EARTHJUSTICE

March 5, 2019

Sent via Electronic Mail

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

Re: Wishbone Hill Coal Mine.

Dear Mr. Berry:

Earthjustice submits this letter on behalf of its client, the Chickaloon Village Traditional Council ("Chickaloon" or "the Council"). The Council is the governing body of the Chickaloon Native Village, a federally recognized Tribe located in the vicinity of the Wishbone Hill Coal Mine in south-central Alaska.

Pursuant to 30 C.F.R. § 842.12(a), Chickaloon hereby requests that you conduct an inspection of the Wishbone Hill Coal Mine under 30 C.F.R. § 842.11(b), hold the operating permit invalid, and take appropriate enforcement action. In 2010, Usibelli Coal Mine, Inc. ("Usibelli") began operating without a valid permit, because its original operating permit had terminated by operation of law in 1996. As required by 30 C.F.R. § 842.12(a), Chickaloon first informed Alaska's regulatory authority—the Department of Natural Resources (DNR)—of this violation in a letter dated November 28, 2011.[1] Since that time, Chickaloon has been engaged continuously in administrative proceedings and court actions against DNR over this violation. We are also sending a copy of this letter to DNR.

On August 24, 2017, you submitted a letter to DNR requesting additional information on DNR's efforts to enforce the law, taking note of the Denver Field Division's finding that "the permit appears to have terminated in 1996."[2] On December 14, 2017, you sent another letter to DNR recognizing the agency's information gathering efforts and giving the agency an opportunity to correct the violation itself.[3]

Unfortunately, on November 29, 2018, DNR issued a final decision in a letter reasserting its longstanding defiance of court orders and of determinations by the Office of Surface Mining Reclamation and Enforcement (OSM). In the letter, DNR insists that the operating permit

[1] Exhibit 1 (Letter from Brook Brisson and Katie Strong, Trustees for Alaska, to Daniel Sullivan, DNR (Nov. 28, 2011)).
[2] Exhibit 2 at 2 (Letter from David Berry, OSM, to Russell Kirkham, DNR (Aug. 24, 2017)).
[3] Exhibit 3 (Letter from David Berry, OSM, to Russell Kirkham, DNR (Dec. 14, 2017)).

remains valid and refuses to take required enforcement action against Usibelli.[4] As a result, DNR has informed Usibelli that the company remains free to begin operations under the permit as soon as certain monitoring requirements are completed.[5]

Chickaloon regrets that, yet again, it must turn to OSM to enforce the law. On January 11, 2019, Trustees for Alaska submitted a letter to you requesting the same relief.[6] Chickaloon joins fully in that letter, incorporating it by reference, and adds the following considerations.

DNR's principal justification is simply a rehash of its longstanding position that the renewals of the permits in 1996, 2001, 2006, and 2014 were implicit extensions: "the renewed grant of a permission to mine inherent in a renewal effectively allowed the applicant time to begin mining in compliance with the terms of the renewed permit."[7] Both OSM and the courts have rejected this position. Last July, the Deputy Director of OSM addressed this very issue in a decision on informal review of the Eagle No. 2 Mine in West Virginia, holding, "Like the court in *Castle Mountain*, I reject the proposition that the regulatory authority can make implicit extensions."[8] DNR's letter attempts to re-litigate this issue. OSM should reject it summarily.

Apparently recognizing that it cannot prevail on the issue of implicit extensions, DNR alternatively purports to grant a retroactive extension of the 1996 deadline for commencing operations that Usibelli failed to meet. Under both the state and federal statutes, DNR may grant an extension only if it is "reasonable" and is necessary due either to litigation or to causes "beyond the control and without the fault or negligence of the permittee."[9] DNR does not claim that litigation necessitated the extension here. Instead, the agency asserts that Usibelli was faultless in its failure to obtain an extension.[10]

Both of DNR's findings—that the extension is reasonable and was due to factors beyond Usibelli's control—are arbitrary.

First, it is simply not true that Usibelli's failure to obtain an extension was beyond its control and without its fault. Usibelli is a sophisticated and experienced corporation that has been in the coal mining business since 1943. The company has always been represented by able counsel and in any event should be presumed to be aware of the requirements of the surface coal mining laws. This is particularly true here, where the issue is a core provision going to the

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[4] Exhibit 4 (Letter from Andrew Mack, DNR, to Fred Wallis, Usibelli (Nov. 29, 2018)).
[5] *Id.* at 28.
[6] Exhibit 5 (Letter from Katie Strong, Trustees for Alaska, to David Berry, OSM (Jan. 11, 2019)).
[7] Exhibit 4 at 21-22.
[8] Exhibit 6 at 13 (Letter from Glenda Owens, OSM, to Harold Ward, WV Dep't of Envt'l Protection, at 13 (July 26, 2018) (citing *Castle Mt. Coal. v. OSM*, No. 3:15-cv-00043-SLG, 2016 WL 3688424 (D. Alaska July 7, 2016))).
[9] 30 U.S.C. § 1256(c); AS 27.21.070(b).
[10] Exhibit 4 at 24.

validity of the entire operating permit.[11] A permittee has a responsibility to ensure its compliance with the law. Usibelli could have and should have sought the extensions required by both state and federal law. Similarly, when DNR mistakenly granted renewals lacking any explicit extensions, Usibelli could have and should have sought clarification from DNR. Usibelli's failure to take these prudent steps necessarily reflected either negligence on Usibelli's part or a deliberate strategy to take advantage of DNR's mishandling of the permit. Either way, it is plainly not true that the mishandled permits were beyond Usibelli's control or without its fault or negligence. Operators must not be allowed to hide behind a regulatory authority's manifest errors.

DNR's finding that the extension was reasonable is also arbitrary. The agency held that "the time taken to begin mining was reasonable as discussed earlier in this document."[12] It is difficult to find such a discussion earlier in the document. The finding appears to be based on Usibelli's inability to find a purchaser for the coal, though there is no explicit finding that the length of time this has taken was "reasonable" under the statute.[13] OSM has correctly found that this rationale would contravene Congressional intent by allowing permits to remain dormant indefinitely.[14] Further, DNR never addresses the core issue: whether the cumulative time of the retroactive extension was reasonable. DNR conspicuously avoids the question whether it is reasonable to grant extensions totaling 14 years from the last extension deadline (1996 to 2010), 16 years from the original deadline (1994 to 2010), and 19 years from the issuance of the permit (1991 to 2010). Nor does the agency consider whether it is reasonable to do so retroactively 27 years after the original permit (1991 to 2018). These substantial extensions should be evaluated by comparison to the presumptive three-year deadline in the statute, which is what Congress considered reasonable.[15] Even if it were true that Usibelli had been faultless in its failure to seek and obtain extensions in a timely fashion, the substantial passage of time raises significant questions DNR ignores completely. As OSM has previously noted, to allow a permittee to sit on a dormant permit for decades while waiting for a purchaser to come along defeats the purpose of the statute. When a permittee fails to commence operations in a timely fashion, adversely affected members of the public are entitled, at some point, to a new process taking a fresh look at the proposed mine applying current science and technology, without the presumption of renewal.[16] Here, for example, DNR overlooks the prejudicial effect on members of the public, who never received meaningful notice that extensions were being granted or that the requirements for extensions were met, as required by the Alaska program.[17] For these reasons, it was arbitrary for DNR to find it reasonable to extend retroactively a dormant permit issued an entire generation ago.

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[11] *See* Exhibit 7 at 6 n.6 (Letter from Jeffrey Fleischman, OSM, to Russell Kirkham, DNR (Jan. 18, 2017)) ("Usibelli is a sophisticated operator that had or should have had knowledge of the facts and the law when it acquired the permits.").
[12] Exhibit 4 at 24.
[13] *Id.* at 22.
[14] *See* Exhibit 5 at 9.
[15] 30 U.S.C. § 1256(c); AS 27.21.070.
[16] *See* 30 U.S.C. § 1256(d)(1); AS 27.21.080(a).
[17] 11 AAC 90.117(c) ("All notices under this subsection will specifically identify any extensions of time granted under AS 27.21.070.").

This is particularly true where the affected public includes Tribes. The United States has a "unique legal relationship" with Tribal governments like Chickaloon, and this includes a fiduciary responsibility to protect their interests.[18] The United States recognizes the inherent sovereign powers of Tribes, and its agencies are required to consult with Tribes on a government-to-government basis.[19] The federal government has a commitment "to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications."[20]

In accordance with these policies, Chickaloon renews its request for government-to-government consultation with OSM regarding the Wishbone Hill mine. Chickaloon further asks that you consider its request today for an inspection and enforcement in light of the unique legal relationship between Tribes and the U.S. government and in light of the special responsibilities owed by the United States to Tribes.

Pursuant to 30 C.F.R. § 842.12(c) and the consultation owed by agencies to Tribal governments, Chickaloon requests that a representative of the Tribe be allowed to accompany the agency in its inspection of the mine.

Thank you for your prompt response to this request. You may contact me at the address on the letterhead, by email to twaldo@earthjustice.org, or by phone at (907) 500-7123.

Sincerely,

Thomas S. Waldo
EARTHJUSTICE
Attorneys for Chickaloon Village Traditional Council

cc:

Glenda Owens, Acting Director
Office of Surface Mining Reclamation and Enforcement
gowens@osmre.gov

Corri A. Feige, Commissioner
Alaska Department of Natural Resources
Corri.Feige@alaska.gov

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[18] *See*, *e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249, § 2(a) (Nov. 9, 2000).
[19] *Id.* §§ 2(b), 3(a), 3(c)(3), 5(a).
[20] Presidential Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009).

Russell Kirkham, Manager, Coal Regulatory Program
Alaska Department of Natural Resources
Russell.Kirkham@alaska.gov

TABLE OF EXHIBITS

TRUSTEES FOR ALASKA
SUSTAIN | PROTECT | REPRESENT

November 28, 2011

Daniel S. Sullivan, Commissioner
Alaska Department of Natural Resources
550 W. 7th Ave, Suite 1260
Anchorage, AK 99501-3557
Daniel.sullivan@alaska.gov

Sent via email

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

Dear Commissioner Sullivan:

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 Inletkeepter, Alaska Community Action on Toxics ("ACAT"), Pacific Environment, the Chickaloon Village Traditional Council ("CVTC"), and the Alaska Chapter of the Sierra Club (collectively "Groups"). Groups have reason to believe that Usibelli Coal Mining, Inc. ("Usibelli") is conducting surface coal mining operations at Wishbone Hill near Sutton, Alaska without valid mining permits, in violation of the Alaska Surface Coal Mining Control and Reclamation Act ("ASCMCRA"). Groups hereby request that DNR immediately issue a Cessation Order to Usibelli for all surface coal mining operations at Wishbone Hill until Usibelli obtains valid mining permits for those activities.

1. *Groups are or may be adversely affected and are proper parties to raise ASCMCRA compliance issues at the Wishbone Hill Mine Area to DNR.*

Groups are or may be adversely affected by unpermitted operations at Wishbone Hill and are proper parties to bring these issues to DNR. *See* AS 27.21.230(h) ("A person who is or may be adversely affected by a surface coal mining operation may notify the DNR Commissioner, in writing, of a violation of this chapter that the person has reason to believe exists at the site of the surface coal mining operation."); *see also* 11 AAC 90.607(a) ("A citizen may request an inspection…[via] a written statement…giving the commissioner reason to believe that a violation, condition, or practice [that is causing or can reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources] exists"). 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). The unpermitted operations at Wishbone Hill, therefore, threaten to adversely affect Groups, 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 affects. 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 Wishbone Hill Coal Mine 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 over 250 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 threaten 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 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.

CVTC is the governing body of the federally-recognized Chickaloon Native Village, or Nay'dini'aa Na' Traditional Village ("Chickaloon"). Unlike Alaska Native Corporations or non-profit organizations, CVTC is a separate-sovereign, an Ahtna Athabascan Nation, and fully functioning government with its own government-to-government relationship with the United States and its agencies, including OSM. CVTC exercises all of its inherent and express powers in accordance with their Constitution, Federal Indian law, and Tribal common law. CVTC acts and governs on behalf of all Chickaloon Tribal citizens. CVTC's Tribal headquarters and governmental offices are located in the vicinity of Sutton, Alaska and within sight of Wishbone Hill and the permit area. The permit areas for the Wishbone Hill and Jonesville coal mines are entirely within Chickaloon's traditional territories and have been continuously used and occupied by Chickaloon citizens since time immemorial for cultural, spiritual, and subsistence activities. Both permit areas are considered sacred sites to Chickaloon and contain numerous cultural and archaeological resources. CVTC's interest in these resources and associated activities are recognized and protected as a matter of Tribal, State, Federal, and International law. Furthermore, CVTC has worked tirelessly with State, Federal, and local governments, investing over 1.2 million dollars and thousands of hours, to restore and enhance salmon populations, fish

passage, and fish and wildlife habitat destroyed and damaged within and near the permit areas by historic small-scale coal mining operations. In particular, CVTC has undertaken extensive restoration and rehabilitation of Moose Creek and Eska Creek, both of which provide critical fish and wildlife habitat. Coal mining activities, especially operations conducted without a valid permit, threaten all of these interests.

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. *Groups 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). ASCMRA 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). 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," *id.*, if an extension is requested prior to the expiration of the three-year time period. *See R.R. Comm'n of Texas v. Coppock*, 215 S.W.3d 559, 562 (Tex. App. 2007). Numerous activities fall within the definition of "surface coal mining operations," including road building and other construction activities related to mine development. AS 27.21.998(17). *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). 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. AS 27.21.070(b). Accordingly, any subsequent "surface coal mining operations" at the site have been, and are being, conducted without a valid ASCMCRA permit, in violation of AS 27.21.060(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. *DNR 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.*

DNR must investigate whether Usibelli has been undertaking mining operations without a permit since June 2010 and reply within either 10 days of a site inspection or within 15 days of the receipt of this complaint letter, if DNR decides not to conduct an inspection. 11 AAC 90.607(c). 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," 11 AAC 90.613(c), DNR must "immediately issue a notice of violation and order a cessation of the … surface coal mining operation." AS 27.21.240(a); *see also* 11 AAC 90.613(a), (c). This Cessation Order must remain in effect until Usibelli obtains a valid permit to conduct surface coal mining operations. *See* AS 27.21.240(a) ("[A] cessation order remains in effect until the commissioner determines that the violation has been abated, or until [the cessation order is] modified, vacated, or terminated").

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:
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Russell Kirkham, Manager, Coal Regulatory Program
Alaska Department of Natural Resources
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United States Department of the Interior

OFFICE OF SURFACE MINING
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1999 Broadway, Suite 3320
Denver, CO 80202-3050

August 24, 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 carefully reviewing your Informal Review request, I have determined that I need further information and clarification from DNR before I can reach a final determination about whether the Denver Field Division's decision should be affirmed, reversed, or modified.

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 district court determined that OSMRE's interpretation of 30 U.S.C. § 1256(c) was contrary to the plain language of SMCRA, and vacated OSMRE's TDN decision. *Castle Mountain Coalition v. OSMRE*, 2016 U.S. Dist. LEXIS 87953 (D. Alaska July 7, 2016).

In its July 17, 2016, decision, the Alaska District Court reviewed the language of the federal statute (30 U.S.C. § 1256(b)(6)) and concluded 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." *Castle Mountain Coalition v. OSMRE*, 2016 U.S. Dist. LEXIS 87953, at *43. The Court also held that OSMRE and the State of Alaska "must give effect to the unambiguously expressed intent of Congress." *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 "did not evaluate the validity of Usibelli's permits."

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.

Determination

In DNR's Request for Informal Review, DNR stated that it had taken "appropriate action" on the TDNs because it had directed the cessation of mining at Wishbone Hill, had begun reviewing the administration of the permits, and had requested additional information from Usibelli, all in an effort to reach a decision on the status of the permits in light of the Court's decisions. On page 7 of its TDN decision, the Denver Field Division acknowledges that DNR directed the cessation of mining at Wishbone Hill, but determined that this did not constitute "appropriate action" under 30 C.F.R. § 842.11(b)(1)(B)(3). The Denver Field Division's TDN decision then stated "[i]t 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." TDN Decision, p. 7.

I acknowledge DNR's efforts to resolve this matter and commend it for instructing Usibelli "to cease any activities at Wishbone Hill beyond maintenance activities approved by DNR in any future orders" pending a DNR review of the permit status in light of the Court's decision. This action ensures that that no mining will occur on Wishbone Hill until DNR can review the facts of the case in light of the Court's decisions and come to a final decision on the appropriate course of action. *See, e.g.*, Informal Review Request, p. 2; Nov. 17 Letter to Usibelli.

However, although DNR has taken positive steps, its ultimate position on the condition of Usibelli's permits remains unclear. Please advise me of the status of your review of these

permits. I note that, if you have not completed your review, 30 C.F.R. § 842.11(b)(1)(ii)(B)(*4*)(*ii*) allows OSMRE to find that "good cause" for taking no action exists if you "require[] reasonable additional time to determine whether a violation of the State program does exist." Your Request for Informal Review, however, did not clearly indicate that you needed an additional, reasonable amount of time to determine the status of the permits. If DNR can provide me with a clear position on the status of the Wishbone Hill permits or a reasonable schedule for completion of the permit review, I will consider that information in my final determination about whether DNR has taken "appropriate action" in connection with the TDNs or has demonstrated that it had "good cause" for not taking action.

OSMRE respects Alaska's position as a primacy state, and I believe the most expeditious path forward would be for the status of the Wishbone Hill permits to be resolved by DNR in a manner consistent with SMCRA and the Court's decision. Such a process would allow any state decision and/or order to be subject to review and appeal through the state administrative and judicial process.

Conclusion

Before I reach a final determination on whether DNR took "appropriate action" or had "good cause" for not doing so, I am requesting that DNR provide me with the status of its review or a schedule for the timely completion of the review. I request your response within 30 days after receipt of this letter.

Sincerely,

David A. Berry
Regional Director

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

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
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December 14, 2017

Mr. Russell Kirkham
Program Manager
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550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501-3577

Certified Mail/Return Receipt

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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).

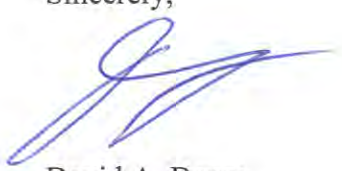
My decision is also informed by the principles of cooperative federalism and state primacy. SMCRA clearly puts the state regulatory authorities in charge of managing regulatory matters within their jurisdiction and provides only for limited federal oversight. *See, e.g.*, 30 U.S.C. § 1201(f) ("the primary 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

[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

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

Heidi Hansen, Deputy Commissioner, Dept. of Natural Resources

TRUSTEES FOR ALASKA
PROTECT | DEFEND | REPRESENT

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.

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.

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
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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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