

- AML FCC AUDIT R.C. MO. FCC COMPLIANCE
ALAN MILLER 816-374-6841

- JOHN SENDER LEX KJ - 606-233-2808
I WORK IF DENIED

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112.230 Information Regarding Abandoned Mine Land Reclamation Fee:

SCA is currently working with the Office of Surface Mining (OSM) to determine appropriate AML fees. SCA will pay the required AML fees. All required AML fees will be paid by:

Local

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

Boston Office

Sunnyside Cogeneration Associates
c/o Environmental Power Corporation
200 State Street, 13th Floor
Boston, Massachusetts 02109
Telephone (617) 720-5550
Employer Identification No.: 84-1027584

112.300-330 Information Regarding "Owners" and "Controllers"

The Applicant, SCA, is a Utah joint venture. SCA holds the contracts, property, and permits for the project in its name. Because the joint venture is essentially a partnership between KPS and KSI, SCA has no corporate information of its own. Therefore, information regarding the two entities which comprise the joint venture, KPS and KSI, is provided. Pursuant to your request, information regarding SPC, the corporation that owns KPS and KSI, and EPC, the corporation who owns SPC, is also provided herein.

The names, addresses and social security numbers of each person who has owned or controlled the Applicant, that person's relationship to the Applicant (including percentage of ownership and location in the organization structure), title of the person's position, date position assumed, when submitted under R645-300-147, and the date of departure from that position is provided as follows for SPC, KPS and KSI:

Joseph E. Cresci SSN: 149-30-9412	President and Director of SPC, KPS and KSI (from December 1987 to present)	200 State Street 13th Floor Boston, MA 02109
Donald A. Livingston SSN: 009-30-7980	Vice President and Director of SPC (from December 1987 to present), Vice President of KPS and KSI (from December 1987 to present) Director of KPS and KSI (from December 1987 to 1992)	200 State Street 13th Floor Boston, MA 02109
Joseph L. Serafini SSN: 012-32-0385	Secretary and Director of SPC, KPS and KSI (from December 1987 to February 1990)	200 State Street 13th Floor Boston, MA 02109
Bayard R. Kraft, III SSN: 136-42-3293	Treasurer of SPC, KPS and KSI (from April 1985 to present); Secretary of SPC, KPS and KSI (from February 1990 to present)	Box 45 109 Union Street Manchester, VT 05254

SPC, KPS and KSI are wholly owned subsidiaries of EPC. The stock in these entities is owned 100% by EPC. EPC is a publicly owned and traded corporation. A list of all the directors and officers, past and present, in EPC, along with titles, social security numbers and terms of office is provided below. In addition, the following individuals own more than 5% of the stock in the corporation: Joseph E. Cresci (29%) and Donald A. Livingston (13%). Information regarding these individuals is provided above. The information on EPC is as follows:

HIGHLIGHTS OF A COURTESY INSPECTION

(Permit ACT/007/035 - Co-Gen)

DATE HELD: February 11, 1993, 10 a.m. - 2:30 p.m.
 WHERE HELD: Sunnyside, UT
 WHY: Courtesy Inspection Requested by Lowell & Pam
 WHO ATTENDED:

<u>NAME</u>	<u>ORGANIZATION</u>	<u>LOCATION/PHONE</u>
Bill Malencik	DOGM	Price, 637-5806
Stephen Demczak	DOGM	Price, 637-5806
Gary Gray	Sunnyside Coal Co.	Sunnyside, 888-4421
✓ Jerry Carter	Savage	Price, 637-0050
✓ Fred Busch	Savage	SLC, 263-9400
Kendall Reed	Tampella Services	Sunnyside, 888-4486
✓ Alane Boyd	EWP Engineering	SLC, 261-0090
Edwin Brailey	Parsons Main Inc	Sunnyside, 888-4407
Jessica Smith	EWP Engineering	SLC, 261-0090
Rick Fisher	Tampella Services	Sunnyside, 888-4486

WHAT: Highlighted

1. Laws and Regulations
2. Style of operation at various mines relating to:
 - Record systems
 - Field operation--environmental compliance
 - Translate Utah Regulations and permit requirements into do's and don'ts so the field person is knowledgeable what can, cannot and what must be done.
 - Inspection, enforcement and administrative review
 - This was done to provide ideas of different effective systems used by other mines.
 - Utah Coal association, Environmental Subcommittee
Blake Webster (suggested contact) Phone # 220-4584
3. Field Review of the majority of environmental control measures, majority not observable because of snow conditions.

Followup Issues (Suggested Responsible Party--
 a) Co-Gen Management b) Permit Supervisor)

<u>ITEM</u>	<u>REGULATIONS</u>	<u>FOLLOWUP ACTION</u>
-I.D. Signs-- I.D. Signs must be displayed at each point of access from public road	521.241, 242,243, 244	a) Install required signs before next official inspection or discuss matter with permit supervisor.

<p>-Permit Markers-- Several areas perimeter markers do not clearly mark affected area (disturbed area)</p>	<p>521.250</p>	<p>a) Install required markers before next inspection.</p>
<p>-Refuse Pile Signs</p>	<p>MSHA Regs 30 CFR, 77.215-1</p>	<p>a) Replace MSHA refuse sign with required information pertinent to the new permittee. a) Suggest permittee contact MSHA Price office to discuss refuse pile, advise of DOGM permit transfer and any followup MSHA may require.</p>
<p>-Permit Boundary Sign</p>	<p>None to my know- ledge</p>	<p>a) The undersigned is not aware of any Utah Coal Mine Regulations that requires the permit boundary to be signed. As a suggestion, the permittees may find it to their advantages to place signs where their permit boundary interfaces with Co- Gen plant and Sunnyside Coal Co. The rational for this suggestion is two-fold: (1) Alert all companies and their employees where the property boundaries lie as marked on the ground and, (2) to prevent encroachment where another party may unknowingly do something on the permit area which is not in compliance with the R645 Regs resulting in a compliance problem for the permittee.</p>
<p>-Vegetation Test Plot</p>	<p>R645- 300-143</p>	<p>a) Fence around the test plot needs to be maintained. Review "plan" to determine fencing requirements (R645- 301-526.200). Detail on test plot monitoring reporting, etc. are to be covered in operating agreement.</p>

Carryover Projects

-Open Channel Spillway/Clearwater Pond	R645- 301- 742.223	a) Complete spillway construction per deadlines heretofore established.
-Culverts/Railroad Logs	R645- 301- 817.43	a) Complete culvert (2) installation per deadlines heretofore established.
-Cover Last (3rd lift) that remains uncovered	R645- 301- 553.252	a) Followup on refuse combustion problem/compliance issue
-Non Coal Waste/Refuse Pile	R645- 301- 528.333	b) "At no time will non-coal waste be deposited in a refuse pile". This is a permit defect in my opinion that needs to be corrected and if so cleanup action must be initiated.
-Roads	R614- 301- 742.411	a) Haul road under construction lying adjacent to and in a N.E. direction from pasture pond. Road ditch was blocked. Operator stated that culvert was to be installed 2/12/93. a) With snow melt, road drainage systems need to be maintained to keep uncontrolled runoff off the roads.

-Handouts: 1 copy each

Utah Coal Mine Law - Title 40-Chapter 10
 Utah Coal Mine Regulations - R645
 Excerpt Public Law 95-87 - Section 402
 Excerpt 30 CFR - 870-5 - Definition Reclaimed Coal

** Special thanks to Gary & Alane for their contributions to
 the courtesy inspection.

** NOTE TO ATTENDEES

If I overlooked items that should be included herein, please
 give me a call.

THANKS
 Bill

ADMINISTRATIVE CONFIDENTIAL

An off the record discussion took place concerning refuse piles in relation to AML fees and royalties - Highlights of Discussion:

- I. Mentioned that OSM audits mining AML fees, MMS royalties. Provided one copy each of SMCRA, Section 402; Title 30, Ch VII 870.5, definition of reclaimed coal as related to refuse piles, and my off the cuff opinion is that it would appear the definition fits the 35¢ AML fees.
- II. Busch mentioned they didn't have to pay AML fees because the operation is different from others that are paying on reclaimed coal from refuse piles.
- III. Boyd mentioned, attorney Burnett is working with Lowell on the matter of AML fees.
- IV. In light of III above, the discussion was concluded with different opinions and the matter is in the hands of the responsible parties.

Division determines to contain information addressing each application requirement of the State Program and to contain all information necessary to initiate processing and public review.

"Affected Area" means any land or water surface area which is used to facilitate, or is physically altered by, coal mining and reclamation operations. The affected area includes the disturbed area; any area upon which coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from coal mining and reclamation operations; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas upon which are sited structures, facilities, or other property material on the surface resulting from, or incident to, coal mining and reclamation operations; and the area located above underground workings.

"Agricultural Use" means the use of any tract of land for the production of animal or vegetable life. The uses include, but are not limited to, the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.

"Alluvial Valley Floors" means the unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities, but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

"Applicant" means any person seeking a permit, permit change, and permit renewal, transfer, assignment, or sale of permit rights from the Division to conduct coal mining and reclamation operations or, where required, seeking approval for coal exploration.

"Application" means the documents and other information filed with the Division under the R645 Rules for the issuance of permits; permit changes; permit renewals; and transfer, assignment, or sale of permit rights for coal mining and reclamation operations or, where required, for coal exploration.

"Approximate Original Contour" means that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls, spoil piles, and coal refuse piles having a design approved under the R645 Rules and prepared for abandonment. Permanent water impoundments may be permitted where the Division has determined that they comply with R645-301-413.100 through R645-301-413.334, R645-301-512.240, R645-301-514.300, R645-301-515.200, R645-301-533.100 through R645-301-533.600, R645-301-542.400, R645-301-733.220 through R645-301-733.224, R645-301-743, R645-302-270 through R645-302-271.400, R645-302-271.600, R645-302-271.800, and R645-302-271.900.

"Aquifer" means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

"Arid and Semiarid Area" means, in the context of ALLUVIAL VALLEY FLOORS, an area where water use by native vegetation equals or exceeds that supplied by precipitation. All coalfields in Utah are in arid and semiarid areas.

"Auger Mining" means a method of mining coal at a cliff or highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

"Best Technology Currently Available" means equipment, devices, systems, methods, or techniques which will (a) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable state or federal laws; and (b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife, and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques which are currently available anywhere as determined by the Director, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetation selection and planting requirements, animal stocking requirements, scheduling of activities, and design of sedimentation ponds in accordance with R645-301 and R645-302. Within the constraints of the State Program, the Division will have the discretion to determine the best technology currently available on a case-by-case basis, considering among other things the economic feasibility of the equipment, devices, systems, methods or techniques, as authorized by the Act and the R645 Rules.

"Blaster" means a person who is directly responsible for the use of explosives in connection with surface blasting operations incidental to UNDERGROUND COAL MINING AND RECLAMATION ACTIVITIES or SURFACE COAL MINING AND RECLAMATION ACTIVITIES, and who holds a valid certificate issued by the Division in accordance with the statutes and regulations administered by the Division governing training, examination, and certification of persons responsible for the use of explosives in connection with surface blasting operations incident to coal mining and reclamation operations.

"Board" means the Board of Oil, Gas and Mining for the state of Utah, or the Board's delegated representative.

"Cemetery" means any area of land where human bodies are interred.

"Coal" means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D388-77.

"Coal Exploration" means the field gathering of: (a) surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or (b) the gathering of environmental data to establish the conditions of an area before beginning coal mining and reclamation operations under the requirements of the R645 Rules.

✓ **"Coal Mine Waste"** means coal processing waste and underground development waste.

"Coal Mining and Reclamation Operations" means (a) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 40-10-18 of the Act, surface coal mining and reclamation operations and surface impacts incidental to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include all activities necessary and incidental to the reclamation of the operations, excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in-situ distillation; or retorting, leaching, or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate

commerce at or near the mine site. Provided, these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 40-10-8 of the Act; and, provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and (b) the areas upon which the activities described under part (a) of this definition occur or where such activities disturb the natural land surface. These areas will also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

"Coal Mining and Reclamation Operations Which Exist on the Date of Enactment" means all coal mining and reclamation operations which were being conducted on August 3, 1977.

"Coal Preparation or Coal Processing" means the chemical and physical processing and the cleaning, concentrating, or other processing or preparation of coal.

"Coal Processing Plant" means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. Coal processing plant includes facilities associated with coal processing activities, such as, but not limited to, the following: loading facilities; storage and stockpile facilities; sheds, shops, and other buildings; water-treatment and water-storage facilities; settling basins and impoundments; and coal processing and other waste disposal areas.

"Coal Processing Waste" means earth materials which are separated from the product coal during cleaning, concentrating, or the processing or preparation of coal.

"Collateral Bond" means an indemnity agreement in a sum certain executed by the permittee as principal which is supported by the deposit with the Division of: (a) a cash account, which will be the deposit of cash in one or more federally-insured or equivalently protected accounts, payable only to the Division upon demand, or the deposit of cash directly with the Division; (b) negotiable bonds of the United States, a State, or a municipality, endorsed to the order of, and placed in the possession of, the Division; (c) negotiable certificates of deposit, made payable or assigned to the Division and placed in its possession, or held by a federally insured bank; (d) an irrevocable letter of credit of any bank organized or authorized to transact business in the United States payable only to the Division upon presentation; (e) a perfected, first lien security interest in real property in favor of the Division; or (f) other investment grade rated securities having a rating of AAA or AA or A, or an equivalent rating issued by a nationally recognized securities rating service, endorsed to the order of, and placed in the possession of, the Division.

"Combustible Material" means organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

"Community or Institutional Building" means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions including, but not limited to educational, cultural, historic, religious, scientific, correctional, mental-health or physical-health care facility; or is used for public

services, including, but not limited to, water supply, power generation, or sewage treatment.

"Compaction" means increasing the density of a material by reducing the voids between the particles, and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.

"Complete and Accurate Application" means an application for permit approval or approval for coal exploration, where required, which the Division determines to contain all information required under the Act, the R645 Rules, and the State Program that is necessary to make a decision on permit issuance.

"Cooperative Agreement" means the agreement between the Governor of the State of Utah and the Secretary of the Department of the Interior as published at 30 CFR 944.30.

"Cropland" means land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops.

"Cumulative Impact Area" means the area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface and groundwater systems. Anticipated mining will include, at a minimum, the entire projected lives through bond releases of: (a) the proposed operation, (b) all existing operations, (c) any operation for which a permit application has been submitted to the Division, and (d) all operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.

"Cumulative measurement period" means, for the purpose of R645-106, the period of time over which both cumulative production and cumulative revenue are measured.

- (a) For purposes of determining the beginning of the cumulative measurement period, subject to Division approval, the operator must select and consistently use one of the following:
 - (i) For mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977, or
 - (ii) For mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.
- (b) For annual reporting purposes pursuant to R645-106-900, the end of the period for which cumulative production and revenue is calculated is either
 - (i) For mining areas where coal or other minerals were extracted prior to July 1, 1992, June 30, 1992, and every June 30 thereafter; or
 - (ii) For mining areas where extraction of coal or other minerals commenced on or after July 1, 1992, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that day thereafter.

"Cumulative production" means, for the purpose of R645-106, the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by R645-106-700.

"**Irreparable Damage to the Environment**" means any damage to the environment in violation of the Act, the State Program, or the R645 Rules that cannot be corrected by actions of the applicant.

"**Knowingly**" means for the purposes of R645-402, that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure, or refusal.

"**Land Use**" means specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur and may include land used for support facilities that are an integral part of the use. Changes of land use from one of the following categories to another will be considered as a change to an alternative land use which is subject to approval by the Division.

CROPLAND - Land used for the production of adapted crops for harvest, alone or in rotation with grasses and legumes, that include row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar crops.

DEVELOPED WATER RESOURCES - Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, flood control, and water supply.

FISH AND WILDLIFE HABITAT - Land dedicated wholly or partially to the production, protection, or management of species of fish or wildlife.

FORESTRY - Land used or managed for the long-term production of wood, wood fiber, or wood-derived products.

GRAZING LAND - Land used for grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production.

INDUSTRIAL/COMMERCIAL - Land used for (a) extraction or transformation of materials for fabrication of products, wholesaling of products, or long-term storage of products; this includes all heavy and light manufacturing facilities, or (b) retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments.

PASTURE LAND OR LAND OCCASIONALLY CUT FOR HAY - Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.

RECREATION - Land used for public or private leisure-time activities, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

RESIDENTIAL - Land used for single and multiple-family housing, mobile home parks, or other residential lodgings.

UNDEVELOPED LAND OR NO CURRENT USE OR LAND MANAGEMENT - Land that is undeveloped or if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

"**Liabilities**" means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

"**Materially Damage the Quantity or Quality of Water**" means, with respect to ALLUVIAL VALLEY FLOORS, to degrade or reduce, by coal mining and reclamation operations, the water quantity or

quality supplied to the alluvial valley floor to the extent that resulting changes would significantly decrease the capability of the alluvial valley floor to support agricultural activities.

✓ "**Mining**" means, for the purposes of R645-400-351, (a) extracting coal from the earth or coal waste piles and transporting it within or from the permit area; and (b) the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than a mine site.

"**Mining area**" means, for the purpose of R645-106, an individual excavation site or pit from which coal, other minerals and overburden are removed.

"**Moist Bulk Density**" means the weight of soil (oven dry) per unit volume. Volume is measured when the soil is at field moisture capacity (1/3 bar moisture tension). Weight is determined after drying the soil at 105 degrees Celsius.

"**MSHA**" means the Mine Safety and Health Administration, U.S. Department of Labor.

"**Mulch**" means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing microclimatic conditions suitable for germination and growth.

"**Natural Hazard Lands**" means, for the purposes of R645-103-300, geographic areas in which natural conditions exist which pose or, as a result of coal mining and reclamation operations, may pose a threat to the health, safety, or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches, and areas of unstable geology.

"**Net Worth**" means total assets minus total liabilities and is equivalent to owners' equity.

"**Noxious Plants**" means species that have been included on the official Utah list of noxious plants.

"**Occupied Dwelling**" means any building that is currently being used on a regular or temporary basis for human habitation.

"**Office**" means Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior.

"**Operator**" means any person engaged in coal mining who removes, or intends to remove, more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

"**Other minerals**" means, for the purpose of R645-106, any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material.

"**Other Treatment Facilities**" means, for the purposes of R645-301-356.300, R645-301-356.400, R645-301-513.200, R645-301-742.200 through R645-301-742.240, and R645-301-763, any chemical treatments, such as flocculation or mechanical structures such as clarifiers, that have a point source discharge and that are utilized to prevent additional contribution of suspended solids to stream flow or runoff outside the permit area.

"**Outslope**" means the face of the spoil or embankment sloping downward from the highest elevation to the toe.

"**Overburden**" means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

- unsuitable for coal mining and reclamation operations, unless the applicant demonstrates that before January 4, 1977, substantial legal and financial commitments were made in relation to the operation covered by the permit application; or
- 133.220. Not within an area designated as unsuitable for mining pursuant to R645-103-300 and R645-103-400 or 30 CFR 769 or subject to the prohibitions or limitations of R645-103-230;
- 133.300. For coal mining and reclamation operations where the private mineral estate to be mined has been severed from the private surface estate, the applicant has submitted to the Division the documentation required under R645-301-114.200;
- 133.400. The Division has made an assessment of the probable cumulative impacts of all anticipated coal mining and reclamation operations on the hydrologic balance in the cumulative impact area and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area;
- 133.500. The operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);
- 133.600. The Division has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the Division has determined that no additional protection measures are necessary; and
- 133.700. The applicant has:
- 133.710. Demonstrated that reclamation as required by the State Program can be accomplished according to information given in the permit application.
- 133.720. Demonstrated that any existing structure will comply with the applicable performance standards of R645-301 and R645-302.
- 133.730. Paid all reclamation fees from previous and existing coal mining and reclamation operations as required by 30 CFR Part 870.
- 133.740. Satisfied the applicable requirements of R645-302.
- 133.750. If applicable, satisfied the requirements for approval of a long-term, intensive agricultural postmining land use, in accordance with the requirements of R645-301-353.400.
- 133.800. For a proposed remining operation where the applicant intends to reclaim in accordance with the requirements of R645-301-553.500, the site of the operation is a previously mined area as defined in R645-100-200.
134. Performance Bond Submittal. If the Division decides to approve the application, it will require that the applicant file the performance bond or provide other equivalent guarantee before the permit is issued, in accordance with the provisions of R645-301-800.
140. Permit Conditions. Each permit issued by the Division will be subject to the following conditions:
141. The permittee will conduct coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to R645-301-800.
142. The permittee will conduct all coal mining and reclamation operations only as described in the approved application, except to the extent that the Division otherwise directs in the permit.
143. The permittee will comply with the terms and conditions of the permit, all applicable performance standards and requirements of the State Program.
144. Without advance notice, delay, or a search warrant, upon presentation of appropriate credentials, the permittee will allow the authorized representatives of the Division to:
- 144.100. Have the right of entry provided for in R645-400-110 and R645-400-220.
- 144.200. Be accompanied by private persons for the purpose of conducting an inspection in accordance with R645-400-100 and R645-400-200 when the inspection is in response to an alleged violation reported to the Division by the private person.
145. The permittee will take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit, including, but not limited to:
- 145.100. Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance;
- 145.200. Immediate implementation of measures necessary to comply; and
- 145.300. Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.
146. As applicable, the permittee will comply with R645-301 and R645-302 for compliance, modification, or abandonment of existing structures.
147. The operator will pay all reclamation fees required by 30 CFR Part 870 for coal produced under the permit, for sale, transfer or use.
148. Within 30 days after a cessation order is issued under R645-400-310, except where a stay of the cessation order is granted and remains in effect, the permittee will either submit the following information current to when the order was issued or inform the Division in writing that there has been no change since the immediately preceding submittal of such information:
- 148.100. Any new information needed to correct or update the information previously submitted to the Division by the permittee under R645-301-112.300.
- 148.200. If not previously submitted, the information required from a permit applicant by R645-301-112.300.

R645. Natural Resources; Oil, Gas and Mining; Coal.**R645-400. Inspection and Enforcement: Division Authority and Procedures.****R645-400-100. General Information on Authority and Procedures**

- 110. Right of Entry
- 120. Enforcement Authority
- 130. Inspection Program
- 140. Availability of Records
- 150. Public Participation
- 160. Compliance Conference

R645-400-200. Information Related to Inspections

- 210. Requests for Inspections
- 220. Right of Entry
- 230. Review of Adequacy and Completeness of Inspection
- 240. Review of Decision Not to Inspect or Enforce

R645-400-300. Provisions of State Enforcement

- 310. Cessation Orders
- 320. Notices of Violation
- 330. Suspension or Revocation of Permits
- 340. Service of Notices of Violation, Cessation Orders and Show Cause Orders
- 350. Informal Public Hearing
- 360. Board Review of Citations
- 370. Inability to Comply
- 380. Compliance Conference
- 390. Injunctive Relief

R645-400-100. General Information on Authority and Procedures.**110. Right of Entry.**

111. Within the State of Utah, Division representatives may enter upon and through any coal exploration or coal mining and reclamation operation without advance notice upon presentation of appropriate credentials. No search warrant will be required, except that the State may provide for its use with respect to entry into a building.

✓ 112. Division representatives may inspect any monitoring equipment or method of exploration or operation and have access to and may copy any records required under the approved State Program. Division representatives may exercise these rights at reasonable times, without advance notice, upon presentation of appropriate credentials. No search warrant will be required, except that the State may provide for its use with respect to entry into a building.

120. **Enforcement Authority.** Nothing in the Federal Act or the State Program will be construed as eliminating any additional enforcement rights or procedures which are available under State law to the Division, but which are not specifically enumerated in Sections 40-10-20 and 40-10-22 of the Act.

130. Inspection Program.

131. The Division will conduct an average of at least one partial inspection per month of each active coal mining and reclamation operation under its jurisdiction, and will conduct a partial inspection of each inactive coal mining and reclamation operation under its jurisdiction as are necessary to ensure effective enforcement of the State Program. A partial inspection is an on-site or aerial review of a person's compliance with some of the permit conditions and requirements imposed under the State Program.

132. The Division will conduct an average of at least one complete inspection per calendar quarter of each active or inactive coal mining and reclamation operation under its jurisdiction. A complete inspection is an on-site review of a person's compliance with all permit conditions and requirements imposed under the State Program, within the entire area disturbed or affected by the coal mining and reclamation operation.

133. The Division will conduct inspections of coal explorations as are necessary to ensure compliance with the State Program.

134. Aerial Inspection.

134.100. Aerial inspections will be conducted in a manner which reasonably ensures the identification and documentation of conditions at each coal mining and reclamation operation inspected.

134.200. Any potential violation observed during an aerial inspection will be investigated on-site within three (3) days: provided, that any indication of a condition, practice or violation constituting cause for the issuance of a cessation order under section 40-10-22(1)(b) of the Act will be investigated on site immediately, and provided further, that an on-site investigation of a potential violation observed during an aerial inspection will not be considered to be an additional partial or complete inspection for the purposes of R645-400-131 and R645-400-132.

135. The inspections required under R645-400-131 through R645-400-134 will:

135.100. Be carried out on an irregular basis, so as to monitor compliance at all operations, including those which operate nights, weekends, or holidays;

135.200. Occur without prior notice to the permittee or any agent or employee of such permittee, except for necessary on-site meetings; and

135.300. Include the prompt filing of inspection reports adequate to enforce the requirements of the approved State Program.

136. For the purposes of R645-400 an inactive coal mining and reclamation operation is one for which:

136.100. The Division has secured from the permittee the written notice provided for under R645-301-515.320; or *circulate*

136.200. Reclamation Phase II as defined at R645-301-880.320 has been completed and the liability of the permittee has been reduced by the Division in accordance with the State Program.

140. Availability of Records.

141. The Division will make available to the Director of the Office, upon request, copies of all documents relating to applications for and approvals of existing, new, or revised coal exploration approvals or coal mining and reclamation operations permits and all documents relating to inspection and enforcement actions.

142. Copies of all records, reports, inspection materials, or information obtained by the Division will be made immediately available to the public in the area of mining until at least five years after expiration of the period during which the subject operation is active or is covered by any portion of a reclamation

without advance notice or a search warrant, upon presentation of appropriate credentials;

✓ 221.200. May, at reasonable times and without delay, have access to and copy any records, and inspect any monitoring equipment or method of operation required under the State Program or any condition of an exploration approval or permit imposed under the State Program; and

221.300. Will have a right to gather physical and photographic evidence to document conditions, practices or violations at the site.

222. No search warrant will be required with respect to any activity under R645-400-221 except that a search warrant may be required for entry into a building.

230. **Review of Adequacy and Completeness of Inspection.** Any person who is or may be adversely affected by coal mining and reclamation operations or coal exploration operations may notify the Director in writing of any alleged failure on the part of the Division to make adequate and complete or periodic inspections as provided in R645-400-130 or R645-400-210. The notification will contain information to demonstrate the belief that the person is or may be adversely affected including the basis for his or her belief that the Division has failed to conduct the required inspections. The Director will within 15 days of receipt of the notification, determine whether there is sufficient information to create a reasonable belief that R645-400-130 or R645-400-210 are not being complied with, and if not, will immediately order an inspection to remedy the noncompliance. The Director will, also furnish the complainant with a written statement of the reasons for such determination and the actions, if any, taken to remedy the noncompliance.

240. **Review of Decision Not to Inspect or Enforce.**

241. Any person who is or may be adversely affected by coal exploration or coal mining and reclamation operations may ask the Director to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for State inspection under R645-400-210. The request for review will be in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.

242. The Director will conduct the review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request. The person alleged to be in violation will also be given a copy of the results of the review, except that the name of the citizen will not be disclosed unless confidentiality has been waived or disclosure is required under Utah or federal law.

243. Informal review under this section will not affect any right to formal review or to a citizen's suit under the State Program.

R645-400-300. Provisions of State Enforcement.

310. Cessation Orders.

311. The Division will immediately order a cessation of coal mining and reclamation operations or of the relevant portion thereof, if it finds, on the basis of any Division inspection, any violation of the State Program, or any condition of a permit or an exploration approval under the State Program, which:

311.100. Creates an imminent danger to the health or safety of the public; or

311.200. Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

312. Coal mining and reclamation operations conducted by any person without a valid coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations.

313. If the cessation ordered under R645-400-311 will not completely abate the imminent danger or harm in the most expeditious manner physically possible, the Division will impose affirmative obligations on the person to whom it is issued to abate the violation. The order will specify the time by which abatement will be accomplished.

314. When a notice of violation has been issued under R645-400-320 and the permittee fails to abate the violation within the abatement period fixed or subsequently extended by the Division then the Division will immediately order a cessation of coal exploration or coal mining and reclamation operations or of the portion relevant to the violation. A cessation order issued under R645-400-314 will require the permittee to take all steps the Division deems necessary to abate the violations covered by the order in the most expeditious manner physically possible.

315. A cessation order issued under R645-400-311 or R645-400-314 will be in writing, signed by the authorized representative of the Division who issued it, and will set forth with reasonable specificity:

315.100. The nature of the violation;

315.200. The remedial action or affirmative obligation required, if any, including interim steps, if appropriate;

315.300. The time established for abatement, if appropriate, including the time for meeting any interim steps;

315.400. A reasonable description of the portion of the coal exploration or coal mining and reclamation operations to which it applies; and

315.500. The order will remain in effect until the violation has been abated or until vacated, modified or terminated in writing by the Division.

316. Reclamation operations and other activities intended to protect public health and safety and the environment will continue during the period of any order unless otherwise provided in the order.

317. The Division may modify, terminate or vacate a cessation order for good cause, and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the permittee.

318. The Division will terminate a cessation order by written notice to the permittee, when it is determined that all conditions, practices or violations listed in the order have been abated. Termination will not affect the right of the Board to assess civil penalties for those violations under R645-401.

Exhibit VIII

curities, Inc. v. Metz, supra. As to the convenience to witnesses, four potential witnesses are listed on behalf of the defendants that reside in Louisiana. GECC on the other hand has stated that Nancy K. Callahan, a resident of New York, is a potential witness. The listing of a greater number of witnesses by defendant, however, should not be determinative when it has not been shown that the defendant would be prejudiced by having to rely on deposition testimony. See *Kreisner v. Hilton Hotel Corp., supra*, at 178; *Y4 Design Ltd. v. Regensteiner Pub. Enterprises, supra*, at 1069-1070. This may well be a case for documentary summary judgment.

When viewed in terms of the interests of justice and judicial economy, retention of this action by this court is warranted. The Loan Agreement, Personal Guarantee, and the Corporate Guarantee all provide that New York law governs the controversy. Should the action be transferred to Louisiana, the District Court there would be bound to apply New York law, the law of the forum that plaintiff originally bargained for. The District Court sitting in New York is obviously more familiar with New York law. The argument that this action should be heard in Louisiana together with a claim for indemnification against the bankrupt, is overborne by the consents which sought to avoid just such a result.

Since this action is in its initial stages, it is conceivable that additional facts may develop with respect to the factors affecting a transfer. At this stage, the record fails to establish that the interests of justice require such a transfer. Leave is granted, however, to renew the motion which is denied at this time in the event that additional facts are presented.

IT IS SO ORDERED.

UGI CORPORATION and Ken Pollock, Inc. and Heavy Media, Inc., Plaintiffs,

v.

James G. WATT, Secretary U.S. Department of the Interior and James R. Harris, Director, Office of Surface Mining, Defendants.

Civ. No. 83-0926.

United States District Court, M.D. Pennsylvania.

Sept. 30, 1985.

Electric-generating companies challenged assessment of strip-mining fees. On cross motions for summary judgment, the District Court, Conaboy, J., held that: (1) companies were engaged in surface mining, notwithstanding that material they mined was by-product of former underground mining activity, and (2) companies would have to pay statutory interest on unpaid reclamation fees at rate set by Secretary of Interior.

Judgment for government.

1. Mines and Minerals ⇐92.6

Gleaning of combustible material from refuse banks that are composed of by-products of underground mining activity conducted long before enactment of Surface Mining Control and Reclamation Act is "surface coal mining operations" within meaning of that statute and requires payment of surface mining fee based on higher tonnage rate than that for underground mining operations. Surface Mining Control and Reclamation Act of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Mines and Minerals ⇐92.6

Companies found to have engaged in surface coal mining operations would be required to pay statutory interest on unpaid reclamation fees, notwithstanding that they had been diligent in prosecuting action



challenging assessment of fees on that basis and that status of their operation had not been entirely clear; companies should have paid fees that had been assessed and then proceeded with litigation. Surface Mining Control and Reclamation Act of 1977, § 402(e), 30 U.S.C.A. § 1232(e).

3. States ⇄18.9

State statutes which conflict with federal regulations that have been established to achieve task charged by Congress to federal agency must be subordinated to those regulations, absent showing that regulations are arbitrary or capricious.

4. Interest ⇄31

Companies required to pay interest under Surface Mining Control and Reclamation Act would be required to pay interest at rate set by Secretary of Interior; request to pay interest owed at rate legally recognized in Commonwealth of Pennsylvania amounted to regulatory challenge that could only be brought in United States District Court for District of Columbia, and federal regulation delineating interest rate was not arbitrary or capricious. Surface Mining Control and Reclamation Act of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.

E. Barclay Cale, Jr., Frank M. Thomas, Jr., Philadelphia, Pa., for plaintiffs.

James West, First Asst. U.S. Atty., Harrisburg, Pa., for defendants.

MEMORANDUM AND ORDER

CONABOY, District Judge.

I

This Court issued a "Memorandum and Order" in this case on June 29, 1984 which, we thought at the time, rendered a final decision in this case. U.G.I. Corporation, Ken Pollock, Inc., and Heavy Media, Inc.

1. 30 C.F.R. § 870.13 provides:

(a) Surface mining fees. The fee for anthracite, bituminous, and subbituminous coal, including reclaimed coal, is 35 cents per ton unless the value of such coal is less than \$3.50

(hereinafter collectively referred to as Plaintiffs) apparently thought so too and framed an appeal to the Third Circuit. The Third Circuit determined, however, that because our Order had not included an assessment as to how much Plaintiffs actually owe the Department of the Interior, there was not a final order in this case from which to appeal. The Third Circuit (per Judge Gibbons) stated:

Federal Rule of Civil Procedure 54(b) provides that "[w]hen more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." ... The rule provides, further, that in the absence of such a determination "any order or other form of decision, however designated, which adjudicates fewer than all the claims ... shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims...." (emphasis ours). See 747 F.2d 893, 894 (3 Cir.1984).

Taking their cue from the emphasized portion of the citation above, Plaintiffs have filed a motion for summary judgment to the effect that the combustible material with which they generate electricity is not produced via strip mining, but is better characterized as the product of underground mining conducted decades ago. If we find that Plaintiffs' position is correct, we would then direct that the material taken by Plaintiffs from four different Luzerne County refuse banks between the fourth quarter of 1977 and the present would be taxable at the rate of \$.15 per ton instead of \$.35 per ton.¹ We do not so find.

per ton, in which case the fee is 10 percent of the value.

(b) Underground mining fees. The fee for anthracite, bituminous, and subbituminous coal is 15 cents per ton unless the value of

The question of whether combustible material gleaned from refuse banks composed of by-products of underground mining activity conducted long before the Surface Mining Control and Reclamation Act (30 U.S.C. § 1201 *et seq.*) was enacted is taxable has been definitively addressed by the Third Circuit's decision in *U.S. v. Devil's Hole, Inc.*, 747 F.2d 895 (3 Cir.1984). *Devil's Hole*, supra, leaves little room for argument as to whether anyone engaged in removing combustible material² from refuse banks, culm piles, or settlement pits is engaged in strip mining. The *Devil's Hole* Court stated:

... Title VII of the Act defines "surface coal mining operations" to include "excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, ..." 30 U.S.C. § 1291(28)(B). There is no doubt that appellant's activities fall within this definition. See 747 F.2d 895, 898 (3 Cir. 1984).

Similarly, in this case there is no doubt that Plaintiffs' activities can only be described as "surface coal mining operations" since the materials have been removed from the aforementioned Luzerne County sites which Plaintiffs themselves characterize as "silt and culm banks".³

[1] The Plaintiffs base their contention on the very recent Third Circuit decision in *U.S.A. v. Brook Contracting Corp.*, 759 F.2d 320 (3 Cir.1985). *Brook Contracting*, supra, does stand, as Plaintiffs allege, for the proposition that § 402 of the SMCRA should not be given an expansive interpretation. We do not see, however, from our reading of *Brook Contracting* that the

such coal is less than \$1.50 per ton, in which case the fee is 10 percent of the value.

2. We say "combustible material" rather than coal since the Surface Mining Control and Reclamation Act does not include a definition of coal.
3. See Docket Item 35 at page 1.
4. This rate had been assessed by the Office of Surface Mining in a document (Docket Item 33) filed with this Court on April 22, 1985. In that document OSM relied on Plaintiffs' own ton-

Third Circuit has elected to alter the edict announced in *Devil's Hole* a scant seven months earlier. *Brook Contracting* states, in essence, that when calculations are made as to the number of tons that are taxable by the Department of the Interior pursuant to 30 U.S.C. § 1232(a) the Department may tax *only* the tonnage of combustible material produced. This Court fails to see how this determination affects the utility of *Devil's Hole*, which clearly affirmed the right of the Department to tax combustible material removed from refuse banks as a product of a *surface mining operation*. Since there is no allegation in the case *sub judice* that the Department is attempting to tax tonnages of non-combustible material, we find that *Brook Contracting* is inapposite and that the instant case is nearly identical factually to *Devil's Hole* and, hence, controlled by its rationale. We find, as we did in our earlier opinion, that Plaintiffs are conducting surface mining operations at the Luzerne County sites and, therefore, must pay the \$.85 per ton duty prescribed by the SMCRA.⁴

II

The Plaintiffs also seek judgment that they should not be assessed interest on any unpaid taxes this Court finds them to owe to the Department of the Interior. They cite *Thomas v. Duralite Co., Inc.*, 524 F.2d 577, 589 (3d Cir.1975), for the proposition that "[I]nterest is not to be recovered merely as compensation for money withheld but, rather, in response to considerations of fairness. It should not be imposed when its exaction would be inequitable...."⁵ Plaintiffs then note that an-

nage reports to arrive at a calculation that Plaintiffs owed \$486,164.00 in reclamation fees and interest if that amount was paid on or before April 30, 1985. It was made clear that if this amount was not paid additional interest would accrue. 30 U.S.C. §§ 1232(a) and (e) grant power to the Secretary of Interior to collect said fees and interest.

5. *Id.* at page 13.

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other Third Circuit decision, *Feather v. United Mine Workers of America*, 711 F.2d 530 (3 Cir.1983), delineates a four part test to determine whether an award of pre-judgment interest is appropriate. That test inquires:

- (1) Whether the claimant has been less than diligent in prosecuting the action;
- (2) Whether the defendant has been unjustly enriched;
- (3) Whether an award would be compensatory; and
- (4) Whether countervailing equitable considerations militate against a surcharge.

Feather, supra, at 540.

Applying this test to the instant case, we find that: (a) the claimant has been diligent in prosecuting this action since Plaintiffs' action for a declaratory judgment as to whether culm bank refuse is to be considered "coal" antedated Defendants' action to collect reclamation fees; (b) the Defendants (Plaintiffs in the garbled procedural posture of this case since consolidation) have not been unjustly enriched because, had they done as they were authorized to do and simply paid the fees and passed the cost along to their customers in the form of a fuel adjustment clause, they would have been in the same economic situation they now find themselves; (c) any award here is not compensatory in character since there is no damages question before this Court but, rather, a question as to the validity of a tax; (d) countervailing equitable considerations do militate against the surcharge here in the sense that it was not made utterly clear that Plaintiffs' operations constituted a surface mining operation until *Devil's Hole* was decided in 1982.⁶

[2] These findings notwithstanding, we cannot agree that the Plaintiffs should be discharged from their duty to pay statutory interest. As the Defendants have not-

ed, the SMCRA has, since its enactment in 1977, included language designating that "[A]ny portion of the reclamation fee not properly or promptly paid pursuant to this section shall be recoverable, *with statutory interest*, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts." (emphasis ours). See 30 U.S.C. § 1232(e). Defendants argue further that, although the statutory rate has changed as new regulations were promulgated by the Secretary of Interior and published in the Federal Register, said changes in no way exempt Plaintiffs from their duty to pay statutory interest on any reclamation fees not promptly remitted. Defendants cite *Federal Crop Insurance v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947), for the proposition that:

Just as everyone is charged with knowledge of the Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents ... regardless of actual knowledge of what is in the Regulations or of the hardships resulting from innocent ignorance.

We think *Federal Crop Insurance*, supra, to be good law today and conclude that Plaintiffs herein are charged with knowledge of Congressional mandates as expressed in the Federal Register and the Code of Federal Regulations.

We think, too, that Plaintiffs unreasonably withheld monies which should have been paid to the Department of the Interior pending the outcome of this litigation. We think the government is correct in its contention that this situation is much more analagous to a tax claim than to an action to compel payment of an unliquidated debt.⁷ Therefore, the appropriate course of conduct for the Plaintiffs to follow here would have been to pay the reclamation fees they had been assessed and then to

ing" before the *Devil's Hole* decision. See Docket Item 35 at page 15.

6. Plaintiffs' brief in support of its motion for summary judgment correctly points out that there was conflicting case law as to whether operations similar to the Luzerne County operations we now consider constituted "surface min-

7. See Docket Item 43 at page 13.

proceed with the litigation. This would have insulated Plaintiffs from the accrual of interest.

It would hardly seem consistent with the overall purpose of the SMCRA to allow Plaintiffs to now pay only the reclamation fees they were assessed after withholding these sums since June of 1983. The Defendants have referred this Court to a recent decision of the Fourth Circuit, *United States v. S.S. (Joe) Burford, Inc.*, 761 F.2d 173 (4 Cir.1985), which contains the following rationale.⁸

... refusal to award prejudgment interest on delinquent reclamation fees jeopardizes the Congressional program to revitalize abandoned mine land by restricting the Secretary's ability to assure timely collection of reclamation fees. The regulation in question, 30 C.F.R. § 870.15(d), was duly promulgated and has the force of law.

We find the 4th Circuit's view logical and persuasive and we think we would be sending an inappropriate message to other concerns similarly situated to the instant Plaintiffs if we allow them to avoid payment of statutory interest in a situation where the Department has been deprived of money it needs to fulfill the purpose Congress intended—the revitalization of abandoned mine land—for well over two years.

In sum, we find that no equitable argument, however persuasive, can prevail over an argument founded upon a federal statute. That is the situation in this case and this Court would be derelict in its duty were it to ignore the provisions of said statute, Plaintiffs' obligation to comply therewith, and the deleterious effect which granting the relief Plaintiffs seek would likely have on the Secretary's ability to collect these reclamation fees. The Plaintiffs clearly must be made to pay statutory interest for these reasons.

III

[3, 4] Finally, Plaintiffs' contend that, if they are found to owe the interest on these

8. *Id.* at page 12.

fees, they should pay interest at the legal rate recognized in the Commonwealth of Pennsylvania. Here, again, we must disagree. The Defendants' argument to the effect that Plaintiffs' request to pay any interest owed at the Pennsylvania rate is actually a regulatory challenge is well-founded since there are federal regulations which delineate what the interest rate should be. See 30 C.F.R. § 870.15(c). This interest rate has been indexed to a rate established by the Department of the Treasury since April 1, 1983. Thus, we have a question as to whether the federal regulations preempt Pennsylvania's established statutory interest rate. In other words, the Plaintiffs are challenging whether the Secretary may promulgate a regulation which establishes a higher interest rate for past due reclamation fees than Pennsylvania provides. Such regulatory rule-making challenges may only be brought in the United States District Court for the District of Columbia. See *Drummond Coal Company v. Watt*, 735 F.2d 469, 472 (11 Cir.1984). Thus, we do not have jurisdiction over such a rule-making dispute. Moreover, we think it an elementary concept that when a federal agency charged by the United States Congress with accomplishing a task perceived as a public policy—here the revitalization of land made useless by the ravages of the coal mining industry—establishes regulations to achieve that task, any state statutes which conflict with said regulation must be subordinated to it absent a showing that it is arbitrary and capricious. *In re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1308 (D.C.D.C.1978). Plaintiffs have advanced no argument which would lead this Court to believe that the interest rate established in 30 C.F.R. § 870.15(c) is an arbitrary or capricious exercise of the power Congress has vested in the Department of Interior. To the contrary, the provision for interest penalties in excess of the somewhat antiquated (in view of commercial interest rates of the last decade) 6% utilized by Pennsylvania seems

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a very rational tool for forcing compliance with the SMCRA. Thus, we find that Plaintiffs owe the Department of Interior interest at the rates set by the Secretary. An appropriate *Order* follows.

4. In accordance with calculations provided by the Office of Surface Mining (See attached assessment of August 27, 1985), the pro rata shares of this obligation are:

	Fees Due	Interest to 9/30/85	Total
Anthracite Loading	\$ 43,967	\$22,758	\$66,725.00
Pollock, Ken Inc.	178,830	96,055	274,885.00
Pollock, Ken	23,648	12,667	36,315.00
Heavy Media, Inc.	74,465	48,250	122,715.00
Pollock, Ken	1,691	1,810	3,001.00

ORDER

AND NOW, this 30th day of September, 1985, IT IS ORDERED as follows:

1. Plaintiffs' motion for summary judgment herein is denied.
2. Defendants' cross-motion for summary judgment is granted.
3. Plaintiffs are directed to pay to the Office of Surface Mining, U.S. Department of the Interior the sum of \$503,641.00.

5. Each party shall bear its own costs in this action.

6. Judgment in Defendants' favor is hereby entered and the Clerk of Courts is directed to close this case.

**United States Department of the Interior
OFFICE OF SURFACE MINING**

Penn Traffic Bldg., Room 360
319 Washington Street
Johnstown, PA 15901
August 27, 1985

MEMORANDUM

TO: Beverly Perry, Attorney
OSM Solicitors, DC
/s/ Joseph F. Geissinger

THROUGH: Joseph F. Geissinger, Area Office Manager
Johnstown Area Office
/s/ Isaac E. Isaacson

FROM: Isaac E. Isaacson, Auditor
Johnstown Area Office

SUBJECT: Reclamation Fees and Interest Due from Anthracite Loading; Pollock, Ken; Pollock Ken, Inc.; and Heavy Media, Inc.

Per your request, we have performed a review to determine Reclamation Fees and Interest due OSM for the period 10/1/77 thru 6/30/85. Interest was computed through 9/85 because of trial date of September 1985.

Our source in our review was the Computer Sums Reported from our Denver Finance Center dated 8/26/85. Please note we have audited the above named companies for the period 10/1/77 thru 12/31/84.

The company totals are as follows, with quarter breakdown attached;

Company	ID#	Tons	Fees Due	Int. 9/85	Total Due
A) Anthracite Loading	3601698-02	125,621	\$ 43,967	\$ 22,758	\$ 66,725
B) Pollock Ken, Inc.	3601698-01	510,943	178,830	96,055	274,885
C) Pollock, Ken	3607124-01	67,564	23,648	12,667	36,315
D) Heavy Media, Inc.	3605094-01	212,756	74,465	48,250	122,715
E) Pollock, Ken	3606366-01	4,832	1,691	1,810	3,001
TOTAL		921,716	\$322,601	\$181,040	\$503,641

Please phone if you have any questions, FTS 723-9223.

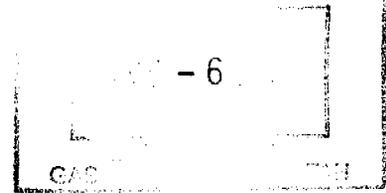
EXHIBIT NO. VIII

UNITED STATES FUEL COMPANY



P.O. BOX 887
PRICE, UTAH 84501

(801) 637-2252
FAX (801) 343-2344



To Whom It May Concern:

In the early to mid 1980's, United States Fuel Company contested their obligation to pay \$0.35 per ton (OSM Fees) for coal fines sold from U. S. Fuel's slurry ponds. U. S. Fuel lost that contest. Since that time U. S. Fuel has paid the required \$0.35 per ton for the coal fines as they were sold. Furthermore, I have been told by reliable sources that this legal contest was heard in the Supreme Court, however I have not found that documentation as of yet.

Michael P. Watson
President
United States Fuel Company

Exhibit VIII

curities, Inc. v. Metz, supra. As to the convenience to witnesses, four potential witnesses are listed on behalf of the defendants that reside in Louisiana. GECC on the other hand has stated that Nancy K. Callahan, a resident of New York, is a potential witness. The listing of a greater number of witnesses by defendant, however, should not be determinative when it has not been shown that the defendant would be prejudiced by having to rely on deposition testimony. See *Kreisner v. Hilton Hotel Corp., supra*, at 178; *Y4 Design Ltd. v. Regensteiner Pub. Enterprises, supra*, at 1069-1070. This may well be a case for documentary summary judgment.

When viewed in terms of the interests of justice and judicial economy, retention of this action by this court is warranted. The Loan Agreement, Personal Guarantee, and the Corporate Guarantee all provide that New York law governs the controversy. Should the action be transferred to Louisiana, the District Court there would be bound to apply New York law, the law of the forum that plaintiff originally bargained for. The District Court sitting in New York is obviously more familiar with New York law. The argument that this action should be heard in Louisiana together with a claim for indemnification against the bankrupt, is overborne by the consents which sought to avoid just such a result.

Since this action is in its initial stages, it is conceivable that additional facts may develop with respect to the factors affecting a transfer. At this stage, the record fails to establish that the interests of justice require such a transfer. Leave is granted, however, to renew the motion which is denied at this time in the event that additional facts are presented.

IT IS SO ORDERED.

UGI CORPORATION and Ken Pollock, Inc. and Heavy Media, Inc., Plaintiffs,

v.

James G. WATT, Secretary U.S. Department of the Interior and James R. Harris, Director, Office of Surface Mining, Defendants.

Civ. No. 83-0926.

United States District Court,
M.D. Pennsylvania.

Sept. 30, 1985.

Electric-generating companies challenged assessment of strip-mining fees. On cross motions for summary judgment, the District Court, Conaboy, J., held that: (1) companies were engaged in surface mining, notwithstanding that material they mined was by-product of former underground mining activity, and (2) companies would have to pay statutory interest on unpaid reclamation fees at rate set by Secretary of Interior.

Judgment for government.

1. Mines and Minerals ¶92.6

Gleaning of combustible material from refuse banks that are composed of by-products of underground mining activity conducted long before enactment of Surface Mining Control and Reclamation Act is "surface coal mining operations" within meaning of that statute and requires payment of surface mining fee based on higher tonnage rate than that for underground mining operations. Surface Mining Control and Reclamation Act of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Mines and Minerals ¶92.6

Companies found to have engaged in surface coal mining operations would be required to pay statutory interest of unpaid reclamation fees, notwithstanding that they had been diligent in prosecuting action



challenging assessment of fees on that basis and that status of their operation had not been entirely clear; companies should have paid fees that had been assessed and then proceeded with litigation. Surface Mining Control and Reclamation Act of 1977, § 402(e), 30 U.S.C.A. § 1232(e).

3. States ⇐18.9

State statutes which conflict with federal regulations that have been established to achieve task charged by Congress to federal agency must be subordinated to those regulations, absent showing that regulations are arbitrary or capricious.

4. Interest ⇐31

Companies required to pay interest under Surface Mining Control and Reclamation Act would be required to pay interest at rate set by Secretary of Interior; request to pay interest owed at rate legally recognized in Commonwealth of Pennsylvania amounted to regulatory challenge that could only be brought in United States District Court for District of Columbia, and federal regulation delineating interest rate was not arbitrary or capricious. Surface Mining Control and Reclamation Act of 1977, § 101 et seq., 30 U.S.C.A. § 1201 et seq.

E. Barclay Cale, Jr., Frank M. Thomas, Jr., Philadelphia, Pa., for plaintiffs.

James West, First Asst. U.S. Atty., Harrisburg, Pa., for defendants.

MEMORANDUM AND ORDER

CONABOY, District Judge.

I

This Court issued a "Memorandum and Order" in this case on June 29, 1984 which, we thought at the time, rendered a final decision in this case. U.G.I. Corporation, Ken Pollock, Inc., and Heavy Media, Inc.

1. 30 C.F.R. § 870.13 provides:

(a) Surface mining fees. The fee for anthracite, bituminous, and subbituminous coal, including reclaimed coal, is 35 cents per ton unless the value of such coal is less than \$3.50

(hereinafter collectively referred to as Plaintiffs) apparently thought so too and framed an appeal to the Third Circuit. The Third Circuit determined, however, that because our Order had not included an assessment as to how much Plaintiffs actually owe the Department of the Interior, there was not a final order in this case from which to appeal. The Third Circuit (per Judge Gibbons) stated:

Federal Rule of Civil Procedure 54(b) provides that "[w]hen more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." ... The rule provides, further, that in the absence of such a determination "any order or other form of decision, however designated, which adjudicates fewer than all the claims ... shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims...." (emphasis ours). See 747 F.2d 893, 894 (3 Cir.1984).

Taking their cue from the emphasized portion of the citation above, Plaintiffs have filed a motion for summary judgment to the effect that the combustible material with which they generate electricity is not produced via strip mining, but is better characterized as the product of underground mining conducted decades ago. If we find that Plaintiffs' position is correct, we would then direct that the material taken by Plaintiffs from four different Luzerne County refuse banks between the fourth quarter of 1977 and the present would be taxable at the rate of \$.15 per ton instead of \$.35 per ton.¹ We do not so find.

per ton, in which case the fee is 10 percent of the value.

(b) Underground mining fees. The fee for anthracite, bituminous, and subbituminous coal is 15 cents per ton unless the value of

The question of whether combustible material gleaned from refuse banks composed of by-products of underground mining activity conducted long before the Surface Mining Control and Reclamation Act (30 U.S.C. § 1201 *et seq.*) was enacted is taxable has been definitively addressed by the Third Circuit's decision in *U.S. v. Devil's Hole, Inc.*, 747 F.2d 895 (3 Cir.1984). *Devil's Hole*, *supra*, leaves little room for argument as to whether anyone engaged in removing combustible material² from refuse banks, culm piles, or settlement pits is engaged in strip mining. The *Devil's Hole* Court stated:

... Title VII of the Act defines "surface coal mining operations" to include "excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, ..." 30 U.S.C. § 1291(28)(B). There is no doubt that appellant's activities fall within this definition. See 747 F.2d 895, 898 (3 Cir. 1984).

Similarly, in this case there is no doubt that Plaintiffs' activities can only be described as "surface coal mining operations" since the materials have been removed from the aforementioned Luzerne County sites which Plaintiffs themselves characterize as "silt and culm banks".³

[1] The Plaintiffs base their contention on the very recent Third Circuit decision in *U.S.A. v. Brook Contracting Corp.*, 759 F.2d 320 (3 Cir.1985). *Brook Contracting*, *supra*, does stand, as Plaintiffs allege, for the proposition that § 402 of the SMCRA should not be given an expansive interpretation. We do not see, however, from our reading of *Brook Contracting* that the

such coal is less than \$1.50 per ton, in which case the fee is 10 percent of the value.

2. We say "combustible material" rather than coal since the Surface Mining Control and Reclamation Act does not include a definition of coal.

3. See Docket Item 35 at page 1.

4. This rate had been assessed by the Office of Surface Mining in a document (Docket Item 33) filed with this Court on April 22, 1985. In that document OSM relied on Plaintiffs' own ton-

Third Circuit has elected to alter the edict announced in *Devil's Hole* a scant seven months earlier. *Brook Contracting* states, in essence, that when calculations are made as to the number of tons that are taxable by the Department of the Interior pursuant to 30 U.S.C. § 1232(a) the Department may tax *only* the tonnage of combustible material produced. This Court fails to see how this determination affects the utility of *Devil's Hole*, which clearly affirmed the right of the Department to tax combustible material removed from refuse banks as a product of a *surface mining operation*. Since there is no allegation in the case *sub judice* that the Department is attempting to tax tonnages of non-combustible material, we find that *Brook Contracting* is inapposite and that the instant case is nearly identical factually to *Devil's Hole* and, hence, controlled by its rationale. We find, as we did in our earlier opinion, that Plaintiffs are conducting surface mining operations at the Luzerne County sites and, therefore, must pay the \$.35 per ton duty prescribed by the SMCRA.⁴

II

The Plaintiffs also seek judgment that they should not be assessed interest on any unpaid taxes this Court finds them to owe to the Department of the Interior. They cite *Thomas v. Duralite Co., Inc.*, 524 F.2d 577, 589 (3d Cir.1975), for the proposition that "[I]nterest is not to be recovered merely as compensation for money withheld but, rather, in response to considerations of fairness. It should not be imposed when its exaction would be inequitable...."⁵ Plaintiffs then note that an-

nage reports to arrive at a calculation that Plaintiffs owed \$486,164.00 in reclamation fees and interest if that amount was paid on or before April 30, 1985. It was made clear that if this amount was not paid additional interest would accrue. 30 U.S.C. §§ 1232(a) and (e) grant power to the Secretary of Interior to collect said fees and interest.

5. *Id.* at page 13.

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other Third Circuit decision, *Feather v. United Mine Workers of America*, 711 F.2d 530 (3 Cir.1983), delineates a four part test to determine whether an award of pre-judgment interest is appropriate. That test inquires:

- (1) Whether the claimant has been less than diligent in prosecuting the action;
- (2) Whether the defendant has been unjustly enriched;
- (3) Whether an award would be compensatory; and
- (4) Whether countervailing equitable considerations militate against a surcharge.

Feather, supra, at 540.

Applying this test to the instant case, we find that: (a) the claimant has been diligent in prosecuting this action since Plaintiffs' action for a declaratory judgment as to whether culm bank refuse is to be considered "coal" antedated Defendants' action to collect reclamation fees; (b) the Defendants (Plaintiffs in the garbled procedural posture of this case since consolidation) have not been unjustly enriched because, had they done as they were authorized to do and simply paid the fees and passed the cost along to their customers in the form of a fuel adjustment clause, they would have been in the same economic situation they now find themselves; (c) any award here is not compensatory in character since there is no damages question before this Court but, rather, a question as to the validity of a tax; (d) countervailing equitable considerations do militate against the surcharge here in the sense that it was not made utterly clear that Plaintiffs' operations constituted a surface mining operation until *Devil's Hole* was decided in 1982.⁶

[2] These findings notwithstanding, we cannot agree that the Plaintiffs should be discharged from their duty to pay statutory interest. As the Defendants have not-

ed, the SMCRA has, since its enactment in 1977, included language designating that "[A]ny portion of the reclamation fee not properly or promptly paid pursuant to this section shall be recoverable, *with statutory interest*, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts." (emphasis ours). See 30 U.S.C. § 1232(e). Defendants argue further that, although the statutory rate has changed as new regulations were promulgated by the Secretary of Interior and published in the Federal Register, said changes in no way exempt Plaintiffs from their duty to pay statutory interest on any reclamation fees not promptly remitted. Defendants cite *Federal Crop Insurance v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947), for the proposition that:

Just as everyone is charged with knowledge of the Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents ... regardless of actual knowledge of what is in the Regulations or of the hardships resulting from innocent ignorance.

We think *Federal Crop Insurance*, supra, to be good law today and conclude that Plaintiffs herein are charged with knowledge of Congressional mandates as expressed in the Federal Register and the Code of Federal Regulations.

We think, too, that Plaintiffs unreasonably withheld monies which should have been paid to the Department of the Interior pending the outcome of this litigation. We think the government is correct in its contention that this situation is much more analagous to a tax claim than to an action to compel payment of an unliquidated debt.⁷ Therefore, the appropriate course of conduct for the Plaintiffs to follow here would have been to pay the reclamation fees they had been assessed and then to

ing" before the *Devil's Hole* decision. See Docket Item 35 at page 15.

6. Plaintiffs' brief in support of its motion for summary judgment correctly points out that there was conflicting case law as to whether operations similar to the Luzerne County operations we now consider constituted "surface min-

7. See Docket Item 43 at page 13.

proceed with the litigation. This would have insulated Plaintiffs from the accrual of interest.

It would hardly seem consistent with the overall purpose of the SMCRA to allow Plaintiffs to now pay only the reclamation fees they were assessed after withholding these sums since June of 1983. The Defendants have referred this Court to a recent decision of the Fourth Circuit, *United States v. S.S. (Joe) Burford, Inc.*, 761 F.2d 173 (4 Cir.1985), which contains the following rationale.⁸

... refusal to award prejudgment interest on delinquent reclamation fees jeopardizes the Congressional program to revitalize abandoned mine land by restricting the Secretary's ability to assure timely collection of reclamation fees. The regulation in question, 30 C.F.R. § 870.15(d), was duly promulgated and has the force of law.

We find the 4th Circuit's view logical and persuasive and we think we would be sending an inappropriate message to other concerns similarly situated to the instant Plaintiffs if we allow them to avoid payment of statutory interest in a situation where the Department has been deprived of money it needs to fulfill the purpose Congress intended—the revitalization of abandoned mine land—for well over two years.

In sum, we find that no equitable argument, however persuasive, can prevail over an argument founded upon a federal statute. That is the situation in this case and this Court would be derelict in its duty were it to ignore the provisions of said statute, Plaintiffs' obligation to comply therewith, and the deleterious effect which granting the relief Plaintiffs seek would likely have on the Secretary's ability to collect these reclamation fees. The Plaintiffs clearly must be made to pay statutory interest for these reasons.

III

[3, 4] Finally, Plaintiffs' contend that, if they are found to owe the interest on these

fees, they should pay interest at the legal rate recognized in the Commonwealth of Pennsylvania. Here, again, we must disagree. The Defendants' argument to the effect that Plaintiffs' request to pay any interest owed at the Pennsylvania rate is actually a regulatory challenge is well-founded since there are federal regulations which delineate what the interest rate should be. See 30 C.F.R. § 870.15(c). This interest rate has been indexed to a rate established by the Department of the Treasury since April 1, 1983. Thus, we have a question as to whether the federal regulations preempt Pennsylvania's established statutory interest rate. In other words, the Plaintiffs are challenging whether the Secretary may promulgate a regulation which establishes a higher interest rate for past due reclamation fees than Pennsylvania provides. Such regulatory rule-making challenges may only be brought in the United States District Court for the District of Columbia. See *Drummond Coal Company v. Watt*, 735 F.2d 469, 472 (11 Cir.1984). Thus, we do not have jurisdiction over such a rule-making dispute. Moreover, we think it an elementary concept that when a federal agency charged by the United States Congress with accomplishing a task perceived as a public policy—here the revitalization of land made useless by the ravages of the coal mining industry—establishes regulations to achieve that task, any state statutes which conflict with said regulation must be subordinated to it absent a showing that it is arbitrary and capricious. *In re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1308 (D.C.D.C.1978). Plaintiffs have advanced no argument which would lead this Court to believe that the interest rate established in 30 C.F.R. § 870.15(c) is an arbitrary or capricious exercise of the power Congress has vested in the Department of Interior. To the contrary, the provision for interest penalties in excess of the somewhat antiquated (in view of commercial interest rates of the last decade) 6% utilized by Pennsylvania seems

8. *Id.* at page 12.

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a very rational tool for forcing compliance with the SMCRA. Thus, we find that Plaintiffs owe the Department of Interior interest at the rates set by the Secretary. An appropriate *Order* follows.

4. In accordance with calculations provided by the Office of Surface Mining (See attached assessment of August 27, 1985), the pro rata shares of this obligation are:

	Fees Due	Interest to 9/30/85	Total
Anthracite Loading	\$ 43,967	\$22,758	\$66,725.00
Pollock, Ken Inc.	178,830	96,055	274,885.00
Pollock, Ken	23,648	12,667	36,315.00
Heavy Media, Inc.	74,465	48,250	122,715.00
Pollock, Ken	1,691	1,310	3,001.00

ORDER

AND NOW, this 30th day of September, 1985, IT IS ORDERED as follows:

1. Plaintiffs' motion for summary judgment herein is denied.
2. Defendants' cross-motion for summary judgment is granted.
3. Plaintiffs are directed to pay to the Office of Surface Mining, U.S. Department of the Interior the sum of \$503,641.00.

5. Each party shall bear its own costs in this action.

6. Judgment in Defendants' favor is hereby entered and the Clerk of Courts is directed to close this case.

**United States Department of the Interior
OFFICE OF SURFACE MINING**

Penn Traffic Bldg., Room 360
319 Washington Street
Johnstown, PA 15901
August 27, 1985

MEMORANDUM

TO: Beverly Perry, Attorney
OSM Solicitors, DC
/s/ Joseph F. Geissinger

THROUGH: Joseph F. Geissinger, Area Office Manager
Johnstown Area Office
/s/ Isaac E. Isaacson

FROM: Isaac E. Isaacson, Auditor
Johnstown Area Office

SUBJECT: Reclamation Fees and Interest Due from Anthracite Loading; Pollock, Ken; Pollock Ken, Inc.; and Heavy Media, Inc.

Per your request, we have performed a review to determine Reclamation Fees and Interest due OSM for the period 10/1/77 thru 6/30/85. Interest was computed through 9/85 because of trial date of September 1985.

Our source in our review was the Computer Sums Reported from our Denver Finance Center dated 8/26/85. Please note we have audited the above named companies for the period 10/1/77 thru 12/31/84.

The company totals are as follows, with quarter breakdown attached;

Company	ID#	Tons	Fees Due	Int. 9/85	Total Due
A) Anthracite Loading	3601698-02	125,621	\$ 43,967	\$ 22,758	\$ 66,725
B) Pollock Ken, Inc.	3601698-01	510,943	178,830	96,055	274,885
C) Pollock, Ken	3607124-01	67,564	23,648	12,667	36,315
D) Heavy Media, Inc.	3605094-01	212,756	74,465	48,250	122,715
E) Pollock, Ken	3606366-01	4,832	1,691	1,310	3,001
TOTAL		921,716	\$322,601	\$181,040	\$503,641

Please phone if you have any questions, FTS 723-9223.

EXHIBIT NO VII

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

February 24, 1994

LOUIS H. CALLISTER
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L. S. McCULLOUGH, JR.
FRED W. FINLINSON
DOROTHY C. PLESHE
JOHN A. BECKSTEAD
JEFFREY N. CLAYTON
JAMES R. HOLBROOK
CHARLES M. BENNETT
W. WALDAN LLOYD
JAMES R. BLACK
H. RUSSELL HETTINGER
JEFFREY L. SHIELDS
STEVEN E. TYLER
CRAIG F. McCULLOUGH
GARY S. HANSEN

RANDALL D. BENSON
R. WILLIS ORTON
GEORGE E. HARRIS, JR.
T. RICHARD DAVIS
DAMON E. COOMBS
PAUL R. INCE
BRIAN W. BURNETT
ANDRÉS DIAZ
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JOHN H. REES
MARK L. CALLISTER
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 R. STATEN

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

TO CALL WRITER DIRECT

MAR 15 1994

VIA FEDERAL EXPRESS

John Sender
Office of Surface Mining
1300 New Circle Road N.E.
Suite 102
Lexington, Kentucky 40505

FEB 25 1994

Re: Sunnyside Cogeneration Associates ("SCA") - Request for
Exemption from Abandoned Mine Land ("AML") Reclamation Fees

Dear Mr. Sender:

Pursuant to our telephone conversation, enclosed please find the
following documents:

1. Bankruptcy Order approving Purchase and Sale Agreement for
Kaiser Power Corporation assets pursuant to Section 363 dated
December 23, 1987.
2. Purchase and Sale Agreement dated August 5, 1987.
3. Amendment to Purchase and Sale Agreement dated October 15,
1987.
4. Deed, Assignment and Bill of Sale dated December 28, 1987.
5. Assignment and Assumption Agreement dated March 28, 1991 by
and between Sunnyside Fuel Corporation and Sunnyside
Cogeneration Associates.

As we discussed, the Office of Surface Mining ("OSM") would like
to review some additional historical information regarding SCA's refuse
pile located in Sunnyside, Utah ("Refuse Pile") which is the focus of
the request that the SCA be exempt from paying AML fees.

The Sunnyside Mine has been in operation since the early 1900's.
Approximately fifty years ago, a wash plant was added to the Sunnyside

Mine. Coal mine waste from the wash plant has been deposited on the Refuse Pile since that time.

In discussions with the local people, many of them informed us that various discussions had taken place over the years about utilizing the Refuse Pile. Many of the local residents never thought anything productive would happen with the Refuse Pile and that it would remain there as a source of problems.

Subsequent to the passage of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Kaiser Coal, who owned the Sunnyside Mine and the Refuse Pile, began to investigate the possibility of consuming the Refuse Pile as an alternative to disposal by utilizing it in an electric power generation facility. PURPA requires that a power generating facility be a qualifying facility ("QF"), before it can sell power to a local public utility at that utility's avoided cost.

In the early 1980's, the Public Service Commission of Utah ("PSC") began the process of evaluating the appropriate avoided cost that Utah Power & Light ("UP&L") should pay to any QFs in its territory. Kaiser Coal participated in these hearings through a subsidiary Kaiser Power. Eventually, an avoided cost amount was established. In 1985, Kaiser Power approached UP&L and requested that Kaiser Power through its subsidiaries Kaiser Systems, Inc. and Kaiser Power of Sunnyside, Inc. in a joint venture called SCA be allowed to sign a contract at the avoided cost price for a project. In January, 1987, after lengthy legal proceedings and hearings, SCA signed a Power Purchase Agreement with UP&L that would allow the use of the Refuse Pile in a QF electric generating facility.

After the Power Purchase Agreement was signed in 1987, Kaiser Steel Corporation, the parent company of Kaiser Coal, took out bankruptcy. In the bankruptcy process, subsidiaries and assets of subsidiaries were sold off and liquidated. At this point in time, Environmental Power Corporation ("EPC") became interested in purchasing the SCA project. The real value to the project was the signed Power Purchase Agreement with UP&L and several million dollar of grandfathered investment tax credits specifically associated with the SCA project. At the time, the project also had certain environmental permits and authorizations.

In December 1987, the Bankruptcy Court approved the sale of the SCA project to EPC including the Power Purchase Agreement, permits and fee title to the land and the coal mine waste associated with the Refuse Pile. In 1987, the Bankruptcy Trustee offered EPC other coal mine waste piles in the area, associated with the Kaiser bankruptcy, at no cost. EPC declined to take any additional piles, viewing these as

John Sender
February 24, 1994
Page 3

environmental liabilities as opposed to assets. The Bankruptcy Trustee sold the SCA project which included the Power Purchase Agreement, etc. as a combined package.

After EPC purchased the SCA project, an unrelated entity purchased the Sunnyside Mine and is operating it today.

After purchasing the rights to the SCA project in December, 1987, EPC made several attempts to finance the construction of the project. Finally in April, 1991, \$109,500,000.00 worth of bonds were issued to finance the construction of the power plant. Equity participation was also obtained. These bonds were Solid Waste Disposal Refunding Bonds which qualified under federal tax law because SCA is eliminating the Refuse Pile which is a waste.

The Federal Energy Regulatory Commission ("FERC") found that the coal refuse met FERC's two part test for a "waste" material and recertified SCA as a small power production facility utilizing a waste material.

Construction on the SCA project began in the summer of 1991 and the plant began to produce electricity in 1993. The SCA plant is still undergoing some adjustments and final fine tuning. At full production, it is anticipated that the SCA project will utilize approximately 400,000 tons of coal mine waste on an annual basis.

At the 1991 closing, the Refuse Pile was transferred into the SCA name.

You will note in the Purchase and Sell Agreement that EPC paid approximately \$1,000,000.00 at 1987 closing, in addition to assuming some liabilities. As I discussed earlier, the real value to the project was the Power Purchase Agreement with UP&L, which had been signed after a great deal of expense. The cost to begin the process of negotiating a power purchase agreement from the beginning and starting the permit process new would exceed the purchase price of the SCA project. Also during that time frame, avoided costs declined significantly. The value to SCA project of having a signed Power Purchase Agreement at a higher avoided cost is significant. As a point of reference, UP&L maintains that current avoided costs are approximately one-half of what they were in 1987.

The SCA project has experienced many difficulties along the way and many people believed it would never be built. Because of the financial difficulties associated with this project, including delays and the loss of investment tax credits, etc., the SCA project cannot afford to pay AML fees in addition to all of its other increased

John Sender
February 24, 1994
Page 4

expenses. For all of the reasons I have listed in my letter to OSM dated November 8, 1993 and those listed herein, this exemption should be granted for the SCA project.

SCA appreciates all your efforts in reviewing our request and hopes that you will give us every consideration in this matter. 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

BWB/mcm
cc: Lowell Braxton
Joe Helfrich
Randy Hardin
David Pearce
Alane Boyd



VACATION/TERMINATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name Sunnyside Cogeneration Associates

Mailing Address P. O. Box 58087 Salt Lake City, UT 84158-0087

State Permit No. ACT/007/035

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated* (1953):

Notice of Violation No. N 93-26-3-1 dated September 28, 19 93.

Cessation Order No. C _____ dated _____, 19 ____.

Part 1 of 1 is vacated terminated because letter provided by OSM Denver, copy attached hereto, states that the permittee has not paid required AML fees. Therefore, it can only be concluded that no records were prepared on this matter. Furthermore,

~~Part ##### of ##### is vacated terminated because~~ the permittee did not provide the undersigned any records after the NOV was issued to demonstrate such records have been prepared and maintained. This NOV is hereby terminated with an effective date October 28, 1993.

Part ____ of ____ is vacated terminated because _____

Date of service/ mailing November 18, 1993 Time of service/ mailing 3:00 a.m. p.m.

Sunnyside Cogeneration Associates
Permittee/Operator representative

Title

Signature

Mr. J. Malencik
Division of Oil, Gas & Mining

Reclamation Specialist
Title

Signature 11/18/93



United States Department of the Interior



OFFICE OF SURFACE MINING

Reclamation and Enforcement

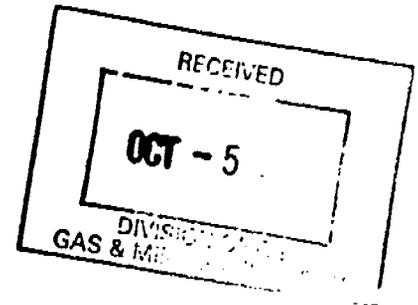
P.O. Box 25065

Denver Federal Center

Denver, Colorado 80225-0065

OCT 1 1993

Mr. Bill Malencik
Division of Oil, Gas and Mining
P.O. Box 169
451 E. 400th North
Price, Utah 84501-2699



Dear Mr. Malencik:

Thank you for your telephone call to JoAnn Hagan on September 28, 1993, notifying her that Sunnyside Cogeneration Associates, P.O. Box 58087, Salt Lake City, Utah 84158, was actively mining on permit No. ACT007035. The company has not paid reclamation fees. We checked with Steve Rathbun at the Albuquerque Field Office, who said that the company should be paying fees at the surface rate of \$.35 per ton.

We will send the company a Coal Reclamation Fee Report, OSM-1. Again thank you for this information. If we can be of further assistance to you, please call JoAnn Hagan at (303) 236-0368.

Sincerely,

Roy E. Morris
Chief, Division of
Financial Management

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

---ooOoo---

IN THE MATTER OF THE APPEAL : FINDINGS, CONCLUSIONS
OF FACTS OF VIOLATIONS : AND ORDER
N93-26-3-1 AND N93-26-4-1, :
SUNNYSIDE COGENERATION :
ASSOCIATES, CARBON COUNTY, : CAUSE NO. ACT/007/035
UTAH :

---ooOoo---

On May 11, 1994, the Division of Oil, Gas and Mining ("Division") held an informal hearing concerning the facts of violations issued to Sunnyside Cogeneration Associates (SCA) for the above-referenced Notices of Violation (NOVs). The following individuals attended:

Presiding: James W. Carter
Director

Petitioner: Brian W. Burnett
Attorney

Division: Joe Helfrich
Assessment Officer

Board: Ronald W. Daniels
Assessment Conference Officer

The Findings, Conclusions, and Order in this matter are based on information provided by the Petitioner in connection with this informal hearing, and on information in the files of the Division.

FINDINGS OF FACT

1. Notice of this hearing was properly given.

2. The Assessment Conference, to review the proposed penalties for NOVs N93-26-3-1 and N93-26-4-1, was held immediately following this informal hearing regarding facts of violations. The requirement to pay the assessed penalties is stayed pending this decision upon the informal review of facts of violations.

3. NOV N93-26-3-1 was written for "failure to provide records during an inspection demonstrating the operator has paid all past-due reclamation fees required . . ."

4. NOV N93-26-4-1 was written for "failure by the permittee to pay all reclamation fees required for coal produced under the permit . . ."

5. By letter dated November 8, 1993, SCA asked the Office of Surface Mining to determine that the requirement to pay AML fees is not applicable to SCA's operations.

6. SCA has not paid AML fees on its operation, and SCA has not maintained records demonstrating either that it had paid or had documented the fact that it was not required to pay AML fees, at the time of the inspections leading to the issuance of NOV N93-26-3-1 and N93-26-4-1.

CONCLUSIONS OF LAW

1. SCA violated rule R. 645-400-221.200 by failing to provide documentary evidence of either payment of AML fees, or evidence of SCA's exemption from the requirement to pay AML fees.

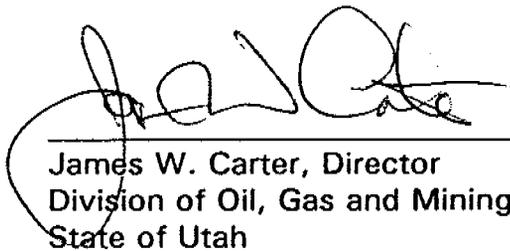
2. The Division did not establish a violation of rule R. 645-300-147 in that SCA's liability for payment of AML fees is currently undecided.

ORDER

NOW THEREFORE, it is ordered that:

1. NOV N93-26-3-1 is upheld.
2. NOV N93-26-4-1 is vacated.
3. The finalized assessment, resulting from the Assessment Conference of May 11, 1994, is due and payable to the Division 30 days from the date of this Order.
4. The Petitioner may appeal the determinations of facts of violations and/or the finalized assessments to the Board of Oil, Gas and Mining by filing said appeal within 30 days of the date of this Order, in accordance with statutory and regulatory requirements, including placing the assessed civil penalty in escrow.

SO DETERMINED AND ORDERED this 20th day of June 1994.



James W. Carter, Director
Division of Oil, Gas and Mining
State of Utah

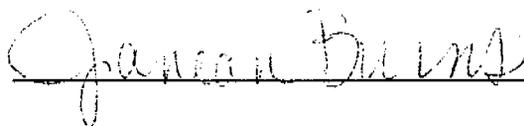
CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS, CONCLUSIONS AND ORDER for Cause No. ACT/007/035 to be mailed by certified mail, postage prepaid, on the 24 day of June 1994, to the following:

Brian Burnett, Esq.
Callister, Duncan and Nebeker
Kennecott Building, Suite 800
10 East South Temple
Salt Lake City, Utah 84133

Fred Finlinson, Resident Agent
Callister, Duncan and Nebeker
Kennecott Building, Suite 800
10 East South Temple
Salt Lake City, Utah 84133

David Pearce
Sunnyside Cogeneration Associates
P.O. Box 58087
Salt Lake City, Utah 84133



P 074 976 106

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to DAVID PEARCE	
Street SUNNYSIDE COGEN	
P.O. Box PO BOX 58087	
P.O., State and ZIP Code SLC UT	
Postage	\$ 29
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	1.00
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$ 2.29
Postmark or Date	

SM DOGM N93-26-4-1

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3. Article Addressed to:
**DAVID PEARCE
SUNNYSIDE COGEN
PO BOX 58087
SLC UT**

4. Article Number
P074 976 106

Type of Service:
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

Always obtain signature of addressee or agent and **DATE DELIVERED.**

5. Signature - Address
X

6. Signature - Agent
X Margaret McQuinn

7. Date of Delivery
JUN 08 1994

8. Addressee's Address (ONLY if requested and fee paid)

SM DOGM N93-26-4-1

PS Form 3811, Mar. 1988 * U.S.G.P.O. 1988-212-865 DOMESTIC RETURN RECEIPT

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS



PENALTY FOR PRIVATE USE, \$300

SENDER INSTRUCTIONS
Print your name, address and ZIP Code in the space below.

- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

RETURN TO

Print Sender's name, address, and ZIP Code in the space below.

STATE OF UTAH
NATURAL RESOURCES
OIL, GAS, & MINING
3 TRIAD CENTER, SUITE 350
SALT LAKE CITY, UTAH 84180-1203



- STICK POSTAGE STAMPS TO ARTICLE TO COVER FIRST CLASS POSTAGE, CERTIFIED MAIL FEE, AND CHARGES FOR ANY SELECTED OPTIONAL SERVICES. (See front)
1. If you want this receipt postmarked, stick the gummed stub to the right of the return address leaving the receipt attached and present the article at a post office service window or hand it to your retail carrier. (no extra charge)
 2. If you do not want this receipt postmarked, stick the gummed stub to the right of the return address of the article, date, detach and retain the receipt, and mail the article.
 3. If you want a return receipt, write the certified mail number and your name and address on a return receipt card, Form 3811, and attach it to the front of the article by means of the gummed tabs if space permits. Otherwise, affix to back of article. Endorse front of article RETURN RECEIPT REQUESTED adjacent to the number.
 4. If you want delivery restricted to the addressee, or to an authorized agent of the addressee, endorse RESTRICTED DELIVERY on the front of the article.
 5. Enter fees for the services requested in the appropriate spaces on the front of this receipt. If custom receipt is requested, check the applicable block in item 1 of Form 3811.



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

Michael O. Leavitt
Governor

Ted Stewart
Executive Director

James W. Carter
Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340
801-359-3940 (Fax)
801-538-5319 (TDD)

June 2, 1994

CERTIFIED RETURN RECEIPT REQUESTED
P 074 976 106

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

Re: Finalized Assessment for State Violation #N93-26-4-1, Sunnyside Refuse & Slurry, Sunnyside Cogeneration Associates ACT/007/035, Folder #5, Carbon County, Utah

Dear Mr. Pearce:

The civil penalty for the above-referenced violation has been finalized. This assessment has been finalized as a result of a review of all pertinent data and facts including those presented in the assessment conference by you or your representative and the Division of Oil, Gas and Mining inspector.

Within fifteen (15) days of your receipt of this letter, you or your agent may make a written appeal to the Board of Oil, Gas and Mining. To do so, you must escrow the assessed civil penalty with the Division within a maximum of thirty (30) days of receipt of this letter, but in all cases prior to the Board Hearing. Failure to comply with this requirement will result in a waiver of your right of further recourse.

If no timely appeal is made, this assessed civil penalty must be tendered within thirty (30) days of your receipt of this letter. Please remit payment to the Division, mail c/o Vicki Bailey at the address listed above.

Thank you for your cooperation.

Sincerely,

Ronald W. Daniels
Assessment Conference Officer

sm
Enclosure

cc: Bernie Freeman, OSM, AFO



WORKSHEET FOR FINAL ASSESSMENT OF PENALTIES
UTAH DIVISION OF OIL, GAS AND MINING

COMPANY/MINE Sunnyside Refuse & Slurry NOV #N93-26-4-1
Sunnyside Cogeneration Associates

PERMIT # ACT/007/035 VIOLATION 1 of 1

Assessment Date 6/02/94 Assessment Officer Ronald W. Daniels

Nature of Violation:

Failure to adequately identify and describe surface coal mining related to surface coal mining operations.

Date of Termination: Pending OSM determination

	<u>Proposed Assessment</u>	<u>Final Assessment</u>
(1)History/Previous Violations	<u>1</u>	<u>1</u>
(2)Seriousness		
(a) Probability of Occurrence	<u> </u>	<u> </u>
Extent of Damage	<u> </u>	<u> </u>
(b) Hindrance to Enforcement	<u>12</u>	<u>12</u>
(3)Negligence	<u>30</u>	<u>23</u>
(4)Good Faith	<u>-0</u>	<u>-0</u>
Total Points	<u>43</u>	<u>36</u>
TOTAL ASSESSED FINE		\$ <u>520.00</u>

NARRATIVE: (Brief explanation for any changes made in assignment of points and any additional information that was available after the proposed assessment.)

Negligence points are changed to be at the midpoint of the greater "degree of fault" category, since the operator began to seek clarification on the issues earlier than previously thought.
sm



MODIFICATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name SUNNYSIDE COGENERATION ASSOCIATES

Mailing Address P.O. BOX 58081, S.L.C. UT. 84158-0081

State Permit No. ACT/007/035

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated (1953):

Notice of Violation No. N 93-26-4-1 dated 10/15, 19 93.

Cessation Order No. C _____ dated _____, 19 _____.

Part _____ of _____ is modified as follows: THE ABATEMENT DATE IS EXTENDED TO WEDNESDAY, JUNE 15, 1994.

Reason for modification is OSM DETERMINATION OF AML PAYMENT REQUIREMENTS.

Part _____ of _____ is modified as follows: _____

Reason for modification is _____

Part _____ of _____ is modified as follows: _____

Date of service (mailing) 5/10/94 Time of service (mailing) 1100 a.m. p.m.

Date of inspection 10/15/93

FRED FINLINDSON
Permittee/Operator representative

RESIDENT AGENT FOR SCA
Title

MAILED FROM DOGM OFFICE
Signature

SOB HEURICH
Division of Oil, Gas & Mining

REGULATOR/PROGRAM COORDINATOR
Title

Joseph C. Kuffel
Signature



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

DDW files

Michael O. Leavitt
Governor
Ted Stewart
Executive Director
James W. Carter
Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340
801-359-3940 (Fax)
801-538-5319 (TDD)

April 11, 1994

CERTIFIED RETURN RECEIPT REQUESTED
No. P 540 714 000

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

Re: Informal Hearing and Assessment Conference for State Violation
N93-40-6-4, N93-26-3-1, N93-26-4-1, N93-13-1-1, N93-13-2-1,
C93-13-1-1, and C93-13-2-1, Sunnyside Cogeneration Associates, Sunnyside
Refuse & Slurry Mine, ACT/007/035, Folder #5, Carbon County, Utah

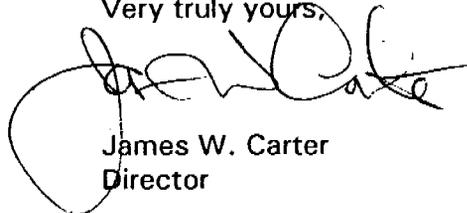
Dear Mr. Pearce:

In accordance with written requests from Brian Burnett dated December 10 and December 30, 1993, and February 15, 1994, please be advised that the Informal Hearing and Assessment Conference on state violation N93-40-6-4, N93-26-3-1, N93-26-4-1, N93-13-1-1, N93-13-2-1, C93-13-1-1 and C93-13-2-1, Sunnyside Refuse and Slurry Mine has been established for Wednesday, May 11, 1994, beginning at 9:00 a.m.

Pertinent, written material you wish reviewed before the conference can be forwarded to me at the address listed above.

The conference will be held at the office of the Division of Oil, Gas and Mining.

Very truly yours,



James W. Carter
Director

vb
cc: Brian Burnett, Callister, Duncan & Nebeker
Fred Finlinson, Callister, Duncan & Nebeker
L. Braxton
J. Helfrich





MODIFICATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name SUNNYSIDE COGENERATION ASSOCIATES

Mailing Address _____

State Permit No. ACT/007/035

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated (1953):

Notice of Violation No. N 93-26-04-01 dated 10/15, 19 93

Cessation Order No. C _____ dated _____, 19 _____

Part 1 of 1 is modified as follows: THE NOTICE IS EXTENDED TO APRIL 13, 1994
THE 90TH DAY IN ACCORDANCE WITH R-645-400-327.100 AS PER

Reason for modification is REQUEST DATED FEBRUARY 7, 1994 (ATT.)

Part _____ of _____ is modified as follows: _____

Reason for modification is _____

Part _____ of _____ is modified as follows: _____

Date of service/ mailing 2/9/94

Time of service/ mailing 3:00 a.m. p.m.

Date of inspection 10/15/93

FRED FINLINDSON
Permittee/Operator representative

RESIDENT AGENT
Title

Signature

JOSEPH C. HELFRICH
Division of Oil, Gas & Mining

REGULATORY PROGRAM COORDINATOR
Title

Joseph C. Helfrich
Signature

**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

February 7, 1994

OF COUNSEL
WAYNE L. BLACK, P.C.
FRED L. FINLINGS
RICHARD M. NEBEKER
EARL R. STATEN

LOUIS H. CALLISTER, SR.
(1904-1983)
PARNELL BLACK
(1897-1981)

TO CALL WRITER DIRECT

LOUIS H. CALLISTER
ADAM M. DUNCAN
GARY R. HOWE
L. B. McCULLOUGH, JR.
FRED W. FINLINGS
DOROTHY C. FLESHE
JOHN A. BECKSTEAD
JEFFREY N. CLAYTON
JAMES R. HOLBROOK
CHARLES M. BENNETT
W. WALDEN LLOYD
JAMES R. BLACK
H. RUSSELL HETTINGER
JEFFREY L. SHIELDS
STEVEN E. TYLER
CRAIG F. McCULLOUGH
GARY B. HANSEN

RANDALL D. BENSON
R. WILLIS DIXON
GEORGE E. HARRIS, JR.
T. RICHARD DAVIS
DAMON E. GOOMBS
PAUL R. INCE
BRIAN W. BURNETT
ANDRÉS DIAZ
LYNDA COOK
JOHN H. REES
MARK L. CALLISTER
R. BRYAN FISHER
JAN M. BERGSON
JOHN B. LINDSAY
DOUGLAS K. CUMMINGS
LUCY KNIGHT ANDRE
KATHRYN C. KNIGHT

1 ALSO MEMBER ARIZONA BAR
1 ALSO MEMBER FLORIDA BAR
1 ALSO MEMBER MISSOURI BAR
1 ALSO MEMBER CALIFORNIA BAR
1 MEMBER CALIFORNIA BAR ONLY

VIA FACSIMILE

Joe Helfrich
Division of Oil, Gas & Mining
2 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

Re: Sunnyside Cogeneration Associates ("SCA")
Permit No. ACT/007/035
Notice of Violation No. N93-26-4-1

Dear Joe:

As you know, Notice of Violation No. N93-26-4-1 relating to the payment of Abandoned Mine Land ("AML") fees was issued by the Division of Oil, Gas and Mining ("DOG M") on October 15, 1993 and was extended until Tuesday, February 8, 1994, in accordance with the Utah Admin. Code §R645-400-327.100.

SCA hereby formally requests that the NOV be extended again through April 15, 1994 to allow time for the Office of Surface Mining ("OSM") to determine whether SCA is exempt from payment of AML fees.

I am attaching a letter from Jane T. Gray from OSM to you which states that OSM is reviewing SCA's request for exemption from AML fees and that OSM will not require SCA to report or pay reclamation fees until OSM has ruled on SCA's request. In addition, John Sender from OSM has requested additional information regarding the SCA project, which I will be supplying in the near future. We will keep you informed regarding the progress of this matter.

Utah Admin. Code §R645-400-327.100 continues to provide the basis for this extension request because SCA is diligently pursuing approval for the exemption from AML fees, the decision has not or will not be issued within the time frame, and decision is beyond the control of SCA.

Joe Helfrich
February 7, 1994
Page 2

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

BWB/mcm
cc: Lowell Braxton
Pam Grubaugh-Littig
David Pearce
Alane Boyd



United States Department of the Interior



OFFICE OF SURFACE MINING
 Division of Compliance Management
 1300 New Circle Road, N.E.
 Suite 102
 Lexington, Kentucky 40505-4215

February 3, 1994

Mr. Joe Helfrich
 Regulatory Program Coordinator
 Division of Oil, Gas and Mining
 335 W. North Temple
 3 Triad Center
 Suite 350
 Salt Lake City, Utah 84180-1203

RE: Sunnyside Cogeneration Associates (SCA) Exemption Request

Dear Mr. Helfrich:

The Office of Surface Mining (OSM) is currently reviewing a request from SCA for exemption of coal mine waste from Abandoned Mine Land Reclamation Fees.

Until OSM renders a decision on SCA's Exemption Request, we will not require SCA to report and pay reclamation fees.

Sincerely,

JANE T. GRAY
 Manager, Region II
 Division of Compliance Management

Post-It™ brand fax transmittal memo 7671		# of pages ▶
To <i>Scott Carlson</i>	From <i>Joe Helfrich</i>	
Co. <i>ENP</i>	Co. <i>OSM</i>	
Dept.	Phone # <i>538-5340</i>	
Fax # <i>266-1671</i>	Fax # <i>35A-3940</i>	



MODIFICATION OF NOTICE OF VIOLATION / CESSATION ORDER

To the following Permittee or Operator:

Name SUNNYSIDE CO-GENERATION ASSOCIATES

Mailing Address P.O. Box

State Permit No. ACE/007/035

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated (1953):

Notice of Violation No. N -93-26-04-01 dated 10/15, 1993.

Cessation Order No. C _____ dated _____, 19 ____.

Part 1 of 1 is modified as follows: THE NOTICE IS EXTENDED TO TUESDAY FEBRUARY 8TH 1994 IN ACCORDANCE WITH R.645-400-327.100

Reason for modification is THE REQUEST CLEARLY IDENTIFIES A FEDERAL ANNUAL FEE AUDIT + EVALUATION; THE SCHEDULING OF WHICH IS NOT WITHIN THE CONTROL OF

Part _____ of _____ is modified as follows: THE PERMITTEE. ATT.

Reason for modification is _____

Part _____ of _____ is modified as follows: _____

Date of service/ mailing 1/19/94 Time of service/ mailing 3:00 a.m. p.m.

Date of inspection 10/15/93

Fred Finlinson
Permittee/Operator representative

Resident Agent for SCA
Title

Signature

William S. Malendok
Division of Oil, Gas & Mining

Signature

Reclamation Specialist
Title

Greg C. Hedrick FOR
Signature

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

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)

January 12, 1994

TO CALL WRITER DIRECT

LOUIS H. CALLISTER
ADAM M. DUNCAN
GARY R. HOWE
L. S. McCULLOUGH, JR.
FRED W. FINLINSON
DOROTHY C. PLESHE
JOHN A. BECKSTEAD¹
JEFFREY N. CLAYTON
JAMES R. HOLBROOK
CHARLES M. BENNETT²
W. WALDAN LLOYD
JAMES R. BLACK
H. RUSSELL HETTINGER
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STEVEN E. TYLER
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RANDALL D. BENSON
R. WILLIS ORTON
GEORGE E. HARRIS, JR.³
T. RICHARD DAVIS
DAMON E. COOMBS
PAUL R. INCE⁴
BRIAN W. BURNETT
ANDRÉS DIAZ
LYNDA COOK
JOHN H. REES
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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



JAN 19 1994

DIVISION OF
OIL, GAS & MINING

HAND DELIVERED

James W. Carter
Director, Division of Oil, Gas & Mining
3 Triad Center - Suite 350
Salt Lake City, Utah 84180-1203

Re: Sunnyside Cogeneration Associates Permit No. ACT/007/035,
State Violation No. N93-26-4-1

Dear Jim:

Sunnyside Cogeneration Associates ("SCA") hereby requests an extension regarding State Violation No. N93-26-4-1 which was issued on October 15, 1993 by the Division of Oil, Gas & Mining ("DOGM") for failure to pay AML fees on waste coal utilized by the SCA facility. I have previously sent letters to you on October 27, 1993 and to Joe Helfrich on December 10, 1993 regarding this issue.

By letter dated November 8, 1993, SCA requested that the Office of Surface Mining ("OSM") determine if AML fees are applicable to the SCA project. I received a letter dated November 26, 1993 from Ed Kay, Acting Director of OSM, stating that he had received my request for determination and that OSM was presently reviewing the supporting documentation. For your convenience, attached please find copies of the above mentioned correspondence relating to this particular issue.

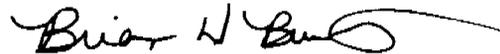
In November, 1993, OSM contacted me and stated that they had been asked to conduct an audit on the SCA facility regarding AML fees, but that the audit would probably not take place until January. I have not received any additional information from OSM regarding either the audit or the determination, but would hope that a favorable determination would be forthcoming.

James W. Carter
January 12, 1994
Page 2

I trust this information will be sufficient to allow for an extension. If you need any additional information, please contact me. Thank you for your cooperation in this regard.

Very truly yours,

CALLISTER, DUNCAN & NEBEKER



Brian W. Burnett

BWB/mcm
cc: Joe Helfrich
David Pearce
Alane Boyd

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

December 10, 1993

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

LOUIS H. CALLISTER
ADAM M. DUNCAN
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JAMES R. HOLBROOK
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W. WALDOAN LLOYD
JAMES R. BLACK
H. RUSSELL HETTINGER
JEFFREY L. SHIELDS
STEVEN E. TYLER
CRAIG F. McCULLOUGH
GARY B. HANSEN

RANDALL O BENSON
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T. RICHARD DAVIS
DAMON E. COOMBS
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BRIAN W. BURNETT
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LYNDA COOK
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P. BRYAN FISHBURN
JAN M. BERGESON
JOHN B. LINDSAY
DOUGLAS K. CUMMINGS
LUCY KNIGHT ANDRE
KATHRYN C. KNIGHT

†ALSO MEMBER ARIZONA BAR
†ALSO MEMBER FLORIDA BAR
†ALSO MEMBER MISSOURI BAR
†ALSO MEMBER CALIFORNIA BAR
†MEMBER CALIFORNIA BAR ONLY

HAND DELIVERED

Joseph C. Helfrich
Assessment Officer
Division of Oil, Gas & Mining
State of Utah
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

Re: Sunnyside Cogeneration Associates' Permit No. ACT\007\035
Proposed Assessments for State Violation No. N93-26-3-1, and
and State Violation No. N93-26-4-1

Dear Joe:

Pursuant to your letters and proposed assessments in the matters set forth above, dated November 8, 1993, and November 24, 1993, Sunnyside Cogeneration Associates ("SCA") hereby informally appeals the fact of the above violations and/or the proposed penalty assessments for those violations pursuant to Utah Admin. Code R645-401-700. As you may know, SCA previously requested an informal hearing on these alleged violations by letter dated October 27, 1993, a copy of which is attached hereto and incorporated by reference herein.

SCA states as follows:

SCA has requested that the Office of Surface Mining ("OSM") determine that SCA is not required to pay abandoned mine land ("AML") fees on the waste coal utilized from SCA's permit area. This letter was sent to OSM on November 8, 1993, a copy was previously provided to the Division of Oil, Gas and Mining ("DOGM"). A copy of the letter to OSM without the exhibits is attached hereto and incorporated by reference herein. OSM has received SCA's request and responded with a letter dated November 26, 1993 stated that OSM is reviewing the matter, a copy of which is attached hereto and incorporated by reference herein.

Joseph C. Helfrich
December 10, 1993
Page 2

SCA does not believe that it should pay AML fees. If OSM agrees with SCA regarding the AML fee issue, violations regarding this issue will be void.

DOGM terminated Violation No. N93-26-3-1 on November 18, 1993, a copy of which is attached hereto and incorporated by reference herein.

Pursuant to the above information, SCA requests an informal conference and/or assessment conference regarding the above issues. 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
Attorneys for Sunnyside Cogeneration
Associates

cc: David Pearce
Alane Boyd

CALLISTER, DUNCAN
& NEBEKER

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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October 27, 1993

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1 ALSO MEMBER ARIZONA BAR
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OF COUNSEL
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LOUIS H. CALLISTER, SR.
(1904-1983)
ARNELL BLACK
(1897-1991)

TO CALL WRITER DIRECT

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 NOV's.

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
Utah Counsel for Sunnyside
Cogeneration Associates

cc: David Pearce
Alane Boyd 94985-1

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November 8, 1993

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LOUIS H. CALLISTER, SR.
(1904-1983)
PARNELL BLACK
(1897-1931)

TO CALL WRITER DIRECT

VIA FEDERAL EXPRESS

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 Office of Surface Mining ("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 OSM. 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 in addition to its coal mining operations, owns and 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. SCA is not associated with the Sunnyside Mine. The Refuse Pile contains approximately 9 to 10 million tons of coal mine waste. Roughly 6 to 7 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 Summary, Exhibit "B". 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 C, ("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 "C", 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 "C", 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 "D", 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 "D", Table 4, at 13d.

Various options for disposing of this waste have been reviewed. Because the Refuse Pile is principally composed 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

W. Hord Tipton
November 8, 1993
Page 3

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 FERC, 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. Additionally, no royalties are paid on utilization of the waste pile. SCA is the sole owner of the Refuse Pile.

SCA essentially obtained the Refuse Pile for free by taking on the environmental liability for its removal. Other owners of refuse piles have offered their material to SCA for free for assuming the reclamation obligations. The Sunnyside Refuse Pile must be reclaimed under SMCRA to eliminate attendant environmental hazards. The SCA project has been created to serve that end and would not exist but for the fact that the Refuse Pile is waste material in need of reclaiming and governmental economic incentives have been created to utilize this type of disposal.

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 front-end loader to a truck and then to a hopper, located off the Refuse Pile, 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 a circulating fluidized bed boiler. The limestone is added to reduce the sulfur dioxide emissions of the 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 SCA facility.

SCA will sell its power to PacifiCorp., a local utility company, pursuant to the Public Utilities Regulatory Policies Act ("PURPA") which facilitates waste disposal operations that create energy. The SCA project has received PURPA approval for the energy that will be generated through the burning of the Refuse Pile, which has been found to qualify as waste for PURPA purposes. The SCA facility would not exist and be able to reclaim the Refuse Pile, but for PURPA approval and the tax-exempt bond financing available for this type of operation.

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 according to the ASTM definitions.

Under OSM's new proposed definition of coal, as "combustible, carbonaceous rock composed principally of consolidated and chemically altered plant remains," 58 Fed. Reg. 52374, 52376 (1993) (to be codified at 30 C.F.R. § 700.5) (proposed October 7, 1993), the Refuse Pile still does not meet the definition of coal. 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.) Given the contents data, it is clear that the Refuse Pile does not meet the new proposed definition of coal because it is principally composed of ash and not combustible, carbonaceous rock. 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.

Both the average heating values and ash content data demonstrate that the Refuse Pile is composed of coal mine waste and not coal as defined in either the current regulations or the proposed regulations at 30 C.F.R. § 700.5. 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 coal produced for sale, transfer, or use, . . ." (emphasis added). SCA is engaged in the process of burning coal mine waste in its 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, but rather coal mine waste will be used, SCA is not engaged in surface mining operations, and therefore does not owe AML reclamation fees.

C. THE VALUE OF THE COAL MINE WASTE IS ZERO.

"The fee for anthracite, bituminous, and subbituminous coal, including reclaimed coal, is 35 cents per ton unless the value of such coal is less than \$3.50 per ton, in which case the fee is 10 percent of

the value." 30 C.F.R. § 870.13 (1992). 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 Sunnyside Refuse Pile consists of coal mine waste and has no value. No AML fees should be paid for using the Reuse Pile.

SCA's facility was certified by FERC as a qualified cogeneration facility burning waste. For material to be classified as waste by FERC, the refuse material must be both a by-product and currently have little or no commercial value. In 1987, FERC 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." 39 F.E.R.C. ¶ 62,091 at 63,285 (1987). SCA was recertified by FERC on February 11, 1992 as a small power production facility utilizing a waste material.

The act of burning the coal mine waste creates value for the generation of electricity, but only because the Refuse Pile qualifies as a waste product under PURPA which requires utilities to purchase power generated from facilities like SCA that dispose of waste material. The fact that the Refuse Pile has no value and is waste provides the only reason the SCA project exists.

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. Additionally, no royalties are paid on utilization of the Refuse Pile. SCA is the sole owner of the Refuse Pile.

SCA essentially obtained the Refuse Pile by assuming the environmental liability for its removal. Other owners of refuse piles have offered their material to SCA for free for assuming the reclamation obligations. 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 Sunnyside Refuse Pile must be reclaimed under SMCRA to eliminate attendant environmental hazards. The SCA project has been created to serve that end and would not exist but for the fact that the Refuse Pile is waste material in need of reclaiming and governmental economic incentives have been created to utilize this type of disposal.

OSMRE Directive AML-14 discusses when AML fees are required for material recovered from abandoned coal refuse piles. In the Directive,

OSM sets the value of anthracite culm bank material produced before August 3, 1977 at zero, and accordingly the material is exempt from AML fees. It is therefore consistent to exempt bituminous material from AML fees when there is no distinction in the process that created the materials. Approximately 70% of the Refuse Pile was deposited prior to 1977.

The materials handling costs per ton associated with the coal mine waste, limestone, and ash disposal are significant, not to mention the environmental costs associated with the Refuse Pile. Adding AML fees to the costs of the SCA project further damages a marginal operation. Essentially, SCA is engaged in a federally encouraged and licensed waste disposal operation. Because the waste itself has no value, no AML fees are owing upon its elimination 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 Land 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 as a disposal site. The Refuse 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" which will be an environmental benefit. 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.

PURPA was passed to encourage funding and development of alternative energy resources including the use of waste resources. This public policy was further implemented by the financing opportunities which encourage the disposal of waste. The SCA project is an example of the public policy favoring the use of a waste for a beneficial purpose.

The only way a waste coal fired generating unit is economically feasible is to obtain the rights to the coal refuse for free. The materials handling costs per ton associated with the coal mine waste, limestone, ash disposal, and the environmental costs associated with the coal refuse are significant. Adding AML fees at any rate to those expenses creates additional financial hardships. The SCA project is already a reclamation project. A levy of reclamation fees on each ton of waste coal used by the project is like charging a reclamation fee to an AML contractor on an AML contract.

SUMMARY

With the foregoing facts, rulings, and regulations in mind, we respectfully request that OSM 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 the Refuse Pile consists of coal mine waste and has no marketable value for benefaction and its use has been licensed for power generation purposes because it has no value and is waste, no AML fees are owing from its disposal.

W. Hord Tipton
November 8, 1993
Page 10

4. Alternatively, if the fine refuse is deemed to be coal, it is still only 16 percent of the Refuse Pile contents and therefore only the incidental extraction of coal from coal mine waste. Therefore no AML fees are owed.

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 and PURPA.

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

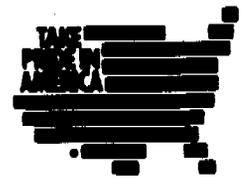
Enclosures

cc: James W. Carter
David Pearce
Alane Boyd
Brent Blauch



United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
WASHINGTON, D.C. 20240



NOV 26 1993

Mr. Brian W. Burnett
Calister, Duncan & Nebeker
Attorneys at Law
Suite 800, Kennecott Building
Salt Lake City, Utah 84133

Dear Mr. Burnett:

Thank you for your letter of November 8, 1993, to Mr. W. Hord Tipton, in which you requested that the Office of Surface Mining Reclamation and Enforcement (OSM) provide a determination with regard to an exemption for reclamation fee payment on coal mine waste that is contained in the Sunnyside Refuse Pile, Sunnyside, Utah, and used by Sunnyside Cogeneration Associates.

OSM is reviewing your request, together with the supporting documentation you provided. Upon completion of our review, we will notify you of our determination.

Sincerely,

Ed Kay
Acting Deputy Director

VACATION/TERMINATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name Sunnyside Cogeneration Associates

Mailing Address P. O. Box 58087 Salt Lake City, UT 84158-0087

State Permit No. ACT/007/035

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated* (1953):

Notice of Violation No. N 93-26-3-1 dated September 28, 19 93

Cessation Order No. C _____ dated _____, 19 _____

Part 1 of 1 is vacated terminated because letter provided by OSM Denver, copy attached hereto, states that the permittee has not paid required AML fees. Therefore, it can only be concluded that no records were prepared on this matter. Furthermore,

~~Part _____ of _____ is vacated terminated because~~ the permittee did not provide the undersigned any records after the NOV was issued to demonstrate such records have been prepared and maintained. This NOV is hereby terminated with an effective date October 28, 1993.

Part _____ of _____ is vacated terminated because _____

Date of service/mailing November 18, 1993 Time of service/mailing 3:00 a.m. p.m.

Sunnyside Cogeneration Associates
Permittee/Operator representative

Title

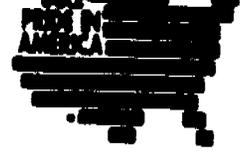
Signature

Wm. J. Malencik
Division of Oil, Gas & Mining

Reclamation Specialist
Title

Wm. J. Malencik
Signature 11/18/93

United States Department of the Interior



OFFICE OF SURFACE MINING

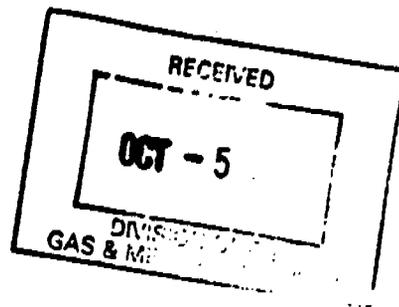
Reclamation and Enforcement

P.O. Box 25063

Denver Federal Center

Denver, Colorado 80225-0065

OCT 1 1993



Mr. Bill Malencik
Division of Oil, Gas and Mining
P.O. Box 169
451 E. 400th North
Price, Utah 84501-2699

Dear Mr. Malencik:

Thank you for your telephone call to JoAnn Hagan on September 28, 1993, notifying her that Sunnyside Cogeneration Associates, P.O. Box 58087, Salt Lake City, Utah 84158, was actively mining on permit No. ACT007035. The company has not paid reclamation fees. We checked with Steve Rathbun at the Albuquerque Field Office, who said that the company should be paying fees at the surface rate of \$.35 per ton.

We will send the company a Coal Reclamation Fee Report, OSM-1. Again thank you for this information. If we can be of further assistance to you, please call JoAnn Hagan at (303) 236-0368.

Sincerely,

Roy E. Morris
Chief, Division of
Financial Management



MODIFICATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name Western States Minerals Corporation

Mailing Address 250 South Rock Blvd, Suite 130, Reno NV 89502

State Permit No. ACT/OIS/002

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated (1953):

Notice of Violation No. N 91-32-67 dated December 19, 1991

Cessation Order No. C _____ dated _____, 19 ____

Part ____ of ____ is modified as follows: abatement is extended

to February 18, 1994 per operator request

Reason for modification is and approval by Lowell P. Preston, see attached.

Part ____ of ____ is modified as follows: _____

Reason for modification is _____

Part ____ of ____ is modified as follows: _____

Date of service/mailling 1/18/94

Time of service/mailling 3:00 a.m. p.m.

Date of inspection _____

[Signature]
Permittee/Operator representative

[Signature]
Title

Signature _____

[Signature]
Division of Oil, Gas & Mining

[Signature]
Title

Signature _____

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE/OPERATOR
DOGM/MVC-1

GOLDENROD - NOV FILE
an equal opportunity employer

Certified Mail
#P 143 960 979



January 11, 1994

Ms. Pamela Grubaugh-Littig
 Permit Supervisor
 Utah Division of Oil, Gas and Mining
 355 West North Temple
 3 Triad Center, Suite 350
 Salt Lake City, Utah 84180-1203

Re: J.B. King Mine, ACT/015/002, Emery Co., Ut

Dear Ms. Grubaugh-Littig:

Thank you for meeting with us on December 30, 1993 regarding reclamation work to be performed at the J.B. King site. We feel that the meeting was very productive; and we appreciate the guidance and support expressed by you, Tom, and Lowell.

In order to respond in accordance with the guidelines discussed during our December 30 meeting, additional field data will need to be developed. The time required to develop this data and incorporate it into an appropriate response will take longer than the time currently allowed by the Division (January 17, 1994). Therefore, we respectfully request approximately an additional 30 days, until February 18, in which to respond.

The response proposed to be submitted on February 18 will contain plans to address the reconstruction of the main and feeder channels at the site, as well as other modifications to specifically address concerns expressed in NOV's N93-32-6-1, N93-25-3-1 and N93-25-5-1. When these plans are approved by the Division, the on-site implementation will proceed as quickly as practicable.

Again, we appreciate your help and consideration in this matter.

Very Sincerely,

E.M. (Buzz) Gerick
 V.P. Operations

cc: Barry J. Barnum, HAL, Inc.
 Sam Bamberg, Bamberg Assoc.
 J.B. King file
 Larry Berg

(1) No interim abatement has been required by DOGMA
 (2) Operator's request for more field data prior to development of response is contemplated at 645-400-3271. Operator's basis for additional data was established in 12-30-93 mtg w/ DOGMA and is supported by its participants in the meeting

LLS
 1-12-94



UTAH
NATURAL RESOURCES
Oil, Gas & Mining

3 Triad Center • Suite 350 • Salt Lake City, UT 84180-1203 • 801-538-5340

MODIFICATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name SUNNYSIDE COGENERATION ASSOCIATES

Mailing Address 20 Laureate, Democrat Webster, Kennecott Blvd, Suite 800, JOE STEWART,

State Permit No. ACT/007/035 SLC, UT, 84113

Utah Coal-Mining & Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated* (1953):

Notice of Violation No. N 93-26-41 dated OCTOBER 15, 1993

Cessation Order No. C _____ dated _____, 19 _____

Part 1 of 1 is modified as follows: ABATEMENT EXTENDED TO

JANUARY 7, 1993 AS PER OPERATOR'S REQUEST AND PENDING

Reason for modification is AUDIT BY OSM REGARDING AML Fees

Part _____ of _____ is modified as follows: _____

Reason for modification is _____

Part _____ of _____ is modified as follows: _____

Date of service/ mailing 12/14/93

Time of service/ mailing 3:30 a.m. p.m.

Date of inspection _____

FRED FINLSON
Permittee/Operator representative

RESIDENT AGENT FOR SCA
Title

Signature

J. RANDALL HARDEN
Division of Oil, Gas & Mining

St. Reel. Engr
Title

Signature

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE/OPERATOR GOLDENROD - NOV FILE
DOGM/MVC-1

an equal opportunity employer

Rev. 12/86 001059



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

Michael O. Leavitt
Governor

Ted Stewart
Executive Director

James W. Carter
Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340
801-359-3940 (Fax)
801-538-5319 (TDD)

November 24, 1993

CERTIFIED RETURN RECEIPT
P 074 975 453

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

Re: Proposed Assessment for State Violation No. N93-26-4-1, Sunnyside Refuse & Slurry, Sunnyside Cogeneration Associates Mine, ACT/007/035, Folder #5, Carbon County, Utah

Dear Mr. Pearce:

The undersigned has been appointed by the Board of Oil, Gas and Mining as the Assessment Officer for assessing penalties under R645-401.

Enclosed is the proposed civil penalty assessment for the above-referenced violation. The violation was issued by Division Inspector, William J. Malencik on October 15, 1993. Rule R645-401-600 et. sec. has been utilized to formulate the proposed penalty. By these rules, any written information which was submitted by you or your agent, within fifteen (15) days of receipt of the Notice of Violation, has been considered in determining the facts surrounding the violation and the amount of penalty.

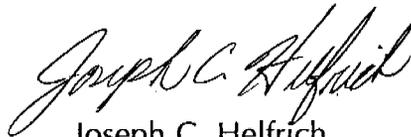
Under R645-401-700, there are two informal appeal options available to you:

1. If you wish to informally appeal the fact of this violation, you should file a written request for an Informal Conference within 30 days of receipt of this letter. This conference will be conducted by the Division Director. This Informal Conference is distinct from the Assessment Conference regarding the proposed penalty.

2. If you wish to review the proposed penalty assessment, you should file a written request for an Assessment Conference within 30 days of receipt of this letter. If you are also requesting a review of the fact of violation, as noted in paragraph 1, the Assessment Conference will be scheduled immediately following that review.

If a timely request for review is not made, the fact of violation will stand, the proposed penalty(ies) will become final, and the penalty(ies) will be due and payable within thirty (30) days of the proposed assessment. Please remit payment to the Division, mail c/o Vicki Bailey.

Sincerely,



Joseph C. Helfrich
Assessment Officer

sm

Enclosure

cc: Bernie Freeman, OSM
Fred Finlinson, Esq.

**WORKSHEET FOR ASSESSMENT OF PENALTIES
UTAH DIVISION OF OIL, GAS AND MINING**

COMPANY/MINE Sunnyside Refuse & Slurry/Sunnyside Cogeneration Associates

NOV #ACT/007/035

PERMIT # ACT/007/035

VIOLATION 1 OF 1

ASSESSMENT DATE 11/24/93

ASSESSMENT OFFICER Joseph C. Helfrich

I. HISTORY MAX 25 PTS

- A. Are there previous violations which are not pending or vacated, which fall within 1 year of today's date?

ASSESSMENT DATE 11/24/93

EFFECTIVE ONE YEAR TO DATE 11/24/92

PREVIOUS VIOLATIONS	EFFECTIVE DATE	POINTS
<u>N93-14-1-1</u>	<u>6/15/93</u>	<u>1</u>

1 point for each past violation, up to one year;
5 points for each past violation in a CO, up to one year;
No pending notices shall be counted.

TOTAL HISTORY POINTS 1

II. SERIOUSNESS (either A or B)

NOTE: For assignment of points in Parts II and III, the following applies. Based on the facts supplied by the inspector, the Assessment Officer will determine within which category, the Assessment Officer will adjust the points up or down, utilizing the inspector's and operator's statements as guiding documents.

Is this an Event (A) or Hindrance (B) violation? Hindrance

A. Event Violations Max 45 PTS

1. What is the event which the violated standard was designed to prevent?
2. What is the probability of the occurrence of the event which a violated standard was designed to prevent?

... PROBABILITY	RANGE
... None	0
... Unlikely	1-9
... Likely	10-19
... Occurred	20

ASSIGN PROBABILITY OF OCCURRENCE POINTS _____

PROVIDE AN EXPLANATION OF POINTS

3. What is the extent of actual or potential damage?

RANGE 0 - 25*

*In assigning points, consider the duration and extent of said damage or impact, in terms of area and impact on the public or environment.

ASSIGN DAMAGE POINTS _____

PROVIDE AN EXPLANATION OF POINTS

B. Hindrance Violations MAX 25 PTS

1. Is this a potential or actual hindrance to enforcement? Actual

RANGE 0 - 25

Assign points based on the extent to which enforcement is actually or potentially hindered by the violation.

ASSIGN HINDRANCE POINTS 12

PROVIDE AN EXPLANATION OF POINTS

Inspector's statement reveals that R-645-300.147 requires permit holders to pay reclamation fees for all coal produced under permit for sale, transfer or use pursuant to surface coal mining. Furthermore, the approved MRP Part 112.230 Page 100-2 Book 1 states in substance that the permittee would work with OSM on fee payments.

TOTAL SERIOUSNESS POINTS (A or B) 12

III. NEGLIGENCE MAX 30 PTS

- A. Was this an inadvertent violation which was unavoidable by the exercise of reasonable care? **IF SO - NO NEGLIGENCE;**
 OR Was this a failure of a permittee to prevent the occurrence of a violation due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation due to the same? **IF SO - NEGLIGENCE;**
 OR Was this violation the result of reckless, knowing, or intentional conduct? **IF SO - GREATER DEGREE OF FAULT THAN NEGLIGENCE.**

... No Negligence	0
... Negligence	1-15
... Greater Degree of Fault	16-30

STATE DEGREE OF NEGLIGENCE Greater Degree of Fault

ASSIGN NEGLIGENCE POINTS 30

PROVIDE AN EXPLANATION OF POINTS

The AML fees when paid and appropriated are utilized for pre SMCRA mine reclamation. Failure to pay such fees could delay reclamation. Furthermore, since the permittee was put on notice concerning fee payment, it is clearly a greater degree of negligence. On 2/11/93 at a courtesy inspection, the matter of reclamation fees was brought to the attention of the permittee by William J. Malencik, Reclamation Specialist for the Division.

IV. GOOD FAITH MAX 20 PTS. (EITHER A or B) (Does not apply to violations requiring no abatement measures.)

- A. Did the operator have onsite the resources necessary to achieve compliance of the violated standard within the permit area?
 ... **IF SO - EASY ABATEMENT**
 Easy Abatement Situation
- | | |
|---|-------------|
| ... Immediate Compliance | -11 to -20* |
| ... Immediately following the issuance of the NOV) | |
| ... Rapid Compliance | -1 to -10* |
| ... (Permittee used diligence to abate the violation) | |
| ... Normal Compliance | 0 |
- (Operator complied within the abatement period required)

(Operator complied with conditions and/or terms of approved Mining and Reclamation Plan)

* Assign in upper or lower half of range depending on abatement occurring in 1st or 2nd half of abatement period.

- B. Did the permittee not have the resources at hand to achieve compliance OR does the situation require the submission of plans prior to physical activity to achieve compliance?
 . . . **IF SO - DIFFICULT ABATEMENT**

Difficult Abatement Situation

- . . . **Rapid Compliance -11 to -20***
 . . . (Permittee used diligence to abate the violation)
- . . . **Normal Compliance -1 to -10***
 . . . (Operator complied within the abatement period required)
- . . . **Extended Compliance 0**
 (Permittee took minimal actions for abatement to stay within the limits of the NOV or the violated standard, or the plan submitted for abatement was incomplete)
 (Permittee complied with conditions and/or terms of approved Mining and Reclamation Plan)

EASY OR DIFFICULT ABATEMENT? **ASSIGN GOOD FAITH POINTS** -0

PROVIDE AN EXPLANATION OF POINTS

To be evaluated upon termination of the violation.

V. ASSESSMENT SUMMARY FOR N93-26-4-1

I.	TOTAL HISTORY POINTS	<u> 1 </u>
II.	TOTAL SERIOUSNESS POINTS	<u> 12 </u>
III.	TOTAL NEGLIGENCE POINTS	<u> 30 </u>
IV.	TOTAL GOOD FAITH POINTS	<u> -0 </u>
	TOTAL ASSESSED POINTS	<u> 43 </u>
	TOTAL ASSESSED FINE	<u>\$ 720.00</u>

P 074 975 453

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to DAVID PEARCE	
Street and No. SUNNYSIDE COGEN ASSOC	
P.O. State and ZIP Code PO BOX 58087	
Post Office SALT LAKE CITY UT	84158-0087
City/State/ZIP UT 84158-0087	52
Country USA	100
Special Delivery Fee	
Restricted Delivery Fee	1.00
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$ 2.52
Postmark or Date	

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available: Consult postmaster for fees and check box(es) for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3. Article Addressed to: Mr. David Pearce Sunnyside Cogen Assoc PO Box 58087 SLC UT 84158	4. Article Number P 074 975 453
Type of Service: <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise	
Always obtain signature of addressee or agent and DATE DELIVERED.	
5. Signature of Addressee X	8. Addressee's Address (ONLY if requested and fee paid)
6. Signature - Agent X <i>Michael McZurro</i>	
7. Date of Delivery 11-29-93	

PS Form 3811, Mar. 1988 * U.S.G.P.O. 1988-212-865 DOMESTIC RETURN RECEIPT

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS

- Print your name, address and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
 - Attach to front of article if space permits, otherwise affix to back of article.
 - Endorse article "Return Receipt Requested" adjacent to number.

RECEIVED

NOV 30 1993



DIVISION OF
OIL, GAS & MINING

PENALTY FOR PRIVATE
USE, \$300

RETURN TO

Print Sender's name, address, and ZIP Code in the space below.

STATE OF UTAH

 NATURAL RESOURCES

 OIL, GAS, & MINING

 3 TRIAD CENTER, SUITE 350

 SALT LAKE CITY, UTAH 84180-1203

PS Form 3811, June 1983

93-26-4-1

COMPANY/MINE Sunny Side Operations Inc NOV/CO-# 9 26-41

PERMIT # Asst VIOLATION # 1 OF 1

HINDRANCE TO ENFORCEMENT VIOLATIONS INSPECTORS STATEMENT

A. HINDRANCE TO ENFORCEMENT (Answer for hindrance violations only such as violations concerning recordkeeping, monitoring, plans and certification.)

- 1. Describe how violation of this regulation actually or potentially (check one) hindered enforcement by DOGM and/or the public and explain the circumstances.

R-645-300-147 requires permit holder to pay reclamation fees for all coal produced under permit for sale, transfer, or use, pursuant to surface coal mining. Furthermore, the approved MR, part 112.230, pg 100-2, Book 1 states in substance that the permittee would work with OSM on fee payment. ³¹

B. DEGREE OF FAULT (Only one question applies to each violation, check and discuss.)

() No Negligence

If you think this violation was not the fault of the operator (due to vandalism or an act of God), explain. Remember the permittee is considered responsible for actions of all persons working on the mine site.

() Ordinary Negligence

If you think this violation was the result of not knowing about DOGM regulations, indifference to DOGM regulations or the lack of diligence or reasonable care. Explain.

The National for the Recklessness determination is based on the fact that fees, when paid and appropriated are utilized for the success mine reclamation. Failure to pay such fee would be may delay reclamation. Furthermore, since the permittee was put on notice concerning fee payment it is clearly beyond ordinary negligence

(✓) Recklessness:

If the actual or potential environmental harm or harm to the public should have been evident to an operator, describe the situation and what if anything, the operator did to correct it prior to being cited.

³¹ Also on 2/11/93 at a courtesy inspection the matter of reclamation fee was brought up by the undersigned. Suggested that the permittee Research Fine Hiawatha refuse mining fee precedent case that the Utah Supreme Court ruled in the favor of the government.

Page 2

COMPANY/MINE Sunupide Co. Inc

NOV/EB # 93-26-4-1

PERMIT # Act 009/035

VIOLATION # 1 OF 1

(1) Knowing and Willful Conduct

Was the operator in violation of a specific permit condition? Did the operator receive prior warning of noncompliance by State or Federal inspectors concerning this violation? Has DOGM or OSM cited the violation in the past? If so, give the dates and the type of warning or enforcement action taken.

Good Faith

- 1 In order to receive good faith for compliance with an NOV or CO the violation must have been abated before the abatement deadline. If you think this applies, describe how rapid compliance was achieved (give dates) and describe the measures the operator took to comply as rapidly as possible.

- 2 Explain whether or not the operator had the necessary resources on site to achieve compliance.

- 3 Was the submission of plans prior to physical activity required by this NOV? Yes ___ No ✓ If yes, explain.

10/22/93
DATE

Jim. J. Malick
AUTHORIZED REPRESENTATIVE



4

MODIFICATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name Sunnyside Cogeneration Associates
Mailing Address P.O. Box 58087, Salt Lake City, Utah 84158-0087
State Permit No. ACT/007/035

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated (1953):

Notice of Violation No. N 93-26-4-1 dated October 15, 19 93

Cessation Order No. C _____ dated _____, 19 _____

Part 1 of 1 is modified as follows: abatement is extended to
December 3, 1993 per operator request
Reason for modification is dated October 27, 1993.

Part _____ of _____ is modified as follows: _____

Reason for modification is _____

Part _____ of _____ is modified as follows: _____

Date of service/ mailing _____ Time of service/ mailing _____ a.m. p.m.

Date of inspection _____

Permittee/Operator representative _____ Title _____

Signature _____

PAMELA GRUBBING-LITTLE
Division of Oil, Gas & Mining

Permit Supervisor
Title

Signature _____

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE/OPERATOR GOLDENROD - NOV FILE
DOGM/MVC-1

cc: Bill Malenak equal opportunity employer

● **SENDER:** Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address. (Extra charge) 2. Restricted Delivery (Extra charge)

3. Article Addressed to: SUNNYSIDE COGENERATION MR. DAVID PEARCE PO BOX 58087 SLC UT 84158 ACT/007/035 N93-26-4-1		4. Article Number P 074 975 438 Type of Service: <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise	
5. Signature - Address X		Always obtain signature of addressee or agent and DATE DELIVERED.	
6. Signature - Agent <i>X Margaret M. Quarrie</i>		8. Addressee's Address (ONLY if requested and fee paid)	
7. Date of Delivery 1-1-93			

PS Form 3811, Mar. 1988 * U.S.G.P.O. 1988-212-865 DOMESTIC RETURN RECEIPT

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS

- Print your name, address and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
 - Attach to front of article if space permits, otherwise affix to back of article.
 - Endorse article "Return Receipt Requested" adjacent to number.



PENALTY FOR PRIVATE USE, \$300

RETURN TO

Print Sender's name, address, and ZIP Code in the space below.

STATE OF UTAH
 NATURAL RESOURCES
 OIL, GAS, & MINING
 3 TRIAD CENTER, SUITE 350
 SALT LAKE CITY, UTAH 84180-1203



NO. N 93-2641

To the following Permittee or Operator:

Name Sunnyside Cogenetrical Associates

Mine Sunnyside Coal Refuse Surface Underground Other

County Caribou State UT Telephone 801-882-4476

Mailing Address PO Box 58087, Salt Lake City, UT 84158-0087

State Permit No. Act 007/1030

Ownership Category State Federal Fee Mixed

Date of inspection October 15, 1993, 19__

Time of inspection 2:00 a.m. p.m. to 3:30 a.m. p.m.

Operator Name (other than Permittee) N/A

Mailing Address N/A

notice of violation

Under authority of the Utah Coal Mining and Reclamation Act, Section 40-10-1 et seq., *Utah Code Annotated*, 1953, the undersigned authorized representative of the Division of Oil, Gas & Mining has conducted an inspection of above mine on above date and has found violation(s) of the act, regulations or required permit condition(s) listed in attachment(s). This notice constitutes a separate Notice of Violation for each violation listed.

You must abate each of these violations within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.

The undersigned representative finds that **cessation of mining is** **is not** expressly or in practical effect required by this notice. For this purpose, "mining" means extracting coal from the earth or a waste pile, and transporting it within or from the mine site.

This notice shall remain in effect until it expires as provided on reverse side of this form, or is modified, terminated or vacated by written notice of an authorized representative of the director of the Division of Oil, Gas & Mining. Time for abatement may be extended by authorized representative for good cause, if a request is made within a reasonable time before the end of abatement period.

Date of service/mailing Oct 15, 1993 Time of service/mailing 2:00 a.m. p.m.

Sunnyside Cogenetrical Assoc. ENVIRONMENTAL COORDINATOR
Permittee/Operator representative Title

[Signature]
Signature

Wm. J. Maloney Rec. Spec.
Division of Oil, Gas & Mining representative Title

[Signature] 26
Signature Identification Number

10/15/93

SEE REVERSE SIDE

WHITE-DOG M YELLOW-OSM PINK-PERMITTEE/OPERATOR GOLDENROD-NOV FILE

IMPORTANT — READ CAREFULLY

1. PENALTIES.

a. **Proposed assessment.** The Board of Oil, Gas & Mining assesses fines based upon a proposed assessment recommended by an assessment officer. You may submit written information pertaining to violation(s) covered by this order within 15 days of the date this notice or order is served on you or your agent. Information will be used by the assessment officer in determining facts surrounding the violation(s) and amount of penalty. A representative of the Division of Oil, Gas & Mining will serve the proposed assessment on you or your agent within 30 days of issuance of notice or order.

b. **Assessment.** The penalty will be finalized unless you or your agent file a written request within 15 days of receipt of proposed assessment for an informal hearing before the assessment officer.

For each violation included in this notice, a penalty of up to \$5,000 may be assessed for each separate day the violation continues.

If you fail to abate any violations within the time set for abatement or for meeting any interim step, you will be assessed a minimum penalty of \$750 for each day of continuing violation beyond the time set for abatement. You will be issued a Cessation Order requiring you to cease surface coal mining operations or the portion of the operations relevant to the violation.

2. INFORMAL PUBLIC HEARING.

An informal public hearing may be held at or near the mine site if this notice requires cessation of mining, expressly or in practical effect. On the reverse of this page, the authorized representative has made a finding as to whether or not this notice

requires cessation of mining. Please review this finding and inform the authorized representative if you disagree with it. (~~See UMC/SMC 843.15(a)~~) *RL45-400-300 at Ag*

If this notice requires cessation of mining, it will expire within 30 days from date you are notified unless an informal public hearing is held or waived, or the condition, practice or violation is abated within the 30-day period. You will be notified of date, time and location of hearing.

3. FORMAL REVIEW AND TEMPORARY RELIEF.

You may apply for review of this notice or assessment before the Board of Oil, Gas & Mining by submitting an application for hearing within 30 days of receipt of notice or assessment by you or your agent. Apply to:

Secretary
Board of Oil, Gas & Mining
3 Triad Center, Suite 350
Salt Lake City, UT 84180-1203.

If applying for a formal board hearing, you may submit with your petition for review a request for temporary relief from this notice. Procedures for obtaining a formal board hearing are contained in the board's Rules of Practice and Procedure and in ~~UMC 845.19~~ of the board's regulations. *RL45-401-300 at Ag*

4. EFFECT ON PERMIT.

The permit may be suspended or revoked if it is determined that a pattern of violations of the act, regulations or permit conditions exists, and that the violations were caused by an unwarranted or willful failure to comply.

For further information, consult Section 40-10-20, 21, 22 and 23, *Utah Code Annotated*, UMC/SMC Parts 843-845, 900 or contact the Division of Oil, Gas & Mining at (801) 538-5340. *RL45-400-300 at Ag*

RL45-401 at Ag



NOTICE OF VIOLATION NO. N 93-26-4-1

Violation No. 1 of 1

Nature of violation

Failure by the permittee to pay all reclamation
fees required for coal produced under the permit
for sale, transfer or use, pursuant to surface coal
mining.
Refer to attached letter from Roy E. Morris, dated Oct 1, 1993.

Provisions of act, regulations or permit violated

RG45-300-147

Portion of operation to which notice applies

Retuse pile mining area

Remedial action required (including any interim steps)

Pay all past due reclamation fees and comply
with requirements detailed in 30 CFR, Part 870

Maintain required records on AUM fees at the
mine site as well as with the submit failure to pay
all fees.

Abatement time (including interim steps)

October 28, 1993 1pm.



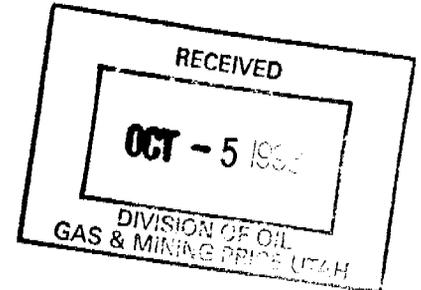
United States Department of the Interior



OFFICE OF SURFACE MINING

Reclamation and Enforcement
P.O. Box 25065
Denver Federal Center
Denver, Colorado 80225-0065

Mr. Bill Malencik
Division of Oil, Gas and Mining
P.O. Box 169
451 E. 400th North
Price, Utah 84501-2699



Dear Mr. Malencik:

Thank you for your telephone call to JoAnn Hagan on September 28, 1993, notifying her that Sunnyside Cogeneration Associates, P.O. Box 58087, Salt Lake City, Utah 84158, was actively mining on permit No. ACT007035. The company has not paid reclamation fees. We checked with Steve Rathbun at the Albuquerque Field Office, who said that the company should be paying fees at the surface rate of \$.35 per ton.

We will send the company a Coal Reclamation Fee Report, OSM-1. Again thank you for this information. If we can be of further assistance to you, please call JoAnn Hagan at (303) 236-0368.

Sincerely,

Roy E. Morris
Chief, Division of
Financial Management