



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources

COMMISSIONER'S OFFICE

550 W. 7th #1400
Anchorage, AK 99501
Main: 907.269.8431
Fax: 907.269.8918

June 22, 2015

Katie Strong
Staff Attorney
Trustees for Alaska
1026 W. 4th Ave, Ste. 201
Anchorage, AK 99501
kstrong@trustees.org

Brook Brisson
Staff Attorney
Trustees for Alaska
1026 W. 4th Ave, Ste. 201
Anchorage, AK 99501
bbrisson@trustees.org

Colin C. O'Brien
Staff Attorney
Earthjustice Alaska Office
441 W. 5th Ave., Ste. 301
Anchorage, AK 99501
cobrien@earthjustice.org

Madeline Gallo
Associate Attorney
Earthjustice Alaska Office
441 W 5th Ave, Suite 301
Anchorage, AK 99501
mgallo@earthjustice.org

Erick B. Fjelstad,
James N. Leik,
Representing Usibelli Coal Mine, Inc.
Attorneys
Perkins Coie, LLP
1029 W. 3rd Ave. Suite 300
Anchorage, Alaska, 99501
efjelstad@perkinscoie.com
jleik@perkinscoie.com

Marcie M. Menefee,
Executive Director Alaska Mental Health Lands Trust
Office
2600 Cordova St. Suite 100
Anchorage, Alaska, 99503
marcie.menefee@alaska.gov

Ashley Brown
John Hutchins
Assistant Attorney Generals
1031 W. 4th Avenue, Ste. 200
Anchorage, AK 99501
ashley.brown@alaska.gov
john.hutchins@alaska.gov

Subject: Commissioner's decision adopting recommended decision of hearing officer in appeal of Division of Mining, Land and Water's Renewal of Wishbone Hill Coal Mining Permit Nos. 01-89-796 and 02-89-796.

On November 3, 2014, Trustees for Alaska (Trustees), on behalf of five organizations,¹ and Earthjustice, on behalf of the Chickaloon Village Traditional Council, submitted letters ("requests") to the Commissioner of the Department of Natural Resources ("DNR" or "department"), seeking a hearing pursuant to AS 27.21.150 to

¹ Collectively, Trustees represent Castle Mountain Coalition, Cook Inletkeeper, Alaska Center for the Environment, Community Action on Toxics, and the Alaska Chapter of the Sierra Club.

review the Division of Mining, Land and Water's ("Division") decision to approve the Usibelli Coal Mine, Inc.'s ("Usibelli") permit renewal request for the Wisbone Hill Mine, Permit Numbers 01-89-796 and 02-89-796. The parties represented by Trustees and Earthjustice are collectively referred to as requestors.

The requestors waived their right to an oral hearing and were granted a hearing by brief. On November 26, 2014, DNR appointed Terry L. Thurbon to act as the hearing officer and to provide a recommended decision to the Commissioner for consideration. On March 17, 2015, the hearing officer issued a recommended decision on the requestors' appeal,² and on March 21, 2015, the hearing officer issued errata for the recommended decision.³

After a thorough review of the administrative record, the requests for a hearing, the requestors' briefing during the hearing, Alaska laws and regulations, as well as relevant federal laws, this decision adopts the hearing officer's recommended decision and incorporates it by reference in its entirety. Although addressed in the recommended decision, it is worth repeating that the Division took seriously public comments and concern over the adequacy of data relied upon to determine whether the proposed operation will meet required environmental standards. The Division requested and received additional baseline information from Usibelli and imposed eight new stipulations to Usibelli's permit renewal. Three of the eight new stipulations related to hydrology or fish, areas of concerns pursued by the requestors in their comments and subsequent appeals. As "opponent[s] of renewal" of the permits, requestors had the burden of proving that the permit should not be renewed.⁴ Because the requestors have failed to meet their burden, I affirm the Division's October 3, 2014 decision to renew Wishbone Hill Coal Mining Permit Nos. 01-89-796 and 02-89-796.

The requestors further argue that, in light of the additional information requested and received by the Division, the Division made a "major revision" to the permit requiring additional public notice and comment. A "major revision" is a revision that "constitutes a significant departure from the original permit, such as a change in permit area or the method of conducting mining or reclamation operations which would significantly change the effect of the operation on persons or the environment."⁵ Requestors' argument that the additional information or stipulations resulted in a "major revision" is not supported by statute or regulations. The renewal did not authorize a change in the permit area or a change in method that would significantly alter the effect of the operation on persons or the environment. The Division received additional baseline information and added new stipulations that, among other things, provided for additional monitoring and permit compliance. There is no requirement for additional public notice and comment for these types of revisions. Further, requestors had an opportunity to review and evaluate these revisions through a hearing request pursuant to AS 27.21.150, which they have chosen to exercise.

The hearing officer also correctly determined that AS 27.21.070 does not provide for automatic termination of permits for failure to commence mining activities. As noted by the hearing officer, the requestors' arguments are based largely on their interpretation of the federal-equivalent statute, 30 U.S.C. § 1256(c); however, even assuming requestors have correctly interpreted the federal statute, the same is not required of the state statute.⁶

² Recommended Decision, Attachment A.

³ Errata for Recommended Decision, Attachment B.

⁴ AS 27.21.080(a).

⁵ 11 AAC 90.123(a)(2).

⁶ On March 18, 2015, the same requestors in this appeal filed an administrative appeal in Federal district court to challenge the Office of Surface Mining Reclamation and Enforcement's decision that the federal statute

A review of the state statute's legislative history supports the finding of the hearing officer. Alaska Statute 27.21.070 was enacted in 1982 by SB 843.⁷ Generally, the legislative history materials focus on the need to enact a bill that allowed for implementation of a state program in place of the nationwide program administered by the Secretary of the Interior. For instance, in a letter dated March 9, 1982 from Governor Jay Hammond to Jalmar Kerttula, President of the Senate, Governor Hammond stated: "The program proposed in this bill is both complicated and comprehensive. Most of its contents are mandated by federal law and regulations, although some improvements on the federal law have been made, and the bill is considerably shorter than its federal counterpart." Similarly, in a letter dated April 12, 1982 from Mark Wittow, Special Assistant to the Commissioner of DNR, to Senator Ed Dankworth, Mr. Wittow emphasized that "the bill enjoys this widespread support because of the severity of the federal law, and the belief that state conduct of a surface coal mining program would likely be considerably more enlightened than a program directed from Washington, D.C." This suggests that, where possible, the state legislature sought to reduce some of the burdens imposed by the federal legislation and implement a program more tailored to the needs of Alaskans.

In a section-by-section analysis in the finance committee's file, the intent behind AS 27.21.070 is explained as follows: "AS [27.21.070] sets a basic permit term of five years, unless a longer initial period is necessary to obtain financing. A permittee is required to commence operations within 3 years after the permit is issued, subject to some exceptions." In a legislative summary in the finance committee's file, section .070 has this summary:

Permits will be issued for five years. The Commissioner can issue a permit for a longer period if the applicant shows that it is necessary in order to obtain financing for equipment or to open the operations. A permittee is required to commence operations within 3 years after the permit is issued. This can be extended if the permittee shows litigation is precluding commencement of operation or threatens substantial economic loss or for reasons beyond the control, fault, negligence of the permittee. If the coal is to be mined for use in a synthetic fuel facility or specific major electric generating facility, surface mining is considered to have begun at the time construction of the facility is begun.

Although the legislative history does not specifically discuss the omission of the word "shall" from the state statute, the omission of the word and the lack of any discussion regarding an "automatic termination" support the hearing officer's recommended decision. The legislative history illustrates an overall intent to reduce the harshness of the federal program and implement a program—a much as possible—that can respond to the specific needs of Alaska. Implementing a provision that requires an "automatic termination" if a permittee failed to commence operations within three years runs counter to that general intent and does not allow consideration of the reasons behind such a delay. The legislative summary quoted above allows for an extension if the permittee shows they were precluded from commencing operations for reasons beyond the "control, fault, [or] negligence of the permittee." Again, this suggests an agency finding, or some sort of agency determination before the termination of a permit, and does not suggest that the legislature envisioned an automatic termination of the permit at the conclusion of year three if operations had not begun.

The related issue is whether the state statute must require an automatic termination if a court finds the corresponding federal statute requires automatic termination of permits after three years if no extension is

does not result in an automatic termination. *See Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement*, No. 3:15-cv-00043-SLG.

⁷ At the time of enactment, the statute was numbered AS 41.45.070. It was re-numbered as AS 27.21.070 in 1983. To avoid confusion, it will be referred to as AS 27.21.070.

granted. Although the Alaska statutes must be consistent with Federal law, they need not be identical to it. The federal program will preempt a state's program if the state's program "interfere[s] with the achievement of the purposes and requirements" of the federal program.⁸ The Secretary of the Interior "shall set forth any State law or regulation which is construed to be inconsistent with this chapter."⁹ Reading 30 U.S.C §§ 1254 and 1255 together, so long as Alaska's program complies with the achievement of the purposes and requirements of the federal program, Alaska's program is not inconsistent with the federal program.

In its decision dated November 4, 2014, denying the requestors' citizen's complaint, the Office of Surface Mining Reclamation and Enforcement stated the purpose of the federal statute as follows: "(1) to ensure that reclamation requirements did not become outdated because of delays in mining and (2) to ensure prompt development of the nation's coal resources."¹⁰ Even without an automatic termination, Alaska's statute and regulations fulfill the purposes of the federal program as they allow for the Division to request revisions and updates to the existing permit as part of the renewal process. This avoids any concern over the reclamation requirements becoming outdated due to any delay in beginning operations. In addition, the state's program is consistent with ensuring prompt development as it avoids the unnecessarily harsh result of automatic termination when conditions beyond the permittee's control delayed the start of operations.

After careful review of all of the issues raised in the requests and subsequent briefing, consideration of the record, applicable Alaska statutes and regulations, as well as relevant federal laws, the hearing officer's recommended decision is adopted and incorporated by reference in its entirety. For the reasons stated above and included in the hearing officer's recommended decision, the Division's October 3, 2014 decision is affirmed.



Mark Myers
Commissioner

Date

6-22-2015

This decision is the final administrative order and decision of the department for the purpose of an appeal to the Superior Court. An eligible person affected by this final administrative order and decision may appeal to Superior Court within 30 days in accordance with the Alaska Rules of Court and to the extent permitted by applicable law.

Cc: Ed Fogels, Deputy Commissioner, DNR
John Crowther, Assistant to the Commissioner, DNR
Brent Goodrum, Director, DMLW, DNR
Russell Kirkham, Coal Regulatory Unit Manager, DMLW, DNR

⁸ 30 U.S.C. § 1254(g).

⁹ 30 U.S.C. § 1255.

¹⁰ *Letter from Office of Surface Mining Reclamation and Enforcement to Russell Kirkham*, at 16 (Nov. 4, 2014).