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cc: Jue
BR, TAM, JFB
aug: Jle

**CALLISTER, DUNCAN
& NEBEKER**

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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SALT LAKE CITY, UTAH 84133

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July 28, 1993

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Mr. James W. Carter
Director
Division of Oil, Gas & Mining
3 Triad Center - Suite 350
Salt Lake City, Utah 84180-123

RECEIVED

JUL 28 1993

DIVISION OF
OIL GAS & MINING

RE: SCA Reclamation Permit, ACT/007/035, Condition #5

#2

Dear Jim:

Our firm is Utah Counsel for Sunnyside Cogeneration Associates ("SCA"), a joint venture that is the owner of a waste coal electrical generation plant (the "plant") located at Sunnyside, Utah. SCA is the current holder of a surface reclamation permit ("permit") for the waste coal mined by the Sunnyside Coal Company ("Sunnyside Coal") and its predecessor, Kaiser Coal Company. Sunnyside Coal, after washing and preparing its coal for delivery to customers, transports the waste rock, low grade coal and fines to the refuse pile now known as the "permit area". SCA is the owner of this refuse pile located in the permit area and SCA is and will continue to remove the waste coal from the permit area, size and prepare it as fuel, then burn this material in the plant.

SCA has applied for and received from the Division of Oil, Gas & Mining ("DOG M") a permit for the reclamation of the refuse pile. In this permit is a condition #5 which is set forth as follows:

"By September 30, 1993, the permittee must submit, for inclusion in the PAP, a report of the fish inventory in Icelander Creek and adjacent areas. The permittee must assist the DWR in an inventory of Icelander Creek for fish species to the Price River. Baseline transects must be established above and below the Price River, in Icelander Wash and at the discharge at the base of the refuse pile. Two category 2 fish species, Roundtail chub and Flannelmouth sucker, are likely to be found at the Price River and Icelander Wash confluence. The Roundtail chub is likely to be listed to the Threatened and Endangered Species list. The DWR will provide a report of this inventory. A copy of the

Mr. James Carter
July 28, 1993
Page 2

DWR report must be submitted within 10 days of receipt for inclusion in the PAP."

When the PAP was issued, the above condition was included. SCA was willing to agree because their role was a supportive role to a broader study being conducted by DWR. It appears now that DWR has changed its position. Copies of the April 28, 1993 and the July 12, 1993 letters from DWR are attached as Exhibits 1 & 2 reflecting a change from assisting DWR to conducting two extensive studies on the greater Grassy Trail drainage area. This substantial change was caused because state funding was not available.

SCA has asked for DWR's review of its determination of the extent of the study necessary to protect and enhance fish and wildlife impacted by the operation of the permit. A copy of the request to DWR is attached as Exhibit 3.

SCA initially requested the waiver of Condition #5 from its permit by a letter from our consultants, Eckhoff, Watson and Preator, dated June 11, 17 and 7, of 1993. Unfortunately, this letter is referred to as having each of these dates, but it is our initial request to have Condition #5 removed from our permit. A copy is attached as Exhibit 4. DOGM responded on the 15th of June, 1993 and denied SCA's request to delete Condition #5. A copy of DOGM's denial is attached as Exhibit 5. A meeting was held on the 30th of June to attempt to resolve what should be done.

SCA firmly believes that the scope of work proposed by DWR is extensive and beyond that required under the regulations for its Permit. SCA has appealed the DWR's decision and SCA now asks DOGM to hold Condition #5 in abeyance until the proper scope of work has been resolved at DWR. Once the recommendation of DWR is resolved, then that recommendation should be appropriately attached as a condition to SCA's permit.

The positions raised with the DWR about the scope of the work are relevant to DOGM's permit requirement. The operation of a DOGM permit should not impair fish and or wildlife, in fact, steps should be taken to enhance environment for the fish and wildlife impacted by the operation of the permit. In this case, the new scope of work proposed by DWR goes far beyond what is appropriate.

SCA is requesting a review (appeal) of the DOGM denial of SCA's request to have Condition #5 removed from its permit. In the process of that review, it may be in all of the parties interest for DOGM to hold in abeyance Condition #5 until resolution at DWR of the appropriate scope of work. If we can be of any help in meeting

Mr. James Carter
July 28, 1993
Page 3

informally with you and your staff, to help resolve these issues, we are willing to meet. Thank you for your cooperation.

Sincerely yours,

CALLISTER, DUNCAN & NEBEKER



Fred W. Finlinson

FWF:mm

cc: Ted Stewart, Director of the Department of Natural Resources
Kenneth W. Phippen, DWR Regional Habitat Manager
Alane Boyd, Eckoff, Watson and Preator

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Mr. Tim Provan
Director
Division of Wildlife Resources
1596 West North Temple
Salt Lake City, Utah 84116

RE: DWR's Recommendation for Studies on the Sunnyside
Cogeneration Associates' DOGM Reclamation Permit,
ACT/007/035.

Dear Tim:

Our firm represents Sunnyside Cogeneration Associates ("SCA"), a joint venture, that is the owner of a waste coal fired electrical generation plant ("the Plant") located at Sunnyside, Utah. Since the Plant burns waste coal formerly mined from the Sunnyside Mine, which is now owned by Sunnyside Coal Company, it was required to obtain a Surface Mining Reclamation Permit from the Utah Division of Oil, Gas and Mining ("DOGM"). This permit was issued by DOGM on February 4, 1993. The Division of Wildlife Resources ("DWR") was contacted and contributed to the writing of the permit.

One of the provisions of the DOGM regulations requires DOGM to:

"The scope and level of detail for such information will be determined by the Division in consultation with state and federal agencies with responsibilities for fish and wildlife and will be sufficient to design the protection and enhancement plan required under R645-301-333."

Pursuant to R645-301-333 stated above, DWR was contacted by DOGM and condition #5 was included in the SCA permit. This condition requires a report of the fish inventory of Icelander Creek and adjacent areas be included in the PAP for SCA. The language of the permit condition in question is included for your convenience.

By September, 30, 1993, the permittee must submit, for inclusion in the PAP, a report of the fish inventory in Icelander Creek and adjacent areas.

Mr. Tim Provan
July 28, 1993
Page 2

The Permittee must assist the DWR in an inventory of Icelander Creek for fish species to the Price River. Baseline transects must be established above and below the Price River, in Icelander Wash and at the discharge at the base of the refuse pile. Two Category 2 fish species, Roundtail chub and Flannelmouth sucker, are likely to be found at the Price River and Icelander Wash confluence. The Roundtail chub is likely to be listed to the Threatened and Endangered Species list. The DWR will provide a report of this inventory. A copy of the DWR report must be submitted within 10 days of receipt for inclusion in the PAP."

In the discussions that were held during the preparation of the Permit, SCA was told that this fish inventory report would be prepared by DWR and that all SCA would be required to do was to provide a couple of employees to assist DWR in conducting the required fish inventory. DWR has now notified DOGM and SCA that DWR will not conduct such an interview and DOGM has ordered SCA to now obtain consultants to conduct these fish inventories for DWR and that DWR would have one or two people available to assist SCA in the inventory and by the way, the inventory would have to be conducted over two different periods of time. A copy of the April 28, 1993 letter from DWR reversing its early position is attached as Exhibit 1. A copy of a July 12, 1993 follow up letter from DWR requesting two different inventories is also attached as Exhibit 2.

With this change in DWR's position from it's initial recommendation which was incorporated into the SCA permit, it is necessary to request a review or appeal of the DWR's initial recommendation that was included in condition #5 of the SCA permit.

The requirement of the controlling regulation is to develop a plan to protect or enhance fish and wildlife. SCA has provided information in the PAP that substantiates the fact that there is no protection or enhancement required for this permit for the following reasons.

1. Lack of impact of permit area on fish and wildlife.

At the toe of the waste coal pile or refuse pile, there is a seep that is fed in part by the surface water of Grassy Trail Creek that is used to transport coal fines in a slurry for storage in the waste coal area or refuse pile. The waste coal area has been operating under permits issued by the Water Quality Division of the Utah Department of Environmental Quality, ("DEQ"). DEQ is aware of the seep, but because of the limited amounts of water being released at the seep, a permit

Mr. Tim Provan
July 28, 1993
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has not been required. In the SCA permit, this area is monitored for water quality.

On January 22, 1993, the federal Office of Surface Mining ("OSM") stated in a letter to SCA's consultants, Eckhoff, Watson and Preator, that "The Mining operation to be permitted will cause little or no depletion of surface water..". The actual operation of the Plant will require water use for cooling purposes and other incidental uses; however, these uses are regulated by DEQ and discharge is not allowed into any surface water. The operation of the Sunnyside Mine may require surface water from Grassy Trail Creek to continue the slurry operation to transport the coal fines to the storage area and this water, less evaporation and other water discharged to other points, to feed the seep at the foot of the refuse pile. In the event that the Sunnyside Mine discontinues mining or using its wash and preparation plant, no water from Grassy Trail Creek will be transferred into the waste coal area at the head of Icelander Creek. The seep is producing about 30 gallons per minute into the head of Icelander Wash, as reported on the 30th of June, 1993.

The seep is between a 1/4 to 1/2 of a mile above the Whitmore Spring area in Icelander Wash which is the first reliable source of water in the Wash. A few miles lower in Icelander, the Galanis Spring adds to the water in the Wash. Many in the area feel that the East Carbon sewage lagoons are a major contributor to the increased flow into Icelander Wash from the Galanis Spring area. Icelander Wash crosses the highway, US 6, approximately 8 miles below the permit area. It is approximately 15 miles from the permit area to the confluence of Grassy Trail Creek with the Price River. A seep running at 30 gpm does not have an impact on fish living in the Price River, unless it is an unusual pollution problem. The major sources of water in Icelander Wash, Whitmore and Glanis Springs are both located below the seep and there are an additional 11 tributaries that join Icelander Wash before it empties into the Price River.

Water is diverted from Grassy Trail Creek at the Sunnyside Mine and may reach Icelander at the seep. Grassy Trail Creek, while close to the permit area, winds its way to the Price River along an approximate 20 miles route before it joins the Price River. Icelander Wash joins Grassy Trail Creek approximately 5 miles before the confluence of Grassy Trail Creek and the Price River.

The drainage area of Grassy Trail Creek is substantial at its confluence with the Price River. There are other major developments in this drainage that may have a greater impact on fish and or wildlife than the SCA operation in the permit area. To single out SCA because

Mr. Tim Provan
July 28, 1993
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of its reclamation permit to conduct what turns out to be a major study of the Grassy Trail Drainage Basin is a scope of work far beyond the requirement of the regulations to protect or enhance fish and wildlife as a result of the impact of the permitted operation.

2. Lack of fish in the immediate vicinity of the Permit Area.

The information already included in the PAP is that there are no currently listed endangered or threatened fish or wild life species in the immediate area of the Plant. There are endangered fish species in the Colorado River, but the 30 gpm from the seep is a long way from these species, both in miles and lack of impact. The Roundtail chub and Flannelmouth sucker are not yet listed and even if listed as threatened, the seep is also a long way both in miles and lack of impact on any species in the Price river. Icelander Creek is an ephemeral stream and in the permit area is unlikely to support any fish. Any other wildlife needs for habitat are met by the springs, Whitmore and Galanis, which flow entirely independent of the permitted operation of the refuse pile.

3. The Change in Scope.

In December of 1992, the DWR was going to conduct an inventory of the fish in the Grassy Trail drainage. After the Budget was approved for the next year, the DWR was apparently not allocated enough funds by the legislature to conduct this study, even with the assistance of SCA. Thus in April of 1993, the requirement by DWR is changed so that SCA is required to conduct an indepth study of the Grassy Trail drainage. The only difference between the provisions of condition #5 and what now is required, is the lack of funding available to DWR. The needs of the fish or the impact of the Plant have not changed. That impact is still minimal if non existent. SCA is willing to take steps to protect and enhance the fish and wildlife impacted by the permit operation, but feels that it is not reasonable to place the entire burden a drainage wide study on 30 gpm contribution.

SCA therefore requests a review of DWR's position on the SCA permit and the condition #5. Please advise us as to what procedural steps should be taken above this request for agency review. At this

Mr. Tim Provan
July 28, 1993
Page 5

point, SCA is willing to exhaust all of its administrative and legal remedies to obtain a reasonable plan that can and should be appropriately a part of the SCA permit.

Sincerely yours,

CALLISTER, DUNCAN & NEBEKER



Fred W. Finlinson

FWF:mm

cc: Ted Stewart, Director of the Department of Natural Resources
James Carter, Director of the Division of Oil, Gas and Mining
Kenneth W. Phippen, DWR Regional Habitat Manager
Alane Boyd, Eckoff, Watson and Preator

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State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WILDLIFE RESOURCES

Michael O. Leavitt
Governor

Ted Stewart
Executive Director

Timothy H. Provan
Division Director

Southeastern Region
455 West Railroad Avenue
Price, Utah 84501-2829
801-637-3910
801-637-7361 (Fax)

April 28, 1993

RECEIVED

APR 30 1993

ECKHOFF, MANAGER OF REGION

Jessica W. Smith
1121 East 3900 South, Suite C 100
Salt Lake City, UT 84124-1214

Dear Jessica:

Due to recent budget reductions in our programs, I must provide a different recommendation than our phone conversation. The DWR can provide one or two people to oversee the fish sampling but Sunnyside Cogeneration Associates should provide a qualified consultant. This consultant should be familiar with the endemic Colorado River fish species, have electrofishing gear and a crew of three. The DWR's presence will be required before any fish sampling may occur.

The Price River will need to be sampled during low flows. Late summer through early spring will be an appropriate sampling period. My recommendation for Icelander Creek is to sample during spring runoff. Little is known of this creek, so if more information suggests a more appropriate sampling period then I will provide a suitable recommendation.

Although it will be difficult to complete Icelander Creek this year, the late runoff may provide the opportunity. One day in the field should be sufficient. At least two sites should be sampled on the Price River. One site above the confluence with Icelander Creek and one site below. Additional sites below Icelander Creek would provide valuable baseline information.

I appreciate your clarification letter and apologize for the necessary changes in my recommendation. If you have further questions, please call (637-3310).

Sincerely,

Kenneth W. Phippen
Regional Habitat Manager

Copy: Pamela Grubaugh-Littig, DOGM
Robert Williams, USFWS
Ralph Miles, DWR





State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WILDLIFE RESOURCES

Michael O. Leavitt
Governor

Ted Stewart
Executive Director

Timothy H. Provan
Division Director

Southeastern Region
488 West Railroad Avenue
Price, Utah 84501-2889
801-437-3310
801-637-7081 (Fax)

July 12, 1993

Ted Schmidt, Wildlife Biologist
Pioneer Environmental Services, Inc.
980 West 1800 South
Logan, Utah 84321

Dear Mr. Schmidt:

I am writing in order to clarify the sampling needs identified in my previous letter. Sampling of Iceland and Grassy Trail Creek during August will be necessary along with the spring sample. The August survey objective is to determine a baseline resident population for those creeks and the Price River. The spring sampling is necessary to establish the spawning population.

I hope this clarifies the fisheries data needs required for Sunnyside Cogeneration's mine plan. This data will satisfy the baseline fisheries population requirements for the mine plan. I mentioned in my previous letter that, as conditions dictate, additional sampling may be required throughout the life of the mine plan.

If you have any further questions, please give me a call (837-3310).

Sincerely,

Kenneth W. Phippen
Regional Habitat Manager

Copy: Susan White, DOGH
Ralph Miles, DWR



SUNNYSIDE COGENERATION ASSOCIATES

POST OFFICE BOX 58087
SALT LAKE CITY, UTAH 84158-0087

June 11, 1993

Ms. Pamela Grubaugh-Littig
Division of Oil, Gas and Mining
3 Triad Center - Suite 350
Salt Lake City, UT 84180-1203

Dear Pam,

EWP recently received a letter from the Division of Wildlife Resources (DWR) concerning Permit Condition No. 5, the fish and wildlife inventory of Icelander Creek and adjacent areas. EWP has been in contact with the DWR prior to receiving this letter. In past conversations with DWR, it was relayed to SCA that one or two people would be needed to assist DWR in conducting the required fish inventories. The same information was also reiterated by DOGM both in conversation and in Permit Condition No.5. Due to the recent information received from DWR stating that the original scope of work for SCA is no longer feasible, SCA is proposing that Permit Condition No. 5 be waived. Below is a detailed discussion of why SCA feels this Permit Condition is not necessary nor required according to DOGM regulations.

Under section R645-301-322 of DOGM regulations, the permittee is required to provide information to satisfy fish and wildlife concerns. R645-301-322.100 specifically states,

"The scope and level of detail for such information will be determined by the Division in consultation with state and federal agencies with responsibilities for fish and wildlife and will be sufficient to design the protection and enhancement plan required under R645-301-333."

In regards to this regulation, SCA has provided information in the PAP to substantiate the fact that there is no protection or enhancement plan for fish habitat required for this permit. The following paragraphs provide additional discussions to support this claim.

On January 22, 1993, EWP received a letter from Office of Surface Mining (OSM) stating, "The "mining" operation to be permitted will cause little or no depletion of surface water..." referring to the SCA mining operation. Since there will be virtually no depletion of surface water, it is highly unlikely that habitats existing in the area will be affected. Therefore, there will be no special project designed to protect or enhance fish habitat. In addition, Icelander Creek is an ephemeral stream within the SCA Permit Area and adjacent areas. In other words, the stream flows only in direct response to precipitation or snowmelt and the quantity of water is limited. The information provided in the SCA PAP is adequate to substantiate these statements.

Section R645-301-322.200 through 322.240 of DOGM regulations requires, "Site-specific resource information necessary to address the respective species or habitats...when the permit area or adjacent area is likely to include:"

"Listed or proposed endangered or threatened species of plants or animals or their critical habitats..."

Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs, supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

Ms. Pamela Grubaugh-Littig
June 17, 1993
Page Two

Other species or habitats identified through agency consultation as requiring special protection under state or federal law."

In response to the above regulations, the following discussion provides information to support the fact that the fish inventory requirements do not meet the criteria specified above and therefore, should not be required.

The fish inventory area is not adjacent to the SCA Permit Area, but approximately 14 miles away. This should exempt SCA from having to perform a fish inventory in the Price River. Also, as stated above, Iceland Creek is an ephemeral stream and it is unlikely that it supports any fish or wildlife species entirely on its own within the Permit Area. In addition, there are no fish species listed on the Threatened and Endangered Species List in Iceland Creek or the Price River, nor have there been species or habitats identified through agency consultation as requiring special protection under state or federal law.

As stated above, it has been and remains SCA's understanding that "...the permittee must assist the DWR in an inventory of Iceland Creek for fish species to the Price River...". Upon receiving the notification from DWR, this no longer is the case. As stated in the letter from DWR, due to recent budget reductions, they are asking SCA to provide "...a qualified consultant...familiar with the endemic Colorado River fish species, having electrofishing gear and a crew of three." SCA is capable and willing to provide one or two people, as originally discussed with both DOGM and DWR, to aid in the data gathering effort. SCA will not provide additional assistance other than what was originally required.

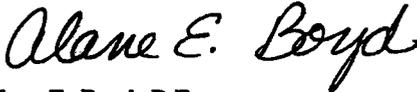
It was discussed that DWR would perform the inventories with the permittee's assistance, not vice versa. It is not the permittee's responsibility to perform the inventories under the conditions specified by DOGM and DWR. The work entailed is much greater than that required by the DOGM in the permit condition. Therefore, as a result of this new information received from DWR, and the fact that it does not represent previous expectations and requirements of the DOGM, we are requesting that Permit Condition No. 5 be omitted from the list of permit conditions issued to SCA.

Feel free to call if there are questions. We look forward to receiving a response from DOGM concerning this issue.

Sincerely,



David Pearce
Authorized Member, Management Committee



Alane E. Boyd, P.E.
Senior Engineer

cc: Brian Burnett, CD&N



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

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June 15, 1993

Mr. David Pearce
Sunnyside Cogeneration Associates
P.O. Box 58087
Salt Lake City, Utah 84158-0087

Dear Mr. Pearce:

Re: Permit Condition #5, Sunnyside Cogeneration Associates (SCA), Sunnyside Refuse and Slurry, ACT/007/035, Folder #2, Emery County, Utah

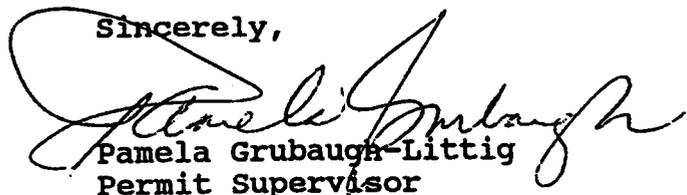
The Division is in receipt of your June 7, 1993 letter requesting that Permit Condition No. 5 be omitted from the permit issued to SCA. The Division has discussed this request with the Division of Wildlife Resources (DWR) and the request is denied.

After a field visit, Division staff in consultation with the DWR will determine if sampling Icelander Creek is still possible this year. SCA should have qualified staff available to conduct this sampling immediately if conditions allow.

This letter will serve as a notice that Permit Condition No. 5 is modified to comply with the sampling plan outlined in the DWR letter from Kenneth Phippen, Regional Habitat Manager, dated April 28, 1993. Additionally, SCA must provide a written report of the inventory instead of DWR unless otherwise provided by DWR. Please remember that failure to comply with the terms and conditions of the permit will result in an enforcement action.

Please call Susan White or myself if you have any comments or questions.

Sincerely,



Pamela Grubaugh-Littig
Permit Supervisor

