

Memorandum

TO: Janet Kieler, Permit Unit Manager
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Colorado Department of Public Health & Environment

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FROM: Ronda Sandquist

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RE: Modifications to Administratively Extended Discharge Permits – Pioneer Natural Resources USA, Inc. and XTO Energy, Inc.

Introduction

Pioneer Natural Resources USA, Inc. (“Pioneer”) and XTO Energy, Inc. (“XTO”) (collectively, the “Companies”) operate coalbed methane wells in the Raton Basin. Discharge permits for these operations (“Permits”) expired on January 31, 2015, and have been administratively extended indefinitely, as allowed by State Water Quality Regulations (“Regulations”) pending reissuance of the Permits by the Water Quality Control Division (“Division”). *See* 5 C.C.R. §§ 1002-61, 61.8(3)(o).

The Companies previously requested extensions of the deadline for meeting certain discharge limits and existing compliance schedule for iron, boron, EC/SAR, and WET. Each of the limits was extended until June 30, 2015. The short period of time was granted because the Division expected to have them renewed “on or before August 2014.” In its response to the extension, the Companies incorporated its original request for extension to extend the deadline through December 16, 2014.

Despite the fact that these permit amendments only maintain the status quo, the Division has stated that it cannot modify an administratively extended permit. Therefore, any modifications to the Permits’ terms would not occur until the Permits are reissued. The Division’s decision unduly penalizes the Companies. This memorandum reviews state and federal

regulations governing permit modification and addresses the Division's position that it cannot modify a permit that has been administratively extended.

Discussion

Section 25-8-502(5) of the Colorado Water Quality Control Act (the "Act") and Section 61.9(1) of Colorado's discharge permit regulations ("Discharge Permit Regulations" or "Regulation") provide that if the Division has not issued or denied a permit within 180 days of the receipt of the permit application, the Division shall issue a temporary permit or the existing permit is extended pursuant to Section 24-4-104 of the Administrative Procedure Act.

Neither the federal discharge regulations nor the Colorado Discharge Permit Regulation prohibit modifications under these circumstances. Colorado Discharge Permit Regulation 61.8(3)(o) provides:

[f]iling of a timely and complete application shall cause the expired permit to continue in force to the effective date of the new permit. The permit's duration may be extended only through administrative extensions and not through interim modifications.

5 C.C.R. § 1002-61.8(3)(o). *See also* 40 C.F.R. § 122.6 (providing a similar administrative extension for water quality permits issued by the U.S. Environmental Protection Agency ("EPA")). Additionally, Regulation 61.8(8) provides that "[a] permit may be modified, suspended, or terminated in whole or in part *during its term* for reasons determined by the Division . . ." 5 C.C.R. § 1002-61.8(8)(a) (emphasis added). Because the Permit term has already been extended, there are no restrictions under this regulation to allow particular terms of the Permits to be modified by the Division. Regulation 61.8(8)(b)(iv) also specifically allows the Division to modify a permit when "[t]he Division determines that good cause exists to modify a permit condition because of events over which the permittee has no control and for which there is no reasonable available remedy." 5 C.C.R. § 1002-61.8(8)(b)(iv).

Significantly, these provisions allow modification of an administratively extended permit pending reissuance, particularly when, as is the case here, the modifications are prompted by events over which the permittee has no control and for which there is no reasonable remedy apart from the requested modification.¹ There also appears to be no written policy or guidance from the Division disallowing modification of administratively extended permits.

Federal and state regulations favor permit modifications where there is new information which was not available at the point of permit issuance that would have justified the application of different permit conditions at the time of issuance. 40 C.F.R. § 122.62(a)(2); 5 C.C.R. § 61.8(8)(b)(ii). Additionally, federal and state regulations list new or amended regulations as a

¹ Federal regulations promulgated by the EPA, upon which the Regulations are based, also allow for administrative extensions but are also silent as to whether EPA can modify an administratively extended permit. *See* 40 C.F.R. § 122.6.

cause for permits modification. 40 C.F.R. § 122.62(a)(3); § 61.8(8)(b)(iii). Under these criteria, the permit should be modified.

Without modification, the current Permits place the Companies in the untenable position of having discharge concentrations for constituents that are above the Permit levels even though status quo water quality supports the uses.

Finally, the Division has stated that it cannot modify a permit that is administratively extended because of historical practice and policy. In fact, though, the Division and EPA have modified permits in precisely this circumstance. In 1998 and 2000, the Division approved two separate permit modifications for Metro Wastewater Reclamation District (“Metro”); the first, to add a pH compliance schedule (1998) and, the second, to revise toxicity (WET) testing (2000), even though the permit was administratively extended. Metro’s pH compliance schedule request was approved by the Division. In its rationale for approval, the Division stated that such a modification would “have no effect on the execution of the [new] permit,” and further approved Metro’s request for toxicity testing determining that the modification would “benefit the water quality of this stream segment.”

EPA has also taken actions in the past with respect to permits under its jurisdiction consistent with modification and reissuance of an administratively extended permit. For example, EPA Region 10 revised and reissued NPDES General Permit AKG-33-0000, governing discharges from facilities related to oil and gas extraction in Alaska, after the 2004 version of the General Permit expired. The new General Permit differed, in part, from the 2004 General Permit, including the scope of facilities covered by the General Permit. At that time, numerous facilities covered by the expired 2004 General Permit had submitted notices of intent (“NOIs”) to be covered by the reissued permit, but were still operating under the administratively extended 2004 General Permit. The Fact Sheet for the reissued NPDES Permit No. AKG-33-0000 stated:

When this GP [General Permit] is reissued, facilities eligible for coverage under the new GP that were administratively extended will be automatically covered by the new GP. Coverage for any other facility that received an administrative extension by timely filing an NOI prior to the 2004 GP’s expiration date will remain administratively extended until a permit is issued to cover those discharges. Facilities no longer covered by this GP will need to obtain other permit coverage.

EPA Fact Sheet, NPDES Permit No. AKG-33-0000 at 1. This shows that while a permit is under administrative extension, it may be modified and reissued in a manner that affects only some of the facilities or activities under the original permit and that not every aspect of a permit needs to be addressed at once. *Id.* at 6 (IV.A.5).

Conclusion

There are ample grounds for the Division to modify the Permits during the administrative extension. Federal and state laws do not prevent the Division from modifying the Permits.

Moreover, federal and state regulations favor permit modifications that are justified by new information or which reflect new or amended regulations. Finally, the Division cannot argue against the modification based on its historical practice and policy, because it undertook a permit modification on behalf of Metro Wastewater Reclamation District when its permit was administratively extended. EPA has also modified a permit under administrative extension. As such, the Division should modify the Permits during the administrative extension to prevent undue harm to the Companies.