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SECRETARY, BOARD OF
OIL, GAS & MINING

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

Southern Utah Wilderness Alliance, and Utah Chapter of the Sierra Club,	:	
Petitioners,	:	**Docket No.** 2010-009 **Cause No. M/047/0090**
Division of Oil, Gas and Mining,	:	
Respondent.	:	

REQUEST FOR AGENCY ACTION
AND REQUEST FOR A HEARING BY
PETITIONERS SOUTHERN UTAH WILDERNESS ALLIANCE, et al.

Southern Utah Wilderness Alliance (SUWA), and Utah Chapter of the Sierra Club (Sierra Club) (collectively SUWA) file this Request for Agency Action to appeal the decision of the Division of Oil, Gas and Mining (Division) approving the application of Earth Energy Resources (Earth Energy) to conduct tar sands mining and reclamation operations at the PR Springs mine. SUWA respectfully requests a hearing on the reasons for the decision.

As explained more fully below, the Division failed to follow applicable state law, including its own regulations, in failing to withhold approval of Earth Energy's inaccurate and incomplete permit application. Accordingly, SUWA urges the Board to vacate the Division's

approval of the Earth Energy permit application and enter an order denying it as inaccurate, incomplete, or both. Alternatively, SUWA requests that the Board vacate the approval decision and remand the matter to the Division to allow Earth Energy to correct identified permit deficiencies, if it can.

I. LEGAL AUTHORITY, JURISDICTION AND STANDING

This Board has legal authority and jurisdiction to review approval of the Earth Energy permit application pursuant to Utah Code Ann. § 40-10-14(3), Utah Admin. Code r. 641-100 *et seq.*, and r. 647-5-106.17. SUWA and Sierra Club are interested parties in this action.

Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Utah Chapter of Sierra Club has approximately 3,770 members. These members use and enjoy public lands in and throughout Utah, including the Tavaputs Plateau area. Sierra Club members use these lands for a variety of purposes, including: recreation, solitude, scientific study, and aesthetic appreciation.

SUWA is a non-profit environmental membership organization dedicated to the sensible management of public lands within the State of Utah; to the preservation and protection of plant and animal species; and to the preservation of Utah's remaining wild lands. SUWA has offices in Utah and in Washington, D.C. SUWA has members in all fifty states and several foreign countries. SUWA members use and enjoy public lands in and throughout Utah for a variety of purposes, including scientific study, recreation, hunting, aesthetic appreciation and financial

livelihood. SUWA members visit and recreate (e.g., study, hunt, camp, bird, sightsee, and enjoy solitude) throughout the lands that are the subject of this request for agency action, including the Tavaputs Plateau and surrounding public lands. SUWA members have a substantial interest in resources affected by this matter, including wildlife, plant communities, night skies, air quality, water quality, and cultural historic sites. SUWA members also have a substantial interest in seeing that the Division complies with the terms and requirements of state law and its own regulations.

Each organization brings this action on its own behalf as well as on behalf of its members – aggrieved parties who have participated in a hearing before the Division. Utah Admin. Code r. 647-5-106.17. SUWA's members use the biological, recreational, cultural/historic, aesthetic, water, air, and other environmental resources located within and adjacent to the Tavaputs Plateau area to stargaze, hike, hunt, camp, and sightsee. They view the wildlife, plant communities and archeological sites there and enjoy the unique solitude of these undeveloped lands. SUWA's members have enjoyed and hope to continue to enjoy the resources of the Tavaputs Plateau area. The Division's unlawful decision to approve the proposed tar sands mining and reclamation operations in these largely untrammeled areas will have a direct adverse effect on these resources and on the interests of SUWA's members. Each of the affected members of the Southern Utah Wilderness Alliance and the Utah Chapter of the Sierra Club relies upon one or more of these organizations to bring actions such as this one to protect the member's potentially affected interests.

II. SUMMARY OF THE ARGUMENT

The Division acted arbitrarily, capriciously, and contrary to law in failing to withhold approval of Earth Energy inaccurate and incomplete permit application because the application

contains only conceptual details of the company's planned West Pit expansion. For its part, the Division failed to require Earth Energy to include the required details of this proposed expansion, to include the possible cumulative impacts of the expansion on air and water quality, to allow the company to improperly segment its planned operations and to require the necessary permits and analysis for the entire project. Additionally, the Division was both unwilling and unable to discuss the possible effects of this expansion during the informal hearing and further stated that this expansion, totaling 31 acres, would be considered an "amendment" to the approved notice of intention. By definition, an amendment "is an insignificant change in the approved notice of intention." Utah Admin. Code r. 647-11-106. By admission at the informal hearing, the Division stated that it is Division policy that any expansion affecting less than 50% of the total affected area – in this case, a 213-acre site – is considered an amendment, and therefore would not be subject to public notice and comment. This policy, as it applies to Earth Energy's permit, deprives SUWA of its rights under law as a party to these proceedings.

III. PROCEDURAL HISTORY

On September 28, 2007, Earth Energy submitted its initial Notice of Intention (NOI) to Commence Large Mining Operations for the PR Spring Mine, M/047/0090. The Division determined that this application was incomplete, and after several revision and responses to the Division's review of the NOI, the company submitted a final, revised NOI on May 7, 2009. On May 20, 2009, the Division issued tentative approval of the NOI and submitted this approval for public comment.

On July 2, 2009, Western Resource Advocates (WRA) timely filed comments on the tentative approval through the offices of the Resource Development Coordinating Committee.

Among other items, WRA raised concerns over air quality, soil erosion, stormwater runoff, reclamation and subsidence.

Subsequent to filing these comments, WRA, on behalf of SUWA, filed a timely protest of the decision to grant tentative approval of the NOI. The Division determined that a hearing on this protest was not appropriate, and on September 21, 2009, it granted conditional approval of the NOI. Subsequent to the conditional approval, on October 9, 2009,[1] SUWA filed a Request for Agency Action (RAA) pursuant to Utah Admin Code. § 63G-4-201, Utah Admin. Code r. 647-5-104(1.12) and (2.13), and r. 647-5-106, challenging the Division's decision to approve the NOI. In its RAA, SUWA requested an informal hearing before the Division. The request for a hearing was granted, and on November 23, 2009, an informal hearing was held before John Baza, Division Director, at the Division offices. On December 22, 2009, Mr. Baza issued his decision, denying SUWA's challenge to the approval of the NOI. Pursuant to Utah Admin. Code r. 641-100 *et seq.*, and r. 647-5-106, SUWA timely appeals Mr. Baza's decision and requests a formal adjudicative hearing.

IV. STATEMENT OF FACTS

Earth Energy holds State Institutional Trust Lands Administration (SITLA) tar sands leases on 5,930 acres of Utah's Uinta Basin, near PR Spring. Earth Energy PR Spring Mine NOI [hereinafter NOI] at 1. Within this lease area, Earth Energy has identified a 2,255 acre Study Area for the PR Spring Mine, and the initial mine development under this NOI covers 213 acres in the southeastern portion of the area. *Id.* The details provided by Earth Energy in its NOI focus exclusively on a 62-acre initial mine pit (North Pit). NOI at 13. The company anticipates

[1] The September 9, 2009 date on WRA's Request for Agency Action was a typo. The correct date of the Request, and the date the Request was sent to Dana Dean of the Division, was October 9, 2009.

that it will mine approximately 7.9 million cubic yards of material from the North Pit. NOI at 14. Due to processing of this material, mining from the North Pit will result in 9.7 million cubic yards of waste. *Id.* The NOI states that after the North Pit is mined, Earth Energy would extend mining to the southwest, to a contiguous area known as the West Pit. *Id.* The NOI indicates that the West Pit covers 32 acres, meaning that the proposed expansion is fifty percent of the size of the North Pit.[2]

Earth Energy contends that details of its West Pit are conceptual in nature, and that once testing has been completed, the pit design will be completed and submitted to the Division. *Id.* Because it maintains that the design of the West Pit is "conceptual," Earth Energy has only included approximate figures in its bonding, which will be revised once the plan is finalized. NOI at 14-15. The life of the mine is expected to be between 6 and 13 years for both the North and the West pits. NOI at 15.

V. ARGUMENTS AND BASES OF REQUEST FOR REVIEW

Without waiving any other arguments it may raise before the Board after a complete review of the certified administrative record, SUWA principally argues that the Division wrongfully approved Earth Energy's incomplete, inaccurate, and otherwise unlawful permit application in direct violation of Utah Admin. Code r. 645-4-103 to -110. Specifically, during the November 23, 2009 informal hearing, the Division stated that the NOI was inclusive of both the North and the West pits. Under questioning from SUWA, the Division conceded that the NOI did not, in fact, contained detailed information related to the West Pit. Further, the Division noted that, based on Division policy, the West Pit expansion would be considered an "amendment" to the approved notice of intention.

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[2] Area maps provided by Earth Energy in the NOI show the West Pit to be 31 acres in size.

According to Division regulations, an amendment "is an insignificant change in the approved notice of intention." Utah Admin. Code r. 647-11-106. According to testimony given by the Division at the informal hearing, the Division considers an amendment to include any expansion that: 1) impacts less than fifth percent of the total affected area; or, 2) requires less than a fifty percent or $50,000 increase in the bond amount. Further, because an amendment is, by definition, "an insignificant change," the Division would not subject such an expansion to the public notice and comment process. It is unclear what, if any, additional analysis the Division would undertake relative to Earth Energy's plan to mine the West Pit.

According to the Division, and based on this policy, because the 31-acre West Pit constitutes less than fifth percent of the 213-acre footprint of the mine, the West Pit expansion would considered an amendment to the NOI. This policy, as it applies to Earth Energy's permit, would not only deprive SUWA of its rights under law as a party to these proceedings, but also constitutes an improper segmentation of the project as a whole. Because the public and government agencies are being asked to provide oversight and comment based on only a portion of the actual impact of the mine, any feedback that the Division receives will necessarily be flawed.

First, the Division is improperly allowing Earth Energy to obtain air and water permits for only the North Pit, rather than for the mine as a whole. Such an approach denies the Division, as well as the other government agencies tasked with oversight of these permits, the ability to properly analyze the overall impacts of the mine. Such a segmentation could result in the false conclusion that, for instance, the air quality impacts of the project do not reach the threshold of a major source under the Clean Air Act, or that the stormwater runoff from the mine does not require a permit under the Clean Water Act. As a result, the Division is allowing Earth

Energy to obtain its mining permit, as well as its permits from both EPA and DWQ, based on an assessment of only a portion of the overall project in violation of state and federal law. The Division may not allow Earth Energy to circumvent the requirements of the law and avoid consideration of the true consequences of its mining operations by segmenting its project.

Second, while the Division has obtained an estimated bonding amount covering both the North and the West pits, the specific reclamation plan associated with the overall mine has not been considered. This leaves both the government and the public without the information necessary to determine the adequacy of the plan. For example, it is uncertain what effects the expansion into the West Pit would have on the size, shape and stability of the tailings piles, and whether the reclamation plan associated with the North Pit would require substantial modification based on that expansion. This, of course, also implicates the sufficiency of the storm water pollution prevention plan.

Third, it is arbitrary and capricious for the Division to set a fifty-percent threshold as its criteria for what constitutes an "insignificant" mine expansion. The Merriam-Webster dictionary defines insignificant as something small in size, quantity or number. A 31-acre mine and the associated 4.85 million cubic yards of overburden is not insignificant and not small in size, quantity or number.[3] While the Division is entitled to a certain amount of discretion in its definition of what constitutes insignificant, a fifty percent increase – fully half the size of the original mine – clearly exceeds that threshold. Even if such a large increase in percentage were to be considered proper, which it is not, it is also improper for the Division to consider the entire footprint of the overall mining operations rather than the mine itself. After all, it is the size of

[3] The 4.85 million cubic yard figure is extrapolated from the specifications for the North Pit. That pit is 62-acres in size and is predicted to produce 9.7 million cubic yards of waste material. Therefore, it is assumed that a 31-acre pit will produce half of the waste associated with a pit that is twice its size.

the mine – not the size of the footprint of the mining operation – that determines the size of the subsequent tailings pile, the adequacy of the reclamation, the extent of air emissions and the details of storm water runoff. With PR Springs, because the 31-acre West Pit is exactly half the size of North Pit, a determination that such an expansion constitutes an insignificant change to the NOI exempt from public notice and comment is arbitrary, capricious and not in accordance with the law.

VI. CONCLUSIONS AND PRAYER FOR RELIEF

For the foregoing reasons, SUWA respectfully requests that this Board determine that the Division failed to follow its own regulations in approving Earth Energy's permit application for the PR Springs mine and accordingly vacate the Division's approval of Earth Energy's permit application and enter an order denying it as inaccurate, incomplete, or both. Alternatively, SUWA requests that the Board vacate the approval decision and remand the matter to the Division to allow Earth Energy to correct identified deficiencies, if it can. SUWA further requests that this Board provide such other and further relief as may be appropriate.

Respectfully submitted this 7th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2010, I served a true and correct copy of Request for Agency Action and Request for a Hearing by Petitioners Southern Utah Wilderness Alliance, et al., to each of the following persons via first-class mail, postage pre-paid:

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