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& McCULLOUGH

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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(1904-1983)  
PARNELL BLACK  
(1897-1951)

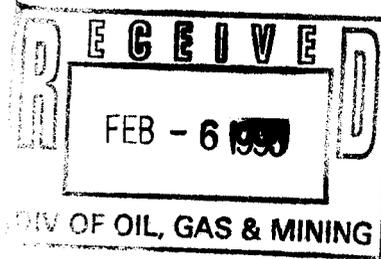
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LUCY KNIGHT ANDRE  
KATHRYN C. KNIGHT  
ZACHARY T. SHIELDS  
PENNI JOHNSON

1 ALSO MEMBER ARIZONA BAR  
2 ALSO MEMBER FLORIDA BAR  
3 ALSO MEMBER MISSOURI BAR  
4 ALSO MEMBER CALIFORNIA BAR

February 3, 1995

TO CALL WRITER DIRECT



Office of Surface Mining  
Reclamation and Enforcement  
P.O. Box 360095M  
Pittsburgh, PA 15251-6095

Re: Sunnyside Cogeneration Associates - Permit No. ACT/007/035  
Coal Reclamation Fee Report - OSM-1

To Whom It May Concern:

Enclosed please find OSM-1 Coal Reclamation Fee Report for the fourth quarter of 1994 for Sunnyside Cogeneration Associates ("SCA").

Please note that future correspondence relating to the OSM-1 reports should be sent to the following address:

Plant Manager  
Sunnyside Cogeneration Associates  
P.O. Box 10  
East Carbon, Utah 84520  
Telephone (801) 888-4476

As you know, the Office of Surface Mining ("OSM") has determined that SCA is not required to pay AML reclamation fees pursuant to OSM's decision dated July 27, 1994, a copy of which is attached hereto and incorporated by reference herein.

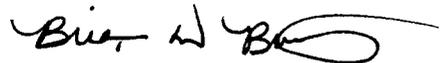
ACT/007/035 #2  
Copy Pan, Bill M.

Office of Surface Mining  
February 3, 1995  
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 NEBEKER & McCULLOUGH



Brian W. Burnett

cc: Utah Coal Regulatory Program  
Utah Division of Oil, Gas & Mining  
355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
Attention: Lowell Braxton

Jose Gutierrez  
Sunnyside Cogeneration Associates  
P.O. Box 10  
East Carbon, Utah 84520

Robert S. Evans II  
NRG Energy, Inc.  
1221 Nicollet Mall, Suite 700  
Minneapolis, MN 55403-2445

Alane Boyd  
Eckhoff, Watson & Preator Engineering  
1121 East 3900 South  
Suite 100  
Salt Lake City, Utah 84124

# Part 1 -- OSM-1 Coal Reclamation Fee Report

1. Reporting for \_\_\_ 1st, \_\_\_ 2nd, \_\_\_ 3rd or X 4th quarter, 19 94

This certification covers the following permit number(s):

UT ACT/007/035

2. I hereby certify that the statements made herein are true, complete and correct to the best of my knowledge and belief and are made in good faith.

Brian W Burnett

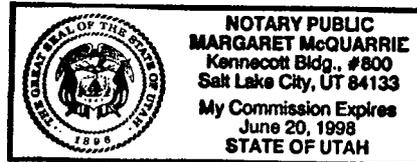
Print in ink or type the name of reporting person, corporate officer, agent or director on behalf of the operator or the permittee.

BRIAN W BURNETT

Feb 2, 1995

Signature

Date



3. Subscribed and sworn to before me in my presence the

2nd day of February, 19 95.

(seal)

Margaret McQuarrie  
Notary Public signature

My commission expires 6/20/98

4.

Contact person: BRIAN W BURNETT Plant Manager

Telephone number 888-4476  
(801) 530-7300

Master entity number 128991

Reporting entity number 128991

Check one  electronic funds transfer  
 check

<sup>TES</sup>  
SUNNYSIDE COGENERATION ASSOCIATION

~~PO BOX 58087~~

~~SALT LAKE CITY UT~~  
~~84158~~

P.O. Box 10  
EAST CARBON, UTAH 84520

5. Total payment enclosed

\$ 0.00

Title 30 U.S.C. Section 1232 provides that any person, corporate officer, agent or director, on behalf of a coal mine operator who knowingly makes any false statements, representation or certification, or knowingly fails to make any statement, representation or certification required in this section shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than one year or both.

Return to OSM or call SUSAN BELL at (303) 236-0368 if you have any questions.

# Part 2 -- Coal Reclamation Fee Report, OSM-1

OS549351  
128991



You must fill out a Part 2 and Part 3 for each permit number you are reporting.

6. Reporting for \_\_\_ 1st, \_\_\_ 2nd, \_\_\_ 3rd or **X** 4th quarter, 19 94

7. Permit Number ACT/007/035 Mine Name SUNNYSIDE COURSE REFUSE & SLIP State UT

a. MSHA number 4201813	e. Permittee name SUNNYSIDE COGENERATION ASSOCIATES	h. Operator name SUNNYSIDE COGENERATION ASSOCIATES
b. County Tribe <del>BEAVER</del> CARBON	f. Address <del>PO BOX 58087</del> P.O. Box 10	i. Address <del>PO BOX 58087</del> P.O. Box 10
c. <input type="checkbox"/> Mining complete	EAST CARBON, UTAH 84520 <del>SALT LAKE CITY UT 84158</del>	EAST CARBON, UTAH 84520 <del>SALT LAKE CITY UT 84158</del>
d. <input type="checkbox"/> All stockpile reported	g. Taxpayer I.D. <u>84-1027564</u> NONE	j. Taxpayer I.D. <u>84-1027564</u> NONE

## 8. Fee Computation

a. Gross tons <u>82,375 .00</u>	a. Gross tons _____	a. Gross tons _____
b. Moisture	b. Moisture	b. Moisture
(1) total _____ %	(1) total _____ %	(1) total _____ %
(2) inherent _____ %	(2) inherent _____ %	(2) inherent _____ %
(3) excess _____ %	(3) excess _____ %	(3) excess _____ %
c. Reduced tons _____	c. Reduced tons _____	c. Reduced tons _____
d. Net tons _____	d. Net tons _____	d. Net tons _____
e. Rate \$ _____	e. Rate \$ _____	e. Rate \$ _____
f. Calculated fee \$ <u>0.00</u>	f. Calculated fee \$ _____	f. Calculated fee \$ _____

9. Total calculated fee for this permit number \$ 0.00

# Part 3 -- Coal Reclamation Fee Report, OSM-1

OS549351  
128991

 Complete a Part 3 for each permit number you are reporting. This information is required under section 402(c) of the Abandoned Mine Reclamation Act of 1990. **10.** Reporting for \_\_\_ 1st, \_\_\_ 2nd, \_\_\_ 3rd or  4th quarter, 19 94

**11. Permit Number** ACT/007/035 **Mine Name** SUNNYSIDE COURSE REFUSE & SLUR **State** UT

**12. Mineral owners** **address** **city/state/zip**  
*Sunnyside Cogeneration Associates P.O Box 10 ; EAST CARBON, UTAH 84520*

**13. Purchasers of coal** **address** **city/state/zip**  
*Same*

**14. Coal delivered to:** (prep plant, tipple, loading point) **address** **city/state/zip**  
*Same*



# United States Department of the Interior

OFFICE OF SURFACE MINING  
Reclamation and Enforcement  
Washington, D.C. 20240

JUL 27 1994

Callister Nebeker  
& McCullough

JUL 29 1994

Brian W. Burnett  
Callister, Duncan & Nebeker  
Suite 800, Kennecott Building  
Salt Lake City, UT 84133

**RECEIVED**

Dear Mr. Burnett:

This is in response to the correspondence and other data you submitted regarding the applicability of reclamation fees to the coal waste material generated from the Sunnyside Mine wash plant, and burned in the waste-coal fired small power production facility operated by Sunnyside Cogeneration Associates (SCA).

According to the information you have provided, it is our understanding that:

1. the material was or is the by-product of the coal preparation process, and has been found by the Federal Energy Regulatory Commission (FERC) to have little or no commercial value;
2. FERC has certified the SCA operation as a waste burning facility and that certification remains valid;
3. the material is not processed to remove the residual coal from the aggregate waste material; and
4. the material from the Sunnyside wash plant, which will be burned in the SCA facility, has no market value.

Based on this and related information, we find that the waste material in question has no value and will not be subject to reclamation fees. We must emphasize, however, that this information is subject to review by our staff, and that you must notify us immediately if any of the conditions you cited or representations you made should change. In addition, this finding does not release or in any way circumscribe SCA's or related parties' responsibilities under Title V of the Surface Mining Control and Reclamation Act, and as specified in the permit issued by the Utah Department of Natural Resources.

Because SCA's refuse pile operation is permitted, it will still be necessary to report the tonnage used from the pile on the Coal Reclamation Fee Report (Form OSM-1) that is mailed to operators each calendar quarter. Should you have any questions on these matters, please contact Jane Gray (606-233-2808) or James Krawchyk (412-921-2676) of our audit staff.

Sincerely,



Robert Ewing, Assistant Director  
Finance and Accounting



# State of Utah

## DEPARTMENT OF ENVIRONMENTAL QUALITY DIVISION OF WATER QUALITY

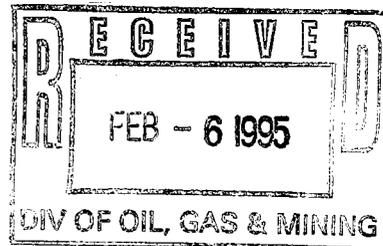
Michael O. Leavitt  
Governor

Dianne R. Nielson, Ph.D.  
Executive Director

Don A. Ostler, P.E.  
Director

288 North 1460 West  
P.O. Box 144870  
Salt Lake City, Utah 84114-4870  
(801) 538-6146 Voice  
(801) 538-6016 Fax  
(801) 536-4414 T.D.D.

February 3, 1995



Mr. Mark Page  
Regional Engineer  
State Engineer's Office  
453 South Carbon Avenue  
Price, Utah 84501-0718

*Pepi Swell, Aaron, Henry, Joe, Bill*  
RE: Sunnyside Cogeneration Associates -  
Grassy Trail Creek (double-side)  
ACT/007/035 #2

Dear Mark:

The Division of Water Quality (DWQ) met with representatives from Sunnyside Cogeneration Associates (SCA) on Friday January 27, 1995 to discuss issues relating to the discharge of water into Grassy Trail Creek from SCA's drilling operations.

As you know, SCA's drilling operations are producing water that contains a foaming agent and a polymer. DWQ has reviewed the MSDS sheets for these materials and have concerns regarding their impacts to the aquatic ecosystem. DWQ is monitoring this situation and has issued a Notice of Violation to SCA for unauthorized discharges and for discharges which do not meet the parameters of SCA's UPDES discharge permit. The water from the drilling operation is being discharged at one of SCA's approved UPDES outfalls into Grassy Trail Creek. The water travels approximately three (3) miles downstream to Diversion #4.

We have been informed that your office has required that water reaching Diversion #4 on the Grassy Trail Creek be split so that some minimum stream flow is maintained. Water containing the foam and polymer from the SCA drilling operation reaching Diversion #4, thus far has been diverted by SCA into a lined reservoir at the SCA plant site.

By placing all of the foam and polymer contaminated water produced from the drilling operation in the SCA reservoir, the current damage to Grassy Trail Creek is limited to the stretch from the UPDES discharge point to Diversion #4. Allowing the water to be split at Diversion #4 would increase the potential for environmental damage. Also, future cleanup or mitigative efforts could



February 3, 1995

Page 2

be compounded by allowing this material to disperse into the lower reach of grassy Trail Creek, the Price River, and Green River. Pending these cleanup efforts, DWQ endorses the recapture of the water from the drilling operation at the SCA reservoir as a way to minimize the potential environmental damage relating to these issues.

Thank you for your cooperation in this regard. If you have any questions, please contact Fred Pehrson or me at 538-6146.

Sincerely,

Utah Water Quality Board



Don A. Ostler, P.E.  
Executive Secretary

DAO:FCP:mhf

cc: Brian W. Burnett  
Utah Division of Wildlife Resources  
Southeastern Utah Health District  
David Ariotti, District Engineer  
Utah Division of Oil, Gas & Mining

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FILE: SUNNYSIDE COGENERATION ASSOC

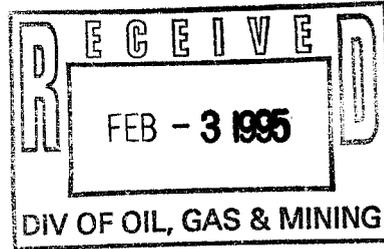
**SUNNYSIDE COGENERATION ASSOCIATES**

ONE POWER PLANT ROAD  
SUNNYSIDE, UTAH 84539

*cc JWC  
PRL  
TAM  
JWA  
aug file  
2/3/95  
BJ*

January 30, 1995

James W. Carter  
Director - Division of Oil, Gas & Mining  
3 Triad Center, Suite 350  
Salt Lake City, UT 84180-1203  
Phone: (801) 538-5340



RE: **Proposed Drilling Plan to Characterize the Refuse Pile for Acid/Toxic Materials**  
Sunnyside Cogeneration Associates, Permit No ACT/007/035

Dear Mr. Carter,

SCA previously requested that the Division waive the requirement to characterize the existing refuse pile by conducting a drilling and sampling program. In your response, you indicated that you still believed that a characterization program was necessary. You recommended that we meet with you to design a schedule to meet the needs of the present MRP.

As you are aware, NRG Energy Inc. and Babcock & Wilcox (the "Partners") have submitted materials to your Division in support of formally acquiring the joint venture partnership interest in SCA, formerly held by Kaiser Power and Kaiser Systems, Inc. The Division's approval of this acquisition will allow the Partners to assume management of SCA.

The Partners have expressed their interest in moving forward with technical discussions on characterizing the refuse pile for acid/toxic materials to identify the Division's interests and determine cost effective options to address them. They are interested in reaching an agreement on what must be done and will participate as necessary to accomplish it.

Please let us know when we can organize a meeting that can be attended by all of those who need to participate.

Sincerely,

A handwritten signature in cursive script that reads "Alane E. Boyd".

Alane E. Boyd, PE  
Senior Engineer, EWP Engineering

AEB:ssc

cc: Brian Burnett      CNM  
Bob Evans              NRG  
Doug Burnham        B&W  
Lowell Braxton        DOGM  
Daron Haddock        DOGM  
Jose Gutierrez        Acting Plant Mgr.

SENT BY:WSC

: 2- 2-95 : 1:59PM ;

Post-It™ brand fax transmittal memo 7671		# of pages ▶ 12
To Div. OIL/GAS/MIN	From OFF. SURF. MIN.	
Co.	Co. HBO Field OFF	
Dept.	Phone # 505 766-1486	
Fax # 801-359-3940	Fax # 505 766-2009	



United States Department

OFFICE OF HEARINGS AND APPEALS

Hearings Division  
 6432 Federal Building  
 Salt Lake City, Utah 84138  
 (Phone: 801-524-3344)

OSMRE-2 AM 11:40

OSMRE-WSS

cc: Jwe  
 JPB  
 PLZ  
 JAM

January 31, 1995

SUNNYSIDE COGENERATION  
 ASSOCIATED, a Utah joint venture.

Applicant

v.

OFFICE OF SURFACE MINING  
 RECLAMATION AND  
 ENFORCEMENT (OSMRE).

Respondent

Docket No. DV 94-11-R

Application for Review and Temporary  
 Relief

Notice of Violation  
 No. 94-020-370-003

Permit No. ACT\007\035

Carbon County, Utah

JWA  
 orig file  
 2/6/95  
 BJ

DECISION

Appearances: Brian W. Burnett, Esq., and Fred W. Finlinson, Esq., Salt Lake City, Utah,  
 for applicant;

DeAnn L. Owen, Denver, Colorado, for respondent.

Before: Administrative Law Judge Child

Statement of the Case

On June 3, 1994, Sunnyside Cogeneration Associates (Sunnyside) filed an application for temporary and permanent relief regarding Notice of Violation No. 94-020-370-003 (NOV) issued to Sunnyside by the Office of Surface Mining Reclamation and Enforcement (OSM) on June 2, 1994. The NOV charges Sunnyside, the owner and permittee of a coal refuse mine in Carbon County, Utah (Mine), with a violation of R645-302-261 and R645-302-263 of the Utah Administrative Code (Utah program) for "[f]ailure to obtain a validly issued permit for a coal processing plant in accordance with the approved Utah program." (Ex. R-6) This coal processing plant (Preparation Plant) is also owned by Sunnyside. As corrective action, the NOV requires Sunnyside to cease all coal processing activities and to obtain a validly issued permit addressing all parts of the Utah program, "including the bonding requirements."

The matter came on regularly for hearing on June 15, 1994, in Salt Lake City, Utah. The parties stipulated that the application for temporary relief was moot because OSM terminated

SENT BY:WSC

; 2- 2-95 : 2:00PM :

3036725622-

505 7662609:# 3/13

the NOV effective June 3, 1994, and therefore that the issue of temporary relief should be dismissed. They also stipulated that two issues remained for determination: (1) whether the NOV should be vacated and (2) whether OSM should be ordered to pay Sunnyside's costs, including attorney's fees, of defending against the NOV.

The parties have submitted proposed decisions, including proposed findings and conclusions, and responses in support of their respective positions. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent that they are not so consistent or may be immaterial or irrelevant, they are rejected.

The issues to be here determined are:

- I. Was a prima facie case of the validity of the NOV established?
- II. Was the coal crushing facility area validly permitted prior to issuance of the NOV so that the NOV is invalid?
- III. Did OSM take enforcement action against Sunnyside in bad faith or for the purpose of harassing or embarrassing Sunnyside so that Sunnyside is entitled to an award of attorney's fees?
  - A. Does OSM's handling of its dispute with the State over the exemption for preparation plants located at the site of ultimate use evidence bad faith or harassment?
  - B. Does OSM's purported failure to follow the regulatory enforcement provisions evidence bad faith or harassment?
  - C. Does OSM's purported failure to recognize an exception to the regulatory presumption of environmental harm evidence bad faith or harassment?

#### Statement of Facts

The State of Utah, pursuant to sections 503(a) and 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1253(a) and 1273(c), has assumed primary responsibility for the regulation and control of surface coal mining and reclamation operations on State and Federal lands within its borders. See 30 CFR Part 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining (DOG M).

Sunnyside is the sole owner and permittee under the Utah program of the Mine. It is also the sole owner of the Preparation Plant and a power plant (Power Plant), both of which are

located immediately adjacent to the Mine (Tr. 30-31; 70-71; Exs. A-27, R-1 through R-4, R-15). Construction of the Preparation Plant began in April of 1993 (Tr. 95). It consists of coal crushing, screening, and conveying facilities, a belly dump truck loop (access road), coal stockpile, and sediment pond (Tr. 30-31; 70-71; Exs. A-27, R-1 through R-4, R-15).

On September 1, 1993, as a result of a random sample oversight inspection conducted by OSM Inspector Mitchell S. Rollings, OSM issued Ten-Day Notice No. X93-020-370-002 TV1 (the TDN) to DOGM and Sunnyside, alleging a violation of U.A.C. R645-300-112.400 and U.A.C. R645-300-141 for a "disturbance off the permit area" or "[f]ailure to conduct all coal mining and reclamation operations only on those lands designated as the permit area." (Tr. 69; Ex. R-15) The area of off-permit disturbance identified in the TDN included the crushing facilities and other components of Sunnyside's Preparation Plant (Ex. R-15).

In response, DOGM explained that the Preparation Plant, located next to the Power Plant, was originally excluded from the permit area on the basis of the exemption contained in the Utah program for coal processing plants located at the site of ultimate coal use (Ex. R-20). DOGM did, however, require Sunnyside to propose another basis, if one existed, for continuing to exclude the Preparation Plant from the permitted area (Ex. R-20). Eventually, DOGM issued a Notice of Violation (State NOV) to Sunnyside. The State NOV required as abatement action that Sunnyside, by November 5, 1993, identify, describe, and locate all surface coal mining and reclamation activities by submitting adequate permit changes which effectively describe and/or incorporate the access road and facilities (Preparation Plant) located adjacent to the permit area (Tr. 81-82; Ex. R-23). Because DOGM issued the State NOV, OSM refrained from further Federal enforcement at that time (Tr. 81).

Despite receiving extensions of the abatement date, Sunnyside failed to timely abate the State NOV. Consequently, on December 3, 1993, DOGM issued a cessation order (CO) to Sunnyside for "failure to identify and describe all mining and related activities within the permit area." (Tr. 81-83; Ex. R-22).

On December 8, 1993, Sunnyside submitted to DOGM a proposed permit change to include within the permit area an area encompassing the access road, a waste coal storage area within the loop of the access road, and certain drainage control structures (Ex. R-23). On January 21, 1994, DOGM approved Sunnyside's proposed permit change (Ex. R-23).

At the same time, DOGM terminated the CO based upon DOGM's finding that the "[p]lans and designs provided by [Sunnyside] were . . . sufficiently complete and adequate to meet the abatement requirements of [the State NOV]." (Ex. R-23) DOGM also concurred with Sunnyside that the coal crushing facility area should not be included in the permit area because it purportedly is an integral part of the Power Plant operations, is not in connection with the Mine, and is not subject to the permitting requirements (Ex. R-23).

On April 11, 1994, OSM Inspector Rollings inquired regarding the actions which DOGM had taken regarding permitting of Sunnyside's Preparation Plant (Tr. 88). DOGM gave Inspector

Rollings relevant documentation showing that only the area encompassing the access road, waste coal storage area, and drainage structures had been permitted (Tr. 88, 132). Prior to May 4, 1994, OSM informed DOGM that it did not agree with DOGM's finding that the coal crushing facility area need not be permitted (Ex. A-27). It further informed DOGM that it was proposing a federal inspection of Sunnyside's facilities as a follow up to the TDN (Ex. A-27).

On May 12, 1994, OSM specifically informed DOGM that a permit for the coal crushing facility area would have to be issued by June 1, 1994, or OSM would take enforcement action (Tr. 89, 172-173). The next day DOGM relayed this information to Sunnyside and it agreed to submit an application to amend its permit to include the coal crushing facility area (Tr. 173-175). On May 16 and 20, 1994, Sunnyside submitted the application and supporting information (Tr. 175). On June 1, 1994, DOGM issued a letter conditionally approving Sunnyside's application subject to the fulfillment of certain stipulations by June 30, 1994 (Ex. R-24). One of those stipulations was the submittal of a reclamation cost estimate for the coal crushing facility area (Ex. R-24).

On June 2, 1994, OSM Inspector Rollings conducted a follow up inspection of Sunnyside's Preparation Plant and issued the NOV in question, charging Sunnyside with a "[f]ailure to obtain a validly issued permit for a coal processing plant in accordance with the approved Utah program." (Tr. 64; Ex. R-6) In the NOV, OSM identifies the portion of the operation to which the NOV applies as the "coal processing facilities (crushers, conveyors, etc.) adjacent to the refuse mining operation." (Ex. R-6) As corrective action, the NOV required Sunnyside to obtain a permit for the coal processing facilities by August 2, 1994, and directed Sunnyside to cease its coal crushing operations until such time as Sunnyside obtained the permit (Tr. 52-53, 123-124; Ex. R-6).

Inspector Rollings explained that DOGM's June 1, 1994 conditional approval of Sunnyside's application to include the coal crushing facility area within the permit area did not amount to a proper permitting of this area (Tr. 92-93, 120-121, 133-134). Inspector Rollings believed that the area was not properly permitted because (1) DOGM could not legally approve the application without first finding that the existing reclamation bond was adequate to cover the estimated reclamation costs for this additional area, and (2) DOGM had not made this finding, as Sunnyside had not submitted the reclamation cost estimate upon which such a finding is based (Tr. 92-93, 120-121, 133-134).

On June 3, 1994, Sunnyside submitted to DOGM the reclamation cost estimate for the coal crushing facility area and, by letter, DOGM finally approved Sunnyside's permit amendment application, finding that the bond was adequate and that all of the stipulations of the June 1, 1994 letter had been met (Ex. R-26). After twice modifying the NOV to allow Sunnyside to continue to operate the Preparation Plant, OSM terminated the NOV on June 10, 1994, effective June 3, 1994, in light of DOGM's June 3, 1994 final approval of the permit amendment application (Tr. 60-62, 95, 113-117, 136, 139; Exs. R-11 through R-14, R-26).

## Discussion

### I.

#### **Was a prima facie case of the validity of the NOV established?**

Pursuant to 43 CFR 4.1171(a), OSM has the burden of establishing a prima facie case as to the validity of the NOV. The ultimate burden of persuasion rests with Sunnyside. See 43 CFR 4.1171(b).

The parties have not focused upon whether a prima facie case of the validity of the NOV was established. The evidence shows not only that a prima facie case was established, but also that Sunnyside failed to overcome the prima facie case for the reasons set forth below.

### II.

#### **Was the coal crushing facility area validly permitted prior to issuance of the NOV so that the NOV is invalid?**

Sunnyside argues that the NOV is invalid because the coal crushing facility area was validly permitted as of June 1, 1994, contrary to the charge in the NOV. On that date, DOGM issued its letter conditionally approving Sunnyside's application to revise its permit boundaries to include the crushing facility area. Sunnyside contends that this letter constitutes a valid revision of its permit to include the crushing facility area.

Sunnyside's argument cannot be sustained because the June 1, 1994 letter does not and cannot constitute a valid and final approval of Sunnyside's application. In that letter, DOGM states that the application "should be approved as an Incidental Boundary Change with the following stipulations. The stipulations must be completed within 30 days." Thus, the letter did not finally approve the application, but only contemplated approval of the application if and when the stipulations were completed within 30 days.

While the Director of DOGM, James W. Carter, testified that the June 1, 1994 letter was a final approval of Sunnyside's permit amendment application, the wording of the letter and the subsequent June 3, 1994 letter belie this testimony. The June 3, 1994 letter refers to the June 1, 1994 letter as a "conditional approval." It is the June 3, 1994 letter that states with finality that the permit amendment application is "approved" without qualification or condition.

The evidence does not show that the stipulations were completed and the application finally approved until issuance of DOGM's letter dated June 3, 1994, which occurred after issuance of the NOV. Prior to June 3, 1994, Sunnyside had not completed at least one stipulation which required it to "provide a reclamation cost estimate for the [crushing] facilities area." Before submittal of this reclamation cost estimate, DOGM did not and could not approve Sunnyside's application.

Under the Utah program, an applicant for an Incidental Boundary Change must submit to DOGM a detailed reclamation cost estimate regarding the adjustment in acreage prior to approval of the application. This conclusion is dictated by several provisions of the Utah program. First, Incidental Boundary Changes are categorized as "Permit Amendments," U.A.C. R645-303-223, which must "be processed in accordance with the requirements of R645-300-100 and R645-300-200, and the information requirements of R645-301 and R645-302, except that permit amendments will not be subject to requirements for notice, public participation, or notice of decision of R645-300-100." See U.A.C. R645-303-227. Second, one of the applicable requirements provides in pertinent part:

[DOGM] will determine the amount of the bond for each area to be bonded, in accordance with R645-301-830. [DOGM] will also adjust the amount as acreage in the permit area is revised, or when relevant conditions change according to the requirements of R645-301-830.400.

U.A.C. R645-301-812.300. Third, U.A.C. R645-301-830.440 similarly provides: "In the event that an approved permit is revised in accordance with the R645 rules, [DOGM] will review the bond for adequacy and, if necessary, will require adjustment of the bond to conform to the permit as revised." Fourth, the determination of the amount of the bond must "[b]e based on, but not limited to, the detailed estimated [reclamation] cost, with supporting calculations for the estimates, submitted by the permit applicant." U.A.C. R645-301-830.140.

Read together, these regulatory rules clearly required Sunnyside to submit a detailed reclamation cost estimate regarding the crushing facility area for DOGM's review before the Incidental Boundary Change could be approved. They also require DOGM to make a finding that the bond is adequate to cover the estimated reclamation cost for this additional area. Thus, even assuming, *arguendo*, that DOGM did finally approve Sunnyside's application in the June 1, 1994 letter, such approval would not be valid under the Utah Program because of Sunnyside's failure to provide a reclamation cost estimate for the crushing facility area prior to this purported approval and because DOGM had not made a finding that the bond was adequate to cover the estimated reclamation costs. Therefore, the coal crushing facility area was not validly permitted on June 2, 1994, and the NOV is valid.

### III.

**Did OSM take enforcement action against Sunnyside in bad faith  
or for the purpose of harassing or embarrassing Sunnyside  
so that Sunnyside is entitled to an award of attorney's fees?**

Pursuant to 30 U.S.C. § 1275(c) and 43 CFR 4.1294(c), Sunnyside argues that it is entitled to an award of attorney's fees because OSM's enforcement actions against it were taken in bad faith and for purposes of harassing or embarrassing Sunnyside. However, Sunnyside effectively concedes that it is not entitled to attorney's fees if the NOV is valid, stating: "If the NOV is not valid, the following issues have to be reviewed in relation to [Sunnyside's]

request for attorney's fees . . . ." Because the NOV is valid and because Sunnyside did not meet its burden of proof regarding entitlement to attorney's fees, *see Dennis R. Patrick*, 1 IBSMA 248, 86 I.D. 450 (1979), Sunnyside's request for attorney's fees must be denied.

Rather than acting in bad faith or with intent to harass or embarrass Sunnyside, OSM attempted in good faith to resolve the matter for almost one year before resorting to direct Federal enforcement. Because the conduct of a surface coal mining operation, such as the Preparation Plant, without a valid permit constitutes a condition or practice which can be reasonably expected to cause significant, imminent environmental harm, 30 CFR 843.11(a)(2), OSM could have issued, and arguably was required to issue, a cessation order immediately without prior issuance of a ten-day notice upon discovery of the unpermitted status of the Preparation Plant. *See* 30 CFR 843.11(a)(1). Instead, OSM issued the TDN and waited nearly a year for DOGM and Sunnyside to take appropriate action. OSM issued the NOV only after DOGM and Sunnyside failed to meet a final June 1, 1994, deadline to remedy the violation and properly permit the Preparation Plant. When OSM issued the NOV, there was no guarantee that the Preparation Plant would be properly permitted in the near future. Issuance of the NOV apparently had the desired effect of prompting a speedy resolution of the problem. Once the Preparation Plant was permitted, OSM promptly terminated the NOV.

Nevertheless, Sunnyside cites numerous alleged OSM procedural or jurisdictional errors as evidence of OSM's purported bad faith and harassment. These allegations are addressed briefly below.

A.

**Does OSM's handling of its dispute with the State over the exemption for preparation plants located at the site of ultimate use evidence bad faith or harassment?**

OSM has maintained that Sunnyside's operation of the coal crushing facilities constitutes "coal mining and reclamation operations" which must be permitted under the Utah program. DOGM initially disagreed with OSM's position, contending that Sunnyside's crushing facilities "are located at the site of ultimate coal use" and are thus exempt from the permitting requirements of the Utah program under U.A.C. R645-302-261 (Ex. R-15; Ex. R-20).

Sunnyside argues that OSM acted in bad faith or with intent to harass Sunnyside because OSM should have resolved its dispute with DOGM by either seeking an amendment of the Utah program or taking over the Utah program, pursuant to 30 CFR Parts 732 and 733, and 30 U.S.C. § 1271(b). Sunnyside's argument cannot be sustained, as OSM has the authority to enforce the Utah program through either of two statutory routes: (1) through direct Federal enforcement on a mine-by-mine basis under 30 U.S.C. § 1271(a), such as issuing a notice of violation as it did in this case, or (2) through a takeover of the Utah program under 30 U.S.C. § 1271(b). *See Annaco, Inc. v. Hodel*, 675 F. Supp. 1052, 1056-57 (E.D. Ky. 1987); *Turner Brothers, Inc. v. OSM*, 92 IBLA 320, 324-325 (1986).

**B.****Does OSM's purported failure to follow the regulatory enforcement provisions evidence bad faith or harassment?**

The provisions of 30 CFR 842.11(b)(1)(ii)(b)(1) and 30 CFR 843.12(a)(2) prescribe the procedures that must be followed and the requirements that must be met before OSM may exercise its enforcement powers in certain instances. Sunnyside argues that OSM had no jurisdiction to issue the NOV because OSM did not follow these procedures and that this purported lack of jurisdiction is evidence of bad faith or harassment.

Sunnyside's argument cannot be sustained because those provisions do not apply in this case. Rather, where, as here, OSM learns of the existence of a violation involving significant, imminent environmental harm, and it appears that the State has failed to take appropriate action to correct the violation, OSM must conduct a Federal inspection immediately. 30 U.S.C. § 1271(a)(1); 30 CFR 843.11(b)(1). Accordingly, the Interior Board of Land Appeals and the Federal courts have held that where, as here, OSM encounters a violation involving significant, imminent environmental harm, and the State has failed to take appropriate action to correct the violation, a State's primacy does not oust OSM of jurisdiction to take direct and immediate Federal enforcement action. *Triple R Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 126 IBLA 310, 315 (1993); *R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 121 IBLA 142, 147 (1991); *Stone v. Office of Surface Mining Reclamation and Enforcement*, 114 IBLA 353, 357 (1990); *Annaco, Inc.*, 675 F.Supp. at 1058. See also 30 CFR 843.11(a)(1).

Based upon the testimony at the hearing, Sunnyside attacks the premise that significant, imminent environmental harm existed. However, this testimony is irrelevant because Sunnyside's operation of the Preparation Plan without a valid permit is defined by regulation to be a condition or practice which is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 CFR 843.11(a)(2).

Given the foregoing, OSM clearly not only had the authority, but also was required by law to take immediate and direct Federal enforcement action through the issuance of the NOV.

**C.****Does OSM's purported failure to recognize an exception to the regulatory presumption of environmental harm evidence bad faith or harassment?**

Sunnyside correctly notes that OSM required the cessation of Sunnyside's coal crushing operations because this operation of surface coal mining operations without a valid permit is defined by regulation to be a condition or practice which is causing or can reasonably be expected to cause significant, imminent environmental harm. See 30 CFR 843.11(a)(2).

Sunnyside argues that OSM acted in bad faith or with intent to harass because the presumption that environmental harm can reasonably be expected from unpermitted surface coal mining operations does not apply to Sunnyside's coal crushing facilities.

In support of this argument, Sunnyside references the exception to the application of this presumption where the 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." 30 CFR 834.11(a)(2)(i). Sunnyside contends that this exception applies under the facts of this case.

This exception does not apply because Sunnyside had not filed a timely and complete application for a permit for the crushing facility area at the time the NOV was issued. It was not timely because it was not filed prior to the initiation of construction of the Preparation Plant. It was not complete because it did not contain a reclamation cost estimate for the crushing facility area. Because the exception does not apply, OSM's reliance upon the presumption of environmental harm is not evidence of bad faith or harassment.

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Without further belaboring this decision with additional references to contentions regarding errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial.

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Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

#### Findings of Fact

1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. Sunnyside's application to amend its permit to include the coal crushing facility area was not complete until after issuance of the NOV, as it lacked a reclamation cost estimate.
3. Sunnyside's application to amend its permit to include the coal crushing facility area was not timely, as it was not submitted to DOGM prior to initiation of construction of the Preparation Plant.
4. DOGM did not make a finding that Sunnyside's bond was adequate to cover the estimated reclamation costs for the coal crushing facility area until after issuance of the NOV.

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.
2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
3. A prima facie case of the validity of the NOV was established.
4. The coal crushing facility area was not finally or validly permitted until after issuance of the NOV.
5. OSM did not take enforcement action against Sunnyside in bad faith or for the purpose of harassing or embarrassing Sunnyside.
6. Sunnyside is not entitled to an award of attorney's fees.
7. The NOV is valid.

Order

Notice of Violation No. 94-020-370-003 issued to Sunnyside on June 2, 1994, is **AFFIRMED** and Sunnyside's request for attorney's fees is **DENIED**.



Ramon M. Child  
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures.)

## Distribution

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United States Department

OFFICE OF HEARINGS AND APPEALS

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 Salt Lake City, Utah 84138  
 (Phone: 801-524-3344)

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cc: JWC  
 JAB  
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January 31, 1995

SUNNYSIDE COGENERATION  
 ASSOCIATED, a Utah joint venture.

Applicant

v.

OFFICE OF SURFACE MINING  
 RECLAMATION AND  
 ENFORCEMENT (OSMRE).

Respondent

Docket No. DV 94-11-R

Application for Review and Temporary  
 Relief

Notice of Violation  
 No. 94-020-370-003

Permit No. ACT\007\035

Carbon County, Utah

2695  
 BJ

DECISION

Appearances: Brian W. Burnett, Esq., and Fred W. Finlinson, Esq., Salt Lake City, Utah,  
 for applicant;

DeAnn L. Owen, Denver, Colorado, for respondent.

Before: Administrative Law Judge Child

Statement of the Case

On June 3, 1994, Sunnyside Cogeneration Associates (Sunnyside) filed an application for temporary and permanent relief regarding Notice of Violation No. 94-020-370-003 (NOV) issued to Sunnyside by the Office of Surface Mining Reclamation and Enforcement (OSM) on June 2, 1994. The NOV charges Sunnyside, the owner and permittee of a coal refuse mine in Carbon County, Utah (Mine), with a violation of R645-302-261 and R645-302-263 of the Utah Administrative Code (Utah program) for "[f]ailure to obtain a validly issued permit for a coal processing plant in accordance with the approved Utah program." (Ex. R-6) This coal processing plant (Preparation Plant) is also owned by Sunnyside. As corrective action, the NOV requires Sunnyside to cease all coal processing activities and to obtain a validly issued permit addressing all parts of the Utah program, "including the bonding requirements."

The matter came on regularly for hearing on June 15, 1994, in Salt Lake City, Utah. The parties stipulated that the application for temporary relief was moot because OSM terminated

the NOV effective June 3, 1994, and therefore that the issue of temporary relief should be dismissed. They also stipulated that two issues remained for determination: (1) whether the NOV should be vacated and (2) whether OSM should be ordered to pay Sunnyside's costs, including attorney's fees, of defending against the NOV.

The parties have submitted proposed decisions, including proposed findings and conclusions, and responses in support of their respective positions. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent that they are not so consistent or may be immaterial or irrelevant, they are rejected.

The issues to be here determined are:

- I. Was a prima facie case of the validity of the NOV established?
- II. Was the coal crushing facility area validly permitted prior to issuance of the NOV so that the NOV is invalid?
- III. Did OSM take enforcement action against Sunnyside in bad faith or for the purpose of harassing or embarrassing Sunnyside so that Sunnyside is entitled to an award of attorney's fees?
  - A. Does OSM's handling of its dispute with the State over the exemption for preparation plants located at the site of ultimate use evidence bad faith or harassment?
  - B. Does OSM's purported failure to follow the regulatory enforcement provisions evidence bad faith or harassment?
  - C. Does OSM's purported failure to recognize an exception to the regulatory presumption of environmental harm evidence bad faith or harassment?

Statement of Facts

The State of Utah, pursuant to sections 503(a) and 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1253(a) and 1273(c), has assumed primary responsibility for the regulation and control of surface coal mining and reclamation operations on State and Federal lands within its borders. See 30 CFR Part 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining (DOGM).

Sunnyside is the sole owner and permittee under the Utah program of the Mine. It is also the sole owner of the Preparation Plant and a power plant (Power Plant), both of which are

located immediately adjacent to the Mine (Tr. 30-31; 70-71; Exs. A-27, R-1 through R-4, R-15). Construction of the Preparation Plant began in April of 1993 (Tr. 95). It consists of coal crushing, screening, and conveying facilities, a belly dump truck loop (access road), coal stockpile, and sediment pond (Tr. 30-31; 70-71; Exs. A-27, R-1 through R-4, R-15).

On September 1, 1993, as a result of a random sample oversight inspection conducted by OSM Inspector Mitchell S. Rollings, OSM issued Ten-Day Notice No. X93-020-370-002 TV1 (the TDN) to DOGM and Sunnyside, alleging a violation of U.A.C. R645-300-112.400 and U.A.C. R645-300-141 for a "disturbance off the permit area" or "[f]ailure to conduct all coal mining and reclamation operations only on those lands designated as the permit area." (Tr. 69; Ex. R-15) The area of off-permit disturbance identified in the TDN included the crushing facilities and other components of Sunnyside's Preparation Plant (Ex. R-15).

In response, DOGM explained that the Preparation Plant, located next to the Power Plant, was originally excluded from the permit area on the basis of the exemption contained in the Utah program for coal processing plants located at the site of ultimate coal use (Ex. R-20). DOGM did, however, require Sunnyside to propose another basis, if one existed, for continuing to exclude the Preparation Plant from the permitted area (Ex. R-20). Eventually, DOGM issued a Notice of Violation (State NOV) to Sunnyside. The State NOV required as abatement action that Sunnyside, by November 5, 1993, identify, describe, and locate all surface coal mining and reclamation activities by submitting adequate permit changes which effectively describe and/or incorporate the access road and facilities (Preparation Plant) located adjacent to the permit area (Tr. 81-82; Ex. R-23). Because DOGM issued the State NOV, OSM refrained from further Federal enforcement at that time (Tr. 81).

Despite receiving extensions of the abatement date, Sunnyside failed to timely abate the State NOV. Consequently, on December 3, 1993, DOGM issued a cessation order (CO) to Sunnyside for "failure to identify and describe all mining and related activities within the permit area." (Tr. 81-83; Ex. R-22).

On December 8, 1993, Sunnyside submitted to DOGM a proposed permit change to include within the permit area an area encompassing the access road, a waste coal storage area within the loop of the access road, and certain drainage control structures (Ex. R-23). On January 21, 1994, DOGM approved Sunnyside's proposed permit change (Ex. R-23).

At the same time, DOGM terminated the CO based upon DOGM's finding that the "[p]lans and designs provided by [Sunnyside] were . . . sufficiently complete and adequate to meet the abatement requirements of [the State NOV]." (Ex. R-23) DOGM also concurred with Sunnyside that the coal crushing facility area should not be included in the permit area because it purportedly is an integral part of the Power Plant operations, is not in connection with the Mine, and is not subject to the permitting requirements (Ex. R-23).

On April 11, 1994, OSM Inspector Rollings inquired regarding the actions which DOGM had taken regarding permitting of Sunnyside's Preparation Plant (Tr. 88). DOGM gave Inspector

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Rollings relevant documentation showing that only the area encompassing the access road, waste coal storage area, and drainage structures had been permitted (Tr. 88, 132). Prior to May 4, 1994, OSM informed DOGM that it did not agree with DOGM's finding that the coal crushing facility area need not be permitted (Ex. A-27). It further informed DOGM that it was proposing a federal inspection of Sunnyside's facilities as a follow up to the TDN (Ex. A-27).

On May 12, 1994, OSM specifically informed DOGM that a permit for the coal crushing facility area would have to be issued by June 1, 1994, or OSM would take enforcement action (Tr. 89, 172-173). The next day DOGM relayed this information to Sunnyside and it agreed to submit an application to amend its permit to include the coal crushing facility area (Tr. 173-175). On May 16 and 20, 1994, Sunnyside submitted the application and supporting information (Tr. 175). On June 1, 1994, DOGM issued a letter conditionally approving Sunnyside's application subject to the fulfillment of certain stipulations by June 30, 1994 (Ex. R-24). One of those stipulations was the submittal of a reclamation cost estimate for the coal crushing facility area (Ex. R-24).

On June 2, 1994, OSM Inspector Rollings conducted a follow up inspection of Sunnyside's Preparation Plant and issued the NOV in question, charging Sunnyside with a "[f]ailure to obtain a validly issued permit for a coal processing plant in accordance with the approved Utah program." (Tr. 64; Ex. R-6) In the NOV, OSM identifies the portion of the operation to which the NOV applies as the "coal processing facilities (crushers, conveyors, etc.) adjacent to the refuse mining operation." (Ex. R-6) As corrective action, the NOV required Sunnyside to obtain a permit for the coal processing facilities by August 2, 1994, and directed Sunnyside to cease its coal crushing operations until such time as Sunnyside obtained the permit (Tr. 52-53, 123-124; Ex. R-6).

Inspector Rollings explained that DOGM's June 1, 1994 conditional approval of Sunnyside's application to include the coal crushing facility area within the permit area did not amount to a proper permitting of this area (Tr. 92-93, 120-121, 133-134). Inspector Rollings believed that the area was not properly permitted because (1) DOGM could not legally approve the application without first finding that the existing reclamation bond was adequate to cover the estimated reclamation costs for this additional area, and (2) DOGM had not made this finding, as Sunnyside had not submitted the reclamation cost estimate upon which such a finding is based (Tr. 92-93, 120-121, 133-134).

On June 3, 1994, Sunnyside submitted to DOGM the reclamation cost estimate for the coal crushing facility area and, by letter, DOGM finally approved Sunnyside's permit amendment application, finding that the bond was adequate and that all of the stipulations of the June 1, 1994 letter had been met (Ex. R-26). After twice modifying the NOV to allow Sunnyside to continue to operate the Preparation Plant, OSM terminated the NOV on June 10, 1994, effective June 3, 1994, in light of DOGM's June 3, 1994 final approval of the permit amendment application (Tr. 60-62, 95, 113-117, 136, 139; Exs. R-11 through R-14, R-26).

### Discussion

#### I.

#### **Was a prima facie case of the validity of the NOV established?**

Pursuant to 43 CFR 4.1171(a), OSM has the burden of establishing a prima facie case as to the validity of the NOV. The ultimate burden of persuasion rests with Sunnyside. See 43 CFR 4.1171(b).

The parties have not focused upon whether a prima facie case of the validity of the NOV was established. The evidence shows not only that a prima facie case was established, but also that Sunnyside failed to overcome the prima facie case for the reasons set forth below.

#### II.

#### **Was the coal crushing facility area validly permitted prior to issuance of the NOV so that the NOV is invalid?**

Sunnyside argues that the NOV is invalid because the coal crushing facility area was validly permitted as of June 1, 1994, contrary to the charge in the NOV. On that date, DOGM issued its letter conditionally approving Sunnyside's application to revise its permit boundaries to include the crushing facility area. Sunnyside contends that this letter constitutes a valid revision of its permit to include the crushing facility area.

Sunnyside's argument cannot be sustained because the June 1, 1994 letter does not and cannot constitute a valid and final approval of Sunnyside's application. In that letter, DOGM states that the application "should be approved as an Incidental Boundary Change with the following stipulations. The stipulations must be completed within 30 days." Thus, the letter did not finally approve the application, but only contemplated approval of the application if and when the stipulations were completed within 30 days.

While the Director of DOGM, James W. Carter, testified that the June 1, 1994 letter was a final approval of Sunnyside's permit amendment application, the wording of the letter and the subsequent June 3, 1994 letter belie this testimony. The June 3, 1994 letter refers to the June 1, 1994 letter as a "conditional approval." It is the June 3, 1994 letter that states with finality that the permit amendment application is "approved" without qualification or condition.

The evidence does not show that the stipulations were completed and the application finally approved until issuance of DOGM's letter dated June 3, 1994, which occurred after issuance of the NOV. Prior to June 3, 1994, Sunnyside had not completed at least one stipulation which required it to "provide a reclamation cost estimate for the [crushing] facilities area." Before submittal of this reclamation cost estimate, DOGM did not and could not approve Sunnyside's application.

Under the Utah program, an applicant for an Incidental Boundary Change must submit to DOGM a detailed reclamation cost estimate regarding the adjustment in acreage prior to approval of the application. This conclusion is dictated by several provisions of the Utah program. First, Incidental Boundary Changes are categorized as "Permit Amendments," U.A.C. R645-303-223, which must "be processed in accordance with the requirements of R645-300-100 and R645-300-200, and the information requirements of R645-301 and R645-302, except that permit amendments will not be subject to requirements for notice, public participation, or notice of decision of R645-300-100." See U.A.C. R645-303-227. Second, one of the applicable requirements provides in pertinent part:

[DOGM] will determine the amount of the bond for each area to be bonded, in accordance with R645-301-830. [DOGM] will also adjust the amount as acreage in the permit area is revised, or when relevant conditions change according to the requirements of R645-301-830.400.

U.A.C. R645-301-812.300. Third, U.A.C. R645-301-830.440 similarly provides: "In the event that an approved permit is revised in accordance with the R645 rules, [DOGM] will review the bond for adequacy and, if necessary, will require adjustment of the bond to conform to the permit as revised." Fourth, the determination of the amount of the bond must "[b]e based on, but not limited to, the detailed estimated [reclamation] cost, with supporting calculations for the estimates, submitted by the permit applicant." U.A.C. R645-301-830.140.

Read together, these regulatory rules clearly required Sunnyside to submit a detailed reclamation cost estimate regarding the crushing facility area for DOGM's review before the Incidental Boundary Change could be approved. They also require DOGM to make a finding that the bond is adequate to cover the estimated reclamation cost for this additional area. Thus, even assuming, *arguendo*, that DOGM did finally approve Sunnyside's application in the June 1, 1994 letter, such approval would not be valid under the Utah Program because of Sunnyside's failure to provide a reclamation cost estimate for the crushing facility area prior to this purported approval and because DOGM had not made a finding that the bond was adequate to cover the estimated reclamation costs. Therefore, the coal crushing facility area was not validly permitted on June 2, 1994, and the NOV is valid.

### III.

**Did OSM take enforcement action against Sunnyside in bad faith or for the purpose of harassing or embarrassing Sunnyside so that Sunnyside is entitled to an award of attorney's fees?**

Pursuant to 30 U.S.C. § 1275(c) and 43 CFR 4.1294(c), Sunnyside argues that it is entitled to an award of attorney's fees because OSM's enforcement actions against it were taken in bad faith and for purposes of harassing or embarrassing Sunnyside. However, Sunnyside effectively concedes that it is not entitled to attorney's fees if the NOV is valid, stating: "If the NOV is not valid, the following issues have to be reviewed in relation to [Sunnyside's]

request for attorney's fees . . . ." Because the NOV is valid and because Sunnyside did not meet its burden of proof regarding entitlement to attorney's fees, *see Dennis R. Patrick*, 1 IBSMA 248, 86 I.D. 450 (1979), Sunnyside's request for attorney's fees must be denied.

Rather than acting in bad faith or with intent to harass or embarrass Sunnyside, OSM attempted in good faith to resolve the matter for almost one year before resorting to direct Federal enforcement. Because the conduct of a surface coal mining operation, such as the Preparation Plant, without a valid permit constitutes a condition or practice which can be reasonably expected to cause significant, imminent environmental harm, 30 CFR 843.11(a)(2), OSM could have issued, and arguably was required to issue, a cessation order immediately without prior issuance of a ten-day notice upon discovery of the unpermitted status of the Preparation Plant. *See* 30 CFR 843.11(a)(1). Instead, OSM issued the TDN and waited nearly a year for DOGM and Sunnyside to take appropriate action. OSM issued the NOV only after DOGM and Sunnyside failed to meet a final June 1, 1994, deadline to remedy the violation and properly permit the Preparation Plant. When OSM issued the NOV, there was no guarantee that the Preparation Plant would be properly permitted in the near future. Issuance of the NOV apparently had the desired effect of prompting a speedy resolution of the problem. Once the Preparation Plant was permitted, OSM promptly terminated the NOV.

Nevertheless, Sunnyside cites numerous alleged OSM procedural or jurisdictional errors as evidence of OSM's purported bad faith and harassment. These allegations are addressed briefly below.

A.

**Does OSM's handling of its dispute with the State over the exemption for preparation plants located at the site of ultimate use evidence bad faith or harassment?**

OSM has maintained that Sunnyside's operation of the coal crushing facilities constitutes "coal mining and reclamation operations" which must be permitted under the Utah program. DOGM initially disagreed with OSM's position, contending that Sunnyside's crushing facilities "are located at the site of ultimate coal use" and are thus exempt from the permitting requirements of the Utah program under U.A.C. R645-302-261 (Ex. R-15; Ex. R-20).

Sunnyside argues that OSM acted in bad faith or with intent to harass Sunnyside because OSM should have resolved its dispute with DOGM by either seeking an amendment of the Utah program or taking over the Utah program, pursuant to 30 CFR Parts 732 and 733, and 30 U.S.C. § 1271(b). Sunnyside's argument cannot be sustained, as OSM has the authority to enforce the Utah program through either of two statutory routes: (1) through direct Federal enforcement on a mine-by-mine basis under 30 U.S.C. § 1271(a), such as issuing a notice of violation as it did in this case, or (2) through a takeover of the Utah program under 30 U.S.C. § 1271(b). *See Annaco, Inc. v. Hodel*, 675 F. Supp. 1052, 1056-57 (E.D. Ky. 1987); *Turner Brothers, Inc. v. OSM*, 92 IBLA 320, 324-325 (1986).

B.

**Does OSM's purported failure to follow the regulatory enforcement provisions evidence bad faith or harassment?**

The provisions of 30 CFR 842.11(b)(1)(ii)(b)(1) and 30 CFR 843.12(a)(2) prescribe the procedures that must be followed and the requirements that must be met before OSM may exercise its enforcement powers in certain instances. Sunnyside argues that OSM had no jurisdiction to issue the NOV because OSM did not follow these procedures and that this purported lack of jurisdiction is evidence of bad faith or harassment.

Sunnyside's argument cannot be sustained because those provisions do not apply in this case. Rather, where, as here, OSM learns of the existence of a violation involving significant, imminent environmental harm, and it appears that the State has failed to take appropriate action to correct the violation, OSM must conduct a Federal inspection immediately. 30 U.S.C. § 1271(a)(1); 30 CFR 843.11(b)(1). Accordingly, the Interior Board of Land Appeals and the Federal courts have held that where, as here, OSM encounters a violation involving significant, imminent environmental harm, and the State has failed to take appropriate action to correct the violation, a State's primacy does not oust OSM of jurisdiction to take direct and immediate Federal enforcement action. *Triple R Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 126 IBLA 310, 315 (1993); *R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 121 IBLA 142, 147 (1991); *Stone v. Office of Surface Mining Reclamation and Enforcement*, 114 IBLA 353, 357 (1990); *Annaco, Inc.*, 675 F.Supp. at 1058. See also 30 CFR 843.11(a)(1).

Based upon the testimony at the hearing, Sunnyside attacks the premise that significant, imminent environmental harm existed. However, this testimony is irrelevant because Sunnyside's operation of the Preparation Plan without a valid permit is defined by regulation to be a condition or practice which is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 CFR 843.11(a)(2).

Given the foregoing, OSM clearly not only had the authority, but also was required by law to take immediate and direct Federal enforcement action through the issuance of the NOV.

C.

**Does OSM's purported failure to recognize an exception to the regulatory presumption of environmental harm evidence bad faith or harassment?**

Sunnyside correctly notes that OSM required the cessation of Sunnyside's coal crushing operations because this operation of surface coal mining operations without a valid permit is defined by regulation to be a condition or practice which is causing or can reasonably be expected to cause significant, imminent environmental harm. See 30 CFR 843.11(a)(2).

Sunnyside argues that OSM acted in bad faith or with intent to harass because the presumption that environmental harm can reasonably be expected from unpermitted surface coal mining operations does not apply to Sunnyside's coal crushing facilities.

In support of this argument, Sunnyside references the exception to the application of this presumption where the 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." 30 CFR 834.11(a)(2)(i). Sunnyside contends that this exception applies under the facts of this case.

This exception does not apply because Sunnyside had not filed a timely and complete application for a permit for the crushing facility area at the time the NOV was issued. It was not timely because it was not filed prior to the initiation of construction of the Preparation Plant. It was not complete because it did not contain a reclamation cost estimate for the crushing facility area. Because the exception does not apply, OSM's reliance upon the presumption of environmental harm is not evidence of bad faith or harassment.

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Without further belaboring this decision with additional references to contentions regarding errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial.

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Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

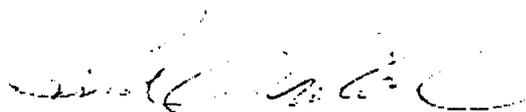
1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. Sunnyside's application to amend its permit to include the coal crushing facility area was not complete until after issuance of the NOV, as it lacked a reclamation cost estimate.
3. Sunnyside's application to amend its permit to include the coal crushing facility area was not timely, as it was not submitted to DOGM prior to initiation of construction of the Preparation Plant.
4. DOGM did not make a finding that Sunnyside's bond was adequate to cover the estimated reclamation costs for the coal crushing facility area until after issuance of the NOV.

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.
2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
3. A prima facie case of the validity of the NOV was established.
4. The coal crushing facility area was not finally or validly permitted until after issuance of the NOV.
5. OSM did not take enforcement action against Sunnyside in bad faith or for the purpose of harassing or embarrassing Sunnyside.
6. Sunnyside is not entitled to an award of attorney's fees.
7. The NOV is valid.

Order

Notice of Violation No. 94-020-370-003 issued to Sunnyside on June 2, 1994, is AFFIRMED and Sunnyside's request for attorney's fees is DENIED.



Ramon M. Child  
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures.)

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