STATE OF COLORADO

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Pioneer/XTO CBM CDPES Permit Public Comment Period Extension

1 message

Scott - CDPHE, Erin <erin.scott@state.co.us> Mon, Apr 6, 2015 at 5:18 PM
To: Erin Scott - CDPHE <Erin.Scott@dphe.state.co.us>
Cc: Lori Mulsoff - CDPHE <lori.mulsoff@state.co.us>
Bcc: deborah.burns@state.co.us

To stakeholders interested in the Coal-Bed Methane (CBM) discharge permits in the Purgatoire watershed:

The Division has extended the public comment period on these permits by two days, so the comment period will now close on Wednesday April 8, 2015, 5 pm. The reason for this extension is to allow time for consideration of an extended public comment period and process, and for other interested parties to become aware of the discussions and provide input on the possibility of an extended public comment process.

The content of what was provided directly to XTO and Pioneer from the Division that outlines what this process might look like, and possible timelines, is included below.

Due to significant interest on the permits we are also going to post comments on the Division's website in the morning. The Division also received a Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay from both XTO and Pioneer. While the Division does not consider these public comments, it does provide the context for the extended public process so the Division will also post these on its website in the morning of April 7, 2015.

If you have any questions, Please continue to use Lori Mulsoff as your main contact for these permits. Lori is out today so I am sending this email on her behalf. She can be reached atlori.mulsoff@state.co.us or at 303-692-3549

The Water Quality Control Division ("Division") has considered your clients request that the Division engage in a facilitated dialogue regarding Pioneer's and XTO's draft renewal permits (Colorado Discharge Permit Nos. CO 0047767, CO 0047776, CO 0048003, CO 0048054 and CO 0048062) that are not final and currently out for public comment. As you are aware, the Division engaged in dialogue with XTO and Pioneer for months on these permits leading up to publication of the draft renewal permits for public comment. The Division continues to be committed to resolving any outstanding issues or misunderstandings regarding the renewal permits. The Division will agree to participate in a facilitated discussion with Pioneer and XTO on the following conditions, which the Division hopes will be mutually agreeable to Pioneer and XTO.

SCOPE OF THE FACILITATED DISCUSSION

From the Division's perspective, the purpose of the facilitated discussion is to create a productive space to discuss and hopefully resolve or narrow outstanding issues associated with Pioneer's and XTO's draft permits. For the Division to participate, the facilitated discussion must be a non-binding process.

It is the Division's understanding that Pioneer's and XTO's remaining issues relate to the draft effluent limitations for total recoverable iron, electrical conductivity/sodium adsorption ratio ("EC/SAR"), and whole effluent toxicity ("WET"), so it is the Division's position that the facilitated discussion should be limited to these topics.

Given that the draft permits demonstrate the Division's position on the draft effluent limitations for total recoverable iron, EC/SAR, and WET the Division would like Pioneer and XTO to agree to provide a written explanation of its position and alternative approach no later than 1 week prior to the facilitated discussion.

To accommodate the facilitated discussion the Division will extend the public comment period for the five draft permits for forty-five days (45) days, with the option to extend an additional thirty (30) days. The extended public comment period will end May 6, 2015. Because this facilitated discussion will generate substantive comments, the Division will incorporate the information generated during the facilitated discussion into the administrative record for the draft permits and will consider the information along with all other public comments, including an additional written comments Pioneer and XTO may submit.

Finally, the remaining issues on the draft permits are technical. Division believes that better progress will be made by technical staff focusing on the technical issues without attorneys present. Therefore, the Division's preference is to limit the facilitated discussion to technical staff. Any legal issues that arise during this facilitated discussion can be tabled for discussion between counsel. We also believe that the discussion would benefit by having a representative from EPA participate to provide EPA's perspective on the issues.

ROLE OF THE FACILITATOR

The role of the facilitator will be to foster open dialogue, organize the discussion, keep the conversations on topic, and help clarify points so they are understood. The facilitator will remain neutral and will not propose independent opinions or otherwise direct the outcome or information generated. Again, as stated above, the facilitator is not an arbiter, mediator, or any type of legal or quasi-legal fact finder or decision maker; therefore, the facilitator will not have any role in determining the final decision. The authority for any final decision on these permits rests with the Division, and will be included in the final permits.

The Division considered Pioneer and XTO's suggestion of Barbara Biggs to serve as the facilitator. The Division cannot agree to use a current commissioner as the facilitator because of conflicts issues. Alternatively, the Division suggests that Will Allison, Air Quality Control Division Director, serve as the facilitator. Mr. Allison has extensive regulatory and legal experience, including knowledge of the water quality control permitting process. Additionally, given that Mr. Allison is a CDPHE employee there would be no cost for either party to have Mr. Allison act as the facilitator. Should Pioneer and/or XTO disagree to Mr. Allison acting as the facilitator, the Division would recommend Lisa Carlson serve as the facilitator. Ms. Carlson is the current facilitator for the Colorado Water Quality Forum, and so she is well versed in Colorado water quality issues including permitting. However, the Division has no funding source to pay for Ms. Carlson so the companies will need to pay her fees.

ADDITIONAL TERMS

Finally, in exchange for the Division agreeing to participate in the facilitated discussion, we ask that Pioneer and XTO agree that the companies will not pursue reconsideration of, or an appeal of the Division's denial of the companies' Notice of Appeal, Request for Administrative Hearing, and Request for Stay. Pioneer and XTO will retain the ability to appeal the final permits.

REQUEST FOR STAY AND REQUEST FOR AN EXTENSION OF PERMIT REQUIREMENTS

In your email dated March 30, 2015 you stated that you are expecting follow-up on "actions to stay portions of the administrative processes and appeals, and extend the existing permit requirements scheduled to become effective July 2015." As stated in the Division's March 19, 2015 denials, the Division does not have the authority to stay XTO's and Pioneer's current permit terms because the deadline to request a stay has passed. The Division's authority to issue a stay is limited to respond to requests for stays that are made within the statutory timeframe after final action by the Division. In this case the request is either well beyond that statutory timeframe for prior permit actions, or before final agency action on the current draft renewal permits.

Additionally, the Division will not modify the administratively extended permits, which will result in the compliance schedules expiring and the underlying limits becoming effective in July. The Division understands that the companies are concerned about their ability to meet the terms and conditions in the current permits beginning in July. For this reason we recognize the need to move quickly to schedule and complete the facilitated discussion. We also recognize that having new permits in place by July may still be difficult. We believe there may be an option that may be available that we could pursue should we find that additional time is needed to issue the final permits. We can explore that option with you at the appropriate time.

We look forward to your reply

Erin Scott
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Permits Unit 3

COLORADO
Water Quality Control Division
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