



March 20, 2015

Alice Edwards, Director
Division of Air Quality
Department of Environmental Conservation
410 Willoughby Avenue, Suite 303
P.O. Box 111800
Juneau, AK 99811-1800
E: Alice.Edwards@alaska.gov

Submitted via electronic mail

Re: Second informal review of decision to issue Air Quality Control Minor Permit No. AQ1227MSS04 to Usibelli Coal Mine, Inc. for the Wishbone Hill Coal Mining and Processing Operation

Dear Director Edwards:

Thank you for granting Chickaloon Village Traditional Council's (CVTC's) second request for informal review of the Air Quality Control Minor Permit No. AQ1227MSS04 (Permit). We welcome your interest and close attention to the issues raised in CVTC's request. In response to your request for additional information pertaining to the informal review, Earthjustice submits the following information and two attached exhibits on behalf of CVTC, the governing body of the federally-recognized Chickaloon Native Village (CNV or the Tribe), with all of the inherent powers of a sovereign Ahtna Athabascan Nation.

Your first request for additional information pertains to Lease ADL 224865; you attached a copy of it to your correspondence and asked that CVTC "identify the language in ADL 224865 which you believe does not support Usibelli's claimed authority to exclude the public under the lease." Before addressing the language of the lease, CVTC wishes to express its disappointment that the lease was not made publicly available by the Division of Air Quality (Division) until now. CVTC has made several requests of the Division for specific evidence of Usibelli's authority to exclude the public, and had never received a copy of this lease until you forwarded it with your most recent correspondence.

In any event, Usibelli's authority to exclude the public is plainly limited by the lease's statement on page 2 that it is "[s]ubject to . . . ADL 218234," a "100 foot wide public easement," and the lease's statement on page 3 that "[n]o public access easement may be obstructed or otherwise rendered by the Lessee incapable of reasonable use by the public for the purposes for which it was reserved." Though Usibelli may not have addressed easement ADL 218234 in its

documentation for the Permit, it was described on a list of “public roads and trails” submitted by Usibelli to the Department of Natural Resources (DNR) in support of a mining permit.¹ According to the same Usibelli submission to DNR, ADL 218234 is “for a 80 foot wide logging trail and included public use.”² A recent search of DNR’s online Land Administration System database indicates that the easement and trail connects areas inside and outside of the ambient air boundary.³ Usibelli lacks authority to limit the public’s use of easement ADL 218234, which has not been addressed in the Division’s delineation of the ambient air boundary.

You previously remanded the Permit decision with instructions that your staff “further clarify[y] and document[]” Usibelli’s authority to preclude public access—and called on them to obtain “the land manager’s interpretation of their lease agreements.”⁴ Although it is unclear when the Division came to possess a copy of Lease ADL 224865, and whether Usibelli’s other leases have been obtained, all applicable leases and the leasing agencies’ interpretation(s) of the public access provisions should be included in the Permit record and made available to the public. Neither Usibelli’s nor our interpretation of ADL 224865 is an adequate substitute for the leasing agencies’ interpretation under the remand instructions you provided.

The second item you request is identification of “all public roads, trails, waters, or public assessment easements” which fall within the ambient air boundary for Lease ADL 225305. With all due respect, the issue is not whether there is evidence of a public right-of-way or even current use in an area, but whether the permittee has both the legal authority and an effective means to exclude the public. An examination of Lease ADL 225305 reveals no grant of authority to exclude the public, and to the extent public access is mentioned it all, it is clear that the lease places importance on accommodating public access.⁵ Again, we urge the Division to

¹ Usibelli, “Land Use Information,” Wishbone Hill 2009 Update, Part C, Chapter XII (2009), Ex. 31 at XII-8, *available at* http://dnr.alaska.gov/mlw/mining/coal/wishbone/partc/chapter_xii.pdf. This exhibit numbering reflects a continuation of the exhibit numbers used by 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, dated April 14, 2014; 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, dated June 25, 2014 (“2014 CVTC Request for Informal Review”); and CVTC’s Request for informal review of Revision to Air Quality Control Minor Permit No. AQ1227MSS04, dated Feb. 19, 2015.

² *Id.*

³ *See* Ex. 32 (prepared using DNR’s Land Administration System database, *available at* <http://dnr.alaska.gov/projects/las/>).

⁴ ADEC, AQ1227MSS04 Informal Review Determination (Sept. 8, 2014) at 5.

⁵ *See* ADL 225305, ¶ 10 (“No public access easement may be obstructed or otherwise rendered incapable of reasonable use for the purposes for which it was reserved”) & Special Stipulations ¶ 4 (requiring a re-routing of ADL 52715 “to accommodate public access”).

make this lease part of the permitting record and to secure its interpretation from the leasing agency as you requested in the first remand.⁶

Finally, your letter states that “the Air Program further investigated and documented the natural barriers along the eastern boundary” and asks again for information from CVTC concerning vegetation, topography, and other natural conditions on the eastern side of the ambient air boundary – asserting that CVTC “refused” to share this information previously. This request is premised on two misconceptions:

First, it is simply not the case that in response to your previous remand Division staff documented natural “barriers” along the eastern boundary. As CVTC has long maintained, neither the vegetation nor the gentle topography, which is readily assessed using a topographic map, is sufficient to preclude public access.⁷ While Division staff did visit the eastern boundary, the photographs taken in the field document natural *conditions* but not natural *barriers*, with the pictures clearly showing that the vegetation and terrain are insufficient to preclude public access. Indeed, since CVTC’s earlier request for informal review, Usibelli has conceded that unlike other portions of the ambient air boundary, “the eastern boundary has fewer, and less dramatic, natural barriers.”⁸

Second, to be clear, this was not an issue on which the Tribe declined to give information, as you state in your most recent correspondence. Rather, in CVTC’s response to your first request for additional information, CVTC indicated that this information should have been provided by Usibelli in the first place, as the burden to demonstrate public access does not fall on the public.⁹ Further, CVTC has been and remains willing to show DEC staff members relevant maps and photographs of the area, including the eastern boundary, but is concerned that wider distribution of this information would pose a risk to the sensitive nature of sacred sites – particularly in light of the popularity of this area for public recreation.¹⁰ We again invite you to meet with CVTC in a formal consultation which would serve the dual purposes of providing more information for your review and protecting these sacred sites from disclosure and potential damage. We regret that you still feel some uncertainty as to the physical features of this area in spite of our offers to provide this information several times throughout the course

⁶ We reiterate the importance of securing an interpretation from the agency rather than relying on Usibelli’s interpretation. We have been unable to confirm Usibelli’s interpretation with respect to this lease because the only version of the lease available to us expired in 2012. Perhaps the most recent renewal of the lease differs from the previous lease, but the version we have does not contain the language quoted in Usibelli’s memorandum.

⁷ See, e.g., 2014 CVTC Request for Informal Review at 8-9.

⁸ Usibelli Coal Mine LLC Memorandum (Oct. 23, 2014) at 6.

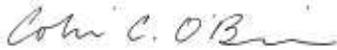
⁹ CVTC, Response to Informal Review of Decision to Issue Air Quality Control Minor Permit AQ1227MSS04 to Usibelli Coal Mine, Inc. for the Wishbone Hill Coal Mining and Processing Operation (Aug. 22, 2014) at 2-3.

¹⁰ See *id.* at 2-3.

of the permitting process. A consultation would be beneficial for everyone involved to facilitate the sharing of information.

Thank you for your attention to this important matter. Please do not hesitate to contact me or Lisa Wade, Council Member and Director of CVTC's Health, Education, and Social Services Department, if you have any additional questions or to schedule the consultation.

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
Dennis McLerran, Regional Administrator, Environmental Protection Agency Region 10
Bill Walker, Governor, State of Alaska
Byron Mallott, Lieutenant Governor, State of Alaska
Steven Ross, Alaska Department of Law