0030

CALLISTER, DUNCAN
& NEBEKER
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 800 KENNECOTT BUILDING
SALT LAKE CITY, UTAH 84133
TELEPHONE 801-530-7300
FAX 801-364-9127

October 27, 1993

LOUIS H. CALLISTER
ADAM M. DUNCAN
GARY R. HOWE
L. S. McCULLOUGH, JR.
FRED W. FINLINSON
DOROTHY C. PLESHE
JOHN A. BECKSTEAD[1]
JEFFREY N. CLAYTON
JAMES R. HOLBROOK
CHARLES M. BENNETT[2]
W. WALDAN LLOYD
JAMES R. BLACK
H. RUSSELL HETTINGER
JEFFREY L. SHIELDS
STEVEN E. TYLER
CRAIG F. McCULLOUGH
GARY B. HANSEN
RANDALL D BENSON
R. WILLIS ORTON
GEORGE E. HARRIS, JR.[3]
T. RICHARD DAVIS
DAMON E. COOMBS
PAUL R. INCE[4]
BRIAN W. BURNETT
ANDRÉS DIAZ
LYNDA COOK
JOHN H. REES
MARK L. CALLISTER[5]
P. BRYAN FISHBURN
JAN M. BERGESON
JOHN B. LINDSAY
DOUGLAS K. CUMMINGS
LUCY KNIGHT ANDRE
KATHRYN C. KNIGHT

[1] ALSO MEMBER ARIZONA BAR
[2] ALSO MEMBER FLORIDA BAR
[3] ALSO MEMBER MISSOURI BAR
[4] ALSO MEMBER CALIFORNIA BAR
[5] MEMBER CALIFORNIA BAR ONLY

OF COUNSEL
WAYNE L. BLACK, P.C.
FRED L. FINLINSON
RICHARD H. NEBEKER
EARL P. STATEN

LOUIS H. CALLISTER, SR.
(1904-1983)
PARNELL BLACK
(1897-1951)

TO CALL WRITER DIRECT

RECEIVED
OCT 26 1993
DIVISION OF
OIL, GAS & MINING

James W. Carter, Director
Division of Oil, Gas & Mining
State of Utah
3 Triad Center, Suite 350
Salt Lake City, Utah 84180

Re: Sunnyside Cogeneration Associates' Violation No. N93-26-3-1, Violation No. N93-26-4-1; Extension Request

Dear Jim:

On September 28, 1993, the Division of Oil, Gas & Mining ("DOGM") issued Violation No. N93-26-3-1 because Sunnyside Cogeneration Associates ("SCA") failed to provide records during the inspection that AML fees had been paid. On October 15, 1993, DOGM issued Violation No. N93-26-4-1 to SCA for failure to pay reclamation fees. In both circumstances mentioned above, SCA has until October 28, 1993 at 1:00 p.m. to abate the NOVs.

SCA hereby requests that this deadline be extended until the Office of Surface Mining ("OSM") rules on the applicability of AML fees to the SCA project. SCA will request an opinion from OSM on this issue within the next week. SCA hopes to have the matter resolved in the near future. SCA also hereby requests an informal hearing on the fact of the violations set forth above.

Thank you for your cooperation in this regard. If you have any questions, please feel free to contact me.

Very truly yours,

CALLISTER, DUNCAN & NEBEKER

Brian W. Burnett

Brian W. Burnett
Utah Counsel for Sunnyside
Cogeneration Associates

cc: David Pearce
Alane Boyd 94585-1

CALLISTER, DUNCAN
& NEBEKER
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 800 KENNECOTT BUILDING
SALT LAKE CITY, UTAH 84133
TELEPHONE 801-530-7300
FAX 801-364-9127

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October 27, 1993

TO CALL WRITER DIRECT

DRAFT
BY BWB DATE 10/27/93
CALLISTER, DUNCAN & NEBEKER

W. Hord Tipton, Director
Office of Surface Mining
Reclamation and Enforcement
1951 Constitution Ave. N.W.
Washington, D.C. 20240

RE: Exemption of Coal Mine Waste at the Sunnyside Refuse Pile, Sunnyside, Utah from Abandoned Mine Land Reclamation Fees

Dear Mr. Tipton:

The State of Utah, Department of Natural Resources, Division of Oil, Gas and Mining, ("DOGM"), has required Sunnyside Cogeneration Associates ("SCA") to pay Abandoned Mine Land Reclamation Fees under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1232 (1986), 30 C.F.R. § 870 (1992) on the Sunnyside Refuse Pile ("Refuse Pile") owned by SCA and located near Sunnyside, Utah. After review of the Refuse Pile contents and the applicable OSM regulations and directives, it is our conclusion that SCA is not required to pay AML fees. We respectfully request a determination on this issue from the Office of Surface Mining pursuant to OSM Directive No. AML-14, Trans. No. 446 (1988). Our facts and analysis of the issue are outlined in this letter. The supporting documents referred to in the letter are attached and labeled as exhibits.

FACTS

SCA, a Utah joint venture, owns the Refuse Pile near Sunnyside, Utah. The Refuse Pile contains the waste from the nearby Sunnyside Mine which operates a coal wash plant. Coal mine waste from the wash plant has been deposited on the Refuse Pile for approximately the past 50 years by several different business entities which have owned and operated the Sunnyside Mine. The Refuse Pile contains approximately 10.3 million tons of coal mine waste. Roughly 7.3 million tons of the coal mine waste were deposited prior to 1977.

Two independent engineering firms have sampled the Refuse Pile on three separate occasions to determine its geologic contents. The first study was performed in September, 1987 by Applied Hydrology Associates ("AHA"). The study ("AHA study") is attached as Exhibit A. AHA drilled 13 holes in the Refuse Pile at varying depths from 13 to 120 feet and collected 52 samples from these drill holes at 10 foot intervals. Of the 52 samples taken, 8 are defined as fine coal refuse and represent 16% of the samples drilled. The other 44 samples are defined as coarse coal refuse, representing the other 84% of the drilled samples. AHA has determined that the "mean heating value of the 52 samples taken across the coarse and fine coal refuse is 6,200 Btu per pound," see AHA study, Exhibit "A", at 27. The coarse coal refuse, which is 84% of the Refuse Pile, has a mean heating value of 5,831 Btu per pound. See AHA study, Exhibit "A", at 26. The AHA study did not consolidate the data received from the analysis of the 52 samples for dry ash values within the pile. However, taking an average of the dry ash values for all samples taken, according to the AHA raw data found in the AHA study, Appendix B, the pile consists of 50.14% ash on a dry basis. See AHA study, Exhibit "A", at Appendix C. Data is not provided to clearly determine the coarse refuse dry ash content. However, the coarse refuse is reported as having a 51.18% ash content on a moist basis. See AHA study, Exhibit "A", at 26.

The second study was completed by the John T. Boyd Company ("Boyd") of Pennsylvania in March, 1991, and attached as Exhibit B, ("Boyd study"). Boyd drilled 11 holes in the Refuse Pile. 109 samples were collected by Boyd at 10 foot intervals. The mean heating value of the 109 coarse and fine samples, as determined by Boyd is 5,568 Btu per pound and the mean ash content is 55.19% on a dry basis. See Boyd study, Exhibit "B", Tabulation 2, at 17. The mean heating value of the coarse samples is 4,893 Btu per pound with a mean ash content of 61.86% on a dry basis. See Boyd study, Exhibit "B", Tabulation 3, at 21.

Boyd also sampled the Refuse Pile in September of 1992. Their report lists their determinations of the Refuse Pile contents combining the data received from the 1991 samples with the additional 1992 samples. Boyd found that for the 205 samples of coarse and fine refuse from 1991 and 1992 the mean heating value of the pile is 5847 Btu per pound and the dry ash content is 53.20%. See Boyd study #2, Exhibit "C", Table 2, at 11e. When considering the coarse refuse alone, the combined year results are 4,969 Btu per pound and 61.36% ash on a dry basis. See Boyd study #2, Exhibit "C", Table 4, at 13d.

SCA has looked at various options for disposing of this waste. Because the Refuse Pile consists primarily of ash, the coal mine waste is not saleable and therefore has no marketable value. There have been several attempts to process the waste by benefaction to make a

marketable product, but all attempts have proven to be uneconomical. Instead, SCA has determined to burn the waste in its facility which will create electricity.

SCA's facility was certified by the Federal Energy Regulatory Commission ("FERC") in their docket QF 86-556-000, April 24, 1987, as a qualified cogeneration facility burning waste. For material to be classified as waste by the Federal Energy Regulatory Commission, the "refuse material must be both a by-product and currently have little or no commercial value." Kenvil Energy Corp., 23 F.E.R.C. ¶ 61,139 at 61,302 (1983). In Sunnyside Cogeneration Assocs., 39 F.E.R.C. ¶ 62,091 at 63,285 (1987), the Director of the Office of Electric Power Regulation held that "the bituminous coal refuse proposed for utilization as the primary energy source of the facility will meet the Commission's two part test for 'waste' material." SCA was recertified by FERC on February 11, 1992 as a small power production facility utilizing a waste material.

SCA's project was financed with the use of Solid Waste Disposal Refunding Revenue Bonds issued by Carbon County, Utah. Bonds of this type can only be utilized for projects which qualify for tax exempt status because they dispose of waste. SCA met that qualification.

SCA will utilize the coal mine waste in the Refuse Pile by first moving the waste from the existing Refuse Pile by means of a truck with a front-end loader to a hopper which will feed the waste to a crusher for grinding to a 1/4" X 0" size. A magnetic separator will remove tramp metal from the waste product prior to crushing to protect the crushing equipment from damage. After being crushed, the waste product will be mixed or blended with waste product from the Refuse Pile that does not require crushing. This blending of the waste is done to achieve a more uniform fuel for SCA's facility and to avoid the costs of unnecessary crushing. The waste material will then be combined with limestone and burned in circulating fluidized bed boilers. The limestone is added to reduce the sulfur dioxide emissions of the cogeneration facility. The entire Refuse Pile will be removed and used as fuel for the SCA facility to create electricity. There will be no attempts to extract carbonaceous material from the refuse pile or to separate the carbonaceous material from the ash and sulfur. Additionally, no physical or chemical process will be used to clean, wash or enrich the refuse pile before it meets its end use of burning in the cogeneration facility.

ANALYSIS

A. THE USE OF THE REFUSE PILE IS NOT SUBJECT TO RECLAMATION FEES BECAUSE THE REFUSE PILE DOES NOT MEET THE DEFINITION OF COAL.

30 U.S.C. § 1232(a) (1986)(emphasis added) states "All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, ... a reclamation fee of 35 cents per ton of coal produced by surface coal mining ... ." 30 C.F.R. § 870.12 (1992)(emphasis added) requires that operators pay a reclamation fee on each ton of coal produced ... ." Coal is defined at 30 C.F.R. § 700.5 (1992) which states in relevant part:

> Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of "anthracite" immediately above.

"[T]he ASTM has classified mineral matter-free coals by rank according to BTU content, ranging from 6,300 BTU's per pound to greater than 15,500 BTU's per pound." U.S.A. v. Brook Contracting Corp., 759 F.2d 320, 325 (3d Cir. 1985).

The contents of the Sunnyside Refuse Pile was calculated as having an average heating value of 6,200 Btu per pound in the AHA study and 5,568 Btu per pound and 5,847 Btu per pound in the Boyd studies. However, if the coarse coal samples, comprising 84 percent of the Pile, are considered separately the calculations are 5,831 Btu per pound and 4,893 Btu per pound and 4,969 Btu per pound, respectively. These Btu calculations do not meet the listed standards set by the ASTM for the Classification of Coal in Standard D 388-77 and incorporated in the definition of coal at 30 C.F.R. § 700.5 (1992).

The Third Circuit Court has held that "as a matter of law, ... 'coal produced by surface coal mining' means combustible coal that would qualify as such under ASTM standards and excludes the weight of rock, clay, dirt, and other debris in the computation of the reclamation fee." Brook, 759 F.2d at 327. This ruling is based on the Courts' determination that "Congress intended to impose the fee on combustible coal only, and not, ... on additional tonnages of rock, clay and dirt." Brook, 759 F.2d at 325. Given the contents studies, the Refuse Pile by definition does not consist of coal. However, it can be described as containing coal mine waste.

Coal mine waste is defined at 30 C.F.R. § 701.5 (1992) and is defined as coal processing waste which is further defined as "earth

materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal." The Refuse Pile meets this definition because it consists of the waste product produced by the Sunnyside Mine coal wash plant in the extraction of coal.

Coal mine waste is further defined in OSMRE Directive No. AML-14(2)(a), Trans. No. 446 (1988), which defines "Abandoned mine refuse piles" as "[a] surface deposit of coal mine waste as defined in 30 C.F.R. § 701.5 which does not meet the definition of coal as defined in 30 C.F.R. § 700.5 or for which the ash content as a whole exceeds 50 percent on a dry basis." The Refuse Pile meets the first prong of this definition, as stated above, because the Refuse Pile is a surface deposit of coal mine waste and does not meet the ASTM definition of coal as incorporated in 30 C.F.R. § 700.5 (1992). The Refuse Pile also meets the second prong of the OSMRE Directive definition because as a whole the Refuse Pile contains 50.14% ash on a dry basis according to the AHA study and 55.19% ash and 53.20% ash on a dry basis in the Boyd studies. When considering the coarse refuse alone which makes up 84% of the Pile contents, the ash values are even higher, testing at 60.14% and 61.36% in the Boyd studies on a dry basis. (This calculation is not available from the AHA study.)

Both the average heating values and ash content data demonstrate that the Refuse Pile is composed of coal mine waste as defined in OSMRE Directive No. AML-14(2)(a), Trans. No. 446 (1988). Because 30 C.F.R. § 870.12 (1992) only taxes coal and not coal mine waste the use of the Sunnyside Refuse Pile is not subject to Abandoned Mine Land Reclamation fees.

B. SCA IS NOT ENGAGED IN A SURFACE COAL MINING OPERATION.

30 C.F.R. § 870.12(a) (1992) requires that an operator "pay a reclamation fee on each ton of <u>coal produced</u> for sale, transfer, or use, . . ." (emphasis added). SCA is engaged in the process of burning coal mine waste in its cogeneration facility. No coal will be produced from or used in its transporting and blending of the Refuse Pile. The entire Refuse Pile consisting of coal mine waste will be burned to generate electricity. The reclamation fee does not apply where coal mine waste is simply used.

Furthermore, the fee computation in 30 C.F.R. § 870.13 (1992) applies to underground mining, surface mining, and in situ mining. Surface mining is defined as "the extraction of coal from the earth by removing the materials over the coal seam ... reclaiming coal operations are considered surface coal mining." 30 C.F.R. § 870.5 (1992). SCA is not engaged in surface coal mining as defined and used

in Part 870 because there is no "extraction of coal from the earth" by any means. SCA will use coal mine waste from the Refuse Pile, but will not extract coal. While reclamation of coal from refuse piles is considered surface mining according to the definition of surface coal mining at 30 C.F.R. § 870.5 (1992), SCA is not in the business of "reclaiming or extracting coal" from the Refuse Pile and therefore does not meet any of the definitional categories for fee computation.

Finally, the United States District Court for the Northern District of West Virginia interpreted 30 C.F.R. § 870.12(b) (1992) to require that "coal from the gob piles would not be assessed a reclamation fee until it had been cleaned, processed, and sold." U.S. v. Spring Ridge Coal Co., 793 F.Supp. 124, 127 (N.D.W.Va. 1992). SCA is not cleaning, processing, or selling coal from the Refuse Pile contents. It is using the entire contents of coal mine waste in its facility to create electricity. 30 C.F.R. § 870.12(b)(1) (1992)(emphasis added) states that "... the use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit." No coal will be severed or removed from the Refuse Pile but the entire Refuse Pile consisting of coal mine waste will be burned for energy. Because no coal will be produced or used from this disposal operation, SCA is not engaged in surface mining operations, and therefore does not owe AML reclamation fees.

C. EVEN IF SCA IS REQUIRED TO PAY AML FEES, THE VALUE OF THE COAL MINE WASTE IS ZERO.

Many attempts have been made to put the Refuse Pile to beneficial use to create a marketable product. All attempts have failed. The Refuse Pile will not bear further extraction and has such a high ash content it is not saleable to anyone for coal extraction. The Refuse Pile has been ruled as waste by FERC having little or no economic value. Essentially, SCA obtained the Refuse Pile by assuming the reclamation obligation. Other refuse piles in the area have been offered to SCA if SCA would agree to assume the reclamation obligations associated therewith. Additionally, approximately 7.3 million tons of coal mine waste were deposited in the Refuse Pile prior to 1977.

OSMRE Directive No. AML-14(3)(a), Trans. No. 446 (1988) states that "for purposes of fee determination, anthracite culm bank material produced before August 3, 1977 has no value. No AML reclamation fees are therefore owed on such material or on material derived therefrom by processing." The Sunnyside Refuse Pile consists of coal mine waste from a bituminous coal mine. Because 30 C.F.R. § 700.5 (1992) incorporates the ASTM standards for coal in the definition of 'anthracite', the Refuse Pile contains the equivalent of anthracite

culm bank material in the amount of approximately 7.3 million tons, deposited prior to 1977. Thus, this portion of the Refuse Pile has no value by definition and no reclamation fees are owing from its use in the SCA facility.

AML fees are determined by the gross value of each ton of coal produced at the time of bona fide sale, transfer, or use by the operator. 30 C.F.R. §§ 870.12(a,b), 870.5 (1992). The value of the other 3 million tons of the Refuse Pile is also zero because it has no marketable value. Therefore, given the fact that the Refuse Pile has no value, no AML fees are owing on the 3 million tons of coal mine waste when it is used in SCA's facility.

D. ALTERNATIVELY, THE REFUSE PILE IS EXEMPT FROM AML FEES BASED ON THE INCIDENTAL COAL EXTRACTION EXEMPTION.

If the fine and coarse coal in the Refuse Pile is considered separately, the coarse coal clearly meets the definition of coal mine waste with mean heating values of 5,831, 4,893, and 4,969 Btu per pound, from the three studies, and ash content values of 60.14% and 61.36%, according to the two Boyd studies, respectively. (See the Discussion in Section A above incorporated here by reference.) The coarse coal makes up 84% of the Pile contents according to the AHA study.

Federal Regulation 30 C.F.R. § 870.11(d) (1992) excepts the "extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for commercial use or sale." Even if the fine refuse is considered coal it is only 16% of the Pile contents. Use of the Refuse Pile can therefore at best be described as the extraction of coal incidental to the extraction of other minerals according to 30 C.F.R. § 870.11(d) (1992) and thus is excepted from owing AML reclamation fees.

E. PUBLIC POLICY FAVORS A DECISION FOR SCA

The legislature in enacting the Abandoned Mine Reclamation Fund intended to create a fund for the reclamation of the abandoned mines and tailings piles across the country created by coal mining prior to August 3, 1977. To fund this operation a tax or fee was enacted to be levied on all coal mined after that date. The Sunnyside Refuse Pile would be eligible for reclamation funding, because it was created long before 1977, but for the fact that it is not an abandoned site and is still connected with the mining operation at the Sunnyside Mine. The coal mine waste pile requires reclamation under SMCRA but is worthless for further coal extraction or other beneficial uses other than to be

burned to generate electricity. Through this burning process a waste product will become energy and the Refuse Pile will be "reclaimed" such that it will no longer pose environmental threats. As a matter of public policy requiring the payment of AML fees on the Sunnyside Refuse Pile would not be beneficial to the environment and the ultimate statutory goal of coal mine and refuse reclamation.

The only way a waste coal fired generating unit is economically feasible is to obtain the rights to the coal refuse for free. The material handling and environmental costs associated with the coal refuse are significant and adding AML fees to those expenses creates additional financial hardships. The SCA project is already only marginally economical and a levy of reclamation fees would create additional problems for the project.

SUMMARY

With the foregoing facts, rulings, and regulations in mind, we respectfully request that the Office of Surface Mining determine that SCA is not required to pay AML fees on the Sunnyside Refuse Pile. The Refuse Pile is exempt from AML fee regulations for the following reasons:

1. The Refuse Pile consists of coal mine waste and not coal therefore no AML reclamation fees are owing.

2. Use of the Refuse Pile does not involve coal production of any kind, which is required to determine the AML fee. Further, because no coal is produced through severance or extraction from the earth, SCA is not engaged in a surface mining operation and therefore SCA does not come under any of the definitions for fee determination.

3. Because 7.3 million tons of the Refuse Pile were deposited prior to 1977, by definition that portion of the Pile has no value. Additionally, the remaining 3 million tons have no value for sales or use purposes alone, therefore no AML fees are owing from its use.

4. Alternatively, if the fine refuse is deemed to be coal it is still only 15 percent of the Pile contents and therefore only the incidental extraction of coal from the other coal mine waste and exempt from AML fees.

5. Finally, from a public policy viewpoint, a ruling in favor of SCA would be beneficial both economically and environmentally and be in keeping with the purpose behind the Abandoned Mine Land Reclamation Act.

For all the foregoing reasons we submit this letter for your determination. We appreciate your consideration of this matter. If you have any questions or need further information please call me at 530-7428 or Kathryn C. Knight at 530-7447. We look forward to hearing from you on this matter.

Sincerely yours,

CALLISTER, DUNCAN & NEBEKER

Brian W. Burnett

Enclosures
cc: James W. Carter
David Pearce
Alane Boyd

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