



February 19, 2015

Alice Edwards, Director
Division of Air Quality
Department of Environmental Conservation
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Submitted via electronic mail

Re: Request for informal review of Revision to Air Quality Control Minor Permit No. AQ1227MSS04

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) decision of February 5, 2015, to revise Air Quality Control Minor Permit No. AQ1227MSS04 (Permit) for Usibelli Coal Mine, Inc.'s (Usibelli) Wishbone Hill Coal Mining and Processing Operation (Mine).

CVTC submitted comments on the proposed Permit and is entitled to request informal review.¹ CVTC also submitted a previous request for informal review of the Permit pursuant to 18 AAC 15.185.² In response, you remanded the Permit back to the Air Permit Program "for further review and documentation."³ Despite your remand, the Permit is still arbitrary and

¹ CVTC's Comments on ADEC's Preliminary Decision to Approve Usibelli Coal Mine, Inc.'s Application for Air Quality Control Minor Permit AQ1227MSS04 for the Wishbone Hill Coal Mining and Processing Operations and accompanying exhibits, dated April 14, 2014, are attached.

² CVTC's 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 ("2014 CVTC Request for Informal Review") and accompanying exhibits, dated June 25, 2014, are attached.

³ ADEC, AQ1227MSS04 Informal Review Determination (Sept. 8, 2014) ("Informal Review Determination") at 5.

unlawful as it assumes, contrary to available evidence, that Usibelli has the authority and the ability to exclude the public from areas within the delineated ambient air boundary.

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

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Any correspondence also should be copied to counsel for CVTC:

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I. CVTC'S INTEREST IN THE PERMITTING DECISION

A. Nature and Scope of Interests

As described in the 2014 CVTC Request for Informal Review, the Mine 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.⁴

Moose Creek (Tsidek'etna') itself is of particular importance to the CNV. Chickaloon Tribal ancestors fished for salmon in the creek,⁵ 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 restoring fish habitats and salmon populations, including a national award-winning Moose Creek Fish Passage Restoration Project. Similar fish passage restoration efforts are now underway in Eska Creek to the east of the Mine. The Chickaloon Tribal people continue to fish for salmon in Moose Creek.

⁴ See 2014 CVTC Request for Informal Review at 2-3.

⁵ 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 § 14.14.

The Chickaloon Tribal people continue to live near Wishbone Hill, which is located within one-quarter mile of community homes and in close proximity to 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—in addition to a school curriculum appropriate for each grade level. There are also homes, 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 Ahtna lifeways 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 potlatch, Chickaloon Tribal hunters attempted to access State lands within the Permit area for taking a moose (a fundamental human right also guaranteed under the Alaska Constitution).⁶ Barriers erected by Usibelli prevented using this traditional area for the hunt.

II. CONTESTED PERMIT CONDITIONS AND PROPOSED ALTERNATIVE

The ambient air quality boundary upon which the Permit is based is improper because ADEC has not demonstrated that Usibelli has the authority or 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."⁷ 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 to protecting air quality and public health. If the ambient air quality boundary is determined to begin at a point far away from the Mine, or

⁶ 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).

⁷ See 42 U.S.C. § 7409.

delineated to encompass areas 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. Delineation of the ambient air boundary is also important because ADEC must not encourage or sanction unlawful restrictions on Tribal access to, and use of, the Permit area for critical cultural and spiritual activities.

As used in the Clean Air Act, “ambient air” refers to “outdoor air used by the general public.”⁸ EPA defines “ambient air” as “that portion of the atmosphere, external to buildings, to which the general public has access.”⁹ EPA affords an “exemption from ambient air . . . *only* for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers.”¹⁰ ADEC maintains a similar policy, requiring “a fence or some other barrier.”¹¹ DEC allows, “[i]n *limited* circumstances and on a case-by-case basis, geographical barriers such as a cliff or river” to be used as an ambient air boundary, and in “*rare* cases” if a “physical barrier is impractical or creates a safety concern . . . ADEC has allowed applicants to establish an access control plan for their ambient air boundary.”¹²

The ambient air boundary for the revised Permit, described in Condition 18 of the Permit, purportedly has been delineated to protect the public from elevated levels of nitrogen dioxide and particulate matter pollution. Condition 18 requires Usibelli to implement a Public Access Control Plan, including the maintenance of physical barriers (e.g., gates and fencing) in certain locations.¹³ Otherwise, the Public Access Control Plan relies heavily on natural barriers such as “vegetative species” and “ridge lines” that Usibelli has assured ADEC are sufficient to exclude the public from the Mine site.¹⁴ The revised Permit incorporates small changes to Conditions 18.2b and 18.4 “to provide additional clarity regarding the names and locations of trails crossing the eastern ambient air quality boundary” but these revisions “do not create a material change to the existing fencing requirements.”¹⁵

CVTC previously sought informal review of the Permit on the grounds that Condition 18 and its incorporation of Usibelli’s Public Access Control Plan fail to protect Tribal access to the Permit area for critical cultural and spiritual activities.¹⁶ CVTC also pointed out that the delineated ambient air boundary does not comply with regulatory requirements, as Usibelli

⁸ *Train v. Natural Res. Defense Council*, 421 U.S. 60, 65 (1975).

⁹ 40 C.F.R. § 50.1(e).

¹⁰ Letter from Douglas M. Costle, EPA, to Hon. Jennings Randolph (Dec. 19, 1980), Ex. 12 (emphasis added).

¹¹ ADEC Modeling Review Procedures Manual (June 30, 2013), at 32.

¹² *Id.* (emphases added).

¹³ Permit, Conditions 18.1, 18.2, and 18.4.

¹⁴ See, e.g., Wishbone Hill Coal Mining and Processing Operation Public Access Control Plan (Feb. 2014) (“Public Access Control Plan”) at 2-3.

¹⁵ Letter from John F. Kuterbach, ADEC, to Lisa Wade, CVTC, (Feb. 5, 2015) at 1.

¹⁶ 2014 CVTC Request for Informal Review at 6-9.

failed to demonstrate that (1) it possesses legal authority to exclude the public from all areas within the boundary and (2) adequate physical barriers exist to preclude such public access.¹⁷

You agreed with the concerns raised by CVTC before, finding in your Informal Review Determination that “it is difficult to determine from the permit record whether the local vegetation along the eastern portion of the boundary is an adequate barrier to prevent public access” and that “Usibelli’s authority to preclude public access within the ambient air quality boundary under the applicable leases could be further clarified and documented in the permit record.”¹⁸ As a result of these findings, you “remand[ed] the portion of Permit Condition #18 related to the Public Access Control Plan back to the Air Permit Program for the purpose of further review and documentation of Usibelli’s authority and the physical barriers used in the minor air permit to prevent public access for the eastern portion of the ambient air boundary.”¹⁹

Following your Informal Review Determination, Air Permit Program staff compiled additional information in the form of an unsigned legal memorandum “developed by Usibelli” and an ADEC report detailing an on-site survey of the eastern ambient air boundary.²⁰ These two documents do not resolve the concerns raised by CVTC and are not responsive to your remand order. Indeed, far from confirming the propriety of the ambient air boundary as delineated for the Permit in Condition 18, the additional documents underscore both that Usibelli has failed to demonstrate that it possesses legal authority to fully exclude the public from all areas within the ambient air boundary and that existing physical barriers are inadequate to preclude such public access and protect the public. Consider the following:

- Your Informal Review Determination states that “Air Permit Program staff indicated that they must rely on the land manager’s interpretation of their lease agreements to determine whether Usibelli has authority to preclude public access,” and further cautions that “[s]hould the *leasing agencies* determine that Usibelli does not have this authority, revisions would be needed to the air permit.”²¹ Despite the finding that substantiation for Usibelli’s authority to exclude the public must come from the leasing agencies themselves, there is no evidence that state and local authorities have been contacted—let alone evidence that these lessors verified that Usibelli, as lessee, has the authority to exclude the public as claimed. Notably, as CVTC documented in its previous request for informal review, officials from the Department of Natural Resources (ADNR) have represented that the Permit area is “open to the public” and the

¹⁷ *Id.* at 6-9.

¹⁸ Informal Review Determination at 5.

¹⁹ *Id.*

²⁰ See Memorandum from Fathima Siddeek, ADEC, to John F. Kuterbach, ADEC, (Feb. 2, 2015) at 1.

²¹ Informal Review Determination at 5 (emphasis added).

public is “welcome to visit the project site at any time.”²²

- The memorandum supplied by Usibelli is inadequate on its face and does not resolve whether the company possesses authority to exclude the public as assumed by the Permit. For example, the memorandum does not even purport to address Usibelli’s authority under the leases for “Phase 2” of the planned mining operation.²³ Usibelli offers the excuse that it “does not propose any mining in the ‘Phase 2’ [ambient air boundary] . . . for several years,” but concedes that the Permit “establishes the ambient air boundary for both phases of the mine.”²⁴ It does not matter when Usibelli plans to undertake its second phase of operations. ADEC may not lawfully issue the Permit now without a proper record for all Permit terms and conditions, as currently written.
- Usibelli’s memorandum is also inadequate on its face because an incomplete *description* of the leases is no substitute for supplying *proof* of the authority to exclude the public by providing copies of the actual leases. Without full copies of the leases and related documentation, it is impossible to accept Usibelli’s characterization of its authority. For example, Usibelli asserts in its memorandum that surface lease ADL 224865 allows it to exclude the public based upon a quoted statement in the lease that “[e]xcept as described in stipulation 13, public access may be restricted on the parcel by the Lessee.”²⁵ This excerpt begs the obvious question: what are the exceptions “described in stipulation 13” that limit Usibelli’s authority to restrict public access? Without that information, ADEC obviously lacks the documentation necessary to conclude that Usibelli has the authority to exclude public access.
- According to Usibelli’s memorandum, surface lease ADL 225305 is “perhaps the least clear in its terms regarding restricting public access.”²⁶ This characterization is not accurate as the lease clearly forbids Usibelli from limiting public access. According to language excerpted by Usibelli itself, the lease states that “[t]he ability of all users to use or access state land or public waters *must not be restricted*.”²⁷ It is worth noting that Usibelli previously claimed without qualification that “[p]ublic access can be currently legally restricted within the ambient air quality boundary within Surface Lease ADL 225305,”²⁸ underscoring that ADEC cannot rely on Usibelli’s characterizations of the

²² 2014 CVTC Request for Informal Review at 7 (citing email from Russell Kirkham, ADNR, to Emily Fehrenbacher, Sierra Club, Re. DNR Wishbone Hill permit Area Tour (Nov. 9, 2011), Ex. 25 at 1).

²³ Usibelli Coal Mine LLC Memorandum (Oct. 23, 2014) (“Usibelli Memo”) at 4.

²⁴ *Id.*

²⁵ *Id.* (quoting surface lease ADL 224865).

²⁶ *Id.* at 5.

²⁷ *Id.* (emphasis added).

²⁸ ADEC, Response to Comments for Minor Permit AQ 1227MSS04 (June 10, 2014) at 32-33 (quoting UCM submission to ADEC).

leases and must review complete, original documentation.

- Usibelli attempts to defend the ambient air boundary for surface lease ADL 225305 by arguing that “only a small portion of the tract (northeast corner) falls with[in] the [ambient air boundary], and there is no indication or record of traditional public use of that small area.”²⁹ These excuses fall short, however, as they are not material to determining whether an area may be excluded from ambient air—a determination that hinges on the permittee’s legal authority and physical ability to exclude the public. Further, it is disingenuous for Usibelli to claim that there is no record of traditional use of the area given that surface lease ADL 225305 encompasses a stretch of Moose Creek, the use of which by Chickaloon Tribal members is well-documented.³⁰
- As CVTC noted in its previous request for informal review, Usibelli’s coal leases declare that “[p]ublic access to, and use of, the leased area will *not* be restricted . . . *except in the vicinity of mines, buildings and other mine-related structures, and for safety reasons*” and requires that “[a]reas where access will be restricted must be identified in applications for an exploration permit or surface mine permit.”³¹ Usibelli’s exploration permit application suggests that limits on public access will be minimal, stating only 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.”³² Its application for a renewed and revised surface mine permit describes the public access control features as consisting of a gate across the road at the mine entrance, fencing around the facilities area, and fencing at the west end of Mine Area 1.³³ These areas are smaller than the ambient air boundary as currently delineated. The ambient air boundary, as currently drawn, therefore appears to be inconsistent with Usibelli’s state coal leases.
- Even if Usibelli has authority to exclude Tribal and other community members from land near the Mine (which it does not), the delineated ambient air quality boundary is improper because the Public Access Control Plan relies on natural barriers that are

²⁹ Usibelli Memo at 5.

³⁰ See, e.g., 2014 CVTC Request for Informal Review at 2-3 (citing Shem Pete’s Alaska: The Territory of the Upper Cook Inlet Dena’ina).

³¹ 2014 CVTC Request for Informal Review at 7 (citing lease ADL 23803, Stipulations ¶ 3) (emphasis added); see also Usibelli Memo at 4 (quoting coal leases ADL 309947 and ADL 32144). Coal lease ADL 309947 and coal lease ADL 32144 have been attached as Exhibit 26 and Exhibit 27, respectively. This exhibit numbering reflects a continuation of the exhibit numbers used by CVTC’s comments on the proposed Permit and the 2014 CVTC Request for Informal Review.

³² Usibelli, Wishbone Hill Coal Exploration Permit Renewal Application, Permit No. 01-86-795 (Apr. 2012) (“Exploration Permit Renewal Application”), Ex. 22 at 26, 28 (emphasis omitted).

³³ Usibelli Application to Renew Wishbone Hill Surface Coal Mining Permit, Part D: Operation and Reclamation Plan (2014), Ex. 28 at D-32.

inadequate to ensure that public health is protected. CVTC previously pointed out that natural barriers were lacking on the eastern side of the Mine,³⁴ and the Permit was remanded with the explicit “purpose of further review and documentation of . . . the physical barriers used in the minor air permit to prevent public access for the eastern portion of the ambient air boundary.”³⁵ In its memorandum, Usibelli concedes that unlike other portions of the ambient air boundary, “the eastern boundary has fewer, and less dramatic, natural barriers.”³⁶

- Rather than attempt to substantiate the existence of extensive natural barriers that do not exist along the eastern side of the mine, Usibelli’s memorandum takes the position that “other circumstances . . . effectively limit public access on that east side,” emphasizing the presence of a correctional facility and private property along the eastern side and multiple “no trespassing signs” posted there.³⁷ This not sufficient. EPA has emphasized that private property and “no trespassing” signs do not constitute an acceptable barrier to access, explaining that “areas of private property” that are “not restricted . . . by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large” meaning “[s]uch persons, whether they are knowing or innocent trespassers, will be exposed to and breathe the air above the property.”³⁸
- Usibelli’s reliance upon “no trespassing” signs on property that it does not own or control also overlooks that many Tribal and local community members use the private property along the eastern boundary—frequently and lawfully—as invitees of the private property owners (i.e., the Elks and Chickaloon Native Association). The lack of natural barriers between the mine site and those properties creates the risk that community members lawfully accessing the Elks’ or Chickaloon’s private property will also access the Mine site (from which the public may not be excluded), thereby exposing community members to elevated levels of air pollution.
- The ease of access to the eastern edge of the ambient air boundary was confirmed by ADEC staff. ADEC Air Permit Program staff conducted an on-site ambient air quality boundary survey on November 25, 2014, and did not report any difficulty reaching the

³⁴ 2014 CVTC Request for Informal Review at 8-9.

³⁵ Informal Review Determination at 5.

³⁶ Usibelli Memo at 6.

³⁷ *Id.* at 6-7.

³⁸ *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), Ex. 14).

ambient air boundary.³⁹ Indeed, not only were ADEC staff members able to reach and travel along the boundary with ease, but the photographs taken at the boundary reveal the terrain and vegetation to constitute no barrier to public access—if not a desirable location for outdoor activities.⁴⁰

- Usibelli also argues that public access to the Mine site is not a concern because there is “[o]nly [o]ne [e]stablished [t]rail” and it will be blocked off and relocated outside of the ambient air boundary.⁴¹ However, nowhere does Usibelli define or explain what constitutes an “established trail.” In any event, as matter of fact, the entire proposed Mine site is crisscrossed with a substantial network of trails.⁴² These trails are heavily used for subsistence, recreation, and other purposes—with potentially hundreds of community members using the trails during the weekend when weather is favorable. Neither the Permit, the Public Access Control Plan, nor Usibelli’s memorandum account for such heavy public access and use.
- Finally, Usibelli’s memorandum cites to other projects where it avers no fence was required to preclude access at the ambient air boundary.⁴³ Usibelli concedes, however, that all of the listed projects were “in more remote settings.”⁴⁴ That is a substantial understatement, as the projects cited by Usibelli are nothing like the proposed Wishbone Hill Mine. There is simply no comparison to be made between a mine located 6 miles away from Nome—or in the Arctic Ocean, many miles from shore—and Usibelli’s proposed Mine, which is located within one quarter-mile of private residences and within one mile of a school in an area that is widely used by Tribal and other community members for cultural and spiritual activities and for numerous forms of recreation.⁴⁵

In light of the foregoing, it is plain that Usibelli has failed to demonstrate that it possesses legal authority to fully exclude the public from all areas within the ambient air boundary and that inadequate physical barriers exist to preclude such public access and protect

³⁹ See generally, ADEC Wishbone Hill Ambient Air Quality Boundary On-Site Survey Report (Nov. 25, 2014).

⁴⁰ See ADEC Division of Air Quality Photograph Log (Nov. 25, 2014) at 2-9 (showing hospitable terrain and vegetation in photos 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 16, and 17).

⁴¹ Usibelli Memo at 7.

⁴² See Sutton Area Trails Overview, Ex. 29.

⁴³ Usibelli Memo at 7 & Attach. A.

⁴⁴ *Id.* at 7.

⁴⁵ See, Alaska Department of Health and Social Services, Health Impact Assessment for Proposed Coal Mine at Wishbone Hill, Matanuska-Susitna Borough Alaska (Sept. 30, 2014), Ex. 30 at 1, 8 (describing land use in the project area); see also Exploration Permit Renewal Application, Ex. 22 at 28 (“Access within the exploration area itself is provided by a rather extensive network of roads and trails that resulted from past mining and exploration work, forestry activities, and recreational uses.”).

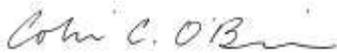
the public. Accordingly, there is a clear need to reassess and revise the ambient air boundary and associated conditions in the Permit.

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 therefore should reopen the Permit—in direct, official consultation with CVTC—to take into account Tribal spiritual and cultural practices and to protect these and other community uses from air pollution that exceeds the National Ambient Air Quality Standards or Alaska Ambient Air Quality Standards. To effectuate this access and protection, the ambient air boundary necessarily must be drawn much more narrowly, with an attendant reduction in emissions from the Mine.

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,



Colin O'Brien
Earthjustice
Counsel for Chickaloon Village Traditional Council

Cc: President Barack Obama
Raina Thiele, Associate Director, White House Office of Intergovernmental Affairs and Public Engagement
Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples
Sally Jewell, Secretary, Department of the Interior
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