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COLORADO
Department of Public
Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

ORDER DENYING NOTICE OF APPEAL, REQUEST FOR ADJUDICATORY HEARING, AND REQUEST STAY

In Re: Pioneer Natural Resources USA, Inc., Colorado Discharge Permit Nos. CO 0047767, CO 0047776 and CO 0048003

By this ORDER, the Water Quality Control Division of the Colorado Department of Public Health and Environment ("the Division") **DENIES** the request by the Pioneer Natural Resources USA, Inc. ("Pioneer") for an adjudicatory hearing on and stay of Colorado Discharge Permit Nos. CO 0047767, CO 0047776 and CO 0048003.

BACKGROUND

1. Pioneer is currently permitted to discharge pollutants pursuant to discharge permit number CO 0047767 from the East Spanish Peaks Coalbed Methane Operation to Wet Canyon, Cow Canyon, Sarcillo Canyon, Valdez Canyon, Burro Canyon, Santistevan Canyon, Smith Canyon, Unnamed Canyons, and Reilly Canyon, all tributary to the mainstem of the Purgatoire River, above Trinidad Lake. Pioneer is currently permitted to discharge pollutants pursuant to discharge permit number CO 0047776 from the Lorencito Canyon Coalbed Methane Operation to Lorencito Canyon, and tributaries to Lorencito Canyon, All Tributary to the Purgatoire River Mainstem. Pioneer is currently permitted to discharge pollutants pursuant to discharge permit number CO 0048003 from the West Spanish Peaks Coalbed Methane Operation to Parras Canyon and Guajatoyah Creek, tributary to the North Fork of the Purgatoire River.

2. On December 26, 2013, Pioneer submitted an application to the Division to renew discharge permit numbers CO 0047767, CO 0047776 and CO 0048003 (collectively, the "Permits"), which were scheduled to expire December 31, 2014.

3. In addition to its permit renewal request, from December 12, 2013 through August 6, 2014, Pioneer submitted a series of requests to the Division to modify its Permits. Relevant to Pioneer'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 on December 12, 2013; a permit modification request for an alternate approach for WET on December 16, 2013; and received a permit modification request for a compliance schedule for the EC and SAR limits that became effective April 1, 2014 on August 6, 2014. Prior to February 6, 2015, the Division had issued final determinations on all of Pioneer's modification requests other than Pioneer's requests related to its permit effluent limitations for total recoverable iron, whole effluent toxicity ("WET"), and electrical conductivity/sodium adsorption ratio ("EC/SAR").

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4. Regarding Pioneer's modification requests for boron, total recoverable iron and WET, the Division communicated in its July 31, 2014, Fact Sheets for permit modifications to the Permits that the modification did not include a complete evaluation of the Pioneer's modification requests for total recoverable iron and WET and that these requests, including the final compliance schedule dates (if deemed necessary), were going to be evaluated in the renewal permits; and that this approach was intended to ensure that these requests were going to be evaluated in the context of changes in the basin regulations for the Arkansas river basin which had occurred since the last permit term. The Division communicated with Pioneer in various phone conversations and meetings during the late summer and fall of 2014 that it was also going to evaluate Pioneer's EC/SAR modification requests in the renewal permits.

5. The Division administratively extended the Permits on December 31, 2014, which will remain extended and in full effect until the Division issues final renewal permits.

6. The Division published draft permit documents for public comment on February 6, 2015, for discharge permit CO 0047776 and CO 0048003, and on February 9, 2015, for discharge permit number CO 0047767. 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 ends April 6, 2015.

7. The Division's Public Notice No. CO-2-2-15 stated that the Division had made "tentative" determinations in the Draft Permit Documents that the "limitations and conditions imposed in these permits implement all application statutes and regulations and water-quality standards."

8. In the draft fact sheets associated with the draft permits the Division explained it postponed acting on the modification requests for total recoverable iron, WET, and EC/SAR until the permit renewal and that it had incorporated these permit modification requests into the permit renewal.

9. The Division incorporated the permit modifications for total recoverable iron, WET, and EC/SAR in the Draft Permit Documents.

10. On March 9, 2015, Pioneer filed a *Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay* ("Appeal") with the Division. Pioneer cited section 25-8-403 of the Water Quality Control Act ("WQCA") C.R.S. §25-8-101 *et seq.*, (2014), and section 61.8(8)(e) of the permitting regulations, 5 CCR 1002-61, §61.8(8)(e), as the basis for its appeal and request for adjudicatory hearing. Pioneer cited section 25-8-406, C.R.S., and section 61.7(c) of the permit regulations, 5 CCR 1002-61, §61.7(c), as the basis for its request for stay.

11. Specifically, Pioneer requested the Division stay: (1) adoption, implementation, and

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enforcement of the challenged EC/SAR limitations currently in effect; (2) adoption, implementation, and enforcement of the WET testing approach and iron limitations in the current permit, which become effective July 1,2015; and (3) adoption, implementation, and enforcement of the provisions of pending draft Permits related to WET, iron, and EC/SAR, should those provisions become final during the pendency of Pioneer's appeal.

12. As grounds for its request for adjudicatory hearing, Pioneer alleges that Division denied Pioneer's requests to modify total recoverable iron, WET, and EC/SAR effluent limitations, which was "arbitrary, capricious, in excess of the Division's authority, not based on substantial evidence, and an abuse of discretion in violation of Colo. Rev. Stat. § 24-4-106." Pioneer also alleges that the Division issued "new permit modifications" for WET and EC/SAR in the Draft Permit Documents. *Appeal*, pp. 3-4.

13. As grounds for its request that the Division stay the terms outlined in paragraph 9 of this Denial, Pioneer alleges that without a stay Pioneer could be subject to enforcement actions and citizen suits with the associated fines, costs and fees, which could threaten Pioneer's goodwill and reputation. Pioneer also alleges that an alternative to noncompliance is shutting down Pioneer's outfalls, which is exceedingly expensive and often itself irreversible. Finally, Pioneer alleges that compliance with permit terms and conditions would cause Pioneer to undertake significant or impossible remedial measures. *Appeal*, pp. 34-35.

For the reasons set forth below, the Pioneer's Request For Appeal, Request for Adjudicatory Hearing, and Request for Stay is **DENIED**.

RELEVANT LAW

14. Section 25-8-403 of the WQCA 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.

15. Section 61.8(8)(e) of the permit regulations, 5 CCR 1002-61, provides that permit modifications are subject to 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).

16. 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.

17. Section 61.7(1) of the permit regulations, 5 CCR 1002-61, authorizes the Division to grant a stay of contested terms of a final renewal permit upon, as relevant here, "appeal and within thirty (30) days of issuance of the final renewal permit [or final permit modification, pursuant to the cross reference in section 61.8(8)(e)]."

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THERE IS NO "FINAL ORDER OR DETERMINATION" TO APPEAL THROUGH AN ADJUDICATORY HEARING

18. The Division has not issued a "final order or determination"; therefore there is no Division decision or action that is ripe for Pioneer to appeal.

19. The Division did not deny Pioneer's permit modification requests for total recoverable iron, WET, and EC/SAR. The Division explained in the draft Fact Sheets associated with the draft permits that it postponed its review of the modification requests and incorporated the modification requests into the permit renewal process. *Draft Fact Sheet associated with CO 0047767*, pp. 2, 9, 11; *Draft Fact Sheet associated with CO 0047776*, pp. pp. 2, 9, 11; *Draft Fact Sheet associated with CO 0048003*, pp. 2, 9, 11

20. The Division noticed for public comment the Division's preliminary decision about Pioneer's permit modification requests for total recoverable iron, WET, and EC/SAR in the Draft Permit Documents. *Draft Permit CO 0047767*, pp. 5-30; *Draft Fact Sheet associated with CO 0047767*, pp. 2, 9, 11; *Draft Permit CO 0047776*, pp. 4-16 ; *Draft Fact Sheet associated with CO 0047776*, pp. pp. 2, 9, 11; *Draft Permit CO 0048003*, pp. 4-13; *Draft Fact Sheet associated with CO 0048003*, pp. 2, 9, 11

21. All determinations in the Draft Permit Documents are preliminary. The preliminary decisions in the Draft Permit Documents are not effective and therefore have not triggered any rights or responsibilities by Pioneer. Pioneer admitted in its Appeal that the Division's decisions in the Draft Permit Documents are preliminary, "[a]lthough the Division issued initial draft renewal permits on February 6, 2015, the terms of the draft renewal permits do not not take effect until Final Permits are issued following a public comment period." *Appeal*, pp. 11.

22. The Division is seeking public comment, including Pioneer's comments, on its preliminary decisions found in the Draft Permit Documents until April 6, 2015. After the public comment period closes the Division will review and respond to all comments, and may revise what is currently in the draft permits, including but not limited to the effluent limitations for total recoverable iron, WET, and EC/SAR.

23. There are no "new" or "Division initiated" permit modifications in the Draft Permit Documents. Pioneer requested modifications to its effluent limitations for total recoverable iron, WET, and EC/SAR, which the Division provided preliminary effluent limitations for these constituents in the Draft Permit Documents. While the Division did not propose to provide Pioneer with the exact modifications it requested for these constituents in the Draft Permit Documents, the regulations do not require the Division to "take or leave" a permittee's modification request. Section 61.8(8) provides the Division discretionary authority on how it chooses to modify a permit term. Here, Pioneer initiated the modification request and the Division is using its discretionary authority to evaluate and respond to those requests using

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the best science that is within the constraints and meets the requirements of the legal framework.

24. Because all of the Division's decisions that Pioneer has included in its Appeal are preliminary and still available for public comment the Division has not issued a "final order or determination," from which Pioneer is empowered to appeal, and which "directly affects" Pioneer.

Pioneer Failed to Submit its Request for Stay within Appropriate Timeframes

25. The Division is not authorized to grant Pioneer's request to stay Pioneer's current EC/SAR effluent limitations, current WET testing requirements, and the provisions in the draft permits related to total recoverable iron, WET, and EC/SAR under section 25-8-406, C.R.S., because section 406 is limited to "final actions" regarding "terms and condition of a renewal permit." None of the effluent limitations for which Pioneer has requested a stay are or were "terms and conditions of a [final] renewal permit."

26. Pioneer has no right to a stay for its current EC/SAR effluent limitations, current WET testing requirements, and the provisions in the draft permits related to total recoverable iron, WET, and EC/SAR because the time to appeal has lapsed or the time to appeal is not ripe. To the extent applicable, sections 61.7(1)(a) and (b), 5 CCR 10020-61, require a permittee to request a stay within "thirty (30) days of issuance of the final [renewal] permit [or final permit modification, pursuant to the cross reference in section 61.8(8)(e)]." Each of Pioneer's stay request is discussed in turn below.

27. Regarding Pioneer's first request for stay—adoption, implementation, and enforcement of the challenged EC/SAR limitations currently in effect—the time to appeal and request a stay for these effluent limitations has passed. The Division made its final determination about Pioneer's current EC/SAR limitations on February 28, 2014. Pioneer did not appeal and request a stay within thirty days, and therefore failed to exhaust its administrative remedies.

28. Regarding Pioneer's second request for stay—adoption, implementation, and enforcement of the WET testing approach and iron limitations in the current permit, which become effective July 1,2015—the time to appeal these effluent limitations has passed. The Division made its final determination about the Pioneer's current WET testing approach on July 31, 2014. Pioneer did not appeal and request a stay within thirty days, and therefore failed to exhaust its administrative remedies.

29. Regarding Pioneer's third request for stay—adoption, implementation, and enforcement of the provisions of pending draft Permits related to WET, iron, and EC/SAR, should those provisions become final during the pendency of [Pioneer's] appeal—the time toappeal these permit terms has not started. Section 61.7(1)(a) and (b) both provide that the time to appeal and request a stay is within thirty days of issuance of the final renewal

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permit or final permit modification. Here, that time has not started yet, and therefore Pioneer's request for stay is not ripe.

FOR THE FOREGOING REASONS, Pioneer's 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 Control Division

19 March 2015
Date

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CERTIFICATE OF SERVICE

I certify that I have served the within ORDER DENYING NOTICE OF APPEAL, REQUEST FOR ADJUDICATORY HEARING, AND REQUEST FOR STAY this 19th day of March, 2015, as follows:

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