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<p>In the Matter of:</p> <p>Permits CO-0048054 and CO-0048062, Held by XTO Energy, Inc.,</p> <p>Petitioner.</p>	<p>Case Number:</p>
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<p>XTO ENERGY, INC.’S NOTICE OF APPEAL, REQUEST FOR ADJUDICATORY HEARING, AND REQUEST FOR STAY</p>	

XTO Energy, Inc. (“XTO”) brings this Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay regarding the Water Quality Control Division’s (the “Division’s”) August 13, 2015 Modification No. 2 to discharge permits CO-0048054 and CO-0048062 (the “Permits”), which authorize the discharge of produced water from XTO’s coalbed methane (“CBM”) operations in the Raton Basin to tributaries of the Purgatoire River.

I. INTRODUCTION

Modification No. 2 to the Permits, issued August 13, 2015, imposes a new requirement that XTO immediately report two-year average effluent maximum concentrations (“two-year averages”) for several parameters, even though those two-year averages are based on supposedly “report only” data collected prior to the permit term. This decision diverges from standard practice and the Division’s adopted Discharge Monitoring Report (“DMR”) Guidance, under which XTO would not be required to report two-year averages until two years of data (during the current permit term) have been collected. This new requirement should be overturned because the use of “report only” data violates due process, and because the departure from standard Division definitions, practice, and Guidance without explanation or justification is arbitrary, capricious, and an abuse of discretion.

XTO therefore requests (1) an adjudicatory hearing to address Modification No. 2, and (2) a stay of the new requirement that XTO immediately report two-year averages (as detailed in Section V, *infra*).

II. STATUTORY AND REGULATORY AUTHORITY

A. Notice of Appeal and Request for Adjudicatory Hearing.

XTO brings this request for an adjudicatory hearing under the State Administrative Procedure Act, codified at sections 24-4-101 through 108 of the Colorado Revised Statutes, the Colorado Water Quality Control Act (the “WQCA”), codified at sections 25-8-101 through 803 of the Colorado Revised Statutes, and the regulations of the Water Quality Control Commission (the “Commission”), 5 C.C.R. § 1002.

Section 25-8-403 of the WQCA provides that any party directly affected by a final order or determination of the Division may apply for a hearing with respect to such order or determination. Regulation 61.7 in turn provides that the “application [*sic*] . . . affected or

aggrieved by the Division's final determination may demand an adjudicatory hearing within thirty (30) days of the issuance of the final permit determination." 5 C.C.R. § 1002-61.7(a). The hearing may address all the issues of fact and law raised prior to the hearing. *See* 5 C.C.R. § 002-61.7(c). The hearing shall be subject to the requirements of sections 24-4-105 and 25-8-401 through 406 of the Colorado Revised Statutes, as well as 5 C.C.R. § 1002-21.7.

XTO is entitled to an adjudicatory hearing regarding the decisions in the August 13, 2015 modified Permits and Fact Sheets because they are final determinations, and XTO is a party directly affected and aggrieved by them. This request for an adjudicatory hearing is timely under section 24-4-105(14)(a)(II), C.R.S., and 5 C.C.R. § 1002-61.7(a). The Division is the proper forum for this hearing. *See* 5 C.C.R. § 1002-21.4(A)(3).

B. On Appeal, the Division Has the Burden of Proof.

The Division will bear the burden of proof at the adjudicatory hearing, as its actions are not based upon significant changes in the facts relevant to water quality or changes in the applicable statutes or regulations. 5 C.C.R. § 1002-61.7(d)(ii).

C. Request for Stay.

XTO brings its request for a stay under section 25-8-406, C.R.S., and 5 C.C.R. § 1002-61.7(1), which provide that the Division may stay any contested terms and conditions of a permit for good cause shown. The basis for a finding of good cause for a stay is discussed in Section V, below.

III. FACTUAL BACKGROUND

The Division renewed the Permits on May 29, 2015, effective July 1, 2015 (the "Renewal Permits"). *See* Ex. X-01 (Permit No. CO0048054, May 29, 2015); Ex. X-02 (Fact Sheet to Permit No. CO0048054, May 29, 2015); Ex. X-03 (Permit No. CO0048062, May 29, 2015); Ex.

X-04 (Fact Sheet to Permit No. CO0048062, May 29, 2015).¹ The Fact Sheets to the Renewal Permits indicated, albeit not clearly, that for some parameters and outfalls, XTO would immediately be required to report two-year averages based on data collected 23 months prior to the effective date of the permit. *See, e.g.*, 48054 Fact Sheet (May 29, 2015) at 55 (dissolved copper), 58 (total recoverable iron for outfall 039-A), 72 (partially dissolved lead), 74 (partially dissolved selenium), 76 (total boron); 48062 Fact Sheet (May 29, 2015) at 39 (partially dissolved copper), 42 (total recoverable iron), 42-43 (partially dissolved lead), and 48 (total boron). The data on which the new two-year averages would be based only existed because the previous permits required XTO to collect it as “report-only” data. *See, e.g.*, Ex. X-17 (Permit No. CO0048054, Mod. 5, July 31, 2014); Ex. X-18 at 9 (Permit No. CO0048062, Mod. 6, July 31, 2014).

In a letter dated August 10, 2015, XTO pointed out that this requirement appeared to conflict with the Renewal Permits’ definition of “Two (2)-Year Rolling Average,” as well as the Division’s DMR Guidance. Ex. X-19 (Letter from R. Sandquist re: Calculation of Two-Year Average Limits on Discharge Monitoring Reports, Aug. 10, 2015). The letter noted that “Two (2)-Year Rolling Average” (referenced in the definition of “Antidegradation limits”) was defined, in relevant part, as:

Antidegradation limits apply as the average of all data collected in a two (2) year (24 month) period. These limits become effective upon the effective date of the permit, **but are not reportable on a DMR until two years (typically 24 months) of data have been collected**, unless otherwise directed in Part I.A.2 of the permit. After data has been collected for 24 months, the 30-day averages for each month are then averaged together to determine the two-

¹ Although not directly pertinent here, the Division issued Modification No. 1 to the Permits and accompanying Fact Sheets on June 19, 2015, effective July 1, 2015. *See* Ex. X-05 (Permit No. CO0048054, Mod. 1, June 19, 2015); Ex. X-06 (Fact Sheet to Permit No. CO0048054, Mod. 1, June 19, 2015); Ex. X-07 (Permit No. CO0048062, Mod. 1, June 19, 2015); Ex. X-08 (Fact Sheet to Permit No. CO0048062, Mod. 1, June 19, 2015).

year rolling average (using data from month 1 to month 24, then month 2 to month 25, month 3 to month 36, etc.).

Id. (quoting Part I.C.27 of the Renewal Permits) (emphasis in the original). The letter also referenced the Division's DMR Guidance, which states:

Collection of the data required to calculate a two-year rolling average shall start immediately upon the effective date of the permit, but the data is not reported on a DMR until two years after the effective date of the permit.

Id.; *see also* Ex. X-20 (DMR Guidance). Consistent with the DMR Guidance and prior practice, XTO confirmed in its letter that it would not report or comply with the new two-year rolling averages until two years of data have been collected. Ex. X-19.

The Division responded to XTO's August 10 letter by issuing Permit Modification No. 2 and accompanying Fact Sheets. *See* Ex. X-09 (Permit No. CO0048054, Mod. 2, Aug. 13, 2015); Ex. X-10 (Fact Sheet to Permit No. CO0048054, Mod. 2, Aug. 13, 2015); Ex. X-11 (Permit No. CO0048062, Mod. 2, Aug. 13, 2015); Ex. X-12 (Fact Sheet to Permit No. CO0048062, Mod. 2, Aug. 13, 2015). The Fact Sheets rejected XTO's confirmation, noting that the Permits' definition of "Two (2)-Year Rolling Average" includes the qualifier "unless otherwise directed in Part I.A.2 of the permit." *See, e.g.*, Ex. X-10 at 1-2 (Fact Sheet to Permit No. CO0048054, Mod. 2, Aug. 13, 2015). Acknowledging that clarifying language did not appear for each permit limitation table in Part I.A.2, the Fact Sheets stated: "The following language will be added to each permit limitation table in the permit: 'The 2 year average should be reported using data from the previous 23 months, regardless of the permit term.'" *Id.* at 2. This addition both clarified that the new two-year average reporting requirement required the use of data from a previous permit term and broadly applied the requirement to numerous parameters, even those with compliance schedules and those that are report only.

The Division issued Permit Modification No. 3 and accompanying Fact Sheets on August 21, 2015, effective the same day. Ex. X-13 (Permit No. CO0048054, Mod. 3, Aug. 21, 2015); Ex. X-14 (Fact Sheet to Permit No. CO0048054, Mod. 3, Aug. 21, 2015); Ex. X-15 (Permit No. CO0048062, Mod. 3, Aug. 21, 2015); Ex. X-16 (Fact Sheet to Permit No. CO0048062, Mod. 3, Aug. 21, 2015).

IV. BASIS FOR APPEAL

The Division's decision to require immediate reporting of two-year averages should be reversed. It is arbitrary and capricious, an abuse of discretion, and contrary to constitutional right. First, the use of past, "report only" data violates due process in that it deprives XTO of the ability to challenge or verify any of the "report only" samples. Second, the decision arbitrarily and capriciously departs from the standard practice of delaying reporting of two-year averages until after two years of data have been collected, and provides no explanation or justification for the change. Third, report only data is collected for informational purposes only, so after-the-fact use of that data for compliance determinations reverses previously issued permit terms by ex post facto imposing enforcement criteria for informational data that was properly collected for informational, not compliance purposes. For these reasons, the decision announced in Modification No. 2 should be overturned.

A. The Use of Report Only Data Violates Due Process.

As a result of Modification No. 2 and the definition of "Two (2)-Year Averages," XTO must now report averages based on report-only data collected during the previous permit term. Using such data to determine two-year averages violates due process by failing to provide XTO with notice prior to collecting the data that it would be used to determine permit compliance, and depriving XTO of the opportunity to confirm or challenge the underlying data. When XTO is on notice that the data it is collecting will be used to determine compliance with enforceable

limits, XTO takes added steps to ensure the accuracy of that data, such as contesting irregular data or collecting verification samples when possible exceedances occur. Here, without knowledge that the reported data would later become actionable, XTO had no notice that it should take such steps. Retroactively making “report only” data actionable thus unfairly deprives XTO of these procedural safeguards, violating its due process rights.

Data collected as “report only” under a previous permit should not be used to determine reportable, two-year rolling averages in the Renewal Permits; those two-year averages should only be reportable once two years of data have been collected under the same permit term. The new requirement should be reversed for all parameters: those with numeric limits, those with “report only” requirements, and those with compliance schedules. Although the new reporting requirement only raises compliance concerns for those parameters with limits, it creates needless administrative costs for the report-only parameters that would ordinarily not have to be reported on a discharge monitoring report (“DMR”) for another two years. Similarly, for those parameters with compliance schedules, the requirement would require the reporting of averages based on data obtained during the compliance schedule, effectively depriving XTO of the benefit of a compliance schedule—the ability to bring parameters into compliance before actionable reporting.

B. The New Two-Year Average Requirement Is Arbitrary and Capricious.

The Division’s decision to retroactively make “report only” data actionable by requiring immediate reporting of two-year averages arbitrarily and capriciously departs from Division guidance and standard definitions. The Division’s DMR Guidance states that “[c]ollection of the data required to calculate a two-year rolling average shall start immediately upon the effective date of the permit, but the data is not reported on a DMR until two years after the effective date

of the permit.” Ex. X-20. Similarly, under the previous permits, the term “Antidegradation limits” (another term for two-year limits) had the following, standard definition:

Antidegradation limits apply as the average of all data collected for months in that group during a rolling 24-month period. These limits become effective after data has been collected for all months in the group during the **24 months following permit issuance**. . . .

See, e.g., Ex. X-17 at 15 (Permit No. CO0048054, Mod. 5, July 31, 2014) (emphasis added).

The definition of “Two (2)-Year Rolling Average” in the Renewal Permits, however, added the new qualification emphasized below:

Antidegradation limits apply as the average of all data collected in a two (2) year (24-month) period. These limits become effective upon the effective date of the permit, but are not reportable on a DMR until two years (typically 24 months) of data have been collected, **unless otherwise directed in Part I.A.2 of the permit**. After data has been collected for 24 months, the 30-day averages for each month are then averaged together to determine the two-year rolling average (using data from month 1 to month 24, then month 2 to month 25, month 3 to month 26, etc.).

See, e.g., Ex. X-09 (Permit No. CO0048054, Mod. 2, Aug. 13, 2015) (emphasis added).

Modification No. 2 then added the following language to every permit limitation table in Part I.A.2 of the Renewal Permits: “The 2 year average should be reported using data from the previous 23 months, regardless of the permit term.” Ex. X-10 at 2 (Fact Sheet to Permit No. CO0048054, Mod. 2, Aug. 13, 2015). The effect of this addition in conjunction with the modified definition is that XTO must now report two-year averages that are based on report-only data collected under the previous permits, which are now expired, except to the extent that specific terms are stayed.

Neither the Permits nor Fact Sheets associated with the Renewal Permits or Modification No. 2 explain this departure from the standard definition of “Antidegradation limits” and the Division’s DMR Guidance. There is no justification for this change, as neither XTO’s CBM

operations nor the Purgatoire River’s water quality has changed since the previous permits. Highlighting the arbitrariness of this modification, the April 30, 2015 discharge permit for the New Elk Mine, which discharges into the *same watershed*, does not contain such a requirement. *See* Ex. X-21 (Discharge Permit No. CO0000906 (New Elk Mine), Apr. 30, 2015). The Division’s standard antidegradation definition and DMR Guidance are designed to ensure that the current permit regulates activities during the current permit term, rather than looking back in time to past operations to determine compliance under new permit terms that did not previously exist. The decision to require immediate reporting of averages based on data collected as “report only” under previous permits is arbitrary, capricious, and an abuse of discretion.

The two-year limits should only take effect once two years of data have been collected under the Renewal Permits (i.e., in approximately June 2017).

V. REQUEST FOR STAY

XTO requests that the Division stay its implementation and enforcement of the new requirement that XTO immediately report two-year averages. In other words, XTO requests that the Division not implement or enforce the new definition of “Two (2)-Year Averages” or the language added by Modification No. 2 (“The 2 year average should be reported using data from the previous 23 months, regardless of the permit term.”). The stay should apply to all parameters subject to the new two-year average reporting requirement (i.e., even report-only parameters and parameters with compliance schedules), including the following parameters with numeric limits:

<u>Permit No.</u>	<u>Parameter</u>	<u>Outfall(s)</u>
48054	Potentially dissolved copper	070A, 083A, 088A
48054	Total recoverable iron	016A, 019A, 021A, 025A, 027A, 028A, 037A*, 039A, 045A, 051A*, 067A, 073A, 078A, 082A, 083A, 084A*, 088A*
48054	Potentially dissolved lead	028A, 083A

48054	Total boron	028A*, 050A, 068A, 070A, 073A, 084A
48054	Potentially dissolved selenium	010A, 012A, 016A, 018A, 019A, 028A*, 031A, 032A, 034A, 035A, 039A, 040A, 042A, 047A*, 051A, 066A*, 067A, 068A, 069A, 072A, 073A, 078A, 084A
48054	Chloride	010A, 012A, 016A, 018A, 019A, 021A, 025A, 027A, 028A, 031A, 032A, 034A, 035A, 037A, 039A, 040A, 042A, 045A, 047A, 049A, 050A, 051A, 057A, 066A, 067A, 068A, 069A, 070A, 072A, 073A, 074A, 078A, 082A, 083A, 084A, 088A, 093A
48054	Radium 226+228	049A
48062	Potentially dissolved copper	001G, 060A
48062	Total recoverable iron	001A*, 001G, 002G, 004G, 006G, 007G, 014A*, 015G, 016A, 016G, 017A, 018A, 019A, 021G, 022A, 022G, 023A, 023G, 024G, 027G, 028G, 031G, 032A*, 033A*, 033G, 034A*, 036G, 037G, 038G, 039G, 040A, 040G, 042G, 043G, 049A, 060A, 079H, 080H*
48062	Potentially dissolved lead	022A*
48062	Total boron	007G, 017A, 019A, 023A, 040A, 040G, 043G, 079H
48062	Chloride	007G, 016A, 018A, 021G*, 022G, 023G*, 024G*, 028G, 031G*, 033G, 043G

* outfalls with compliance schedules until 7/1/2017.

Good cause exists for the requested stay, as requiring XTO to comply with the challenged requirement would increase XTO's reporting and compliance costs, and potentially give rise to compliance issues, even though the requirement could be overturned on appeal. To impose these costs and create such compliance concerns before hearing XTO's appeal of this new requirement would deprive XTO of the benefit of the appeal process, causing it substantial harm. Given that the basis for XTO's appeal—a denial of due process—the risk that XTO would be found in

noncompliance during the appeal process is particularly good cause for a stay. Moreover, the terms of the previous permits (i.e., not requiring the immediate reporting of two-year averages) provide adequate protection and predictability while this appeal is pending; accordingly, refusal of the stay would provide no corresponding public benefit. Good cause therefore exists for a stay of the new two-year averages requirement pursuant to section 25-8-406, C.R.S., and 5 C.C.R. § 1002-61.7(1).

VI. ESTIMATE OF HEARING TIME

XTO estimates that one day will be required to conduct the hearing.

Dated September 11, 2015.

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