THE STATE of ALASKA
GOVERNOR BILL WALKER

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November 29, 2018
Fred Wallis
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RE: REVIEW OF WISHBONE HILL PERMIT VALIDITY AND CESSATION OF ACTIVITY PENDING REVIEW: WISHBONE HILL MINE PERMITS #X11-141-182-005 AND 11-141-182-006

Dear Mr. Wallis,

On November 17, 2016, the Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW) sent a letter ordering Usibelli Coal Mine, Inc. (Usibelli) to cease any activities at the Wishbone Hill (Wishbone) mine site beyond approved maintenance activities, pending a review by DNR of its administration of the Wishbone Hill permits in light of recent federal court decisions and Usibelli's response to a contemporaneous request for information from DMLW to Usibelli.

The permits under review were originally issued in 1991 and have continuously been treated as valid by DNR since issuance. They have been the subject of regular inspection, review, renewal, findings of validity, and oversight throughout the decades since issuance. The current review was prompted by the suggestion that despite this long and large record representing many hundreds of hours of work by department employees, and multiple renewal decisions confirming that those permits are in good standing such that they could and should be renewed, the permits lapsed at the end of the initial permit term in 1996 and have been void ever since. Each of these renewal decisions issued over the decades was the subject of public notice, each was appealable, and each could have been appealed on the basis that the renewal decision was really an *ultra vires* attempt to revive a lapsed permit. Those appeals could have been made to the Commissioner of Natural Resources and, if the decision on the appeal from the Commissioner was unsatisfactory, to the Alaska court system. No successful appeal was made on these grounds and the time for appeal has long since passed.[1]

DNR has completed its review and has determined that despite procedural issues with the prior administration of the Wishbone Hill permits numbered #X11-141-182-005 and 11-141-182-006, the Wishbone Hill permits are valid and in good standing, and have been since issued in 1991. As a result of its review, DNR has found the following, summarized below and discussed in detail in part II below:

1. The Wishbone Hill permits cannot be presumed to be invalid on the basis of the existing written record.

[1] Indeed, until 2014, no appeal of a public-noticed renewal decision occurred at all.

2. The identified issues in the administration of the Wishbone Hill permits were programmatic and not a result of Usibelli's failure to comply with the terms of its permit or to actively seek development of its permitted rights. Despite documentation issues, the record evidences a clear understanding and intent on DNR's part that extensions of time to commence mining would be granted with the renewals in 1996, 2001, and 2006, for the term of the renewal. Nothing in the record evidences a contrary understanding.
3. Extensions of time within which to begin mining could be validly granted in this instance.
4. DNR did have the authority, at the time it issued each renewal decision, to renew the Wishbone Hill permits and those permits, therefore, remain valid notwithstanding any failure to document an extension of time to begin mining.
5. To the extent there remains any question of the adequacy of prior extensions and validity of the permits, DNR grants a retroactive extension of time to commence coal mining operations effective until the time these operations commenced in June of 2010.

The DMLW order to cease activities dated November 17, 2016 is therefore **terminated**, although DNR notes that Usibelli may not currently commence mining for at least 6 months because (1) Usibelli is in voluntary cessation mode and (2) pursuant to the 2014 renewal decision, Usibelli may not resume activities at the Wishbone Hill site because it must first complete at least six months of additional groundwater sampling required by the renewal.[2]

I. INTRODUCTION

Pursuant to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, et seq., Alaska administers its own federally-approved regulatory program governing surface coal mining and reclamation in the state through implementation of the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA at AS 27.21.010, et seq.) and related regulations (11 AAC 90). Thus, Alaska has primacy jurisdiction over regulation of coal mining in the state, and the federal oversight agency, the Office of Surface Mining Reclamation and Enforcement (OSMRE) maintains a limited oversight role.[3]

The Wishbone Hill permits were issued in 1991 by the Alaska DNR pursuant to Alaska's primacy program and were considered valid, existing permits by DNR since that date. DNR's current review of the Wishbone Hill permits was triggered in November, 2016 by two decisional documents in a federal court case in the District of Alaska where questions about validity of the permits were raised by the plaintiffs.[4]

In *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement,* plaintiffs challenged an OSMRE administrative decision regarding the Wishbone Hill permits issued as part of a "ten-day notice" (TDN) process set out in 30 U.S.C. § 1271 and 30 C.F.R. § 842.11. OSMRE

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[2] Attachment 1, Wishbone Hill Mine Permit Renewal, October 3, 2014 at 3.

[3] 30 C.F.R. § 902.10; 30 U.S.C. § 1271.

[4] *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement*, Case No. 3:15-cv-00043-SLG (Dist. Alaska).

issued the TDNs as a result of allegations by several of the plaintiffs in the litigation that Usibelli was mining without a valid coal mining permit when it commenced construction of a road at the project site in the summer of 2010. Several of the plaintiffs had alleged in "citizen's complaints" to OSMRE that the state and federal coal regulatory statutes mandate that coal mining permits terminate automatically after three years if "surface coal mining" had not yet commenced under the permits and if extensions of time to commence mining were not granted.[5] The relevant state statutory provision states that:

> A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. The commissioner 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.[6]

The federal statute referenced in the "citizen's complaints" states:

> A permit shall terminate if the permittee has not commenced the surface coal mining operations covered by such permit within three years of the issuance of the permit: Provided, That the regulatory authority may grant reasonable extensions of time upon a showing that such extensions are necessary by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee[.][7]

The citizen complaints alleged that the Wishbone Hill state permits, originally issued in 1991, had terminated by operation of law by the time that surface coal mining commenced with construction of a road in 2010 because extensions of time to commence mining were not granted beyond 1996. As part of OSMRE's administrative determination regarding DNR's response to the ten-day notices, OSMRE determined that the phrase "shall terminate" as used in the federal statute did not mandate automatic permit termination.[8] OSMRE concluded that therefore Alaska's position, as articulated in its TDN responses, "that its statute does not result in automatic termination when a permittee misses the three-year deadline" was "no less stringent" than the federal statute and was consistent with the language of the Alaska statute.[9]

In a decision on summary judgment dated July 7, 2016, the Court disagreed with OSMRE's determination, and found that the phrase "shall terminate" in the "permit termination" provision[10] of the

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[5] Attachment 2, Citizen Complaints to OSMRE (citing to AS 27.21.070(b) and 30 U.S.C. § 1256(c)).

[6] AS 27.21.070.

[7] 30 U.S.C. § 1256(c).

[8] Attachment 3, November 4, 2014 OSMRE decision on TDNs.

[9] Attachment 3, November 4, 2014 OSMRE decision on TDNs at 18.

[10] 30 U.S.C. § 1256(c).

federal Surface Mining Control and Reclamation Act of 1977 was unambiguous "in that a surface mining permit terminates by operation of law if mining operations have not timely commenced under that statute unless an extension has been granted pursuant to the statute's terms."[11] The Court remanded the matter to OSMRE for further proceedings consistent with the decision. In a subsequent order on a motion to alter or amend the judgment, dated October 26, 2016, the Court further clarified that on summary judgment, because "the basis for [OSMRE's] decision was its interpretation of federal law, the Court reviewed [OSMRE's] interpretation of that law," and that the Court did not "evaluate the validity of Usibelli's permits."[12]

Shortly after the October 26 order, the federal oversight agency, OSMRE, sent DNR another "ten-day-notice" letter dated November 2, 2016, indicating that OSMRE believed that the "implication" of the July 7, 2016 decision regarding the proper interpretation of the federal statutory provision was that Usibelli was "currently mining without a valid permit at the Wishbone Hill Mine...."[13] DNR responded on November 17, 2016 to OSMRE, noting, *inter alia*, that it was initiating a review of the administration of its permits and had ordered cessation of activities at the Wishbone Hill mine site pending that review.[14] After subsequent TDN proceedings, OSMRE issued a determination on informal review finding that Alaska DNR had established good cause under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(ii) to not take "appropriate action" to remedy a violation because DNR was taking steps to determine whether a violation of the State program existed within a reasonable period of time.[15]

In a letter to Usibelli dated November 17, 2016, DMLW ordered cessation of activities at the Wishbone Hill mine site "pending a review by DNR of its administration of the permit[s] in light of the recent court decisions" and in light of Usibelli's future responses to a concurrent request for more information from Usibelli regarding activities under the Wishbone Hill permits and extensions of time to commence mining under the permits.[16] The November 17, 2016 letter to Usibelli stated:

> The Court's July 7 order vacated OSMRE's original TDN decision, and today DNR provides a supplemented response to its original TDN response, for OSMRE's consideration on remand. DNR maintains that the Wishbone Hill permits remain valid state-issued permits, for the reasons articulated in the TDN responses and the Commissioner's June 22, 2015 decision. But OSMRE has indicated in language of its November 2, 2016 letter that it believes that the Wishbone Hill permits could be invalid, stating that the "implication of the Court's decision is that Usibelli is currently mining without a valid permit at the Wishbone Hill Mine." Therefore, pursuant to its general powers as articulated in AS 27.21.030(4) and AS 27.21.030(14), Usibelli is ordered to

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[11] *CMC v. OSMRE*, No. 3:15-CV-00043-SLG, 2016 WL 3688424, at *14 (D. Alaska July 7, 2016).

[12] *CMC v. OSMRE*, 3:15-CV-00043-SLG, Doc. 93, Order re Motion to Alter or Amend at 2.

[13] Attachment 4, November 2, 2016 Letter from J. Fleischman to R. Kirkham.

[14] Attachment 5, November 17, 2016 letter from R. Kirkham to J. Fleischman.

[15] Attachment 6, letter from D. Berry to R. Kirkham dated December 14, 2017. OSMRE indicated that a decision was anticipated "early 2018."

[16] Attachment 7, November 17, 2016 letter from B. Goodrum to F. Wallis.

> cease any activities at Wishbone Hill beyond maintenance activities approved by DNR in any future orders. Further, Usibelli is requested to provide the additional information describe below within 30 days. DNR is issuing this order to allow it to review its administration of the permit in light of the recent court decisions and Usibelli's response to this request for information. DNR reiterates that it has not made a determination that the existing permit terminated by operation of law or is otherwise invalid at this point in time.[17]

Usibelli responded to DMLW providing additional information on December 2, 2016.[18] After additional requests for information by DMLW on December 9, 2016 and October 2, 2017, Usibelli provided additional supplementation on November 28, 2017.[19]

DNR has now reviewed the permit file (including documentation of the 2015 renewal decision and subsequent appeal and Commissioner's decision), relevant court orders in *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement (CMC v. OSMRE)*,[20] correspondence and supporting documentation from the TDN process with OSMRE, and the additional information submitted by Usibelli in response to inquiries from DMLW. This review has also included an examination of Usibelli's activity at the site, the reasons for the timing of that activity, the nature of the market for the coal, Usibelli's efforts to market the coal from the Wishbone Hill site, and Usibelli's communication with the Department about its activities relating to Wishbone Hill project. As part of its review, DNR also reviewed the federal and Alaska surface coal mining statutes, including their history and purpose.

As a result of its review, particularly of the review of permit administration between 1995 and 2007, DNR has identified procedural issues and incomplete documentation regarding DNR administration of extensions of time to commence mining pursuant to AS 27.21.070(b) for the Wishbone Hill permits. As a general matter, DNR cannot, given the passage of time, changes in personnel, and the limits of memory, ascertain definitively whether there was, or was not, any oral correspondence on the topic of extensions of time to commence mining. Nor can DNR determine definitively whether there is any written correspondence regarding extensions of time to commence mining that was misfiled or otherwise not in the current files. In other words, an absence of documentation regarding communications about extensions of time to commence mining does not signify that such communications never occurred. And, on the contrary, the documentation that does exist in the record

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[17] Attachment 7, November 17, 2016 letter from B. Goodrum to F. Wallis.

[18] Attachment 8, Letter dated December 2, 2016 from F. Wallis to B. Goodrum.

[19] Attachment 9, November 28, 2017 letter from F. Wallis to R. Kirkham; December 9, 2016 letter from R. Kirkham to F. Wallis, and October 2, 2017 letter from R. Kirkham to F. Wallis.

[20] Attachment 10, *CMC v. OSMRE*, No. 3:15-CV-00043-SLG, 2016 WL 3688424 (D. Alaska July 7, 2016). Relevant orders attached include the Order on Cross Motions for Summary Judgment; Order re: Motion to Alter or Amend Judgment; and Order on Motion to Certify a Question of Law for Appeal (Attachment 5).

regarding every approval and action taken by the Department suggests that extensions of time to commence mining were granted.

II. Review of Permit History and the Surface Coal Mining and Reclamation Act

A. Background: Administrative History of Permits

1. Permit Renewals and Requests for Extension of Time to Begin Mining

DNR has reviewed its relevant files regarding administration of the Wishbone permits. The Wishbone Hill permits were first issued to Idemitsu Alaska Inc. on September 5, 1991. Therefore, the Wishbone Hill permit history spans *twenty-seven years*, back to the early days of Alaska's coal regulatory program. Any verbal discussions or decisions regarding the permits that occurred 10 to over 20 years ago may not be captured in the administrative documentation. In addition, it is impossible for DNR to know whether there has been a loss, over this extended period, of relevant communications or documentation regarding extensions of time to commence mining. This is one reason that DNR requested that Usibelli submit any additional documentation it might have regarding the topic of permit extensions. As a result of this uncertainty, a key question that arose during DNR's review was the question of whether, particularly in the event that termination occurs automatically by operation of law, the absence of documentation from 10 to over 20 years ago that an extension was granted should be construed in favor of the permittee, or, in favor of termination of a permit. Here, while documentation regarding decisions on extensions is imperfect, there is documentation of repeated affirmative renewals of the permits, indicating a contemporaneous understanding that the permits were valid and in existence. DNR concludes that here, where all documentation that does exist indicates an understanding that the permit was considered valid and to have not terminated, any lack of written documentation regarding extensions of time to commence mining, or lack of clarity in agency documentation, should be construed in favor of the permittee. DNR believes this should be particularly true in the event that the state statute were to be read to mandate termination by operation of law. The record of the Wishbone Hill permits shows that the actions of the State, the permittee, and the federal oversight agency were all consistent with the belief, intent, and understanding that the Wishbone Hill permits were valid.

The original term for the permits issued in 1991 was five years. At that time of application for the permit in 1989, the permittee, Idemitsu Alaska, Inc. (Idemitsu) was engaged in negotiations to provide coal to Japanese utilities and hoped to begin shipments from Wishbone Hill in the fourth quarter of 1991.[21] According to a contemporaneous news article, issuance of the permit was delayed as a result of an injunction by the Superior Court preventing mineral development on Alaska Mental Health Land Trust (Mental Health Trust) lands.[22] Though a settlement was agreed to in 1991, that settlement was subject to court approval and any changes to the settlement had the potential to change the economics of the project.[23] The settlement was approved in a decision that was appealed to the Alaska Supreme

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[21] Attachment 11, Letter from J. Helling to G. Gallagher, dated September 11, 1989.

[22] Attachment 12, DNR Press release dated Sept. 6, 1991.

[23] Attachment 13, Daily News article dated 9.12.91.

Court, where it was not finally affirmed until May of 1997.[24] Legal uncertainty surrounding the settlement continued however until November of 1997, when a petition for *certiorari* to the United States Supreme Court was denied.[25] However, even after that, there was administrative uncertainty about Mental Health Trust lands administration which continued for several years beyond 1997.

Idemitsu, through McKinley Mining Consultants, Inc., requested an extension of time to begin mining due to the pending Mental Health Trust litigation, and that request was found reasonable and approved in 1994.[26] The time to commence mining was extended until September 4, 1996. In 1996, while the Mental Health Trust litigation was still pending, the permits were transferred from Idemitsu to North Pacific Mining Corporation (NPMC).[27] On July 11, 1996, NPMC sought renewal of the permits and, acknowledging the delay in commencement of mining through the previous permit term as a result of the litigation, indicated that NPMC wished to advance the project but was seeking an experienced coal mine operator.[28] Correspondence in the record prior to the July 11 submission indicates that DNR recognized that NPMC needed to acquire another extension of time to commence mining, and that this concern was relayed to NPMC.[29] On January 31, 1996, Thomas Crafford with NPMC wrote to Jules Tileston, DNR, that NPMC was "continuing its efforts towards obtaining a partner to assist in the development of the Wishbone Hill coal project," but that "the necessary project reviews and engineering studies will not have been completed in time to meet the September 1996 deadline for renewal."[30] NPMC noted that it would "simply like to extend the existing permit without any major revision," indicating possible conflation of the renewal requirements with the extension of time to commence mining.[31] A contemporaneous DNR memorandum indicates that DNR was aware of the extension requirement,[32] and DNR sent NPMC a letter dated February 7, 1996 stating that "[i]n regards to AS 27.21.070(b), your justification for the extension needs to address the requirements in statute," and that

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[24] *Weiss v. State*, 939 P.2d 380 (Alaska 1997).

[25] *Weiss v. Alaska*, 522 U.S. 948 (1997).

[26] Attachment 14, Letter granting extension of start time from S. Dunaway, Jr. to J. Helling, dated August 24, 1994; Attachment 15, Letter from J. Helling to S. Dunaway, Jr. dated August 3, 1994.

[27] Attachment 16, Transfer Approval Cover Letter dated September 19, 1995, from S. Dunaway, Jr. to T. Crafford, dated September 19, 1995.

[28] Attachment 17, July 11, 1996 Permit Application Cover Letter from T. Crafford to B. Novinska.

[29] Attachment 18, January 31, 1996 Letter from T. Crafford to J. Tileston; Attachment 19, February 6, 1996 Memorandum from "Brian," to "Jules,"; Attachment 20, February 7, 1996 Letter from Sam Dunaway, DNR, to Tom Crafford, NPMC.

[30] Attachment 18, January 31, 1996 Letter from T. Crafford to J. Tileston.

[31] Attachment 18, January 31, 1996 Letter from T. Crafford to J. Tileston.

[32] Attachment 19, February 6, 1996 Memorandum from "Brian," to "Jules." Other DNR memoranda further discuss the extension issue. Attachment 21, DNR Memoranda.

"[w]e will work with you on this issue."[33] In a draft letter (later finalized as the July 11 cover letter for the permit renewal application), NPMC explained that operations had not yet begun because of the depressed international steaming coal price and the Mental Health Trust lands litigation, but that it had signed a letter of intent with Usibelli.[34] The letter also stated, "I hope this letter and the accompanying forms satisfy the remaining requirements" for renewing the permits.[35] This language, in the context of the January 1996 letter from DNR regarding extension requirements, is a clear attempt to meet all requirements, including those relating to time to begin mining, to ensure the permits were in good standing and could be renewed. Notations in the administrative record from the Director stating that a prior-submitted draft of the NPMC letter "looks okay to me," as well as a notation in the public notice of the renewal that an extension of time to commence mining was requested, coupled with the fact that the renewal was ultimately granted, indicate that DMLW granted an extension of time to commence mining when DMLW approved the permit renewal on October 23, 1996.[36] That decision indicated the Department's expectation that mining would commence within the permit term.[37] The public notice of the decision noted the request for an extension of time to begin mining and, naturally, though perhaps somewhat confusingly, appears to treat the extension term and the permit renewal term as identical, writing:

> The applicant has again requested an extension for beginning mining due to ongoing marketing efforts. The Division is approving a 5-year permit term for the renewal and has agreed to continue the $10,000.00 bond ....[38]

The cover letter to the renewal decision stated that "should mining not commence within this renewal term, then due to the length of time since the original permit application work was completed no further renewals will be considered without an extensive review of the original applications and the baseline information they were based on."[39] This language shows that DNR contemplated, with its renewal, a five year period – coinciding with the permit term – within which the permittee was to begin mining.

In December 1997, just over one year later, DNR approved transfer of the permits from NPMC to Usibelli. The permit transfer decision also contains language that indicates DNR intended to further link extensions of time to commence mining with any future permit extensions. The permit transfer

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[33] Attachment 20, February 7, 1996 Letter from Sam Dunaway, DNR, to Tom Crafford, NPMC.

[34] Attachment 22, July 9, 1996 Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR.

[35] Attachment 22, July 9, 1996 Draft Letter faxed from T. Crafford, NPMC, to B. Novinska, DNR.

[36] Attachment 22, July 10, 1996 "draft" letter from T. Crafford to B. Novinska; Attachment 22, 1996 Renewal (including public notice).

[37] Attachment 23, 1996 Renewal (including public notice).

[38] Attachment 23, 1996 Renewal (including public notice).

[39] Attachment 23, 1996 Renewal (including public notice).

decision repeated language from the recent renewal which conflates or couples renewals with extensions. The cover letter stated that:

> "The permit term remains unchanged, and ends on September 4, 2001. However, should mining not commence within this term, due to the length of time since the original permit application work was completed, no further renewals will be considered without a review of the original applications and the baseline information they were based on."[40]

This language reinforces that DNR considered the extension of time to commence mining to have been granted to the end of the permit term, and further indicates that any future extensions of time to commence mining would be linked to renewals. In its review of DNR's program at the time, OSMRE noted the increased public interest in the Sutton area regarding the mine. It noted that as a result, during the 1997 transfer, DNR had posted information flyers in the Sutton area, and continued to keep the Sutton Community Council informed of coal related activities in the area.[41] It also noted the language in the DNR approval regarding the fact that mining had not commenced and the conditioning of further renewals on additional technical review.[42] Usibelli sought renewal of the permits in 2001.[43] In the cover letter transmitting the application, Usibelli noted coal exploration that it conducted in 1998 and 1999 at the site, but acknowledged that it was not yet prepared to immediately commence mining.[44] In other words, Usibelli explicitly informed DNR in its renewal request that it had neither begun mining within the permit term nor contemplated an immediate commencement of mining. Further, it listed reasons for the delay. It noted that "[i]n conjunction with marketing efforts, Usibelli continues to evaluate methods for extracting and transporting the coal; however, because of the present uncertainty in pricing for energy commodities, operational plans for the project have not been revised at this point."[45] Usibelli also noted that it "trust[ed] that [its] application for renewal of the Wishbone Hill surface coal mining permits is complete," and that it stood "ready to work with you and answer any questions that may arise during your review of our renewal application."[46]

DNR next gave public notice of the renewal application.[47] Indeed, DNR increased its efforts to inform the public of the status of the Wishbone Hill mine. OSMRE noted in its 2001 oversight report that the Wishbone permits were "due to be renewed in early 2002," and that DNR continued increased

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[40] Attachment 24, 1997 Transfer documents.

[41] Attachment 25, Excerpts from OSMRE Oversight Reports.

[42] Attachment 25, Excerpts from OSMRE Oversight Reports.

[43] Attachment 26, 2001 Renewal.

[44] Attachment 26, 2001 Renewal.

[45] Attachment 26, 2001 Renewal.

[46] Attachment 26, 2001 Renewal.

[47] Attachment 26, 2001 Renewal.

informational efforts with the community beyond public notice in newspapers.[48] DNR posted informational flyers in the Sutton community and "continues to keep the Sutton Community Council, the Chickaloon native community, and the Buffalo Mine Road Community Council informed of all coal related activities," by methods that also included site visits for interested parties and attendance by DNR at "Council meetings," in addition to informational flyers and use of the internet to publicize permitting actions.[49] OSMRE noted in 2001 that "active mining" had not yet commenced at Wishbone, and that the State was scheduled to process a renewal.[50]

DNR granted the renewal, recognizing that operations had not yet commenced.[51] The public notice also reported that "[p]arts of the permit application have been revised to provide current environmental background information."[52] It noted, in responses to comments, that "[t]he Division has carefully reviewed the proposed plan of operation and has determined that the impacts to the environment from the proposed activity are within the scope allowed by 11 AAC 90.301-501."[53] The renewal decision also contained responses to public comments received.[54] Finally, DNR found that the "applicant meets the criteria of AS 27.21.180 and the renewal of the surface coal mining permits 01-89-796 and 02-89-796 can be approved."[55]

In 2004, OSMRE noted that Usibelli had exploration and mining permits at Wishbone and that it "plans to develop this area when the coal market improves," although Usibelli "has not yet initiated any activity at the Wishbone Hill location."[56]

Usibelli again sought renewal of the permits in 2006.[57] The public notice stated that "[t]his renewal is for an additional five-year term" and reported DNR's conclusion that "[p]arts of the permit application have been revised to provide current information as required by 11 AAC 90.021 through 11 AAC 90.065," and that "[t]he application meets all of the requirements of the Alaska Surface Coal Mining Program[.]" During the comment period, a public meeting was held on August 25, 2006, where

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[48] Attachment 25, Excerpts from OSMRE Oversight Reports.

[49] Attachment 25, Excerpts from OSMRE Oversight Reports.

[50] Attachment 25, Excerpts from OSMRE Oversight Reports.

[51] Attachment 26, 2001 Renewal (noting that the contemplated reclamation bond was "sufficient to guarantee obligation for the first year of activity once operations commence").

[52] Attachment 26, 2001 Renewal.

[53] Attachment 26, 2001 Renewal.

[54] Attachment 26, 2001 Renewal.

[55] Attachment 26, 2001 Renewal.

[56] Attachment 25, Excerpts from OSMRE Oversight Reports.

[57] Attachment 27, 2006 Renewal.

a representative from Usibelli explained that mining would not begin immediately as Usibelli had to first develop a market.[58] OSMRE noted in its 2007 oversight report that Usibelli had not yet initiated any activity at the Wishbone Hill location, and that Usibelli planned to possibly develop the area "when the economics are right."[59]

At the time of each renewal decision issued prior to Usibelli's commencement of mining, it was clear first, that DNR was aware that Usibelli had not commenced mining at the Wishbone Hill site; second, that the public was informed that Usibelli had not commenced mining at the Wishbone Hill site; third, that OSMRE was also aware that Usibelli had not commenced mining at the Wishbone Hill site. Each renewal, nevertheless, was granted after DNR found that Usibelli was in compliance with Alaska law and that the permits could be renewed.

As discussed below in subsection (2), after a thorough review of the record and requests for additional information from Usibelli, it appears that while numerous activities occurred at the mining site, including bulk sampling, pursuant to Usibelli's exploration permits, there is little dispute that mining commenced no later than June of 2010 when Usibelli began construction of a road into the mine area. In November 2014, DNR issued a decision on a timely submitted renewal request. This decision was appealed, in part based on allegations that the permits had terminated by operation of law for failure to commence mining activities. In 2015, Commissioner Myers issued a decision on appeal of the renewal, affirming the validity of the Wishbone permits.[60] The appellants chose not to appeal the decision to state court.

2. Activity at the Mine Site

An overflight inspection of the mine site by DNR was first conducted on May 10, 1991 to record the pre-mining condition of the site. Following this inspection, DNR conducted regular flight and ground inspections of the site. Subsequent inspection reports through March 25, 1994, indicate that no development activity had taken place and that the project was on hold as a result of the Mental Health Trust litigation and project economics until 1994.[61] A July 29, 1994 inspection report indicates that the operator did not intend to begin mining and was looking for a buyer.[62] The next inspection report, dated August 24, 1994, indicated that the operator had sought an extension of time to begin mining until September 4, 1996, and that this request was approved.[63] The inspection reports note no further activity until October 16, 1998. In October of 1998, Usibelli had identified eight drilling sites, cleared vegetation on six of them and surveyed a seventh. Usibelli had begun drilling at three of the sites, lined

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[58] Attachment 27, 2006 Renewal.

[59] Attachment 25, Excerpts from OSMRE Oversight Reports.

[60] Attachment 28, 2014 Renewal, Attachment 29, 2015 Decision on Appeal re: Renewal.

[61] Attachment 30, Inspection reports.

[62] Attachment 30, Inspection reports.

[63] Attachment 30, Inspection reports.

one in preparation for geophysical testing, plugged another and was actively drilling the third at the time of the inspection.[64] This drilling was conducted pursuant to Usibelli's coal exploration permit.

Prior to Usibelli, Idimitsu was issued an exploration permit in 1986 and the permit was revised each year between 1987 through 1992. The exploration permit and its revisions included authorizations for bulk sampling and exploration drilling. Idimitsu also created vegetation and reclamation test plots under those exploration permits.

Exploration permits were also issued to Usibelli in 1997 (revised 1998), 1999, 2001, 2003, 2008, 2010, and 2012. The last exploration permit was issued in 2012 and expired in 2014. The 1997-2001 permits specifically authorized a new bulk sample site. A second bulk sample was collected sometime in 2010 and sent to the Electric Power and Development Co., Ltd (JPower) in Japan for testing.

While "surface coal mining" as defined by AS 27.21.998(17) did not commence pursuant to authorization of the Wishbone Hill mining permits prior to 2010, significant activities did occur at the Wishbone Hill mine site under the coal exploration permits issued to Usibelli and its predecessors, in furtherance of development of coal mining at Wishbone Hill. These activities included, but are not limited to, the following:

- bulk sampling (mined and reclaimed in the late 1980s);
- baseline studies including the installation and maintenance of vegetation and reclamation test plots, wetland studies, and fish and wildlife studies within the project area;
- drilling of exploratory and monitoring wells from 1980 – 2000, which were inspected by both DNR and OSMRE;
- a second bulk sample site started in 1998 and completed in 2000 (inspected by DNR and OSMRE);
- two test trenches/pits which have been open to allow for additional bulk samples to be collected for potential analysis;
- monitoring wells which have been retained to allow for long term monitoring of ground water conditions;
- quarterly water quality sample collection on Moose Creek (1999 through 2001);
- quarterly discharge/flow measurements on Moose Creek (1998 through 2001);
- quarterly water quality samples collected on Moose Creek (2008 and 2009);
- quarterly discharge/flow measurements on Moose Creek (2007 through 2009);
- discharge/flow and stream morphology assessments on Buffalo Creek (2008);
- water quality assessments for groundwater and piezometer readings (2008 and 2009); and
- aquatic biologic resource studies for Moose Creek and Buffalo Creek (2008).

In sum, Usibelli has conducted activities and collected baseline data as required by DNR in order to maintain its permits over the years. It has maintained a ground water monitoring network, collected

[64] Attachment 30, Inspection reports.

surface water quality data, studied and maintained vegetation and reclamation test plots, conducted wetland studies, and conducted fish and wildlife studies within the project area.

In 2010, with the knowledge and approval of DNR, and pursuant to Usibelli's approved operation and reclamation plan, Usibelli initiated construction under the Surface Coal Mining Permit of a pioneer road into the mine area in June of 2010. Since then, Usibelli has completed one condemnation hole (summer 2010), constructed a gravel pad to be used for staging equipment (summer 2010), constructed and paved the initial 200 feet of the pioneer road (summer-fall, 2010) and has completed clearing trees and vegetation along the entire length of the pioneer road (fall 2011 and winter 2012). DNR has previously considered this road construction to be the initiation of surface coal mining operations under the approved permit, and confirms that understanding here.

3. Inspections by DNR and OSMRE

As part of the requirements of 11 AAC 90.601, DNR has conducted numerous inspections of the permit site and active surface mining operations. Between 1993 and 2011, DNR conducted over 70 inspections of the permitted areas. DNR was aware of the road construction in 2010, and inspected the construction. After initiation of surface coal mining operations in 2010, DNR conducted site visits to the Wishbone Hill coal project with OSM in both June of 2010 and July of 2011. This included site visits to the staging area along the Glenn Highway and the pioneer road. Since 2011, DNR has conducted 53 inspections at the Wishbone Hill site (123 inspections total since issuance of permits in 1991).

4. Revisions to the Wishbone Hill Mine Permits

Various updates to information for permits were made over the years, and in 2009, Usibelli submitted an extensive revision to the operation and reclamation plan. Starting in 2008, DNR worked with Usibelli to identify what was needed to be included in this revision request. Usibelli hired a company to come in and redraft all of the plats and figures of the mine plan onto an updated high quality topographic base and air photo. Most of the original mining plan was kept but additional details were added such as location of the facilities and a detailed design for the haul road. This revision was approved by DNR in July of 2009[65]. Additional revisions were made as part of the renewal process in 2011-2014.

5. Factors contributing to delay in commencement of mining

What has been clear from the beginning to both the permittees and DNR is that this project could not be developed in a way consistent with the principles encoded in the statute without long term supply contracts, and those contracts were never expected to be local. Alaska is geographically remote, has a smaller population than most states, and Healy power plant continued to be well supplied by Usibelli's Healy mine as of 2006.[66] From the beginning, the permittees looked to Asia for a coal market. Idemitsu

[65] Attachment 31, July 22, 2009 revision.

[66] Attachment 27, 2006 Renewal.

hoped to market its coal to Japanese utilities.[67] Idemitsu seems to have been in advanced negotiations to supply coal to these utilities and this drove its desire to have the permits approved in time to begin producing coal for delivery in the last quarter of 1991.[68] An injunction prohibiting development of the lease made this impossible. Due to the Mental Health Trust litigation delay, much of the market demand Idemitsu sought to meet was filled by Australian producers.[69] Idemitsu lost interest and sought to liquidate its holding as a result.[70]

Usibelli's interest in the property was also founded on plans to market to Asia.[71] As Usibelli explained to the Department in a letter dated May 15, 2000, development of a grass roots coal mining project can take ten years or more.[72] Alaska's limited population density has real consequences for the marketability of Alaskan coal. So, too, do transportation costs. High transportation costs can make it expensive to ship raw materials (such as coal) to existing markets and high costs for shipping finished products from Alaska can make it difficult to entice coal dependent industries to locate in Alaska. The security of a long-term supply contract, therefore, can be critical to development of coal resources in Alaska.

More importantly, the security of such a contract in itself works to further the goals of the surface coal mining statutes. Where there are supply contracts, a company can gauge demand and decide to produce only if contracts in hand match the coal resource in such a way that the coal can be produced efficiently, financially, continuously, and completely. Situations where land is partially mined then reclaimed and later re-disturbed for additional mining are avoided as are situations in which a company begins mining but unexpectedly loses a market and stops mining. Further, in the Wishbone Hill context, the Mental Health Trust litigation had an impact that went far beyond the years of litigation and conclusion of litigation in 1991. Any long-term contract opportunities established before or at the time of issuance of the permits in 1991 were lost as a result of the litigation and resulting uncertainty leaving the company at square one again in terms of obtaining such a contract once litigation resolved. In the context of the Wishbone Hill mine permits and the regulatory program for surface coal mining, a delay in commencement of mining while attempts are made to obtain such contracts could be a reasonable delay if the efforts made to obtain such contracts are reasonable, as the record indicates they were here.

B. Background on Intent and the Purpose of SMCRA

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[67] Attachment 11, Letter from J. Helling to G. Gallagher.

[68] Attachment 11, Letter from J. Helling to G. Gallagher.

[69] Attachment 13, Daily News article dated 9.12.91.

[70] Attachment 27, 2006 Renewal.

[71] Attachment 32, Mining News article Dated April 29, 2012.

[72] Attachment 33, May 15, 2000 Letter from A. Renshaw to B. Kuby.

Because the purpose of this review is to ensure compliance with the federally-approved state surface coal mining and reclamation acts, it is a worthwhile exercise to examine the purpose of the federal and state acts for principles that can serve to guide the review. The federal act was adopted first and the state program, including the state statute, was adopted in accordance with the requirements of the federal act.

Of special note in the federal act is 30 U.S.C. § 1201(f), which reports Congress's finding that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States." This finding sets out the core principle of cooperative federalism underlying the Act. It recognizes that geographic factors unique to each state will affect the development of the industry in the state and that each state, therefore, is better positioned to understand the impact of surface coal mining on the landscape and the impact of the landscape on surface coal mining. Accordingly, Congress created a statute that was designed to "assist the States in developing a program to achieve the purposes of this chapter." 30 U.S.C. § 1202(g). It is important to note that the new set of environmental standards put forth in SMCRA were meant to be the "floor," and states were free to adapt to local circumstances, as long as state programs were no less stringent, or protective, than the federal program. The federal program also provided for steps the federal agency would take if it found inadequate state enforcement. 30 U.S.C. § 1271(b). That provision explicitly provides that if the Secretary of the Interior finds that a state has failed to enforce all or part of the state program effectively, and that the state has not adequately demonstrated its capability and intent to enforce such State program, the Secretary will enforce SMCRA requirements. *Id.* However, as part of that enforcement, if a state permittee "met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation" to SMCRA requirements before "suspending or revoking the state permit." *Id.* This language shows the clear intent of Congress to provide a path to bring a good faith permittee's operations into compliance where state programmatic issues occur.

The purposes of the Act most relevant to this review includes protecting society and the environment from the adverse effects of surface coal mining; protecting the rights of landowners; ensuring that surface coal mining is not conducted where reclamation of the land following mining is infeasible; ensuring that coal mining operations are conducted so as to protect the environment; ensuring that reclamation takes place "*as contemporaneously as possible with surface coal mining operations;*" ensuring that "*the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided*" while striking a balance between the need for that coal and protection of the environment and agricultural productivity; and, where necessary, exercising the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.[73]

The italicized quotations are emphasized here because together they illustrate a pair of fundamental principles that drive the restrictions on permit term in the federal program, set out in 30 U.S.C. § 1256(b). The state program is modeled on the federal program, and is required to be "in

[73] 30 U.S.C. § 1202(e)-(f).

accordance with" the federal program.[74] The Alaska Legislature made findings very similar to the federal findings when it created the Alaska Surface Coal Mining Control and Reclamation Act. The Alaska Legislature emphasized the "unique environmental conditions the state is best equipped to understand," and included a list of purposes of the state act that mirrored the list of purposes for the federal act, including "to assure that reclamation of land on which surface coal mining takes place is accomplished as contemporaneously as practicable" and "to assure that the coal supply essential to the nation's energy requirements and to its economic and social well-being."[75] The permit term restrictions in the state and federal statutes help ensure that where coal can be mined consistently with the environmental requirements of the act, it is brought to market and that the impact of mining is addressed through reclamation as contemporaneously as possible with that mining.

These principles are in tension with each other. Behind one is a desire to bring coal to market promptly, behind the other is a desire to ensure that coal is developed when the environmental impacts of developing it can be minimized. This tension is reflected in the federal regulations regarding permanent program performance standards at 30 C.F.R. § 810.2(j), which requires "[s]triking a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." To help strike that balance, the regulations set, as an objective for the program, that it achieve "[m]aximum use and conservation of the solid fuel resource being recovered so that reaffecting the land through future surface coal mining operations can be minimized."[76] A compliant program must provide for mining of coal where that can be done in a way sufficiently protective of environmental and agricultural interests, it requires that where mining is conducted it be conducted thoroughly and completely so as to avoid repeated disturbance to the land, and it requires reclamation as nearly contemporaneously as possible with mining so as to minimize the time the land is disturbed.

There are important reasons to commence mining promptly, but also important reasons to ensure that mining takes place only when that mining can be completed sensitively, efficiently, promptly, and fully.

It is also significant that the requirement to begin mining within three years is a threshold one, not a continuing one. Once mining has commenced, the requirement has been satisfied and there is no further requirement that mining be pursued with diligence or a permit will be terminated. Instead, there are provisions in the state and federal programs providing for companies to go into voluntary cessation of mining upon notice to the state or federal regulatory authority and with appropriate measures taken to secure or stabilize the site during cessation.[77] Thus, the permit term provision in both statutes requiring that mining commence within three years is consistent with a purpose to cut short neglected mining interests, but not with a purpose to force development to continue at a particular schedule or pace regardless of circumstances.

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[74] 30 U.S.C. § 1253(a)(1).

[75] AS 27.21.010(b)(5) and (7).

[76] 30 C.F.R. § 810.2(b).

[77] 11 AAC 90.471; 30 C.F.R. § 817.131.

III. Discussion of Findings

With the intent of the state and federal regulatory programs and the history of the Wishbone Hill permits in mind, we now consider the state's administration of these permits.

DNR's review of its permit administration for Wishbone Hill has revealed that the documentation of decisions to extend time to begin mining over the administration of this permit has been problematic, and sometimes sparse. However, DNR believes that the conclusion to be drawn from these programmatic issues is not that the permits have lapsed, automatically or otherwise, as a result. First, there is no requirement in the statute that a written decision be issued for extensions of time to commence mining. DNR, therefore, cannot conclusively establish that no extensions were granted merely from any lack of explicit written evidence that they were granted, or that the permits had terminated automatically or otherwise, particularly given the continued inspections and renewals of the permits, the 1997 permit transfer, as well as the 2009 revision approval, which bolder and support that there was an understanding by DNR and the permittee that the permits continued to exist. To the extent that (preserved) written documentation of extensions is sparse, contemporaneous documentation regarding inspections, renewals, and the maintenance of financial assurance all evidence that extensions of time to commence mining were granted. It was not until late 2010, *after* mining had commenced, that the validity of the permits for failure to commence mining was questioned in citizen complaints.[78] Second, the identified issues in the process were programmatic and not a result of Usibelli's or its predecessors' failure to comply with the terms of its permit or to actively seek development of its permits. Finally, the contention that the permits lapsed ignores the fact that the permits were repeatedly renewed, and that these renewal decisions were granted with DNR's knowledge that mining had not yet commenced and knowledge why it had not commenced. In other words, all of the evidence in the record indicates that extensions of time to commence mining were granted.

A. Usibelli began coal mining in 2010.

As previously noted, DNR found evidence of mining related activities, but no clear evidence that "coal mining operations" pursuant to the activities authorized by the Wishbone Hill Surface Coal Mining permits had occurred before June of 2010.

Despite the fact that "surface coal mining operations" as authorized by the mining permits had not commenced, Usibelli and its predecessors have conducted numerous activities for the purposes of development of Wishbone Hill at the mine site. One reason why DNR requested additional information from Usibelli and re-examined its record was to confirm that none of the previously conducted activities qualified as "surface coal mining" under its statutes or regulations. While Usibelli was active in the Wishbone Hill area during the time the permits span (1991 to present), with activities such as conducting various environmental baseline studies and bulk sampling, DNR has confirmed that Usibelli did not appear to have conducted any activity that constituted surface coal mining pursuant under AS 27.21.998(16), and as authorized under the mining permits (versus exploration permits), until access road construction in June 2010.

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[78] Attachment 2.

B. Because no written decision is required, no presumption of permit invalidity can be drawn from limited and potentially flawed written record.

The lack of a requirement in statute or regulation for a written request for or decision on an extension of time to begin mining makes it impossible to infer from silence that no such extensions were granted or exist. The lack of a requirement for a written decision here contrasts with explicit requirements elsewhere in the coal statutes for written decisions.[79] If a written decision regarding extensions of time to commence mining were required, such that failure to obtain such a decision in writing would result in a permit expiring by operation of law or otherwise, the legislature would have included a requirement for a written decision in the statute, as it knew to do so in other instances. Because no written decision is required, it is impossible to infer from silence that no extensions were granted in the situation here. This is particularly true, where the record otherwise displays a clear understanding by the agency (1) that mining had not commenced but that (2) the permits continued to exist over the years. That DNR knew that mining at the Wishbone Hill site had not commenced and that DNR repeatedly renewed the permits are not matters in dispute and clear record evidence exists to support both conclusions. Because a written decision is not required, the only inference that can reasonably be drawn from these facts is that extensions of time were granted. Any inference otherwise is inconsistent with the explicit findings in each permit renewal decision that the renewal of the Wishbone permits could be approved.[80] Even if permits terminate by operation of law based on failure to commence mining within the time required and the time to commence mining passed, if the agency affirmatively renewed a permit, then the clear inference is that the agency granted an extension of time to commence mining. Therefore, I conclude that because no written decision is required, no presumption of permit invalidity can be drawn from the record at hand. As discussed below, while the record regarding extensions is imperfect, the permit renewals were effectively findings that the permits were valid at the time of renewal, such that the permits could be renewed. Those findings could have been challenged at the time, but they were not.

C. The time to challenge the validity of the Usibelli permits has passed.

SMCRA was designed to provide for state regulation, with federal oversight, of surface coal mining. The ten day notice process is an important part of that federal oversight. It allows interested parties to call the attention of federal regulators to potential program violations and sets out a process for federal regulators to notify state regulatory authorities of that information and for states to report back to federal regulators their conclusions or actions relating to that information. The ten day notice process is not meant, however, to be a mechanism through which old decisions of state regulatory authorities could be revisited and collaterally attacked. Nothing in SMCRA creates a process by which renewal decisions can be attacked years or even decades after they are made. At the time of each renewal decision before 2011, the public was informed that Usibelli had not yet commenced mining and any person could have

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[79] *See, e.g.,* AS 27.21.180(a) AS 27.21.180 (a) "...application for a permit or for revision or renewal of a permit, the commissioner shall grant, condition, modify, or deny the application and notify the applicant in writing of the commissioner's action" and AS 27.21.190(e) "...A revision under this subsection must be based on a written finding of the commissioner relating to the need for the revision...." Written decisions are of course best practice, but the coal statutes are very clear where one is mandated.

[80] *See* Attachments 26, 27, 28 and 29.

sought review of each decision on the basis that Usibelli had not yet commenced mining. Those challenges were not made, the renewal decisions were issued and became final. To the extent that each renewal decision was a decision that a valid permit existed that could be renewed, and that at least one of the decisions (the 1996 renewal) indicates that it also was a decision to extend the time to commence mining, the time to appeal these decisions is now passed. Each renewal decision represented a decision that the permits were valid and to remain so throughout the renewal period specified in the permit. Usibelli has now commenced mining and had commenced mining at the time of the last renewal decision. That decision was appealed to the Commissioner based on arguments of failure to timely commence mining, and these arguments were rejected. That decision was not appealed to the superior court. DNR finds nothing in the text, history, or purpose of SMCRA or ASCMCRA to suggest that even if a valid timely challenge to prior renewal decisions might have been made, it may now, let alone *must* now, disregard those decisions, the decisions having been made and the appeal period having passed.

ASCMCRA provides that the Commissioner may, after a due process hearing, revoke a permit where a permittee has failed to take action required by this chapter.[81] It may also, "within a time limit established by regulation, review the permit and may, for good cause, require reasonable revisions of the permit during the term of the permit."[82] It may conduct inspections to evaluate compliance with the statute.[83] At any time it may adopt or modify performance standards by regulation and require the permittee to abide by the current performance standards.[84] It may issue cessation orders where it finds a person is in violation of the statute.[85] It does not, however, provide a process or require DNR to summarily rescind a previously issued decision that a permit is valid.

Unless, therefore, Alaska's most recent decision renewing the permit can be said to be *ultra vires*, there is no basis for finding that Usibelli is in violation of the statute. DNR issued a renewal decision in 2014 and at that time Usibelli had begun mining as required by the statute. A decision is *ultra vires* when it is not just technically or procedurally flawed, but it must be wholly beyond the scope of the agency's authority under any circumstances and for any purpose.[86]

As will be explained in more detail below, DNR does not find that its decisions were wholly beyond the scope of the agency's authority. First, as discussed below, DNR finds that extensions of time could validly have been granted at each renewal date. Therefore, each renewal cannot be said to exceed the scope of the agency's authority under the statute regardless of any technical failure to notice its decision to grant renewal. Second, Alaska courts have typically asked, before finding an agency grant of right valid, whether the grant seriously impairs the purpose of the statutes under which it is

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[81] AS 27.21.030(6).

[82] AS 27.21.190(a).

[83] AS 27.21.230(a).

[84] AS 27.21.210.

[85] AS 27.21.240.

[86] *See Earthmovers of Fairbanks, Inc. v. State*, 765 P.2d 1360, 1368 (Alaska 1988).

granted.[87] A review of the statute quickly establishes that far from impairing the purposes of the statute, permitting the agency to renew can only further the purposes of the statute.

D. The 1996, 2001, 2006, and 2014 were effective to renew the Wishbone Hill Permits Notwithstanding Any Failure to Document and Extension of Time to Begin Mining.

The Department granted successive renewals of the Wishbone Hill permits in 1996, 2001, 2006, and 2014. Any finding that the permit has lapsed would be inconsistent with those public-noticed grants of renewal. It was argued in the context of an appeal of the 2014 renewal that the Wishbone Hill permits had terminated by operation of law by the time operations commenced in 2010, and that the permits were therefore not eligible for renewal in 2014 or presumably, in 2006 (the last renewal before operations commenced).[88] The difficulty with this position is twofold. It ignores first the fact that while DNR was not required to make any affirmative finding beyond the fact that a renewal application was complete,[89] numerous findings were, in fact, made in the 1996, 2001, and 2006 renewals. In the 1996 renewal, DNR noted that an extension was requested (as the time to commence mining was lapsed), that the renewal was granted, but that if mining did not commence by the next renewal, any further renewals would only be granted with an extension review of the background information and the mine plan. In 2001 and 2006, it was similarly clear that DNR acknowledged that mining had not commenced, but that DNR had conducted a review of the mine plan and underlying information, and made an affirmative finding of compliance. The second difficulty is that while issuance of a new permit or renewal must be made pursuant to a specific decision-making process pursuant to statutes and regulations, the grant of an extension of time to begin mining requires no such process besides a requirement to public notice any extensions in a renewal notice. However, there is no indication in the regulation that a failure to public notice an extension in a renewal notice would invalidate either the extension or the renewal. The Commissioner's discretion to grant extensions is limited only by requirements that such extensions be temporally reasonable and that they be necessary because of litigation or any other reason beyond the control of the permittee.

The renewal decisions made affirmative findings. For example, in the 2006 renewal, affirmative findings were made regarding the adequacy of the bond, that the activities proposed meet the requirements of AS 27.21 and 11 AAC 90, that the permit areas are not in an area designated unsuitable for mining, that the proposed plan would not affect known threatened or endangered species or their critical habitat, that the criteria of AS 27.21.180 – 180– are met *and that renewal can be approved.*[90] The 2014 decision similarly found that "the application for renewal *meets the criteria of AS 27.21.180* and the renewal of the Surface Coal Mining Permits 01-89-796 and 02-89-796 *can be approved.*[91]

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[87] *Id. at 1369.*

[88] Attachment 29, June 22, 2015 Commissioner's Decision on Renewal attaching Hearing Officer Decision.

[89] AS 27.21.080; 11 AAC 90.129(b).

[90] Attachment 27.

[91] Attachment 28.

There is an explicit finding in the renewals that the subject permits *can be renewed* – this is effectively a rejection of the position that the permits have lapsed and are no longer renewable.

Moreover, an opponent of the permit bears the burden to show that a permittee has failed to meet the requirements of the state act and that the permit cannot, therefore, be renewed.[92] No person at any point has met that burden. No attempt was even made to meet that burden in a renewal process – in the matter of the requirement that mining begin within three years – until the beginning of the last renewal process when Castle Mountain Coalition and the Chickaloon Village Traditional Council made this argument. That argument, however, was rejected in an agency administrative decision process culminating in a final Commissioner-level decision which was not appealed to the Alaska Superior Court.[93] The renewal of the permits, therefore, represents affirmative decisions of the Commissioner that the permits were valid at each renewal date such that they could be renewed. Those decisions have not been challenged in court and, the time for such challenges having long past, must therefore be treated as valid.[94]

While the grants of renewal may have been procedurally flawed in that they may not have been preceded by a grant – at least a preserved written grant– of an extension of time to begin mining, they were still decisions that were within the power of the Commissioner to make at the time. This is because at the time of each renewal, the Commissioner had the power to find that an extension of time to begin mining could validly be granted. Therefore, it was within the power of the Commissioner (or his delegates) to grant a renewal.

1. **Extensions of time within which to begin mining could be validly granted in this instance.**

The Department is aware of no facts tending to show that an extension of time to begin mining could not have been granted and was not, therefore, effectively granted by virtue of the valid renewal of the permits. Because extensions of time could have been granted, the renewed grant of a permission to

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[92] AS 27.21.080(a).

[93] The Commissioner based the decision on a determination that the state statute did not mandate automatic termination. Attachment 29, 2015 Renewal Decision. As acknowledged earlier, the decisional documents in *CMC v. OSMRE* have called this interpretation into question, however no state or federal court at this point has provided a definitive ruling on this issue or the validity of the Wishbone permits such that this decision is affirmatively vacated or overturned by a court.

[94] It is worth noting that ratification of the permits through renewals is consistent with case law from other primacy states. For instance, one state court has found that it was reasonable and consistent with a state program that a transfer of a permit would include an automatic three year extension of time to commence mining. C. & T. Evangelinos v. Div. of Mineral Res. Mgmt., 2004-Ohio-7061, ¶ 72 (finding that [a]lthough there is no written record of Oxford's extension, this Court cannot conclude that the Division's practice of granting extensions to permit transferees is arbitrary, capricious, or contrary to law").

mine inherent in a renewal effectively allowed the applicant time to begin mining in compliance with the terms of the renewed permit.

As explained above, it has been understood, throughout the history of these permits, the development of this coal could only be conducted, consistent with the requirements of the statute, through a long term supply contract, likely to a global market. It has similarly been understood, throughout the history of these permits, that the conditions under which this coal could be developed had not yet occurred. This was through no fault of Usibelli. DNR has never questioned or been given reason to question Usibelli's diligence in attempting to find a market for this coal; nor has DNR any basis for finding that Usibelli has control over the state of global coal markets.

An extension may be granted for *any reason or reasons* beyond the control of the permittee.[95] At least one state court has found market conditions to be a reason "beyond the control of the permittee" in the context of extensions of time to commence mining under a state regulatory program.[96] It is worth noting again the discretionary nature of extensions. DNR is not *required* to grant an extension for reasons beyond the control of the permittee, but it *may*.

To require mining to begin where it cannot be pursued to completion so as to minimize the time during which the land is disturbed, however, is something the statute is clearly designed to prevent. A reading of the statute to prevent extensions of time to commence mining based on market conditions would not support timely and complete development of the site and would be contrary to that purpose and, therefore, must be rejected. As summarized above, the Department has reviewed the economic conditions prevailing during the time since the permits were issued and the efforts the permittees have made to market the coal. It can, and does, affirmatively find that it would not have been reasonable to begin mining at Wishbone Hill at any point before 2010.

2. At the time of each renewal decision, DNR had the authority to grant an extension of time to begin mining.

The 1996 renewal decision, as explained above, quite clearly tied its extension of time to begin mining with the permit term. In 2001, therefore, DNR could validly grant an extension of time to begin mining and renew the permit. Had it neglected to extend the time to begin mining, it seems to have been free, as the court in *CMC v. OSMRE* indicated, to retroactively extend the time to commence mining at the time of renewal.[97] If a retroactive extension of time to commence mining is permissible, then a regulatory authority (here, DNR) has the authority to ratify a decision that might have been procedurally flawed (renewals or past extensions) by granting a retroactive extension, if the requirements of the statute are met. Where DNR had the power to validly renew a permit and did, in fact, renew a permit,

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[95] AS 27.21.070(b).

[96] R.R. Comm'n of Texas v. Coppock, 215 S.W.3d 559, 571 (Tex. App. 2007)
(stating "we conclude that the Commission's interpretation of section 134.072 as allowing for a permit extension due to unfavorable market conditions "beyond the control and without the fault or negligence of the permit holder" is consistent with the plain language of the statute").

[97] OSMRE letter re: Decision on Request for Informal Review, TDN Marfork Coal Co., dated July 26, 2018.

and that renewal decision was not successfully appealed, it would be inappropriate for DNR to now summarily decide that the renewal decision was invalid.

This finding is entirely consistent with the history and purpose of the statute. A determination, now, that the permits at issue are invalid could only delay the development of the Wishbone Hill coal. There has been no suggestion that existing performance standards are inadequate or that DNR lacks the power to revise performance standards at any time, nor has there been a suggestion that development of this coal cannot take place consistent with the requirements of the statute. Given this, a finding that Usibelli must cease operations would frustrate the requirement that mining begin promptly with no counterbalancing advancement of any other statutory purpose. A determination that the Wishbone permits are invalid would also have the effect of penalizing the permittee for programmatic failures without the possibility of bringing the permit into compliance. This appears to be inconsistent with the structure of SMCRA, which provides a path for permittees to come into compliance where noncompliance was as a result of programmatic deficiencies.[98]

It is appropriate, therefore, to find that DNR could and did validly renew the permits.

E. To the extent there remains any question of the adequacy of prior extensions and validity of the permits, DNR grants a retroactive extension.

Failure of the state regulatory authority to properly implement an approved program is not the same question under the federal act as the question of validity of a state-issued permit. In 30 U.S.C. § 1235(d), the act provides for approval of a state program and for withdrawal of that approval. The statute distinguishes between violation by a person of the act and improper implementation, by a state regulatory authority, of its program. The statute recognizes that inadequate State enforcement of its program should not result in suspension or revocation of a state permit but that the permit should be brought into conformance with the requirements of the Act.[99] The interests of the permittee in the permit were intended, by Congress, to be protected from attacks on permit validity based on the programmatic errors of a state regulator. This includes the right to successive renewal of a permit.[100] Congress further sought to protect the permittee by designing the citizen suit provisions to "prevent private operators from being sued for errors that really stem from the regulating authority's improper implementation of the law."[101] An interpretation of the statute that would allow, through action of the state regulatory agency, a permit to lapse despite the understanding of the regulatory authority and the permittee, without at least the possibility of revival, would be inconsistent with the purposes of Congress as made apparent in the statutory text. In addition, it would be inconsistent with the express purpose of

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[98] 30 U.S.C. § 1271(b).

[99] 30 U.S.C. § 1271(b).

[100] AS 27.21.080(a); 30 U.S.C. § 1256(d).

[101] *Friends of Mat-Su v. Usibelli Coal Mine, Inc.*, 2012 WL 12871632 (D. Alaska Sept. 13, 2012).

SMCRA to assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided.[102]

In light of the clear intent of the federal statute to protect permit holders from invalidation of permits as a result of programmatic errors, and the legislative purposes of the state and federal statutes, DNR finds that to the extent any administrative deficiencies in prior extensions of time to commence mining for the Wishbone Hill permits would negate the fact that the extensions occurred, a retroactive extension of time to commence mining is warranted in this instance. An extension of time to commence mining, retroactive to expiration of the first, never-challenged extension in September 1996, is appropriate here given the totality of the circumstances and the equities of the situation.

First, in this unique situation, under AS 27.21.070(b), it was "beyond the control and without the fault or negligence of the permittee" that DNR, with the federal oversight agency's full knowledge and oversight, continued to affirmatively renew the Wishbone Hill permits and treat the permits as valid, representing to the permit holder and the public that the permits existed. Because DNR finds no fault or negligence in Usibelli's effort to begin mining at the site, that the time taken to begin mining was reasonable as discussed earlier in this document, and in light of Usibelli's efforts to keep DNR informed of its progress toward commencement of mining, DNR has determined that it would be inequitable, unjust, and contrary to the intent of ASCMCRA and SMCRA to treat the permits as terminated. DNR continued to review and renew the permits despite being on notice from Usibelli that mining operations had not commenced, and despite Usibelli's good faith attempts with each renewal to provide DNR with the information required to maintain the permits' validity. To the extent that the prior renewals indicated an understanding by the agency that extensions were granted and that the permits were valid, then based on a review of the administrative record, DNR believes that all inferences should be drawn in favor of the permittee assuming (as here) there has been no evidence of bad faith on the permittee's behalf. The equitable circumstances here justifying a retroactive extension are unique,[103] and unlikely to be repeated under the Alaska program, particularly since DNR instituted procedures in 2014 to avoid such repetition. Although DNR notes that AS 27.21.070 does not contain any language prohibiting retroactive extensions, it considers prospective extensions to be best agency practice and procedures for Alaska.

F. Programmatic failures do not undermine the validity of an existing permit.

The concept that the renewals implied, and essentially constituted, extensions of time to commence mining is supported by a review of the renewal decisions in the context of the statutory requirements for renewal. Permit renewal is provided for in AS 27.21.080, and the process for renewal is set out in the same place. A permit includes a right of successive renewal such that where a permittee seeks renewal of a permit, an opponent of the permit bears the burden of proving that the permit should not be renewed.[104] Renewals are not granted if the Commissioner makes, in writing, a finding that the

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[102] 30 U.S.C. § 1202(f).

[103] Some might say that circumstances where a permit's very existence is questioned over 10 years after the alleged termination are not just unique, they are extraordinary.

[104] AS 27.21.080(a).

terms and conditions of the permit have not been satisfactorily met, that the surface coal mining operation is not in compliance with the standards of the act, that the renewal substantially jeopardizes the permittee's continuing responsibility on existing permit areas, that the permittee has not shown that it has maintained its performance bond, or if the permittee has failed to provide required information.[105] No "affirmative" findings, however, are required to grant a renewal.

Separately, the statute regarding permit term provides that a permit "terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued."[106] Because a permit by default is issued for five years and may be issued for longer,[107] it is implicit in the statute that this termination requirement may cut short a valid permit with time remaining on its term. The permit term and the requirement to commence surface mining within three years are independent requirements of the statute. The statute also grants the Commissioner authority to make reasonable extensions of the time to begin mining where the permittee shows such extensions are necessary either "because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee" or "for reasons beyond the control and without the fault or negligence of the permittee."[108] Because under AS 27.21.070(b) the term of the permit can be cut short by failure to commence mining, and because the grant of an extension of time to begin mining carries its own standard different from the standard for renewal (or, indeed, issuance) of a permit, these are independent requirements under the statute.

Neither the statute nor the associated regulations require that the permittee submit a written application for an extension of time to begin mining or that the Commissioner issue a written decision regarding extensions of time.[109] DNR does by regulation require that notice of a renewal decision sent to the applicant and interested parties (e.g., commenters) will identify any extensions of time granted under AS 27.21.070.[110]

In 1994, DMLW quite explicitly extended the time to begin mining under the Wishbone Hill permits until September 4, 1996, the end of the original permit term.[111] In January 1996, as time for renewal approached, then permittee North Pacific Mining Corporation entered into correspondence with DMLW seeking permit renewal and extension.[112] DMLW reminded North Pacific of the AS

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[105] AS 27.21.080(a)(1)-(5).

[106] AS 27.21.070(b).

[107] AS 27.21.070(a).

[108] AS 27.21.070(a).

[109] This is contrasted with the requirement that DNR must make certain findings, "in writing," if a renewal is not granted.

[110] 11 AAC 90.117(c).

[111] Attachment 14.

[112] Attachments 17, 19, 20, 21, 22, and 23.

27.21.070(b) extension process and noted that all required information – including information pertaining to extension of time to begin mining, should be submitted at least 120 days prior to the permit's end as required by the renewal statute.[113] In a May 13, 1996 intra department memo, the need for a basis for an extension was noted and the handwritten notes of the surface mining manager indicate the manager's inclination to grant the extension because of economics, the Mental Health Land Trust litigation, and a potential deal with Usibelli Coal Mines.[114] The public notice for the permit renewal decision stated that a request to extend time to commence mining had been received "due to ongoing marketing efforts."[115] When communicating to the permittee the DNR's decision on the renewal, DNR renewed the permit for a five year term and noted "[h]owever, should mining not commence within this renewal term [5 years], then due to the length of time since the original permit application work was completed no further renewals will be considered without an extensive review of the original applications and the baseline information they were based on."[116] This language indicates that DNR understood that it was granting an extension for the permit term with the renewal decision, and that if mining did not commence by the end of the term, then any future renewal of the permit would need to include a future extension of time to commence mining. The document makes clear that further extension of time to commence mining would only be granted based on an extensive review of the original applications and the baseline information. This statement is particularly important, because, as noted above, a renewal does not typically require such review of this information (See AS 27.21.080). While this extra review is unnecessary for permit renewal it does indicate that the close examination DNR gave to subsequent renewal decisions was in part driven by its recognition that commencement of mining at the site had been and continued to be delayed.

DMLW gave, as required, notice that the applicant "has once again requested an extension for beginning mining due to ongoing marketing efforts" and that it was "approving a five year permit term for the renewal," therefore, once again, extending the time to begin mining for the duration of the permit.[117] A year later, it approved transfer of the permit to Usibelli under the same conditions.[118]

In April of 2001, Usibelli began correspondence with DMLW seeking renewal of the permit. Usibelli again noted that it had no updated operational plan for the project and that was because of the present uncertainty in pricing for energy commodities.[119] It noted continuing marketing efforts, which were also described in the OSMRE 2001 oversight report.[120] DMLW was informed that mining had not

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[113] Attachment 19.

[114] Attachment 21.

[115] Attachment 23.

[116] Attachment 23

[117] Attachment 23.

[118] Attachment 23.

[119] Attachment 24.

[120] Attachment 26.

and would not presently commence. Following what had become a standard course of action with this permit, DMLW again granted the permit renewal, making no distinction between the renewal term and the time within which to begin mining. DMLW noted that it had "carefully reviewed" the plan of operations as part of its renewal, and affirmatively determined that the impacts to the environment "are within the scope allowed by 11 AAC 90.301-501."[121] Similarly, the 2006 renewal public notice noted updates Usibelli made to provide current information, and discussions in the record for that decision (from the public) included discussion of timing of commencement of mining and marketing efforts.[122] The final 2006 renewal decision dated November 27, 2006 also stated in a response to comment that DMLW "has carefully reviewed the proposed plan of operation and has determined that the impacts to the environment from the proposed activity is within the scope allowed by 11 AAC 90.301-501 [performance standards]."[123] In other words, to the extent that the 1996 renewal coupled extension of time to begin mining with renewals, dependent on an additional continued review of original applications and baseline information (not ordinarily required for renewal alone), these written decisions indicate such review did occur.

Further, as discussed above, the Department has been continually informed of and aware of Usibelli's anticipated operations timeline and the reasons for the delay in commencement of mining. The Department chose to grant permit renewals in 2001 and 2006 after having been explicitly informed by Usibelli that mining had not commenced, as required by AS 27.21.070(b), and of the reasons for the delay in commencement of mining. The Department treated the permit renewal term and the extension of time to begin mining as identical questions. These permit renewals were effectively findings by the DMLW that the permits were valid at the time of renewal, such that they could be renewed. The permit renewals in 1996, 2001, and 2006 were not challenged, and the time to challenge these decisions has long since passed.

In its November 4, 2014 TDN decision on the issue (now vacated), OSMRE found that this was not an acceptable practice for permit extensions as it leaves neither the OSMRE, the public, nor the permittees any way of ascertaining the rationale behind DNR's decision. DNR agrees that best practice is to document grants of extension of time to commence mining in written decisions, and in 2015 developed internal procedures to ensure this occurs. However, even if it is determined that state law should be interpreted to mandate that permits terminate automatically by operation of law if an extension of time to commence mining has not been explicitly granted in a separate written decision regarding extensions, it does not necessarily follow that therefore an extension previously granted under heretofore flawed agency procedures could be deemed void 10, 20, or more years later. Such an interpretation of the state statutes, or of the federal statutes, would mandate that permits could be deemed invalid years after operations began in a "gotcha" moment based on insufficient agency procedures or perceived inadequacies in acceptability or documentation of extensions granted years

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[121] Attachment 27.

[122] Attachment 27.

[123] Attachment 27.

previous.[124] The invalidation of the permits would occur despite an operator's good-faith attempts to maintain the permits and despite an understanding from the regulatory agency that the permits are valid. Such an interpretation of the language of the permit term provisions does nothing to serve the purposes of the state and federal statutes of orderly development of coal resources in a manner that protects the environment.

G. DNR need not address the question of whether Alaska's permit termination provision, AS 27.21.070(b), mandates automatic termination.

The Department recognizes that while the Court in *CMC v. OSMRE* was not required to reach the issue of whether Alaska law provides for termination of permits by operation of law within three years, there is language in that court's opinion indicating that it believes that only a reading of AS 27.21.070(b) that provides for termination by operation of law would be consistent with the federal statute. However, as a result of the basis for this decision, DNR need not address the legal question of whether or not, in light of the court decisions that triggered this review and other legal considerations such as the 2014 renewal decision and Alaska State rules of statutory construction, Alaska's state law provides for automatic termination of permits by operation of law.

DNR recognizes that the uncertainties identified above could be and have been reduced or eliminated by improvements in DNR internal procedures. DNR has developed such procedures in cooperation with OSMRE which are now in place as internal guidance.[125] DNR is also considering whether any relevant regulatory changes are required and intends to consult with OSMRE as well regarding any additional steps that might be taken to ensure this situation does not arise again.

IV. Conclusion

As a result of the findings in this determination, DNR has determined that the Wishbone Hill permits are valid, existing permits, and the stay on permit activities is lifted, effective 30 days from the date of this decision. DNR notes that under the currently approved permit, Usibelli must complete all monitoring found in the permit stipulations at least 6 months prior to the development of the wash plant pond and related facilities or development of the Phase I or II mining areas. DNR also notes that currently Usibelli is under voluntary temporary cessation under 11 AAC 90.471, and must notify DMLW prior to resuming normal operations. Therefore, although the stay is lifted, mining operations may not commence for at least 6 months.

A person affected by this decision may request reconsideration, in accordance with 11 AAC 02. Any reconsideration request must be received within 20 calendar days after the date of "issuance" of this decision, as defined in 11 AAC 02.040(c) and (d), and may be mailed or delivered to the Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-907-269-8918, or sent by electronic mail to dnr.appeals@alaska.gov . If reconsideration is not requested by that date or if the commissioner does not order reconsideration on his own motion, this

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[124] Indeed, lack of documentation of extensions could be revealed even if *production* had continuously been occurring for many years.

[125] Attachment 34, DNR Action Plan.

decision goes into effect as a final order and decision on the 31st calendar day after the date of issuance. Failure of the commissioner to act on a request for reconsideration within 30 days after issuance of this decision is a denial of reconsideration and is a final administrative order and decision for purposes of an appeal to Superior Court. The decision may then be appealed to Superior Court within a further 30 days in accordance with the rules of the court, and to the extent permitted by applicable law. An eligible person must first request reconsideration of this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.

Sincerely,

Andrew Mack

Andrew T. Mack
Commissioner

Attachment

Cc:

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