



# EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

April 30, 2015

Commissioner Larry Hartig  
Alaska Department of Environmental Conservation  
410 Willoughby Avenue, Suite 303  
Juneau, AK 99811



**SUBMITTED VIA HAND DELIVERY**

Re: **Request for a hearing on the existing agency record and written briefs on the Division of Air Quality's decisions to issue and affirm, following informal review, Air Quality Control Minor Permit No. AQ1227MSS04**

Dear Commissioner Hartig:

Enclosed please find Chickaloon Village Traditional Council's request for a hearing on the Alaska Department of Environmental Conservation's decisions to issue and affirm, following informal review, Air Quality Control Minor Permit No. AQ1227MSS04, issued to Usibelli Coal Mine, Inc. for the Wishbone Hill Coal Mining and Processing Operation, with accompanying attachments and exhibits. A DVD containing electronic copies of the request for hearing, attachments, and exhibits is also included.

Thank you,

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**Re: Request for a hearing on the existing agency record and written briefs on the Division of Air Quality's decisions to issue and to affirm, following informal review, Air Quality Control Minor Permit No. AQ1227MSS04**

Dear Commissioner Hartig:

On behalf of Chickaloon Village Traditional Council (CVTC), the governing body of the federally-recognized Chickaloon Native Village (hereinafter also referred to as "the Chickaloon Tribe" or "the Tribe"), with all of the inherent powers of a sovereign Athabascan Nation, Earthjustice submits this request for a hearing on the Alaska Department of Environmental Conservation's (ADEC) decisions to issue and to affirm, following informal review, Air Quality Control Minor Permit No. AQ1227MSS04 (Permit), issued to Usibelli Coal Mine, Inc. (Usibelli) for the Wishbone Hill Coal Mining and Processing Operation (Mine). The Permit was issued with slight technical revisions on February 5, 2015; a decision affirming the Permit on informal review pursuant to 18 AAC 15.185 was issued by Cindy Heil, Acting Director of the Division of Air Quality, on March 31, 2015 (2015 Informal Review Determination).

A hearing on the existing agency record and on written briefs is requested pursuant to AS 46.14.200, 18 AAC 15.200, and 18 AAC 15.220(b)(3). Such a hearing will demonstrate that the ambient air boundary delineated for the Permit lacks any foundation in the record and that the 2015 Informal Review Determination is rife with factual inaccuracies, contradicts admissions by Usibelli as well as a prior Division of Air Quality decision on informal review, and arbitrarily fails to respond to significant issues raised by the Chickaloon Tribe.

In light of the Division of Air Quality's manifest errors, the Commissioner may elect to forego a hearing altogether and simply remand the Permit on the basis of this request. See 18 AAC 15.220(b)(2).

**I. CONTACT INFORMATION**

As required by 18 AAC 15.200(a)(2), CVTC's contact information is:

Chickaloon Village Traditional Council  
Attention: Lisa Wade  
P.O. Box 1105  
Chickaloon, AK 99674  
T: 907.745.0707 / F: 907.745.0709  
E: lisaw@chickaloon.org

Per 18 AAC 15.200(a)(1), any correspondence should be copied to counsel for CVTC:

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**II. CVTC'S INTEREST IN AIR QUALITY CONTROL MINOR PERMIT NO. AQ1227MSS04**

The Chickaloon Tribe submitted comments on the Permit;<sup>1</sup> the Tribe twice requested and twice was granted informal review of the Permit;<sup>2</sup> and the Tribe is adversely affected by ADEC's decisions to issue the Permit and to affirm the Permit following informal review.

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<sup>1</sup> 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 Comments), and accompanying exhibits 1 through 19, are attached.

<sup>2</sup> CVTC's initial 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 accompanying exhibits 20 through 25, are attached. This exhibit numbering reflects a continuation of the exhibit numbers used by CVTC's Comments; exhibits to all subsequent submissions by CVTC follow the same convention of continuity. CVTC's follow-up Request for Informal Review of Revision to Air Quality Control Minor Permit AQ1227MSS04, dated February 19, 2015 (2015 CVTC Request for Informal Review), and accompanying exhibits 26 through 30, are attached. The two decisions of then-Division Director Alice Edwards granting informal review, dated July 2, 2014 and February 27, 2015, respectively, are also attached.

A. Nature and Scope of Interests

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 these locations continue to hold great spiritual significance for the Tribe. For example, the ridge at the head of Moose Creek is called Tsida K'ae Dghilaaye' in Ahtna, where a trail used by Ahtna people led up the creek and over the mountains to the upper Kashwitna River.<sup>3</sup> Ahtna families lived, hunted, and gathered berries throughout Tsadaka Canyon (Tsidek'e Dyii) on Moose Creek, southwest of the mining area.<sup>4</sup> Just southwest of that canyon is C'ek'aali Cene', a well known bluff that was the site of a village.<sup>5</sup> There is a trail leading from Moose Creek up to Wishbone Lake, which was "a popular fishing spot."<sup>6</sup>

Moose Creek (Tsidek'etna') itself is of particular importance to the Chickaloon Tribe—"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 there during the 1918 flu epidemic."<sup>7</sup> An early American explorer, Joseph C. Castner, reported an Ahtna camping place near Moose Creek.<sup>8</sup>

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 Glenn 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, environmental 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.

Salmon are a central part of Chickaloon Native Village's culture, and restoration of spawning habitats and fish passage, once destroyed by previous coal mining, is critical to the Tribe's ongoing ability to practice its culture and traditions. Chickaloon Tribal ancestors fished for salmon in Moose Creek,<sup>9</sup> and the Tribe has worked hard to restore Moose Creek from the severe damage incurred by coal mining of the past. For example, the U.S. Fish and Wildlife Service and the Tribe entered into cooperative agreements to restore salmon runs. To date, the

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<sup>3</sup> 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.

<sup>4</sup> *Id.* at 297 § 14.78.

<sup>5</sup> *Id.* at 296-97 § 14.13.

<sup>6</sup> *Id.* at 297 § 14.15.

<sup>7</sup> *Id.* at 297 § 14.14.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Chickaloon Tribe and its partners have spent more than \$1,200,000 and thousands of hours restoring Moose Creek fish habitats and salmon populations, including a national award-winning Moose Creek Fish Passage Restoration Project.

B. How and the Extent to which Interests are Affected

The Permit, as issued, will burden the Chickaloon Tribe's health, welfare, and spiritual and cultural practices, including subsistence practices and ceremonies within and in close proximity to the Mine. Clean air and clean water are absolutely required for the Chickaloon Tribe'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 both the sky and water.

The Permit currently includes an ambient air boundary that excludes an overly large area near the Mine from air quality protections, including large swaths of public lands leased by Usibelli. Owing to the elevated pollution levels expected within the ambient air boundary, the Permit requires Usibelli to exclude Chickaloon Tribal members from State-owned lands to which Chickaloon Tribal members otherwise would have access to for important spiritual and cultural practices. 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),<sup>10</sup> but barriers erected by Usibelli prevented using this traditional area for the hunt.

The overly large ambient air boundary also means that compliance with ambient air quality standards has been modeled at a considerable distance from the Mine, thereby allowing Usibelli to emit more air pollution, using fewer controls, than would be lawful otherwise. This heightened pollution load, including conventional air pollutants, fugitive dust, blowing coal dust, and toxic emissions, threatens the health and welfare of Tribal citizens who live, work, attend school, and engage in spiritual and cultural practices in close proximity to the Mine site. Tribal cultural practices also will be directly and negatively affected by noise from blasting and mining operations and water pollution.

III. **GROUNDS FOR HEARING AND PERMIT REVERSAL**

A hearing should be granted because the Permit's ambient air quality boundary is not supported by the record. The Division of Air Quality arbitrarily has failed to demonstrate that Usibelli has the legal authority or an ability to physically exclude the public—both requirements

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<sup>10</sup> See Alaska Const. art. I, § 4; U.S. Const. amend. I; see also *Frank v. State*, 604 P.2d 1068, 1072-74 (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).

that must be met before an area is excluded from air quality standards and protection. Further, the 2015 Informal Review Determination is factually inaccurate, ignores record evidence and admissions by Usibelli, is inconsistent with the Division's previous informal review of the Permit, and arbitrarily fails to respond to significant issues raised by the Chickaloon Tribe.

A. Legal Requirements and Procedural Background

The Clean Air Act regulates the concentration of air pollution in the "ambient air."<sup>11</sup> 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 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."<sup>12</sup> EPA defines "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access."<sup>13</sup> 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."<sup>14</sup> ADEC maintains a similar policy, requiring "a fence or some other barrier."<sup>15</sup> ADEC 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."<sup>16</sup>

The ambient air boundary for the 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., fencing) in certain locations.<sup>17</sup> 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

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<sup>11</sup> See 42 U.S.C. § 7409.

<sup>12</sup> *Train v. Natural Res. Defense Council*, 421 U.S. 60, 65 (1975).

<sup>13</sup> 40 C.F.R. § 50.1(e).

<sup>14</sup> Letter from Douglas M. Costle, EPA, to Hon. Jennings Randolph (Dec. 19, 1980), Ex. 12 (emphasis added).

<sup>15</sup> ADEC Modeling Review Procedures Manual (June 30, 2013) at 32.

<sup>16</sup> *Id.* (emphases added).

<sup>17</sup> Permit, Conditions 18.1, 18.2, and 18.4.

from the Mine site.<sup>18</sup> The Permit, as issued on February 5, 2015, 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.”<sup>19</sup>

CVTC initially sought informal review of the Permit in 2014 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.<sup>20</sup> CVTC also pointed out that the delineated ambient air boundary does not comply with regulatory requirements, as Usibelli 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.<sup>21</sup>

In a decision on informal review issued on September 8, 2014 (2014 Informal Review Determination), Alice Edwards, then-Director of the Division of Air Quality, agreed with the concerns raised by CVTC, finding 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” and 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.”<sup>22</sup> As a result of these findings, then-Director Edwards “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.”<sup>23</sup>

Following the 2014 Informal Review Determination, Air Quality Division staff compiled additional information regarding the ambient boundary. The additional information consisted of an unsigned legal memorandum “developed by Usibelli” and a site report and photograph log compiled by ADEC staff that described natural conditions along the eastern ambient air boundary but did not state any conclusions about whether those conditions would prevent

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<sup>18</sup> See, e.g., Wishbone Hill Coal Mining and Processing Operation Public Access Control Plan (Feb. 2014) (Public Access Control Plan) at 2-3.

<sup>19</sup> Letter from John F. Kuterbach, ADEC, to Lisa Wade, CVTC (Feb. 5, 2015) at 1.

<sup>20</sup> 2014 CVTC Request for Informal Review at 6-9.

<sup>21</sup> *Id.*

<sup>22</sup> 2014 Informal Review Determination at 5.

<sup>23</sup> *Id.*

public access.<sup>24</sup> It was on the basis of these documents that the Permit was reissued, without substantive changes, on February 5, 2015.<sup>25</sup>

CVTC subsequently requested a second informal review of the Permit, pointing out why the additional information collected by ADEC failed to resolve the ambient air boundary concerns raised by CVTC and were not responsive to the 2014 Informal Review Determination and remand.<sup>26</sup> This second informal review request was granted on February 27, 2015, by then-Director Edwards, who requested additional information from the Chickaloon Tribe.<sup>27</sup> That additional information was provided to ADEC on March 20, 2015.<sup>28</sup>

B. The Permit and ADEC's 2015 Decision on Informal Review are Contradicted by the Record and Arbitrary.

Cindy Heil, Acting Director of the Division of Air Quality, issued a decision on CVTC's second informal review request on March 31, 2015.<sup>29</sup> The 2015 Informal Review Determination asserts that "the ambient air quality boundary used in the permit decision was correct," and presents a mere three paragraphs of analysis offered as "Reasons for the Decision."<sup>30</sup> These three paragraphs include gross factual inaccuracies, ignore record evidence and admissions by Usibelli, contradict the prior determination of then-Director Edwards, and fail to respond to significant issues raised by the Chickaloon Tribe.

1. *The 2015 Informal Review Determination fails to establish that Usibelli possesses legal authority to exclude the public from the area within the ambient air boundary.*

The 2015 Informal Review Determination refers to "Usibelli's lease" in the singular, asserting that "the lease" provides authority for Usibelli to exclude the public.<sup>31</sup> Acting Director Heil neglects to provide a name, citation, or even a textual excerpt for the lease upon which the 2015 Informal Review Determination is based, which is unsupported because the Mine site is subject to multiple leases covering different areas of the Mine site, each of which places distinct

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<sup>24</sup> See Memorandum from Fathima Siddeek, ADEC, to John F. Kuterbach, ADEC, (Feb. 2, 2015) (Siddeek Memo) (noting and enclosing "a Memorandum developed by Usibelli, and a report and photograph log of a site visit conducted by ADEC staff members").

<sup>25</sup> See generally Letter from John F. Kuterbach, ADEC, to Lisa Wade, CVTC (enclosing Siddeek Memo and enclosures thereto).

<sup>26</sup> See generally 2015 CVTC Request for Informal Review.

<sup>27</sup> Letter from Alice Edwards, ADEC, to Lisa Wade, CVTC (Feb. 27, 2015).

<sup>28</sup> CVTC's response to ADEC's February 2015 request for additional information, dated March 20, 2015 (2015 CVTC Additional Information Submission), is attached along with accompanying exhibits 31 and 32.

<sup>29</sup> See generally 2015 Informal Review Determination.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

legal limitations on Usibelli's use of the property and authority to exclude the public. Usibelli's own memorandum to ADEC acknowledged that the first phase of the Mine alone involves four leases with variable legal requirements: two State coal leases and two State surface use leases.<sup>32</sup> The fact that the 2015 Informal Review Determination refers to a single, unidentified, and unidentifiable (given the scant information provided) lease—when the ambient air boundary implicates Usibelli's legal authority under multiple State leases—is obviously inadequate.

Acting Director Heil's reliance on a single lease also fails to resolve a key information gap that is fatal to the Permit. As CVTC identified in its second request for informal review, Usibelli pointedly has neglected to provide information on its legal authority to exclude the public for all "phases" of the planned Mine.<sup>33</sup> Usibelli supplied a memorandum identifying some of the leases pertinent to the ambient air boundary, but the memorandum does not purport to address Usibelli's authority under the leases for "Phase 2" of the planned mining operation.<sup>34</sup> 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."<sup>35</sup> It does not matter when Usibelli plans to undertake its second phase of operations, or even whether the company mines coal in Phase 2 at all, because public land covered in "Phase 2" falls within the currently permitted ambient air boundary. If Usibelli lacks present authority to exclude the public from Phase 2 lands, the Permit is unlawful. The 2015 Informal Review Determination does not mention, let alone address, Usibelli's failure to provide substantiation for the Permit's ambient air boundary within the land covered by Phase 2 of the Mine. Accordingly, both the Permit and the 2015 Informal Review Determination are arbitrary.

The 2015 Informal Review Determination also appears to offer a legal interpretation of the lone, unidentified lease, a role that ADEC previously explicitly disavowed as improper. According to the 2014 Informal Review Decision, "Air Permit Program staff indicated that they must rely on the land manager's interpretation of their lease agreements to determine whether Usibelli has the 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 . . ."<sup>36</sup> Despite this finding that verification for Usibelli's authority to exclude the public must come from the leasing agencies themselves, there is no evidence that State and local land managers have been contacted—let alone evidence that these lessors verified that Usibelli, as lessee, has the authority to exclude the public as claimed. Notably, contrary to Acting Director Heil's suggestion in her informal review decision that the public may be excluded, CVTC has documented a representation by an official from the Alaska Department of Natural Resources (ADNR) that the Permit area is "open to the public" and the public is

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<sup>32</sup> Usibelli Coal Mine LLC Memorandum (Oct. 23, 2014) (Usibelli Memo) at 4-5.

<sup>33</sup> 2015 CVTC Request for Informal Review at 6.

<sup>34</sup> Usibelli Memo at 4-5.

<sup>35</sup> *Id.* at 4, n.13

<sup>36</sup> 2014 Informal Review Determination at 5 (emphasis added).

“welcome to visit the project site at any time.”<sup>37</sup> The Division of Air Quality has not addressed this record evidence.

Acting Director Heil’s unsupported assertion that Usibelli may exclude the public, based on a single lease that is not cited or identified in any way, is inconsistent with other evidence in the record—evidence that has been highlighted by CVTC without response or refutation from the Division. Consider the following:

- As CVTC noted in its original 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.*”<sup>38</sup> It is perhaps this clause, included in two of Usibelli’s coal leases, to which the 2015 Informal Review Determination refers when it states that “Usibelli’s lease includes a provision stating that public access may be restricted for safety reasons.”<sup>39</sup> This clause, which emphasizes the *minimization* of limits upon public access, requires *both* proximity to the mining operation *and* a safety reason before a restriction on public access may be imposed. But even if the clause in the coal leases permitted Usibelli to exclude the public for reasons of safety untethered from geographic proximity, they would not support the Permit here. The clause does not permit Usibelli to create an unnecessary safety problem and then use that safety problem to exclude the public. The purpose of this lease provision is to preserve public access, not to limit it. Further, section 13(d) in each of the coal leases requires Usibelli to “perform all operations under this lease . . . with regard for safety” and to “avoid damage to and waste of other natural resources not covered by this lease.”<sup>40</sup> Rather than polluting the air unnecessarily and using that safety hazard to exclude the public, the lease requires Usibelli to use better emission controls and to avoid the safety hazard in the first place.
- Usibelli’s coal leases, however, are not the only leases relevant to Usibelli’s authority to limit public access. Usibelli asserts in its memorandum that surface lease ADL 224865 allows it to exclude the public from the land governed by that particular lease based upon a quoted statement in the lease that “public access may be restricted on the parcel by the Lessee.”<sup>41</sup> This excerpt identifies *some* authority for Usibelli to limit public access,

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<sup>37</sup> 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).

<sup>38</sup> 2014 CVTC Request for Informal Review at 7 (citing lease ADL 23803, Stipulations ¶ 3) (emphases added); *see also* Usibelli Memo at 4 (quoting coal leases ADL 309947 and ADL 32144). Coal leases ADL 309947 and ADL 32144 were attached to the 2015 CVTC Request for Informal Review as exhibit 26 and exhibit 27, respectively.

<sup>39</sup> 2015 Informal Review Determination at 1.

<sup>40</sup> Ex. 26 at 4 (ADL 309947); Ex. 27 at 4 (ADL 32144).

<sup>41</sup> Usibelli Memo at 4 (quoting surface lease ADL 224865).

but it begs the question: to what degree may access be restricted? Significantly, page 2 of surface lease ADL 224865 specifies that the lease is “[s]ubject to . . . ADL 218234,” a “100 foot wide public access easement,” and page 3 of the same lease declares 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.” CVTC flagged these two lease terms for ADEC in response to a specific request from then-Director Edwards, who enclosed the lease in correspondence and requested that CVTC “identify the language in ADL 224865 which . . . does not support Usibelli’s claimed authority to exclude the public under the lease.”<sup>42</sup> Acting Director Heil does not mention or address these details in the 2015 Informal Review Determination.

- Usibelli itself has acknowledged a lack of clear authority to exclude the public from all leased areas encompassed within the ambient air boundary, stating in its memorandum to ADEC that surface lease ADL 225305 is “perhaps the least clear in its terms regarding restricting public access.”<sup>43</sup> This suggestion that ADL 225305 lacks clarity is not accurate as the lease explicitly forbids Usibelli from limiting public access. According to language excerpted by Usibelli itself in its memorandum, the lease states that “[t]he ability of all users to use or access state land or public waters *must not be restricted*.”<sup>44</sup> CVTC highlighted the terms of ADL 225305 and Usibelli’s admission in its second request for informal review;<sup>45</sup> nonetheless, Acting Director Heil does not mention or address these details in the 2015 Informal Review Determination.

2. *The 2015 Informal Review Determination fails to establish that adequate barriers exist to exclude the public from the area within the ambient air boundary.*

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 incorporated into the Permit relies on natural barriers that are inadequate to ensure that public health is protected. CVTC previously pointed out that natural barriers were lacking on the eastern side of the Mine,<sup>46</sup> and the Permit was remanded by then-Director Edwards 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.”<sup>47</sup>

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<sup>42</sup> See 2015 CVTC Additional Information Submission at 1-2; Letter from Alice Edwards, ADEC, to Lisa Wade, CVTC (Feb. 27, 2015) at 1; *id.* at 2 (noting enclosure of 224865).

<sup>43</sup> Usibelli Memo at 5.

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> 2015 CVTC Request for Informal Review at 6-7.

<sup>46</sup> 2014 CVTC Request for Informal Review at 8-9.

<sup>47</sup> 2014 Informal Review Determination at 5.

In the 2015 Informal Review Determination, Acting Director Heil cites “the expert opinion of the Department staff who visited the site and observed the boundary” and who allegedly “found for the eastern Wishbone Hill ambient boundary” that “the location and vegetation was sufficient . . . except where trails approach and cross the proposed boundary.”<sup>48</sup> According to Acting Director Heil, “the [P]ermit addresses these locations for existing and future trails by requiring fencing where the trails cross the boundary.”<sup>49</sup> These assertions are not supported by the record.

First, it is simply not the case that ADEC staff offered an expert opinion establishing the location and vegetation as a sufficient barrier to access along the eastern ambient air boundary. While the record indicates that Division of Air Quality staff did visit the eastern boundary, a visit that was memorialized in a site report and photograph log, nowhere does the site report state that the staff encountered any difficulty reaching the ambient air boundary or that any barriers to access were observed.<sup>50</sup> Indeed, not only were ADEC staff members able to reach and travel along the eastern ambient air 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.<sup>51</sup> In any event, it doesn’t require an “expert” to identify an easy walk through the woods, as revealed by the ADEC photograph log, and Acting Director Heil’s suggestion that significant natural barriers exist along the eastern edge has been contradicted by Usibelli, which has conceded that unlike other portions of the ambient air boundary, “the eastern boundary has fewer, and less dramatic, natural barriers.”<sup>52</sup>

Second, Acting Director Heil’s assertion in the 2015 Informal Review Determination that the Permit addresses all trails that cross the ambient air boundary is incorrect. This finding reflects an uncritical acceptance of Usibelli’s assertion that there is “[o]nly [o]ne [e]stablished [t]rail” in the vicinity of the Mine. But nowhere does Usibelli define or explain what constitutes an “established trail.”<sup>53</sup> As matter of fact, the entire proposed Mine site is crisscrossed with a substantial network of trails.<sup>54</sup> 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.<sup>55</sup> Neither the Permit, the Public Access Control Plan, nor

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<sup>48</sup> 2015 Informal Review Determination at 2.

<sup>49</sup> *Id.*

<sup>50</sup> See generally, Wishbone Hill Ambient Air Quality Boundary Survey, On-Site Report (Nov. 25, 2014) (by ADEC permit writer Aaron J. Simpson).

<sup>51</sup> See ADEC Division of Air Quality Photo Log (Nov. 25, 2014) (by ADEC permit writer Aaron Simpson) at 2-9 (showing hospitable terrain and vegetation in photos 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 16, and 17).

<sup>52</sup> Usibelli Memo at 6.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> See, e.g., Sutton Area Trails Overview, Ex. 29 (showing some, but not all, area trails).

<sup>55</sup> See 2015 CVTC Request for Informal Review at 9.

the 2015 Informal Review Determination acknowledge or account for the record evidence of such heavy public access and use.

Significantly, CVTC has identified an access route that crosses the ambient air boundary that is not addressed by the Permit in any way. More specifically, the Tribe flagged for ADEC easement ADL 218234,<sup>56</sup> an access route that Usibelli described on a list of “public roads and trails” submitted by the company to ADNR in support of a mining permit.<sup>57</sup> Though Usibelli has neglected to address ADL 218234 in any documentation made available to ADEC, according to Usibelli’s submission to ADNR, ADL 218234 is an easement for an “80 foot wide logging trail and included public use.”<sup>58</sup> A search of ADNR’s online Land Administration System database indicates that the easement and trail connects areas inside and outside of the southern ambient air boundary.<sup>59</sup> Despite the fact that ADEC specifically requested that CVTC “identify all public roads, trails, waters, or public easements which . . . within the ambient air boundary,”<sup>60</sup> the 2015 Informal Review Determination fails to address or even mention the logging road within easement ADL 218234.

Finally, Acting Director Heil’s assertion that “Usibelli has the actual ability to preclude public access,” based on one event previously highlighted by CVTC,<sup>61</sup> is not supported. On the occasion in 2011 that Chickaloon Tribal hunters were unable to access State lands within the Permit area for taking a moose during a Tribal funeral potlatch,<sup>62</sup> their access was prevented by gates erected across a decades-old community trail upon which the Mine access road has been built in numerous locations. The effectiveness of Usibelli’s gates on a particular occasion, installed along merely one of many potential routes for public access, does not support a conclusion that Usibelli “has the actual ability to preclude public access” along all portions of the ambient air boundary—especially along the eastern boundary, where the Permit allows Usibelli to forego the erection of physical barriers despite the company’s acknowledgement of a lack of natural barriers.<sup>63</sup>

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<sup>56</sup> 2015 CVTC Additional Information Submission at 1-2.

<sup>57</sup> Usibelli, “Land Use Information,” [Wishbone Hill] 2009 Update, Part C, Chapter XII (2009), Ex. 31 at XII-8.

<sup>58</sup> *Id.* (internal cross-reference omitted).

<sup>59</sup> Compare Ex. 32 (map showing ADL 218234, prepared using ADNR’s Land Administration System database, available at <http://dnr.alaska.gov/projects/las/>) with Permit at 41 (map showing the ambient air boundary).

<sup>60</sup> Letter from Alice Edwards, ADEC, to Lisa Wade, CVTC (Feb. 27, 2015) at 1.

<sup>61</sup> 2015 Informal Review Determination at 2.

<sup>62</sup> See *supra* at 4; see also 2015 CVTC Request for Informal Review at 3.

<sup>63</sup> See Usibelli Memo at 6 (stating “[t]here are other parts of the perimeter where public access may be less [a]ffected by natural features” including “the eastern boundary [which] has fewer, and less dramatic, natural barriers.”).

## V. RELIEF REQUESTED

It is plain that the Division of Air Quality lacks a sufficient basis for the ambient air boundary set forth in the Permit: both Usibelli and Acting Director Heil have failed to identify any legal authority that would allow Usibelli to fully exclude the public from all areas within the ambient air boundary; and no adequate physical barriers exist to preclude such public access and protect the public, particularly along the eastern ambient boundary and the southern boundary at ADL 218234. The Chickaloon Tribe therefore respectfully requests that the Commissioner grant a hearing on the existing agency record and written briefs pursuant to 18 AAC 15.220(b)(3).

As there is a clear need to reassess and revise the ambient air boundary and associated conditions in the Permit, the Commissioner may wish to immediately remand the Permit to Division of Air Quality staff pursuant to 18 AAC 15.220(b)(2).<sup>64</sup>

Because ADEC has refused to consult with the Chickaloon Tribe regarding the Permit, there has been no consideration of protected Tribal uses of the area or of the consequences of Tribal use 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. Ultimately, to effectuate this access and protection, the ambient air boundary necessarily must be drawn more narrowly, with an attendant reduction in emissions from the Mine.

Respectfully submitted,



Colin O'Brien

Tom Waldo

Earthjustice

*Counsel for Chickaloon Village Traditional Council*

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<sup>64</sup> Because CVTC is requesting immediate remand or a hearing on the existing record and on written briefs, CVTC estimates, pursuant to 18 AAC 15.200(3)(b)(iii), that no time for an adjudicatory hearing will be necessary.

## CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2015, a copy of the foregoing REQUEST FOR A HEARING ON THE EXISTING AGENCY RECORD AND WRITTEN BRIEFS ON THE DIVISION OF AIR QUALITY'S DECISIONS TO ISSUE AND TO AFFIRM, FOLLOWING INFORMAL REVIEW, AIR QUALITY CONTROL MINOR PERMIT NO. AQ1227MSS04, and a DVD with attachments and exhibits, was served via U.S. Mail on each of the following:

Cindy Heil  
Alaska Department of  
Environmental Conservation  
619 E Ship Creek Avenue, Suite 249  
Anchorage, AK 99501

Robert Brown  
Usibelli Coal Mine, Inc.  
634 South Bailey Street, Suite 204  
Palmer, AK 99645

A courtesy copy of the REQUEST FOR HEARING also was provided to each of the following via electronic mail:

President Barack Obama  
Via:  
<https://www.whitehouse.gov/contact/submit-questions-and-comments>

Raina Thiele, Associate Director  
White House Office of Intergovernmental  
Affairs and Public Engagement  
E: [rthiele@who.eop.gov](mailto:rthiele@who.eop.gov)

Victoria Tauli-Corpuz  
United Nations Special Rapporteur on the  
Rights of Indigenous Peoples  
E: [indigenous@ohchr.org](mailto:indigenous@ohchr.org)

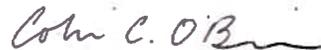
Sally Jewell, Secretary  
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Colin O'Brien  
Earthjustice  
*Counsel for Chickaloon Village Traditional Council*

**Attachments to Chickaloon Village Traditional Council's  
Request for Hearing on the Division of Air Quality's Decision to Issue  
Air Quality Control Minor Permit No. AQ1227MSS04**

**Description**

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Chickaloon Village Traditional Council (CVTC), Comments on 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 Operation (Apr. 14, 2014)

CVTC, 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 (June 25, 2014)

Alaska Department of Environmental Conservation (ADEC), Letter to CVTC, Re. Informal Review of Permit No. AQ1227MSS04 (July 2, 2014)

ADEC, Letter to CVTC, Re. Information Request for Informal Review of Permit No. AQ1227MSS04 (July 10, 2014)

CVTC, Letter to ADEC, Re. 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)

ADEC, Decision Re. Informal Review for Air Quality Minor Permit AQ1227MSS04 for Usibelli Coal Mine Inc. Wishbone Hill Facility (Sept. 8, 2014)

ADEC, Letter to CVTC, with enclosures, Re. Revision to Final Air Quality Control Minor Permit No. AQ1227MSS04 to revise Conditions 18.2b and 18.4 of Minor Permit AQ1227MSS04 (Feb. 5, 2015)

- ADEC, Air Quality Control Minor Permit AQ1227MSS04 Revision 1 (Feb. 5, 2014)
- Siddeek, Fathima, ADEC, Memorandum to John F. Kuterbach, ADEC, Re. Response to Item No. 3 of September 8, 2014 Informal Review Decision for Minor Permit AQ1227MSS04 (Feb. 2, 2014)
- Usibelli Coal Mine LLC, Wishbone Hill Ambient Air Boundaries Memorandum (Oct. 23, 2014)
- Simpson, Aaron J., ADEC, Wishbone Hill Ambient Air Quality Boundary Survey, On-Site Report (Nov. 25, 2014)
- Simpson, Aaron J., ADEC, ADEC Division of Air Quality Photo Log (Nov. 25, 2014)

CVTC, Request for informal review of Revision to Air Quality Control Minor Permit No. AQ1227MSS04 (Feb. 19, 2015)

ADEC, Letter to CVTC, with enclosure, Re. Informal Review of Air Quality Minor Permit No. AQ1227MSS04 (Feb. 27, 2015)

- State of Alaska, Department of Natural Resources, Lease Agreement, ADL No. 224865 (1990)

CVTC, Letter to ADEC, 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 (Mar. 20, 2015)

ADEC, Decision Re. Informal Review for Air Quality Minor Permit AQ1227MSS04 for Usibelli Coal Mine, Inc. Wishbone Hill Facility, as amended 2/5/15 (Mar. 31, 2015)

**Exhibits to Chickaloon Village Traditional Council's  
Request for Hearing on the Division of Air Quality's Decision to Issue  
Air Quality Control Minor Permit No. AQ1227MSS04**

<b>Ex. No.</b>	<b>Description</b>
1	CVTC, Comments on Preliminary Decision to Approve Minor Permit Application for Usibelli Coal Mine, Inc. Wishbone Hill Mining and Processing Operations, Air Quality Control Minor Permit AQ1227MSS03 (Sept. 19, 2011)
2	Environmental Protection Agency (EPA) Region 10, Alaska SIP – Federally Approved Rules
3	EPA, Fact Sheet, Final Revisions to the National Ambient Air Quality Standards for Nitrogen Dioxide (undated)
4	Khanh Tran, AMI Environmental, Comments on the Air Quality Impact Analysis of the Minor Permit Application for the Usibelli Wishbone Hill Coal Mining and Processing Project (Mar. 31, 2014)
5	Memorandum from Tyler Fox, EPA, to Regional Air Division Directors, Re. Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-Hour NO <sub>2</sub> National Ambient Air Quality Standard (Mar. 11, 2011)
6	MACTECH, Sensitivity Analysis of PVMRM and OLM in AERMOD, Alaska DEC Contract No. 18-8018-04 (Sept. 2004)
7	Memorandum from Lydia Wegman, EPA, to Regional Air Directors, Re. EPA Reconsideration of Application of Collocation Rules to Unlisted Sources of Fugitive Emissions for Purposes of Title V Permitting (June 2, 1995)
8	Letter from Pamela Blakely, EPA, to Edwin Bakowski, P.E. (Aug. 8, 2007)
9	Letter from Cheryl L. Newton, EPA, to Janet McCabe, Indiana Department of Environmental Management (Mar. 6, 2003)
10	State of Alaska Health Impact Assessment Program, Draft Health Impact Assessment for Proposed Coal Mine at Wishbone Hill, Matanuska-Susitna Borough Alaska (Mar. 5, 2012) (excerpts)
11	Viney P. Aneja, "Characterization of Particulate Matter (PM <sub>10</sub> ) in Roda, Virginia" (undated)
12	Letter from Douglas M. Costle, EPA, to Hon. Jennings Randolph (Dec. 19, 1980)

- 13 Memorandum from Stephen D. Page, EPA, to Regional Air Division Directors, Re. Interpretation of "Ambient Air" In Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration (June 22, 2007)
- 14 Memorandum from Walter C. Barber, EPA, to Gordon M. Rapier, Re. Applicability of PSD Increments over Company Property (May 23, 1977)
- 15 Memorandum from G.T. Helms, EPA, to Steve Rothblatt, Re. Ambient Air (Apr. 30, 1987)
- 16 Letter from Donald C. Toensing, EPA, to W. Clark Smith, Nebraska Department of Environmental Quality (Aug. 1, 2000)
- 17 U.S. Geological Survey, The National Map US Topo for Farnsworth Peak Quadrangle
- 18 Kennecott smelter map, printed from Salt Lake County Recorder Interactive Map, *available at* <http://assessor.slco.org/Javaapi2/ParcelViewExt.cfm>
- 19 Letter from Nancy Helm, EPA, to John Kuterbach, Alaska Department of Environmental Quality, Re. Determining the Ambient Air Boundary for Potential Permit Application in Support of Alaska Industrial Development and Export Authority's Restart of Healy Clean Coal Project (Sept. 11, 2007)
- 20 Shem Pete's Alaska: The Territory of the Upper Cook Inlet Dena'ina (James Kari & James A. Fall, eds., 2d ed. 2003)
- 21 Alaska Department of Natural Resources (ADNR), Final Findings of Fact and Decision, Coal Exploration, Wishbone Hill Exploration, Permit No. 01-86-795 (Aug. 10, 2012)
- 22 Usibelli Coal Mine, Inc., Wishbone Hill Coal Exploration Permit Renewal Application, Permit No. 01-86-795 (Apr. 2012) (excerpt)
- 23 U.S. Geological Survey, Mineral-resource locality and mineral-resource assessment tract map, Ketchikan, Alaska (1991)
- 24 U.S. Geological Survey, Ketchikan (B-2) Quadrangle Topographic Map (1958)
- 25 Email from Russell Kirkham, ADNR, to Emily Fehrenbacher, Sierra Club, Re. DNR Wishbone Hill permit Area Tour (Nov. 9, 2011)
- 26 ADNR, Coal Lease ADL No. 309947

- 27 ADNR, Coal Lease ADL No. 32144
- 28 Usibelli Application to Renew Wishbone Hill Surface Coal Mining Permit, Part D: Operation and Reclamation Plan (2014) (excerpt)
- 29 Sutton Area Trails Overview Map
- 30 Alaska Department of Health and Social Services, Health Impact Assessment for Proposed Coal Mine at Wishbone Hill, Matanuska-Susitna Borough Alaska (Sept. 30, 2014) (excerpt)
- 31 Usibelli Wishbone Hill 2009 Update, Part C, Chapter XII: Land Use Information (2009)
- 32 ADNR Land Estate Map for ADL 218234