

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

**NEW MEXICO ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION,
SURFACE WATER QUALITY BUREAU,**

Complainant,

No. WQCC 20-16 (CO)

v.

**MATADOR PRODUCTION COMPANY and
SAN MATEO MIDSTREAM, LLC,**

Respondents.

**MOTION TO AMEND REMEDIATION DEADLINES AND STAY ACCRUAL
OF STATUTORY PENALTIES**

As permitted by 20.1.3.15 NMAC and the Scheduling Order issued on June 9, 2020, Matador Production Company (“Matador”) and San Mateo Midstream, LLC (“San Mateo”) (collectively, “Respondents”) move the Hearing Officer for an order extending the deadline for remediation contained in Paragraph 25 of the First Amendment to the Administrative Compliance Order (“FAACO”) until after a hearing in this matter is held on September 8, 2020, and a decision by the Commission is entered thereon. Under the current deadlines, remediation must not only begin, but be completed, before Respondents have their hearing in September. This means Respondents must either capitulate to a remediation plan they believe may be harmful to the environment and not supported by the facts, or ignore the remediation deadline and risk later claims for additional civil penalties. Respondents ask only for the opportunity to have their hearing first, where they may present their evidence and arguments. And extending the deadline would not result in any increased harm to the environment. The threat of civil penalties and illogical scheduling

should not be used to coerce compliance or burden Respondents' exercise of their right to a full and fair hearing in this matter.

For these reasons, the remediation deadline should not occur until after the September 8, 2020 hearing and a subsequent decision by the Commission. In the alternative, Respondents move to stay assessment and accrual of any potential fines for non-compliance with the Administrative Compliance Order ("ACO"), and in particular the deadlines in Amended Paragraph 25, that may be issued under NMSA 1978, Section 74-6-10, until the Commission has entered a final decision. To sustain the remediation deadlines imposed by the ACO, the cleanup required under the approved remediation plan, and the potential for substantial daily fines for non-compliance before an evidentiary hearing can be held to determine liability would be arbitrary, capricious, and an abuse of discretion. In support, Respondents state as follows:

1. Under 20.1.3.10 NMAC and its statutory authority, the Water Quality Control Commission ("Commission") issued a scheduling order appointing a Hearing Officer to perform the functions described in 20.1.3.10(B)(2) NMAC. Those functions include ruling "upon motions and procedural requests that do not seek final resolution of the proceeding and issue all necessary orders," and exercising all powers and duties prescribed or delegated by the Commission under the Water Quality Act or 20.1.3 NMAC.

2. On April 17, 2020, Respondents timely requested a public hearing on the original ACO in this matter. Respondents also served and filed an Answer to the ACO on the same date.

3. The ACO alleges, among other things, that Respondents violated the provisions of 20.6.4.13(A) NMAC (addressing river bottom deposits) and 20.6.4.13(J) NMAC (addressing turbidity) due to an alleged release of boring fluids in the Black River in late February 2020 during a boring operation to install pipeline casing under the river. Respondents deny these allegations, and the ACO offers no sampling or chemical analysis to support its assertions.

4. At the Commission's May 12, 2020 meeting, Respondents and the Division agreed to waive the 90-day hearing requirement to accommodate the Commission's hearing schedule and to give the parties time to reach voluntary resolution of the ACO. Respondent was then, and remains, ready to participate in a hearing at the earliest available setting.

5. On June 18, 2020, the Division issued the FAACO, amending Paragraph 25 of the ACO. In it, the Division requires Respondents to start remediation of the alleged release "in accordance with the remediation plan approved by the Department" by July 9, 2020, and to "complete remediation of the Site" by August 20, 2020. See FAACO ¶ 25.

6. The hearing on the ACO, however, will not take place until September 8, 2020, which is *after* the remediation deadlines have already passed. NMSA 1978, Section 74-6-10(F) provides that a person who fails to take corrective actions within the time specified in a compliance order may be subject to civil penalties of not more than \$25,000 for each day of continued non-compliance with the compliance order.

7. This means that, by simply exercising their right to challenge the ACO and approved remediation plan at hearing, Respondents risk accruing substantial daily civil penalties before their challenge of the allegations in the ACO and conditions for remediation are even heard in this matter. That is improper.

8. The importance of holding the hearing before remediation is crucial here, where Respondents dispute both that they are liable at all, and whether the proposed remediation would actually benefit (or harm) the environment.

9. Respondents contest liability for river sedimentation the Division claims was caused by the alleged release, the deadlines in Amended Paragraph 25, and the conditions in the approved remediation plan, which have been incorporated into the ACO. In particular, Respondents dispute whether any meaningful amounts of boring fluids from their operation

entered the river and maintain that substances deposited in the river are naturally occurring sediments unrelated to Respondents' boring operations.

10. Respondents' view is that the significant majority of the alleged sedimentation and observed river conditions are the consequence of rain events that occurred before, during, and after Respondents' boring operations. These rain events caused significant runoff, streambank erosion, and sedimentation within the river. Respondents have observed and documented sediment runoff from rain events in video and photographic images that depict a mix of naturally occurring riverbank material and caliche pouring into the Black River upstream of Respondents' boring operation site where the alleged release is purported to have occurred. *See* March 4, 2020 video (IMG_2593.MOV and IMG_2597.MOV), attached as **Exhibit A**; *see also* March 4, 2020 photographs of the same locations, attached as **Exhibit B**.

11. If, as the Division asserts, there was a release of boring fluids (which contain no hydrocarbons), such release would not have violated the narrow provisions of 20.6.4.13(A) NMAC or 20.6.4.13(J) NMAC. For example, 20.6.4.13(A)(1) NMAC only limits stream deposits to "quantities that damage or impair the normal growth, function or reproduction of aquatic life or significantly alter the physical or chemical properties of the bottom." Similarly, 20.6.4.13(A)(2) NMAC only limits stream deposits to "quantities that damage or impair the normal growth, function or reproduction of aquatic life or adversely affect other designated uses." And 20.6.4.13(J) NMAC provides that "limited-duration turbidity increases caused by dredging, construction or other similar activities may be allowed provided all practicable turbidity control techniques have been applied and all appropriate permits, certifications and approvals have been obtained." Here, the Division cannot demonstrate that Respondents' alleged release exceeded the standards for stream deposits. And, Respondents had all appropriate permits, certifications, and approvals necessary for its boring operation. In addition, elevated turbidity persisted for only a limited time.

12. The boring fluid used by Respondents was largely comprised of bentonite, an inert form of clay commonly used to line the inside of water wells and ponds. Bentonite is also used in cosmetics and skin creams. No oil or other hydrocarbons were present. If, as the Division asserts, any bentonite was actually released into the river, it would not currently be causing any immediate threat or harm to wildlife or human activity, and there is no justification for requiring remediation to occur in accordance with the deadlines set forth in Amended Paragraph 25 of the ACO.

13. Respondents also contest the conditions imposed by the approved remediation plan to the extent it requires cleanup of bentonite to an “absence” standard—which is not supported by 20.6.4.13(A) NMAC—along nearly three miles of the Black River’s length to the confluence of the Pecos River. Respondents also contest the approved remediation plan to the extent it purports that “successful remediation” and “completion” under an “absence” benchmark may be determined solely at the discretion of NMED. *See* April 30, 2020, NMED Approved Remediation Plan at 2, attached as **Exhibit C**.

14. The proposed remediation plan would, in fact, cause more turbidity and sedimentation in the river, all for the supposed benefit of removing an inert clay that does not harm the water quality or present a potential threat to wildlife or human activity.

15. Respondents must be permitted to raise their reasonable and valid objections to the cleanup scope and benchmarks adopted in the approved remediation plan at a hearing *before* any remediation is required to take place without risk of accruing substantial civil penalties.

16. With this factual background, to enforce the ACO’s requirement to start and complete cleanup pursuant to the approved remediation plan before liability for the alleged release is even determined would be a gross miscarriage of justice and an abuse of discretion. This is especially true when significant surface runoff and erosion from other sources have contributed

substantial volumes of sediment to the river within the timeframe of the alleged release that are, for practical purposes, chemically indistinguishable from Respondents' boring fluids.

17. Similarly, Respondents must be allowed to challenge the ACO and approved remediation plan before daily civil penalties for non-compliance with the remediation deadlines, cleanup standards, and other requirements of the ACO are imposed.

18. Respondents may also not be able to meet the remediation deadlines imposed in Amended Paragraph 25 due to the resurgence of COVID-19 and the need to implement COVID-safe practices during remediation. Respondents should not be penalized for their inability to comply with the remediation plan deadlines because of the pandemic.

WHEREFORE, for the reasons stated, Respondents respectfully request that the Hearing Officer grant this motion and enter an order amending the ACO's deadlines to provide that the start and completion of remediation shall be required only after the Commission has entered a decision in this case so Respondents can challenge liability for river sedimentation and conditions in the approved remediation plan without the risk of being in non-compliance with the ACO before a hearing. In the alternative, Respondents move to stay assessment and accrual of any potential fines for non-compliance until a final decision by the Commission has been entered.

Counsel for Respondents sought the concurrence of counsel for the Division, but concurrence was denied.

Respectfully submitted,

HOLLAND & HART, LLP

By: /s/ Adam G. Rankin

Adam G. Rankin
Kaitlyn A. Luck
Post Office Box 2208
Santa Fe, NM 87504-2208
TEL: 505-988-4421
FAX: 505-983-6043
agrarkin@hollandhart.com
kaluck@hollandhart.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, I filed the foregoing document with the New Mexico Environment Department Office of Public Facilitation via Electronic Mail to cody.barnes@state.nm.us and further certify that I served it on the following also via Electronic Mail:

Andrew P. Knight, Esq.
Office of General Counsel
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469
Andrew.Knight@state.nm.us

Attorney for the New Mexico Environment Department

/s/ Adam G. Rankin

Adam G. Rankin



EXHIBIT B



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EXHIBIT B



Michelle Lujan Grisham
Governor

Howie C. Morales
Lt. Governor

**NEW MEXICO
ENVIRONMENT DEPARTMENT**

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855
www.env.nm.gov



James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

Sent Via Electronic Mail

April 30, 2020

Matador Production Company as operator for Longwood RB Pipeline, LLC, a subsidiary of San Mateo Midstream, LLC
One Lincoln Centre
5400 LBJ Freeway
Suite 1500
Dallas, Texas 75240
AGRankin@hollandhart.com

Re: SWQB Response to Proposed Remediation Plan; Bentonite Drilling Mud; Black River, Eddy County

The New Mexico Environment Department (NMED) Surface Water Quality Bureau (SWQB) received your Remediation Work Plan for the above referenced release by correspondence dated April 8, 2020. The Remediation Work Plan is in response to NMED's Administrative Compliance Order WQCC 20-16, Paras. 20(c)(3) and (5) requiring submission by April 10, 2020. A brief summary of the plan proposal includes: containment and remediation or recovery of released materials from the Black River in Segment 20.6.4.202 NMAC (State of New Mexico Standards for Interstate and Intrastate Surface Waters [WQS]).

The Remediation Plan proposes to conduct the following activities:

- Water quality monitoring upstream and downstream of the activity: remediation activities will immediately cease if they cause turbidity to increase more than 10 NTU over background turbidity when the background turbidity, measured at a point immediately upstream of the activity, is 50 NTU or less, or to increase more than twenty percent when the background turbidity is more than 50 NTU.
- To prevent downstream movement of bentonite or other sediment material, several rows of sandbag and mesh check dams will be temporarily installed as containment BMPs across the width of the river at locations dependent on river conditions, including flow rate and depth.
- The proposed remediation would include removal of bentonite accumulations/deposits from the streambed for approximately 264 feet below the boring site by using a vacuum hose (fitted with a filter to prevent removal of larger items) and pumping into frac tanks.
- Water sampling will be conducted during activities and daily for 7 days after remediation for: TSS, TDS, total dissolved oxygen, pH, turbidity, chlorides, sulfates, volatile organics (BTEX) and TPH.
- Removed materials will be stored in frac tanks until disposal at an approved off-site location.
- Remediation activities are projected to be completed within 30 days of approval.

Based on the Proposed Remediation Plan, NMED additionally requires the following be included in the Plan and implemented accordingly:

1. Remediation shall be completed within 90 days of the issuance of the ACO (by June 20, 2020).
2. In the last few weeks, flows at the USGS station Black River at Malaga have shown great variations with flows between 4 and 30 cubic feet per second (cfs). In the event that a precipitation event occurs, Matador should wait approximately 48 hours or until streamflow returns to normal, baseflow conditions before continuing with remediation activities.
3. Matador shall conduct a visual survey of the Black River down to the Pecos River to confirm that additional deposits of bentonite are not present. If downstream bentonite deposits are discovered, they must be added to the remediation plan and NMED must be notified accordingly.
4. Photo-documentation must occur before and after remediation. Prior to remediation, Matador shall visually document the presence of the material being cleaned up, along with GPS points of the locations of the material. After remediation, photos shall be taken of the same areas to show remediation is complete. Photos shall be taken in such a manner that it shows not only the bentonite material but a wider shot showing context of the site. Before and after photo-documentation shall be taken from the same location and same angle. All photographs must include an accurate time and date stamp created by the digital camera device.
5. Matador should ensure that minimal disturbance occurs in order to gain access to remediation sites (e.g., no clearing or grading for access or tank staging).
6. If the proposed check dams are ineffective at preventing downstream movement of bentonite, Matador must notify NMED of the turbidity exceedances and propose new controls to NMED for approval before resuming remediation work.
7. Any planned deviations must be reported to NMED for approval prior to implementation. Any unplanned deviations must be reported to NMED with corrective actions taken.
8. Absence or minimal visible signs of the introduced materials (i.e., bentonite mud) shall be used as a benchmark that remediation is complete. Photo-documentation to demonstrate successful remediation is required (see #4) and completion will be determined by NMED either by review of photo-documentation and/or with Oil Conservation Division (OCD) staff onsite inspection verification. Determination of completion will be consistent with New Mexico's general water quality criteria, which state:

"Surface waters of the state shall be free of... fine sediment particles (less than two millimeters in diameter), precipitates or organic or inorganic solids from other than natural causes that have settled to form layers on or fill the interstices of the natural or dominant substrate in quantities that... alter the physical... properties of the bottom." (20.6.4.13(A)(1) NMAC).

"Turbidity attributable to other than natural causes shall not reduce light transmission to the point that... will cause substantial visible contrast with the natural appearance of the water." (20.6.4.13(J) NMAC).

Based on the information submitted, including the additional requirements noted above, the Remediation Plan is satisfactory to NMED. Matador must update NMED-SWQB on the progress of the remediation, as well as results of additional sampling and final progress report upon completion.

In the event that any WQS are violated as a result of the activities, Matador Production Company and San Mateo Midstream could be subject to further enforcement pursuant to the New Mexico Water Quality Act [Section 74-6-10-NMSA]. NMED reserves the right to require additional corrective actions not already being required should this release result in the degradation of surface water or ground water quality. Nothing in this letter shall be construed as relieving Matador Production Company or their contractors of the obligation to comply with all other applicable federal, state, and local laws, regulations, permits or orders.

If you have any questions, please contact Sarah Holcomb of the Surface Water Quality Bureau at 505-827-2798, or by email at sarah.holcomb@state.nm.us.

Sincerely,

Shelly Lemon Digitally signed by Shelly Lemon
Date: 2020.04.30 09:46:48 -06'00'

Shelly Lemon, Bureau Chief
Surface Water Quality Bureau

cc: Brent Larsen, USEPA (6WDPE) <larsen.brent@epa.gov>
Carol Peters-Wagnon, USEPA (ECDWM) <peters.carol@epa.gov>
Rebecca Roose, NMENV <Rebecca.Roose@state.nm.us>
Michelle Hunter, NMED GWQB <Michelle.Hunter@state.nm.us>
Sarah Holcomb, NMED SWQB <sarah.holcomb@state.nm.us>
Jennifer Foote, NMED SWQB <jennifer.foote@state.nm.us>
Michael Kesler, NMED District III <michael.kesler@state.nm.us>
Griswold, Jim, EMNRD <Jim.Griswold@state.nm.us>
Ames, Eric, EMNRD <Eric.Ames@state.nm.us>
Shawn Denny, NMDFG <shawn.denny@state.nm.us>
Brian Willey <bwilley@sanmateomidstream.com>
Matt Hairford <MHairford@matadorresources.com>
Casey Snow <CSnow@matadorresources.com>
Bryan A. Erman <berman@matadorresources.com>
James Meier <jmeier@sanmateomidstream.com>
Craig Adams <cadams@matadorresources.com>
Sean O'Grady <sogrady@sanmateomidstream.com>
Natalie Gordon <ngordon@vertex.ca>