
**MODIFIED ORDER REGARDING JUNE 12, 2015 NOTICE OF APPEAL,
REQUEST FOR ADJUDICATORY HEARING, AND REQUEST FOR STAY**

**In Re: XTO Energy Incorporated, Colorado Discharge Permit Nos. CO
0048054 and CO 0048062**

By this ORDER, the Water Quality Control Division of the Colorado Department of Public Health and Environment (“the Division”) **GRANTS** the request by the XTO Energy Incorporated (“XTO”) for an administrative adjudicatory hearing on Colorado Discharge Permit Nos. CO 0048054 and CO 0048062, and **GRANTS IN PART AND DENIES IN PART** the request by XTO that the Division stay Colorado Discharge Permit Nos. CO 0048054 and CO 0048062.

BACKGROUND

1. XTO is currently permitted to discharge pollutants pursuant to discharge permit number CO 0048054 from Lorencito Canyon and portions of Hill Ranch Coalbed Methane Operations to the Lorencito Canyon, tributaries to Lorencito Canyon, and all tributaries to the Purgatoire River Mainstem. XTO is currently permitted to discharge pollutants pursuant to discharge permit number CO 0048062 from the Golden Eagle, Apache Canyon, and portion of the Hill Ranch Coalbed Methane Operation to tributaries to the South and Middle Fork of the Purgatoire River, tributaries to the Purgatoire River, and the Purgatoire River (collectively, “Current Permits”).
2. On December 26, 2013, XTO submitted an application to the Division to renew the Current Permits, which were scheduled to expire January 31, 2015.
3. In addition to its permit renewal request, from December 12, 2013 through August 6, 2014, XTO submitted a series of requests to the Division to modify its Current Permits. Relevant to XTO’s request for an adjudicatory hearing, the Division received a permit modification request for an extension of the compliance schedule for boron and less stringent effluent limits for iron; a permit modification request for an alternate approach for WET; and received a permit modification request for a compliance schedule for the EC and SAR limits that became effective April 1, 2014. Prior to February 6, 2015, the Division had issued final determinations on all of XTO’s modification requests other than XTO’s requests related to its permit effluent limitations for total recoverable iron, whole effluent toxicity (“WET”), and electrical conductivity/sodium adsorption ratio (“EC/SAR”).
4. The Division administratively extended the Current Permits on January 31, 2015, which remain extended and in full effect until the Division issues proposed renewal permits and the proposed renewal permits become effective, which occurs 30 days after issuance or at such later date specified by the Division. The proposed renewal permit

becomes effective in its entirety unless a stay is granted.

5. The Division published draft permit documents for public comment on February 6, 2015, for discharge permit CO 0048054, and on February 9, 2015, for discharge permit number CO 0048062. The draft permit documents included draft permits, draft fact sheets, draft water quality assessments, and associated draft appendices (hereinafter, collectively the “Draft Permit Documents”). The public comment period for the Draft Permit Documents concluded on April 8, 2015.

6. On April 6, 2015 and April 8, 2015, XTO submitted comments on the Draft Permit Documents.

7. On May 8, 2015, XTO and the Division entered into the Agreement to Engage in Facilitated Discussion (“Agreement”). Pursuant to paragraph 4 of the Agreement, if XTO disagrees with term(s) related to WET, iron or EC/SAR in the Proposed Renewal Permits, Pioneer or XTO agreed to request an administrative adjudicatory hearing and request a stay of the particular permit term(s) from the Division. In paragraph 5 of the Agreement, “the Parties agree to begin a non-binding facilitated discussion process no later than thirty (30) days following a request for stay by XTO.

8. On May 29, 2015, the Division issued proposed renewal permits for Colorado Discharge Permit Nos. CO 0048054 and CO 0048062 (“Proposed Permits”), and Fact Sheets and responses to comments in Appendix C associated with the Proposed Permits and specified the effective date of the permit to be July 1, 2015.

9. On June 12, 2015, XTO filed a *Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay* (“Appeal”) of the Proposed Permits with the Division.

For the reasons set forth below, the XTO’s Request for Adjudicatory Hearing is **GRANTED** and Request for Stay is **GRANTED IN PART AND DENIED IN PART**.

RELEVANT LAW

Laws Regarding Administrative Adjudicatory Hearings

10. Section 25-8-403, C.R.S., of the Water Quality Control Act (“Act”) provides any party that is “directly affected” by a “final order or determination” of the Division may apply to the Division for an administrative hearing pursuant to section 24-4-104, C.R.S.

11. Section 61.7(a) of the permit regulations, 5 CCR 1002-61, provides, “[t]he application [*sic*] or any other person, affected or aggrieved by the Division’s final determination may demand an adjudicatory hearing.”

12. Section 61.7(c) of the permit regulations limits the scope of the administrative adjudicatory hearing to “[o]nly issues of law or fact raised by the applicant or other person

prior to the adjudicatory hearing.”

13. Section 61.7(d) of the permit regulations establishes that, “[t]he person requesting the adjudicatory hearing shall have the burden of proof in all hearings,” except in the following circumstance, “(i)[w]here the Division initiated the permit revocation or modification; and (ii) [w]here the Division denies renewal of a permit or changes the terms of a renewed permit and that denial or change is not based either upon significant changes in the facts relevant to water quality considerations or upon changes in the applicable statutes or regulations.”

Laws Regarding Administrative Stays

14. Section 25-8-406 of the Act provides “the Division may stay any contested terms and conditions of a permit for good cause shown” “if a permittee requests an adjudicatory hearing... challenging final action by the Division in regard to any terms and conditions of a renewal permit,” In paragraph 4 of the Agreement the Division agreed that, “for good cause shown, the Division will issue a stay of the particular permit term(s) related to WET, iron or EC/SAR.”

15. Section 61.7(1)(a) of the permit regulations authorizes the Division to grant a stay of “contested terms and conditions of a final renewal permit” for “good cause shown.”

16. Section 61.7(1)(c) of the permit regulations provides “[t]he Division shall grant the request [for administrative stay] if it reasonably appears that serious harm would otherwise result and either (i) refusal would not provide corresponding public benefit; or (ii) the alleged violation or activity to which the order or determination applies will not continue, or if it does continue, any harmful effects on state waters will be alleviated promptly after cessation of the violation or activity.”

17. Section 61.7(1)(e) of the permit regulations provides, “[d]uring the period of any such stay, the corresponding terms and conditions of the prior permit shall remain in effect and are enforceable.”

XTO’S REQUEST FOR AN ADMINISTRATIVE ADJUDICATORY HEARING IS GRANTED

18. XTO requested an adjudicatory hearing “regarding the Water Quality Control Division’s (the ‘Division’s’) May 29, 2015 decisions concerning discharge permits CO-0048054 and CO-0048062.” *Petitioner’s Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay*, p. 1.

19. The Division finds that as the permit holder XTO is directly affected by the Division’s final determinations in the Proposed Permits.

FOR THE FOREGOING REASONS, the Division **GRANTS** XTO’s request for an

administrative adjudicatory hearing.

XTO'S REQUEST FOR STAY IS GRANTED IN PART AND DENIED IN PART

20. The scope of XTO's request for stay is not clear in the Appeal. On page three of the Appeal, XTO requests that the Division stay "its adoption, implementation, and enforcement of the challenged SAR [sodium adsorption ration] limitations, WET [whole effluent toxicity] testing approach, and iron limitations." On pages four and forty-two of the Appeal, XTO requests that the Division stay the Proposed Permits in "their entirety." Additionally, XTO alleged that the Division erred regarding the following parameters in the Proposed Permits: chronic WET; iron; SAR; the monitoring frequency for other metals; and flow. XTO did not specifically ask that the Division stay the monitoring frequency of other metals and flow limitations.

21. The request that the Division stay the Proposed Permits in their entirety, and to the extent the discussion of the alleged errors concerning the monitoring frequency of other metals and flow limits constitute a request for a stay of permit terms and conditions, those requests exceed the agreed-upon scope of the stay request in paragraph 4 of the Agreement. Despite the lack of clarity about the scope of XTO's request for stay, and despite the fact the request for stay exceeded the agreed upon scope in the Agreement, reading the Appeal in the light most favorable to XTO, the Division addresses all possible requests for stay below, which include the Proposed Permits in their entirety, chronic WET, iron, SAR, the monitoring frequency for other metals and the flow limitations.

XTO's Request That the Division Stay the Proposed Permits in Their Entirety

22. XTO states that "a stay of the new permits in their entirety is is [sic] appropriate because of the complexity that would be required if only the challenged terms were stayed." *Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay*, p. 43. Additionally, XTO states that the Proposed Permits "must be stayed in their entirety to preclude undue, irreparable harm to XTO." *Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay*, p. 4.

23. In its Appeal, XTO provided specific information about its perception of errors made by the Division and, in some instances, the harm associated with complying with the terms and conditions associated with WET, iron, SAR, the monitoring frequency of the other metals and the flow limits in the Proposed Permits. Regarding the remaining terms and conditions, XTO did not allege that the Division erred with respect to the remaining terms, nor did it provide information about why and how complying with the remaining terms and conditions in the Proposed Permits would seriously harm XTO.

24. The Division has identified which specific terms and conditions are stayed in this Order. The Division has also stated which terms and conditions in the Current Permits correspond to the terms that have been stayed, and as such remain effective during the period of the stay. Accordingly, because the Division has identified which specific terms

and conditions are stayed, and which specific corresponding terms and conditions are effective during the period of the stay, the operating terms and conditions in whole are clear.

25. Accordingly, because XTO did not discuss why all terms and conditions other than WET, iron, SAR, the monitoring frequency of the other metals and flow limits in the Proposed Permits are in error or why and how compliance with these terms would seriously harm XTO, and because the Division has identified which terms are stayed below, the Division finds that XTO has not shown good cause for its request that the Division stay the Proposed Permits in their entirety.

26. Additionally, pursuant to section 25-8-406, C.R.S., the Division's authority to grant a stay is limited to "contested" terms and conditions. According to the Merriam-Webster Dictionary, the word contest means "to say that you do not agree with or accept something." To the extent that a permit with terms and conditions that are stayed makes the permit complex does not meet the statutory standard that a requestor "contests" term and conditions. Complexity is not the same thing as a lack of agreement or acceptance.

FOR THE FOREGOING REASONS, the Division **DENIES** XTO's request that the Division stay the Proposed Permits in their entirety.

XTO's Request That the Division Stay the Terms and Conditions in the Proposed Permits Associated with Chronic WET

27. In support of its request that the Division stay the terms and conditions associated with chronic WET, XTO provides the following reasons: chronic WET should not be applied at outfalls; treatment for WET isn't feasible; the Division erred in its reasonable potential analysis for WET testing; the permits should provide for reduced WET monitoring and relief from WET testing; the Division's two-year compliance schedule does not leave enough time to obtain an alternative test procedure; and additional cost of quarterly chronic WET testing is unreasonable, the Division's Powder River Comparison is inapposite and based on a flawed report.

28. The Division's reasonable potential analysis for chronic WET testing, and the Division's use of the United States Geological Service's study on the Potential Effects of Sodium Bicarbonate, a Major Constituent of Produced Waters from Coalbed Natural Gas Production, on Aquatic Life ("USGS Study") both informed the chronic WET permit terms and conditions in the Proposed Permits. Additionally, the monitoring frequency and duration of the compliance schedules affect XTO's implementation of the chronic WET terms and conditions in the Proposed Permits.

29. The Division finds that XTO has contested the terms and conditions in the Proposed Permits associated with chronic WET because XTO raised disagreements concerning the Division's reasonable potential analysis for chronic WET testing, the Division's use of the USGS Study, the monitoring frequency, and duration of the compliance schedules.

Because the chronic WET terms and conditions in the Proposed Permits differ from the chronic WET terms and conditions in the Current Permits, the Division finds XTO has alleged facts that, if proven, make it reasonably appear that serious harm could result and refusal would not provide corresponding public benefit. Therefore, the Division finds XTO has shown good cause for its request that the Division stay the terms and conditions in the Proposed Permits associated with chronic WET.

FOR THE FOREGOING REASONS, the Division **STAYS** the terms and conditions in the Proposed Permits associated with chronic WET, and identifies the corresponding terms and conditions in the Current Permits that will remain in effect during the period of the stay, as identified in June 26, 2015 Modified Attachments 1 and 2.

XTO's Request that the Division Stay the Terms and Conditions in the Proposed Permits Associated With Iron

30. In support of its request that the Division stay the terms and conditions associated with iron, XTO provides the following reasons: the Division erred in ignoring [*sic*] 5-year data set; the Division erred in using the 2-year set of data; the Division's suggested treatment plan is unreasonably expensive and practically infeasible; the Division's proposed treatment plan for iron would be likely to increase SAR levels; the Division ignores the reality that background iron level are already high; and the Division failed to approve or deny XTO's iron modification request.

31. The historic iron data set informed the iron antidegradation-based effluent limitations ("ADBELs"¹).

32. The Division finds that XTO has contested the iron ADBELs in the Proposed Permits associated because XTO has raised disagreement about the data set the Division used to derive these effluent limitations. Because the iron ADBELs in the Proposed Permits differ from the iron terms and conditions in the Current Permits, the Division finds XTO has alleged facts that, if proven, make it reasonably appear appears that serious harm would otherwise result and refusal would not provide corresponding public benefit. Therefore, the Division finds XTO has shown good cause for its request that the Division stay the ADBEL iron effluent limitations in the Proposed Permits.

FOR THE FOREGOING REASONS, the Division **STAYS** the terms and conditions in the Proposed Permits associated with iron ADBELs, and identifies the corresponding terms and conditions in the Current Permits that will remain in effect during the period of the stay, as identified in June 26, 2015 Modified Attachments 1 and 2.

¹ On pages 20 and 21 of the Appeal under sections IV.B.2.a. and b., XTO cited the acronym "ABDELs", which isn't defined in the Appeal. However, the acronym ADBELs is defined in the Appeal as antidegradation based effluent limitations, and the Division believes XTO meant ADBELs in these instances.

XTO's Request That the Division Stay the Terms and Conditions in the Proposed Permits Associated With SAR

33. In support of its request that the Division stay the terms and conditions associated with SAR, XTO provides the following reasons: the Division fails to properly apply its own policy; the modified LCL method creates significant uncertainty, depriving XTO of due process; the modified LCL method is more stringent than the previous limits, making a compliance schedule appropriate; the Division's calculation of the benchmark SAR value of 1.2 is flawed; the Division failed to apply the benchmark SAR value of 2.4 in the renewal permits; there is no active irrigation diversion on the Lorencito; flow limitations are impermissible and restrict operational flexibility; the revised SAR approach does not account for laboratory imprecision; the LCL approach is inapplicable; and the Division failed to approve or deny XTO's EC/SAR testing modification request.

34. The LCL methodology and soil benchmark value informed the SAR permit terms and conditions in the Proposed Permits.

35. The Division finds that XTO has contested the terms and conditions in the Proposed Permits associated with SAR because XTO raised disagreements concerning the Division's use of the LCL methodology and soil benchmark value. Because the SAR terms and conditions in the Proposed Permits differ from the SAR terms and conditions in the Current Permits, the Division finds that XTO has alleged facts that, if proven, make it reasonably appear that serious harm would otherwise result and refusal would not provide corresponding benefit. Therefore, the Division finds XTO has shown good cause for its request that the Division stay the terms and conditions in the Proposed Permits associated with SAR.

FOR THE FOREGOING REASONS, the Division **STAYS** terms and conditions in the Proposed Permits associated with SAR, and identifies the corresponding terms and conditions in the Current Permits that will remain in effect during the period of the stay, as identified in June 26, 2015 Modified Attachments 1 and 2.

XTO's Request That the Division Stay the Monitoring Frequency for Other Metals in the Proposed Permits

36. On page 35 of the Appeal, XTO defines other metals ("Other Metals") as "the monitoring of metals other than iron." This Order adopts this definition. This definition does not include Radium or Sulfide, which are not metals.

37. In support of its request that the Division stay the monitoring frequency for the Other Metals, XTO provides the following reason: the required testing for other metals is unreasonably costly.

38. The Division finds XTO has alleged facts that, if proven, make it reasonably appear that serious harm would not result if the Division did not stay the monitoring frequency

for the Other Metals, other than low-level Mercury, because XTO is already collecting effluent sampling for other parameters, including metals (for example, iron and manganese) at these frequencies. All Other Metals other than low-level mercury samples can be collected during one field visit with one sample collector, while low-level mercury requires two sampling personnel. When sampling metals, all “total” metals other than mercury are collected in one sample bottle, and all “dissolved” metals are collected in one additional sample bottle. Transmitting the two sample bottles (one sample bottle of total metals and one sample bottle of dissolved metals) to the laboratory for analysis for all of the metals would occur simultaneously. Therefore, XTO has not shown good cause for its request that the Division stay the monitoring frequencies for the Other Metals other than mercury in the Proposed Permits.

FOR THE FOREGOING REASONS, the Division **DENIES** XTO’s request that the Division stay the monitoring frequency for Other Metals other than mercury in the Proposed Permits. Division **STAYS** the monitoring frequencies in the Proposed Permits associated with mercury, and identifies the corresponding terms and conditions in the Current Permits that will remain in effect during the period of the stay, as identified in June 26, 2015 Modified Attachments 1 and 2.

XTO’s Request That the Division Stay the Flow Limits

39. In support of its request that the Division stay the terms and conditions associated with the flow limits associated with the EC/SAR effluent limitations, XTO provides the following reason: flow limits are impermissible and restrict operational flexibility.

40. The flow limits in the Proposed Permits are identical to the flow limits in the Current Permits. XTO did not contest the flow limits in its Current Permits.

41. The Division finds XTO has alleged facts that, if proven, make it reasonably appear that serious harm would not result if the Division did not stay the flow limits. In fact, there would be no harm to XTO because staying the flow limits would not provide any relief to XTO or otherwise change XTO’s requirements because the flow limitations in the Proposed Permits are identical to the flow limits in the Current Permits. Therefore, the Division finds that XTO has not shown good cause for its request that the Division stay the flow limits in the Proposed Permits.

FOR THE FOREGOING REASONS, the Division **DENIES** XTO’s request that the Division stay the terms and conditions in the Proposed Permits associated with flow.

JUNE 26, 2015 MODIFICATIONS TO ATTACHMENTS 1 AND 2

42. On June 26, 2016, Christopher O. Murray sent an email to Emily Jackson titled “Pioneer/XTO – Specific Issues from June 19, 2015 Order.” In the email Mr. Murray identified “a list of issues identified in the stay order that need to be addressed.”

43. Some of the items identified in the email were typographical errors in the terms and conditions that the Division stayed in its June 19, 2015 Order Regarding June 12, 2015 Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay (“June 19, 2015 Order”) as identified in Attachments 1 and 2. For these terms and conditions in Attachments 1 and 2 the Division modified the corresponding terms and conditions in June 26, 2015 Modified Attachments 1 and 2 (Modified Attachments).

44. This Order and the Modified Attachments supersede in its entirety the June 19, 2015 Order and Attachments 1 and 2.

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Patrick J. Pfaltzgraff, Director
Water Quality Control Division

26 June 2015
Date

CERTIFICATE OF SERVICE

I certify that I have served the within ORDER DENYING NOTICE OF APPEAL, REQUEST FOR ADJUDICATORY HEARING, REQUEST FOR STAY this 26th day of June, 2015, as follows:

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