
ORDER DENYING 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”) **DENIES** the September 11, 2015 request by XTO Energy Incorporated (“XTO”) for an adjudicatory hearing on and stay of permit modification number 2 – minor modification, associated with Colorado Discharge Permit Nos. CO 0048054 and CO 0048062.

BACKGROUND

1. On May 29, 2015, the Division renewed XTO’s permit numbers CO 0048054 and CO 0048062.
2. On August 10, 2015, XTO submitted a request to the Division in which XTO requested “confirmation” of its understanding of the 2-year rolling average reporting requirements.
3. On August 13, 2015, the Division issued a minor permit modification and corrected a typographical error which clarified the 2-year rolling average reporting requirements.

For the reasons set forth below, the XTO’s September 11, 2015 Request For Appeal, Request for Adjudicatory Hearing, and Request for Stay is **DENIED**.

RELEVANT LAW

4. Section 25-8-403 of the Water Quality Control Act (“WQCA”), Colo. Rev. Stat, 25-8-101 to 25-8-803, provides that “within the time permitted for seeking judicial review” any party that is “directly affected” by a “final order or determination” of the Division may apply to the Division for an administrative hearing.
5. Section 61.8(8)(e) of the permit regulations, 5 CCR 1002-61, exempts minor permit modifications from the public notice and comment on draft permits (5 CCR 1002-61, §61.5(2)), public meetings on draft permits (5 CCR 1002-61, §61.5(3)), requirements for issued permits (5 CCR 1002-61, §61.6), permit adjudicatory hearings (5 CCR 1002-61, §61.7), and permit fees (5 CCR 1002-61, § 61.15).

6. Section 61.8(8)(f) of the permit regulations authorizes the Division to issue minor permit modifications “without following the requirements of section 61.5(2), 61.5(3), 61.7 and 61.15.”
7. Section 61.8(4)(a) of the permit regulations provides, “any discharge authorized by a discharge permit may be subject to such monitoring, recordkeeping, and reporting requirements as may be reasonably required in writing by the Divisions...”
8. Section 61.8(4)(l) of the permit regulations provides, “[r]eporting shall be as frequent as the Division shall reasonably determine to be necessary.”
9. Section 61.8(4)(k) of the permit regulations require a permittee to “retain for a minimum of three (3) years records of all monitoring information...”
10. Section 61.4(1)(f) of the permit regulations requires a Principle Executive Officer or duly authorized representative to sign and certify all reports that are required by a permit.
11. Section 61.4(1)(h) of the permit regulations require that the duly authorized representative certify, "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."
12. Section 25-8-406 of the WQCA authorizes the Division to grant an administrative stay if a permittee requests an agency adjudicatory hearing, “challenging final action by the division in regard to any terms and conditions of a renewal permit,” for good cause shown. The stay “expire[s] when a final determination is made after the conclusion of the hearing held pursuant to 24-4-105, C.R.S.”
13. Section 61.7(1)(c) of the permit regulations states that the Division shall grant a request for administrative stay if it reasonably appears that serious harm would otherwise result and either (i) refusal would not provide the 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 water will be alleviated promptly after cessation of the violation or activity.

THE PERMIT REGULATIONS EXEMPT MINOR PERMIT MODIFICATIONS

FROM ADMINISTRATIVE ADJUDICATIONS AND ADMINISTRATIVE STAYS

14. Sections 61.8(8)(e) and (f) of the permit regulations exempt minor permit modifications from permit adjudicatory hearings and administrative stays, as provided by section 61.7.
15. Consistent with the Water Quality Control Commission's intent, the Division does not provide permit adjudicatory hearings or stays for minor permit modifications.

THE REPORTING REQUIREMENT FOR THE 2-YEAR ROLLING AVERAGE IS REASONABLE

16. The Division is authorized to include reasonable reporting requirements in water quality discharge permits. The 2-year rolling average reporting requirements in the May 29, 2015 renewed permit numbers CO 0048054 and CO 0048062, as corrected for some tables in permit modification number 2 – minor modification are reasonable.
17. XTO's previous permit required that the company collect and report water quality samples. XTO reported the water quality results to the Division on discharge monitoring reports ("DMR").
18. Pursuant to the permitting regulations, XTO's previous permit and XTO's current permit, every page of a DMR must be signed by the Principle Executive Officer or duly authorized representative. By signing the DMR, the Principle Executive Officer or duly authorized representative certifies to the Division, under penalty of law, that the information on the DMR is true and accurate.
19. The permitting regulations require XTO to retain records of all monitoring information for a minimum of three years.
20. The Discharge Monitoring Report Guidance, is for informational purposes only. "The procedures and/or methods described in this document are provided for information only. This guidance is not meant to modify or replace permit language or applicable laws and regulations. In the event of a conflict between this guidance and permit language or applicable laws and regulations, the permit and/or laws and regulations shall govern." *Water Quality Control Division, Discharge Monitoring Report Guidance, Page 3.*
21. Pursuant to its regulatory authority, the Division reasonably required XTO to use the data collected under the previous permit, which XTO certified as true and accurate, along with data collected under the current permit to report 2-year rolling average results.

**A Stay is Only Effective during the Pendency of an Administrative
Adjudicatory Hearing**

- 22. The WQCA states that a stay expires when a final determination is made after the conclusion of an administrative adjudicatory hearing. Accordingly, under the WQCA a stay is only available during the pendency of an administrative adjudicatory process.
- 23. In this order the Division denies XTO's request for an administrative adjudicatory hearing, therefore the Division cannot grant a stay where it has not granted an administrative adjudicatory hearing.

XTO Failed to Provide Good Cause for its Request for Stay

- 24. The Division may only grant an administrative stay where it grants an administrative hearing and where there is good cause.
- 25. The permitting regulations inform the standard of good cause. The permitting regulations provide that for the Division to grant a stay it must reasonably appear that serious harm would otherwise result.
- 26. In this case, denial of XTO's request for stay would not result in serious harm. Permit modification number 2 – minor modification clarified that XTO must use its own data that it already certified as true and accurate to calculate its 2-year rolling averages. The authenticity and accuracy of the data is not in dispute, therefore XTO will not be harmed by using its own data to calculate its 2-year rolling averages.

FOR THE FOREGOING REASONS, XTO's September 11, 2015 Notice of Appeal, Request for Adjudicatory Hearing, and Request For Stay is **DENIED**.

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT:

Patrick J. Pfaltzgraff, Director
Water Quality

15 September 2015

Date