretation of the language of the permit term provisions does nothing to serve the purposes of the state and federal statutes of orderly development of coal resources in a manner that protects the environment.

G. DNR need not address the question of whether Alaska's permit termination provision, AS 27.21.070(b), mandates automatic termination.

The Department recognizes that while the Court in *CMC v. OSMRE* was not required to reach the issue of whether Alaska law provides for termination of permits by operation of law within three years, there is language in that court's opinion indicating that it believes that only a reading of AS 27.21.070(b) that provides for termination by operation of law would be consistent with the federal statute. However, as a result of the basis for this decision, DNR need not address the legal question of whether or not, in light of the court decisions that triggered this review and other legal considerations such as the 2014 renewal decision and Alaska State rules of statutory construction, Alaska's state law provides for automatic termination of permits by operation of law.

DNR recognizes that the uncertainties identified above could be and have been reduced or eliminated by improvements in DNR internal procedures. DNR has developed such procedures in cooperation with OSMRE which are now in place as internal guidance.[125] DNR is also considering whether any relevant regulatory changes are required and intends to consult with OSMRE as well regarding any additional steps that might be taken to ensure this situation does not arise again.

IV. Conclusion

As a result of the findings in this determination, DNR has determined that the Wishbone Hill permits are valid, existing permits, and the stay on permit activities is lifted, effective 30 days from the date of this decision. DNR notes that under the currently approved permit, Usibelli must complete all monitoring found in the permit stipulations at least 6 months prior to the development of the wash plant pond and related facilities or development of the Phase I or II mining areas. DNR also notes that currently Usibelli is under voluntary temporary cessation under 11 AAC 90.471, and must notify DMLW prior to resuming normal operations. Therefore, although the stay is lifted, mining operations may not commence for at least 6 months.

A person affected by this decision may request reconsideration, in accordance with 11 AAC 02. Any reconsideration request must be received within 20 calendar days after the date of "issuance" of this decision, as defined in 11 AAC 02.040(c) and (d), and may be mailed or delivered to the Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-907-269-8918, or sent by electronic mail to dnr.appeals@alaska.gov . If reconsideration is not requested by that date or if the commissioner does not order reconsideration on his own motion, this

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[124] Indeed, lack of documentation of extensions could be revealed even if *production* had continuously been occurring for many years.

[125] Attachment 34, DNR Action Plan.

decision goes into effect as a final order and decision on the 31st calendar day after the date of issuance. Failure of the commissioner to act on a request for reconsideration within 30 days after issuance of this decision is a denial of reconsideration and is a final administrative order and decision for purposes of an appeal to Superior Court. The decision may then be appealed to Superior Court within a further 30 days in accordance with the rules of the court, and to the extent permitted by applicable law. An eligible person must first request reconsideration of this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.

Sincerely,

Andrew Mack

Andrew T. Mack
Commissioner

Attachment

Cc:

David Berry, OSMRE, Office of the Regional Director ; 1999 Broadway, Suite 3320, Denver, CO 80202-3050

Brook Brisson & Katherine G. Strong
Trustees for Alaska, 1026 W. 4th Ave., Suite 201. Anchorage, AK 99501

Tom Waldo, Earthjustice, 325 Fourth Street, Juneau, AK 99801

Heidi Hansen, Deputy Commissioner, Dept. of Natural Resources

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Casper Area Office
PO Box 11018
150 East B Street, RM 1018
Casper, WY 82602

January 18, 2017

Certified Mail/Return Receipt

Russell Kirkham, Coal Regulatory Program
Manager Alaska Department of Natural Resources
Division of Mining Land and Water
550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501

Dear Mr. Kirkham:

On December 20, 2011, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued Ten-Day Notices (TDNs) #XII-141-182-005 and #XII-141-182-006 to the Alaska Department of Natural Resources (DNR), Division of Mining, Land and Water. The facts and procedural history of this matter have been stated numerous times, and we will not repeat them in detail here.[1] In sum, OSMRE issued the TDNs to DNR in response to citizen complaints received from three public interest groups, Chickaloon Village Traditional Council, Earthjustice, and the Trustees for Alaska, acting on behalf of seven additional organizations (Complainants), alleging that Usibelli Coal Mine Inc. (Usibelli) is conducting surface coal mining operations at the Wishbone Hill Mine without valid permits. Although the two permits at issue in this case were issued by DNR in 1991 and were transferred to new permittees and renewed multiple times, no surface coal mining operations took place at the mine site until June 2010. Complainants charge that the lack of surface mining for that length of time invalidates the permits. They asked "that OSMRE immediately issue a cessation order to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit for those activities."

As a part of the TDN process, OSMRE requested that DNR provide a detailed explanation of the validity of two permit renewals issued to Usibelli. DNR has provided OSMRE with an initial response and a supplemental response to the TDNs, dated January 6, 2011 and August 2, 2012, respectively. In these responses, DNR concluded that its decisions over the years to renew the Wishbone Hill permits included implicit extensions of the time to commence

[1] *See, e.g.,* OSMRE's November 4, 2014, TDN determination. The legal analysis of that TDN determination was subsequently vacated by the U.S. District Court for the District of Alaska. *Castle Mountain Coalition v. OSMRE*, 2016 U.S. Dist. LEXIS 87953 (D. Alaska July 7, 2016). The decision in *Castle Mountain Coalition* also restates the pertinent background information. *Id.* at *3-*17.

mining and that Usibelli was consequently not operating without a valid mining permit. Because it determined that a violation did not exist under the approved program, DNR concluded it had good cause for not taking action against Usibelli.

On November 4, 2014, based on the information provided by DNR, OSMRE found that there was good cause for not taking action against Usibelli but not for the reasons that DNR articulated. In that decision, OSMRE indicated that DNR did not follow appropriate procedures in extending the time for Usibelli's predecessors to commence mining because, contrary to DNR's arguments, granting extensions by implication is not an acceptable practice. OSMRE determined, however, that, under Alaska's approved program, permits do not simply terminate by operation of law and that for a permit to terminate in the State of Alaska, the regulatory authority must take affirmative action on the record. In the case of Wishbone Hill, OSMRE found that, at that time, DNR failed to affirmatively terminate the permits and, consequently, Usibelli was not operating without a permit. As a result, OSMRE concluded that DNR had "good cause" for not taking action against Usibelli for operating without a permit.

OSMRE's 2014 determination, however, was challenged by the public interest groups to the United States District Court for the District of Alaska. On July 7, 2016, the court issued a decision vacating OSMRE's 2014 determination based on the court's conclusion that the phrase "shall terminate" as set forth in section 506(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(c), is unambiguous: a surface mining permit terminates by operation of law if mining operations have not commenced within three years of permit issuance unless an extension has been granted in accordance with the statute. *Castle Mountain Coalition v. OSMRE*, 2016 U.S. Dist. LEXIS 87953 (D. Alaska July 7, 2016). The court remanded the matter to OSMRE for further proceedings consistent with its decision. On August 12, 2016, however, Usibelli, an Intervenor-Defendant, filed a Motion to Alter or Amend the Judgment.

While that motion was pending, on August 30, 2016, in light of the court's July 7 decision, OSMRE provided you with an opportunity to submit an additional response to OSMRE regarding the two outstanding TDNs. You indicated that you planned to submit additional information but sought an extension from OSMRE to respond until after the court decided Usibelli's pending motion. We declined to provide you with additional time and, on September 8, 2016, you filed with the court a Motion for Stay of Judgment Pending Consideration of Intervenor-Defendant's Motion to Alter or Amend, which was granted on September 12, 2016. The Stay expired on October 26, 2016, when the court issued its order denying Usibelli's motion.

In response to the court's decision, on November 2, 2016, OSMRE again provided DNR with an opportunity to submit an additional response to the two outstanding TDNs. On November 17, 2016, DNR submitted to OSMRE a package of additional materials in response to the TDNs. The additional response package consisted of a cover letter, several DNR Inspection Reports for inspections conducted at the Wishbone Hill site, legal documents associated with the Wishbone Hill litigation, permitting-related documents, and various correspondence between parties involved in the litigation.

After reviewing the submitted materials, OSMRE notes that DNR's response mostly contained documents previously evaluated by OSMRE. The most significant document not previously reviewed by OSMRE was a letter dated November 17, 2016, from DNR to Usibelli. That letter ordered the temporary cessation of operations at the Wishbone Hill Mine. The letter also requested that within 30 days Usibelli provide the state additional information about the date that mining activities commenced at the Wishbone Hill site and the reasons for the delay in commencement of mining activities at the mine.

DNR's TDN response continued to maintain that, despite the court's July 7, 2016 and October 26, 2016 decisions, DNR had good cause for not taking enforcement action against Usibelli because it considered Usibelli's two permits to be valid. In the alternative, DNR claimed that, even if the permits terminated in 1996, DNR has taken appropriate action to resolve any potential violations.

OSMRE reviews a regulatory authority's response to a TDN to determine whether the regulatory authority has taken appropriate action to cause the violation to be corrected or shown good cause for not taking such action. 30 C.F.R. § 842.11(b)(1)(ii)(B). OSMRE will accept a regulatory authority's response to a TDN as constituting "appropriate action" or "good cause" unless the regulatory authority's response is arbitrary, capricious, or an abuse of discretion. *Id.* at § 842.11(b)(1)(ii)(B)(*2*). As explained below, we find DNR's response to be arbitrary, capricious, and an abuse of discretion.

I. Alaska has not demonstrated "good cause" for not taking enforcement action.

Alaska has not demonstrated "good cause" for not taking enforcement action against Usibelli because it arbitrarily and capriciously concluded that a violation of its program does not exist in connection with the Wishbone Hill Mine.

As summarized above, the U.S. District Court for the District of Alaska has concluded that under section 506(c) of SMCRA, it is unambiguous that a surface mining permit terminates by operation of law if mining operations have not commenced within three years of permit issuance unless an extension has been granted in accordance with the statute. *Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *42-*43. After reviewing the court's decision, the United States has decided not to appeal the court's decision.

The language of section 506(c) and the parallel state provision—AS 27.21.070(b)—are virtually identical.[2] In addition, we are mindful that SMCRA and its implementing regulations require

[2] *Compare* AS 27.21.070(b) ("A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. 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* 30 U.S.C. § 1256(c) ("A permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit: *Provided*, That the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or

that approved state programs be "no less stringent than" SMCRA and "no less effective than" the federal regulations. 30 C.F.R. § 730.5; *see also* 30 U.S.C. § 1255(b).[3] For these reasons, we conclude that any interpretation of AS 27.21.070(b) that is not in accord with the interpretation of section 506(c) of SMCRA as set forth in *Castle Mountain* is arbitrary, capricious, and an abuse of discretion.

Despite the court's view that the language of section 506(c) of SMCRA and AS 27.21.070(b) is unambiguous, DNR's response attempts to interpret AS 27.21.070(b) differently than SMCRA. DNR's primary argument is that it had good cause for not taking enforcement action against Usibelli because Alaska state law does not mandate automatic termination of permits for a failure to commence mining. As support for its interpretation DNR cites to a June 22, 2015 administrative order, which held that Alaska law does not require automatic termination of permits for failure to commence mining. However, an examination of the order reveals it does not support DNR's position. The June 22, 2015 administrative order adopted and incorporated by reference an earlier recommended decision by a hearing examiner. Notably, the hearing examiner in the case found that the pertinent Alaska provision, AS 27.21.070(b), means that if operations under a permit have not commenced in three years, "the permit terminates, unless the commissioner has or does grant an extension." *In re: Division of Mining Land and Water's Renewal of Wishbone Hill Coal Mining Permit Nos. 01-89-796 and 02-89-796*, Recommended Decision, p. 5 (Mar. 17, 2015) (emphasis added). The hearing examiner thus read the Alaska statute in much the same way as the U.S. District Court for the District of Alaska read the parallel SMCRA provision: if mining does not begin within three years, a permit terminates unless the operation qualifies for an extension.

Despite this reading, the hearing examiner found that such terminations are not "automatic" because there could be some circumstances where there is a factual dispute about such matters as whether three years had elapsed or whether the operation had actually begun operations. But these are factual questions rather than legal ones, and, in any event, the factual dispute at issue

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threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee . . . ."); *see also Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *7 ("In conformance with SMCRA, Alaska's statutory framework tracks these federal provisions.").

[3] DNR's November 17 additional response to the TDNs claims that its interpretation that the Alaska program does not require mandatory termination of permits after three years if no extension is granted is "no less stringent than SMCRA" and relies on arguments made on pages 18-29 of Alaska's Cross-Motion on Summary Judgement in *Castle Mountain.* Because we conclude that, in light of the *Castle Mountain* decision, the only reasonable interpretation of the Alaska program, on its face, requires termination of permits by operation of law after three years if no extension is granted, we do not need to reach the issue of whether a different interpretation of AS 27.21.070(b) would also be no less stringent and no less effective than SMCRA and the federal regulations. We do, however, strongly disagree with the arguments made in Alaska's Cross-Motion, particularly the gross mischaracterization that state programs are only required to be "no less stringent than" and "no less effective" than the substantive protections of SMCRA and the federal regulations. Significantly, we disagree with the position that the issues raised in the subject TDNs—including whether or not mining can take place in Alaska under certain circumstances—are not substantive. Moreover, state programs must be "no less stringent than" and "no less effective than" SMCRA and the implementing federal regulations. Contrary to Alaska's argument in the Cross-Motion, this requirement is not limited to substantive protections of SMCRA, including those provisions related to permits. *See, e.g.,* 30 U.S.C. § 1253(a); 30 C.F.R. §§ 730.5, 730.11732.15(b), and 773.1; *see also* 44 FR 14902, 14952-14962 (Mar. 13, 1979).

in connection with Usibelli does not involve any of these scenarios.[4] We agree, moreover, with the hearing examiner's conclusions that a situation could arise where there is a factual dispute that will need to be resolved before it is known whether a permit terminated by operation of law under AS 27.21.070(b). That possibility, however, does not change the application of the plain meaning of AS 27.21.070(b), as interpreted by the court in *Castle Mountain*, once any factual dispute is resolved: application of AS 27.21.070(b) must either lead to a conclusion that operations began within the specified timeframe or, if not, the permit terminated by operation of law or an extension was properly granted.[5]

At any rate, even if the June 22, 2015 administrative order had interpreted the Alaska statute in a way contrary to the district court's ruling, it is the district court's ruling that would prevail here. If a statute is unambiguous in its meaning, as the district court found in the *Castle Mountain* case, there is no statutory gap for an agency to fill with an interpretation. ***Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.***, 545 U.S. 967, 982-983 (2005) ("[J]udicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). Because the court in *Castle Mountain* held that section 506(c) of SMCRA is unambiguous in its meaning and AS 27.21.070(b) is practically identical, DNR has no gap to fill with a contrary interpretation such as presented in its November 17 additional response to the TDNs. Now that the court in *Castle Mountain* has concluded that section 506(c) is unambiguous in its meaning and that AS 27.21.070(b) is substantially identical, it is arbitrary, capricious, and an abuse of discretion for DNR to rely on a commissioner's June 22, 2015 decision, issued prior to the *Castle Mountain* case, to attempt to demonstrate good cause for failing to take enforcement action against Usibelli.

DNR also contends in its November 17 additional response to the TDNs that, in the alternative, if Alaska's statute now must be interpreted to mean automatic termination, that this interpretation did not govern during the operative timeframe—from 1996 when the permits were issued to 2010 when mining commenced. Instead, DNR contends that Alaska law, as articulated by the commissioner's June 22, 2015 decision governed during that time, and automatic termination is not required.

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[4] DNR has not alleged that there is such a factual dispute about the operative facts regarding the Wishbone Hill permits.

[5] In addition to adopting and incorporating the hearing examiner's recommended decision, the commissioner's June 22, 2015 decision also reviewed the legislative history of AS 27.21.070(b) and determined that the lack of any automatic termination discussion in that legislative history supported the hearing examiner's recommended decision. It is a basic principle of administrative law that legislative history is irrelevant if the statutory text is clear. *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1170 (9th Cir. 2008) ("We decline to wade into [the statutory provision's] unhelpful legislative history to further clarify a matter of interpretation resolved on the face of the statute."). Moreover, the legislative history, as stated by the commissioner, does not clearly indicate that the Alaska legislature meant something other than the plain statutory text that was enacted; thus, it is not relevant in the face of the text of AS 21.21.070(b), which the court in *Castle Mountain* found to be unambiguous. *Id.*

This argument is contrary to prevailing law. Once a court construes a statute, that construction "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994).[6] The court in *Castle Mountain* held that section 506(c) of SMCRA unambiguously mandates the termination of a permit when mining operations under that permit do not commence within three years of permit issuance and a valid extension has not been obtained. *Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *42-*43. AS 27.21.070(b) is substantially identical to SMCRA section 506(c) and must mean the same thing. As such, it is arbitrary, capricious, and an abuse of discretion for DNR to consider that AS 27.21.070(b) meant something different from 1996-2010 than it does now or when it was enacted.

Finally, DNR still maintains that implicit extensions to begin mining operations are acceptable under AS 27.21.070(b) and were granted by DNR. OSMRE, however, has reviewed all of the materials submitted by DNR since 2011 and has not been able to find any evidence that DNR granted extensions, either implicitly or explicitly. As OSMRE has previously stated in its November 4, 2014 correspondence to DNR, moreover, there are only two legitimate grounds for permit extensions under the Alaska program, "the extension [must be] 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." AS 27.21.070(b). Consequently, even if it were possible for DNR to grant implicit extensions as part of permit renewals, the record would have to contain clear evidence that one of these grounds for an extension under AS 27.21.070(b) existed. The record as presented by DNR in connection with these TDNs simply does not contain such documentation and consequently we consider DNR's response to be arbitrary, capricious, and an abuse of discretion.[7]

In sum, based on OSMRE's analysis of the documents submitted by the state in response to the TDNs since 2011, including the documents submitted with the November 17, 2016 additional

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[6] Although not raised by DNR, we recognize the likelihood that Usibelli may have relied on both DNR's 1997 approval of the transfer, assignment, or sale of permits to Usibelli from its predecessor even though these permits allegedly terminated in 1996 and DNR's subsequent renewal of those permits. Any such reliance, however, is insufficient to overcome the serious nature of operating without a valid permit, which is considered under both the federal regulations and the Alaska program to be a de facto imminent harm situation. *See* 30 C.F.R. § 843.11(a)(2); 11 AAC 90.613(c). Usibelli is a sophisticated operator that had or should have had knowledge of the facts and the law when it acquired the permits. Moreover, in light of the court's decision in *Castle Mountain*, these apparent violations do not ensure that the energy-production purpose that led to the enactment of section 506(c) of SMCRA was met. This provision was enacted to prevent speculators from permitting, but not developing, a mine; the exception proviso is designed to ameliorate the harshness of an automatic termination when delay was beyond the control of the permit holder. 121 Cong. Rec. 6,174 (Mar. 12, 1975) ("The purpose of the section . . . was to provide that, once a permit was given for the mining of coal, there would be immediate and prompt mining, and that someone would not sit on a permit and hold up the development of coal operations.") (Memo. Ex. D). Yet here, no operations or extensions in accordance with the exception proviso appear to have been granted for almost fifteen years before surface mining operations commenced.

[7] DNR's position that it granted implicit extensions at the time of permit renewal is also undercut by DNR's November 17, 2016 letter to Usibelli requesting information about the date of commencement of mining activities and the reasons for the delay at the Wishbone Hill Mine. If DNR did not have this information, it could not have implicitly granted extensions in accordance with AS 27.21.070(b).

response to the TDNs, OSMRE finds that the state has not demonstrated "good cause" for not taking appropriate action.

II. Alaska has not demonstrated that it has taken appropriate action to resolve the violation.

DNR claims it has taken appropriate action for two reasons. First, it says that it has taken steps to ensure that any harm that could have resulted from continued recognition of terminated permits has been addressed in the permit renewal process. Even assuming that the current operations now comply with all other provisions of the approved Alaska program, the permittee appears to be operating without a permit in violation of the statute. Therefore, we consider DNR's actions to be arbitrary, capricious, and an abuse of discretion because ensuring that the Wishbone Hill permits are up-to-date they do not resolve the violation.

A second argument DNR makes to demonstrate that it has taken appropriate action is that, pursuant to its November 17 letter, it has directed Usibelli to temporarily cease all activity at the Wishbone Hill Mine. In addition, it has requested Usibelli to provide: (1) the date of commencement of mining activities at the Wishbone Hill Mine site; and (2) reasons for the delay in commencement of mining activities at the Wishbone Hill Mine. DNR also stated that it may make its direction to cease all mining activity permanent depending on Usibelli's response to the state's information request. DNR claims that this temporary cessation order constitutes "appropriate action" pursuant to its statute and regulations and obviates any need for OSMRE to conduct a federal inspection.

Again we disagree. "Appropriate action" under the federal regulations includes "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(1)(B)(*3*). It is unclear how DNR's temporary cessation order and its request for Usibelli to respond to two questions constitute appropriate action to remedy a situation where the permit appears to have terminated in 1996. Simply asking for additional information will not correct such a violation. The order directing Usibelli to cease operations at Wishbone Hill might have been an appropriate action; however, it was labeled temporary and did not direct Usibelli to either obtain new permits or demonstrate that valid permit extensions were obtained, which are the only two ways that the deficiency alleged can be cured.

For these reasons, OSMRE concludes that DNR has not yet taken appropriate action to cause the violation to be corrected.

III. Conclusion

For the foregoing reasons, OSMRE has determined that DNR has neither taken appropriate action nor demonstrated good cause for failure to do so regarding the allegation that the Wishbone Hill Mine permits (01-89-796 and 02-89-796) have terminated by operation of law pursuant to AS 27.21.070(b). OSMRE, therefore, orders that a federal inspection be conducted on those permits.

As provided in 30 C.F.R. § 842.11(b)(1)(iii)(A), if DNR disagrees with this determination, it may file a request, in writing, for informal review by the OSMRE Western Region Director. Such a request for informal review may be submitted to the OSMRE Denver Field Division Chief, PO Box 11018, 150 East B Street, Room 1018, Casper, WY 82602 or to the OSMRE Western Region Director, 1999 Broadway, Suite 3320, Denver, CO 80202. The request must be received by OSMRE within five (5) days from receipt of OSMRE's written determination.

If you have any questions about this determination, please contact me at (307) 261-6550.

Sincerely,

Jeffrey Fleischman
Division Chief, Denver Field Division

Cc: Ed Fogels, Deputy Commissioner
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United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

JUL 26 2018

Mr. Harold Ward, Director
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

Re: Decision on Request for Informal Review, Ten Day Notice X12-111-391-002; Marfork Coal Company, Inc., Eagle No. 2 Mine, Permit Number S-3028-05

Dear Mr. Ward:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) is rendering a new decision with respect to an informal review request made by your agency on June 18, 2012. The subject request was for informal review of a decision by OSMRE's Charleston Field Office (CHFO) on the above-referenced matter. Specifically, the West Virginia Department of Environmental Protection (WVDEP) requested informal review of the CHFO's determination that WVDEP's response to Ten Day Notice (TDN) X12-111-391-002 was arbitrary, capricious, and an abuse of discretion because a permit it had issued to Marfork Coal Company, Inc., (Marfork)[1] expired when mining had not started within three years of permit issuance. The CHFO also found that WVDEP's purported retroactive grant of an extension to Marfork did not comport with West Virginia's approved regulatory program. WVDEP maintains that its decision to approve an extension of the above-referenced permit was proper and in accordance with the approved program. As such, WVDEP maintains that it has shown good cause to demonstrate a violation did not exist under the approved program.

Since that time, this matter has undergone litigation, resulting in this matter being before me for a second time, now on remand from the U.S. District Court for the District of Columbia. *Coal River Mountain Watch v. U.S. Dep't of the Interior*, No. 1:13-cv-01606-KBJ (D.D.C.). The provision of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) at issue here has also been the subject of a decision by the U.S. District Court for the District of Alaska in *Castle Mountain Coal. v. OSMRE*, No. 3:15-cv-00043-SLG, 2016 U.S. Dist. LEXIS 87953 (D. Alaska July 7, 2016).

[1] Permit No. S-3028-05 is now held by Republic Energy, Inc. For consistency, I will refer to Marfork and its successor entities as "Marfork."

I have carefully considered your request, the record before me, and the decisions of both district courts. For the reasons set forth below, I am again reversing the CHFO's determination. I am also taking action to have a new TDN issued on the same permit for more recent activities related to the statutory requirement to commence coal mining operations within three years of permit issuance.

Relevant Statutory and Regulatory Provisions

SMCRA provides specific requirements for the issuance, renewal, extension, and termination of permits. Section 506(a) of SMCRA, 30 U.S.C. § 1256(a), requires persons to obtain permits from either the State regulatory authority or OSMRE, as applicable, before engaging in or carrying out any surface coal mining operations on lands within a State. Section 506(c) specifies that a permit "shall terminate" if the permittee has not commenced operations within a three-year statutory time frame:

> (c) Termination. *A permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit*: *Provided,* That the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee....

30 U.S.C. § 1256(c) (emphasis added).

OSMRE's implementing regulations largely mirror the statutory provision: "A permit shall terminate if the permittee has not begun the surface coal mining and reclamation operation covered by the permit within 3 years of the issuance of the permit." 30 C.F.R. § 773.19(e)(1). They allow the regulatory authority to grant a reasonable extension of time for commencement of operations if the permittee provides a written statement to the regulatory authority showing that an extension of time is necessary for at least one of two enumerated reasons. 30 C.F.R. § 773.19(e)(2). Further, any extension of time granted must be set forth in the permit, and notice of the extension must be made public. 30 C.F.R. § 773.19(e)(4).

West Virginia's approved regulatory program, which OSMRE determined to be no less stringent than SMCRA and no less effective than the implementing Federal regulations, provides as follows:

> A permit terminates if the permittee has not commenced the surface mining operations covered by the permit within three years of the date the permit was issued: *Provided,* That the secretary may grant reasonable extensions of time upon a timely showing that the extensions are necessary by reason of litigation precluding commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee....

W. Va. Code § 22-3-8(a)(3). In addition, West Virginia's Code of State Rules provides:

> Extensions of time for a permit as provided in subsection 3, section 8 of the Act shall be specifically set forth in a written approval and made part of the permit. Such extension shall be made public by the Secretary.

W. Va. Code R. § 38-2-3.27.e.

Background

On June 6, 2008, WVDEP issued permit S-3028-05 to Marfork for its Eagle No. 2 mine in Raleigh County, West Virginia. A little more than three and half years later, on January 9, 2012, Robert Goodwin, a member of Coal River Mountain Watch (CRMW), emailed WVDEP asserting that the permit had terminated as a matter of law because Marfork had failed to commence mining within three years of the date of the permit's issuance. On January 12, 2012, WVDEP notified Marfork of the West Virginia Code's permit termination and extension provisions, which are based on SMCRA. Marfork responded on January 31, 2012, requesting an extension of the Eagle No. 2 permit due to delays in acquiring a Clean Water Act § 404 permit caused by past litigation. On February 9, 2012, WVDEP granted an extension to commence mining operations until June 6, 2013.

On February 13, 2012, Mr. Goodwin sent an email to the CHFO asserting that Marfork's Eagle No. 2 permit had terminated as a matter of law. On February 15, 2012, based on Mr. Goodwin's complaint, the CHFO sent a TDN to WVDEP that required WVDEP to take appropriate action to cause the described violation to be corrected or show cause for failure to terminate the permit. WVDEP responded to the TDN on February 27, 2012, explaining that it had notified Marfork of WVDEP's policy on extension of permits. WVDEP explained that Marfork submitted an extension request, and WVDEP granted the requested extension. On April 3, 2012, the CHFO requested additional information from WVDEP; among other things, the CHFO sought information regarding WVDEP's authority to retroactively extend a permit.

On April 18, 2012, WVDEP sent the CHFO a supplemental response to the TDN. Among other things, that letter explained that, per a January 1993 policy, WVDEP is to notify permittees at least 90 days before their permit's three-year anniversary date. If WVDEP fails to notify a permittee prior to the three-year date, the same policy instructs WVDEP to notify a permittee belatedly and follow the same procedures as if the agency had notified the permittee on time. The letter explained that West Virginia law provides no specific deadline for the request and granting of an extension, other than that the request and demonstration of necessity be "timely." WVDEP concluded that these provisions allowed the agency to extend the Marfork permit even after three years had passed without mining.

On June 8, 2012, the CHFO sent a letter to WVDEP indicating that Marfork's permit had expired after three years without mining and that WVDEP failed to take appropriate action and acted arbitrarily and capriciously in retroactively extending the permit. The CHFO found that Marfork had failed to meet West Virginia's criteria for an extension and that, in any case, West Virginia's

law and regulations did not allow for retroactive extensions. The CHFO also found that WVDEP's failure to timely notify Marfork of the permit's three-year anniversary did not justify the retroactive extension and that WVDEP had violated state law when it failed to notify the public of its extension of the Marfork permit. On June 13, 2012, the CHFO notified Mr. Goodwin of its determination on the TDN.

On June 18, 2012, pursuant to 30 C.F.R. § 842.11(b)(1)(iii)(A), WVDEP requested informal review of the CHFO's decision. The agency alleged that the TDN process could not be used to challenge WVDEP's permit extension, the CHFO's determination exceeded the scope of Mr. Goodwin's citizen complaint and its own TDN, the CHFO failed to apply the correct deferential standard of review, and WVDEP's interpretation of West Virginia law as allowing an extension after the three-year mark was reasonable, and not arbitrary, capricious, or an abuse of discretion. WVDEP went on to address the issues that it alleged were outside the scope of the citizen complaint and TDN, primarily arguing that Marfork met the criteria for an extension due to litigation and circumstances beyond its control and that WVDEP had no duty under West Virginia law to provide public notice of the extension.

WVDEP's responses to the TDN.

In the TDN process, WVDEP conceded that it had failed to follow its established policy of notifying a permittee of the upcoming three-year anniversary of permit issuance. However, relying upon its internal January 1993 policy entitled, "Termination of Not Started Permits that are 3 Years Old," WVDEP reached the conclusion that, although three years had passed since the permit was issued, WVDEP could still grant an extension due to the fact that WVDEP failed to notify Marfork of the impending expiration of the three-year period. In support, WVDEP cited the following language from paragraph 4.E. of the 1993 policy:

> There should not be any not started permits which have exceeded more than three years since issuance (or the most recent renewal date). However, if any of these are discovered, that have not been notified in accordance with the procedure given above, you should proceed in accordance with the guidelines listed above.

WVDEP interpreted the permit termination provision in West Virginia Code § 22-3-8(a)(3) as not prohibiting extensions after the three year period:

> [T]he termination language of the statute is conditioned by a proviso allowing WVDEP to grant a reasonable extension upon a timely showing by the permittee that certain circumstances necessitate an extension. . . . The function of this proviso is to restrain and conditionally qualify the termination of a not-started permit. Syl. pt. 1, *State ex rel. Browne v. Hechler*, 197 W.Va. 612, 476 S.E.2d 559 (1996). Essentially, if a timely showing is made by the permittee that certain circumstances necessitate an extension, WVDEP may grant a reasonable extension in lieu of the permit terminating because the operative termination language is restricted by the proviso. *See Id.* at 614 ("Similarly, it has been stated, 'Provisos serve the purpose of restricting the operative effect of statutory

> language to less than what its scope of operation would be otherwise.'" (internal citations omitted)).

Letter from Thomas L. Clarke to Roger Calhoun, *Ten Day Notice No. X12-111-391-002*, pp. 1-2 (April 18, 2012). WVDEP also asserted that its internal policy requires the issuance of notice to a permittee of an impending statutorily based permit termination before it terminates the permit for failure to start mining within three years of permit issuance. According to WVDEP, under this policy, it can grant an extension to a permittee, even if more than three years have passed since permit issuance, if WVDEP has failed to follow its own internal policy of notifying a permittee of the impending three-year permit anniversary before the three years lapse. Moreover, WVDEP noted that its policies ensure that operations on any permit would not commence with outdated reclamation requirements in place.

WVDEP therefore issued a standard form letter to Marfork, on January 12, 2012, stating: "Our records indicate that the above referenced permit is approaching the three year anniversary date and that the proposed operation has not yet commenced." The letter further outlined the relevant provisions of West Virginia Code § 22-3-8 and concluded: "If the Division of Environmental Protection does not receive your written response within thirty (30) days … your permit will be terminated."

On January 31, 2012, Marfork responded to the WVDEP letter by, among other things, requesting a five-year extension and by providing its rationale for an extension in accordance with section 22-3-8. On February 9, 2012, WVDEP issued an extension approval letter to Marfork stating:

> This is to notify you that in accordance with your request, the termination date for Permit Number S302805 has been extended to June 6, 2013.[2]
>
> You are required to update the permit to current regulatory requirements prior to activation or at the next renewal.
>
> You are cautioned to carefully note the termination date of this permit extension. Further extensions will be considered and granted only if a timely and adequate request is submitted. The Division of Environmental Protection bears no responsibility for providing you any additional notice.

The CHFO responded to WVDEP by letter dated June 8, 2012. Citing 30 C.F.R. § 842.11(b)(1)(ii)(B), it found that WVDEP had not taken appropriate action to cause the

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[2] Separate from this explicit extension to commence operations, as is set forth in greater detail below, on March 19, 2013, WVDEP renewed Marfork's permit. As explained below, WVDEP subsequently extended the permit again, and the revised expiration date of the permit was June 6, 2018.

violation to be corrected and that WVDEP's initial and supplemental responses to the TDN were arbitrary, capricious, and an abuse of discretion under West Virginia's approved regulatory program. More specifically, the CHFO found, among other things, that: mining operations had not started within three years of permit issuance, and, therefore, the permit had expired on June 6, 2011, when Marfork failed to commence mining by that date; nothing in West Virginia's approved program allows for retroactive extensions; WVDEP's approval of the extension request did not acknowledge the reasons for granting the extension or how Marfork's request satisfied the requirements in W. Va. Code § 22-3-8(a)(3) for extending the permit; and Marfork's extension request failed to meet any of the statutory or regulatory criteria for obtaining an extension.

WVDEP's request for informal review of the CHFO's determination.

WVDEP requested informal review of the CHFO's determination on June 18, 2012, via a ten-page letter addressing a number of issues. At the outset, WVDEP alleges that OSMRE lacks TDN jurisdiction over "permit defects" because such permitting problems are not on-the-ground "violations" under SMCRA and are not properly dealt with through a Federal inspection of a surface coal mining operation. WVDEP argues that OSMRE is improperly using the TDN process to subvert the exclusive administrative and judicial appeal processes assigned to the states under SMCRA. On the merits, WVDEP argues that the CHFO's determination exceeded the scope of both the citizen complaint and the TDN; the CHFO failed to afford deference to WVDEP's responses to the TDN; and WVDEP's responses were not arbitrary and capricious because the internal policy WVDEP relied upon is a permissible construction of W. Va. Code § 22-3-8(a)(3), which, according to WVDEP, is silent on the issues of notice to the permittee and the issuance of an extension of time after the expiration of the three-year period.[3]

On August 20, 2013, I sent OSMRE's informal review decision (hereinafter "August 20, 2013, decision") to WVDEP. The decision reversed the CHFO's determination, finding that WVDEP did not act arbitrarily or capriciously in failing to terminate the permit and in granting the extension after the three-year mark. Among other things, I found that SMCRA's permit termination provision, section 506(c), was ambiguous and interpreted it to mean that a permit does not terminate by operation of law after three years without mining, but rather remains valid until the regulatory authority takes action to terminate it. I also found that it was neither arbitrary nor capricious for WVDEP to interpret its own State program as not requiring automatic termination.

On October 21, 2013, plaintiff CRMW filed a lawsuit in the U.S. District Court for the District of Columbia, claiming that OSMRE's determination that, under SMCRA, a permit does not automatically terminate after three years without mining contradicted the plain language of

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[3] WVDEP also provided substantive responses to issues that it alleged were outside the scope of the citizen complaint and TDN.

SMCRA and its implementing regulations and was arbitrary and capricious. Plaintiff also alleged that OSMRE's August 20, 2013, decision was a "de facto rule" and that OSMRE failed to abide by the Administrative Procedure Act's (APA) notice and comment procedures for rulemakings.

Castle Mountain Coalition v. OSMRE.

While the *Coal River* litigation was pending, a second lawsuit involving the same permit termination provision of SMCRA was filed by the Castle Mountain Coalition and other environmental organizations in the District of Alaska. *Castle Mountain Coal. v. OSMRE*, No. 3:15-cv-00043-SLG (D. Alaska). That case involved two coal mining permits originally issued in September 1991 by the Alaska Department of Natural Resources (ADNR) to Idemitsu Alaska, Inc. ADNR extended the time to commence mining on the permits in 1994 and approved the transfer of the permits to Usibelli Coal Mine, Inc. (Usibelli), the current permit holder, in 1997. *Castle Mountain Coal. v. OSMRE*, No. 3:15-cv-00043-SLG, 2016 U.S. Dist. LEXIS 87953, at *7, *9 (D. Alaska July 7, 2016). No further extensions were expressly requested or granted and surface coal mining operations did not begin until June 2010, when Usibelli started building a road to the project site. *Id.* at *8-9.

On December 14, 2011, the eventual plaintiffs in that case submitted a citizen complaint to OSMRE alleging, among other things, that the two permits terminated by operation of law in 1996. *Id.* at *10-11. OSMRE issued two TDNs to ADNR requesting an explanation as to why the permits had not terminated. *Id.* at *11. In response, ADNR claimed that its decisions to renew the permits in 2002 and 2006 implicitly granted extensions of time to commence mining. *Id.* OSMRE issued an initial decision in July 2012, rejecting ADNR's implicit extension theory and finding that, in the absence of valid extensions, the permits terminated in 1996. *Id.* at *12-13. However, OSMRE found it lacked the information necessary to determine whether ADNR nevertheless had taken appropriate action or shown good cause for failing to take action on the permits and gave ADNR an additional ten days to provide a supplemental response. *Id.* at *13. In November 2014, after reviewing the supplemental information that ADNR provided, OSMRE issued its final decision on the two TDNs. *Id.* at *14. OSMRE again rejected ADNR's implicit extension theory, but found that the permits remained valid because, under section 506(c) of SMCRA, a permit does not terminate by operation of law after three years without mining. *Id.* at *14. Rather, it becomes subject to termination by the regulatory authority at that time. *Id.* at *14-15. Because ADNR had not taken action to terminate the permits, OSMRE determined that the permits remained valid. *Id.* at *15.

On March 18, 2015, Castle Mountain Coalition and other environmental organizations brought suit against OSMRE challenging its November 2014 determination. On July 7, 2016, the court granted Castle Mountain Coalition's Motion for Summary Judgment. The court found that the language "shall terminate" in section 506(c) of SMCRA "is not ambiguous. Rather, Congress has directly spoken to the precise question and has provided that a surface coal mining permit terminates by operation of law when mining operations have not commenced within three years unless the agency has affirmatively granted an extension for one of the two specified reasons allowed in the statute." *Id.* at *42-43; *see also id.* at *47. The court observed that OSMRE had rejected ADNR's assertion that it had implicitly granted extensions when it granted Usibelli

permit renewals. *Id.* at *12-14. Moreover, the court noted that OSMRE had found fault in purported implicit extensions in 2002 and 2006 because neither Usibelli nor ADNR made the statutorily required findings that would have been necessary to justify any extensions. *Id.* at *12-13. Later in the decision, the court itself rejected implicit extensions. *Id.* at 43. Nonetheless, the *Castle Mountain* court left open the possibility that, if the statutory grounds for an extension have been met, a regulatory authority may be able to grant an extension, even after a permit has terminated. *Id.* at *46-47. The *Castle Mountain* court did not determine that issue in its decision. *Id.* at *47.

Remand in *Coal River Mountain Watch v. DOI.*

On December 23, 2016, the government moved the court in *Coal River Mountain Watch v. DOI* to both vacate OSMRE's August 20, 2013, decision and remand it for reconsideration in light of the District of Alaska's decision in *Castle Mountain*. The D.C. District Court granted the government's unopposed motion for vacatur and voluntary remand on December 26, 2016.

On January 27, 2017, the CHFO provided a copy of the D.C. District Court's remand order in *Coal River* to WVDEP and gave it an opportunity to submit any supplemental information on the matter. The CHFO explained that, in submitting supplemental information, WVDEP should take into consideration the District of Alaska's decision in *Castle Mountain*.

On February 10, 2017, WVDEP submitted a letter with supplemental information to OSMRE; on February 17, 2017, WVDEP supplemented its initial response with a letter supplied to it by the current permittee, Republic Energy. Collectively, OSMRE considers these two letters to be WVDEP's supplemental information. In its supplemental information, WVDEP indicated that, on March 21, 2016, it granted Marfork an extension of time to commence operations on the permit in question. WVDEP maintains that the extension to June 6, 2018, was granted "in the normal course of business in accordance with the practices and procedures of the approved [West Virginia] primacy program." Letter from Harold Ward to Glenda H. Owens, *Reply to January 2017 opportunity for WVDEP to submit supplemental information*, p. 1 (February 10, 2017) (hereinafter "WVDEP February 10, 2017, letter"). WVDEP states that the "[n]ecessary findings for granting an extension were made and in the letter granting the extension WVDEP indicated that permittee is '. . . required to update the permit to current regulatory requirements prior to activation or at the next renewal.'" *Id.* The supplemental information also notes, among other things, the legal argument that "the West Virginia Surface Coal Mining and Reclamation Act ('WVSCMRA') requires mandatory mid-term review of surface mining permits prior to expiration of the three year deadline" and that "WVSCMRA's imposition of this mandatory duty prior to the three year deadline is consistent with WVDEP's previously-stated view that the termination provision is not self-executing; rather, termination requires affirmative agency action." Letter from Harold Ward to Glenda H. Owens, *Addition to WVDEP supplemental information letter of January 10, 2017*, p. 2 of attachment (February 17, 2017) (hereinafter "WVDEP February 17, 2017, letter").

WVDEP also noted that the "permit at issue has been maintained since its issuance in that surface water monitoring has been routinely conducted as called for in the permit, insurance provided, and bonding maintained...." WVDEP February 10, 2017, letter, p. 2. WVDEP also

noted that the "NPDES permit for the mining operation has remained in effect since its original issuance." *Id.* WVDEP maintains that its 1993 guidance has not been questioned previously by OSMRE and is entitled to the deference due to the established primacy state regulatory authority's interpretation and practice. *Id.* The response also noted that SMCRA and its West Virginia counterpart seem to recognize the investments in time and resources to obtain a surface coal mining permit as is reflected in the statutorily provided right of successive renewal. *Id.* WVDEP maintains that requiring Marfork's successor company (Republic Energy, Inc.) to "re-permit the Eagle No. 2 Mine will serve no environmental benefit, given that the permitting information has been routinely updated as part of the reissuances, while re-permitting will impose a significant – and unnecessary – expense on Republic." WVDEP February 17, 2017, letter, p. 2 of attachment.

The response also provides another legal argument in support of WVDEP's actions, noting: "[I]t is clear the 'Alaska District Court's decision' of July 7, 2016 … does not preclude extension of a permit that had terminated if the proper findings are made by the regulatory authority. Accordingly, the statement by the U.S. District Judge Gleason for the Alaska District, which states, '… it may be that under SMCRA the regulatory authority can extend the time to commence mining even after a permit has terminated, provided the statutory grounds for extension have been met' … supports the WVDEP position that extensions may be granted if the permittee supplies a showing that litigation precluding commencement or threatening substantial economic loss without fault of the permittee would result from termination." WVDEP February 10, 2017, letter, p. 2.

As part of our review, we obtained information on the status of the permit since my last decision while the litigation was pending. As noted earlier, in response to Marfork's January 31, 2012, extension request, on February 9, 2012, WVDEP approved an extension of time for Marfork to commence operations on the permit until June 6, 2013. After the January 2012 extension request but prior to the June 6, 2013, expiration date, there is no record of a specific request for an extension to commence operations by Marfork nor any specific grant of an extension by WVDEP. However, WVDEP reports that the permit was "renewed on March 19, 2013, at which time it was reviewed by the agency to determine if it satisfied current environmental regulatory requirements…." WVDEP February 10, 2017, letter, p. 1. It appears that WVDEP treated the 2013 permit renewal as an implicit extension of the period of time within which Marfork had to commence operations.

Less than three years later, on March 14, 2016, Marfork submitted to WVDEP another request to extend the time within which it may commence operations. On March 21, 2016, WVDEP expressly granted the permit extension, extending the time to commence operations to June 6, 2018. WVDEP currently lists the Marfork permit as "A1-Active, Moving Coal Possible."

Discussion

The scope of review.

In reviewing the substantive merits of your request for informal review, OSMRE applies the arbitrary, capricious, or abuse of discretion standard to determine if WVDEP's responses to the

TDN constituted "appropriate action" to cause the violation to be corrected or "good cause" for failing to do so. WVDEP is correct that it is entitled to deference with respect to its TDN responses. The scope of review under the deferential arbitrary and capricious standard is narrow, and OSMRE should not substitute its judgment for that of the agency.

The *Castle Mountain* case.

In *Castle Mountain*, the District of Alaska considered the same question of law at issue here: Whether 30 U.S.C. § 1256(c), SMCRA § 506(c), requires that a permit terminate by operation of law after three years without mining (unless a valid extension has been obtained). OSMRE contended that SMCRA § 506(c) is ambiguous and that OSMRE's interpretation of that section as making a permit subject to termination by the regulatory authority's affirmative action – rather than requiring termination by operation of law – after three years without mining (unless a valid extension has been obtained) was reasonable and owed deference by the court. As discussed above, the District of Alaska found that section 506(c) is not ambiguous and rejected OSMRE's interpretation, finding that, under section 506(c), a permit terminates by operation of law after three years without mining, unless there has been a valid extension. *Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *42-43. Yet, as referenced earlier, the *Castle Mountain* court did not determine whether, and specifically left open the possibility that, a regulatory authority may be able extend the time to commence mining, *i.e.*, grant an extension, even after a permit has terminated:

> Plaintiffs concede that "the statute places no express time limits on when an extension may be granted." Accordingly, it may be that under SMCRA the regulatory authority can extend the time to commence mining even after a permit has terminated, provided the statutory grounds for extension have been met.

Id. at *46-47. OSMRE has carefully considered the *Castle Mountain* decision. As explained in more detail below, I conclude that WVDEP's extension of Marfork's permit in 2012, even though mining under the permit did not commence within three years of permit issuance, was permissible under West Virginia's approved State program.

Whether WVDEP acted arbitrarily and capriciously when it retroactively granted an extension to Marfork in 2012.

The record shows that, as of June 6, 2011, Marfork failed to commence mining operations within three years of permit issuance. WVDEP agrees that Marfork failed to submit a request for a permit extension prior to the expiration of the initial three-year period. Thus, the principal issue here with respect to TDN X12-111-391-002 is whether WVDEP was arbitrary and capricious or abused its discretion in determining that it had validly issued an extension of time to commence operations to Marfork after the three-year statutory window had expired.

Nothing in SMCRA or West Virginia's approved program specifically restricts the time period in which an extension can be granted. Moreover, the District Court's opinion in *Castle Mountain* states that retroactive extension of expired permits may be consistent with SMCRA, and, by extension, an approved State program. Indeed, section 506(c) of SMCRA does not establish that

a regulatory authority is precluded from extending a permit even after the three-year period to commence mining has run. Rather, as noted above, a proviso in section 506(c) provides that "the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee . . . ."

W. Va. Code § 22-3-8(a)(3) is based on section 506(c) of SMCRA. The extension provisos in both provisions, along with the use of the words "reasonable" and "necessary," suggest that a regulatory authority has discretion to extend a permit and that an extension is not limited to a particular point in time, even after the three-year termination period has run. While W. Va. Code § 22-3-8(a)(3) requires that the operator make a "timely" showing of necessity for a requested extension, there is no direction in these exception provisos that an extension has to come at a particular point in time. Both SMCRA and the West Virginia Code provide that once the regulatory authority determines that a permit extension is "necessary," based upon the statutory criteria, the extension must be "reasonable." In sum, like SMCRA § 506(c), W. Va. Code § 22-3-8(a)(3) does not specifically preclude extensions after the three-year period. Given that W. Va. Code § 22-3-8(a)(3) is silent on the issue, I find that WVDEP's long-standing twenty-five year old January 1993 policy is a permissible construction of section 22-3-8(a)(3).

Beyond the timing element, as was made clear in the *Castle Mountain* decision, the statutory grounds for an extension must also be met. In its determination, the CHFO concluded that Marfork had not met the substantive requirements of West Virginia Code § 22-3-8(a)(3) to make a "timely showing that the extensions are necessary by reason of litigation precluding commencement [of operations], or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee . . . ." I note that WVDEP provided a copy of the 2012 extension request from Marfork. *See* January 31, 2012, letter from Stephanie Morgan. This letter explains how litigation served to create complications and delays that prevented Marfork from obtaining its Clean Water Act § 404 "fill" permit necessary to commence operations, thus constituting a condition precluding commencement by reason of conditions beyond the control and without the fault or negligence of the permittee. Based on this rationale, WVDEP granted Marfork's requested extension. In addition to the fact that the extension-criteria issue was never properly before OSMRE because it was beyond the scope of the underlying TDN, the CHFO should not have substituted its judgment for that of the approved regulatory authority. However, from the information before me, it does not appear that the CHFO had a basis for concluding that WVDEP acted arbitrarily or capriciously with respect to this issue.

In light of the foregoing, and the *Castle Mountain* court's statement that, under SMCRA, the regulatory authority might be able to extend the time to commence mining even after a permit has terminated, provided the statutory grounds for an extension have been met, I conclude that, while WVDEP's extension of time to commence operations in 2012 was beyond the three-year period, neither SMCRA nor West Virginia's approved program disallows permit extensions after the three-year mark. As such, it was neither arbitrary nor capricious for the State of West Virginia to interpret its own program provisions as allowing the permit extension it granted to Marfork in 2012. Although the West Virginia Code uses slightly different language than

SMCRA, it does not give clear and unequivocal warning that an extension cannot be granted after a permit terminates for missing the three-year deadline. *See* West Virginia Code § 22-3-8(a)(3). I conclude that WVDEP's actions with respect to the extension it granted in 2012, which were the subject of the underlying TDN X12-111-391-002, were consistent with the approved West Virginia regulatory program and SMCRA and its implementing Federal regulations.[4]

Consequently, I conclude that in 2012, WVDEP did not act arbitrarily or capriciously when, after discovering Marfork's failure to commence operations, it followed its written 1993 policy, gave notice to the permittee of the statutory requirements, and required the permittee to identify its reasons for the delay or face permit termination. I also agree that WVDEP, after receiving and analyzing Marfork's explanations and requests, did not act arbitrarily or capriciously when it established a reasonable extension of time for the commencement of operations (June 6, 2013) and when it took action to ensure that operations on the Marfork permit would not commence with outdated reclamation requirements in place. I do not concur in the CHFO's June 8, 2012, determination that WVDEP's actions were arbitrary, capricious, and an abuse of discretion.[5]

Subsequent extensions of time to commence operations on the Marfork permit.

However, the passage of time does not allow this to be the end of the story. In March 2013, prior to the June 6, 2013, deadline to commence operations or obtain an extension, it appears that WVDEP "implicitly" extended the time for commencement of operations in conjunction with renewing the Marfork permit. Unlike the 2012 extension discussed above, in 2013, it does not appear that Marfork made a request for an extension, or that WVDEP made an express determination that Marfork either satisfied the requirements for an extension or should be granted one. Instead, WVDEP's position seems to be that the processes of granting permit extensions and permit renewals are inextricably linked and that granting a permit renewal necessarily includes granting an extension.

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[4] State programs must consist of elements that are no less stringent than SMCRA and no less effective than its implementing regulations. *See* 30 C.F.R. § 732.15(a) (a state program must be "in accordance with" SMCRA and "consistent with" the Federal regulations) and 30 C.F.R. § 730.5 (defining "in accordance with" and "consistent with").

[5] The CHFO, in concluding that WVDEP's action was arbitrary and capricious, ruled on several issues that were not raised in the underlying TDN. The TDN addressed only Marfork's "[f]ailure to activate mining or apply for [an] extension within 3 years of permit issuance" and the fact that the "state has not terminated [the] permit." TDN X12-111-391-002 (February 15, 2012). Some of the issues addressed by the CHFO in its letters, however, went beyond the failure to meet the three-year time frame. As WVDEP has asserted, these issues were beyond the scope of this TDN and were thus not properly before the agency. However, from the information before me, it does not appear that the CHFO had a basis for concluding that WVDEP acted arbitrarily or capriciously with respect to these issues.

In addition, WVDEP has also argued, among other things, that it is inappropriate to use the TDN process to review a permitting action. I note that the underlying issue in this instance is not a challenge to the validity of the original issuance of the permit. Rather, the underlying issue is the alleged violation of a West Virginia program requirement or condition that permit holders must follow.

Like the court in *Castle Mountain,* I reject the proposition that the regulatory authority can make implicit extensions. In *Castle Mountain*, the state regulatory authority argued that granting a permit renewal constituted an implicit extension: "[A]DNR [the state regulatory authority] maintained that 'by granting a renewal of the permit with full knowledge of the status of Usibelli's operations (*i.e.*, that coal mining operations had not begun), [A]DNR was implicitly granting an extension when it granted the permit renewals. . . ." *Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *11. Rejecting this argument, the *Castle Mountain* court found that granting extensions without making the necessary findings is impermissible: "SMCRA's termination provision is not ambiguous. Rather, Congress has directly spoken to the precise question and has provided that a surface coal mining permit terminates by operation of law when mining operations have not commenced within three years *unless the agency has affirmatively granted an extension for one of the two specified reasons allowed in the statute."* 2016 U.S. Dist. LEXIS 87953, at *42-43 (emphasis added). Here, in connection with the purported extension in 2013, WVDEP failed to indicate how Marfork met either of the two permissible grounds for an extension. This omission effectively caused the permit to terminate once again.

However, as the *Castle Mountain* court noted, 2016 U.S. Dist. LEXIS 87953, at *47, and as I stated above with regard to the 2012 extension, it may be that under SMCRA, the regulatory authority can extend the time to commence mining even after a permit has terminated, provided the statutory grounds for an extension have been met. On March 14, 2016, Marfork requested an extension of the time to commence operations. It provided a one-paragraph justification for its request:

> The permittee believes the loss of the permit would cause an undue financial hardship on Republic Energy, Inc. if not extended. This permit has substantial quantities of recoverable coal that are part of the [sic] an overall scope of project for the area and will become necessary to justify both the capital required and long term development and marketing strategy for future mining associated with this and other permits adjacent to and in the area. Loss of this permit would be a substantial loss to Republic Energy, Inc. For this reason, Republic Energy, Inc. is requesting an extension of permit S-3028-05.

I find that a retroactive extension is permissible if Marfork can show that it meets the statutory criteria for an extension. The approved West Virginia program specifically requires that extension requests must be timely. West Virginia's program also provides that "the secretary may grant reasonable extensions of time upon a timely showing that the extensions are necessary by reason of litigation precluding commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee...." W. Va. Code § 22-3-8(a)(3). Further, WVDEP's January 1993 policy guidance entitled, "Termination of Not Started Permits that are 3 Years Old" provides the following in its sample notification letter template for not started permits approaching three years since issuance:

> The Statute further provides that the Director may grant a reasonable extension of time upon a showing by the permittee that such is necessary for one of the following reasons:
>
> 1. Litigation precluding commencement of operations or threatening substantial economic loss to the permittee; or
> 2. Conditions exist which are beyond the control and without the fault or negligence of the permittee which preclude commencement of the operations.

Letter from Thomas L. Clarke to Thomas Shope, *Ten Day Notice No. X12-111-391-002*, Exhibit 2 (June 18, 2012). *See also* Letter from Keith O. Porterfield to Marfork Coal Company, Inc., *Permit No. S302805* (January 12, 2012); and 30 C.F.R. § 773.19(e)(2).

As I noted earlier, a primacy state regulatory authority has broad discretion in making a determination of this nature. However, a regulatory authority cannot make a decision that is inconsistent with applicable law or without a rational basis after proper evaluation of relevant criteria. The sole rationale advanced by Marfork in its 2016 extension request is that it would lose its investment in the permit if the time for commencing operations is not extended and the permit is terminated. Allowing an extension for this reason would make the statutory criteria meaningless because any permittee can make this argument: all permits require a substantial investment, and termination of a permit necessarily results in loss of that investment. Marfork's request advances no evidence of litigation or specific conditions beyond its control and without its fault or negligence that preclude commencement of mining operations. To give meaning to the statutory provision, the loss of investment in the permit alone cannot be the basis for an extension. To find otherwise would allow the exception to swallow the rule itself.

These specific concerns have not previously been raised to WVDEP because the underlying TDN in this matter related solely to the extension issued in 2012. As such, I am instructing the Charleston Field Office to issue a new TDN to WVDEP to give it an opportunity to take appropriate action to address these potential violations or provide good cause for not taking action with respect to the extensions of time to commence operations set forth above.

Conclusion

As detailed above, I am again reversing the CHFO's determination that WVDEP's actions were arbitrary, capricious, and an abuse of discretion relative to extending the time for commencing operations on the Marfork permit in February 2012. WVDEP has shown good cause for not taking further action because a violation did not exist under its approved program.

I am also hereby instructing the CHFO to issue a new TDN with respect to the extensions to commence coal mining operations granted by WVDEP on March 19, 2013 (implicit extension), and March 21, 2016 (explicit extension), and the current validity of the Marfork permit.

Sincerely,

Glenda H. Owens
Deputy Director

cc: Thomas D. Shope, Regional Director, Appalachian Region, OSMRE
Roger Calhoun, Field Office Director, Charleston Field Office, OSMRE

United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Western Region Office
1999 Broadway, Suite 3320
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NOV 0 4 2014

Russell Kirkham, Coal Regulatory Program Manager
Alaska Department of Natural Resources
Division of Mining Land and Water
550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501

Dear Mr. Kirkham:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has completed the evaluation required by 30 C.F.R. § 842.11(b)(1)(ii)(B) of the responses by the Alaska Department of Natural Resources (DNR), Division of Mining Land and Water, to Ten-Day Notices (TDNs) #X11-141-182-005 and #X11-141-182-006. As you are aware, three public interest groups, Chickaloon Village Traditional Council, Earthjustice, and the Trustees for Alaska, acting on behalf of seven additional organizations (Complainants), filed a citizen complaint with OSMRE alleging that Usibelli Coal Mine Inc. (Usibelli) is conducting surface coal mining operations at the Wishbone Hill Mine without valid permits in violation of the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA). Although the two permits at issue in this case were issued in 1991 and have been transferred to new permittees and renewed multiple times, no surface coal mining operations took place at the mine site until 2010. Complainants charge that the lack of surface mining for that length of time invalidates the permit under the Alaska law, which provides that "[a] permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued." AS 27.21.070(b). They ask "that OSMRE immediately issue a cessation order to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit for those activities."

On December 20, 2011, based on these citizen complaints, OSMRE issued two TDNs to DNR requesting a detailed explanation of the validity of two permit renewals issued to Usibelli. In response to the TDNs, DNR, in an initial response, dated January 6, 2011, combined with the later supplemental information dated August 2, 2012, concluded that its decisions over the years to renew the Wishbone Hill permits included implicit extensions of the time to commence mining and that Usibelli was consequently not operating without a valid mining permit. Because it believed that a violation did not exist under the approved program, DNR concluded it had good cause for not taking action against Usibelli.

I have completed the evaluation required by 30 C.F.R. § 842.11(b)(1)(ii)(B) of DNR's responses to these TDNs. Based on the record before me, and for the reasons set forth below, I find that there is good cause for not taking action against Usibelli, but not for the reasons that DNR articulates. In my opinion, DNR did not follow appropriate procedure in extending the time for Usibelli's predecessors to commence mining; contrary to DNR's arguments, granting extensions by implication is not an acceptable practice. Nevertheless, under Alaska law, permits do not simply terminate by operation of law. To terminate a permit, the regulatory authority must take affirmative action on the record. In this case, DNR failed to do so and, consequently, Usibelli was not operating without a permit. I find that DNR, consequently, had "good cause" for not taking action against Usibelli for operating without a permit. I also find however, DNR had a responsibility to issue prompt determinations on the failure of Usibelli's predecessors to initiate mining and that it failed to do so. This situation cannot be allowed to happen again. Consequently, pursuant to OSMRE's Directive Reg-23, entitled, "Corrective Actions for Regulatory Program Problems and Action Plans," and with your assistance, I intend to create a written Action Plan to address your failure to implement your program provisions on the timely commencement of mining operations.

I. STATUTORY AND REGULATORY BACKGROUND

A. Federal and Alaska Provisions Pertaining to the Extension of Time to Commence Mining, Permit Renewal and Permit Termination

Extensions of the Time to Commence Mining

Both federal and Alaska law require mining operations to commence within three years of permit issuance, although extensions may be granted under certain conditions. The relevant federal provision, section 506(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) specifies that a permit "shall terminate" if the permittee has not commenced operations within a three-year statutory time frame but, under certain conditions, allows the regulatory authority to grant reasonable extensions:

> (c) Termination. A permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit: *Provided,* That the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee: *Provided further*, That in the case of a coal lease issued under the Federal Mineral Leasing Act, as amended, extensions of time may not extend beyond the period allowed for diligent development in accordance with section 7 of that Act: *Provided further*, That with respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee shall be deemed to have commenced surface mining operations at such time as the construction of the synthetic fuel or generating facility is initiated.

30 U.S.C. § 1256(c) (emphasis added).

OSMRE's implementing regulations largely mirror the statutory provision: "A permit shall terminate if the permittee has not begun the surface coal mining and reclamation operation covered by the permit within 3 years of the issuance of the permit." 30 C.F.R. § 773.19(e)(1). However, they allow the regulatory authority to grant a reasonable extension of time for commencement of operations if: (1) the permittee provides a written statement to the regulatory authority showing that an extension of time is necessary for at least one of two enumerated reasons, (2) the time extension is set forth in the permit, and (3) notice of the extension is made public. 30 C.F.R. § 773.19(e)(2) and (4).

Alaska's approved regulatory program similarly provides that "a permit terminates" if operations do not commence within the three year time frame, but allows reasonable extensions:

> A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. The commissioner [of DNR] 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... .

AS 27.21.070(b).

1. Permit Renewals

Both federal and Alaska law also provide for the regulatory authority to approve permit renewals, a matter that is distinct from extensions of the time to commence mining. In both cases, permit terms are generally five years,[1] valid permits carry the right of successive renewal,[2] and a permit renewal grants an additional term not to exceed that of the original permit.[3]

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[1] *See* section 506(b) of SMCRA, 30 U.S.C. § 1256(b) and AS 27.21.070(a).

[2] Section 506(d)(1) of SMCRA provides:

> Any valid permit issued pursuant to this Act shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal and such renewal shall be issued (provided that on application for renewal the burden shall be on the opponents of renewal), subsequent to fulfillment of the public notice requirements of sections 513 and 514 unless it is established that and written findings by the regulatory authority are made that -
>
> (A) the terms and conditions of the existing permit are not being satisfactorily met;
>
> (B) the present surface coal mining and reclamation operation is not in compliance with the environmental protection standards of this Act and the approved State plan or Federal program pursuant to this Act; or
>
> (C) the renewal requested substantially jeopardizes the operator's continuing responsibility on existing permit areas;

B. The TDN Process

Under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1), whenever OSMRE has "reason to believe" that "any person is in violation of any requirement [of SMCRA] or any permit condition required by [SMCRA]," OSMRE must notify the regulatory authority (RA). The RA then has ten days to take appropriate action to cause the violation to be corrected or show good cause for not taking action. *Id.*; *see also* OSMRE's implementing regulation at 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2). The initial notice OSMRE gives to the RA under this provision is commonly referred to as a ten-day notice (TDN). "Appropriate action" includes enforcement or other action to correct the violation. 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). Circumstances constituting "good cause" for not taking appropriate action are set forth in 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). Good cause includes a showing by the state regulatory authority that the possible violation does not exist under the approved state program. *Id.* at § 842.11(b)(1)(ii)(B)(4)(i). OSMRE will accept a regulatory authority's response to a TDN as constituting "appropriate action" or "good cause" unless the regulatory authority's response is arbitrary, capricious, or an abuse of discretion. *Id.* at § 842.11(b)(1)(ii)(B)(2). If the regulatory authority disagrees with OSMRE's determination, the regulatory authority may request informal review. *Id.* at § 842.11(b)(1)(iii).

If the RA fails to take appropriate action, or show the requisite good cause for failing to act, OSMRE will order and conduct a Federal inspection of the surface coal mining operation at which the alleged violation is occurring, unless the information available to OSMRE is a result of a previous Federal inspection. *Id.* at § 842.11(b)(1)(iii)(C) (The ten-day notification period is waived when a person provides OSMRE with adequate proof that an imminent danger of significant environmental harm exists and that the RA has failed to take appropriate action.). If the Federal inspection reveals that a violation exists, OSMRE will take an enforcement action, including issuance of a notice of violation or cessation order, as appropriate.[4] *Id.* at § 843.12(a)(2).

> (D) the operator has not provided evidence that the performance bond in effect for said operation will continue in full force and effect for any renewal requested in such application as well as any additional bond the regulatory authority might require pursuant to section 509; or (E) any additional revised or updated information required by the regulatory authority has not been provided. Prior to the approval of any renewal of permit the regulatory authority shall provide notice to the appropriate public authorities.

30 U.S.C. § 1256 (d)(1). The Alaska statute provides for the right of successive permit renewal as follows:

> 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. Subject to (c) of this section, if a permittee applies for renewal of a permit, the commissioner shall renew the permit after public notice is given in the manner provided in AS 27.21.130…

AS 27.21.080(a).

[3] *See* section 506(c)(3) of SMCRA, 30 U.S.C. § 1256(c)(3) and AS 27.21.080(d).

[4] Under section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2), OSMRE must immediately issue a cessation order when, on the basis of a Federal inspection, OSMRE determines "that any condition or practices exist, or that any

II. FACTUAL BACKGROUND

A. History of the Wishbone Hill Coal Project

The Wishbone Hill Coal Project at issue here consists of two permits located in the Matanuska Coal Field of south-central Alaska, approximately 40 miles northeast of Anchorage.[5] The Project has a convoluted history. As discussed in more detail below, over 18 years went by between the time Alaska granted permits for the Project in 1991 and the time mining commenced in 2010. Over that period, the operation changed hands twice[6] and the State granted three permit renewals. During that time, despite the fact that mining had not commenced, the Wishbone Hill permittees applied for an extension only once. Only once did the State issue a written decision explaining the bases for any extensions, although in another instance a State employee added handwritten annotations to a fax from the then permittee indicating the State employee's approval of the reasons that the permittee gave for justifying an extension of the time to commence mining. The State claims that it implicitly granted extensions three times as logical corollaries of its grants of permit renewals. On June 1, 2010, the third owner of the permit, Usibelli Coal Mine Inc., (Usibelli) finally began operations. Usibelli submitted permit renewal requests for both permits on May 11, 2011. As part of the renewal process DNR required Usibelli to update baseline surface and groundwater information, install additional surface and groundwater monitoring stations, and address aquatic resources on creeks that could be impacted by mining. DNR issued five-year permit renewals for the two permits on October 3, 2014.

The Wishbone Hill surface coal mining permits (permits 01-89-796 and 02-89-796) were originally issued on September 5, 1991, for a five-year permit term ending on September 4, 1996. The permittee submitted the first request for an extension on August 24, 1994, requesting 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.[7] The request included an

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permittee is in violation of any requirement of [SMCRA] or any permit condition required by [SMCRA]" and that condition, practice, or violation creates imminent harm or danger. Under section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3), if OSMRE, on the basis of a Federal inspection, "determines that any permittee is in violation of any requirement of [SMCRA] or any permit condition required by [SMCRA]," and that violation does not create imminent harm or danger, then OSMRE must issue a notice of violation (NOV) to the permittee setting forth a reasonable time for abatement of the violation and providing opportunity for a public hearing. If OSMRE finds that the violation has not been abated within the time provided, OSMRE must order a cessation of surface coal mining and reclamation operations.

[5] Alaska permits 01-89-796 and 02-89-796 for the Wishbone Hill Mine and the Wishbone Hill Mine Road, respectively.

[6] The permits, initially issued to Idemitsu Alaska on September 5, 1991, were transferred to North Pacific Mining Corporation ("NPMC") on September 19, 1995, and then to Usibelli Coal Mine, Inc. ("Usibelli") on December 1, 1997. Unless the context requires more detail, we will refer to the "Wishbone Hill permittees" or the "permittee" in this factual summary.

[7] *See* 1994 Request for extension, Attachment E to the August 2, 2012, Letter from Brent Goodrum, Director, Alaska Division of Mining, Land and Water ("DNR") ("August 2, 2012 Letter").

explanation that ongoing litigation had delayed the start of mining and asserted that the circumstances were beyond the permittee's control and without its fault or negligence.[8] 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.[9]

Prior to the expiration of the first extension, on January 31, 1996, the Wishbone Hill permittee (now NPMC) sent a letter to DNR stating that it would "like to extend the existing permits without any major revision."[10] NPMC stated that it requested the extension because it "is continuing its efforts towards obtaining a partner to assist in the development of the Wishbone Hill coal project. We feel that we are close to securing that partner, but it is clear that the necessary project reviews and engineering studies will not have been completed in time to meet the September 1996 deadline for renewal of the SMCRA permit."[11]

A February 6, 1996, memorandum prepared by Brian McMillen, DNR staff member, and addressed to Jules Tileston, Director of DNR's Division of Mining and Water Management,[12] interpreted NPMC's letter as a request for an extension of time to commence mining and noted that NPMC's justifications for an extension were weak:

> A related problem is that AS 27.21.070(b) states the permit terminates if the permittee does not begin mining within three years (Attached). This would be the second extension. NPMC's justification is weak when compared to the wording in the statute. When the actual request is received you or Sam need to look at the justification and make a decision. If the justification is OK there is plenty of time to complete the renewal before the permit expires in September.

In a letter dated February 7, 1996, DNR relayed to NPMC the concern that NPMC's letter did not contain the information necessary to meet the Alaska's requirements for extending the time required for commencing surface mining operations, stating "in regards to AS 27.21.070(b) your justification for the extension needs to address the requirements in [the] statute."[13]

NPMC made no direct response to DNR's critique of its extension request. Over the next few months, NPMC submitted two applications for permit renewals, the first on May 3, 1996, and

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[8] *Id.*

[9] DNR grant of 1994 extension request. Attachment F to August 2, 2012, Letter.

[10] January 31, 1996, letter from NPMC to DNR. Attachment H to August 2, 2012, Letter.

[11] *Id.*

[12] February 6, 1996, Memorandum from "Brian" to "Jules," Attachment I to August 2, 2012, letter.

[13] February 7, 1996, letter from Sam Dunaway, DNR, to Tom Crafford, NPMC, Attachment J to August 2, 2012, Letter.

the second, a more detailed and enlarged application, on July 11, 1996.[14] On July 9, 1996, however, just before submitting its second application for a permit renewal, NPMC faxed a "draft copy of a renewal cover letter" to DNR that addressed some of the issues pertinent to an extension of the time to commence mining operations.[15] The July 9, 1996, fax, which is dated July 10, 1996, is a draft cover letter for NPMC's second part of its permit renewal application. This faxed "draft" is identical to the "official" cover letter dated July11, 1996, that accompanied NPMC's submission of the "legal and financial" sections of the permit renewal application. The fax and the official July 11, 1996, letter explained that operations had not yet begun at Wishbone Hill because of a "depressed international steaming coal price" and the "complications arising from the Mental Health Trust Lands dispute."[16] The letter also stated that both NPMC and operator Usibelli "recognize the importance of maintaining the existing SMCRA permits for the project," and they "hop[ed] this letter and the accompanying forms satisfy the remaining requirements for renewing the SMCRA permits."[17] The letter also explained that NPMC had signed a Letter of Intent with Usibelli (to whom the permit would later be transferred) to operate and develop the mine. Handwritten on the fax letter are the words "Looks ok to me, Jules, 7/10/96."[18] Mr. Jules Tileson was the Director of DNR's Division of Mining and Water Management at the time. That annotation is one of the few written indications that DNR, in connection with this permit renewal, considered Alaska's standards for extending the time to commence mining.

A second indication that Alaska was considering the standards for extension is the public notice of DNR's decision to approve the coal mining permit renewal for the Wishbone Hill Mine, which was published approximately 30 days prior to approval of the permit renewal. According to the notice, "The applicant has again requested an extension for beginning mining due to ongoing marketing efforts."[19] On October 23, 1996, DNR approved NPMC's applications for permit renewals for five-year terms from October 23, 1996, to September 4, 2001.[20] DNR's approval decision states 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."[21] Its decision did not

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[14] July 11, 1996, Letter from T. Crafford, NPMC, to B. Novinska, DNR, Attachment M to August 2, 2012, Letter.

[15] July 9, 1996, Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR, Attachment L to August 2, 2012, Letter.

[16] *Id.* and July 11, 1996, Letter from T. Crafford, NPMC, to B. Novinska, DNR, Attachment M to August 2, 2012, Letter.

[17] *Id.*

[18] July 9, 1996, Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR, Attachment L to August 2, 2012, Letter.

[19] 1996 Permit Renewal, Public Notice. Attachment N to August 2, 2012, Letter.

[20] *Id.*

[21] *Id.*

expressly address the requirements of AS 27.21.070(b) and did not expressly grant a continuation of extension of time to commence mining.

The Wishbone Hill permittee (now Usibelli) submitted applications to DNR for, and was granted, two more permit renewals, one in 2001 and the other in 2006.[22] None of the materials from these applications (at least those forwarded to OSMRE by DNR) contained a request for extension of time to commence mining.[23] In both instances, DNR's decisions do not reference any requests for extension of the time to commence mining operations and are silent with regard to granting an extension.[24]

On June 1, 2010, Usibelli began surface coal mining activities by constructing a road and parking area in connection with the mine. On May 9, 2011, it filed a request to renew the permits for an additional five years pursuant to AS 27.21.080(d) and 11 AAC90.129(b).[25] As part of its permit renewal process, DNR initiated an extended public comment period, conducted several public outreach meetings with community, native and environmental groups, soliciting input into the permitting process. Additionally, DNR required Usibelli to substantially update its permits.

DNR, on August 2, 2012, submitted to Usibelli a letter addressing the history of the Wishbone Hill permits, as well as its position regarding the current status, along with concerns expressed by the public and DNR staff.[26] To address these concerns, DNR has required Usibelli to install additional ground water monitoring wells and piezometers to gather additional baseline water data. DNR also required Usibelli to substantially update its current permits by revising the operation and reclamation plans, hydrology sections, and fish and aquatic resources information, along with numerous other requirements. In response to concerns raised about potential health impacts from coal mining activities at Wishbone Hill, DNR also had a Health Impact Assessment (HIA) prepared by the Alaska Department of Health and Social Services for the mine.[27]

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[22] 2001, 2006 Permit Renewal Requests and Public Notices. Attachment P to August 2, 2012, Letter. Both renewals were also sent to OSMRE pursuant to 11 AAC 90.117(c). Further, contemporaneous OSMRE annual reports indicate that OSMRE was aware of the renewal process. *See, e.g.,* 2004 OSMRE Oversight Report, Attachment C to August 2, 2012, Letter, (stating that "[Usibelli] has not yet initiated any activity at the Wishbone Hill location"); 2005 OSMRE Oversight Report (same); 2009 Oversight Report (same).

[23] Similarly, an August 8, 2001, notice that DNR published in newspapers to announce its receipt of Usibelli's application did not reference a request for extension of time to commence mining operations. Supplemental Material submitted with January 6, 2012, Letter.

[24] 2001, 2006 Permit Renewal Requests and Public Notices. Attachment P to August 2, 2012, Letter.

[25] May 9, 2011, letter from R. Brown, Usibelli, to R. Kirkum, DNR.

[26] August 2, 2012, letter from B. Goodrum, DNR, to R. Brown, Usibelli.

[27] HIAs are not required by state law, but DNR sees them as a useful tool in addressing health related issues raised by the public during its public outreach efforts.

In the August 2, 2012, letter, DNR placed a hold on all further activities at the Wishbone Hill Mine, other than continued water quality monitoring, until DNR has thoroughly reviewed and acted upon Usibelli's permit renewal application.[28]

In response to the concerns raised by DNR in its August 2, 2012, letter , Usibelli has updated its permit application to address all the issues identified by DNR, including committing to installing new groundwater monitoring wells, collecting and analyzing additional baseline surface and groundwater data, updating drainage control structure designs, collecting and analyzing additional fisheries information for Moose and Buffalo Creeks and accepting criteria to ensure that fish in Moose Creek are not adversely affected by blasting. On October 3, 2014, DNR issued its Decision and Findings of Compliance (Decision), which approved the renewal of the two Wishbone Hill permits. The Decision includes nine stipulations designed to ensure that surface coal mining operations are conducted in compliance with ASMCRA and to minimize impacts local communities. These stipulations include application of the geomorphic reclamation approach during backfilling and grading, a requirement that Usibelli obtain an Alaska Pollution Elimination System Permit before any discharges from the disturbed area occur, the installation of new monitoring wells as agreed to by Usibelli during the permit renewal process, additional pre- and post-development surface and groundwater monitoring, limitations on blasting operations to protect fish in Moose Creek, protection of cultural and historic artifacts (unanticipated finds), and limitations on noise and light impacts on the local community.

B. The Citizens Groups' Challenge to the Wishbone Hill Project

Citizens groups, after first challenging Usibelli's permit renewal in Alaska,[29] submitted citizens' complaints to OSMRE on December 14, 2011.[30] The Complainants alleged that (1) the prior permits issued by DNR under ASCMCRA for surface coal mining operations at the mine terminated by operation of A.S. 27.21.070(b) on September 4, 1996, when DNR failed to act on the request by the permittee at that time for an extension of time to commence mining; (2) DNR thereafter erroneously renewed the terminated permits on multiple occasions and erroneously transferred the permits to Usibelli; (3) the renewal permits currently held by

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[28] *Id.*

[29] On November 28, 2011, 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." The complainants alleged that surface coal mining operations at Wishbone Hill were being conducted by Usibelli without a valid permit in violation of the ASCMCRA. 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. *See* DNR response to November 28, 2011, letter, Attachment A to August 2, 2012, Letter.

[30] OSMRE received letters dated December 2, 2011, from the Chickaloon Village Traditional Council; December 14, 2011, from Earthjustice; and December 14, 2011, from the Trustees for Alaska, on behalf of the Friends of MatSu, Castle Mountain Coalition, Alaska Center for the Environment, Cook Inletkeeper, Alaska Community Action on Toxics, Pacific Environment, and the Sierra Club (collectively "Complainants").

Usibelli are thus invalid; and (4) in June 2010, Usibelli conducted surface coal mining activities at the mine without valid permits in violation of A.S. 27.21.060(a). The Complainants ask, "that OSMRE immediately issue a cessation order pursuant to 30 C.F.R. § 843.11 to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit for those activities."

Based on the citizen complaints, OSMRE issued two Ten-day Notices (TDN) to DNR on December 20, 2011, requesting a detailed explanation of the validity of the two permit renewals issued to Usibelli.[31] On January 12, 2012, OSMRE received DNR's hard copy response to the TDNs. The DNR asserted 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. After reviewing this response, OSMRE, in a letter dated July 19, 2012, concluded that significant gaps existed in the permitting information that it had received from DNR. It requested DNR to conduct a permit file review and to advise OSMRE if additional pertinent information is available for our evaluation.

DNR responded by letter dated August 2, 2012, and provided supplemental materials.[32] In its letter, DNR contends that OSMRE lacks authority to use the TDN process to challenge DNR's permit renewal decisions. Once again, DNR asserted that extensions of time to begin coal mining were implicit in the successive renewals granted to the Wishbone Hill permittees. It also pointed out that 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 and asserted that implicit extensions are not *per se* invalid.

III. ANALYSIS

A. OSMRE Has Authority to Issue Ten Day Notices in This Context

DNR contends that OSMRE lacks authority to use the TDN process to question DNR's permit renewal decisions. Specifically, DNR asserts that SMCRA only affords OSMRE oversight authority to enforce a State's approved program where violations involve matters that occur on-the-ground as opposed to those which involve permitting decisions. DNR contends that using the TDN process to correct DNR's permitting decisions does not comport with notions of fairness and equity because it would provide OSMRE and others a perpetual right to challenge such decisions and undermine regulatory certainty. Finally, DNR contends "[t]he TDN[s] in this case [are] 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" and "would invalidate the notion of exclusive jurisdiction that primacy states rely

[31] TDN #X11-141-182-005 was issued with regard to permit number 01-89-796 for the Wishbone Hill Mine. TDN #X11-141-182-006 was issued with regard to permit number 02-89-796 for the Wishbone Hill Mine Road.

[32] The supplemental materials consisted of some documents previously submitted as part of DNR's initial response dated January 6, 2012, as well as new documents intended to demonstrate DNR's compliance with its permitting regulations.

upon under SMCRA and essentially deem that permits are really only valid when OSMRE explicitly says they are."

DNR's contention is simply not supported by the law.[33] OSMRE has oversight authority to enforce the Alaska state program under the statutory provisions of 30 U.S.C. § 1271(a)(1), as implemented in 30 C.F.R. §§ 842.11(b)(1) and 843.12(a)(2). The pertinent provisions of 30 U.S.C. § 1271(a)(1) and 30 C.F.R. §§ 842.11(b)(1) and 843.12(a)(2) do not differentiate between types of violations. More specifically, there is no distinction in the provisions between on-the-ground violations and permitting violations. Section 521(a)(1) of SMCRA provides in pertinent part:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation *of any requirement of this Act* [SMCRA] or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists.

30 U.S.C. § 1271(a)(1)(emphasis added). The plain meaning of these provisions is that they apply to all types of violations, including on-the-ground violations of performance standards or permit conditions and violations of permitting requirements. Interpreting these provisions otherwise, as DNR suggests, is contrary to the plain meaning of the provisions. Thus, OSMRE has clear authority under SMCRA and implementing regulations to use the TDN process to address DNR's permitting issues.

B. The Alaska Regulatory Authority Did Not Follow Appropriate Procedure in Connection with Extensions of the Time to Commence Mining

It is not disputed that Idemitsu Alaska, NPMC and Usibelli all failed to commence mining operations within three years of permit issuance. It also is not disputed that Usibelli did not, as required at AS 27.21.070, request an extension as part of both its permit renewal applications. DNR addresses these problems by asserting that "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." August 2, 2012, Letter at 15. DNR then asserts that it granted a series of implicit extensions in this case: "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." August 2, 2012, Letter at 7.[34]

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[33] OSMRE's TDN authority is explained more fully in the attached Marfork decision, which provides detailed discussions of the legislative history, implementing policy, court decisions, and Interior Board of Land Appeals (IBLA) rulings regarding OSMRE's use of TDNs to address permit related violations. *See* August 20, 2013, Letter from G. Owens, OSMRE, to T. Clark, WVDEP.

[34] DNR also cites the practice in West Virginia in support of its position. *Id.* at 17-18. In our recent opinion in Marfork, we have recently criticized West Virginia's practice. *See* August 20, 2013, Letter.

DNR cites the July 9, 1996, "draft copy of a renewal cover letter" that the Wishbone Hill permittee faxed to DNR as evidence for its implicit consideration and granting an extension at the time of the first permit renewal.[35] As described above, that draft letter gave two reasons as to why operations had not yet begun at Wishbone Hill — a "depressed international steaming coal price" and "the Mental Health Trust Lands litigation" — and a DNR staff member had written "Looks ok to me" on the fax. DNR also appeals to post hoc evidence of bad market conditions to suggest that extensions were justified in connection with the Wishbone Hill permits.[36] There are, however, only two grounds for extension pertinent here: "the extensions [must be] 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." AS 27.21.070(b). The Mental Health Trust Lands litigation might have satisfied the first prong of the regulatory standard if this litigation did indeed "preclude[] the commencement of the operation or threaten[] substantial economic loss to the permittee." That litigation however, was settled on June 10, 1994,[37] so it is hard to see how it could still have been precluding the commencement of mining or threatening economic loss some two years later in 1996. Even more importantly, we have no indication of a conclusion by DNR that the litigation had this effect. The other reason the permittee gave for an extension — "depressed international steaming coal price" or "market conditions" — is just as problematic.[38] For an extension to be granted on such grounds, DNR would have had to conclude that "depressed market conditions" fall into the category of "reasons beyond the control and without the fault or negligence of the permittee." It is highly questionable whether such an interpretation would be acceptable under the statute or implementing regulations, since it would allow permits to remain dormant for years awaiting better market conditions in contravention of Congressional intent.[39] The record could have benefited greatly from an express decision on this important issue. Although the handwritten notes on the faxed letter show that DNR personnel may have considered these matters when they renewed the Wishbone Hill permits in 1996, the informal way of memorializing such an important decision is far from the best practice.

It is significant, moreover, that, at the time of the 1996 permit renewal, the State itself recognized that too much time was passing by without the permittee's commencing mining. In the cover letter to its October 23, 1996, permit renewal decision, it stated that, "should

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[35] July 9, 1996, Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR. Attachment L to August 2, 2012, Letter.

[36] DNR notes that on January 3, 2012, "[Usibelli] 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." August 2, 2012, Letter at 11.

[37] Links to the settlement agreement and court order for the Mental Health Trust Litigation are as follows:
http://akmhcweb.org/Docs/TrustSettlementAgreement.pdf
http://akmhcweb.org/Docs/finalapproval.pdf

[38] From the record, "market conditions" and not the litigations appear to be the reasons most commonly cited as a post hoc justification for these extensions. *See* 1996 Permit Renewal, Public Notice. Attachment N to August 2, 2012, Letter.

[39] As discussed *infra* at page 16,

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." *See* Attachment N to August 2, 2012, Letter. Yet after that, some fourteen years went by during which the State granted two permit renewals before the Wishbone Hill permittee finally commenced mining operations. In connection with these renewals, neither the mining operator nor the State set out any grounds at all justifying extensions of the time to commence mining. The record contains no explanation as to how the concerns the State enunciated in 1996 had been alleviated by the time it granted the permit renewals in 2001 and 2006.

In short, we reject DNR's argument that it is acceptable practice to implicitly decide to extend the time to commence mining.[40] Although the record indicates that there might have been grounds to justify at least some of the extensions, neither we, the public, nor the permittees themselves, have any way of ascertaining the rationale behind DNR's decisions. This absence of a record has opened the door for the TDN challenge in this case. States need to base their extension decisions on the factors set out in their regulatory programs and they need to make these decisions in writing, not implicitly as Alaska asserts it did here. Despite these procedural errors, however, as explained in the next section, I do not think the appropriate remedy here is to close down Usibelli's ongoing operation. Rather, as explained below, the appropriate remedy is to require DNR to follow appropriate procedures.

C. The Wishbone Hill Permits Did Not Terminate By Operation of Law and Usibelli Consequently Was Not Operating Without a Permit

Complainants alleged that surface coal mining operations at Wishbone Hill are being conducted by Usibelli without a valid permit in violation of the ASCMCRA. Although we sharply disagree with the State's arguments on our TDN process and on the adequacy of granting implicit extensions, we do agree with the State's assertion that "[t]he permit holder is not operating without a permit." August, 2, 2012, Letter at 22.

Complainants charge that, under the applicable statutory and regulatory provisions, Usibelli is operating without a permit because the Wishbone Hill permits terminated by operation of law after their predecessors failed to begin mining within the required three-year time frame and Alaska failed to grant them extensions. As discussed in the statutory and regulatory background section above, section 506(c) of SMCRA specifies that a permit "shall terminate" if the permittee has not commenced operations within a three-year statutory time frame. OSMRE's regulation mirrors the statutory provision (*see* 30 C.F.R. § 773.19(e)(1)), while the pertinent Alaska statute provides that "[a] permit terminates" if the permittee does not begin mining within three years (*see* AS 27.21.070(b)). Under Complainants' reading of the statutes and regulations, absent an extension granted before the three-year period expired, the regulatory authority would have no discretion to allow any operations to continue that had begun mining after the three-year statutory time frame. In such a circumstance, the regulatory

[40] As DNR itself concedes in a footnote, there is a requirement in the Alaska regulations at 11 AAC 90.117(c) that extensions should be documented in permit renewal public notices. August 2, 2012, Letter at 17 n.74.

authority would have to recognize that the permit had terminated automatically and, if operations had already commenced, would have to order cessation of the operations because the permittee would be operating without a valid permit.

Alaska's position is that if mining operations do not commence within three years, administrative action is needed to terminate a permit. In Alaska, a permit may only be revoked for failure to comply with an order of the Commissioner of the Department of Natural Resources to take action required by the statute or its regulations "after opportunity for a due process hearing." AS 27.21.030(6). One of the reasons, consequently, that Alaska asserts that Usibelli's permits remain valid is that there has been no such due process hearing. August 2, 1012, Letter at 19.

Two lines of authority govern our decision as to whether DNR's interpretation is correct. The first line of authority sets out general principles of statutory interpretation. Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), an agency (and courts) must follow unambiguous directives set forth in a statute. "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id. at* 842. But if a statute is silent or ambiguous with respect to a specific question, the agency may supply the answer "based on a permissible construction of the statute." *Id. at* 843. "Permissible" interpretations are those that are "rational and consistent with the [statute]." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987). Put differently, if a statute is ambiguous on an issue, a reviewing court must defer to the agency's interpretation as long as it is "reasonable." *Chevron*, 467 U.S. at 844. Under the *Chevron* line of precedent, if SMCRA is silent on the issue of whether termination of permits should automatically result when permits are not commenced within three years, then OSMRE may permissibly interpret the statute (and our regulations implementing the statute) as either effecting an automatic termination or not doing so, so long as the interpretation it adopts is reasonable.

A second line of authority relates to so-called "automatic forfeitures." In this connection, we note that the Complainants reading of the pertinent Federal and state provisions could pose severe consequences to permittees, who have invested substantial amounts of money in preparation for mining operations or who have actually commenced mining operations after the three-year statutory time frame had lapsed, but before the regulatory authority took enforcement action. If SMCRA, the Federal regulations, or the Alaska statute are construed as bringing about automatic and mandatory termination of permits where mining has not commenced within the statutory timeframe, the effect would be forfeitures of these permits by operation of law. As a general proposition, however, "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. Model Ford*, 307 U.S. 219, 226 (1939) (citing *Farmers' and Mechanics' National Bank v. Dearing*, 91 U.S. 29, 33-35 (1875)). As the United States Court of Appeals for the District of Columbia has recognized, given the potentially "horrendous" consequences, an agency should not construe a statute to impose automatic forfeiture unless clearly required to do so: "It is well understood that statutes imposing a forfeiture, particularly the horrendous penalty of forfeiture of an entire cargo worth millions of dollars, are to be construed strictly. The

rationale for such strict construction that persons should receive clear and unequivocal warning before facing exposure to harsh penalties is especially applicable here, where the penalty for noncompliance is enormous." *American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1165 (D.C. Cir. 1978) (footnotes omitted). Under this line of authority, if forfeiture is not mandated by "clear and unequivocal" language in SMCRA and the applicable Federal regulations, then we should not construe our statute and regulations as imposing this harsh penalty. And if the Alaska program provisions do not clearly and unequivocally mandate forfeiture in this kind of situation, then we cannot require the Alaska regulatory authority to interpret its program as effecting an automatic forfeiture when a permittee misses the three-year deadline.

It is highly significant, then, that neither SMCRA, the Federal regulations, nor the Alaska statute expressly state whether the termination occurs automatically by operation of law at the end of that time frame or whether administrative action is required to terminate the permit. Moreover, the use of the word "shall" in SMCRA and the Federal regulations does not resolve that question. As Justice Ginsburg explained in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), "[t]hough 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" Id. at 432-33, n.9 (quoting D. Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 402-403 (1992) ("'shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context"); B. Garner, *Dictionary of Modern Legal Usage* 939 (2d ed. 1995) ("Courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa." (Emphasis in original). The use of the word "shall" in an enforcement provision does not necessarily give rise to a mandatory, nondiscretionary duty. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 835 (1985); *Sierra Club v. Jackson*, 724 F. Supp. 2d 33, 38 n.1 (D.D.C. 2010) ("the mandatory meaning of 'shall' has not been applied in cases involving administrative enforcement decisions").

Typically, Congress, as in other statutes that the U.S. Department of the Interior administers, uses language that leaves no doubt about its intent to effect an automatic forfeiture. For example, the 1872 Mining Law contains the following provision: "Failure to pay the claim maintenance fee or the location fee as required by this subtitle ... shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law." 30 U.S.C. § 28i. Likewise, the Federal Land Policy and Management Act contains the following provision: "(c) The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner...." 43 U.S.C. § 1744(c). As these provisions indicate, Congress knows how to provide specific, express language for automatic termination, abandonment, or forfeiture when the regulated party fails to take certain statutorily required actions.

Section 506(c) of SMCRA, by contrast, does not provide such a "clear and unequivocal" warning that automatic forfeiture of the permit could result from missing the three-year deadline. The absence of language of this type in section 506(c) indicates that Congress did not intend automatic forfeitures of SMCRA permits in cases where mining has not commenced within three years of permit issuance. Therefore, OSMRE interprets the

language of SMCRA to mean that, if mining operations do not commence within three years, and no extension is granted, the permit will not terminate automatically; rather, the permit remains valid until the regulatory authority takes an affirmative action to terminate it. Prior to termination, the regulatory authority must follow its applicable administrative procedures, if any, in terminating the permit. Not only is it *permissible* and *reasonable* under the *Chevron* line of authority to interpret the statute in this fashion, it is the *preferable* interpretation under the line of cases that disfavor automatic forfeitures. Because courts disfavor forfeitures and section 506(c) does not contain express automatic forfeiture terminology, the language of section 506(c) is ambiguous. Based on OSMRE's authority under *Chevron*, OSMRE interprets the word "shall" in section 506(c) to not require automatic permit termination.

The same considerations apply to State program provisions that parallel the language of of section 506(c). States, in the exercise of their discretion, are free to interpret such provisions as requiring termination by operation of law when permittees fail to commence mining operations within the statutory time frame. Unless States adopt such an interpretation, however, the failure to commence mining operations within three years does not cause the operations to terminate by operation of law, but rather makes them subject to termination by the regulatory authority. Here, although the Alaska statute uses slightly different language than SMCRA, it does not give "clear and unequivocal" warning that automatic termination of the permit could result from missing the three-year deadline. *See* Alaska statute AS 27.21.070(b). Consequently, Alaska's position that its statute does not result in automatic termination when a permittee misses the three-year deadline is consistent with the language of its statute and with the case law pertaining to forfeitures. This interpretation is consistent with both the approved Alaska regulatory program and with the Federal regulations and is no less stringent than section 506(c) of SMCRA. Consequently, although the Wishbone Hill permits were arguably subject to termination, those permits remain valid because the State never affirmatively acted to terminate them. Therefore, when Usibelli commenced operations in 2010, it was operating with a valid permit and was not acting in violation of SMCRA or the approved Alaska regulatory program. Alaska thus had good cause for not taking the action against Usibelli that Complainants have requested.[41]

The complainants have asked that we shut down this operation because of irregularities in the State's implementation of its program. We believe that doing so would be contrary not only to the provisions of the Alaska program, but also to the purposes for which section 506(c) of SMCRA was enacted. The legislative history shows that Congress's concern in enacting section 506(c) was two-fold: (1) to ensure that reclamation requirements did not become outdated because of delays in mining and (2) to ensure prompt development of the nation's coal resources.[42] OSMRE, in accordance with its statute, regulations and policy, addressed

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[41] This conclusion does not mean that DNR properly fulfilled all of its duties under the program. To the contrary, as discussed below, DNR's practice of extending time "implicitly" and its failure to begin termination proceedings when required must be remedied going forward.

[42] Congress's intentions in enacting section 506(c) may be gleaned from various reports and floor discussions over the years prior to SMCRA's enactment in 1977. As early as 1973, the version of the legislation that would eventually become SMCRA contained a provision that required the termination of permits three years after issuance if operations had not begun. The Senate report on that bill explained that that provision "assure[d] that no one will be locked into outdated reclamation requirements because permits are taken out and renewed without operations being undertaken ...." S. Rep. No. 93-402, at 54 (1973). Floor debates in 1975 over a version of

the concerns expressed by the Complainants by issuing TDNs to the Alaska DNR. The State is actively working to ensure that the reclamation requirements of Usibelli's permits are not outdated. In response to OSMRE and the Complainants, the State has required Usibelli to gather additional baseline water data; update its current permits by revising the operation and reclamation plans, hydrology sections, and fish and aquatic resources information; and the State prepared an HIA. The draconian and counterproductive remedy of shutting Usibelli down would run counter to the second purpose of section 506(c), ensuring the prompt development of the nation's coal resources.

D. The Appropriate Remedy Is To Require the State of Alaska To Follow Appropriate Procedure

Although I find that Usibelli has not been operating without a permit, that does not mean that no appropriate remedy exists in this case. In a previous section of this letter, I rejected your argument that it is acceptable practice to make "implicit decisions" about extending the time to commence mining. DNR had a responsibility to issue prompt, explicit determinations on the failure of Usibelli's predecessors to initiate mining and failed to do so. I conclude that the appropriate remedy here is to require you to correct the implementation of your program.

If an operator does not initiate mining and its permit becomes subject to termination, the State regulatory authority should promptly take an administrative action. It cannot simply do nothing or let mining go on by default, as Alaska did here. In addressing failures to commence mining, a State has at least two procedural options. Like West Virginia, it might use a formal process that first gives notice to the permittee with an opportunity to rebut, followed by a written decision by the regulatory authority addressing the issue.[43] A simpler alternative is for the State to issue a written notice of termination that squarely addresses the issue of failure to commence operations and that explains the State's reasons for its determination. In either case, the regulatory authority has an affirmative duty to monitor whether timely mining operations are occurring and to issue prompt determinations in cases where mining operations have not commenced within three years.

In its August 2, 2012 letter, DNR compares its policies and actions in this case with those of West Virginia in connection with the Marfork Coal Company. See OSMRE's August 20,

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SMCRA that had been vetoed by President Ford offered additional explanations. *See, e.g.*, 121 Cong. Rec. 13,370 (1975) ("The vetoed bill provided that the permit would lapse 3 years after its issuance if development of the mine had not commenced. This is a significant provision as there are vast amounts of coal currently under Federal lease that are not being developed to meet the Nation's energy needs."); 121 Cong. Rec. at 6,174 ("The purpose of the section ... was to provide that, once a permit was given for the mining of coal, there would be immediate and prompt mining, and that someone would not sit on a permit and hold up the development of coal operations.").

[43] In West Virginia, pursuant to a January 1993 policy entitled, "Termination of Not Started Permits that are 3 Years Old," if a permittee misses the three-year deadline, West Virginia must first give notice to an operator before it acts to terminate the permit for failure to start mining within three years of permit issuance. If such notice is not given, the permit does not terminate automatically and, until notice is given or in response to notice given, the permittee may still seek, and be granted, an extension.

2013, Decision on Request for Informal Review, Ten Day Notice X12-111-391-002;Marfork Coal Company, Inc., Eagle II Mine, Permit Number S-3028-05 ("Marfork"). In the Marfork matter, OSMRE concluded that the West Virginia Department of Environmental Protection (WVDEP) did not act arbitrarily or capriciously when it determined that the Marfork permit, under which mining operations did not commence within three years of permit issuance, had not terminated by operation of law, but was instead subject to termination by WVDEP. The facts there, however, were significantly different from those in this case. When WVDEP discovered Marfork's failure to commence operations, it followed the State's written policy, gave notice to the permittee of the statutory violation, and required the permittee to identify its reasons for the delay or face termination. After receiving and analyzing Marfork's explanation and request, WVDEP established a reasonable extension of time for the commencement of operations and took action to ensure that operations on the Marfork permit would not commence with outdated reclamation requirements in place.

Alaska did almost none of these things, although in recent years it has taken action to update reclamation requirements. In fact, the abject failure of Alaska to make a substantive determination has had the effect of keeping Wishbone Hill permits alive simply by regulatory default.[44] This situation cannot be allowed to happen again. Consequently, I request that, pursuant to OSMRE's Directive Reg-23, entitled, "Corrective Actions for Regulatory Program Problems and Action Plans," you work with me to prepare a written Action Plan to address your failure to implement your program provisions on the timely commencement of mining operations.

IV. CONCLUSION

For foregoing reasons, OSMRE cannot mandate that the State of Alaska interpret its program provisions to require automatic termination or forfeiture in cases where mining has not commenced within three years. Alaska's position that its statute does not result in automatic termination when a permittee misses the three-year deadline is consistent with the language of its statute and with the case law pertaining to forfeitures. I conclude that this interpretation is consistent with both the approved Alaska regulatory program and with the Federal regulations and that it is no less stringent than section 506(c) of SMCRA. Under such an interpretation, permits do not simply terminate by operation of law. To terminate a permit, the regulatory authority must take affirmative action on the record. In this case, DNR failed to take such action and, consequently, Usibelli was not operating without a permit. I find that DNR, consequently, had "good cause" for not taking action against Usibelli for operating without a permit. I also find however, DNR had a responsibility to issue prompt determinations on the failure of Usibelli's predecessors to initiate mining and that it failed to meet its responsibility. This situation cannot be allowed to happen again. Consequently, in accordance with OSMRE's Directive Reg-23, I am asking you to work with me to prepare and implement a written Action Plan to address the failure to implement your program provisions on the timely

[44] Alaska has presented some evidence that its laws require a formal procedure like West Virginia's. As mentioned earlier, in Alaska, a permit may only be revoked for failure to comply with an order of the Commissioner of the Department of Natural Resources to take action required by the statute or its regulations "after opportunity for a due process hearing." AS 27.21.030. The fact remains, however, that the State took no explicit action to address the failure to commence operations. The State should not allow permits to continue in effect because of its own inaction.

commencement of mining operations. I hope that that you will fully cooperate with this effort, that the problems identified in this memorandum will be resolved, and that further administrative action will be unnecessary.

In order to begin work on your Action Plan, please contact me at 303-293-5041.

You may appeal our decision regarding your responses to the TDN to the Deputy Director within five (5) days of receipt of this letter. You should address any appeal to:

Glenda Owens, Deputy Director
Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue NW
Washington, DC 20240

If you have any questions regarding the appeal process, you may contact me at 303-293-5041.

Sincerely,

Robert C. Postle, Manager
Program Support Division

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CASTLE MOUNTAIN COALITION, *et al.*, Plaintiffs, v. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *et al.*, Defendants, and USIBELLI COAL MINE, INC. and STATE OF ALASKA, Intervenor-Defendants.	Case No. 3:15-cv-00043-SLG

ORDER RE MOTION TO ALTER OR AMEND JUDGMENT

Before the Court at Docket 79 is Intervenor-Defendant Usibelli Coal Mine, Inc.'s Motion to Alter or Amend the Judgment. Usibelli asks this Court to alter the judgment at Docket 78 on the grounds that the judgment is "based on a manifest error of law."[1] The Court invited the other parties' responses,[2] and each party responded.[3] Oral argument was not requested and was not necessary to the Court's decision. The parties are familiar with the factual and procedural background in this case, which is set out in the Court's

[1] Docket 80 at 2 (citing FED. R. CIV. P. 59(e) and *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011)).

[2] Docket 81.

[3] *See* Docket 90 (OSM's Opp.); Docket 91 (Plaintiffs' Opp.); Docket 92 (State of Alaska's Response in Support).

July 7, 2016 order at Docket 77 that granted summary judgment to Plaintiffs. Although the Court will deny Usibelli's motion to alter the judgment, this order is intended to clarify certain aspects of the Court's July 2016 order.

Usibelli makes three primary contentions in its motion. First, it asserts that federal law does not play any role in permitting decisions in "primacy" states like Alaska because the State has exclusive jurisdiction over Usibelli's permits. Second, and relatedly, it argues that federal oversight of a state program enacted pursuant to SMCRA is limited to programmatic review of the state's program, such that OSM has no authority to review DNR's individual permitting decisions. Third, Usibelli asserts that the applicable federal regulations require OSM to defer to DNR's interpretation of state law.[4]

Usibelli's motion suggests that it may fundamentally misapprehend the scope of this Court's prior order. Usibelli asserts that the Court erred by "evaluat[ing] the validity of Usibelli's permits" under federal law instead of under Alaska law and urges the Court to uphold OSM's determination because DNR has already determined the permits are valid under Alaska law.[5] But the Court's July 2016 order did not evaluate the validity of Usibelli's permits. Rather, because this case was an appeal from a determination of a federal agency, the Court reviewed only the validity of OSM's determination that DNR had shown good cause for not taking corrective action against Usibelli.[6]

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[4] *See* Docket 80 at 3-4.

[5] Docket 80 at 2, 10.

[6] *See* Docket 26-3 at 6 (OSM's decision).

Under the APA, a court must "hold unlawful and set aside" an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7] In OSM's decision,[8] OSM strived to interpret federal law to determine whether the State's interpretation of its own laws was itself arbitrary or capricious, and specifically whether it was "no less stringent" than federal law required.[9] Because the basis for OSM's decision was its interpretation of federal law, the Court reviewed OSM's interpretation of that law.[10] The Court found that OSM's decision was "not in accordance with law" because its interpretation of SMCRA was contrary to the "shall terminate" provision in 30 U.S.C. § 1256(c). Having concluded that OSM's interpretation was erroneous, the APA required the Court to "hold unlawful and set aside" the agency decision.[11] On remand, OSM will assess DNR's explanation for its failure to act, and will determine, applying this Court's

[7] 5 U.S.C. § 706(2)(A).

[8] The decision that was appealed is reprinted in Docket 26-2, at pages 7-18 and continues at Docket 26-3, at pages 1-7.

[9] *See* Docket 26-3 at 6 ("I conclude that [Alaska's] interpretation . . . is no less stringent than section 506(c) of SMCRA.").

[10] *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also MPS Merchant Servs., Inc. v. FERC*, 2016 WL 4698302 (9th Cir. Sept. 8, 2016). The reason for this rule is to ensure that the policy discretion that Congress assigned to the agency is in fact exercised by the agency, and not by a court. *Louis v. Dep't of Labor*, 419 F.3d 970, 977-78 (9th Cir. 2005)

[11] The statute governing the Court's review uses the word "shall." 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

interpretation of the statute, whether the State has demonstrated the requisite good cause for its inaction.

The Court also finds that Usibelli's premise regarding the exclusivity of state law is not accurate. Federal law sets forth explicit exceptions to a primacy state's "exclusive jurisdiction."[12] 30 U.S.C. § 1253(a) provides that primacy states attain "exclusive jurisdiction . . . *except as provided in section 1271* and 1273 of this title and subchapter IV of this chapter." Section 1271—the section relevant here—explicitly provides for OSM's review of violations of federal law.[13] An operator such as Usibelli cannot reasonably rely on a state law that is less stringent than federal law. Rather, a state program must necessarily comply with the minimum standards set by federal law,[14] and SMCRA plainly contemplates continuing federal oversight as laid out in 30 U.S.C. § 1271.

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[12] *See Farrell-Cooper Min. Co. v. Dep't of Interior*, 728 F.3d 1229, 1232 (10th Cir. 2013) ("States have 'exclusive jurisdiction over the regulation of surface coal mining and reclamation operations' within their borders, subject to three statutory exceptions." (quoting 30 U.S.C. § 1253(a) (citation omitted)).

[13] 30 U.S.C. § 1271(a) ("Whenever . . . the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter . . . [and] the State regulatory authority fails within ten days after notification . . . to show good cause . . . the Secretary shall immediately order Federal inspection of the surface coal mining operation . . . .").

[14] *See* 30 U.S.C. § 1253(a)(1) (providing that state laws must "provide[] for the regulation of surface coal mining and reclamation operations in accordance with the requirements" of SMCRA); *id.* § 1255 (providing that state laws must be at least as stringent as SMCRA); *see also Penn. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 324 (3d Cir. 2002) (noting that state law controls in a primacy state "[u]nless an element of an approved state program is inconsistent—*i.e.*, less stringent than—the federal objective it implements").

Usibelli also asserts that any federal oversight is limited to programmatic review of state programs. But federal law provides a "floor" that requires a primacy state's compliance with SMCRA and requires OSM to ensure each state's compliance with federal law.[15] This means that, pursuant to 30 U.S.C. § 1271(a) and 30 C.F.R. § 842.11, OSM can review a state's individual permitting decisions.[16] Indeed, the statute directs the Secretary to act when she "has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter."[17] And the regulation provides that the Secretary "shall conduct inspections of surface coal mining and reclamation operations" in order to ensure compliance with governing law, and to "determine whether any notice of violation or cessation order issued during an inspection . . . has been complied with."[18] The federal statutory and regulatory provisions expressly provide for more than programmatic review of a state's laws and regulations.[19]

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[15] *Cf. Penn. Fed'n of Sportsmen's Clubs*, 297 F.3d at 317 ("[T]he Secretary retains a limited and ordered federal oversight role to ensure that the minimum requirements of SMCRA are being satisfied.").

[16] *Coteau Prop. Co. v. Dep't of Interior*, 53 F.3d 1466, 1474 (8th Cir. 1995) (noting that OSM has authority to review state permitting decisions "whether based on state or federal regulations").

[17] 30 U.S.C. § 1271(a). SMCRA defines "person" to include "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." *Id.* § 1291(19).

[18] 30 C.F.R. § 842.11(a)(4).

[19] *See also* 30 C.F.R. § 843.11(a)(1) (authorizing the Secretary to "order a cessation of surface coal mining and reclamation operations" when "she finds, on the basis of any Federal inspection, any condition or practice, or any violation of the Act" which creates a danger to the public or the environment).

Finally, Usibelli errs in its description of the deference that OSM must accord to the State's interpretation of Alaska law. Under the federal regulations, OSM will not conduct an inspection if the State regulatory authority "show[s] good cause for" its failure to take corrective action.[20] And "good cause" includes a state's finding that "[u]nder the State program, the possible violation does not exist."[21] But contrary to Usibelli's assertion, OSM is not required to unconditionally accept a primacy state's assertion that there is no violation of state law and accordingly to decline any inspection. Rather, the regulation also provides that only "an action or response by a State regulatory authority that is not *arbitrary, capricious, or an abuse of discretion* under the state program shall be considered . . . 'good cause.'"[22] Conversely, then, a state response that is arbitrary, capricious, or an abuse of discretion is *not* good cause. Thus, pursuant to the federal regulation, OSM may not simply defer to Alaska's interpretation of state law. Rather, OSM must review the state's response—including its contention that there is no violation under state law—for arbitrariness, capriciousness, or an abuse of discretion.[23]

As the Court held in its previous decision, "SMCRA sets the floor to which state programs must comply, [and] Alaska's statute must be in accordance with" the SMCRA.[24]

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[20] 30 C.F.R. § 842.11(b)(1)(ii)(B)(1).

[21] 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i).

[22] 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) (emphasis added).

[23] And, if OSM's subsequent decision is appealed, a reviewing court will review OSM's determination and set it aside if it is "arbitrary, capricious, [or] an abuse of discretion," and will also set it aside if it is "otherwise not in accordance with law," including if it is not in accordance with SMCRA. 5 U.S.C. § 706(2).

[24] Docket 77 at 30-31.

The proper interpretation of state law, and OSM's review of DNR's interpretation of Alaska law, is necessarily derived from the proper interpretation of federal law. The Court agrees with the State and with OSM that it is now the task of OSM, in the first instance, to determine whether Alaska's program is in accordance with SMCRA, applying the interpretation of that law as set forth in the Court's July 7, 2016 order.[25]

Accordingly, Usibelli's Motion to Alter or Amend the Judgment at Docket 79 is DENIED.

DATED this 26th day of October, 2016, at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

[25] *See* Docket 92 at 6 ("The State also believes that any determination as to whether Alaska's program is consistent or inconsistent with SMCRA as interpreted by this Court should be left—in the first instance—to the agency Congress charged with making that determination."); Docket 90 at 11 ("OSMRE will then take [any new explanation given by the state] into account before issuing a new determination on the TDNs that is consistent with the Court's interpretation of [SMCRA].")

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CASTLE MOUNTAIN COALITION, et al., Plaintiffs, v. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, et al., Defendants, and USIBELLI COAL MINE, INC. and STATE OF ALASKA, Intervenor-Defendants.	Case No. 3:15-cv-00043-SLG

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is an administrative appeal from a decision of the Office of Surface Mining Reclamation and Enforcement (OSM). Plaintiffs are Castle Mountain Coalition, Cook Inlet Keeper, Alaska Center for the Environment, Alaska Community Action on Toxics, The Sierra Club, and Chickaloon Village Traditional Council (collectively, Castle Mountain). Defendants are comprised of OSM, the United States Department of the Interior, and Joseph Pizarchik, in his official capacity as Director of OSM (collectively, Federal Defendants). There are two Intervenor-Defendants: Usibelli Coal Mine, Inc. and the State of Alaska. Coal River Mountain Watch appears as *amicus curiae*. Before the Court are cross-motions for summary judgment filed by Castle Mountain and the Federal

Defendants.[1] The Court heard oral argument on the two motions on January 29, 2016.[2]

I. BACKGROUND

Plaintiffs are several non-profit organizations and the governing body of a federally-recognized Native Village. They assert that their "members, supporters, and citizens have health, subsistence, cultural, economic, recreational, scientific, environmental, aesthetic, educational, conservation, commercial, and other interests in the Matanuska Valley."[3] They challenge OSM's decision regarding the State of Alaska's permitting of coal mining operations by Usibelli at the Wishbone Hill Mine near Sutton, Alaska, a community located roughly 60 miles northeast of Anchorage.

At the heart of this dispute is the interpretation of the phrase "shall terminate" in the following statute of the Surface Mining Control and Reclamation Act (SMCRA):

> [A surface coal mining] permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit: *Provided*, That the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee . . . .[4]

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[1] *See* Docket 36 (Castle Mountain's Motion for Summary Judgment); Docket 58 (Federal Defendant's Cross-Motion for Summary Judgment). With regard to Castle Mountain's motion, the Federal Defendants responded at Docket 60; Usibelli and the State of Alaska opposed the motion at Dockets 61 and 62, respectively; Castle Mountain replied at Docket 65; and *amicus curiae* Coal River Mountain Watch filed a brief in support of the motion at Docket 51-1.

[2] Docket 76 (Minute Entry).

[3] *See* Docket 19 (First Amended Complaint) at 3–6.

[4] 30 U.S.C. § 1256(c).

Plaintiffs assert the phrase "shall terminate" in this statute unambiguously means that the permit automatically terminates if mining operations have not commenced within three years from the date of a coal mining permit's issuance and no extension has been granted. OSM found, and all of the Defendants assert to this Court, that the statute is ambiguous and the regulatory authority may interpret, and has reasonably interpreted, it to require administrative termination proceedings to be initiated before a permit may be terminated.

The implementation of SMCRA is overseen by the Secretary of the Interior through OSM. SMCRA establishes minimum nationwide standards for surface coal mining operations, but it also allows states to assume primary jurisdiction (primacy) over the regulation of surface coal mining within the state if the Secretary approves a state program that "provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of [the Act]."[5] However, in primacy states OSM retains certain enforcement powers under § 1271 of the Act. This statute provides that whenever the Secretary has reason to believe that any person is in violation of any requirement of the Act or any permit condition required by it, "the Secretary shall notify the State regulatory authority" by issuing a ten-day notice (TDN), so termed because if a state regulatory agency "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

[5] 30 U.S.C. § 1253.

inspection of the surface coal mining operation at which the alleged violation is occurring . . . ."[6] Moreover, if a primacy state is not enforcing any part of its program, SMCRA states that "the Secretary may provide for the Federal enforcement, under the provisions of section 1271 of [the Act], of that part of the State program not being enforced by such State."[7]

The Secretary approved Alaska's program (ASCMCRA or the Alaska Program) in May 1983, thereby making the Alaska Department of Natural Resources (DNR) the primary regulatory authority for all surface coal mining operations on non-federal and non-Indian lands within Alaska.[8] Both the State of Alaska and Usibelli maintain that because the Secretary approved the Alaska Program, this case should be determined under Alaska law and the federal statute is "largely irrelevant."[9] The Court disagrees. SMCRA sets the minimum standards applicable throughout the nation; state programs that regulate surface coal mining must do so "in accordance with the requirements" of the federal Act.[10] Accordingly, a state's provisions may be more stringent—but not less stringent—than SMCRA's requirements.[11] In accordance with this requirement of federal

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[6] 30 U.S.C. § 1271(a)(1).

[7] 30 U.S.C. § 1254(b).

[8] 30 C.F.R. § 902.10; *see also* AS 27.21.010 *et seq*.

[9] *See* Docket 62 (State Opp.) at 3–4; Docket 61 (Usibelli Opp.) at 11.

[10] *See* 30 U.S.C. §§ 1253(a), 1255.

[11] *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) ("Appellees' claims accurately characterize the Act insofar as it prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program.").

law, the Alaska termination statute substantially tracks the language of SMCRA, as it must. This case concerns the interpretation of the federal termination provision, with which Alaska's parallel provision must, at a minimum, be in accord.

SMCRA prohibits surface coal mining without a permit.[12] Permits are generally valid for five years. However, § 1256(c) of the Act, cited above, provides that a permit "shall terminate" if mining operations do not commence within three years of the permit issuance and sets out the two circumstances when an extension can be granted. A regulatory authority can also renew permits—which is distinct from extending the time to commence mining.[13] In conformance with SMCRA, Alaska's statutory framework tracks these federal provisions.[14]

Pursuant to the Alaska Program, DNR first issued two permits for the Wishbone Hill Coal Project to Idemitsu Alaska, Inc. in September 1991.[15] Idemitsu did not start surface coal mining operations within three years after issuance of the permits. In August 1994, after receiving a request for an extension from Idemitsu, DNR extended the time to start mining operations to September 4, 1996.[16] In September 1995, DNR approved the transfer of the Wishbone Hill permits to North Pacific Mining Corporation (NPMC).[17] In

[12] 30 U.S.C. § 1256(a); *see also* 30 C.F.R. § 773.4(a).

[13] *See* 30 U.S.C. § 1256(d).

[14] *See* AS 27.21.010 *et seq.*

[15] A.R. 1382 (Docket 29-1 at 44–49) (Permits).

[16] A.R. 1345 (Docket 29-1 at 8) (Letter Dated August 3, 1994).

[17] A.R. 1202 (Docket 28-9 at 27) (Letter Dated September 19, 1995).

January 1996, NPMC wrote to DNR, seeking information on the requirements for renewal of the permits.[18] After additional correspondence, DNR renewed the permits for a five-year period ending September 4, 2001.[19] DNR's public notice of its permit renewal decision stated "[t]he applicant has again requested an extension for beginning mining due to ongoing marketing efforts."[20] In a letter accompanying the 1996 permit renewal, DNR informed NPMC 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."[21] In the decision under review in this case, OSM found that in the 1996 permit renewal DNR "did not expressly address the requirements of AS 27.21.070(b) [Alaska's termination provision] and did not expressly grant a continuation of extension of time to commence mining."[22]

In December 1997, DNR approved the transfer of the permits to Usibelli, subject to the conditions and stipulations of the original permits.[23] In April 2001, Usibelli applied for a renewal of the permits for an additional five-year term.[24] In 2002, DNR renewed the

[18] A.R. 1206 (Docket 28-9 at 24).

[19] A.R. 1154–54 (Docket 28-8 at 4–5).

[20] A.R. 1150 (Docket 28-8 at 1).

[21] A.R. 1141 (Docket 28-7 at 15).

[22] A.R. 14 (Docket 26-2 at 13-14).

[23] A.R. 1127 (Docket 28-7 at 1).

[24] A.R. 1075 (Docket 28-6 at 5–6).

permits until September 2006.[25] In November 2006, DNR renewed the permits for another five-year term expiring in November 2011.[26] Neither Usibelli's 2001 permit renewal request nor its 2006 permit renewal request contained a request for an extension of the time to commence mining operations; likewise, each permit renewal by DNR was silent in that regard.[27] Coal mining operations at Wishbone Hill did not begin until June 2010, when Usibelli started building a road from the Glenn Highway to the project site.[28] DNR renewed the permits most recently in October 2014.[29]

Castle Mountain asserts that it "became aware of the invalidity of the permits and unpermitted coal mining operations" in September 2011 when reviewing DNR's 2011 proposal to renew the permits.[30] In November 2011, Trustees for Alaska submitted a citizen complaint to DNR on behalf of several groups including Plaintiffs, asserting that the permits had terminated by operation of law on September 4, 1996, because no mining operations had commenced by that date.[31] DNR responded in December 2011, asserting that it had properly renewed the permits in 1996. DNR added that "while activities prior to 2010 might not rise to the level of 'coal mining operations' as defined by [ASCMCRA],

[25] A.R. 1027-37 (Docket 28-4 at 12-22).

[26] A.R. 928–30 (Docket 28-1 at 4–6).

[27] *See* A.R. 1075 (Docket 28-6 at 5–6); A.R. 931 (Docket 28-1 at 7).

[28] *See* Docket 19 at 13, ¶ 64; Docket 24 at 12, ¶ 64; Docket 35 at 10, ¶ 64; Docket 23 at 8, ¶ 64.

[29] *See* A.R. 40–53 (Docket 26-3 at 22–30, Docket 26-4 at 1–5).

[30] Docket 19 (FAC) at 13, ¶ 65.

[31] A.R. 242 (Docket 26-6 at 15).

coal mining operations did commence as of 2010."[32] DNR concluded that the Wishbone Hill permits were "valid and enforceable, and therefore there is no activity that warrants a Cessation Order to be issued under [the applicable state regulation]."[33]

On December 14, 2011, Trustees for Alaska sent a letter to OSM captioned "Citizen Complaint" asserting that Usibelli was conducting surface coal mining operations at Wishbone Hill without valid permits in violation of ASCMCRA.[34] In response, OSM issued TDNs to DNR that informed DNR of the Trustees' letter and directed DNR to respond with an explanation of what action it intended to take or why it did not believe a permit deficiency existed.[35]

On January 6, 2012, DNR provided a comprehensive response to OSM in support of its position that "the Alaska Program has taken all appropriate action necessary in affirming that the Wishbone Hill permits are valid and therefore declining an inspection and cessation order."[36] DNR's response acknowledged that the Alaska Program requires extensions to commence operations to be addressed in the notice of renewal decisions, and that its 2002 and 2006 permit renewal decisions did not "contain a discussion of extensions."[37] But DNR maintained that "by granting a renewal of the permit with full

[32] A.R. 247 (Docket 26-16 at 24).

[33] A.R. 247 (Docket 26-6 at 24).

[34] A.R. 249 (Docket 26-6 at 26).

[35] A.R. 746–47 (Docket 27-5 at 12–13).

[36] A.R. 679 (Docket 27-2 at 20).

[37] A.R. 683–84 & n.27 (Docket 27-3 at 4–5 & n.27).

knowledge of the status of Usibelli's operations (*i.e.,* that coal mining operations had not begun), DNR was implicitly granting an extension when it granted the permit renewals in 2002 and 2006."[38] And while DNR acknowledged that extensions of the date to begin mining operations "should be documented in the permit renewal notices," it asserted that "the failure to do so does not lead to an automatic termination of the permits under the extension statute."[39]

In July 2012, OSM issued its initial evaluation of DNR's January 2012 response and concluded that "DNR's assertion that the permits are valid is not supported by the facts or applicable law."[40] OSM did not observe any ambiguity in the relevant statutes; rather, it repeatedly observed that under those statutes, "a permit terminates by operation of law if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued."[41] OSM found that DNR had not explicitly granted NPMC's extension request in 1996, and concluded that as a result, the "permits expired on September 4, 1996, by operation of AS 27.21.070(b) when NPMC failed to commence mining by that date." OSM added that "[e]ven if one assumed that DNR's 1996 permit renewal and extension were valid, the subsequent renewals in 2002 and 2006 appear not to have been valid because, once again, neither [Usibelli] nor DNR seem to have made the showing or findings required by AS 27.21.070(b) to justify an extension of time to

[38] A.R. 683–84 (Docket 27-3 at 4–5).

[39] A.R. 684–85 (Docket 27-3 at 5–6).

[40] A.R. 640 (Docket 27-1 at 4).

[41] *Id*. *See also* A.R. 636 (Docket 27 at 163).

commence mining."[42]

OSM's July 2012 initial evaluation discussed and rejected DNR's "implicit extension" theory, finding it to be at odds with the requirements of AS 27.21.070(b). OSM concluded that based on DNR's submission to date, it could not "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 [DNR]."[43] OSM accorded DNR an additional ten days to provide any supplemental information in support of its position.

In August 2012, DNR provided a lengthy supplemental response that challenged OSM's authority to use a ten-day notice process in this circumstance and reiterated DNR's "implicit extension" theory.[44] DNR also asserted that even if OSM had the authority to use the TDN process, it should retract its TDNs for Wishbone Hill because DNR's decision regarding the 2011 permit renewal was then pending.[45]

In November 2014, OSM issued its final decision on Castle Mountain's complaint that is the subject of this appeal.[46] OSM first found that it had the authority to issue the

[42] A.R. 642 (Docket 27-1 at 6).

[43] A.R. 644 (Docket 27-1 at 8).

[44] *See* A.R. 212–36 (Docket 26-5 at 12–23, Docket 26-6 at 1–13.).

[45] DNR cited an OSM directive that provided, "OSM will not review pending RA [Regulatory Authority] permitting decisions and will not issue a TDN for an alleged violation involving a permit defect where the RA has not taken relevant permitting action (e.g., permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights)." A.R. 234 (Docket 26-6 at 9).

[46] A.R. 7–25 (Docket 26-2 at 7–18, Docket 26-3 at 1–7).

ten-day notices in this context. OSM then reaffirmed its prior determination that DNR had not followed the appropriate procedures in connection with extensions of the time for the permit holders to commence mining operations. In this regard, OSM again rejected DNR's implicit extension theory. But OSM reversed its earlier position regarding permit termination and concluded that federal law does not require surface mining permits to terminate by operation of law when mining operations have not commenced; rather, OSM concluded that a state may permissibly interpret SMCRA to require that an administrative proceeding must be initiated to terminate a permit based on a failure to commence mining operations before the permit can be terminated. OSM then found that "DNR failed to [initiate a termination proceeding], and, consequently, Usibelli was not operating without a permit."[47]

OSM presented two primary reasons in support of its conclusion that SMCRA does not mandate permit termination as a matter of law when an extension of the time to commence mining operations has not been sought or obtained. First, OSM observed that "[u]nder the *Chevron* line of precedent, if SMCRA is silent on the issue of whether termination of permits should automatically result when permits are not commenced within three years, then [OSM] may permissibly interpret the statute (and our regulations implementing the statute) as either effecting an automatic termination or not doing so, so long as the interpretation it adopts is reasonable."[48] Second, OSM cited to cases that

[47] A.R. 8 (Docket 26-2 at 8).

[48] A.R. 20 (Docket 26-3 at 2); *see Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984).

recognize the severity of an automatic forfeiture and concluded that "if forfeiture is not mandated by 'clear and unequivocal' language in SMCRA and the applicable Federal regulations, then we should not construe our statute and regulations as imposing this harsh penalty."[49] Accordingly, OSM found DNR's position regarding permit termination "consistent with both the approved Alaska regulatory program and with the Federal regulations and is no less stringent than section 506(c) of SMCRA [the federal termination provision]." OSM also found that "[t]he draconian and counterproductive remedy of shutting Usibelli down would run counter to the second purpose of section 506(c), ensuring the prompt development of the nation's coal resources." OSM concluded that DNR "had 'good cause' for not taking action against Usibelli for operating without a permit." But OSM stated that DNR "has an affirmative duty to monitor whether timely mining operations are occurring and to issue prompt determinations in cases where mining operations have not commenced within three years." It directed DNR to work with OSM to formulate "a written Action Plan to address [DNR's] failure to implement [its] program provisions on the timely commencement of mining operations."[50]

Castle Mountain initiated this action in federal district court in March 2015 seeking to vacate and set aside OSM's determination.

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[49] A.R. 21 (Docket 26-3 at 3); *see also United States v. Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939); *Am. Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1165 (D.C. Cir. 1978).

[50] A.R. 22–24 (Docket 26-3 at 4–6).

II. JURISDICTION

Plaintiffs have asserted that the Court has subject matter jurisdiction over this action pursuant to 5 U.S.C §§ 702–06 (Administrative Procedures Act or APA), 28 U.S.C. §§ 2201–02 (declaratory judgments), and 28 U.S.C. § 1331 (federal question jurisdiction).

Federal courts lack jurisdiction over APA challenges to agency actions when Congress has provided another "adequate remedy."[51] The Federal Defendants assert that SMCRA's citizen suit provision would have provided another adequate remedy to Castle Mountain such that Plaintiffs are precluded from bringing an action under the APA. However, to bring a citizen suit under SMCRA, a would-be plaintiff must, as a general rule, give the regulating entity written notice of the violation sixty days before filing the action. Here, it is undisputed that no such sixty-day notice was given. Therefore, the Federal Defendants maintain that Castle Mountain cannot bring this action at all because Castle Mountain did not provide sixty days' notice to the Secretary as required by SMCRA before commencing this lawsuit.[52] Nor, argue the Federal Defendants, can Castle Mountain bring an APA challenge because it had an alternative adequate remedy of which it failed to avail itself.[53]

The Federal Defendants maintain that Castle Mountain could have brought a citizen suit under § 1270(a)(2), which provides:

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[51] 5 U.S.C. § 704; *see also Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998).

[52] Docket 59 (Memorandum) at 22–23.

[53] *See Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 851 (9th Cir. 1987) ("Where plaintiffs may otherwise proceed under the citizen suit provision, they should not be allowed to bypass the explicit requirements of the Act . . . through resort to . . . the APA.").

> [A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter—
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> . . . .
>
> (2) against the Secretary . . . where there is alleged a failure of the Secretary . . . to perform any act or duty under this chapter which is not discretionary with the Secretary . . . .[54]

The Federal Defendants assert that this citizen suit provision applies because "the substance" of Castle Mountain's allegations is that "the Secretary had a non-discretionary duty, which she failed to fulfill, to order a federal inspection and issue a cessation order because unpermitted mining was taking place at Wishbone Hill."[55] Castle Mountain counters that its challenge is limited to the review of a discretionary act by the agency that falls under the APA, an issue which it frames as whether "OSM's determination that the Alaska Department of Natural Resources . . . ha[d] shown good cause for not taking action in this case" was based on an "unlawful interpretation of SMCRA."[56] Plaintiffs assert they principally seek declaratory relief and vacatur, and not an order compelling OSM to undertake a non-discretionary act.[57] Thus, Castle Mountain asserts that the

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[54] 30 U.S.C. § 1270(a)(2). Other types of citizen suits are authorized in 30 U.S.C. § 1270(a)(1). But that provision has been interpreted to apply only to suits against operators, including the government when it functions as an operator. *See Ok. Wildlife Fed'n v. Hodel*, 642 F. Supp. 569, 571–72 (N.D. Okla. 1986).

[55] Docket 59 at 21.

[56] Docket 65 (Reply) at 9.

[57] *Id. See also* Docket 19 (First Amended Complaint) at 17; *but see* Docket 37 (Castle Mountain's Memorandum in Support of Plaintiffs' Motion for Summary Judgment) at 43 and Docket 65 (Reply) at 33, in which Castle Mountain also asks the Court to "order the agency to conduct a federal inspection and to take additional appropriate actions," a position it later retracted at oral argument.

citizen suit provision in SMCRA does not apply and the Court has subject matter jurisdiction under the APA.

OSM's enforcement duties upon receipt of a citizen complaint are set forth in 30 U.S.C. § 1271(a)(1).[58] That provision does not assign any non-discretionary duties to the agency unless and until the Secretary has found "reason to believe" that a violation exists. Here, Castle Mountain takes issue with OSM's finding that the agency did not have reason to believe that a violation had occurred and asserts that the finding is not in accordance with the law, specifically § 1256(c). Castle Mountain's First Amended Complaint, as framed, does not directly concern the Secretary's non-discretionary actions or duties, and does not seek to compel the Secretary to take some action.[59] Accordingly, the citizen suit provision in § 1270(a)(2) does not provide a jurisdictional basis for the Complaint; thus, the Court has jurisdiction under the APA and 28 U.S.C. § 1331.[60]

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[58] 30 U.S.C. § 1271(a)(1) provides in part that:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any 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 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 at which the alleged violation is occurring . . . .

[59] *See* Docket 19 (FAC) at 17; *see also Ok. Wildlife Fed'n*, 642 F. Supp. at 570 ("The Court's jurisdiction under § 1270(a)(2) is limited to compelling the Secretary to take some action.").

[60] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979) (citing *Califano v. Sanders*, 430 U.S. 99 (1977)) ("Jurisdiction to review agency action under the APA is found in 28 U.S.C. § 1331.").

III. STANDING AND RIGHT TO SUE

The State of Alaska challenges Castle Mountain's standing to bring this case. Under Article III of the Constitution, "[t]he jurisdiction of the federal courts is limited to 'cases' and 'controversies.'"[61] The Supreme Court has deduced a set of requirements that make up the constitutional minimum of standing:

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[62]

Castle Mountain maintains that each Plaintiff "has a mission to protect the Matanuska Valley and traditional Tribal lands from improperly permitted coal mining" where their members and Tribal citizens "reside near, visit, or otherwise enjoy the Matanuska Valley and the mine site for numerous purposes, including recreation, wildlife viewing, and cultural and subsistence practices."[63] No party asserts that these interests do not satisfy the requirements for Article III standing.

However, in addition to Article III standing, "a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law

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[61] *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1138 (9th Cir. 2013) (quoting U.S. Const. art. III, § 2).

[62] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

[63] Docket 37 at 24.

invoked.'"[64] The State argues Plaintiffs lack standing because Plaintiffs' "interests are not within the zone-of-interest that [the termination] provision seeks to protect."[65] The APA provides a cause of action to persons who are "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[66] In the APA context, the Supreme Court has held that the test is "not especially demanding" and "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue."[67]

The State correctly observes that Castle Mountain's right to sue must be measured against the statutory purposes specific to the termination provision in SMCRA—30 U.S.C. § 1256(c).[68] The State maintains that the purpose of that termination provision is to "prevent squatting on mining permits," and that it "vindicates purely economic interests."[69]

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[64] *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387–88 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (the zone-of-interests test does not belong in the "prudential" standing rubric but rather "asks whether this particular class of persons has a right to sue under this substantive statute") (quotation marks, formatting, and citation omitted).

[65] Docket 62 at 12. *See also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (plaintiffs' aggrievements or adverse effects must fall "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint").

[66] 5 U.S.C. § 702.

[67] *Lexmark*, 468 U.S. at 1389 (quotation marks and citations omitted).

[68] Docket 62 at 8; *see, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997) ("Whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provisions of law upon which the plaintiff relies.") (quotation marks and formatting omitted); *see also Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000).

[69] Docket 62 at 11–12.

In the State's view, the interests expressed in Plaintiffs' declarations "describe the harms associated with *commencement* of mining at Wishbone Hill, not the harms associated with a *failure* to commence mining operations at Wishbone Hill."[70] The State asserts that "[e]nvironmental protection is simply not the purpose of the termination provision." Thus, the State maintains that Castle Mountain's purported interests fall outside the zone of interests protected by the termination provision, such that Plaintiffs have no right to challenge the agency's interpretation of the termination statute under the APA.[71]

Castle Mountain responds that its interests are well within the zone of interests protected by the termination provision, which it asserts has dual goals: "ensuring development of coal resources and ensuring that permits and reclamation plans do not become outdated."[72] Plaintiffs observe that OSM's own regulations "deem[] operating without a 'valid' permit to 'constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm.'"[73] Thus, Castle Mountain maintains that "[t]he delay caused the permits to terminate, and the resultant unpermitted mining strongly implicates [Plaintiffs'] environmental, recreational, health, cultural, property, and public participation interests."[74]

The Court finds that Castle Mountain's asserted interests readily fall within the

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[70] Docket 62 at 10. *See also* Dockets 38–49 (Declarations).

[71] Docket 62 at 13. The State also asserts that Castle Mountain has other avenues under the federal and state programs to seek redress. *See* Docket 62 at 14.

[72] Docket 65 at 13.

[73] *Id.* (citing 30 C.F.R. § 843.11(a)(2)).

[74] Docket 65 at 14.

zone of interests protected by the termination provision, as that provision does not relate only to the economic attributes of mining. And Castle Mountain has shown it is adversely affected by the agency's interpretation of the termination provision. In light of the foregoing, Castle Mountain has both Article III standing and the right to sue OSM over its interpretation of SMCRA's termination provision under the APA.

IV. THE SMCRA TERMINATION PROVISION

The APA directs courts to "hold unlawful and set aside" an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[75] Here, the question is whether the agency's interpretation of the termination statute is "not in accordance with law."[76]

In reviewing an agency's interpretation of a statute, a court's first task is to "determine whether 'Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"[77]

The statute at issue is 30 U.S.C. § 1256(c), which again provides that:

> [A coal mining] permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit: *Provided*, That the regulatory authority

[75] 5 U.S.C. § 706(2)(A).

[76] Although framed as cross-motions for summary judgment pursuant to Alaska Local Rule 16.3, in an APA case, "summary judgment merely serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 60 (D.D.C. 2014) (citation omitted).

[77] *Ariz. v. Tohono O'odham Nation*, 818 F.3d 549, 556 (9th Cir. 2016) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

> may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee . . . .

OSM upheld Alaska's interpretation of the provision "to mean that if mining operations do not commence within three years, and no extension is granted, the permit will not terminate automatically; rather, the permit remains valid until the regulatory authority takes an affirmative action to terminate it."[78] All Defendants support OSM's interpretation. Plaintiffs argue that OSM's interpretation is not in accordance with law because the phrase "shall terminate" is not ambiguous. Rather, Plaintiffs maintain that it unambiguously mandates permit termination when mining operations do not begin within three years of a permit's issuance and no explicit extension has been granted.

Accordingly, the Court must first determine if the disputed phrase "shall terminate" is ambiguous. "A statute is ambiguous if it is susceptible to more than one reasonable interpretation. The starting point is the statutory text. . . . When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used."[79] Here, the statute does not define the terms "shall" and "terminate." SMCRA was passed in 1977. In 1976, Webster's Third New International Dictionary explained that "shall" is "used in laws, regulations, or

[78] A.R. 22 (Docket 26-3 at 18).

[79] *Tohono O'odham Nation*, 818 F.3d at 556 (quotation marks omitted) (first quoting *Alaska Wilderness League v. EPA*, 727 F.3d 934, 938 (9th Cir. 2013), then quoting *Chevron*, 467 U.S. at 842–43, and then quoting *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir.2010)).

directives to express what is mandatory," and defined "terminate" to mean "to bring to an ending or cessation in time, sequence, or continuity: CLOSE."[80] Thus, according to this dictionary frequently cited by the Supreme Court, around the time Congress debated SMCRA's termination provision an ordinary meaning of the phrase "shall terminate" would denote a mandatory ending.

Consistent with the ordinary meaning of the term "shall," the Supreme Court has repeatedly recognized that when Congress uses the word "shall," it is mandatory, and does not give an agency authority to disregard that directive. For example, in *Kingdomware Technologies, Inc. v. United States*, the Supreme Court held that "[u]nlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."[81] The Supreme Court has also observed that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion."[82]

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[80] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2085, 2359 (1976). The Supreme Court frequently cites various editions of this dictionary. *See, e.g.*, *Voisine v. United States*, --- S. Ct. ----, No. 14-10154, 2016 WL 3461559, at *5 (U.S. June 27, 2016) (citing the 1954 edition); *McDonnell v. United States*, --- S. Ct. ----, No. 15-474, 2016 WL 3461561, at *13 (U.S. June 27, 2016) (citing the 1961 edition); *Kellogg Brown & Root Servs., Inc. v. United States, ex rel. Carter*, 135 S. Ct. 1970, 1976 (2015) (citing the 1976 edition).

[81] 136 S. Ct. 1969, 1977 (2016); *see also Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016) (where the PLRA provides that "[a]n inmate 'shall' bring 'no action' . . . absent exhaustion of available administrative remedies . . . [t]here is no question that exhaustion is mandatory"); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661–62 (2007) (the statutory phrase "shall approve" means "EPA does not have the discretion to deny a transfer of an application); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations").

[82] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

Highly persuasive to this Court on the issue of any ambiguity in SMCRA's termination provision is the Ninth Circuit decision of *Grand Canyon Trust v. Tucson Electric Power Co.*[83] *Grand Canyon Trust* involved a termination provision in a Clean Air Act regulation that is structurally quite similar to the termination provision in SMCRA, as it contained both a mandatory termination provision and a permissive extension option. The regulation provided:

> Approval to construct [a power plant] shall become invalid if construction is not commenced within 18 months after the receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18–month time period upon a satisfactory showing that an extension is justified.[84]

In December 1977, Tucson Electric received a permit to construct two power plant units. The construction of the units was completed in 1985 and 1990. Many years later, in 2001, Grand Canyon Trust brought a citizen enforcement action against Tucson Electric asserting that Tucson Electric had failed to comply with the regulation because it had not commenced construction by the cut-off date, had discontinued construction for longer than eighteen months, and had not completed construction within a reasonable time.[85]

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[83] 391 F.3d 979 (9th Cir. 2004).

[84] *Grand Canyon Trust*, 391 F.3d at 983.

[85] Subsequent amendments to the Clean Air Act imposed stricter technology requirements on newly-constructed power plants that had not commenced construction by March 19, 1979. These requirements were important in *Grand Canyon Trust* because Grand Canyon Trust sought to impose those requirements on the already-constructed power plants, which could have cost Tucson Electric up to $300 million, and civil penalties for operating without the updated technology of up to $27,500 per day. The issue is not particularly relevant to the statutory interpretation at issue in this case. However, with regard to Defendants' focus on forfeiture, it bears noting that in

The Ninth Circuit agreed with Grand Canyon Trust, and held that a "natural reading" of the phrase "shall become invalid" provided for automatic permit invalidation, even though the term "automatic" was not in the statute itself:

> [W]e read this language to provide that a permit automatically becomes invalid in the enumerated circumstances unless the administrator exercises discretionary authority to extend the permit. On a natural reading of the language, administrative action is only required to forestall invalidation of a permit. No agency action is required to invalidate a permit if construction is not timely commenced.[86]

Like the regulation at issue in *Grand Canyon Trust*, the Court finds that "on a natural reading" of the SMCRA termination provision, the phrase "shall terminate" is self-executing, and "administrative action is only required to forestall invalidation of a permit." Defendants argue that the statute is ambiguous because it does not include the word "automatically" in reference to termination.[87] But like the regulation at issue in *Grand Canyon Trust*, a natural reading of 30 U.S.C. § 1256(c) compels a conclusion that use of the term "automatic" is not required to effectuate the termination by operation of law of a permit in these circumstances.

Textually, the statute as written is self-executing—it does not require the regulatory authority to take any action. If Congress had intended that the regulatory authority must or could take action to terminate the permit in the event that mining activities had not

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Grand Canyon Trust, the Ninth Circuit held that "neither the requirement that Tucson Electric replace its emission-control equipment, nor the potential for civil fines, establishes the type of expectations-based prejudice that laches requires." *Id*. at 988.

[86] *Grand Canyon Trust*, 391 F.3d at 983–84.

[87] *See* Docket 59 at 25.

commenced, then the termination provision should have read: *The regulatory authority shall (or may) terminate a permit*. Other portions of SMCRA do expressly direct the agency to affirmatively take certain actions. For example, § 1260(a) provides "the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time set by the regulatory authority . . . . [T]he regulatory authority shall notify the local governmental officials . . . that a permit has been issued . . . ."; § 1271(a)(2) provides "the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations" when, on the basis of federal inspection, OSM determines the permittee is in violation of SMCRA; and § 1271(a)(4) provides "the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause . . . ." In contrast, that the termination statute does not mandate any action by the agency makes clear that Congress intended permit termination to be self-executing.

The Federal Defendants acknowledge that the term "shall" is generally mandatory, but observe that it is not always the case. They cite to the Supreme Court's decision in *Gutierrez de Martinez v. Lamagno,* a Westfall Act case in which the Court held that the use of the phrase "shall be deemed an action against the United States" when the United States was substituted as a party did not preclude subsequent judicial review of the agency's scope-of-employment certification that effectuated the substitution.[88] In *Gutierrez,* the Supreme Court observed in a footnote that "[t]hough 'shall' generally

[88] 515 U.S. 417 (1995).

means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may".[89] The Supreme Court held that judicial review of the certification decision was permitted, despite the finality of the language "shall be deemed," because to construe the Westfall Act otherwise "would oblige [the Court] to attribute to Congress two highly anomalous commands[:] . . . that Congress, by its silence, authorized the Attorney General's delegate to make [certification determinations without any judicial check[,] [and that Congress] cast Article III judges in the role of petty functionaries . . . stripped of capacity to evaluate independently whether the executive's decision is correct."[90] Here, there are none of the separation-of-powers issues that informed the Supreme Court's construction of the Westfall Act in *Gutierrez*.

The Federal Defendants place considerable emphasis on *Sierra Club v. Jackson*,[91] which concerned whether the administrator of the Environmental Protection Agency had

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[89] The footnote in *Gutierrez* continued:

> See D. MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 402–03 (1992) ("shall" and "may" are "frequently treated as synonyms" and their meaning depends on context); B. GARNER, DICTIONARY OF MODERN LEGAL USAGE 939 (2d ed. 1995) ("[C]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa.") For example, certain of the Federal Rules use the word "shall" to authorize, but not to require, judicial action. See, *e.g.,* Fed.Rule Civ.Proc. 16(e) ("The order following a final pretrial conference *shall* be modified only to prevent manifest injustice.") (emphasis added); Fed.Rule Crim.Proc. 11(b) (A *nolo contendere* plea "*shall* be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.") (emphasis added).

Gutierrez, 515 U.S. at 433 n.9.

[90] *Id.* at 426.

[91] 648 F.3d 848 (D.C. Cir. 2011).

a mandatory duty to take enforcement action under a provision of the Clean Air Act that provides in relevant part:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility . . . .[92]

The Sierra Club argued that the plain text of the statute made enforcement by the Administrator mandatory. The D.C. Circuit Court noted that "[t]he Sierra Club's textual argument carries considerable weight. As we have repeatedly noted, 'shall' is usually interpreted as the language of command."[93] However, the Circuit Court ultimately disagreed with the Sierra Club because although the statute directed the Administrator to act, it only required that the Administrator take such measures "as necessary" and provided "no guidance . . . as to what action is 'necessary.'"[94] The Court does not find *Sierra Club* to be helpful in resolving whether the SMCRA statute is not ambiguous, because the disputed statutory language in this case does not contain the lack of specificity that was present in *Sierra Club*. And textually, the language of SMCRA's termination provision is quite different because it does not command the agency to do anything at all.

Further support for finding that SMCRA's termination statute unambiguously results in permit termination by operation of law when mining operations have not commenced derives from the context in which the language appears. For while the

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[92] 42 U.S.C. § 7477.

[93] *Sierra Club*, 648 F.3d at 856 (quotation marks and citations omitted).

[94] *Id.*

statute clearly directs that a permit shall terminate, it also provides that the agency "may grant reasonable extensions." If the statute were read permissively to allow but not require permit termination if operations had not commenced, regardless of the reason for the delay in commencing operations, then effectively the two limited exceptions to the permit termination would have no purpose in the statute. And yet, "[i]f possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to . . . have no consequence."[95] To comply with this interpretive canon, the words "shall" and "may" should be accorded different meanings in SMCRA's termination provision.

The Supreme Court has observed that "[w]hen a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."[96] The import of the use of both words in a statute was discussed in *Center for Biological Diversity v. United States Fish & Wildlife Service*.[97] In that case, the Ninth Circuit upheld the United States Fish and Wildlife Service's decision to not complete a formal designation of critical habitat for an endangered fish species. The disputed language in the Endangered

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[95] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).

[96] *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). In *Kingdomware*, the Supreme Court held that a statute was unambiguously mandatory because it "requires that 'a contracting officer of the Department *shall* award contracts' to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, '[e]xcept as provided in subsections (b) and (c).' (Emphasis added.) Subsections (b) and (c) provide, in turn, that the Department 'may' use noncompetitive procedures and sole-source contracts for lower value acquisitions. . . . Congress' use of the word 'shall' demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures."

[97] 450 F.3d 930, 935 (9th Cir. 2006).

Species Act (ESA) used both the terms "shall" and "may." The Circuit Court held that "[w]hen 'may' and 'shall' are both used in a statute, 'the normal inference is that each is being used in its ordinary sense—the one being permissive, the other mandatory.'"[98] Put another way, the Circuit Court found that Congress knew the difference between "may" and "shall" when it used them together in that provision of the ESA.

The Federal Defendants maintain that even when "shall" and "may" appear together, their meaning depends on context.[99] In the disputed statute here, they assert that "[t]here is no direction, in the exception proviso, that the extension come at a particular time, either before or after three years has run."[100] To the Federal Defendants, because the statute accords the agency the discretion to grant reasonable extensions at any time, "[t]he only statutory command is that once the regulatory authority determines that a permit extension is 'necessary' to prevent inequity, the extension must be 'reasonable'—a word that clearly envisions a range of permissible outcomes."[101] But this argument overlooks that fact that extensions can be granted under the statute for only two specific reasons. Thus, unlike the statute in *Sierra Club* that directed the administrator to take unspecified measures "as necessary," SMCRA provides only two specific bases on which the regulatory authority can grant permit extensions.[102]

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[98] *Id.* (quoting *Haynes v. United States*, 891 F.2d 235, 239–40 (9th Cir. 1989).

[99] Docket 59 at 27.

[100] Docket 59 at 29.

[101] Docket 59 at 29.

[102] *See supra* notes 91–94 and accompanying text.

The Federal Defendants also cite to *Citizens Association for Sound Energy v. United States Nuclear Regulatory Commission*.[103] In that case, the United States Court of Appeals for the District of Columbia Circuit found permissible the Nuclear Regulatory Commission's (NRC's) statutory interpretation that automatic forfeiture did not result when an operator failed to meet the deadline to file for a permit extension under the Atomic Energy Act. The statute at issue in that case, 42 U.S.C. § 2235, provided:

> The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.[104]

The operator applied for an extension approximately six months after the permit expiration date, which the NRC issued. Citizens Association for Sound Energy challenged the agency action, arguing in part that the operator's failure to apply for an extension prior to the permit's expiration caused "a complete forfeiture of the permit, such as to preclude the issuance of an extension."[105] The D.C. Circuit Court disagreed, holding that "[t]he plain language of [§ 2235] permits the Commission to extend a completion date for 'good cause.' There is no language specifying that the expiration of the construction permit automatically effects forfeiture of the permit, or that the Commission is then barred from

[103] 821 F.2d 725 (D.C. Cir. 1987).

[104] *Citizens Ass'n for Sound Energy*, 821 F.2d at 730.

[105] *Id*.

an application to extend the latest construction date."[106] The Federal Defendants assert the case supports a finding that the statute at issue here is not unambiguous and that OSM's interpretation of the termination provision in SMCRA is reasonable.[107]

Citizens Association did not require the D.C. Circuit to analyze the plain meaning of the phrase "shall expire" as used in the statute at issue. Rather, the Circuit Court focused on the broad "good cause" exception to permit expiration. And that statute contained only the term 'shall' and not the SMCRA provision's combination of "shall" and "may." Most importantly, the case did not address the automatic termination of a permit when no extension had been sought or granted at all—either before or after the permit expiration date—as is the case here. In short, the Court does not find that the D.C. Circuit's analysis in *Citizens Association* demonstrates that the termination provision at issue here is ambiguous.

To interpret the provision as OSM has done—so as to permit an interpretation that makes termination dependent on agency action—reads additional words and conditions into the statute that simply are not there. Moreover, because SMCRA sets the floor to which state programs must comply, Alaska's statute must be in accordance with the

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[106] *Id*.

[107] Docket 59 at 32. The State of Alaska and Usibelli do not directly address the ambiguity question, although the State joins the Federal Defendants' brief on the meaning of "shall." *See* Docket 62 at 27. Usibelli adds that if "shall" in SMCRA "demonstrates Congressional intent to require *automatic* termination . . . the fact that the Alaska statute . . . does *not* use the word 'shall' should support the construction that under Alaska law, there is no automatic termination." *See* Docket 61 at 18. However, since the federal law sets the floor to which primacy states must comply, Alaska cannot adopt a statute that is less stringent than SMCRA. *See supra* notes 8–11 and accompanying text.

termination provision of § 1256(c). Based on the foregoing analysis, the Court finds that SMCRA's termination provision is not ambiguous. Rather, Congress has directly spoken to the precise question and has provided that a surface coal mining permit terminates by operation of law when mining operations have not commenced within three years unless the agency has affirmatively granted an extension for one of the two specified reasons allowed in the statute. OSM's contrary interpretation regarding the Wishbone Hill permits is not in accordance with law, and must be set aside, for the Court, as well as OSM and the State of Alaska, must give effect to the unambiguously expressed intent of Congress.[108]

A review of SMCRA's legislative history on this provision does not warrant a contrary result. The parties cite to portions of SMCRA's or ASCMCRA's legislative history as supporting their positions.[109] On balance, the Court finds that the legislative history cited by the parties does not squarely address the issue before the Court, and is, in any event, unnecessary to parse when the statute itself is unambiguous.[110]

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[108] *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

[109] Docket 37 (Castle Mountain Mot.) at 29–32; Docket 65 (Castle Mountain Reply) at 23; Docket 60 (Fed. Defendants' Opp.) at 34–38; Docket 62 (State of Alaska Opp.) at 25; Docket 61 (Usibelli Opp.) at 17; *see also* Docket 33-1 (Alaska DNR Commissioner Decision) at 2–4 and 8–11.

[110] The State of Alaska asserts that Alaska's legislative history is the relevant authority and that the DNR Commissioner determined that "where possible, the state legislation sought to reduce some of the burdens imposed by the federal legislation and implement a program more tailored to the needs of Alaskans." The State asserts that "[a]utomatic termination is inconsistent with this legislative purpose." Docket 62 at 25. The Court finds this assertion contrary to the law. Alaska coal mining regulations may not "reduce" the burden of SMCRA. Rather, as already stated, Alaska regulations must be "in accordance" with SMCRA or they may be "more stringent." Therefore, Alaska's termination provision must also mean that permits terminate automatically unless a valid extension is granted. *See supra* notes 8–11 and accompanying text.

The parties have also discussed how the law of forfeiture should affect the outcome in this case. OSM's decision referenced several older forfeiture cases, and reasoned that because SMCRA "does not give 'clear and unequivocal' warning that automatic termination of the permit could result from missing the three-year deadline," it is preferable to interpret the Act to not require permit termination.[111] The Federal Defendants add to this line of reasoning by citing to various statutes and regulations that they assert provide a clear lesson: "when Congress (or an agency) chooses to make termination of a license, lease, or permit automatic, it does so explicitly, giving full notice to licensees to be on their guard against forfeiture of their vested rights. The failure to do so in [the termination provision] indicates, quite simply, that that is not the outcome that Congress intended."[112] In effect, the Federal Defendants argue that the phrase "shall terminate" is not sufficiently clear to apprise a permit holder that the permit shall terminate if mining operations are not commenced within the requisite three years or extended period. But, as explained above, this Court disagrees, and finds the phrase "shall terminate" to be free from ambiguity as to the consequence of a failure to commence mining operations when no exception applies.

[111] Docket 26-3 at 2–4; *see also United States v. Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939) (citing *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33–35 (1875)); *Am. Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1165 (D.C. Cir. 1978).

[112] Docket 60 at 34. Usibelli and Alaska both maintain forfeiture arguments under Alaska law. *See* Docket 61 at 16–17; Docket 62 at 28. But, as the Court has made clear, Alaska law does not provide the rules of decision in this case.

Moreover, unlike the cases cited by the Federal Defendants, the loss of a surface coal mining permit for failing to commence operations is not a penalty for violating a federal law. Rather, it is a statutory condition of the permit itself: Usibelli received the permits and subsequent renewals subject to "[a]ll conditions and stipulations of the original permits" that by their own terms did not "relieve the permittee of the responsibility for compliance with any federal, state or local law or regulation."[113] This would encompass the termination and extension provisions. The Federal Defendants refer to the permits as giving licensees "vested rights."[114] But no party has cited to any case that found vested rights that continue beyond a permit's termination. Rather, Castle Mountain has cited cases that hold precisely the opposite.[115] The fact that other statutes and regulations, cited by Defendants, use different language than SMCRA to effect a termination does not render SMCRA's language non self-executing. Moreover, when the termination provision is properly enforced, it is not clear that a significant forfeiture would even occur. For if properly enforced, a permit would terminate before any mining operations had commenced, thereby minimizing any economic losses. And Plaintiffs concede that "the statute places no express time limits on when an extension may be

[113] *See* Docket 28-7 (Permit Transfer) at 1–2; Docket 28-4 at 12–22 (2002 Permit Renewal); Docket 28-1 at 4–6 (2006 Permit Renewal).

[114] Docket 60 at 34.

[115] *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972) (assistant professor's property interest in continued employment extended only to the end date of his contract); *Kraft v. Jacka*, 872 F.2d 862, 867–68 (9th Cir. 1989), *abrogated on other grounds by Dennis v. Higgins*, 498 U.S. 439 (1991) (no protected property interest continued after the automatic expiration of limited gaming licenses).

granted."[116] Accordingly, it may be that under SMCRA the regulatory authority can extend the time to commence mining even after a permit has terminated, provided the statutory grounds for extension have been met. This Court need not determine that issue in this proceeding. In sum, because the termination provision in SMCRA is unambiguous, OSM's and Defendants' assertions regarding forfeiture law are inapposite.

CONCLUSION

In light of the foregoing, the Court finds that the phrase "shall terminate" as set forth in section 1256(c) of the Surface Mining Control and Reclamation Act is unambiguous, in that a surface mining permit terminates by operation of law if mining operations have not timely commenced under that statute unless an extension has been granted pursuant to the statute's terms. Accordingly, Castle Mountain Coalition's Motion for Summary Judgment at Docket 36 is GRANTED; and the Office of Surface Mining Reclamation and Enforcement's Motion for Summary Judgment at Docket 58 is DENIED. The Office of Surface Mining Reclamation and Enforcement Office's determination that SMCRA does not require permit termination when surface coal mining operations have not commenced within three years of permit issuance and no valid extension has been granted, and that DNR therefore had good cause for not taking corrective action in response to the ten-day notices regarding the Wishbone Hill permits, is VACATED. This

[116] Docket 65 at 20.

matter is REMANDED to the agency for further proceedings consistent with this decision.

The Clerk of Court is directed to enter judgment for Plaintiffs accordingly.

DATED this 7th day of July, 2016 at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Western Region Office
1999 Broadway, Suite 3320
Denver, CO 80202-3050

July 19, 2012

Russell Kirkham, Coal Regulatory Program Manager
Alaska Department of Natural Resources
Division of Mining Land and Water
550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501

Dear Mr. Kirkham:

The Office of Surface Mining Reclamation and Enforcement (OSM) has completed an initial evaluation of the response by the Alaska Department of Natural Resources (DNR), Division of Mining, Land and Water, to Ten-Day Notices (TDN) #X11-141-182-005 and #X11-141-182-006. For the reasons set forth below, OSM finds that DNR's response to the TDNs at this time is not in accordance with the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA) and associated regulations. Because the record that OSM reviewed has significant gaps in permitting information, we are requesting your office to conduct a permit file review and to advise OSM if additional pertinent permitting information is available for our evaluation.

BACKGROUND

Overview of Applicable Ten-Day Notice Regulations

A TDN is a form that OSM uses to notify a state regulatory authority when OSM has reason to believe that there is a violation of the state's approved regulatory program. Upon receipt of the TDN, the regulatory authority has 10 days to take "appropriate action" to assure that the violation is corrected or to show "good cause" for failing to do so. *See* 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2). "Appropriate action" includes enforcement or other action to correct the violation. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(*3*). Circumstances constituting "good cause" for not taking appropriate action are set forth in 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*). OSM will accept a regulatory authority's response to a TDN as constituting "appropriate action" or "good cause" unless the regulatory authority's response is arbitrary, capricious, or an abuse of discretion. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(*2*). If the regulatory authority disagrees with OSM's determination, the regulatory authority may request informal review. 30 C.F.R. § 842.11(b)(1)(iii). If OSM's final determination is that the regulatory authority has failed to take appropriate action or demonstrate good cause, OSM will conduct a Federal inspection. 30 C.F.R. § 842.11(b)(1). If the Federal inspection reveals that a violation exists, OSM must take an

enforcement action, including issuance of a notice of violation or cessation order, as appropriate. 30 C.F.R. § 843.12(a)(2).

Overview of Permit Extensions and Renewals

Under ASCMCRA, surface coal mining operations may be conducted only with a valid permit issued by DNR.[1] A.S. 27.21.060(a). Permits for surface coal mining operations are issued for a term of five years. A.S. 27.21.070(a). The permit terminates by operation of law, however, if a permittee does not begin surface coal mining operations within three years after the permit is issued. A.S. 27.21.070(b). DNR may grant reasonable extensions of time to begin operations under two circumstances:

> The commissioner [of DNR] 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.

A.S. 27.21.070(b).

Subject to the termination provisions set forth above, ASCMCRA provides the right of successive renewal of permits for areas within the boundaries of the permit area. A.S. 27.21.080. DNR implementing regulations set forth a procedure for reviewing renewal applications, and as part of that process DNR must provide public notice of the renewal application. 11 AAC 90.113. The regulations also require DNR to send a copy of any decision granting an application for permit renewal to OSM, the applicant, each person who filed comments on the renewal, and each party to any informal conference on the renewal. 11 AAC 90.117(c). The regulation also requires that "[a]ll notices under this subsection will specifically identify any extensions of time granted under A.S. 27.21.070." 11 AAC 90.117(c).

Issuance of TDN #X11-141-182-005 and TDN #X11-141-182-006

TDN #X11-141-182-005 was issued on December 20, 2011, with regard to permit number 01-89-796 for the Wishbone Hill Mine. TDN #X11-141-182-006 was issued on the same date with regard to permit number 02-89-796 for the mine.

OSM issued the TDNs in response to citizen complaints set forth in letters to OSM dated December 2, 2011, from the Chickaloon Village Traditional Council; December 14, 2011, from Earthjustice; and December 14, 2011, from the Trustees for Alaska, on behalf of the Friends of MatSu, Castle Mountain Coalition, Alaska Center for the Environment, Cook Inletkeeper, Alaska Community Action on Toxics, Pacific Environment, and the Sierra Club (collectively

[1] Surface coal mining operations, as defined in A.S. 27.21.998(17), means "an activity conducted on the surface of the land in connection with a surface coal mine or, to the extent that the activity affects the surface of land, conducted in connection with an underground coal mine; the products of which enter commerce or the operation of which directly or indirectly affects interstate commerce . . . ."

"Requestors"). The complaints concern surface coal mining and reclamation operations conducted by Usibelli Coal Mine Inc. (UCM) at the Wishbone Hill Mine. The Requestors allege that (1) prior permits issued by DNR under ASCMCRA for surface coal mining operations at the mine terminated by operation of A.S. 27.21.070(b) on September 4, 1996, when DNR failed to act on a request by the permittee at that time for an extension of time to commence mining; (2) DNR thereafter erroneously renewed the terminated permits on multiple occasions and erroneously transferred the permits to UCM; (3) the renewal permits 01-89-796 and 02-89-796 currently held by UCM are thus invalid; and (4) in June of 2010, UCM conducted surface coal mining activities at the mine without valid permits in violation of A.S. 27.21.060(a). The Requestors ask "that OSM immediately issue a cessation order pursuant to 30 C.F.R. § 843.11 to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit for those activities."

DNR's response to the TDNs

DNR responded to the TDNs in a letter dated January 6, 2012, along with enclosed materials, which OSM received by electronic means on January 9, 2012, followed by hard copy on January 12, 2012. In its response, DNR contends that it has good cause not to take corrective action because the permits under which UCM conducted operations are valid. More specifically, DNR contends that the existing permits are valid because they were properly renewed in 1996, 2002, and 2006, with corresponding extensions of time given to commence mining operations until operations began in June of 2010. DNR contends that its 1996 permit renewal decision explicitly provided the extension of time, while the 2002 and 2006 renewal decisions did so implicitly: "[W]hile the renewal decisions of 2002 and 2006 do not contain a discussion of extensions of the A.S. 27.21.070(b) requirements, the DNR considers that by granting a renewal of the permit with full knowledge of the status of Usibelli's operation (i.e., that coal mining operations had not begun), the DNR was implicitly granting an extension when it granted renewals in 2002 and 2006."

OSM has reviewed all of the documents and other materials submitted by DNR in response to the TDNs. The materials appear to establish, among other things, the following factual chronology concerning permittee submissions and DNR's permitting actions for the Wishbone Hill Mine:

Date	Action
09/05/1991	DNR initially issued permits under ASCMCRA for surface coal mining operations at the mine to Idemitsu Alaska for a five-year permit term of 09/05/1991 to 09/04/1996.
08/03/1994	Idemitsu Alaska submitted a request to DNR under A.S. 27.21.070(b) for extension of time to commence mining until 09/04/1996 (end of permit term). Idemitsu Alaska requested the extension due to ongoing litigation and based on the assertion that the circumstances were beyond its control and without its fault or negligence.

08/24/1994 DNR approved Idemitsu Alaska's request for extension of time to commence mining until 09/04/1996.

09/19/1995 DNR approved permit transfers from Idemitsu Alaska to North Pacific Mining Corporation (NPMC).

01/31/1996 Letter from NPMC to DNR stating that NPMC would "like to extend the existing permit without any major revision." NPMC stated that it requested the extension because NPMC "is continuing its [sic] efforts towards obtaining a partner to assist in the development of the Wishbone Hill coal project. We feel that we are close to securing that partner, but it is clear that the necessary project reviews and engineering studies will not have been completed in time to meet the September 1996 deadline for renewal of the SMCRA permit." In the materials submitted to OSM by DNR, NPMC did not specifically request an extension of time to commence surface coal mining operations and did not address the requirements of AS 27.21.070(b).

02/06/1996 A memorandum prepared by Brian McMillen, DNR staff member, and addressed to Jules Tileston, Director of DNR's Division of Mining and Water Management, interprets NPMC's 01/31/1996 letter as a request for an extension of time to commence mining and states that:

> A related problem is that AS 27.21.070(b) states the permit terminates if the permittee does not begin mining within three years (Attached). This would be the second extension. NPMC's justification is weak when compared to the wording in the statute. When the actual request is received you or Sam need to look at the justification and make a decision. If the justification is OK there is plenty of time to complete the renewal before the permit expires in September.

02/07/1996 Letter from Sam Dunaway, DNR, to Tom Crafford, NPMC, stating that DNR had received NPMC's 01/31/1996 letter and "in regard to AS 27.21.070(b) your justification for the extension needs to address the requirements in [the] statute."

05/03/1996 NPMC submitted applications to DNR for permit renewals for a five-year term from 10/23/1996 to 09/04/2001. The materials from NPMC's applications forwarded to OSM do not mention NPMC's 01/31/1996 letter or address the requirements of AS 27.21.070(b).

07/11/1996 NPMC submitted more detailed and enlarged applications to DNR for permit renewals for a five-year term from 10/23/1996 to 09/04/2001. In the materials forwarded to OSM by DNR, no mention is made of NPMC's 01/31/1996 request and no information is provided addressing the requirements of AS 27.21.070(b).

08/13/1996	DNR published in newspapers notice of its receipt of NPMC's application for permit renewals and stated, "The applicant has again requested an extension for beginning mining due to ongoing marketing efforts."
10/23/1996	DNR decision approving NPMC's applications for permit renewals for five-year terms from 10/23/1996 to 09/04/2001. DNR's approval decision states, "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." DNR's decision did not mention NPMC's 01/31/1996 letter, did not address the requirements of AS 27.21.070(b), and did not expressly grant a continuation of extension of time to commence mining.
07/22/1997	UCM submitted applications to DNR for transfer of NPMC's permits to UCM.
08/13/1997	DNR published in newspapers public notice announcing its receipt of UCM's applications for permit transfer.
12/01/1997	DNR approved UCM's applications for permit transfer.
04/20/2001	UCM submitted applications to DNR for permit renewal. The materials from UCM's applications forwarded to OSM do not contain a request for extension of time to commence mining.
08/08/2001	DNR published in newspapers notice of its receipt of UCM's application for permit renewals. The notice does not reference a request for extension of time to commence mining operations.
01/18/2002	DNR decision approving UCM's applications for permit renewal for the permit term of 01/18/2002 to 09/04/2006. DNR's decision does not reference any request for extension of time to commence mining operations and is silent with regard to granting an extension.
11/27/2006	DNR decision approving UCM's applications for permit renewal for the permit term of 11/27/2006 to 11/27/2011. DNR's decision does not reference any request for extension of time to commence mining operations and is silent with regard to granting an extension.
06/01/2010	UCM conducted surface coal mining activities at the mine by constructing a road and parking area in connection with the mine.

ANALYSIS OF DNR'S RESPONSE TO THE TDNs

There is no dispute that UCM conducted surface coal mining operations beginning in June of 2010 by constructing a road and parking area in connection with the Wishbone Hill Mine. In its response to the TDNs, DNR asserts that it has good cause not to take corrective action because

permits numbered 01-89-796 and 02-89-796 are valid and thus there has been no violation of the State program. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*) ("good cause for failure to take appropriate action includes: (i) under the State program, the possible violation does not exist").

OSM will accept DNR's response as constituting "good cause" for failing to take corrective action unless the response is arbitrary, capricious, or an abuse of discretion. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(*2*). As discussed below, it appears at this time from the documentation that has been forwarded to OSM, that DNR's assertion that the permits are valid is not supported by the facts or applicable law.

DNR's determination that the 1996 renewed permits are valid does not seem to be in accordance with A.S.27.21.070(b).

As discussed above, a permit terminates by operation of law if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. A.S. 27.21.070(b). The three-year period for commencement of such operations may be reasonably extended if the permittee shows, and DNR finds, that the extension is necessary either because litigation precludes the commencement of the operation or threatens substantial economic loss to the permittee or for reasons beyond the control and without the fault or negligence of the permittee. A.S. 27.21.070(b). If the extension is granted in conjunction with a permit renewal, the notice of the permit renewal must "specifically identify any extensions of time granted under A.S. 27.21.070." 11 AAC 90.117(c).

DNR's materials provided in response to the TDNs[2] show that, after Idemitsu Alaska's permits were transferred to NPMC in 1995, NPMC, in a letter to DNR dated January 31, 1996, advised DNR that NPMC would "like to extend the existing permit" because it sought a partner to assist in the development of the mine but could not secure the partner "in time to meet the September 1996 deadline for renewal" of its permit for the mine. The NPMC letter does not specify a period of time for the requested extension.

In response to this letter request, DNR staff prepared a February 6, 1996, memorandum which interpreted NPMC's request as one for a continuation of the extension of time to commence mining that had been previously granted to Idemitsu Alaska until September 4, 1996. The memorandum discussed A.S. 27.21.070(b)'s requirements for an extension of time to commence mining and noted that "NPMC's justification is weak when compared to the wording in the statute." DNR then sent a letter to NPMC dated February 7, 1996, responding to NPMC's request and advising it that "in regard to A.S. 27.21.070(b) your justification for the extension needs to address the requirements in [the] statute."

DNR has provided no documentation or other evidence that NPMC ever provided the additional justification for the extension requested by DNR's letter of February 7, 1996. Instead of justifying an extension, in May and July of 1996, NPMC submitted applications to DNR for a

[2] The facts described throughout this evaluation letter are taken from the materials provided by DNR in response to the TDNs. The chronology of events is summarized in the background section of this letter.

five-year permit renewal for a permit term of October 23, 1996, to September 4, 2001. The renewal applications did not contain a request for continuance of the extension of time to commence mining.

In its newspaper notice announcing receipt of NPMC's applications for five-year permit renewal, DNR stated, "The applicant has again requested an extension for beginning mining due to ongoing marketing efforts." On October 23, 1996, DNR issued a decision approving NPMC's applications for permit renewal. DNR's decision, however, did not explicitly grant an extension or otherwise mention NPMC's January 31, 1996, letter requesting a continuation of the extension of time to commence mining.

From available evidence it appears that DNR did not lawfully grant an extension of time to commence mining operations in its decision of October 23, 1996; consequently, it would appear that the permits terminated as a matter of law and that DNR's purported renewal of the permits was also invalid. More specifically, DNR's actions appear to be invalid for the following reasons:

1. The materials in the record before us are insufficient to make the showing to DNR, required by A.S. 27.21.070(b), that its request for a continuation of the extension of time to commence mining was necessary either because litigation precluded the commencement of the mining operation or threatened substantial economic loss to NPMC or for reasons beyond the control and without the fault or negligence of NPMC. NPMC's stated reason – the desire to acquire a business partner – plainly does not meet the criteria of A.S. 27.21.070(b), a fact that DNR itself recognized when it initially responded to NPMC's request on February 7, 1996.

2. Further, DNR did not itself make the findings necessary for granting NPMC's request for an extension under A.S. 27.21.070(b), namely, that the extension was necessary either because litigation precluded the commencement of the operation or threatened substantial economic loss to NPMC or for reasons beyond the control and without the fault or negligence of NPMC. Neither the decision of October 23, 1996, nor any other contemporaneous document provided by DNR addresses the statutory requirements. Although DNR's approval decision does indicate an intention to closely evaluate future renewals "should mining not commence within this renewal term," that intention cannot substitute for a proper review and application of the statutory extension requirements set forth in A.S. 27.21.070(b). DNR's 1996 renewal decision simply does not mention NPMC's January 31, 1996, letter and does not address the requirements of A.S. 27.21.070(b). The decision thus cannot be viewed as lawfully granting an extension.

3. In addition, DNR appears to have violated regulation 11 AAC 90.117(c) by failing to provide notice that it had granted an extension of time to commence mining operations. The regulation requires that DNR send a copy of any decision granting an application for permit renewal to OSM, the applicant, each person who filed comments on the renewal, and each party to any informal conference on the renewal. The regulation also requires that "[a]ll notices under this subsection will specifically identify any

extensions of time granted under A.S. 27.21.070." In its decision of October 23, 1996, DNR approved NPMC's application for five-year permit renewals, but it seems that it did not fulfill its regulatory obligation to "specifically identify any extensions of time granted under A.S. 27.21.070." DNR has provided no other documentation showing that, pursuant to 11 AAC 90.117(c), DNR notified OSM, NPMC, or any other party that it had granted an extension of time to NPMC to commence mining operations.

In summary, to date, the documents provided by DNR to OSM in response to the TDNs show that NPMC's permits expired on September 4, 1996, by operation of by A.S. 27.21.070(b) when NPMC failed to commence mining by that date. DNR's determination that it lawfully granted an extension and lawfully renewed the permits in its decision of October 23, 1996, is not supported by the documentation in the record forwarded to OSM or by Alaska law.

DNR's determination that the 2002 and 2006 permit renewals are valid does not seem to be in accordance with A.S.27.21.070(b).

DNR's December 1, 1997, approval of UCM's applications for permit transfer and DNR's January 18, 2002, and November 27, 2006, approvals of UCM's applications for permit renewal appear defective because, if the permits expired on September 4, 1996 as indicated by the evidence available to OSM, no valid permits existed to be transferred or renewed. In short, DNR's transfer and renewal actions appear to have been nullities because no valid permits existed for the transfer and renewal.

Even if one assumed that DNR's 1996 permit renewal and extension were valid, the subsequent renewals in 2002 and 2006 appear not to have been valid because, once again, neither UCM nor DNR seem to have made the showings or findings required by A.S. 27.21.070(b) to justify an extension of time to commence mining. DNR approved permit renewals for UCM in January 2002 and again in November 2006. DNR's documentation for these renewal actions provides no evidence that UCM requested an extension of the time to commence surface coal mining operations or that DNR found that an extension was justified due to litigation that precluded mining activities or threatened substantial economic loss, or for reasons beyond UCM's control and without its fault or negligence. The DNR permit renewal decision documents, dated January 18, 2002 and November 27, 2006, are silent with regard to granting extensions of time to commence surface coal mining operations. Moreover, there is no evidence that DNR provided notice specifically identifying the extensions of time granted under A.S. 27.21.070 for the 2002 and 2006 permitting actions, as required by 11 AAC 90.117(c). Given these multiple apparent failures to comply with A.S. 27.21.070(b) and 11 AAC 90.117(c), OSM, without further evidence to the contrary, would have to find in the alternative that the permits expired absolutely no later than November 27, 2006, for failure to commence mining operations.

DNR's "implicit extension" theory does not comport with ASCMCRA at A.S.27.21.070(b).

DNR states in its TDN response, "while the renewal decisions of 2002 and 2006 do not contain a discussion of extensions of the A.S. 27.21.070(b) requirements, the DNR considers that by granting a renewal of the permit with full knowledge of the status of Usibelli's operation (*i.e.*,

that coal mining operations had not begun), the DNR was implicitly granting an extension when it granted renewals in 2002 and 2006."

Based on the current record, OSM could find no lawful basis for DNR's argument that its decisions for renewal of UCM's permits in 2002 and 2006 constituted implicit grants of extensions of time to commence mining at the mine.[3] Nothing in A.S. 27.21.070(b) or any other provision of ASCMCRA or the approved regulatory program provides authority for DNR's argument. As discussed above, A.S. 27.21.070(b) provides that a permit is terminated if a permittee does not begin surface coal mining operations within three years after the permit is issued. The three-year period for commencement of such operations may be reasonably extended by DNR if, and only if, the permittee shows, and DNR finds, that the extension is necessary either because litigation precludes the commencement of the operation or threatens substantial economic loss to the permittee or for reasons beyond the control and without the fault or negligence of the permittee. DNR's contention that the mere decision to renew a permit constitutes an implicit extension of time to commence mining beyond the three-year period is contrary to A.S. 27.21.070(b) because it would allow such extensions absent any of the showings and findings required by A.S. 27.21.070(b). Here, it appears that nothing in UCM's applications for the 2002 and 2006 permit renewals and nothing in DNR's decisions approving the permit renewals made the justifications and findings required by A.S. 27.21.070(b).

Further, A.S. 27.21.070(b) requires that DNR may grant "reasonable extensions of time" to the three-year period for commencement of mining after the permit is issued. DNR's decisions approving the 2002 and 2006 permit renewals do not define or identify any period of time for continued extensions of time to commence mining. Thus, the renewal decisions appear not to comply with A.S. 27.21.070(b)'s requirement that extensions of time be "reasonable."

Finally, DNR argues that certain activities taken by UCM at the State's request constituted surface coal mining operations which affirm that DNR's renewal actions implicitly granted extensions of time to commence mining. Even if DNR's characterization of the activities were accurate, the post-1996 activities could not serve to extend the permits that had already terminated.[4] Moreover, the examples cited by DNR of the activities taken by UCM at the State's request -- namely, ground water monitoring, surface water monitoring, reclamation test plots, wetland studies, stream flow studies, and fish and wildlife studies -- are coal exploration activities as defined at 11 AAC 90.911(17) and cannot be considered surface coal mining operations.

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[3] DNR's argument presumes that the 1996 permit renewals and subsequent transfer to UCM were valid actions. As previously discussed, DNR's determination on those issues appears not to have been in accordance with Alaska's statute. Nevertheless, even assuming the validity of the 1996 renewal, there is no merit to DNR's "implied extension" theory for the 2002 and 2006 renewals.

[4] Also, by DNR's own admission, some of the referenced activities occurred prior to DNR's issuance of the initial permits for the mine in 1991 and thus would have no bearing on the validity of the permits.

Based on OSM's foregoing analysis of the documentation submitted to date by DNR in response to the TDNs, it appears that (1) valid permits held by NPMC under ASCMCRA for surface coal mining operations at the Wishbone Hill Mine terminated by operation of A.S. 27.21.070(b) on September 4, 1996, (2) DNR thereafter erroneously transferred and renewed invalid permits,[5] (3) the permits currently held by UCM are invalid, and (4) in June of 2010, UCM conducted surface coal mining activities at the mine without valid permits in violation of A.S. 27.21.060(a). Further, it appears that DNR did not have good cause for failing to take appropriate corrective action because the violation cited in the TDNs exists under the State program and no other circumstances demonstrating good cause have been asserted or exist under the good cause criteria of 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). It is possible, however, that these apparent defects may be remedied by supplementation of the record submitted to OSM. It appears that the record OSM reviewed has significant gaps in permitting information. For example, no documents other than decision documents were provided for the period of time from 2002 into 2006.

CONCLUSION

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 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. DNR must submit any additional information to Kenneth Walker, Manager, Denver Field Division, Western Region, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway, Suite 3320, Denver, CO 80202 within ten days of receipt of this letter.

If you do not submit any additional pertinent permitting information within ten days from receipt of this letter, OSM will proceed with its final determination on the TDN response from DNR. Should you have any questions concerning OSM's evaluation and findings, please feel free to contact me.

Sincerely,

Kenneth Walker, Manager
Denver Field Division

[5] Alternatively, OSM finds that the permits terminated for failure to commence mining operations no later than November 27, 2006.

cc:

Ed Fogels, Deputy Commissioner
Alaska Department of Natural Resources
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Anchorage, Alaska 99501-3650

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THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
DIVISION OF MINING, LAND & WATER
Director's Office
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November 17, 2016

Fred Wallis
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, AK 99743

RE: CESSATION OF ACTIVITY PENDING REVIEW: WISHBONE HILL MINE PERMITS (PERMIT NUMBERS 01-89-796 and 02-89-796)

Dear Mr. Wallis,

This letter directs a temporary cessation of mining activities under Usibelli Coal Mine., Inc.'s (UCM's) surface coal mining permits Permit # 01-89-796 and 02-89-796 (Wishbone Hill Mine), issued by the Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW) and requests further information from Usibelli.

As you know, on December 20, 2011, the Office of Surface Mining Reclamation and Enforcement (OSMRE), in response to a citizen's complaint filled by Trustees for Alaska and Earthjustice on behalf of local citizen's groups and the Chickaloon Village Traditional Council, issued two Ten Day Notices (#XII-141-182-005 and #XII-141-182-006) alleging that Usibelli Coal Mine Inc. (Usibelli) was potentially conducting surface coal mining operations at the Wishbone Hill Mine without valid permits. Russ Kirkham, Coal Program Manager, and Brent Goodrum, DMLW Director, responded on January 6, 2012 and August 2, 2012, respectively, concluding that the Wishbone permits were valid under state law and that DNR therefore had "good cause" to take no enforcement action regarding the permits. Meanwhile, DMLW issued a renewal for the Wishbone permits on October 26, 2014 for an additional five year permit term. This renewal was administratively appealed by various groups collectively referred to as the "Castle Mountain Coalition," or "CMC." The renewal was affirmed by the Commissioner in an administrative decision dated June 22, 2014.

OSMRE, in a November 4, 2014 decision, determined that DNR had "good cause" for not taking enforcement action because "Alaska's position that its statute does not result in automatic termination when a permittee misses the three-year deadline is consistent with the language of its statute and with the case law pertaining to forfeitures," and because Alaska's interpretation was "no less stringent than section 506(c) of the Surface Mining Control and Reclamation Act (SMCRA)."[1] Castle Mountain Coalition (CMC) filed for judicial

[1] November 4, 2014 letter from B. Postle, OSMRE to R. Kirkham, DNR.

review of OSMRE's decision in the United States District Court for the District of Alaska. On July 7, 2016, the District Court issued a decision vacating the November 4, 2014 TDN decision and ordering OSMRE to reissue a decision consistent with the Court's finding that that the phrase "shall terminate" as set forth in section 1256(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) means surface mining permits terminate by operation of law if mining operations have not commenced within three years of permit issuance, and no extension has been granted in accordance with the statute. UCM filed a motion to alter or amend the Court's decision on August 12, 2016. On September 2, 2016, the presiding judge requested briefing on UCM's motion. The Court issued a decision denying the motion to alter or amend on October 26, 2016.

The Court's July 7 order vacated OSMRE's original TDN decision, and today DNR provides a supplemented response to its original TDN response, for OSMRE's consideration on remand. DNR maintains that the Wishbone Hill permits remain valid state-issued permits, for the reasons articulated in the TDN responses and the Commissioner's June 22, 2015 decision. But OSMRE has indicated in language of its November 2, 2016 letter that it believes that the Wishbone Hill permits could be invalid, stating that the "implication of the Court's decision is that Usibelli is currently mining without a valid permit at the Wishbone Hill Mine."[2] Therefore, pursuant to its general powers as articulated in AS 27.21.030(4) and AS 27.21.030(14), **Usibelli is ordered to cease any activities at Wishbone Hill beyond maintenance activities approved by DNR in any future orders. Further, Usibelli is requested to provide the additional information described below within 30 days.** DNR is issuing this order to allow it to review its administration of the permit in light of the recent court decisions and Usibelli's response to this request for information. DNR reiterates that it has not made a determination that the existing permit terminated by operation of law or is otherwise invalid at this time.

DNR understands that UCM has been in temporary cessation since September 24, 2013 and that under the terms of the permit renewal, UCM may not resume mining at the Wishbone Hill site for at least six months because it must first complete the additional groundwater sampling required by that renewal. Based on the September 8, 2016 Wishbone Hill mine inspection, the site remains in stable condition and DNR recently confirmed in an inspection on November 3, 2016 that no additional activity has occurred on site since monitoring well installation in the fall of 2015. Because UCM is already in voluntary cessation of mining, no further abatement action to secure the site is required of UCM at this time.

DNR requests, however, that you provide within 30 days all information in your possession relating to:

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[2] Letter from J. Fleischman, OSMRE to R. Kirkham, AK DNR.

- The date of commencement of mining activities at the Wishbone Hill site
- Reasons for the delay in commencement of mining activities at the Wishbone Hill Site.

If you have any questions concerning this order please contact Russell Kirkham at 907-269-8650 or via email at russell.kirkham@alaska.gov.

Sincerely,

Brent Goodrum

Director, Division of Mining, Land and Water

Cc. Jeffry Fleischman, OSM
Russell Kirkham, DMLW-Mining

USIBELLI COAL MINE, INC.
P.O. Box 1000 ■ Healy, AK 99743
(907) 683-2226 ■ fax (907) 683-2253

December 2, 2016

Brent Goodrum, Director
Division of Mining, Land and Water
550 W 7th Ave #920
Anchorage, AK 99501-3577

Re: Response to request for information contained in Cessation of Activity Pending Review: Wishbone Hill Mine Permits (Permit Numbers 01-89-796 and 02-89-796) dated November 17, 2016

Dear Director Goodrum:

This letter is in response to your request for information contained in your letter: **Cessation of Activity Pending Review: Wishbone Hill Mine Permits (Permit Numbers 01-89-796 and 02-89-796)** dated November 17, 2016.

Specifically, you requested:

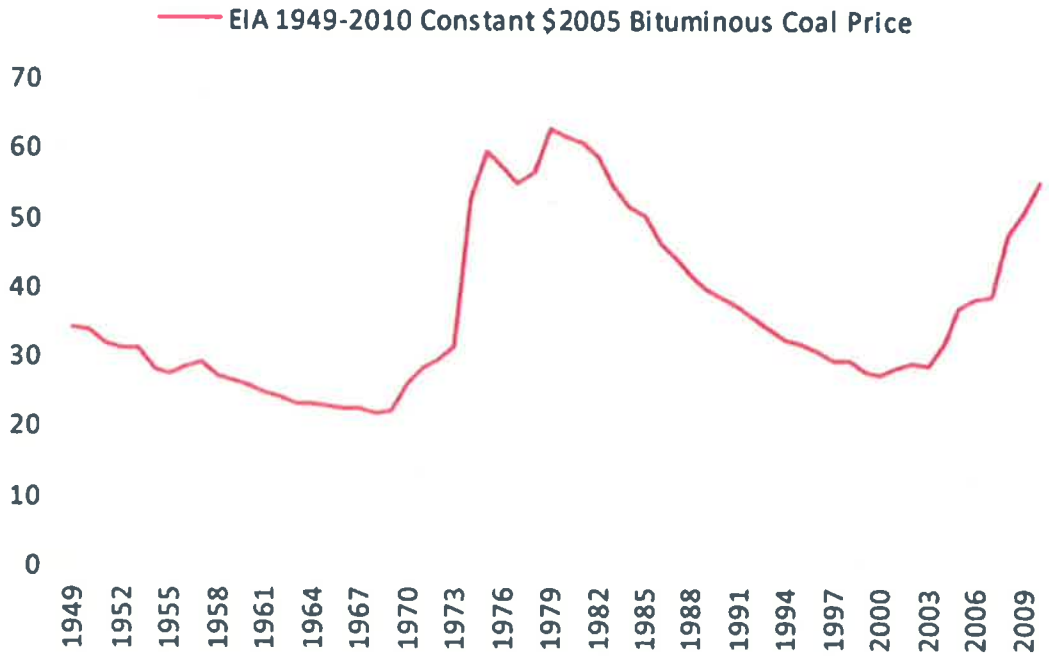
- **The date of commencement of mining activities at the Wishbone Hill site**
- **Reasons for the delay in commencement of mining activities at the Wishbone Hill site**

The date of commencement of mining activities at the Wishbone Hill site
UCM commenced surface coal mining operations in June 2010 by starting construction of the 2.7 mile mine access road.

Reasons for the delay in commencement of mining activities at the Wishbone Hill site
Since December 1, 1997, UCM has held valid surface coal mining permits (Permit Numbers 01-89-796 and 02-89-796) for the Wishbone Hill project, which DNR originally issued to Idemitsu Alaska, Inc. (Idemitsu) on September 5, 1991. Due to a combination of unfavorable coal market conditions and uncertainty regarding the land status due to the Mental Health Trust litigation, DNR granted Idemitsu an extension until the end of the original term of the permit; DNR renewed the permit in October 1996. UCM acquired the renewed permits shortly thereafter in December 1997. The permits were properly renewed in 2002 and 2006 for the permit terms ending in 2001 and 2006, respectively. On May 9, 2011, UCM submitted a request to renew the permits for an additional five-year term.

The unfavorable market conditions that plagued initial development of the Wishbone Hill Coal Mine continued until the early 2000s. When UCM acquired the permits, and up until 2008, the price of export bituminous coal hovered between $30-$40 per short ton. The graph below shows a U.S. Energy Information Administration summary of the historic price of bituminous coal between 1949 and 2010. At prices so low, UCM could not develop the mine. During the 1990s and 2000s, UCM continually informed DNR that UCM intended to develop the leases, but that

the economic conditions at the time did not warrant the commencement of mining operations. It was not until approximately 2008 that the price of coal increased to a level that would allow the Wishbone Hill Coal Mine to become an economically feasible project. At that time, UCM acted quickly to set in motion the prerequisites for project development and began negotiations with prospective partners to commence operations. UCM successfully secured a market partner, and in 2010, announced the commencement of a feasibility study in partnership with J-Power, who was likely to be the off-taker of the coal. Those efforts led to the construction of the road in 2010, as noted above.



Thank you for your continued attention to this important matter. If you require additional information, please do not hesitate to contact me.

Sincerely,

Fred Wallis, P.E.
Vice President, Engineering
Usibelli Coal Mine, Inc.

THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
DIVISION OF MINING, LAND & WATER
Mining Section
550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501-3577
Minerals Property Management Main: 907.269.8642
Fax: 907.269.8649
Coal Regulatory/Abandoned Mine Lands Main: 907.269.8631
Fax: 907.269.8930
TDD: 907.269.8411

December 9, 2016

Fred Wallis
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, AK 99743

RE: FOLLOW UP TO USIBELLI'S DECEMBER 2, 2016 LETTER CONCERNING ORDER FOR CESSATION OF ACTIVITY PENDING REVIEW: WISHBONE HILL MINE PERMITS (PERMIT NUMBERS 01-89-796 and 02-89-796)

Dear Mr. Wallis,

This letter is in response to your letter dated December 2, 2016 to Brent Goodrum, Director of the Division of Mining, Land and Water (DMLW). This letter is in response to DMLWs letter dated November 17, 2016 ordering the cessation of operation. In that letter DMLW also requested that Usibelli provide additional specific information concerning the date of commencement of mining activities at the Wishbone Hill site and reasons for the delay in commencement of mining activities at the Wishbone Hill Site.

We have completed our initial review of your letter. Much of the information provided in this letter had been previously submitted to DMLW. DMLW is requesting that Usibelli supplement their letter by providing additional information that addresses these specific questions:

1. Please provide additional information on how the Mental Health Trust litigation played into delaying the commencement of mining operations and the period of time that the litigation prevented the commencement of mining operations.
2. In your response you indicated that market conditions were unfavorable to the development of the Wishbone Hill Project. Please provide additional detail on Usibelli's efforts to develop a market for this project and why it could not be incorporated into the railbelt power grid.
3. DMLW stated in its letter to the Office of Surface Mining and Reclamation (OSMRE) "that in light of the scrutiny being given to the validity of the [Wishbone Hill mine] permits, the scope and effect of [exploration activities], and how they might be dually characterized under the law, should be revisited." Do you have any position on this statement?

As a reminder, the November 17, 2016 Order for Cessation of Mining Activities remains in effect until terminated by the Director of DMLW or by the Commissioner of the Department of Natural Resources.

If you have any questions concerning this follow-up letter, please contact me at 907-269-8650 or via email at russell.kirkham@alaska.gov.

Sincerely,

Russell Kirkham,
Coal Program Manager

Cc. Brent Goodrum, DMLW
Marty Lentz, DMLW

THE STATE of ALASKA
GOVERNOR BILL WALKER

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TDD: 907.269.8411

October 2, 2017

Fred Wallis
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, AK 99743

RE: SECOND REQUEST FOR ADDITIONAL INFORMATION TO SUPPORT USIBELLI'S DECEMBER 2, 2016 LETTER CONCERNING ORDER FOR CESSATION OF ACTIVITY PENDING REVIEW: WISHBONE HILL MINE PERMITS (PERMIT NUMBERS 01-89-796 and 02-89-796)

Dear Mr. Wallis,

On December 9, 2016, Division of Mining, Land and Water, Mining Section (DMLW-Mining) sent a letter to Usibelli Coal Mine, Inc. (UCM) stating that we had completed our initial review of UCM's response letter dated December 2, 2016. The December 2th letter was in response to a November 17, 2016 order from Brent Goodrum, Director of the Division of Mining, Land and Water ordering the cessation of all mining operation activities at the Wishbone Hill Site and requesting that UCM provides additional specific information concerning the date of commencement of mining activities at the Wishbone Hill site and reasons for the delay in commencement of mining.

During DMLW-Mining review of the December 2nd letter it found that much of the information provided in that letter had been previously submitted to DMLW. DMLW in its December 9th letter requested that Usibelli supplement their response by providing additional information.

As of September 25, 2017, UCM had not provided any additional information to DMLW. At this time, DMLW-Mining is providing a second opportunity to supplements their December 2, 2016 letter. Please provide response to the following questions:

1. Please provide additional information on the role the Mental Health Trust litigation played in delaying the commencement of mining operations and the period of time that the litigation prevented the commencement of mining operations.
2. In your response you indicated that market conditions were unfavorable to the development of the Wishbone Hill Project. Please provide additional

detail on UCM's efforts to develop a market for this project and why it could not be incorporated into the railbelt power grid.

3. Please provide any other information that UCM believes supports an extension or extensions under AS 27.21.070(b).
4. DMLW stated in its letter to the Office of Surface Mining and Reclamation (OSMRE) "that in light of the scrutiny being given to the validity of the [Wishbone Hill mine] permits, the scope and effect of [exploration activities], and how they might be dually characterized under the law, should be revisited." Do you have any position on this statement?

If not response is received by October 23, 2017, DMLW will proceed to make a final determination on the status of the Wishbone Hill Permit.

As a reminder, the November 17, 2016 Order for Cessation of Mining Activities remains in effect until terminated by the Director of DMLW or by the Commissioner of the Department of Natural Resources.

If you have any questions concerning this follow-up letter, please contact me at 907-269-8650 or via email at russell.kirkham@alaska.gov.

Sincerely,

Russell Kirkham,
Coal Program Manager

Cc. Brent Goodrum, DMLW
David Berry, OSMRE

USIBELLI COAL MINE, INC.

PO Box 1000 Healy, Alaska 99743
Telephone (907) 683-2226 • Facsimile (907) 683-2253

November 28, 2017

Russell Kirkham, Coal Program Manager
Alaska Department of Natural Resources
550 W 7th Ave #900B
Anchorage, Alaska 99501-3577

RE: Response to DNR's December 9, 2016 Follow Up to Usibelli's December 2, 2016 Letter Concerning Order for Cessation of Activity Pending Review: Wishbone Hill Mine Permits (Permit Numbers 01-89-796 and 02-89-796)

Dear Mr. Kirkham:

Usibelli Coal Mine, Inc. (UCM) has limited additional information to answer your request for additional information. Our response is below:

1. Please provide additional information on the role of the MHT litigation played in delaying the commencement of mining operations and the period of time that the litigation prevented the commencement of mining operations.

The Mental Health Trust (MHT) litigation got underway in the mid-1980s and impacted the development of many lands, such as Wishbone Hill (WBH), owned by the State of Alaska. The plaintiffs in the litigation argued that many State lands slated for resource development or other uses had inappropriately been diverted from the MHT. That led to the issuance of a preliminary injunction in 1990 that stopped the State from transferring any interest in lands formerly held by the MHT. The preliminary injunction led to a stop on development on many State lands, including lands in the WBH project area. Beyond the actual injunction, the MHT litigation cast a significant cloud on the title for WBH, making it impossible as a practical matter for the original project proponent, Idemitsu, to advance the project. UCM did not acquire the WBH project until December 1997, after the resolution of the MHT litigation.

Please note that the impact of the MHT litigation was widespread in Alaska and extended well beyond the WBH project. For example, another Alaska coal project at the time – the Chuitna Project – was permitted in the early 1990s, but never advanced due to significant uncertainties

caused by the MHT litigation. That project remained dormant until the markets improved in the late 2000s.

The impact of the MHT litigation continued into 1997 – the last step was the denial of certiorari by the U.S. Supreme Court. The MHT litigation and the impacts on Alaska are addressed in the final decision in the matter, *Weiss v. State* (May 1997) found at 939 P.2d 380.

2. In your response you indicated that market conditions were unfavorable to the development of the WBH project. Please provide additional details on UCM's efforts to develop a market for this project and why it could not be incorporated into the Railbelt power grid.

As disclosed in other submittals to DNR, the demand for thermal coals was weak until the late 2000s. UCM provided information to DNR on the market in letters dated January 3, 2012 and on December 2, 2016. We do not have anything further to offer to support the conclusion that thermal coal prices were significantly depressed until the late 2000s, making the development of a coal project in Alaska impossible.

3. DMLW stated in its letter to OSM "that in light of the scrutiny being given to the validity of the [Wishbone Hill mine] permits, the scope and effect of [exploration activities] and how they might be dually characterized under the law should be revisited. Do you have any position on this statement?

As stated in its January 3, 2012 letter to DNR, UCM commenced surface coal mining operations no later than June 2010. UCM expresses no position at this time whether earlier activities at the WBH site resulted in the commencement of mining operations at a date prior to June 2010.

Sincerely,

Fred W. Wallis, P.E.
Vice President of Engineering