



June 25, 2014

Alice Edwards, Director
Division of Air Quality
Department of Environmental Conservation
410 Willoughby Avenue, Suite 303
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E: Alice.Edwards@alaska.gov

Submitted via electronic mail

Re: Request for informal review of decision to issue Air Quality Control Minor Permit AQ1227MSS04 to Usibelli Coal Mine, Inc. for the Wishbone Hill Coal Mining and Processing Operation

Dear Director Edwards:

On behalf of Chickaloon Village Traditional Council (CVTC), the governing body of the federally-recognized Chickaloon Native Village (CNV or the Tribe), with all of the inherent powers of a sovereign Athabascan Nation, Earthjustice submits this request for informal review of the Alaska Department of Environmental Conservation's (ADEC) June 10, 2014, decision to issue Air Quality Control Minor Permit AQ1227MSS04 (Permit) to Usibelli Coal Mine, Inc. (Usibelli) for the Wishbone Hill Coal Mining and Processing Operation (Mine). CVTC submitted comments on the proposed permit and is entitled to request informal review.¹

As required by 18 AAC 15.185(a)(1), CVTC's contact information is:

Chickaloon Village Traditional Council
Attention: Lisa Wade
P.O. Box 1105
Chickaloon, AK 99674
Phone: 745-0707 / Fax: 745-0709
Email: lisaw@chickaloon.org

¹ Chickaloon Village Traditional Council's Comments on ADEC's Preliminary Decision to Approve Permit Application for Usibelli Coal Mine, Inc. Wishbone Hill Mining and Processing Operations, Air Quality Control Minor Permit AQ1227MSS04 (2014 CVTC Comments) and accompanying exhibits (Apr. 14, 2014) are attached.

Any correspondence in response to this request should also be copied to counsel for CVTC:

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I. CVTC'S INTEREST IN THE PERMITTING DECISION.

A. Nature and Scope of Interests

The Wishbone Hill Coal Mining and Processing Operation is located within the Tribe's traditional and customary use area. Chickaloon Tribal ancestors historically lived, traveled, hunted, and traded in the Wishbone Hill area and certain locations continue to hold great spiritual significance. For example, the ridge at the head of Moose Creek is called Tsida K'ae Dghilaaye' in Ahtna, where a trail used by the Larson family led up the creek and over the mountains to the upper Kashwitna River.² The Larson and Wade families lived, hunted, and gathered berries throughout Tsadaka Canyon (Tsidek'e Dyii) on Moose Creek, southwest of the mining area.³ Just southwest of that canyon is C'ek'aali Cene', a well known bluff that was the site of a village.⁴ There is a trail leading from the Moose Creek homestead of the Shaginoff and Wade families up to Wishbone Lake, which was a popular fishing spot.⁵

Moose Creek (Tsidek'etna') itself is of particular importance to the CNV people—"there are burials on both sides of the mouth" of the creek, which runs along the northwest boundary of the Mine, and "[s]everal people died here during the 1918 flu epidemic."⁶ An early American explorer, Joseph C. Castner, reported an Ahtna camping place near Moose Creek.⁷ Chickaloon Tribal ancestors fished for salmon in the creek,⁸ and the Tribe has worked hard to restore Moose Creek from the severe damage incurred by coal mining in the past. For example, the U.S. Fish and Wildlife Service and the Tribe entered into cooperative agreements to restore salmon runs. To date, CNV and its partners have spent more than \$1,200,000 and thousands of hours

² Shem Pete's Alaska: The Territory of the Upper Cook Inlet Dena'ina (James Kari & James A. Fall, eds., 2d ed. 2003), Ex. 20 at 297 § 14.79. This exhibit numbering reflects a continuation of the exhibit numbers used by the 2014 CVTC Comments.

³ *Id.* at 297 § 14.78.

⁴ *Id.* at 296-97 § 14.13.

⁵ *Id.* at 297 § 14.15.

⁶ *Id.* at 297 § 14.14.

⁷ *Id.*

⁸ *Id.*

restoring Moose Creek fish habitats and salmon populations, including a national award-winning Moose Creek Fish Passage Restoration Project.

The Chickaloon Tribal people continue to live near Wishbone Hill, which is located within one-quarter mile of community homes, a school, and important cultural and subsistence resources. Of particular importance is the Ya Ne Dah Ah School, a Tribal cultural center located just 100 yards from the intersection of the highway and Usibelli's access road to the Mine. The Ya Ne Dah Ah School is a central ceremonial area and Tribal property, where younger generations learn the Ahtna Athabascan language, culture, songs, dances, earth stewardship, and history of Chickaloon Native Village. There are also homes, elders' facilities, correctional facilities, and youth camps in the area that will be affected by the Mine.

B. How and the Extent to which Interests are Affected

The Permit, as issued, will burden CNV's health, welfare, and spiritual and cultural practices, including subsistence practices and ceremonies within and in close proximity to the permit area. Clean air and water are absolutely required for CNV's spiritual, physical, and mental well-being and survival. In fact, air and water are so indispensable to the Tribe's way of life and spiritual practices that there is a family clan named for each one.

Tribal cultural practices will be directly and negatively affected by noise from blasting and mining operations, air and water pollution, fugitive dust, blowing coal dust, and toxic emissions, and by blocking Tribal access to traditional use areas. Usibelli's operations have already begun interfering with Tribal rights and resources, such as in 2011, when Usibelli prevented Tribal citizens from accessing important areas for taking a potlatch moose. During a Tribal funeral, Chickaloon Tribal hunters attempted to access State lands within the permit area for taking a moose for the funeral potlatch (a fundamental human right also guaranteed under the Alaska Constitution).⁹ Barriers erected by Usibelli prevented using this traditional area for the hunt.

II. CONTESTED TERMS OR CONDITIONS OF THE DECISION AND PROPOSED ALTERNATIVES.

A. ADEC failed to consult meaningfully with Chickaloon Village Traditional Council.

ADEC's failure to consult meaningfully with CVTC regarding the impacts of the Mine constitutes an ongoing violation of the fundamental human rights of members of CNV, including the right to free, prior, and informed consent under the United Nation's Declaration

⁹ See Alaska Const. art. I, § 4; U.S. Const. amend. I; see also *Frank v. State*, 604 P.2d 1068, 1073-74 (Alaska 1979) (taking moose for Athabascan funerary services is a protected religious practice where proponent is "sincere" and the practice is "deeply rooted" in religious belief, and may only be curtailed by demonstration of a compelling state interest).

on the Rights of Indigenous Peoples,¹⁰ and is contrary to the State’s policy “to work on a government-to-government basis with Alaska’s sovereign Tribes.”¹¹ This failure to consult has resulted in inadequate consideration and accommodation of protected Tribal uses in the Permit. For example, neither Usibelli nor ADEC has consulted with CVTC concerning the Mine’s ambient air quality boundary and its effect on spiritual, cultural, and subsistence practices in the area.

Although CVTC appreciates the opportunity to participate in the public commenting process, as a separate sovereign with unique interests in the lands and waters at issue, they are entitled to much more. Specifically, prior to releasing the Permit for public comment, ADEC should have entered into government-to-government consultation with CVTC to ensure its interests in lands, water, air, and biological and cultural resources were fully considered prior to public release. Instead, ADEC released the draft permit for public comment without consulting with CVTC, and subsequently ignored CVTC’s comments regarding consultation despite the emphasis CVTC’s comments clearly placed on consultation in the introduction, body, and conclusion of the letter.¹² ADEC’s response to comments failed to make any mention of CVTC’s consultation request.

In fact, CVTC has been so left out of the decision making process that it had no choice but to submit a public records request to obtain basic information about the Permit, such as evidence of Usibelli’s legal authority to preclude public access.

The Permit must be reopened and may not be reissued unless or until ADEC—working in direct, government-to-government consultation with CVTC—determines that the Mine will comply with all legal requirements and not otherwise unreasonably interfere with Tribal citizens’ enjoyment of life and cultural and spiritual practices.

¹⁰ The duty of consultation with indigenous peoples is a well-established principle under international human rights law. *See* United Nations Declaration on the Rights of Indigenous Peoples, arts. 11, 15, 19, 28, 29, 32, 38; International Labour Organisation Convention 169, arts. 6, 15; *cf.* United Nations International Convention on the Elimination of All Forms of Racial Discrimination, art. 2.

¹¹ State of Alaska Administrative Order No. 186 (Sept. 29, 2000) (declaring it to be the “policy of the State of Alaska . . . to work on a government-to-government basis with Alaska’s sovereign Tribes, which deserve the recognition and respect accorded to other governments” and recognizing “the value in establishing a comprehensive and mutually respectful State-Tribal relations policy in an effort to promote and enhance . . . a clean and healthy environment”).

¹² *See* 2014 CVTC Comments at 1, 2, 13, 20.

B. The nitrogen dioxide (NO₂) modeling analysis upon which the Permit is based is inadequate.

The modeling analysis submitted by Usibelli and approved by ADEC likely understates NO₂ emissions, and because even this inadequate analysis demonstrates that emissions closely approach the Alaska Ambient Air Quality Standard (AAAQS) for 1-hour NO₂, ADEC should require Usibelli to model NO₂ using a more sensitive model. ADEC's regulations specify that a minor-source air permit application "must include . . . a demonstration . . . that the proposed potential emissions from the stationary source will not interfere with the attainment or maintenance of the ambient air quality standards . . ." ¹³ Usibelli used the Ozone Limiting Method (OLM) to model NO₂ emissions, but a study commissioned by ADEC showed that the Plume Volume Molar Ratio Method (PVMRM) "appears to provide a more realistic treatment of the conversion of NO_x to NO₂ as a function of distance downwind from the source than OLM." ¹⁴ For 1-hour NO₂ averages emitted from sources with multiple emission units, like Wishbone Hill, the study showed that PVMRM predicts significantly higher concentrations than OLM. ¹⁵ Because the OLM predicted the 1-hour NO₂ impact to be 185 µg/m³ and the AAAQS is 188 µg/m³, ¹⁶ using the PVMRM likely would demonstrate that Wishbone Hill will interfere with the attainment of AAAQS. ¹⁷ Having used an inadequate model, Usibelli failed to demonstrate non-interference with maintenance of the 1-hour AAAQS, as required by 18 AAC 50.540(c)(2).

In responding to CVTC's concerns about the model employed, ADEC faulted the study ADEC itself commissioned for not comparing modeling results to monitoring data, and concluded that "the study cannot be used to support a position that any of the techniques, including OLM, underestimate the ambient impacts." ¹⁸ It seems unusual for ADEC to discount the value of its own study. Further, ADEC's response overlooks the fact that it is the applicant that must demonstrate compliance, ¹⁹ not public commenters, and that non-interference with AAAQS is demonstrated by use of modeling, ²⁰ since monitoring a source's emissions before the source is constructed is clearly impossible.

ADEC may not "permit any emission which is injurious to human health or welfare, animal or plant life, or property, or which would unreasonably interfere with the enjoyment of

¹³ 18 AAC 50.540(c)(2).

¹⁴ MACTECH, Sensitivity Analysis of PVMRM and OLM in AERMOD, Alaska DEC Contract No. 18-8018-04 (Sept. 2004) (Sensitivity Analysis), Ex. 6 at 55.

¹⁵ *Id.* at 16, Table 3.3 (showing OLM to predict 1,822 µg/m³ where PVMRM predicts 3,196.9 µg/m³).

¹⁶ ADEC, Response to Comments for Minor Permit AQ 1227MSS04 (Response to Comments) at 27 (June 10, 2014).

¹⁷ *Cf.* Sensitivity Analysis, Ex. 6 at 16, Table 3.3.

¹⁸ Response to Comments at 15.

¹⁹ 18 AAC 50.540(c)(2).

²⁰ *Id.*

life or property.”²¹ By allowing Usibelli to use a model that an ADEC-sponsored study has shown to underestimate 1-hour NO₂ concentrations despite evidence of significant emissions nearing the AAAQS, ADEC has not met its obligation to ensure that Wishbone Hill’s emissions will not be injurious to human health or welfare. The Permit should be reopened in order to model 1-hour NO₂ emissions using the more conservative and realistic PVMRM.

- C. The ambient air quality boundary upon which the Permit is based is improper because ADEC has not demonstrated that Usibelli has the authority and ability to exclude the public, nor should Usibelli exclude the public from this area.

The Clean Air Act regulates the concentration of air pollution in the “ambient air.”²² Because areas not included within the definition of “ambient air” are not protected by provisions of the Act, ADEC’s delineation of where the ambient air begins in relation to emission units at the Mine is of great importance. If the ambient air quality boundary is determined to begin at a point far away from the Mine, or delineated beyond an area where Tribal members or other community members are likely to be, then Usibelli will be authorized to emit more pollution with fewer controls than would be lawful otherwise.

In conjunction with Usibelli’s delineation of the ambient air quality boundary, the company created a Public Access Control Plan that must be revised because it fails to protect Tribal access to and use of the permit area for critical cultural and spiritual activities. Because neither Usibelli nor ADEC has consulted with CVTC, there has been no consideration of protected Tribal uses of the area or the consequences for the ambient air quality boundary. ADEC must reopen the Permit to take into account Tribal spiritual and cultural practices and protect these uses from air pollution that exceeds the National Ambient Air Quality Standards or AAAQS. To effectuate this access and protection, the ambient boundary necessarily must be drawn much more narrowly, with an attendant reduction in emissions from the Mine.

ADEC’s response to comments alleged that “UCM provided evidence that indicates they have legal authority to preclude public access within their [ambient air quality boundary].”²³ ADEC, however, has not furnished this evidence nor even described what the evidence consists of, making it difficult to determine whether Usibelli actually has such authority. Because ADEC refused to describe Usibelli’s evidence, CVTC had to make a public records request for the information and has not yet received a response. ADEC also suggested that “[l]egal disputes on land ownership or access rights need to be taken up with the applicable land owner,”²⁴

²¹ 18 AAC 50.110.

²² See 42 U.S.C. § 7409.

²³ Response to Comments at 26.

²⁴ *Id.*

apparently ignoring that the State is one of the primary landowners in the permit area and that State officials have previously represented that the area is “open to the public.”²⁵

The only readily available, public information indicates that restrictions on public access at the leased area for the Mine are to be avoided to the maximum extent possible. The leases issued by the State to Usibelli stipulate that:

[p]ublic access to, and use of, the leased area will not be restricted as a consequence of coal activities except in the vicinity of mines, buildings and other mine-related structures, and for safety reasons. Areas where access will be restricted must be identified in applications for an exploration permit or surface mine permit. No facilities or operations may be located where they would block existing access routes . . . for hunting, fishing, or public recreation, unless an alternative access route approved by the Department of Natural Resources, after consultation with the Department of Fish and Game, is provided.²⁶

The current Exploration Permit states: “All roads, access trails, and other impacted lands remain open to public use during exploration activities to the maximum extent practicable.”²⁷ Usibelli’s application for exploration permit renewal sheds little additional light on how public access is restricted, stating merely that “[p]ublic access is available to the area by state-maintained roads” and that a “gate has been constructed on the improved trail near the intersection with the Glenn Highway to control public access.”²⁸ When read together, these statements suggest that public access may vary depending on where and what kind of exploration activities are taking place. The statements do not support an unqualified authorization to preclude completely public access, nor is there any suggestion that the boundaries as delineated are required by a compelling state interest “of the highest order . . . not otherwise served.”²⁹ Had ADEC and

²⁵ ADEC’s position on the matter of public access conflicts with a statement made by the Department of Natural Resources (DNR). In November, 2011, DNR denied a request for a public mine tour at Wishbone Hill and stated that the permit area is “open to the public” and the public is “welcome to visit the project site at any time.” Email from Russell Kirkham, Alaska Department of Natural Resources, to Emily Fehrenbacher, Sierra Club, Re. DNR Wishbone Hill permit Area Tour (Nov. 9, 2011), Ex. 25 at 1. These conflicting statements create confusion that is compounded by the lack of publicly available, legal documents explaining the rights of public access and exclusion at the site.

²⁶ See, e.g., Wishbone Hill Lease ADL 23803, Stipulations ¶ 3.

²⁷ Alaska Dep’t of Natural Resources, Final Findings of Fact and Decision, Coal Exploration Permit No. 01-86-795 (Aug. 10, 2012), Ex. 21 ¶ 13.e..

²⁸ Usibelli Coal Mine, Inc., Wishbone Hill Coal Exploration Permit Renewal Application, Permit No. 01-86-795 (Apr. 2012), Ex. 22 at 26, 28 (emphasis omitted).

²⁹ See *Frank v. State*, 604 P.2d at 1070 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

Usibelli consulted CVTC about access to the permit area, perhaps an agreement could have been reached that would preserve Tribal rights concerning their cultural and spiritual practices while also serving the state's interests.³⁰

Finally, even if Usibelli has authority to exclude the Tribal and other community members from land near the Mine, the delineated ambient air quality boundary upon which the Permit is based is improper because the barriers are inadequate to ensure that public health is protected by prevention of access. Although ADEC now requires a fence along the southern edge of the boundary,³¹ and the northwestern boundary appears to have substantial natural barriers,³² the eastern side of the ambient air quality boundary is still exposed other than at marked trail crossings.³³ The elevation change of approximately 130 feet in the first phase, and 260-525 feet in the second, slopes upward towards the north in a manner fairly uniform with the surrounding area, meaning that someone approaching from the east would experience little or no change in elevation.³⁴ This topography is inadequate to assure that public access is precluded from the area exempt from ambient air.³⁵ ADEC also relies on vegetation to preclude access, but still declines to indicate how wide or dense the vegetation is, or how effective it might be in winter or against someone wearing protective clothing.³⁶

ADEC suggests that Wishbone Hill is more similar to the molybdenum deposit at Quartz Hill than to the Kennecott smelter described in CVTC's comments.³⁷ A closer look at the "extreme nature of the terrain" at Quartz Hill³⁸ demonstrates the inadequacy of Wishbone Hill's topography as an effective barrier. Quartz Hill is located in the middle of extreme elevation changes; the deposit is surrounded by mountain peaks reaching over 3,500 feet, while the

³⁰ See State of Alaska Administrative Order No. 186 (reaffirming the State's "long-standing commitment to local self-government that is rooted in the belief that the best and most effective solutions to local problems are those that are conceived locally"); see also United Nations Declaration on the Rights of Indigenous Peoples, arts. 29, 32.

³¹ Response to Comments at 23.

³² Final Permit at 41 (depicting cliffs and Moose Creek along ambient air quality boundary).

³³ Response to Comments at 23 (requiring installing of fence at trail crossings and at least 100 feet in each direction of the crossing).

³⁴ Usibelli Permit Application, Dispersion Modeling, at 18, Fig. 1 (June 2013).

³⁵ ADEC's example of a 10-foot vertical bluff might make access difficult, Response to Comments at 21, but ADEC does not assert that such a bluff exists along the eastern edge.

³⁶ See generally Response to Comments at 22-24.

³⁷ Response to Comments at 25. ADEC did not attach the letter referenced in footnote 5 of the Response to Comments, and therefore CVTC has not had an opportunity to review the full context. However, the location of the deposit and surrounding topography is known.

³⁸ See Response to Comments at 25 & n.5.

closest water body providing access is only 18 feet above sea level.³⁹ This elevation change of well over 3,000 feet is a far cry from the 130 feet of elevation change at Wishbone Hill, which can largely be avoided by following ridgelines on the eastern side of the area. Furthermore, Quartz Hill is located in an area surrounded by designated wilderness, meaning that human use of the area is subject to substantial limitations. In contrast, Wishbone Hill is located close to the state's largest population centers and easily accessible from major highways and roads, and the eastern border of the ambient air quality boundary in particular is close to the Elks Youth Camp. To the extent that Wishbone Hill might be compared to either Quartz Hill or the Kennecott smelter, both of which present significantly greater topographic obstacles than Wishbone Hill, it is clear that Kennecott is more similar to Wishbone Hill due to its close proximity to Salt Lake City and major highways. ADEC and Usibelli have not shown that "knowing or innocent trespassers" are effectively prevented from accessing the permit area from the east side, and therefore the area should not be exempted from ambient air.⁴⁰

Because CNV requires access to the area for its spiritual and cultural practices, ADEC and Usibelli have failed to consult with CVTC, and the public is not effectively precluded from accessing the area exempted from ambient air, ADEC should reopen the Permit and require an analysis of air quality impacts and compliance with the Clean Air Act throughout the entire area without excepting the area currently designated as non-ambient air. ADEC and Usibelli should also consult with CVTC on the important issue of access to the area to ensure that CNV's Tribal rights and religious beliefs are not interfered with and that public safety and health are adequately protected.

³⁹ U.S. Geological Survey, Mineral-resource locality and mineral-resource assessment tract map, Ketchikan, Alaska (1991), Ex. 23 (Quartz Hill deposit is marked KC095 within the 10KC area); U.S. Geological Survey, Ketchikan (B-2) Quadrangle Topographic Map (1958), Ex. 24 (showing elevation of Wilson Arm).

⁴⁰ See *In the matter of Hibbing Taconite Co.*, PSD Appeal No. 87-3, 2 E.A.D. 838, 1989 WL 266359, at *6 (July 19, 1989) (emphasis omitted) (quoting Memorandum from Michael A. James, EPA, to Jack R. Farmer, EPA, Re Ambient Air Quality Monitoring by EPA (Sept. 28, 1972), included as an attachment in Memorandum from Walter C. Barber, EPA, to Gordon M. Rapier, Re Applicability of PSD Increments over Company Property (May 23, 1977) ("Barber Memo"), Ex. 14).

III. CONCLUSION

For the foregoing reasons, Chickaloon Village Traditional Council requests that ADEC reopen the Permit to correct the deficiencies before Usibelli is allowed to operate.

Respectfully submitted,



Madeline Gallo
Colin O'Brien
Earthjustice
Counsel for Chickaloon Village Traditional Council

Cc: President Barack Obama
James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples
Sally Jewell, Secretary, Department of the Interior
Dennis McLerran, Regional Administrator, Environmental Protection Agency Region 10
Sean Parnell, Governor, State of Alaska
Mead Treadwell, Lieutenant Governor, State of Alaska