



TRUSTEES FOR ALASKA

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November 28, 2011

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

Sent via email

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

Dear Commissioner Sullivan:

Trustees for Alaska submits the following citizen complaint on behalf of Friends of Mat-Su ("FoMS"), Castle Mountain Coalition ("CMC"), Alaska Center for the Environment ("ACE"), Cook Inletkeeper, Alaska Community Action on Toxics ("ACAT"), Pacific Environment, the Chickaloon Village Traditional Council ("CVTC"), and the Alaska Chapter of the Sierra Club (collectively "Groups"). Groups have reason to believe that Usibelli Coal Mining, Inc. ("Usibelli") is conducting surface coal mining operations at Wishbone Hill near Sutton, Alaska without valid mining permits, in violation of the Alaska Surface Coal Mining Control and Reclamation Act ("ASCMCRA"). Groups hereby request that DNR immediately issue a Cessation Order to Usibelli for all surface coal mining operations at Wishbone Hill until Usibelli obtains valid mining permits for those activities.

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

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

surface coal mining operations without a permit “causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources.” 11 AAC 90.613(c). The unpermitted operations at Wishbone Hill, therefore, threaten to adversely affect Groups, who have numerous members living, recreating, and otherwise using the region in and around the mine site.

CMC is a small nonprofit community organization based in the Matanuska Valley. CMC has approximately 300 supporters; most live or own property in Chickaloon, Sutton, or Palmer. CMC’s mission is to preserve the economic sustainability, ecological integrity, and quality of life within the Matanuska River watershed. Coal mining will have a significant impact on all aspects of life in the Matanuska Valley. Since the time when historic coal mining ceased, the population of the Valley has increased ten-fold, including a population influx into the communities of Chickaloon, Sutton, and Palmer. The vast majority of Valley residents have never known this as a coal mining area. Unpermitted coal mining operations will negatively impact CMC’s supporters who live, recreate, and otherwise use and enjoy the Matanuska Valley by causing numerous environmental, social, and economic impacts to the region.

FoMS is a nonprofit organization that works to provide land use information, advocate for sustainable borough-wide planning, promote citizen involvement, and offer tools and support needed to develop healthy and vibrant communities in the Matanuska-Susitna (“Mat-Su”) Borough. FoMS has approximately 300 members, many of whom live, own property, do business, recreate, hunt, fish, and enjoy a high quality of life in the vicinity of Wishbone Hill. These members reside in communities throughout the Borough that are and will be adversely affected by operations at Wishbone Hill. Some members live in the Buffalo-Soapstone Community and Sutton, which are directly adjacent to the Wishbone Hill site. Other members live downwind and downstream of the site in Palmer and Wasilla. Operations at Wishbone Hill will have lasting environmental, social, and economic impacts on the quality of life of FoMS’ members throughout the Mat-Su Valley and the larger region; the continuation of unpermitted operations will have particularly egregious affects. Specifically, unpermitted operations will harm human health, private property values, air and water quality, fish and wildlife populations, recreational access, future economic activities, and traffic and safety.

ACE is Alaska’s largest grassroots organization with over 6,000 members. More than 250 of those members reside in the Mat-Su Valley and will be negatively impacted by the Wishbone Hill Coal Mine the continuation of Usibelli’s unpermitted operations. ACE’s organizational mission is to enhance Alaskans’ quality of life by protecting wild places, fostering sustainable communities, and promoting recreational opportunities. An open pit strip coal mine is in direct conflict with ACE’s mission, as the environment around the mine will be significantly impacted, the surrounding communities will suffer harm from coal dust exposure and noise, and recreational opportunities in and around the mine area will be lost indefinitely. In addition to these immediate impacts to over 250 members of ACE living in the Valley, many of ACE’s members take advantage of the Valley’s numerous recreational opportunities and enjoy the scenic and intrinsic value of the environment throughout the year in and around the mine area. These uses are threatened by surface coal mining operations, particularly operations conducted without a permit. Furthermore, ACE members who reside in Anchorage along the rail line will suffer negative impacts associated with transporting coal from Wishbone Hill to Seward,

including exposure to coal dust from open train cars, increased diesel fumes, and increased noise and vibrations.

Cook Inletkeeper is a community-based nonprofit corporation formed in 1995 that works in the public interest to protect the Cook Inlet watershed and the life it sustains. Cook Inletkeeper members use and enjoy the lands and waters in the vicinity of the proposed project. Specifically, Cook Inletkeeper members hike, fish, and otherwise rely on the area around Wishbone Hill for recreational, aesthetic, and economic uses. These interests will be adversely affected if large-scale coal strip mining commences in the region, especially if unpermitted mine operations are allowed to continue.

ACAT is a statewide non-profit public interest environmental health research and advocacy organization dedicated to protecting environmental health and achieving environmental justice. ACAT believes that everyone has a right to clean air, clean water, and toxic-free food. ACAT opposes coal development primarily because toxins from coal have been linked to lung disease, heart disease, strokes, reproductive damage, and other health problems. Unpermitted mining activities at Wishbone Hill threaten the health of over 200 ACAT members in Anchorage and the Mat-Su Valley from blasting, air and water contamination, and fugitive toxic coal dust spread along the transportation corridor from Wishbone Hill, through Palmer and Anchorage, and eventually to Seward. Additionally, coal exported and burned in Asia increases the mercury content of subsistence foods that sustain many communities across the State where ACAT works to reduce the human health impacts of toxic chemicals.

Pacific Environment is an international non-governmental organization that works to protect the living environment of the Pacific Rim by promoting grassroots activism, strengthening communities, and reforming international policies. Pacific Environment has over one hundred supporters in Alaska, many of whom depend on the Matanuska Valley for subsistence and recreation. Unpermitted operations at the Wishbone Hill coal mine threaten Pacific Environment and its' supporters ability to continue to use the area for these activities.

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

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

The Sierra Club is the nation's oldest and largest grassroots environmental organization with a mission to explore, enjoy, and protect the planet. The Sierra Club has 1,500 members throughout Alaska, including approximately 60 who live in the Matanuska-Susitna Borough and will be directly impacted by activities at the site; these impacts will likely be much greater if operations are conducted in the absence of a valid permit. The closest Sierra Club member lives within a mile of the Wishbone Hill project site. As this coal is transported, it could have dust impacts along the rail corridor and at export facilities similar to coal dust impacts in Seward, Alaska. When this coal is shipped overseas and burned, it will contribute to global climate change, thereby harming Sierra Club and its members.

2. *Groups have reason to believe Usibelli is violating ASCMCRA's permitting requirement at Wishbone Hill.*

A fundamental requirement of ASCMCRA is that a person may not conduct surface coal mining operations without a permit. AS 27.21.060(a). ASCMRA permits terminate "if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued." AS 27.21.070(b). DNR may grant "reasonable extensions of time if the permittee shows that the extensions are necessary: (1) because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee," *id.*, if an extension is requested prior to the expiration of the three-year time period. *See R.R. Comm'n of Texas v. Coppock*, 215 S.W.3d 559, 562 (Tex. App. 2007). Numerous activities fall within the definition of "surface coal mining operations," including road building and other construction activities related to mine development. AS 27.21.998(17). *See also Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1243-44 (Alaska 1992) ("[T]he definition of 'surface coal mining operations' in ASCMCRA is broad, and includes more than the actual mining activities.").

DNR originally issued the Wishbone Hill mine permits on August 2, 1991. *See* DNR Decision and Findings of Compliance Related to Surface Mining Permits, Idemitsu Alaska Incorporated, Wishbone Hill Mine, 01-89-796 and 02-89-796 (on file with DNR). Those permits were issued on September 4, 1991, upon fulfillment of the bonding requirements by the applicant. Despite the broad array of activities that would qualify, surface coal mining operations did not commence at Wishbone Hill until June 2010, almost nineteen years after the permits were originally issued. *See* Permit Application at D-91 ("Surface coal mining operations, as defined in AS 27.21.998(17), began under mining permit numbers 01-89-796 and 02-98-796 in June 2010."); *see also* DNR Inspection Reports from July 29, 1993 – June 10, 2010 (no activity taking place at Wishbone Hill (except exploration activities, which do not qualify as "surface coal mining operations") until June, 2010 when Usibelli began construction of the mining road).

When originally issued, the permittee delayed commencing operations and requested an extension of time to start operations until the expiration of the original permit term on September 4, 1996, which DNR granted. *See* Letter from DNR to McKinley Mining Consultants, Inc., dated 8/24/1994 (“The Division of Mining and Water Management has reviewed your request to extend the time for starting the mining operations at Wishbone Hill to September 4, 1996. ... The Division agrees that an extension is warranted and that the September 4, 1996 date is reasonable. The request for extending the start time to begin mining operations at the Wishbone Hill mine to coincide with the end of the original permit term of September 4, 1996 is approved.”).

Surface coal mining operations, however, did not commence within this extended time and no additional extensions of time were requested or granted by the September 4, 1996, deadline. Thus, the permits terminated by operation of law on September 4, 1996. AS 27.21.070(b). Accordingly, any subsequent “surface coal mining operations” at the site have been, and are being, conducted without a valid ASCMCRA permit, in violation of AS 27.21.060(a). Those illegal operations began in June 2010, almost nineteen years after the issuance of the original permits and almost fourteen years after the expiration of the granted time extension for beginning operations. *See* DNR Inspection Reports dated 6/10/2010, 6/15/2010, and 6/17/2010 (construction of the road to the mine begins).

3. *DNR must investigate this complaint and issue a Cessation Order to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit.*

DNR must investigate whether Usibelli has been undertaking mining operations without a permit since June 2010 and reply within either 10 days of a site inspection or within 15 days of the receipt of this complaint letter, if DNR decides not to conduct an inspection. 11 AAC 90.607(c). Because conducting surface coal mining operations without a valid permit “constitute[s] a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources,” 11 AAC 90.613(c), DNR must “immediately issue a notice of violation and order a cessation of the ... surface coal mining operation.” AS 27.21.240(a); *see also* 11 AAC 90.613(a), (c). This Cessation Order must remain in effect until Usibelli obtains a valid permit to conduct surface coal mining operations. *See* AS 27.21.240(a) (“[A] cessation order remains in effect until the commissioner determines that the violation has been abated, or until [the cessation order is] modified, vacated, or terminated”).

Thank you for your prompt attention to this matter. We look forward to a response within the required time. If you have any questions, please do not hesitate to contact Brook Brisson at bbrisson@trustees.org or (907) 276-4244, ext. 112, or Katie Strong at kstrong@trustees.org or (907) 276-4244, ext. 108.

Sincerely,

/s/ _____
Brook Brisson
Staff Attorney

/s/ _____
Katie Strong
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CC:

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