

United States Department of the Interior



OFFICE OF SURFACE MINING
Reclamation and Enforcement
Western Region Office
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July 19, 2012

Russell Kirkham, Coal Regulatory Program Manager
Alaska Department of Natural Resources
Division of Mining Land and Water
550 West 7th Avenue, Suite 900B
Anchorage, Alaska 99501

Dear Mr. Kirkham:

The Office of Surface Mining Reclamation and Enforcement (OSM) has completed an initial evaluation of the response by the Alaska Department of Natural Resources (DNR), Division of Mining, Land and Water, to Ten-Day Notices (TDN) #X11-141-182-005 and #X11-141-182-006. For the reasons set forth below, OSM finds that DNR's response to the TDNs at this time is not in accordance with the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA) and associated regulations. Because the record that OSM reviewed has significant gaps in permitting information, we are requesting your office to conduct a permit file review and to advise OSM if additional pertinent permitting information is available for our evaluation.

BACKGROUND

Overview of Applicable Ten-Day Notice Regulations

A TDN is a form that OSM uses to notify a state regulatory authority when OSM has reason to believe that there is a violation of the state's approved regulatory program. Upon receipt of the TDN, the regulatory authority has 10 days to take "appropriate action" to assure that the violation is corrected or to show "good cause" for failing to do so. *See* 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2). "Appropriate action" includes enforcement or other action to correct the violation. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). Circumstances constituting "good cause" for not taking appropriate action are set forth in 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). OSM will accept a regulatory authority's response to a TDN as constituting "appropriate action" or "good cause" unless the regulatory authority's response is arbitrary, capricious, or an abuse of discretion. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(2). If the regulatory authority disagrees with OSM's determination, the regulatory authority may request informal review. 30 C.F.R. § 842.11(b)(1)(iii). If OSM's final determination is that the regulatory authority has failed to take appropriate action or demonstrate good cause, OSM will conduct a Federal inspection. 30 C.F.R. § 842.11(b)(1). If the Federal inspection reveals that a violation exists, OSM must take an



enforcement action, including issuance of a notice of violation or cessation order, as appropriate. 30 C.F.R. § 843.12(a)(2).

Overview of Permit Extensions and Renewals

Under ASCMCRA, surface coal mining operations may be conducted only with a valid permit issued by DNR.¹ A.S. 27.21.060(a). Permits for surface coal mining operations are issued for a term of five years. A.S. 27.21.070(a). The permit terminates by operation of law, however, if a permittee does not begin surface coal mining operations within three years after the permit is issued. A.S. 27.21.070(b). DNR may grant reasonable extensions of time to begin operations under two circumstances:

The commissioner [of DNR] may grant reasonable extensions of time if the permittee shows that the extensions are necessary (1) because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee.

A.S. 27.21.070(b).

Subject to the termination provisions set forth above, ASCMCRA provides the right of successive renewal of permits for areas within the boundaries of the permit area. A.S. 27.21.080. DNR implementing regulations set forth a procedure for reviewing renewal applications, and as part of that process DNR must provide public notice of the renewal application. 11 AAC 90.113. The regulations also require DNR to send a copy of any decision granting an application for permit renewal to OSM, the applicant, each person who filed comments on the renewal, and each party to any informal conference on the renewal. 11 AAC 90.117(c). The regulation also requires that “[a]ll notices under this subsection will specifically identify any extensions of time granted under A.S. 27.21.070.” 11 AAC 90.117(c).

Issuance of TDN #X11-141-182-005 and TDN #X11-141-182-006

TDN #X11-141-182-005 was issued on December 20, 2011, with regard to permit number 01-89-796 for the Wishbone Hill Mine. TDN #X11-141-182-006 was issued on the same date with regard to permit number 02-89-796 for the mine.

OSM issued the TDNs in response to citizen complaints set forth in letters to OSM dated December 2, 2011, from the Chickaloon Village Traditional Council; December 14, 2011, from Earthjustice; and December 14, 2011, from the Trustees for Alaska, on behalf of the Friends of MatSu, Castle Mountain Coalition, Alaska Center for the Environment, Cook Inletkeeper, Alaska Community Action on Toxics, Pacific Environment, and the Sierra Club (collectively

¹ Surface coal mining operations, as defined in A.S. 27.21.998(17), means “an activity conducted on the surface of the land in connection with a surface coal mine or, to the extent that the activity affects the surface of land, conducted in connection with an underground coal mine; the products of which enter commerce or the operation of which directly or indirectly affects interstate commerce”



“Requestors”). The complaints concern surface coal mining and reclamation operations conducted by Usibelli Coal Mine Inc. (UCM) at the Wishbone Hill Mine. The Requestors allege that (1) prior permits issued by DNR under ASCMCRA for surface coal mining operations at the mine terminated by operation of A.S. 27.21.070(b) on September 4, 1996, when DNR failed to act on a request by the permittee at that time for an extension of time to commence mining; (2) DNR thereafter erroneously renewed the terminated permits on multiple occasions and erroneously transferred the permits to UCM; (3) the renewal permits 01-89-796 and 02-89-796 currently held by UCM are thus invalid; and (4) in June of 2010, UCM conducted surface coal mining activities at the mine without valid permits in violation of A.S. 27.21.060(a). The Requestors ask “that OSM immediately issue a cessation order pursuant to 30 C.F.R. § 843.11 to stop surface coal mining operations at Wishbone Hill until Usibelli obtains a valid mining permit for those activities.”

DNR’s response to the TDNs

DNR responded to the TDNs in a letter dated January 6, 2012, along with enclosed materials, which OSM received by electronic means on January 9, 2012, followed by hard copy on January 12, 2012. In its response, DNR contends that it has good cause not to take corrective action because the permits under which UCM conducted operations are valid. More specifically, DNR contends that the existing permits are valid because they were properly renewed in 1996, 2002, and 2006, with corresponding extensions of time given to commence mining operations until operations began in June of 2010. DNR contends that its 1996 permit renewal decision explicitly provided the extension of time, while the 2002 and 2006 renewal decisions did so implicitly: “[W]hile the renewal decisions of 2002 and 2006 do not contain a discussion of extensions of the A.S. 27.21.070(b) requirements, the DNR considers that by granting a renewal of the permit with full knowledge of the status of Usibelli’s operation (i.e., that coal mining operations had not begun), the DNR was implicitly granting an extension when it granted renewals in 2002 and 2006.”

OSM has reviewed all of the documents and other materials submitted by DNR in response to the TDNs. The materials appear to establish, among other things, the following factual chronology concerning permittee submissions and DNR’s permitting actions for the Wishbone Hill Mine:

<u>Date</u>	<u>Action</u>
09/05/1991	DNR initially issued permits under ASCMCRA for surface coal mining operations at the mine to Idemitsu Alaska for a five-year permit term of 09/05/1991 to 09/04/1996.
08/03/1994	Idemitsu Alaska submitted a request to DNR under A.S. 27.21.070(b) for extension of time to commence mining until 09/04/1996 (end of permit term). Idemitsu Alaska requested the extension due to ongoing litigation and based on the assertion that the circumstances were beyond its control and without its fault or negligence.



- 08/24/1994 DNR approved Idemitsu Alaska's request for extension of time to commence mining until 09/04/1996.
- 09/19/1995 DNR approved permit transfers from Idemitsu Alaska to North Pacific Mining Corporation (NPMC).
- 01/31/1996 Letter from NPMC to DNR stating that NPMC would "like to extend the existing permit without any major revision." NPMC stated that it requested the extension because NPMC "is continuing its [sic] efforts towards obtaining a partner to assist in the development of the Wishbone Hill coal project. We feel that we are close to securing that partner, but it is clear that the necessary project reviews and engineering studies will not have been completed in time to meet the September 1996 deadline for renewal of the SMCRA permit." In the materials submitted to OSM by DNR, NPMC did not specifically request an extension of time to commence surface coal mining operations and did not address the requirements of AS 27.21.070(b).
- 02/06/1996 A memorandum prepared by Brian McMillen, DNR staff member, and addressed to Jules Tileston, Director of DNR's Division of Mining and Water Management, interprets NPMC's 01/31/1996 letter as a request for an extension of time to commence mining and states that:
- A related problem is that AS 27.21.070(b) states the permit terminates if the permittee does not begin mining within three years (Attached). This would be the second extension. NPMC's justification is weak when compared to the wording in the statute. When the actual request is received you or Sam need to look at the justification and make a decision. If the justification is OK there is plenty of time to complete the renewal before the permit expires in September.
- 02/07/1996 Letter from Sam Dunaway, DNR, to Tom Crafford, NPMC, stating that DNR had received NPMC's 01/31/1996 letter and "in regard to AS 27.21.070(b) your justification for the extension needs to address the requirements in [the] statute."
- 05/03/1996 NPMC submitted applications to DNR for permit renewals for a five-year term from 10/23/1996 to 09/04/2001. The materials from NPMC's applications forwarded to OSM do not mention NPMC's 01/31/1996 letter or address the requirements of AS 27.21.070(b).
- 07/11/1996 NPMC submitted more detailed and enlarged applications to DNR for permit renewals for a five-year term from 10/23/1996 to 09/04/2001. In the materials forwarded to OSM by DNR, no mention is made of NPMC's 01/31/1996 request and no information is provided addressing the requirements of AS 27.21.070(b).



- 08/13/1996 DNR published in newspapers notice of its receipt of NPMC's application for permit renewals and stated, "The applicant has again requested an extension for beginning mining due to ongoing marketing efforts."
- 10/23/1996 DNR decision approving NPMC's applications for permit renewals for five-year terms from 10/23/1996 to 09/04/2001. DNR's approval decision states, "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." DNR's decision did not mention NPMC's 01/31/1996 letter, did not address the requirements of AS 27.21.070(b), and did not expressly grant a continuation of extension of time to commence mining.
- 07/22/1997 UCM submitted applications to DNR for transfer of NPMC's permits to UCM.
- 08/13/1997 DNR published in newspapers public notice announcing its receipt of UCM's applications for permit transfer.
- 12/01/1997 DNR approved UCM's applications for permit transfer.
- 04/20/2001 UCM submitted applications to DNR for permit renewal. The materials from UCM's applications forwarded to OSM do not contain a request for extension of time to commence mining.
- 08/08/2001 DNR published in newspapers notice of its receipt of UCM's application for permit renewals. The notice does not reference a request for extension of time to commence mining operations.
- 01/18/2002 DNR decision approving UCM's applications for permit renewal for the permit term of 01/18/2002 to 09/04/2006. DNR's decision does not reference any request for extension of time to commence mining operations and is silent with regard to granting an extension.
- 11/27/2006 DNR decision approving UCM's applications for permit renewal for the permit term of 11/27/2006 to 11/27/2011. DNR's decision does not reference any request for extension of time to commence mining operations and is silent with regard to granting an extension.
- 06/01/2010 UCM conducted surface coal mining activities at the mine by constructing a road and parking area in connection with the mine.

ANALYSIS OF DNR'S RESPONSE TO THE TDNs

There is no dispute that UCM conducted surface coal mining operations beginning in June of 2010 by constructing a road and parking area in connection with the Wishbone Hill Mine. In its response to the TDNs, DNR asserts that it has good cause not to take corrective action because



permits numbered 01-89-796 and 02-89-796 are valid and thus there has been no violation of the State program. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) (“good cause for failure to take appropriate action includes: (i) under the State program, the possible violation does not exist”).

OSM will accept DNR’s response as constituting “good cause” for failing to take corrective action unless the response is arbitrary, capricious, or an abuse of discretion. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(2). As discussed below, it appears at this time from the documentation that has been forwarded to OSM, that DNR’s assertion that the permits are valid is not supported by the facts or applicable law.

DNR’s determination that the 1996 renewed permits are valid does not seem to be in accordance with A.S.27.21.070(b).

As discussed above, a permit terminates by operation of law if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. A.S. 27.21.070(b). The three-year period for commencement of such operations may be reasonably extended if the permittee shows, and DNR finds, that the extension is necessary either because litigation 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. A.S. 27.21.070(b). If the extension is granted in conjunction with a permit renewal, the notice of the permit renewal must “specifically identify any extensions of time granted under A.S. 27.21.070.” 11 AAC 90.117(c).

DNR’s materials provided in response to the TDNs² show that, after Idemitsu Alaska’s permits were transferred to NPMC in 1995, NPMC, in a letter to DNR dated January 31, 1996, advised DNR that NPMC would “like to extend the existing permit” because it sought a partner to assist in the development of the mine but could not secure the partner “in time to meet the September 1996 deadline for renewal” of its permit for the mine. The NPMC letter does not specify a period of time for the requested extension.

In response to this letter request, DNR staff prepared a February 6, 1996, memorandum which interpreted NPMC’s request as one for a continuation of the extension of time to commence mining that had been previously granted to Idemitsu Alaska until September 4, 1996. The memorandum discussed A.S. 27.21.070(b)’s requirements for an extension of time to commence mining and noted that “NPMC’s justification is weak when compared to the wording in the statute.” DNR then sent a letter to NPMC dated February 7, 1996, responding to NPMC’s request and advising it that “in regard to A.S. 27.21.070(b) your justification for the extension needs to address the requirements in [the] statute.”

DNR has provided no documentation or other evidence that NPMC ever provided the additional justification for the extension requested by DNR’s letter of February 7, 1996. Instead of justifying an extension, in May and July of 1996, NPMC submitted applications to DNR for a

² The facts described throughout this evaluation letter are taken from the materials provided by DNR in response to the TDNs. The chronology of events is summarized in the background section of this letter.



five-year permit renewal for a permit term of October 23, 1996, to September 4, 2001. The renewal applications did not contain a request for continuance of the extension of time to commence mining.

In its newspaper notice announcing receipt of NPMC's applications for five-year permit renewal, DNR stated, "The applicant has again requested an extension for beginning mining due to ongoing marketing efforts." On October 23, 1996, DNR issued a decision approving NPMC's applications for permit renewal. DNR's decision, however, did not explicitly grant an extension or otherwise mention NPMC's January 31, 1996, letter requesting a continuation of the extension of time to commence mining.

From available evidence it appears that DNR did not lawfully grant an extension of time to commence mining operations in its decision of October 23, 1996; consequently, it would appear that the permits terminated as a matter of law and that DNR's purported renewal of the permits was also invalid. More specifically, DNR's actions appear to be invalid for the following reasons:

1. The materials in the record before us are insufficient to make the showing to DNR, required by A.S. 27.21.070(b), that its request for a continuation of the extension of time to commence mining was necessary either because litigation precluded the commencement of the mining operation or threatened substantial economic loss to NPMC or for reasons beyond the control and without the fault or negligence of NPMC. NPMC's stated reason – the desire to acquire a business partner – plainly does not meet the criteria of A.S. 27.21.070(b), a fact that DNR itself recognized when it initially responded to NPMC's request on February 7, 1996.

2. Further, DNR did not itself make the findings necessary for granting NPMC's request for an extension under A.S. 27.21.070(b), namely, that the extension was necessary either because litigation precluded the commencement of the operation or threatened substantial economic loss to NPMC or for reasons beyond the control and without the fault or negligence of NPMC. Neither the decision of October 23, 1996, nor any other contemporaneous document provided by DNR addresses the statutory requirements. Although DNR's approval decision does indicate an intention to closely evaluate future renewals "should mining not commence within this renewal term," that intention cannot substitute for a proper review and application of the statutory extension requirements set forth in A.S. 27.21.070(b). DNR's 1996 renewal decision simply does not mention NPMC's January 31, 1996, letter and does not address the requirements of A.S. 27.21.070(b). The decision thus cannot be viewed as lawfully granting an extension.

3. In addition, DNR appears to have violated regulation 11 AAC 90.117(c) by failing to provide notice that it had granted an extension of time to commence mining operations. The regulation requires that DNR send a copy of any decision granting an application for permit renewal to OSM, the applicant, each person who filed comments on the renewal, and each party to any informal conference on the renewal. The regulation also requires that "[a]ll notices under this subsection will specifically identify any



extensions of time granted under A.S. 27.21.070.” In its decision of October 23, 1996, DNR approved NPMC’s application for five-year permit renewals, but it seems that it did not fulfill its regulatory obligation to “specifically identify any extensions of time granted under A.S. 27.21.070.” DNR has provided no other documentation showing that, pursuant to 11 AAC 90.117(c), DNR notified OSM, NPMC, or any other party that it had granted an extension of time to NPMC to commence mining operations.

In summary, to date, the documents provided by DNR to OSM in response to the TDNs show that NPMC’s permits expired on September 4, 1996, by operation of by A.S. 27.21.070(b) when NPMC failed to commence mining by that date. DNR’s determination that it lawfully granted an extension and lawfully renewed the permits in its decision of October 23, 1996, is not supported by the documentation in the record forwarded to OSM or by Alaska law.

DNR’s determination that the 2002 and 2006 permit renewals are valid does not seem to be in accordance with A.S.27.21.070(b).

DNR’s December 1, 1997, approval of UCM’s applications for permit transfer and DNR’s January 18, 2002, and November 27, 2006, approvals of UCM’s applications for permit renewal appear defective because, if the permits expired on September 4, 1996 as indicated by the evidence available to OSM, no valid permits existed to be transferred or renewed. In short, DNR’s transfer and renewal actions appear to have been nullities because no valid permits existed for the transfer and renewal.

Even if one assumed that DNR’s 1996 permit renewal and extension were valid, the subsequent renewals in 2002 and 2006 appear not to have been valid because, once again, neither UCM nor DNR seem to have made the showings or findings required by A.S. 27.21.070(b) to justify an extension of time to commence mining. DNR approved permit renewals for UCM in January 2002 and again in November 2006. DNR’s documentation for these renewal actions provides no evidence that UCM requested an extension of the time to commence surface coal mining operations or that DNR found that an extension was justified due to litigation that precluded mining activities or threatened substantial economic loss, or for reasons beyond UCM’s control and without its fault or negligence. The DNR permit renewal decision documents, dated January 18, 2002 and November 27, 2006, are silent with regard to granting extensions of time to commence surface coal mining operations. Moreover, there is no evidence that DNR provided notice specifically identifying the extensions of time granted under A.S. 27.21.070 for the 2002 and 2006 permitting actions, as required by 11 AAC 90.117(c). Given these multiple apparent failures to comply with A.S. 27.21.070(b) and 11 AAC 90.117(c), OSM, without further evidence to the contrary, would have to find in the alternative that the permits expired absolutely no later than November 27, 2006, for failure to commence mining operations.

DNR’s “implicit extension” theory does not comport with ASCMCRA at A.S.27.21.070(b).

DNR states in its TDN response, “while the renewal decisions of 2002 and 2006 do not contain a discussion of extensions of the A.S. 27.21.070(b) requirements, the DNR considers that by granting a renewal of the permit with full knowledge of the status of Usibelli’s operation (*i.e.*,



that coal mining operations had not begun), the DNR was implicitly granting an extension when it granted renewals in 2002 and 2006.”

Based on the current record, OSM could find no lawful basis for DNR’s argument that its decisions for renewal of UCM’s permits in 2002 and 2006 constituted implicit grants of extensions of time to commence mining at the mine.³ Nothing in A.S. 27.21.070(b) or any other provision of ASCMCRA or the approved regulatory program provides authority for DNR’s argument. As discussed above, A.S. 27.21.070(b) provides that a permit is terminated if a permittee does not begin surface coal mining operations within three years after the permit is issued. The three-year period for commencement of such operations may be reasonably extended by DNR if, and only if, the permittee shows, and DNR finds, that the extension is necessary either because litigation 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. DNR’s contention that the mere decision to renew a permit constitutes an implicit extension of time to commence mining beyond the three-year period is contrary to A.S. 27.21.070(b) because it would allow such extensions absent any of the showings and findings required by A.S. 27.21.070(b). Here, it appears that nothing in UCM’s applications for the 2002 and 2006 permit renewals and nothing in DNR’s decisions approving the permit renewals made the justifications and findings required by A.S. 27.21.070(b).

Further, A.S. 27.21.070(b) requires that DNR may grant “reasonable extensions of time” to the three-year period for commencement of mining after the permit is issued. DNR’s decisions approving the 2002 and 2006 permit renewals do not define or identify any period of time for continued extensions of time to commence mining. Thus, the renewal decisions appear not to comply with A.S. 27.21.070(b)’s requirement that extensions of time be “reasonable.”

Finally, DNR argues that certain activities taken by UCM at the State’s request constituted surface coal mining operations which affirm that DNR’s renewal actions implicitly granted extensions of time to commence mining. Even if DNR’s characterization of the activities were accurate, the post-1996 activities could not serve to extend the permits that had already terminated.⁴ Moreover, the examples cited by DNR of the activities taken by UCM at the State’s request -- namely, ground water monitoring, surface water monitoring, reclamation test plots, wetland studies, stream flow studies, and fish and wildlife studies -- are coal exploration activities as defined at 11 AAC 90.911(17) and cannot be considered surface coal mining operations.

³ DNR’s argument presumes that the 1996 permit renewals and subsequent transfer to UCM were valid actions. As previously discussed, DNR’s determination on those issues appears not to have been in accordance with Alaska’s statute. Nevertheless, even assuming the validity of the 1996 renewal, there is no merit to DNR’s “implied extension” theory for the 2002 and 2006 renewals.

⁴ Also, by DNR’s own admission, some of the referenced activities occurred prior to DNR’s issuance of the initial permits for the mine in 1991 and thus would have no bearing on the validity of the permits.



Based on OSM's foregoing analysis of the documentation submitted to date by DNR in response to the TDNs, it appears that (1) valid permits held by NPMC under ASCMCRA for surface coal mining operations at the Wishbone Hill Mine terminated by operation of A.S. 27.21.070(b) on September 4, 1996, (2) DNR thereafter erroneously transferred and renewed invalid permits,⁵ (3) the permits currently held by UCM are invalid, and (4) in June of 2010, UCM conducted surface coal mining activities at the mine without valid permits in violation of A.S. 27.21.060(a). Further, it appears that DNR did not have good cause for failing to take appropriate corrective action because the violation cited in the TDNs exists under the State program and no other circumstances demonstrating good cause have been asserted or exist under the good cause criteria of 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). It is possible, however, that these apparent defects may be remedied by supplementation of the record submitted to OSM. It appears that the record OSM reviewed has significant gaps in permitting information. For example, no documents other than decision documents were provided for the period of time from 2002 into 2006.

CONCLUSION

Based on OSM's analysis of documents submitted to date by DNR in response to the TDNs, OSM cannot make the determination that the standards for appropriate action or good cause for failure to take action have been met because information is missing from the record that may be available from your office. Because the record that OSM reviewed has significant gaps in permitting information, we are requesting your office to conduct a permit file review and to advise OSM if additional pertinent information is available for our evaluation. This supporting information, if available for these renewal actions and the related decision for the extension of time to commence mining in the required time frame is necessary to provide clarity with regard to the validity of the Wishbone Hill permits. DNR must submit any additional information to Kenneth Walker, Manager, Denver Field Division, Western Region, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway, Suite 3320, Denver, CO 80202 within ten days of receipt of this letter.

If you do not submit any additional pertinent permitting information within ten days from receipt of this letter, OSM will proceed with its final determination on the TDN response from DNR. Should you have any questions concerning OSM's evaluation and findings, please feel free to contact me.

Sincerely,



Kenneth Walker, Manager
Denver Field Division

⁵ Alternatively, OSM finds that the permits terminated for failure to commence mining operations no later than November 27, 2006.



cc:

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