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State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

file TDO back

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May 11, 1992

CERTIFIED RETURN RECEIPT REQUESTED

No. P 540 713 893

W. Hord Tipton, Deputy Director
Office of Surface Mining
Department of the Interior
1951 Constitution Avenue N.W.
Washington, D.C. 20240

Dear Mr. Tipton:

Re: Ten-Day Notice X92-02-370-001 TV2, 1 of 2, Sunnyside Mine, ACT/007/007,
Carbon County, Utah

In accordance with the provisions of 30 CFR 842.11(b)(a)(iii)A, I am requesting an informal appeal of OSM's finding that DOGM's response to part 1 of 2 of the above-referenced TDN was an arbitrary and capricious action.

Part 1 of 2 of the TDN was issued for:

"Failure to contemporaneously reclaim the coarse refuse pile. This applies to the level of the second terrace (counted from the bottom of the pile up) to the level of the fifth terrace." Regulations believed to have been violated: R645-300-143, R645-301-352, and 553.252.

30 CFR 842.11(b)(1)(i) requires issuance of a violation when the authorized representative has reason to believe a violation of the Act or permit exists. The reason to believe is to be based on the information available to the authorized federal representative.

In this case, the Division has "reason to believe" that contemporaneous reclamation as required in the permit and this TDN is not a violation of the permit, but rather is a permit defect. As noted in the TDN response, the Division has reason to

Page 2
W. Hord Tipton
May 11, 1992

believe that the coarse refuse pile is needed for and will be consumed as a fuel source for Sunnyside Cogeneration Associates. On this basis, an enforcement action by the Division would constitute an arbitrary and capricious action. The Division recognized the need to modify the permit to reflect consumption of the coarse refuse pile as a fuel source via a Division Order. There were no unauthorized practices conducted by the operator.

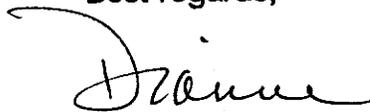
The backfilling and grading required to control the fire contemplated saving the coarse refuse as a fuel source and a NOV was issued for the unauthorized coal fire.

We ask that you find the Division's action of ordering a permit change to correct a permit deficiency to be an appropriate response under 30 CFR 842.11.

The basis for the AFO's finding of inappropriate response to the TDN infers that because the Division ordered a permit change a violation must have existed. The Division has the authority to order permit changes under R645-303-212. In requiring a violation to be issued as a prerequisite to this permit change, the AFO is acting in an arbitrary manner. The AFO's quotation from the now terminated MOU is out of context. This part of the MOU discussed issuance of violations when the violation had occurred. I submit that no performance standards not covered by the NOV issued for the coal fire were violated, and with clear knowledge of Sunnyside Cogeneration Associates' intent to use the refuse as a fuel source, a violation for failing to contemporaneously reclaim would have been an arbitrary and capricious activity on the part of the Division.

Should you require additional information, let me know.

Best regards,



Dianne R. Nielson
Director

vb
cc: R. Hagen, AFO, OSM
L. Braxton
P. Grubaugh-Littig

tdnsny2