

BEFORE THE DIVISION OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

ASSESSMENT CONFERENCE IN THE MATTER OF STATE VIOLATIONS AND PROPOSED ASSESSMENT N89-26-1-1 and C89-25-1-1, PERMIT NO. ACT/007/007, FOLDER NO. 5, SUNNYSIDE RECLAMATION & SALVAGE, INC., CARBON COUNTY, UTAH	: : : : : : : : : : :	REPLY TO RESPONSE BY THE DIVISION OF OIL, GAS & MINING RE: SUNNYSIDE RECLAMATION & SALVAGE, INC.'s OBJECTION TO FACT OF VIOLATION, CESSATION ORDER AND PROPOSED ASSESSMENT
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I. DOUBLE JEOPARDY -- N89-26-1-1 and C89-25-1-1

Dr. Dianne Nielson has confirmed at Paragraph 3 of her response letter dated December 8, 1989, that the Utah Water Pollution Control Committee (the "Committee") and DOGM have issued SR&S notices of violations ("NOV's") for the same incident. This is further evidenced by DOGM citation for N89-26-1-1 which alleges violation of UMC 817.97 and UMC 817.50 for "failure to maintain water quality effluence in accordance with UPDES Permit on Discharge Pond 002, also known as the Whitmore Mine Water Discharge Pond." [emphasis added]

Dr. Nielson argues that double jeopardy has been avoided despite both agencies' citations in this matter by crediting of DOGM fines in a proposed settlement agreement between SR&S and the Committee. A copy of the Settlement Agreement,

Docket No. 189-23A, is attached. The credit proposed by the Committee does not obviate the fundamental fact that two agencies of the State of Utah have penalized SR&S for the same offense in a manner violative of SR&S's constitutional rights. U.S. Constitution, Amendment V; Utah State Constitution, Art. I, Sec. 12. The UPDES Permit at issue in this matter is administered by the Committee not DOGM. Similarly, the alleged violation involved water quality standards set by the Committee under the Federal Clean Water Act and the Utah Water Pollution Control Act, not by the Board of Oil, Gas & Mining under the Utah Coal Mining and Reclamation Act. In light of the Committee's enforcement action in this matter, DOGM must vacate its duplicative NOV. If N89-26-1-1 is vacated, the FTA-CO based on this NOV must also be vacated.

II. FAILURE TO ABATE CESSATION ORDER (FTA-CO) WAS INAPPROPRIATE AND SHOULD BE VACATED

Sunnyside Reclamation & Salvage, Inc. ("SR&S") appreciates the efforts of the Division of Oil, Gas & Mining ("DOGM") to attempt to minimize the impact of its enforcement actions through issuance of an FTA-CO rather than a second notice of violation concerning N89-26-1-1. However, the fact remains that the FTA-CO was an inappropriate citation under the circumstances and must be vacated. In addition, the issuance of a NOV to replace the FTA-CO at this late date would be untimely and procedurally incorrect.

By notice issued to SR&S on April 12, 1989, DOGM terminated N89-26-1-1 because water analysis results of March 31, 1989

through April 12, 1989 demonstrated compliance. Dr. Nielson indicates that she informed SR&S in a telephone conversation on an unspecified date that this termination was "premature" and was withdrawn. SR&S asserts that such withdrawal was improper where the data supported issuance of the notice of termination on April 12, 1989. Even assuming that the notice of termination was withdrawn, issuance of the FTA-CO on April 19, 1989 remains improper. By the terms of a notice issued on April 6, 1989, DOGM set an abatement date for N89-26-1-1 of April 28, 1989, by which SR&S was to maintain water quality effluent. Therefore, on April 19, 1989, when the FTA-CO was issued, SR&S was still within the abatement period of April 28, 1989, and had not failed to timely abate N89-26-1-1.

Dr. Nielson's response suggests that if the FTA-CO was improperly issued, it should be replaced by a notice of violation ("NOV"). Issuance of a replacement NOV is inappropriate for the same reasons that the issuance of an FTA-CO was inappropriate. As acknowledged at page 2 of Dr. Nielson's response, "issuance of the second NOV within the original timeframe proposed by DOGM for abatement, i.e., prior to April 28, could be considered inappropriate."

Issuance of an NOV at this late date in the proceedings is unauthorized, inappropriate and untimely. The conditions leading to the issuance of the notice of violation have long since been abated by the operator. In addition, the Interior Board of Land Appeals ("IBLA") has ruled under similar

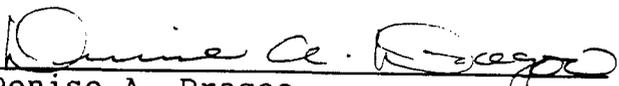
circumstances to those of this case that the hearing officer does not have authority to substitute a notice of violation for an FTA-CO. In Harry Smith Construction Co. v. OSMRE, 78 IBLA 27, GFS(MIN) 28 (1984), the IBLA reversed an Administrative Law Judge's decision modifying a cessation order to a notice of violation and vacated the cessation order. The facts in Harry Smith Construction Co. are very similar to the facts presented in this case. As in this case, the motion to modify the cessation order was made in OSM's post-hearing brief. The IBLA ruled that the ALJ could not grant such post-hearing request for relief without notice to the parties and without appropriate findings of fact and conclusions of law. Page 6, WESTLAW opinion.

Furthermore, if the FTA-CO were reduced to an NOV, the violation becomes so vague as to be unenforceable. In OSMRE v. Ewell L. Spradlin Coal Co., 93 IBLA 386, GFS(MIN) 63 (1986), the IBLA ruled that a notice of violation which does not set forth with reasonable specificity the nature of the alleged violation is properly vacated. Without the failure to abate element, this citation is issued solely on the basis of the alleged violation of UMC 817.97 which requires the operator to protect fish, wildlife and related environmental values "to the extent possible using best technology currently available." At the time that this citation was issued, the operator was employing the best technology available, including implementation of a defloculation procedure.

In addition, the spike in oil and grease effluent does not appear to have created significant imminent environmental harm. While SR&S water samples on April 18 showed a temporary exceedence of oil and grease effluent standards, SR&S data of April 19, 1989 shows compliance. As SR&S testified before the Assessment Officer, due to dilution of the oil and grease spike in Grassy Trail Creek, it is unlikely that fish, wildlife and related values were impacted by this short-term disturbance. For its part, DOGM failed to present testimony demonstrating the adverse impact of the spike on fish, wildlife and related environmental values. Dr. Bauman testified that his studies showed the presence of macroinvertebrate life in this segment of the stream at levels at or greater than background level supporting the fact that there was no significant imminent environmental harm and that § 817.97 values were not violated. Furthermore, on April 19 when DOGM issued the FTA-CO, water samples show that the operator was in compliance with effluent standards and that DOGM had no basis upon which to issue its citation to set an abatement strategy.

Therefore, SR&S requests that the FTA-CO be vacated in its entirety.

RESPECTFULLY submitted on this 21st day of December,
1989.


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