

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE COMMISSIONER OF ENVIRONMENTAL
CONSERVATION**

Chickaloon Village Traditional Council,)
)
) Requestor,)
)
) v.)
)
)
Alaska Department of Environmental)
Conservation, Division of Air Quality)
)
) Respondent.)
_____)

OAH No. 15-0852-DEC
Agency No. AQ1227MSS04

DECISION

I. Introduction

Usibelli Coal Mine applied for an air quality permit for its Wishbone Hill coal project. The Department of Environmental Conservation, Division of Air Quality reviewed the application, took public comment, and issued an air quality control minor permit. Chickaloon Village Traditional Council requested a hearing. The Commissioner of Environmental Conservation concluded that Chickaloon's request for a hearing did not raise any disputed issues of material fact. The commissioner referred the matter to the Office of Administrative Hearings for a hearing on the record and the briefs to review whether Usibelli had the authority under its DNR leases to exclude the public at the ambient air quality boundary, and whether it had the ability to effectively exclude the public from the area inside the boundary.

Because Usibelli has authority under its DNR leases to exclude the public at the ambient air quality boundary, and because Chickaloon has conceded the effective exclusion issue, the division's findings on these two issues are upheld.

II. Facts

Wishbone Hill is in the Matanuska coal fields, approximately seven miles north of Palmer.¹ The coal fields were opened to mining by the federal government in 1916, and active full-scale coal mining continued in the area until 1983.² Usibelli Coal Mine, Inc. has held leases in the area since 1997, and is now proposing a new coal mining and processing operation in the area.³ Chickaloon Village Traditional Council is the tribal government for the Ahtna Athabascan native people indigenous to the area. The Department of Environmental Conservation, Division of Air Quality, is the state agency charged with administering Alaska's air quality control program under the federal Clean Air Act.⁴

In June 2013, Usibelli applied to the division for an air quality control minor permit under 18 AAC 50.502 for the Wishbone Hill project.⁵ On April 14, 2014, Chickaloon commented on the division's preliminary decision to approve the permit application, expressing its concern with "unlawful delineation of the ambient air boundary."⁶ On June 6, 2014, the division issued the minor permit. On June 25, 2014, Chickaloon requested an informal review, again raising the ambient air quality boundary issue, specifically Usibelli's authority to exclude the public at the boundary.⁷ The division director remanded the permit to the Air Permit Program.⁸ The division issued a revised version of the minor permit on February 5, 2015.⁹ Chickaloon requested an informal review of the revised version of the permit on February 19, 2015.¹⁰ The informal review concluded that "the lease appears to provide sufficient authority to restrict public access within the identified ambient air quality boundary."¹¹

¹ Agency Record at 1457.

² Agency Record at 433.

³ Agency Record at 1.

⁴ See AS 46.14; 42 U.S.C. 7401 - 7671q; 18 AAC 50.005 - 50.990.

⁵ Agency Record at 1, 55. Issuance of minor air permits, including the permit issued to Usibelli, is authorized in AS 46.14.120 - 46.14.290, and regulated under 18 AAC 50.502 - 50.560.

⁶ Agency Record at 272.

⁷ Agency Record at 730.

⁸ Agency Record at 734.

⁹ "Air Quality Control Minor Permit No. AQ1227MSS04 Revision 1." Order Granting Hearing on Written Briefs and the Existing Record at 1.

¹⁰ Agency Record at 1455.

¹¹ *Id.*

Chickaloon then requested a hearing on the permit on the record and the briefs. The commissioner granted the request and referred the matter to the Office of Administrative Hearings. However, the commissioner limited the referral to the following two issues.

(1) Does the agency record adequately support the Division's finding that the DNR leases provide UCM the legal authority to exclude public access at the ambient air quality boundary established under the permit?

(2) Does the agency record adequately support the Division's finding that the measures that UCM is required to take in the permit to exclude public access at the ambient air quality boundary will effectively preclude public access as required by applicable law?¹²

Oral argument was held on March 22, 2016. Erin Whalen represented Chickaloon Village Traditional Council, Steven G. Ross represented the division, and Cameron Leonard represented Usibelli Coal Mine.

III. Discussion

The two issues referred by the commissioner are discussed below.

A. Does the agency record support the division's finding that the DNR leases provide Usibelli with the legal authority to exclude public access at the ambient air quality boundary?

The parties agree that Usibelli's coal leases from the Department of Natural Resources give Usibelli the authority to exclude the public "in the vicinity of mines, buildings and other mine-related structures, and for safety reasons."¹³ This language is from a stipulation to the coal leases, which provides:

Public access to, and use of, the leased area will not be restricted as a consequence of coal activities except in the vicinity of mines, buildings and other mine-related structures, and for safety reasons.¹⁴

Usibelli and the division focus on the existence of this and other authority in the coal and surface leases.¹⁵ Chickaloon argues that the area encompassed by the ambient air quality

¹² Order Granting Hearing on Written Briefs and The Existing Record at 3 - 4.

¹³ Chickaloon Reply at 6, *citing* Agency Record at 903, 913; Usibelli's Response at 6, *quoting* letter dated June 4, 2015, from Brent Goodrum, Director, Division of Mining, Land, and Water, Department of Natural Resources, to Aaron Simpson, Division of Air Quality -- Air Permits Program, Agency Record at 1574; DEC Response at 8, *citing* Agency Record at 913 and 926.

¹⁴ Agency Record at 913, 926.

boundary is too large and includes areas where neither vicinity nor safety concerns justify exclusion.¹⁶ Chickaloon argues that the ambient air quality boundary should have been more closely drawn, and that the division should have sought guidance from the Department of Natural Resources before issuing the permit "because the areas from which the public may be excluded will depend on DNR's determination of the appropriate 'vicinity' or safety needs."¹⁷ The remedy Chickaloon seeks is remand to the division for further consultation with DNR about the location of the boundary.¹⁸ Specifically, Chickaloon urges remand to determine whether "the ambient air quality boundary is limited to the vicinity of Mine facilities and any such additional land as is actually necessary to protect public safety."¹⁹

The issue of air quality is related to safety. The Department of Environmental Conservation's air quality division administers the state air quality control program, a program required under the federal Clean Air Act.²⁰ Under the Clean Air Act, the federal Environmental Protection Agency has imposed national ambient air quality standards for pollutants considered "harmful to public health and the environment."²¹ "Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access."²² Exempted from this definition of "ambient air" is "the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers."²³ The area within the ambient air quality boundary is thus not subject to the same ambient air quality standards that apply outside the boundary.²⁴

Land within the ambient air quality boundary is not open to the public. Access to the land within the ambient air quality boundary for the Wishbone Hill project is

¹⁵ DEC Response at 8 - 12; Usibelli Response at 18 - 22.

¹⁶ Chickaloon Opening Brief at 2.

¹⁷ Chickaloon Reply at 6; Whalen oral argument.

¹⁸ Chickaloon Reply at 6.

¹⁹ *Id.* at 14.

²⁰ AS 46.14.010 - 46.14.030.

²¹ *Resisting Environmental Destruction on Indigenous Lands, REDOIL v. United States Environmental Protection Agency*, 716 F.3d 1155, 1159 (9th Cir. 2012).

²² 40 CFR 50.1(e), incorporated by reference in AS 46.14.990.

²³ Agency Record at 1239 (Letter from Douglas M. Costle to Senator Jennings Randolph dated December 19, 1980); *see also Alaska Wilderness League v. United States Environmental Protection Agency*, 727 F.3d 934, 936 (9th Cir. 2013) (noting that EPA has "long exempted" air described in the Costle letter from the definition of "ambient air.")

²⁴ *See REDOIL*, 716 F.3d at 1164.

restricted by a combination of gates, fences, terrain, dense vegetation, and posted signs.²⁵ The ambient air quality boundary is within the leased area and also within the permit boundary. It is outside the disturbance boundary.²⁶ The stated aim of the public access control plan for the project is to "protect the general public from health and safety hazards incident to the industrial activities planned" at Wishbone Hill.²⁷

The question referred is whether the leases provide legal authority to exclude the public from the land within the ambient air quality boundary. They do. Chickaloon urges an additional inquiry into whether the boundary was correctly drawn -- whether it was in fact drawn in the vicinity of the mines and mine-related structures, or where it needs to be for reasons of safety. This inquiry is beyond the scope of the referral. The commissioner's referral cabins the scope of the inquiry in this matter as follows:

Nor is it DEC's burden, as CVTC argues, "to demonstrate that [UCM] has the legal authority" to exclude the public from the ambient air quality boundary. CVTC Request at 4. Rather it is DEC's duty to *determine* whether the leases -- presumptively valid on their face - provide UCM with the requisite legal authority to preclude public access.²⁸

The referral is limited to the issue of whether the DNR leases provide legal authority to preclude public access, and, as explained above, the parties agree that they do. The factual question of whether the ambient air quality boundary has been properly drawn, given the lease language, is beyond the scope of the referral.

B. Does the agency record adequately support the Division's finding that the measures that UCM is required to take in the permit to exclude public access at the ambient air quality boundary will effectively preclude public access as required by applicable law?

Although this issue was briefed, Chickaloon stated at oral argument that it is "not pressing" this issue. Ms. Whalen stated that "the point of the discussion of practical public access in our briefs is to emphasize that this isn't an academic discussion about whether or not Usibelli has authority to exclude the public, because this is an area that is

²⁵ Usibelli Response at 11; Agency Record at 217 - 219.

²⁶ Large version of Map provided by Mr. Ross at oral argument marked "Big Map". A medium sized version of same map supplied by Chickaloon at oral argument was marked "Medium Map." Agency Record at 231 appears to be the same map.

²⁷ Agency Record at 216 (February 2014 Public Access Control Plan at 1).

²⁸ Order Granting Hearing on Written Briefs and the Existing Record at 4, n. 15 (emphasis in original).

well-used by the public, and there are trails that criss-cross the entire area. Chickaloon's solution to this problem isn't stronger fences or better public access control measures." The issue of Usibelli's authority to exclude the public is addressed above. Since the issue of whether the measures required under the permit will effectively preclude public access has been conceded, it will not be addressed further here.

III. Conclusion

The DNR leases provide Usibelli with the legal authority to exclude public access at the ambient air quality boundary. The remaining issue, whether the access measures Usibelli is required to take to restrict access at the ambient air quality boundary will in fact effectively restrict access, has been conceded.

DATED: April 20, 2016.

Signed _____
Kathryn L. Kurtz
Administrative Law Judge

Adoption

I adopt this Decision under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of June, 2016.

Signed _____
Larry Hartig
Commissioner
Dep't of Environmental Conservation