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FILED
OCT 18 2010
SECRETARY, BOARD OF
OIL, GAS & MINING

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

LIVING RIVERS, Petitioners, v. DIVISION OF OIL, GAS AND MINING, Respondent,	**EARTH ENERGY RESOURCES, INC.'S RESPONSE TO PETITIONER'S REQUEST FOR AGENCY ACTION** Docket No. 2010-027
EARTH ENERGY RESOURCES, INC. Respondent.	Cause No. M/047/0090 A

Pursuant to Utah Admin. Code r. 641-104-141 Respondent Earth Energy Resources, Inc. ("Earth Energy") respectfully submits this Response to Living Rivers' ("Petitioner") Request for Agency Action ("Request").

JURISDICTION AND LEGAL AUTHORITY

The Board of Oil Gas and Mining (the "Board") has authority to hear such appeals pursuant to Utah Code § 40-8-6 and Utah Admin. Code r. 647-5-106(17), and not Utah Code § 40-10-14(13) as asserted by Petitioner.

It is uncontested that the Board has authority to hear appeals such as this, but Earth Energy questions whether Petitioner and its counsel are the proper parties to bring such an appeal in this matter. As the procedural history shows, this matter was previously appealed to the Board by Western Resource Advocates ("WRA"), on behalf of the Southern Utah Wilderness Alliance and the Utah Chapter of the Sierra Club (hereinafter "SUWA"), and subsequently dismissed with prejudice pursuant to a Settlement Agreement between Earth Energy, the Division of Oil Gas and Mining (the "Division"), and SUWA (the "SUWA Appeal"). In the Settlement Agreement SUWA agreed to withdraw and dismiss its appeal with prejudice and release any and all claims or objections to Earth Energy's approved NOI for the PR Springs Mine. The Settlement Agreement provided that it would be binding on SUWA, which was defined therein as "the Southern Utah Wilderness Alliance and Utah Chapter of the Sierra Club, and successors, subsidiaries and affiliates of the Southern Utah Wilderness Alliance and/or the Utah Chapter of the Sierra Club."

Petitioner, its counsel and SUWA may not be affiliates or subsidiaries, but they are closely aligned. Evidence of this allegiance includes: the Executive Director of Living Rivers has held numerous offices within the Utah Chapter of the Sierra Club, SUWA's Conservation Director sits on the Board of Directors of WRA which exercises direct control over the activity of counsel in this case and Petitioner list both SUWA and the Sierra Club as part of its "Network." Additionally, the Settlement Agreement was signed on behalf of SUWA by counsel for Petitioner in this case. These circumstances create an appearance of bad faith on the part of Petitioner and WRA in bringing this challenge to the same NOI on substantially similar grounds as the prior SUWA Appeal. Earth Energy believes the NOI is sufficient on its face and will rely

on the merits of its NOI and substantive responses to this appeal. However, Earth Energy believes it is appropriate to bring these circumstances to the Board's attention.

Additionally, Petitioner's request for a declaratory ruling should be denied because it seeks a declaratory ruling on issues outside the Board's jurisdiction. Specifically, Petitioner asks the Board to issue "a declaratory order to clarify the proper forum to voice [storm water and groundwater] concerns and the extent to which the Division must oversee the adequacy of [the Division of Water Quality's ("DWQ")] determinations." Request at 4. The rules provide that "Any person may ... petition the Board for a declaratory ruling on the applicability of any statute, rule, regulation or order to the operations or activities of that person." Utah Admin Code r. 641-111-100. Petitioner is not requesting a declaratory ruling regarding the applicability of a statute, rule or regulation to it, rather it is asking the Board to issue what is essentially an advisory opinion and order on the powers and jurisdiction of DWQ, another agency of the state, and, more remarkably, the Division's authority to oversee that agency. The Board should deny Petitioner's request for a declaratory ruling because the request was not in the proper form and asks for a ruling on matters upon which the Board lacks the authority and jurisdiction to rule.

Further, Petitioner's request for a declaratory order is insufficient because it does not contain the information required by the rules. The relevant administrative rules require that a person requesting a declaratory order "include the questions and answers sought and reasons in support of or in opposition to the applicability of the statute or rule or regulation involved." Utah Admin. Code r. 641-111-100. In its request Petitioner has failed to identify an applicable statute, rule or regulations let alone give any reasons justifying its applicability or non applicability. In short, its request fall outside the narrow power of the Board to issue declaratory rulings.

STATEMENT OF FACTS

Earth Energy is a privately held company engaged in the development of process technology for extraction of bitumen from naturally occurring tar sand deposits in the United States and Canada. Earth Energy has patented a chemical method for extraction of hydrocarbons from oil sands, known as the Ophus Process. The Ophus Process quickly and efficiently separates oil from tar sand removing over 98% of hydrocarbons from the tar sand and leaving no hazardous or deleterious materials behind.

Earth Energy holds Utah School and Institutional Trust lands Administration ("SITLA") oil sands leases on 5,930 contiguous acres in Utah's Uinta Basin, near PR Spring. Within the SITLA lease area, Earth Energy has defined a 2,255-acre study area for the PR Spring Mine. The initial mine development under the Notice of Intent to Commence Large Mining Operations ("NOI") will take place in the southeastern portion of the study area on approximately 213 acres ("Affected Area"). Mining will commence on a 62-acre tract of the Affected Area known as the North Pit. It is expected to take approximately five years for Earth Energy to develop, mine, and, as required by the reclamation plan, re-contour and re-vegetate the North Pit. Following completion of mining operations at the North Pit, and assuming that conditions are favorable, Earth Energy will begin preparations to mine a 32-acre tract known as the West Pit. Before Earth Energy can expand mining operations to the West Pit, however, Earth Energy is required to file a revised NOI with the Division. Because the development of the West Pit is merely conceptual at this time, the revised NOI will include details concerning the design of the pit, location and design of the overburden storage areas, drainage and storm water discharge control plans, a revised reclamation plan, and other details of the mine plan. At that time, the Division will review the expansion in compliance with Utah Admin. Code r. 647-4-118(1)-(2).

PROCEDURAL HISTORY

Earth Energy does not contest the content of the procedural history of this matter as outlined in the Request, but objects to the incompleteness of the history provided therein, and presents this procedural history to fully apprise the Board of the history of this matter. On September 28, 2007, Earth Energy submitted a NOI to the Division. After extensive discussions, several reviews by the Division and revisions by Earth Energy the Division determined the NOI to be complete and tentatively approved the same on May 20, 2009. Following the tentative approval, in accordance with Utah Admin. Code r. 647-4-116, public notice was given in order to receive comment on the tentative decision. In response to the public notice, comments were received by Western Resource Advocates ("WRA"), acting on its own behalf and not on behalf of any client, on July 2, 2009. WRA raised concerns over air quality, soil erosion, stormwater runoff, and reclamation. The Division responded to WRA's comments by reinforcing the fact that the NOI was already conditioned upon Earth Energy obtaining the necessary air and water permits from the Utah Department of Environmental Quality ("DEQ") and/or the U.S. Environmental Protection Agency ("EPA") prior to commencing operations. Based on this fact, the Division made the decision, which was not appealed by WRA, that a hearing was not necessary. On September 21, 2009, the Division issued its final approval of the NOI.

On October 13, 2009, the Division received a letter dated September 9, 2009, from WRA notifying the Division of its filing of a Request for Agency Action and requesting an informal hearing before the Division on behalf of the Southern Utah Wilderness Alliance and the Utah Chapter of the Sierra Club (hereinafter "SUWA"). On November 23, 2009, an informal hearing was held before the Division Director, John Baza. On December 22, 2009, Mr. Baza issued his decision upholding the Division's approval of the NOI. Mr. Baza determined that the Division had "correctly reviewed the NOI to assure compliance with the Mined Land Reclamation Act

and regulations as required to proceed with mining operations," and that the NOI met "all other challenges or deficiencies as presented by WRA in their written and verbal comments." Director's Decision at 2 (Dec. 22, 2009). Following the decision, and at the request of WRA, the Division provided a letter to WRA again clarifying that prior to actual mining operations, Earth Energy must fully comply with all air and water permitting requirements that may be required by the DEQ and the EPA. On January 7, 2010, WRA, on behalf of SUWA, filed a Request for Agency Action appealing the Divisions approval of the NOI.

Before the Board held its hearing on WRA's appeal, the parties negotiated and reached agreement whereby the Division and Earth Energy agreed that any expansion of mining operations into the West Pit or similar in scale to expansion into the West Pit would be treated as a significant revision of Earth Energy's NOI, and would require compliance with Utah Admin Code r. 647-4-118(1)-(2). In return SUWA agreed to withdraw and dismiss its appeal with prejudice and release any and all claims or objections to Earth Energy's approved NOI for the PR Springs Mine. This agreement was memorialized in the Settlement Agreement, noted on page 2 of this response , signed and dated March 22, 2010, by Barclay Cuthbert for Earth Energy, Paul B. Barker for the Division, and Charles R. Dubuc, Jr. for SUWA and the Utah Chapter of the Sierra Club. As discussed above, the Settlement Agreement provided that its terms would be binding on the parties and all successors, subsidiaries, and affiliates.

Subsequently, by letter dated April 26, 2010, Living Rivers on behalf of itself and the Center for Biological Diversity, Peaceful Uprising, and Red Rock Forests requested that the Division hold a hearing and reconsider its decision to approve Earth Energy's NOI. In satisfaction of Living Rivers request for a hearing the Division held an informal conference on July 27, 2010, with John Baza, Director of the Division acting as the hearing officer. Living

Rivers, the Division, Earth Energy, and other interested parties were all given an opportunity to present their testimony. By letter dated September 13, 2010, Mr. Baza informed the parties that, upon consideration of the evidence presented at the informal conference, that the Division's decision to approve the NOI for the PR Spring Mine would be upheld and apprising the parties of their right to appeal the decision to the Board. Thereafter, on September 27, 2010, WRA, on behalf of Living Rivers, filed this Request, asking the Board to overturn the Division's findings and deny the NOI for the PR Springs Mine or, in the alternative, remand the decision to the Division for further analysis.

ARGUMENT

Before responding to the substantive arguments and allegations made in Petitioner's Request, Earth Energy objects to Petitioner's improper attempt to reserve arguments not raised in its Request. By rule, appeals to the Board must "state the grounds for the appeal and the relief requested." Utah Admin. Code r. 647-5-106(17). In the Request Petitioner attempts to evade this rule, and side-step the need to fully state its case in the Request by claiming it does not "waive any other arguments it may raise before the Board after a complete review of the certified administrative record." Request at 6. This amounts to trial by surprise and is contrary to the letter and intent of the Utah Administrative Procedures Act and the Board's rules. Petitioner and its counsel have been involved in these proceedings from the beginning and have had ample opportunity to review the record. Further, Petitioner seems to be operating on a mistaken belief that there is a "certified" administrative record, but there is no requirement or procedure to "certify" the record under the Board's rules. In this regard it is conflating federal administrative procedure with the procedures under Utah law and regulation. Since Petitioner has had access to

the complete record throughout the proceeding, there is no basis for allowing it to side-step the rule's requirement that it include all arguments it seeks to make in its Request.

In its Request Petitioner alleges 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." Request at 6. However, the proper citation is to Utah Admin. Code r. 647-4-103 through 110.

Petitioner alleges that the Division's approval of the NOI was improper because the NOI "fails to sufficiently address potential impacts to (1) downstream uses [which Earth Energy can only assume relates to Petitioner's arguments pertaining to surface water quantity and quality] and (2) groundwater, and (3) the proposed reclamation plan is not in accordance with the Division's rules." *Id.* Earth Energy will respond to each of these allegations in turn.

I. Surface and Groundwater Impacts are Properly Addressed in the NOI.

Utah Admin. Code r. 647-4-109 requires, in pertinent part, that the NOI contain "*a general narrative description* identifying *potential* surface and/or subsurface impacts," including, "projected impacts to surface and groundwater systems," and, "[a]ctions which are proposed to mitigate any of the above referenced impacts." Emphasis added. The NOI provides a detailed discussion of potential impacts of the operation to surface water and groundwater, and provides for monitoring and mitigation measures to minimize the impacts of the operation on natural channels. NOI at 35-39.

For example, the NOI discusses in great detail the geography of the mine site and discusses the benefits of the site for minimizing the potential for surface water impacts. These benefits include minimal up-gradient run-off due to the mine's location on the relatively flat interfluve, the ephemeral nature of the headwater drainages in the overburden/interburden area,

and the remoteness of the location to live surface water. NOI at 36. Similarly, the benefits of the mine site for minimizing impacts to groundwater include the relative depth of the regional groundwater table, the limited extent and yield of any groundwater in the Green River Formation, and the limited evidence of discharge from seeps and springs in the area. NOI at 37.

The NOI is also replete with details of planned mitigation measures to minimize the operation's impacts on natural channels and surface water. The entire mine site is designed to be virtually self contained with all precipitation from the pit and plant site being collected and used in the processing of the ore. NOI at 36. As Petitioner notes in its Request the only possibility for run-off to escape the operation is from the overburden/interburden area and any potential impacts of such runoff are minimized by armoring the channels, installation of rip-rapped energy dissipaters at the toe of the overburden storage, and facing the slopes with coarse material. NOI at 37.

In addition to the full discussion of potential surface water and groundwater impacts contained in the text of the NOI, Earth Energy provided both a detailed Storm Water Pollution Prevention Plan, the Groundwater Discharge Permit by Rule ("Groundwater Discharge PBR") issued by the Utah Division of Water Quality and Earth Energy's Groundwater Discharge Permit by Rule Demonstration to further document the potential impacts to surface water and groundwater and detailing the steps Earth Energy will take to insure that surface water and groundwater will not be adversely impacted.

Petitioner's arguments regarding the inadequacy of the NOI in addressing surface water and groundwater issues seem to be based on a misunderstanding of the mine permitting process and confusion over the required content of a NOI, versus the rules and standards for actual mining operations. For instance, Petitioner alleges the NOI is insufficient because it does not

contain analysis sufficient to satisfy the requirements of Utah Admin. Code r. 647-4-107(2) (3) and (4), claiming that without more data and analysis these provisions cannot be satisfied. Petitioner apparently fails to recognize that Utah Admin. Code r. 647-4-107 governs operational practices and has no bearing on the content of the NOI.

Petitioner further confuses the rules and regulations when it asserts that the failure of the NOI to conclusively eliminate adverse environmental effects by containing the "deleterious material from the Ophus Process" violates Utah Admin. Code r. 647-4-107.4 and 111.4. Again, these rules provide requirements that must, and will be, complied with during the operation and reclamation phases of the mine respectively, not requirements for the content of the NOI. *See* Utah Admin. Code r. 647-4-103. Confusion over the rules is not the only flaw in Petitioner's argument, however, because, contrary to its allegation, the NOI does contain a detailed discussion of how processed materials will be contained within the overburden/interburden area to prevent potential impacts to surface water and groundwater. NOI at 20.

The Request also contains a number of other arguments concerning the potential impacts on water quality. All of these arguments misinterpret the Division's rules and the content of the NOI. Petitioner argues that "[l]eachate from [the sand and clay fines] tailings could potentially migrate through the overburden/interburden storage areas and be transported off site as surface water." Request at 7. Similarly, it argues that leachate from the backfilled pit has the potential to "migrate off site as ground water." Petitioner's suppositions are countered by DWQ's determination in granting the Groundwater Discharge PBR that the PR Springs mine will have a *de minimus* impact of groundwater. The Division appropriately relied upon DWQ's determination.

In addition, as the NOI and Earth Energy's Groundwater Discharge PBR Demonstration clearly show, there is unlikely to be any leachate produced in any quantity that would enter groundwater or seep to the surface from the mine. Earth Energy's position is supported by the following conditions at the property and design features of the PR Spring Mine: 1) low annual precipitation at the mine site (less than 12 inches per year); 2) limited run-off and controlled run-off from storm events; 3) low (15-20 percent) residual moisture in the processed sands and fines that will not release free water; 4) isolation of processed sands and fines by encapsulation in the impoundment cells; and 5) evaporation of residual moisture during the time sands and fines are on the surface. NOI at 15-16, 32, 36-39.

II. The Division's Protection of Confidential Proprietary Information is Proper.

Petitioner's argument that disclosure of proprietary information is necessary to ensure that the Division acted properly in reviewing the NOI, and that the Division is required to divulge such proprietary information to the public are unfounded. First, Petitioner claims the information must be divulged for the Division to properly determine whether "adverse environmental effects of deleterious materials from the Ophus Process are eliminated or controlled, as required by Rule 647-4-107-.4 and 647-4-111.4." Request at 10. As discussed above, Petitioner is mistaken in its belief that Utah Admin Code r. 647-4-107 and 111 create requirements for the content of the NOI. Rather, these provisions provide the standards for the operation and reclamation of the mine under the Division's continuing jurisdiction over the operation. Further, Petitioner's argument fails to explain how releasing proprietary information to the public would in any way effect the Division's ability to assess the potential impacts of the operation.

Second, although Petitioner correctly states that the Division's rules allow it to keep certain information pertaining to the location, size, and nature of the mineral deposit confidential, Request at 10; Utah Admin. Code r. 647-4-115 does not cover the entire scope of proprietary information that the Division is required to keep confidential. The Utah Governmental Records Access and Management Act ("GRAMA") provides for the protection of trade secrets, and requires that a government agency maintain the confidentiality of such information as requested by an applicant. Utah Code Ann. § 63G-2-305. The proprietary information regarding the Ophus Process and the chemical properties of the cleaning emulsion constitute trade secrets under GRAMA and the Division has acted properly in maintaining their confidentiality. That said, Earth Energy has no objection to providing Petitioner with a copy of the MSDS sheet for the emulsion as that information is now in the public record.

III. The Reclamation Plan

Contrary to Petitioner's allegations, the reclamation plan as outlined in the NOI fully addresses all of the requirements of the rule. Utah Admin Code r. 647-4-110 governs the content of a reclamation plan, and requires "a narrative description of the proposed reclamation" and then lists the specific statements, descriptions and procedures that must be included in the plan. Petitioner's Request does not allege that the reclamation plan approved as part of the NOI is deficient in any way. Instead, Petitioner simply states that "the Division is clearly responsible for ensuring the reclamation plan meets statutory and regulatory requirements." Request at 11.

Petitioner's only claim regarding the adequacy of the reclamation plan is that "the Division's reliance on DWQ to ensure storm water permit conditions are met is insufficient, to meet DOGM's responsibility to ensure that the Reclamation Plan meets its stated objectives." *Id.* Petitioner, however, provides no support for its contention that the Division is "relying" on

DWQ to ensure performance under the reclamation plan nor does it provide any explanation of what bearing storm water permits have on the reclamation plan. Even if Petitioner had connected these unconnectable dots, it's argument still fails because it makes no attempt to explain why relying on DWQ to fulfill its statutory mandate is improper. Earth Energy's NOI has adequately addressed the requirements of Utah Admin. Code r. 647-4-110 in Section 110 of the NOI.

Conclusion

As Earth Energy has shown, the NOI for the PR Spring mine fully satisfies the requirements set forth in Utah Admin. Code r. 647-4-103, and the Division acted properly in approving it. Petitioner's arguments for reversal of the Division's finding misconstrue and confuse the statutory and regulatory framework of the mine permitting process, fail to actually show any deficiency in the NOI or the Division's approval of the NOI, and should be rejected by the Board.

For the foregoing reasons, Earth Energy respectfully requests the Board deny Petitioner's requested relief, and uphold the Division's approval of the NOI for the PR Springs Mine.

RESPECTFULLY SUBMITTED this 18th day of October, 2010.

HOLME ROBERTS & OWEN LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of October 2010, a true and correct copy of the foregoing EARTH ENERGY RESOURCES, INC.'S RESPONSE TO PETITIONER'S REQUEST FOR AGENCY ACTION was served by U.S. mail, postage prepaid, as follows:

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