WESTERN RESOURCE ADVOCATES

July 13, 2005

United States Environmental Protection Agency
Clerk of the Board, Environmental Appeal Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: Petition to Review UIC Area Permit No. UT20960-0000 – Antelope Creek Steamflood Pilot Project, Duchesne County, Utah

Pursuant to 40 C.F.R. § 124.19, Western Resource Advocates hereby petitions the Environmental Appeals Board (EAB) to review the UIC Area Permit No. UT20960-0000 for the Antelope Creek Steamflood Pilot Project in Duchesne County, Utah. On July 8, 2004, Western Resource Advocates timely submitted comments on the proposed permit and therefore, the organization has standing to petition the EAB to review the Environmental Protection Agency's (EPA) permit decision. See Western Resource Advocates Comments on Proposed Underground Injection Control Program (UIC) Permit (Permit No. UT20960-00000)(attached). Western Resource Advocates raised each of the reasons supporting EAB's review in their comments. Id.

In addition, Western Resource Advocates has been participating extensively in the development of this project and has obtained, according to the Bureau of Indian Affairs (BIA),

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Land and Water Fund of the Rockies

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all documents which purport to analyze the environmental consequences of the Antelope Creek Steamflood Oil Recovery Pilot Project (hereafter "Antelope Creek Pilot Project"). As discussed further below, the BIA National Environmental Policy Act (NEPA) documentation of the project, as well as EPA' Statement of Basis and Response to Public Comments, acknowledge significant environmental impacts to the ecological integrity of the area. These impacts would result from implementation of the project that must be fully disclosed and discussed prior to any undertaking. Therefore, based on erroneous conclusions of law and important policy considerations, the UIC permit for the Antelope Creek Pilot Project should be remanded to the EPA in order to compel additional analysis.

STATEMENT OF REASONS

I. An Environmental Impact Statement Must Be Prepared Prior to Approving the Antelope Creek Pilot Project.

In issuing the UIC permit, EPA authorized "up to 288 [injection and production] wells on about 720 acres over a portion of the Antelope Creek Field, at a well spacing of one well per 2.5 acres." EPA, Statement of Basis, Petroglyph Operating Co., Inc. – Antelope Creek Streamflood Oil and Recovery Pilot Project – EPA Area Permit No. UT20960-00000 at 4 (hereafter "Statement of Basis"). EPA relies on a BIA prepared 2003 Environmental Assessment ("2003 EA") to suggest that "potential environmental effects of . . . a new shallow steamflood Pilot Project" affecting 720-acres has been adequately disclosed and analyzed pursuant to NEPA. Statement of Basis at 3. However, the 2003 EA is almost completely devoid of any reference to the Antelope Creek Pilot Project. Rather, the few references that do appear in the 2003 EA acknowledge the potential for significant adverse environmental impacts.

For example, in discussing the water supply impacts for the pilot project, BIA states that "[m]inimal water use is expected for the pilot project." 2003 EA at 17. In contrast, EPA estimates that the required water use "could be up to 338.7 acre feet per year," Statement of Basis at 4, an amount the agency determined "is likely to adversely affect" endangered and threatened species. Regarding the effect of the pilot project on area wildlife, BIA notes that the level of proposed activity "would likely displace wildlife from most of the thermal recovery project area during development." 2003 EA at 83-84. These conclusory statements constitute the 2003 EA's entire analysis of the Antelope Creek Pilot Project.

The EPA cannot rely on the deficient 2003 EA to issue the UIC permit. Remarkably, in response to a comment suggesting that the agencies cooperatively prepare an environmental impact statement (EIS), EPA states that they have "recommended preparation of a comprehensive EIS and offered its assistance to collaborate with the BIA on additional analysis." Response to Public Comment at 9. EPA further states that it "believes **it is important to prepare a thorough analysis of the cumulative impacts of similar oil and gas development projects**." *See* id. (emphasis added). Yet, EPA is issuing the UIC permit despite the fact that the level of analysis the agency believes is necessary to consider sufficiently the impacts of the project has not been conducted.

Similarly, in its comments on the 2003 EA, Fish and Wildlife Service (FWS) raised "serious concerns about the potential impacts from the tertiary recovery thermal techniques proposed for the pilot project and from the scope of the proposed disturbance." Letter from Henry Maddux, Field Supervisor, FWS Utah Field Office to Charles Cameron, Uintah and Ouray Agency, Office of Minerals and Mining (Aug. 15, 2001)(attached to 2003 EA). According to

FWS, "the proposed techniques of stream flooding and/or in situ combustion with heat transfer facilities are currently not being employed in Utah" and "[t]hus, we have no data to assist us in determining the potential impacts to our trust species and other natural resources." Id. FWS concluded that the Antelope Creek Pilot Project "warrants that an Environmental Impact Study level of evaluation be conducted on this project." Id.

An EIS is required for the Antelope Creek Pilot Project because the Antelope Creek Pilot Project may significantly affect the environment. See, e.g., Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 112 (9th Cir. 2004)("[A]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factors.'") (emphasis in the original). To trigger the requirement to prepare an EIS, a "plaintiff need not show that significant effects will in fact occur,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient.'" Id. (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (additional citations omitted) (emphasis in original). *See also* National Audubon Soc'y v. Hoffman, 132 F.3d 7, 18 (2d Cir. 1997) ("[W]hen it is a close call whether there will be a significant environmental impact from a proposed action, an EIS should be prepared."); Natural Resources Defense Council v. Herrington, 768 F.2d 1355, 1430 (D.C. Cir. 1985). (agency must make a "convincing case that [the impacts of its action are] insignificant").

The determination of the significance of an action requires consideration of both context and intensity. 40 C.F.R. § 1508.27. Context "means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interest, and the locality." 40 C.F.R. § 1508.27(a). "Significance varies with the

setting of the proposed action." Id. In considering context, "both short- and long-term effects are relevant." Id.

Intensity refers to the "severity of impact." 40 C.F.R. § 1508.27(b). An evaluation of an action's intensity requires consideration of: "[t]he degree to which the proposed action affects public health or safety;" "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;" the degree to which the environmental effects of an action "are likely to be highly controversial;" "the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;" "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. **Significance cannot be avoided** by terming an action temporary or **by breaking it down into small component parts**;" "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;" "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act;" and, "[w]hether the action threatens a violation of Federal, State, or local law or requirement imposed for the protection of the environment." 40 C.F.R. § 1508.27(b).

Contextually, the Antelope Creek Pilot Project is the first of its kind. Petroglyph Operating Company plans to utilize unknown techniques and technologies to extract oil from tar

sands. The impacts of the proposed extraction processes are uncertain. As such, EPA's approval of the UIC Permit and the analysis of the Antelope Creek Pilot Project have national significance. In addition, approval of the proposed project is significant regionally as the Intermountain West has been recently highlighted as the nation's most substantial repository of oil shale and tar sands. Moreover, impacts to air quality and drinking water raise important local health concerns that must be adequately analyzed prior to initiation of the project.

Regarding NEPA's intensity factors, the Antelope Creek Pilot Project would have an adverse impact of public health and safety. *See* 40 C.F.R. § 1508.27(b)(2). Specifically, the project could have an adverse impact on Underground Sources of Drinking Water (USDWs). The EPA noted that testing has indicated "occasional occurrences of ground water in the proposed area." Statement of Basis at 8. In addition, "EPA considers this zone to be an [USDW] where present." *See* id. Although the oil-bearing sand layer is bounded above and below by shale, it is entirely possible that super-heated injection fluids under intense pressure will migrate into the USDW, thus resulting in a negative public health impact. And while only a combination of culinary and clean well water will be used for the Antelope Creek Pilot Project, the approved injection fluid for a full-scale project is comprised of fluids "[w]hich are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste water from gas plants." 40 C.F.R § 144.6(b).

Unique characteristics of the Project area include its proximity to the Ouray National Wildlife Refuge as well as to the Green River, an eligible wild and scenic river. Additionally, as discussed below, the Project area drains into the Duchesne River, which is listed as impaired

under the Clean Water Act, prior to its confluence with the Green River. *See* 40 C.F.R. § 1508.28(b)(3).

The Antelope Creek Pilot Project is also highly controversial. "Controversial" is "construed as a substantial dispute about the size, nature, or effect of the major federal action, rather than the existence of opposition to a use." League of Wilderness Defenders at 1064, *citing* Blue Mountains Biodiversity Project v. Blackwood, 161 F. 3d 1208, 1212 (9th Cir. 1998). The impact on the quality of the human environment of this unproven and unknown technology warrant further investigation. Little is known of the effects of injecting super-heated steam under significant pressure (500-600 PSI) into a shallow sand layer. Although modeling shows that the injection fluids will be confined within the layer, no testing has been done to confirm these results. Additionally, the US FWS states that they "have serious concerns about the potential impacts" of the Pilot Project, that "the proposed techniques are not currently being employed" in this area and that they are unable to determine the potential impacts of the Project. Letter from Henry Maddux, Field Supervisor, FWS Utah Field Office to Charles Cameron, Uintah and Ouray Agency, Office of Minerals and Mining (Aug. 15, 2001)(attached to 2003 EA). Finally, EPA has voiced concerns and "believes **it is important to prepare a thorough analysis of the cumulative impacts of similar oil and gas development projects**." Response to Public Comment at 9 (emphasis added).

Much has been said about the vast amounts of oil locked within the tar-sands and oil shale of Utah. It has been acknowledged that the extraction of this resource is an important energy resource and will require unique and cutting-edge technology. The Antelope Creek Pilot Project represents one such innovative attempt. But with such new technology comes a great

deal of uncertainty regarding its effects on the human environment and the potential risks involved. *See* 40 C.F.R. § 1508.27(b)(5). Injecting vast amounts of superheated steam under intense pressure could have any number of unintended consequences. Prudent decision making dictates that a thorough study be conducted of the possible effects of the Antelope Creek Pilot Project. The superficial analysis of this project contained within the 2003 EA is inadequate to meet this need.

A proper analysis of this technology is also critical because it is cutting-edge and is likely to establish precedents for how such technology is handled in the future. *See* 40 C.F.R. § 1508.27(b)(6). If the Antelope Creek Pilot Project were to prove technologically and economically viable, the application of similar technology is a likely result. As a clear example of this, the applicant had proposed a subsequent project of over 8,000 well sites, spread over 20,740 acres, as an expansion of this project. That the applicant cancelled their request due to possible environmental concerns clearly points to the need for an expanded study.

While the impact of a single well of the Pilot Project may not be significant, the intensity of the Project is derived from the density of the well spacing. This, in turn, is a result of the proposed technology. The oil found within the sand layer is immobile at the existing ground temperature. So, in an attempt to heat the oil up to a sufficient viscosity to allow for extraction, a "heat chest," which is a pathway of sufficient oil temperature, is created between two wells. This requires an intense well spacing of one well per every 2.5 acres. As a result, BIA acknowledges that the sheer density of the project would "likely displace wildlife from most of the thermal recovery project area during development." 2003 EA at 83-84.

As discussed below, the Antelope Creek Pilot Project may adversely affect sites eligible for inclusion in the National Register of Historic Places and may result in the loss or destruction of significant cultural and historic resources warranting further analysis. Additionally, the Antelope Creek Pilot Project would have an adverse affect on endangered and threatened species determined to be critical under Section 7 of the Endangered Species Act (ESA). Following the public comment period, EPA prepared a Biological Evaluation (hereafter "BE") and sent it to the FWS with a request for formal consultation. In the BE, EPA concluded that the proposed action "is likely to adversely affect" four listed species of Colorado River fish and "may adversely affect" their critical habitat. Letter from Sandra Stavnes, EPA Regions 8 Director, Ground Water Program to Henry Maddux, Field Supervisor, FWS Utah Field Office (February 16, 2005).

Finally, the Antelope Creek Pilot Project threatens a violation of both Federal and Utah State law. As noted elsewhere, the inadequate analysis of the effects of the Project is a direct violation of NEPA and the National Historic Preservation Act. Additionally, project-related sediments could negatively impact the lower Duchesne River, in violation of State water quality standards. The lower section of the Duchesne River, prior to its confluence with the Green River, is on the list of impaired waters under Section 303(d) of the Clean Water Act.

Accordingly, as EPA and FWS have stated, the impacts of the Antelope Creek Pilot Project must be thoroughly analyzed prior to initiation. However, no such analysis has yet to occur. And despite EPA's ability to require such analysis prior to issuing the UIC permit, EPA has instead allowed this unprecedented and unanalyzed project to go forward. Therefore,

Western Resource Advocates respectfully requests that the UIC permit be remanded to the agency to compel additional analysis of the impacts of the Antelope Creek Pilot Project.

II. The 2003 EA Failed to Provide for Adequate Public Input

In relying on the 2003 EA as an adequate assessment of the "potential environmental effects" of the Antelope Creek Pilot Project, EPA is violating NEPA because the BIA failed to provide for adequate public notice and comment on the 2003 EA. According to the NEPA implementing regulations, "NEPA procedures must insure that environmental information is available to public officials and **citizens *before*** decisions are made and ***before*** actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). NEPA requires that an EIS or EA must serve its purpose of informing the decision maker and the public. Seattle Audubon Soc'y v. Espy, 998 F. 2d 699, 704 (9th Cir. 1993). That cannot be done if the public is not provided notice of, and does not have a sufficient opportunity to comment on an EA. NEPA documents "serve two purposes: (1) to provide decision makers with enough information to aid the substantive decision whether to proceed with the project in light of its environmental consequence; and (2) to provide the public with information and an opportunity to participate in gathering information." Big Hole Ranchers Association, Inc. v. U.S. Forest Service, 686 F. Supp. 256, 260 (D. Mont. 1988).

It is well settled that "[c]itizen participation is a vital ingredient in the success of NEPA" and that the "opportunity for local citizens or other interested parties to participate in the preparation of the environmental analysis is mandatory under NEPA." *Colony Federal Savings & Loan Ass'n v. Harris*, 482 F. Supp. 296, 304 (W.D. Pa. 1980). Indeed, even before the NEPA regulations were promulgated, courts made clear that federal agencies "must give notice to the

public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." The seminal case for this proposition is Hanley v. Kleindienst, 471 F.2d 823, 836 (2nd Cir. 1972), which held that before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision.

The NEPA regulations further state that "Federal agencies **shall to the fullest extent possible** . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment." *Id.*, at § 1500.2(c) (emphasis added). Similarly, the NEPA regulations specifically mandate that agencies preparing NEPA documents "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments . . . ." *Id.*, at § 1501.4(b). The Council on Environmental Quality (CEQ) has further explained this requirement, and how it intersects with other CEQ requirements, as follows:

> "Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public 'environmental documents' under section 1506.6(b), and, therefore, agencies must give public notice of their availability."
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> "The objective, however, is to notify all interested or affected parties."

CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 *Fed. Reg.* 18026 (1981); *see also* Save Our Ecosystems v. Clark, 747 F.2d 1240, 1247 (9th Cir. 1984) (federal agency's decision to allow only a five-day public comment period on an Environmental Assessment was inadequate and in violation of NEPA and the CEQ regulations); Wroncy v. BLM, 777 F. Supp. 1546, 1548 (D. OR. 1991) (temporary restraining order against a federal

agency program based on plaintiff's showing of a strong likelihood of success on the merits of his claim that the agency failed to provide adequate public notice of the agency's EA and FONSI); Friends of Walker Creek Wetlands v. BLM, 19 ELR 20852, 20854 (D.Or. 1988) (finding that federal defendants "did not adequately provide for public participation to the extent practicable" and ordering the agency to provide a 45-day public comment period on an EA).

According to the 2003 EA, BIA mailed the scoping notice to federal agencies, state agencies, county governments, Native American tribes, and local media. Scoping Notice, Antelope Creek Field Oil and Gas Expansion at 4-5 (attached to 2003 EA). With regard to the local media, BIA provided the scoping notice to the Uintah Basin Standard, the Ute Bulletin, and the Vernal Express. Id. However, BIA never guaranteed that these notices were actually published. Rather, a search of the public notices contained in these newspapers fails to show any public notice related to the 2003 EA. *See* Utah Press Ass'n, Public Notices Online, *available at:* http://publicnoticeads.com/ut/. Accordingly, the public never received notice of the comment period for the 2003 EA, which purports to analyze the Antelope Creek Pilot Project.

Moreover, on October 4, 2004, Western Resource Advocates submitted a Freedom of Information Act request to the Bureau of Indian Affairs that sought, *inter alia*:

> Any and all notices to the public and/or federal or state entities or any other notifications, including but not limited to NEPA notices, federal register notices, and/or electronic notices, in any way related to the Bureau of Indian Affairs 2003 Environmental Assessment for Antelope Creek Oil and Gas Field Expansion, as described in Item 2 and footnote 1; and,
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> Any and all notices to the public and/or federal or state entities or any other notifications, including but not limited to NEPA notices, federal register notices, and/or electronic notices, in any way related to the January 2003 Environmental Assessment in which "BIA evaluated and authorized Petroglyph to conduct development including a thermal recovery (steamflood) pilot project," as described by EPA in the attached public notice and opportunity to comment.

Western Resource Advocates, FOIA Request to the Bureau of Indian Affairs (October 4, 2004). In response, BIA failed to provide any evidence that public notices had actually been published or brought to the public's attention in any way. Simply stated, the public, including this organization, was not and could not have been aware of the comment period on the 2003 EA because of BIA deficient noticing.

EPA contends that "BIA's Environmental Assessment [] is a separate process from EPA's UIC Permitting authority action." Response to Comments at 6. EPA proceeds to outline public notices associated with the withdrawn supplemental EA and EPA's proposed UIC permit. However, the critical question is whether the public had sufficient opportunity to participate in the decision-making for the Antelope Creek Pilot Project, which is analyzed in the 2003 EA. EPA cannot simply ignore the glaring deficiencies of the 2003 EA while authorizing a critical component of the pilot project. EPA's UIC permit is an essential element of the Antelope Creek Pilot Project and EPA has a duty to ensure that any action it takes complies with federal law. EPA acknowledges that "the project could not go forward without EPA air quality and injection permits." Response to Comments at 8. EPA's conclusion that the 2003 EA authorizing the project and the UIC permit which is part of the project are separate and distinct is an erroneous conclusion of law.

Rather, the authorization of the Antelope Creek Pilot Project insufficiently analyzed in the 2003 EA and EPA's UIC permit are connected actions. According to NEPA's regulations, connected actions "[c]annot or will not proceed unless other actions are taken previously and simultaneously" and/or "are independent parts of a larger action and depend on the larger action

for their justification." 40 C.F.R. § 1508.25(a)(1)(ii) & (iii). Connected actions "should be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(1).

Therefore, in preparing the 2003 EA and reaching a Finding of No Significant Impact, BIA violated NEPA's public participation requirements. As such, EPA's reliance on these documents as an adequate assessment of the "potential environmental impacts" of the Antelope Creek Pilot Project is inappropriate and a derivative violation of NEPA. In issuing the UIC permit, EPA has authorized a necessary component of the Antelope Creek Pilot Project that has not been adequately considered pursuant to NEPA. Accordingly, the UIC permit should be rescinded until an adequate NEPA analysis is conducted that includes an opportunity for public participation.

III. The 2003 EA Failed to Assess Adequately Cumulative Impacts Associated with the Antelope Creek Field Development

EPA's issuance of the UIC permit is also contrary to law because the cumulative impacts of the Antelope Creek Pilot Project in relation to other foreseeable actions in the Antelope Creek Field have never been adequately analyzed pursuant to NEPA. NEPA requires that EPA and BIA assess the affects of the Antelope Creek Pilot Project "when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. An analysis of reasonably foreseeable future actions includes any contemplated action because "contemplated actions which have not reached the proposal stage may certainly play a critical role in assessing the impacts of current proposals, and CEQ regulations require that they be considered." Fritiofson v. Alexander, 772 F.2d 1225, 1243 (5th Cir. 1985); *see also* Thomas v. Peterson, 753 F.2d 754, 760 (9th Cir. 1985) (Forest Service's EA

prepared for road construction should have included an analysis of the adverse cumulative effects of planned timber sales, even though the Forest Service had not yet prepared EA's for the timber sales); People ex. rel. Van de Kamp v. Marsh, 687 F. Supp. 495 (N.D.Cal. 1988) ("agency must also consider other proposals and contemplated actions that are not yet formalized proposals."); Hanlon v. Barton, 740 F. Supp. 1446, 1453 (D.Alaska 1988) ("'action[s]' contributing to the cumulative impact of the proposal that is the subject of the EIS need not themselves be . . . 'proposals' within the meaning of [40 C.F.R.] § 1508.23, to be required for impact evaluation in the EIS") (citing Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1497-98 (9th Cir. 1987).

In addition, , NEPA requires that the BLM's cumulative impacts analysis provide "some quantified or detailed information," because "[w]ithout such information, neither courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide." Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998). An agency's cumulative impact analysis "must be more than perfunctory." Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir. 2004) (citations omitted).

The 2003 EA cumulative impact analysis is completely deficient. BIA failed to analyze reasonably foreseeable future actions, such as the proposed 8,008 steam injection wells, failed to consider the past impacts of existing oil and gas development in the area, and failed to consider other actions, such as, road building or dust abatement measures in its cumulative impact analysis. In addition, the 2003 EA lacks any quantified or detailed information on cumulative impacts of this and other actions in the area.

In addition, EPA "believes it is important to prepare a thorough analysis of the **cumulative impacts of similar oil and gas development projects.**" *See* id. (emphasis added). According to FWS, "[c]umulative effects of continued oil and gas developments may result in significant impacts to natural resources, particularly if left unmitigated." Letter from Henry Maddux, Field Supervisor, FWS Utah Field Office to Charles Cameron, Uintah and Ouray Agency, Office of Minerals and Mining (Aug. 15, 2001)(attached to 2003 EA). Therefore, the FWS "remains concerned about the level of developments in the Uintah Basin and recommends a thorough cumulative impacts analysis." Id. As stated above, the cumulative impact analysis of the 2003 EA is seriously deficient and fails to comply with NEPA, yet EPA has authorized an essential component of the project. Prior to issuing the UIC permit, EPA must ensure that all aspects of the pilot projects have complied with federal environmental laws.

IV. EPA Failed to Adequately Analyze the Consequences of Issuing the UIC Permit on Cultural Resources.

Pursuant to 40 C.F.R. § 144.4, EPA must follow the procedures of the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, in issuing the UIC permit for the Antelope Creek Pilot Project. According to BIA's FONSI, "there are no adverse effects on historic properties for the purposes [of] 36 CFR 800.9(b) by preserving Archeological value through conduct of appropriate research in accordance with applicable standards and guidelines." Response to Comments at 5. In addition, the BIA indicates that "[a] Class III cultural resource survey, funded by Petroglyph, would be conducted by a qualified archaeologist on all areas proposed for surface disturbance." Id. Apparently, EPA concludes that the agency has fulfilled its NHPA obligations based on these past statements and by allowing BIA to act as a lead agency

at the Application for a Permit to Drill (APD) stage. EPA has reached an erroneous conclusion of law for several reasons.

First, BIA and EPA's conclusions regarding the timing of NHPA compliance are an invalid interpretation of the NHPA regulations. EPA cannot wait until "NHPA measures are performed by BLM and BIA in conjunction with BLM's application for permit to drill (APD) process" to ensure compliance with the NHPA. Response to Comments at 6. Clearly, issuance of a UIC permit is an undertaking as defined in 36 C.F.R. § 800.16(y). The Antelope Creek Pilot Project, including the issuance of the UIC Permit is an "activity" under the "direct jurisdiction" of EPA "requiring a Federal Permit." 36 C.F.R. ¶ 800.16(y). Accordingly, because issuance of the UIC permit will result in the type of activity that may adversely impact historic properties, EPA and BIA must make reasonable and good faith efforts to identify cultural resources prior to issuing the permit. See Pueblo of Sandia v. United States, 50 F.3d. 856, 863 (10th Cir. 1995)(requiring the Forest Service to make a reasonable and good faith effort to identify historic properties).

For example, in Southern Utah Wilderness Alliance, the Interior Board of Land Appeals recently concluded in the context of oil and gas leasing that BLM must make "a reasonable and good faith attempt to identify 'historic properties' located on the subject parcels" at the leasing stage. SUWA, 164 IBLA 1, 23 (2004). Similarly, in Montana Wilderness Ass'n v. Fry, the court recognized:

> BLM's contention that the sale of oil and gas leases is not an undertaking is not supported by the statute or the regulations. In fact, BLM's argument on this point mirrors its NEPA arguments: By placing stipulations on leases, the agency can avoid affecting historic properties. But like NEPA, NHPA is a procedural statute. The process of identifying and consulting with affected tribes as well as members of the public is the goal sought by the statute. Lease stipulations do not accomplish the same goal, and cannot replace BLM's

> duties under NHPA. Moreover, it is conceivable that different lease stipulations would evolve from a larger discussion of possible effects on historic tribal lands from oil and gas leasing. It seems to me that agency efforts to comply with the law are more productive than efforts that appear to be directed at circumventing the law.
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> **The plain language of NHPA requires consultation once an agency embarks on an undertaking.** The sale of oil and gas leases is an undertaking.

Montana Wilderness Ass'n v. Fry, 310 F.Supp. 2d 1127, 1152-53 (D. Mont.2004).

Federal agencies cannot delay NHPA compliance until another stage of a project. According to the IBLA, such "analysis overlooks the fact that because it is required to evaluate an [application for a permit to drill, or] APD under section 106 does not mean that it is excused [from] evaluating the undertaking, albeit with a broader focus and leasing stage." SUWA, 164 IBLA at 28. EPA is attempting to circumvent the requirement of 40 C.F.R. § 144.44(b) to ensure compliance with the NHPA by delaying such compliance until the APD process. This procedure has been rejected by the Secretary of Interior, through the IBLA, as a violation of the NHPA and EPA would be violating the NHPA if the agency similarly delayed NHPA compliance.

Second, to the extent that EPA suggests NHPA compliance has occurred, BIA's conclusion in the FONSI that there "are no adverse effects on historic properties" is an invalid interpretation of the NHPA regulations and premature given that survey work has not yet been completed. Pursuant to 36 C.F.R. § 800.5(a)(1), an adverse effect on historic properties "is found when an undertaking **may** alter, directly or indirectly, any of the characteristics of a

historic property . . . " 36 C.F.R. § 800.5(a)(1). BIA acknowledges that:

> for the project area show[n] the known archaeological site types in the project area include lithic scatters, open camp historic sites, a canal and reservoir, lithic scatter/ranch complex, rock cairns, a rock shelter camp, and a rock shelter, for a total of 11 sites. Five sites are considered eligible for the National Register of Historic Properties.

2003 EA at 46. It is undisputed that surface disturbing activities such as well construction may displace or adversely impact historic properties. Accordingly, the Antelope Creek Pilot Project **may** have an adverse effect on historic properties as defined by the NHPA regulations. As such, "alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties" should have been considered as part of the UIC permit process. 36 C.F.R. § 800.5(d)(2).

Third, pursuant to 36 C.F.R. § 800.4(b), federal agencies shall take the steps necessary to identify historic properties "in consultation with the SHPO . . . ." 36 C.F.R. § 800.4(b). If the agency then makes a "no effect" finding, it must do this in consultation with SHPO as well. 36 C.F.R. § 800.4(d)(1) (if historic properties are present but the undertaking will have no effect, "the agency official shall notify all consulting parties . . . and make the documentation available for public inspection prior to approving the undertaking"); Southern Utah Wilderness Alliance, 164 IBLA 1, 24 (2004)("[i]f the agency determines that there will be no such effects, it may then propose a finding of no adverse effect to all consulting parties, which would include the states' SHPO. . . .") (*quoting* SUWA v. Norton, 277 F.Supp.2d at 1194) (internal quotations omitted). Compliance with these consultation requirements is critical, as the letter and the spirit of the NHPA regulations "rely on consultation, particularly with SHPO, as the principal means of protecting historic resources." Attakai v. United States, 746 F. Supp. 1395, 1408 (D. Az. 1990) (*citing* 36 C.F.R. 800.1(b)).

The 2003 EA fails to reference any consultation with the SHPO regarding the steps necessary to identify historic property. 36 C.F.R. § 800.4(b). The 2003 EA also fails to note any documentation made available for public inspection prior to approving the Antelope Creek Pilot Project, or that the proposed finding of no adverse effect on historic properties was made in consultation with SHPO with sufficient documentation. 36 C.F.R. §§ 800.4(d)(1); 800.5(b); 800.5(c). As such, NHPA compliance has not occurred for the Antelope Creek Pilot Project.

In issuing the UIC permit, EPA has failed to follow the required procedures of the NHPA. See 36 C.F.R. § 144.4(b). EPA failed to ensure that reasonable and good faither efforts have been made to identify cultural resources in the area, relied on a incorrect conclusion that the project would not adversely affect cultural resources, and failed ensure consultation with SHPO prior to the undertaking. Therefore, EPA's conclusion of law is clearly erroneous and the UIC permit should be remanded back to the agency to compel compliance with the NHPA.

V. EPA Failed to Allow the Public to Provide Input on the Biological Evaluation Relied on to Issue the UIC Permit.

Following the public comments period, "EPA prepared a Biological Evaluation and on February 16, 2005, sent it to the [FWS] with a request for formal consultation." Response to Comments at 2. Despite the fact that Western Resource Advocates and others raised the need for ESA consultation, EPA failed to provide the public with any notice of the BE or allow for public comment. Although EPA believes that public input is not required because the UIC permit is not subject to NEPA's requirements, "important policy considerations" highlight the necessity for public involvement in the ESA consultation process. See 40 C.F.R. § 124.19(a)(2).

In particular, EPA recognized that the Antelope Creek Pilot Project "could result in an estimated water depletion of up to 338.7 acre-feet." BE at 1. Accordingly, EPA "conclude[d] that issuance of the UIC Area Permit for the Antelope Creek Steamflood Pilot Project **is likely to adversely affect** the bonytail, Colorado pikeminnow, razorback sucker and humpback chub because the proposed action may result in water depletions that may impact these species." BE at 8 (emphasis in original). To mitigate this likely adverse impact, FWS simply required the project proponent to pay a one-time charge amounting to $5,520.81

EPA and FWS never reached out to the public which raised these exact concerns during the scoping period. The public never had the opportunity to raise other more effective mitigation measures. The public never had the opportunity to dispute the adequacy of a depletion charge to mitigate likely adverse affects on endangered and threatened species.

Moreover, "for background information purposes," EPA suggests that BIA "determined that the proposed Antelope Creek Field expansion action would not jeopardize threatened and endangered species." Response to Comments at 2. However, EPA also recognized that "[t]his language is incorrect because BIA did not request formal section 7 consultation with FWS and a 'jeopardy' or 'no jeopardy' call is made on by the FWS through a biological opinion after receiving a request by a federal agency for formal consultation." BE at 3. Thus, EPA is aware of the deficiencies of the Section 7 consultation procedures undertaken by BIA, yet have capitulated to these deficient analyses. EPA is aware of the need for a full impact study on the Antelope Creek Pilot Project and recognizes the necessity to cure deficiencies in the ESA consultation process. In fact, EPA has determined that contrary to BIA's conclusion the

Antelope Creek Pilot Project is likely to adversely affect threatened and endangered species. EPA should not sanction such glaring violations of law by issuing the UIC permit.

Therefore, Western Resource Advocates respectfully requests that the UIC permit be remanded to the EPA to allow for the commencement of a public comment period on the adequacy of the BE and FWS mitigation measures. The Antelope Creek Pilot Project is likely to adversely affect threatened and endangered species and "important policy considerations" favor public input on these significant impacts to imperiled species. Western Resources Advocates raised the need for consultation during the scoping period and should have the opportunity to provide input on the consultation process prior to issuance of the UIC permit.

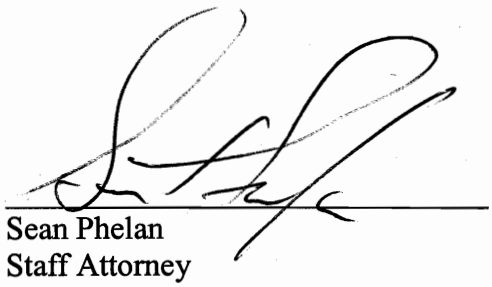
VI. Important Policy Considerations Warrant the Environmental Appeals Board's Review of the UIC Permit and the Antelope Creek Pilot Project

Petroglyph Operating Company is proposing an unprecedented project utilizing unknown and unproven technologies for which no data exist pertaining to environmental impacts. Federal agencies have a duty to ensure that the entire permitting process is conducted lawfully. Western Resource Advocates respectfully requests that the EAB carefully examine the 2003 EA and EPA's documentation relating to the UIC permit to determine whether the severe and unknown environmental impacts have been adequately considered.

BIA has barely even explored the substantial impacts of the Antelope Creek Pilot Project. EPA and FWS have both gone on record articulating the need for the preparation of an environmental impact statement. EPA acknowledges that issuance of the UIC permit will likely adversely affect endangered and threatened species. And, impacts to irreplaceable historic properties have yet to be analyzed despite the issuance of the UIC permit - a necessary component of the Antelope Creek Pilot Project.

Important policy considerations necessitate a thorough consideration of this precedent setting tar sands development project. Accordingly, Western Resource Advocates respectfully requests that the EAB remand this permit back to EPA to compel a comprehensive and thoroughly informed study of the imminent impacts of the Antelope Creek Pilot Project prior to the issuance of the UIC permit.

Dated: July 13, 2005



Sean Phelan
Staff Attorney
Western Resource Advocates

Please note our new address:

Western Resource Advocates
425 East 100 South
Salt Lake City, Utah 84111

WESTERN RESOURCE
ADVOCATES

July 8, 2004

Mr. Dan Jackson
U.S. Environmental Protection Agency
Region 8 Ground Water Program, 8P-W-GW
999 18th Street, Suite 300
Denver, Colorado 80202-2466
VIA Fax (303-312-7084) and US Mail

RE: Proposed Underground Injection Control Program (UIC) Permit (Permit No. UT20960-00000).

Dear Mr. Jackson,

Thank you for the opportunity to comment on your agency's proposal to issue an Underground Injection Control Program (UIC) Permit (Permit No. UT20960-00000) for the Antelope Creek project. We are deeply troubled by the magnitude of the proposed project, its promise to have significant impacts on the environment, and the failure of the various federal agencies involved in permitting and approving this project to take a comprehensive and hard look at these impacts and to keep the public advised of its analysis and decision making.

The segmentation of this project undermines the goals and procedures of the National Environmental Policy Act (NEPA). Because the project could not go forward without U.S. Environmental Protection Agency (EPA) air quality and injection permits, Bureau of Indian Affairs (BIA) approval, and Bureau of Land Management approval of APDs, these agencies, including EPA, should cooperatively prepare an environmental impact statement (EIS) that addresses the significant individual and cumulative environmental impacts of these actions.

While your program does not necessarily deal with air quality impacts, EPA is duty bound to regulate emissions from the project and to ensure that the project does not violate the Clean Air Act. We urge EPA immediately to assert its authority to regulate the proposed project as a single facility to address air quality impacts such as hazardous air pollutant emissions, ozone concentrations, PSD increments, and visibility and other air quality related values in nearby Class I areas. We also request that EPA immediately consult with the Utah Division of Air Quality to determine which agency has jurisdiction over various aspects of the proposed project and to guarantee that these jurisdictions comprehensively regulate all air emissions from the project.

Regarding the UIC Permit and the Statement of Basis for the permit, we make the following comments:

EPA has not adequately addressed or mitigated the significant adverse impacts of the substantial individual and cumulative water depletions or draw downs – a direct consequence of the permitted injection wells and proposed wells – on listed species and non-listed species, and on surface water quality. This issue is of particular concern because **all** injected water will be lost from surface water quantities. Both 40 C.F.R. § 114.4 and EPA's independent responsibilities under the Clean Water Act, the Endangered Species Act and the Fish and Wildlife Coordination Act (FWCA) require this analysis and compliance.

EPA has not adequately addressed or mitigated the significant adverse individual and cumulative impacts of the proposal on archeological sites, particularly those eligible for listing in the National Register of Historic Places. Both 40 C.F.R. § 114.4 and the National Historic Preservation Act require this analysis and compliance.

EPA should enter formal consultation with the US Fish and Wildlife Service (FWS) as the project is likely to affect adversely listed species and will likely adversely modify critical habitat. The contemplated draw downs, which EPA has failed to quantify, promise to exacerbate the deterioration of critical habitat and take listed species, particularly the four listed species of Colorado fish.

In any case, EPA's consultation must be included with the UIC permit as part of the agency's obligations under FWCA and this permitting process. *See* 40 C.F.R. § 114.4. According to FWS's section 7 consultation regulations, "where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes." 50 C.F.R. § 402.06(b); *See also* Sierra Club v. Babbitt, 69 F.Supp.2d 1202, 1223 (E.D. Calif. 1999) (Recognizing that an agency's failure to provide the public with information supporting a Biological Assessment violated NEPA's purpose to "insure that environmental information is made available to public officials and citizens before decisions are made and before actions are taken").

Accordingly, a biological assessment should have been included as part of, or as an appendix to, this permit action. At a minimum, the public should be provided this document so that it can participate meaningfully in the permitting process, which is intended to fulfill EPA's NEPA and FWCA obligations. At the same time, no permit should be approved until the public has been provided such an opportunity and the consultation process is completed. To do otherwise would violate the ESA.

Thank you again for your efforts to protect our nation's drinking water. Please keep us involved in EPA's decision making process relative to this project and provide any addition information to me at:

Western Resource Advocates
1473 South 1100 East, Ste F
Salt Lake City, Utah 84105

Please feel free to contact me with any concerns or questions.

/s/
JORO WALKER, Esq.
Director, Utah Office

Mr. Chester Mills, Superintendent
U.S. Department of the Interior
Bureau of Indian Affairs
Uintah and Ouray Agency
P.O. Box 130
Fort Duchesne, UT 84026

Mr. Gilbert Hunt
Acting Associate Director
Utah Division of Oil, Gas and Mining
1594 West North Temple, Suite 1210
PO Box 145801
Salt Lake City, Utah 84114

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WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment

July 21, 2005

Clerk of the Board
U.S. EPA
Environmental Appeals Board
1341 "G" Street, NW
Suite 600
Washington, D.C. 2005

Dear Clerk of the Board,

We spoke on the telephone today about the fact that our appeal of Region 8's UIC Area Permit No. UT20960-00000, which we FedEx'ed to you on July 13, 2005, was returned to us today. As per our conversation, I am returning the appeal to you in the packaging in which it was returned to us. As we discussed, I have also enclosed the "instruction" sheet explaining that we should mail our appeal to EPA's Ariel Rios address.

I believe that we will get this appeal to you within the relevant deadline – the letter accompanying the permit is dated June 23, 2005. However, if not, please consider it served on time, based on the circumstances surrounding our attempts to comply with the appeal instruction sheet.

Thank you very much for your attention to this matter.

JORO WALKER, Esq.
Director, Utah Office

Colorado Office • 2260 Baseline Road, Suite 200 • Boulder, CO 80302 • 303-444-1188 • Fax: 303-786-8054 • E-mail: info@westernresources.org
Utah Office • 425 East 100 South • Salt Lake City, UT 84111 • 801-487-9911 • E-mail: utah@westernresources.org

www.westernresourceadvocates.org

ADMINISTRATIVE REVIEW (40 CFR §124.19)

1. Within 30 days after a final permit decision has been issued, any person who filed comments on the tentative permit decision or participated in any public hearing on such decision may petition the Administrator to review any condition of the final permit decision.

2. Any person who failed to file comments or participate in any public hearing on the tentative permit decision may petition for administrative review only to the extent of the changes from the tentative to the final permit decision.

3. The petition must include a statement of the reasons supporting that review, including a demonstration that any issues being raised in the petition were previously raised during the public comment period or during any public hearing and, when appropriate, a showing that the condition in question is based on:

    a. a finding of fact or conclusion of law which is clearly erroneous; or

    b. an exercise of discretion or an important policy consideration which that Environmental Appeals Board should, in its discretion, review.

4. Such a request must be made within thirty (30) days of service of notice of the Regional Administrator's action, and shall be mailed to:

    U.S. Environmental Protection Agency
    Clerk of the Board, Environmental Appeals Board (MC 1103B)
    Ariel Rios Building
    1200 Pennsylvania Avenue, N.W.
    Washington, D.C. 20460-0001

5. Within a reasonable time following the filing of the appeal, the Environmental Appeals Board shall issue an order granting or denying the petition for review.

6. The Environmental Appeals Board may defer consideration of an appeal until completion of formal proceedings seeking judicial review of the final agency action. A petition to the Environmental Appeals Board is, under 5 U.S.C. 704, a prerequisite to seeking judicial review.

Anyone with questions on filing documents with the Board should contact the Clerk of the Board. The Clerk can be reached by E-mail at durr.eurika@epa.gov or by calling (202) 233-0122. For additional information, please refer to the Board website address at http://www.epa.gov/eab/.

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