

DISTRICT COURT, LAS ANIMAS COUNTY, COLORADO 200 East 1st Street, Room 304 Trinidad, Colorado 81082 Telephone: 719.846.3316	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: XTO ENERGY, INC., a Delaware corporation, v. Defendant: PATRICK J. PFALTZGRAFF, in his official capacity as the Division Director of the Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment.	
Attorneys for Plaintiffs: Ronda L. Sandquist, Colo. Atty. Reg. No. 9944 Christopher O. Murray, Colo. Atty. Reg. No. 39340 Patrick B. Hall, Colo. Atty. Reg. No. 45317 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.223.1100 E-mails: rsandquist@bhfs.com, cmurray@bhfs.com, phall@bhfs.com	Case Number: Division:
COMPLAINT FOR JUDICIAL REVIEW	

Plaintiff, XTO Energy, Inc., by and through its attorneys, Brownstein Hyatt Farber Schreck, LLP, hereby submits its Complaint as follows:

Summary of the Case

1. XTO Energy, Inc. (“XTO”) seeks relief from a final order of the Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment (the “Division”) dated June 19, 2015 denying XTO’s request for a stay of renewal water discharge permits initially issued May 29, 2015. The permits apply to water produced from the operation of hundreds of coalbed methane (“CBM”) wells in the Raton Basin, a large, underground geological formation in southern Colorado and northern New Mexico.

2. XTO administratively appealed multiple aspects of the renewal permits on June 12, 2015, and because of the number and variety of terms and conditions challenged, requested a

stay of the permits in their entirety. In an order dated June 19, 2015, the Division granted a partial stay of certain permit terms it had previously agreed to stay for good cause shown, denied a stay of other challenged permit terms, and denied the request to stay the permits in their entirety.

3. Because XTO demonstrated good cause for a stay of the permits in their entirety, the Division's piecemeal stay creates significant administrability issues, and a partial stay may not spare XTO from having to inject the produced water or shut down its wells altogether, XTO seeks a reversal of the Division's denial of XTO's request for a full stay.

Disclosure of Related Lawsuit

4. On April 20, 2015, XTO filed a complaint in this Court against the Division, seeking a stay of certain permit terms (WET,¹ EC/SAR,² and iron). *See* Case No. 2015CV30041 (the "April 20 Lawsuit"). The April 20 Lawsuit challenged the Division's implicit denials of XTO's requests for permit modifications for the WET, EC/SAR, and iron parameters. That case is now stayed in accordance with an agreement between XTO and the Division. The present action, although between the same parties, is separate and distinct from the April 20 Lawsuit in that it concerns a different Division order, different permit terms, and a different scope of stay request.

Parties

5. XTO is a Delaware corporation with its principal place of business located at 810 Houston Street, Fort Worth, Texas 76102. XTO is a subsidiary of ExxonMobil that conducts significant CBM operations in Las Animas County.

6. Defendant Patrick J. Pfaltzgraff is the Division Director of the Division, which has a principal place of business at 4300 Cherry Creek Drive South, Denver, Colorado 80246.

¹ As explained in the April 20 Lawsuit, whole effluent toxicity ("WET") is a laboratory test used to assess the possible aggregate toxic effect of effluent to aquatic organisms. As opposed to evaluating the effect of a specific constituent of the discharged water (the "effluent"), WET testing looks at the toxicity of the effluent as a whole to aquatic species. There are two types of WET testing: acute and chronic. Acute toxicity tests are used to determine the concentration of effluent or ambient (pre-existing) water that results in mortality within a group of test organisms during a 24-, 48- or 96-hour exposure. A chronic toxicity test is a longer-term test in which sublethal effects, such as fertilization, growth or reproduction, are measured in addition to lethality. Traditionally, chronic tests are conducted to allow an evaluation of these effects over the test organisms' full life-cycles or significant portions of those test organisms' life cycles (approximately 30 days).

² As explained in the April 20 Lawsuit, Electrical Conductivity ("EC") is a measure of the amount of dissolved solids (salts) in water. As the EC in soil water increases, the sodium can decrease plant growth, making EC an important measure for irrigation water. Similarly, Sodium Absorption Ratio ("SAR") is a measure of the abundance of sodium relative to the abundance of calcium and magnesium in water. SAR is also an agricultural concern, as the ratio relates to the amount of sodium that is available for absorption by soils, which impacts soil structure and moisture. These parameters are often referenced together as "EC/SAR."

The Division is a State agency within the Colorado Department of Public Health and Environment.

Jurisdiction and Venue

7. The Court has jurisdiction over this matter pursuant to Colorado Revised Statutes sections 24-4-106, 25-8-404, and 25-8-406, as it seeks review of a final administrative order denying a request for stay.

8. Venue is appropriate pursuant to Colorado Revised Statutes section 25-8-404(2) and Colorado Rule of Civil Procedure 98, as the affected discharge sources are located in Las Animas County.

Standard of Review

9. Under Colorado Revised Statutes section 25-8-406 and 5 C.C.R. § 1002-61.7(1), the Court's review of the Division's denial of XTO's request for stay is *de novo*.

Status of the Permits

10. XTO holds discharge permits CO-0048054 and CO-048062, by which the Division authorizes and regulates the discharge of water from XTO's CBM wells in the Raton Basin. XTO operates 482 wells; the permits apply to approximately 77 "outfalls," the term of art for a point of water discharge. Most outfalls discharge water from more than one CBM well.

11. The Division issued these discharge permits on December 30, 2009, effective February 1, 2010 (the "Original Permits"). The Original Permits were set to expire on January 31, 2015.

12. The Division did not issue final renewal permits (the "Renewal Permits") until May 29, 2015, after the Original Permits technically expired. As such, the Original Permits were administratively extended from February 1, 2015 to June 30, 2015. The Renewal Permits took effect on July 1, 2015.

Procedural Background

13. The Division issued drafts of the Renewal Permits and draft fact sheets (documents explaining, in narrative form, the reasoning behind the Division's decisions) on February 6, 2015. XTO administratively appealed several aspects of the drafts to the Division on March 9, 2015, within the 30-day deadline set forth in the Water Quality Control Act ("WQCA") regulations. XTO also submitted comments regarding the draft Renewal Permits on April 6, 2015.

14. In conjunction with its administrative appeal, XTO requested a stay of the adoption, implementation, and enforcement of three parameters: WET, EC/SAR, and iron. XTO

argued that the terms and conditions assigned to these parameters amounted to an order that XTO shut down its operations because the most practical method of compliance—deepwell injection—was prohibitively expensive.

15. The Division denied XTO’s request for adjudicatory hearing and request for stay in an order dated March 19, 2015 (the “March 19 Order”).

16. Following the issuance of the March 19 Order, XTO’s representatives engaged with the Division regarding the possibility of entering into a facilitated discussion to address XTO’s permit concerns in a non-adversarial setting. XTO explained that the Division’s actions essentially required injection, which it desired to avoid at all costs.

17. While it was still unclear whether the Division would accept XTO’s offer of a facilitated discussion, XTO filed an appeal of the March 19 Order in this Court (i.e., the April 20 Lawsuit). In that action, XTO sought reversal of the Division’s denial of XTO’s request for stay of WET, iron, and EC/SAR, and requested preliminary injunctive relief.

18. Following negotiations, XTO and the Division entered into an Agreement to Engage in Facilitated Discussion on May 8, 2015 (the “Agreement”). The Agreement is attached as Exhibit 1. Under the Agreement, the Division was to issue renewal permits on or before May 29, 2015. XTO was to file an administrative appeal and request for stay of at least WET, iron, and EC/SAR on or before June 15, 2015, and the Division agreed to stay those parameters for good cause shown within five business days. Following that, XTO and the Division were to engage in a non-binding facilitated discussion to conclude by September 30, 2015. Pursuant to the Agreement, the parties filed a joint motion to stay the April 20 Lawsuit, which this Court granted on May 18, 2015.

19. As it agreed, the Division issued final Renewal Permits and final fact sheets (the “Fact Sheets”) on May 29, 2015.

20. As XTO agreed, it filed a Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay on June 12, 2015 (the “June 12 Appeal”). The June 12 Appeal is attached as Exhibit 2. XTO appealed and requested the stay of the parameters previously challenged—WET, SAR, and iron—but it also appealed several other decisions, including decisions regarding new monitoring requirements, per-outfall flow limits, the Division’s failure to assess economic reasonableness, and a variety of other permit-specific inconsistencies and mistakes.

21. Because XTO was compelled to challenge a significant portion of the Renewal Permits’ terms, XTO requested that the Division stay the Renewal Permits in their entirety. XTO argued that a piecemeal stay would create significant administrative complexity and compliance issues, and that the Original Permits (which would remain in effect during the stay, per the WQCA) would provide adequate protection and predictability while XTO’s administrative appeal was pending.

22. In response, the Division issued an Order Regarding June 12, 2015 Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay on June 19, 2015 (the “June 19 Order”). The June 19 Order is attached as Exhibit 3.

23. In the June 19 Order, the Division found that XTO was a party directly affected by the Division’s final determinations, and thus granted XTO’s request for an adjudicatory hearing.

24. The June 19 Order granted in part and denied in part XTO’s request for stay. The Division granted XTO’s request for stay as to SAR and as to certain components of the WET and iron parameters. In particular, the Division stayed the enforcement of chronic WET, but not acute WET. The Division also stayed monitoring associated with mercury. The Division stayed iron antidegradation-based two-year effluent limits (ADBELs), but not iron water quality-based effluent limits, measured as the average iron level over the previous 30 days (the “30-day iron limits”).

25. The Division then considered whether to (1) stay the permits in their entirety, or (2) stay the additional permit terms challenged (i.e., the new monitoring requirements and flow limits), and rejected both options. In support of its decision to deny the request for a stay of the Renewal Permits in their entirety, the Division found that, by virtue of two attachments to the June 19 Order enumerating which permit terms were stayed, “the operating terms and conditions in whole are clear.” The Division also found that XTO had not explained why terms other than those challenged were in error or how compliance with those terms would seriously harm XTO, and thus concluded that “XTO has not shown good cause for its request that the Division stay the [Renewal Permits] in their entirety.” Finally, the Division found that it did not have the power to stay terms that were not “contested,” stating that an allegation of complexity did not equate to a challenge.

26. In the June 19 Order, the Division denied a stay of the new monitoring requirements (not including mercury), finding that serious harm would not result if the requirements were stayed because XTO was already collecting effluent samples for other parameters at the same frequency. Thus, according to the Division, XTO did not show good cause for a stay of this new requirement. The Division also denied a stay of terms and conditions associated with flow limits, finding that the flow limits are identical to those in the Original Permits, which XTO did not contest.

27. Also on June 19, 2015, the Division issued modified (corrected) Renewal Permits and accompanying fact sheets in response to XTO’s comments on the Renewal Permits and errors identified by XTO in the June 12 Appeal. The accompanying fact sheets merely explain the new permit modifications—they do not correct errors in the final Fact Sheets.

28. On June 26, 2015, in response to additional XTO comments regarding errors in the June 19 Order, the Division issued a modified (corrected) June 19 Order with corrected attachments (“the June 26 Modified Order”). The June 26 Modified Order, along with attachments, is attached as Exhibit 4.

29. XTO subsequently requested a modified stay and additional permit modifications that would avert the threat of noncompliance while the parties engaged in mediation. The Division rejected the request for a modified stay. On July 17, 2015, the Division issued draft modified Renewal Permits that included increased 30-day iron limits and compliance schedules for certain outfalls, but did not stay enforcement of the 30-day limits pending the issuance of final modified Renewal Permits, which will not occur for approximately sixty days.

30. Unable to reach an accord with the Division, and faced with permit terms and conditions that threaten the viability of XTO's Las Animas County operations, XTO brings the present appeal.

The Partially Stayed Permits Are Unadministrable

31. The Division's assertion that the Renewal Permits' "operating terms and conditions in whole are clear" is demonstrably false. To the contrary, the hodgepodge of stayed and effective terms throughout the voluminous Renewal Permits, permit modifications, and stay orders make the permits impossible to administrate.

32. In fact, the attachments to the June 19 Order, which are the basis for the Division's assertion of administrability, contain numerous errors. For instance, while the June 19 Order purportedly stayed iron ADBELs, the attachment does not stay associated requirements that XTO also challenged, including iron compliance schedule activities and the calculation of 2-year averages using the previous 23 months of data for any outfall. The Division did not correct this in the June 26 Modified Order or its corrected attachments. The fact the Division cannot harmonize the attachments with the order signals its likely inability to administer the correct terms over several dozen outfalls per Renewal Permit.

33. Additionally, the Division had difficulty administering the fully effective Original Permits, calling into question its ability to administer partially stayed/partially effective permits. For example, the Division recently sent XTO a compliance advisory indicating that certain outfalls were noncompliant with the potentially dissolved lead requirement. The Original Permits, however, do not contain a potentially dissolved lead limitation.

34. Whether the Division will be able to deliver accurate discharge monitoring report forms ("DMRs") to XTO in a timely manner is also doubtful. DMRs are forms listing all the parameters that the company must monitor. They are filled out by the company and returned to the Division, allowing the Division, EPA, and third parties to evaluate compliance. Alleged noncompliance puts XTO at risk of daily penalties, cease-discharge orders, and citizen suits. On at least one previous occasion, the Division failed to issue DMRs in time for XTO to fill them out, and then cited XTO for noncompliance. Partially staying the Renewal Permits will only complicate the Division's task of timely issuing DMRs that accurately reflect, for two different permits applying to seventy-seven outfalls, the terms stayed and not stayed for each outfall.

35. Because the Renewal Permits are unadministrable if only partially stayed, they should be stayed in their entirety.

XTO Should Not Be Required to Comply with Arbitrary and Capricious Permits

36. The Renewal Permits and associated Fact Sheets initially issued on May 29, 2015 are riddled with mistakes, making them arbitrary and capricious as a whole.

37. With such a large number of errors in the Renewal Permits, and inconsistencies across the modified permits, modified fact sheets, and stay orders, XTO is incapable of discerning which terms and numeric limitations are accurate and enforceable, and which are drafting errors or oversights.

38. XTO identified apparent errors in at least one parameter for nearly every outfall, of which there are several dozen. The pervasiveness of these errors makes the Renewal Permits themselves arbitrary and capricious.

39. Although the Division issued modified Renewal Permits, the modifications have not fully addressed XTO's substantive concerns. Likewise, the fact sheets accompanying the modified Renewal Permits have not addressed other substantive errors and inconsistencies identified in the final Fact Sheets. Therefore, a number of erroneous permit terms and fact sheet explanations remain apparently effective, thus complicating XTO's compliance efforts.

40. XTO should not be required to expend millions of dollars complying with terms that may later be identified as mere clerical errors. Staying the Renewal Permits in their entirety will give both parties the time they need to assess how to administer and comply with the new permit terms.

The Division Entirely Failed to Address Economic Reasonableness

41. The Division failed to comply with its duty under section 25-8-503(8) of the WQCA, which requires the Division to consider whether permit terms and conditions are economically reasonable. Rather than making any specific findings regarding economic reasonableness at the permit stage, as it was obligated to do, the Division purported to incorporate findings of the Water Quality Control Commission ("WQCC") made during proceedings to adopt the *Classifications and Numeric Standards for Arkansas River Basin, Regulation 32*. The Division's broad incorporation of WQCC findings does not sufficiently address or rebut XTO's specific evidence submitted, however. Even if this approach of incorporation by reference were acceptable (which it is not), the Division ignored findings from the 2013 WQCC hearing. Moreover, the Division's reliance on WQCC standards proceedings is unfair because, at the time, XTO did not object the WQCC standards as a whole, but only to the standards as applied to their operations.

42. XTO noted in its June 12 Appeal and in its comments on the draft Renewal Permits that several of the Renewal Permits' terms and conditions would force XTO to perform deepwell injection. Injection would be XTO's most practical option given the infeasibility of installing and operating treatment facilities at dozens of remote outfalls, but it is XTO's worst-case scenario because of its high costs to the company and to Las Animas County.

43. Although XTO highlighted this obvious omission more than once, the Division's June 19 Order still fails to address why the Renewal Permits' limitations are economically reasonable. In fact, there is no evidence that that Renewal Permits are economically reasonable; all of the evidence in the record is to the contrary.

44. The Renewal Permits should not take effect until the Division complies with the WQCA and determines whether the terms and conditions are economically reasonable, which they are not.

The Denial of a Full Stay Violates at Least the Spirit of the Agreement

45. The purpose of the Agreement's stay provision was to prevent XTO from having to inject or shut down in the immediate term, creating space for the parties to negotiate the contested WET, EC/SAR, and iron parameters in a non-adversarial setting. In fact, the only alternative to the Agreement, from XTO's perspective, was the April 20 Lawsuit seeking a preliminary injunction against the enforcement of the proposed WET, EC/SAR, and iron parameters.

46. Now, by issuing a partial stay of only certain aspects of WET, SAR, and iron, and denying a stay of other challenged parameters and of the Renewal Permits in their entirety, the Division is once more effectively mandating that XTO inject or shut down. In other words, even if the Division's stay decision adheres to the language of the Agreement (which XTO reserves its right to dispute either in this case or in the April 20 Lawsuit that is currently stayed), it violates the spirit of the Agreement.

47. The Division's partial stay places the parties in nearly the exact same position they were in before the Agreement was signed and the April 20 Lawsuit was stayed. Because this absurd result violates at least the spirit—if not the plain terms—of the Agreement, XTO has no choice but to seek a reversal of the Division's stay decision in the June 19 Order.

XTO and Those That Rely on XTO's CBM Operations Will Be Irreparably Harmed Absent a Stay

48. Should the Renewal Permits not be stayed in their entirety, the harm to XTO and those that rely on XTO's CBM-produced water will be severe and irreparable.

49. First, the enforcement of the Renewal Permits as only partially stayed would severely impact XTO's CBM operations in the Raton Basin. This is because XTO will not operate outfalls that do not comply with regulatory requirements.

50. Water samples taken in January, March, and April indicate that XTO will likely not be able to comply with the currently effective 30-day iron limits at several outfalls. The 30-day iron limit requires XTO to report the average iron levels across all water samples taken during a month (the permittee has discretion in whether and when to take additional samples). While XTO has not begun sampling for the currently effective 30-day iron limits (as the

permittee, XTO has discretion when to sample), it must do so by September 30, 2015. Thus, although XTO will not know whether any outfalls are actually noncompliant until it begins sampling, XTO currently predicts that several outfalls will be noncompliant unless the draft modified Renewal Permits issued on July 17, 2015 go into effect by September 1, 2015 (the last date on which XTO could begin a 30-day iron sample). This same situation will arise again when the August sampling period begins.

51. Therefore, in light of XTO's company policy, the only practical option that would avert reports of noncompliance and keep XTO's wells operational in the absence of a full stay would be to inject the produced water, a process that would cost tens of millions of dollars in capital costs, over \$1 million per year in operation and maintenance costs, and waste thousands of acre feet of this much-needed water in a typically semiarid environment.

52. Because of the astronomical cost of injection, XTO's only economically viable choice may be shutting down noncompliant wells, a process that is both expensive and potentially irreversible. Stopping and starting a well is not like turning a tap off and on. Rather, shutting down a well is a laborious process that costs millions of dollars. What is more, once shut down, starting a well up again would cost many millions more, an expense that might not be economically viable.

53. XTO will also be irreparably harmed if it is forced to comply with permit terms later disclosed to be clerical mistakes, cited or sued for noncompliance as a result of not timely receiving accurate DMRs, or obligated to comply with terms and conditions subsequently found to be not economically reasonable.

54. Not only will XTO be harmed if the Renewal Permits are not fully stayed, but so will those who have come to rely on XTO's CBM-produced water. XTO's operations contribute nearly 1,780 acre feet per year to the Purgatoire/Arkansas River basin, which has experienced drought conditions for years. Because of the shortage of water in the area, there are ranches that depend almost exclusively on XTO's produced water. Forcing XTO to inject or shutter noncompliant could cause these ranchers extreme hardship, possibly even forcing them to end their operations. The flow of water through State wildlife areas could also cease or be reduced.

55. XTO estimates that CBM operations in Las Animas County could continue for another 20 to 40 years, generating many jobs and tens of millions of dollars of economic benefits to the local communities per year. If XTO were forced to shut down wells, a significant number of these jobs could disappear and a large portion of those economic benefits could evaporate.

56. On the other hand, granting XTO a temporary reprieve from the Renewal Permits during the pendency of the adjudicatory hearing would cause minimal, if any, harm. Years of data show that XTO's CBM-produced water is good and usable, and that the Purgatoire River is clean and healthy. In other words, there would be little, if any, real-world harm to the environment from allowing XTO to continue its operations until the challenged limitations are finalized.

First Claim for Relief
(Reversal of the Division's Denial of XTO's Request for Stay Under
C.R.S. §§ 24-4-106, 25-8-404, and 25-8-406)

57. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 56 above.

58. Under Colorado Revised Statutes section 25-8-406, the Division may stay any contested terms and conditions of a permit for good cause shown.

59. Action by the Division denying a stay is a final agency action subject to *de novo* determination pursuant to Colorado Revised Statutes section 25-8-404.

60. The Division's denial of XTO's request for stay should be reversed, as XTO demonstrated good cause for a stay of the Renewal Permits in their entirety in the form of at least (a) being forced to inject the produced water or shut down the wells, both at a cost of millions of dollars; (b) if the wells are shut down, the cost of restarting the wells, if doing so is even economically viable; (c) the complexity and unadministrability of partially stayed/partially effective Renewal Permits; (d) the harm to the community, including the loss of economic benefits, jobs, and usable water.

Relief Requested

61. XTO requests the following relief in the form of a judgment in favor of XTO and against the Division:

- a. A reversal of the Division's denial of XTO's June 12, 2015 request for a stay of the Renewal Permits in their entirety;
- b. A permanent injunction staying the adoption, implementation, and enforcement of the Renewal Permits;
- c. Costs and fees; and
- d. Any further relief the Court may deem just and proper.

Dated July 20, 2015.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/ Christopher O. Murray

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