

**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.

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

Matador Production Company (“Matador”) and San Mateo Midstream, LLC (“San Mateo”) (collectively, “Respondents”) submit this reply in support of their Motion to Amend Remediation Deadlines and Stay Accrual of Statutory Penalties. For the reasons stated herein, and raised in the Motion and the Supplement to the Motion, Respondents’ Motion should be granted.

ARGUMENT

The Administrative Compliance Order (“ACO”) alleges Respondents released bentonite into the Black River. The approved remediation plan requires Respondents to remediate the alleged release of bentonite. But the standards used to assess compliance are subjective, unclear, and possibly impossible to achieve. The ACO requires Respondents to remediate to the extent that there is the “absence or minimal visible signs” of bentonite in the river—a made-up standard that has no regulatory basis.¹ This novel benchmark is to be assessed solely by the Surface Water

¹ Rather than the “absence or minimal visible signs” of bentonite, the correct regulatory standards for the violations cited in the ACO are: that the river should be “free of . . . fine sediment particles” but only to the extent that

Quality Bureau by means of a photo review, with a possible on-site inspection by New Mexico Oil Conservation Division staff for verification. *See* Motion, Exhibit A at 2. The remediation plan does not explain how to distinguish bentonite from typical river sediment, how to identify where the alleged bentonite deposits are so that they may be removed, or why removal of a benign and harmless substance like bentonite would be beneficial assuming it was present. To compound these substantive problems, the Bureau insists that Respondents comply with the ACO and complete the approved remediation plan before an opportunity for a hearing on the facts and Respondents' objections. This entire scheme suffers from several serious deficiencies.

First, the overwhelming weight of the evidence demonstrates that bentonite was not released into the river and there is no bentonite in the river to remediate. Respondents, whose executives and operations and environmental managers made repeated trips to the site immediately upon learning of the incident, always questioned the assumption that bentonite had been released into the river. The core sampling presented by Respondents' in the Supplement to the Motion corroborates those concerns and confirms that, in areas where at least traces of bentonite would be most expected to be found, the analysis showed that there was no bentonite present. In its response, the Bureau ignores these results.

The Bureau has never sent anyone to the river to identify the bentonite it says is there. Nor has it offered any evidence that bentonite was actually released. The only actual studies and inspections have been done exclusively by Respondents, and those show just the opposite.

Despite their concerns that no bentonite was ever released, Respondents immediately met in good faith with state agencies coordinating the response after the incident. They also acted with

it "damage or impair the normal growth, function or reproduction of aquatic life or significantly alter the physical or chemical properties of the bottom," for 20.6.4.13(A)(1) NMAC; and that "settleable solids from other than natural causes shall not be present . . . in quantities that damage or impair the normal growth, function or reproduction of aquatic life or adversely affect other designated uses," for 20.6.4.13(A)(2) NMAC.

diligence to undertake extensive soil tests and water quality sampling required by the New Mexico Oil Conservation Division (“NMOCD”). That data was shared with the Bureau—it was submitted to NMOCD during the incident response and again when Respondents provided the Bureau their proposed remediation plan, as the Bureau required them to do.

The soil chemistry tests of the materials downstream and upstream of the alleged release suggest that there is no chemical basis to indicate the presence of bentonite. The materials downstream from the release are effectively indistinguishable from the materials upstream. In addition, none of the water sampling tests or monitoring reports reflect the presence of bentonite. If any of this data and sampling had even suggested the presence of bentonite, the Bureau would have pointed to it in response to this Motion. Instead, the Bureau falls back on its unsubstantiated allegations in the ACO, which simply assumes bentonite was released without pointing to evidence.

Visual inspections of the river conducted by Respondents to date also suggest that there is no bentonite in the river. Respondents’ personnel, including management, have inspected the river in stages, repeatedly, and at different points in time, to inspect its banks. None of those inspections identified obvious accumulations of bentonite in the river’s sedimentary deposits. Respondents identified several discrete areas of deposits consisting of light-tan sediments which matched the sediment deposits Respondents recently tested through core sampling and laboratory analyses that confirm the absence of bentonite, as discussed below. To Respondents’ knowledge, no one from the Bureau has yet walked the river or inspected its banks for bentonite. Instead, the Bureau attached a still frame from a snippet of video taken downstream from the location of the alleged release provided by an anonymous resident in the area. After confirming with the Bureau, the location has been determined to be nearly two-thirds of a mile downstream from the site of the alleged release. See **Exhibit G**, attached. It is unclear what the snippet is alleged to show in the

sediment. If the image is intended to suggest that black sedimentation that appears to be present in the image at the location is bentonite, Respondents have subsequently inspected the location and confirmed that there is no black sedimentation at the location. Alternatively, if the lighter colored sedimentation in the image is intended to show the presence of bentonite, it does not match the “tan-colored” mixture of the materials that the Bureau states appeared in the river during the alleged release. *See* NMED Resp. at 2, ¶ 4.

In contrast, Respondents have collected months of daily and weekly water monitoring data and soil chemistry tests. None of this data—collected over the last several months since the alleged release—supports the allegation that Respondents released bentonite into the river.

Most recently, Respondents performed analyses of core samples collected from sediments in the river immediately downstream from the alleged release (Core 2) and approximately 80 feet downstream (Core 3), using a reliable laboratory methodology to identify the presence or absence of bentonite. Attached as **Exhibit H** is an updated laboratory report prepared by Impac Labs which includes photographic documentation of each of the five core samples collected from the river and the specific depth of the soil samples analyzed in the cores based on the mud loggers’ categorization of the sediment types. These results confirm that there was not even a trace of bentonite in either Core 2 or Core 3 where it would be most expected to be found—closest to the source of the alleged release. The analysis instead shows that the material accumulations match the materials found upstream of the alleged location and naturally occurring materials in the riverbed. In particular, the data collected indicates that portions of the cores are a heterolithic mixture rich in calcite and quartz which are common components of caliche. Respondents have previously provided evidence showing significant light-tan runoff into the Black River near the alleged release site, which runoff is likely to have come from the neighboring caliche pit and groomed pad.

Respondents collected these samples as an essential first step in its remediation effort. To remediate any alleged bentonite, it is first necessary to determine whether any exists in the river and where to look. As such, Respondents began their remediation efforts by conducting these tests to determine what exactly to remediate. After the Motion was filed, but in advance of the ACO's requirement to commence remediation on July 9, 2020, Respondents determined that the core samples confirmed the absence of bentonite.

After undertaking the core sampling—something above and beyond even what the ACO required—Respondents notified the Bureau of the absence of bentonite. The Bureau effectively dismissed the sampling and its results. It requested additional information, while making clear that even with such information (regarding the methodology and quality of the sampling), it would still refuse to modify its remediation plan. Respondents provided some of the requested information and are evaluating the other requests.

The Bureau has still never explained where the alleged bentonite deposits are, how to identify them, or why they would harm the river if they existed. And Respondents' samples confirmed that bentonite does not exist in the places it would be most expected. Presented with this evidence, the Bureau's response is simply to demand compliance—and threaten daily fines for disobedience. Never mind that they offer no suggestion on how to remove a substance that no one has located and that scientific evidence shows is not there.

Given the weight of the evidence, Respondents' should be permitted the right to present their valid and substantial objections to the ACO and approved remediation plan at hearing. And, given the weight of the evidence, the deadlines to start and complete remediation should be moved to after a ruling by the Commission to determine whether Respondents are even liable for cleanup.

Second, despite not explaining how to comply with its remediation plan, the Bureau appears to hope its threat of daily fines will force Respondents into submission. While the

Bureau may have authority to issue an ACO “on the basis of any information,” the information available to Bureau has substantially changed since the ACO was issued, since Respondents submitted their proposed remediation plan, and since the Bureau issued its approved remediation plan. But rather than agreeing to first hold a hearing to determine liability and the proper scope of remediation, if any, the Bureau instead appears determined to wield the sword of daily penalties to force Respondents to remediate—even if Respondents are not liable and remediation is not appropriate. That is unjust and is an abuse of discretion.

“It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense.” *Jones v. New Mexico State Racing Comm’n*, 1983-NMSC-089, ¶ 6, 671 P.2d 1145, 1147. But the opportunity to be heard must be “at a meaningful time.” *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm’n*, 1986-NMSC-059, ¶ 18, 725 P.2d 244, 247. Here, a hearing after the ACO requires Respondent to start and finish remediation is not meaningful. In the Bureau’s view, their authority has no bounds and the risk is entirely on Respondents whether to comply or challenge the order. That is incorrect; the Bureau’s authority is limited and is constrained, at the very least, by an abuse of discretion standard. Here, the Bureau’s decision to ignore the weight of the evidence and insist that Respondents act to comply with the ACO (somehow) or face potentially severe penalties is an abuse of discretion and bends, if not breaks, the protections afforded by due process.

Finally, the Hearing Officer has sufficient authority to amend the ACO. The Bureau makes a halfhearted argument that the Hearing Officer lacks authority to grant the relief sought here. But the Commission has expressly delegated to the Hearing Officer “all powers and duties prescribed or delegated by the Commission under the Water Quality Act or 20.1.3 NMAC” to rule “upon motions and procedural requests that do not seek final resolution of the proceeding[.]” See Scheduling Order, dated June 9, 2020. This Motion is not dispositive, it simply seeks to push back

the deadlines to start and complete remediation until after a fair hearing, and to stay assessment and accrual of any potential fines for non-compliance until a final decision by the Commission has been entered. Those issues are well within the authority delegated.

CONCLUSION

For the reasons stated, Respondents' Motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I filed the foregoing document with the New Mexico Environment Department Office of Public Facilitation via Electronic Mail to public.facilitation@state.nm.us and further certify that I served it on the following also via Electronic Mail:

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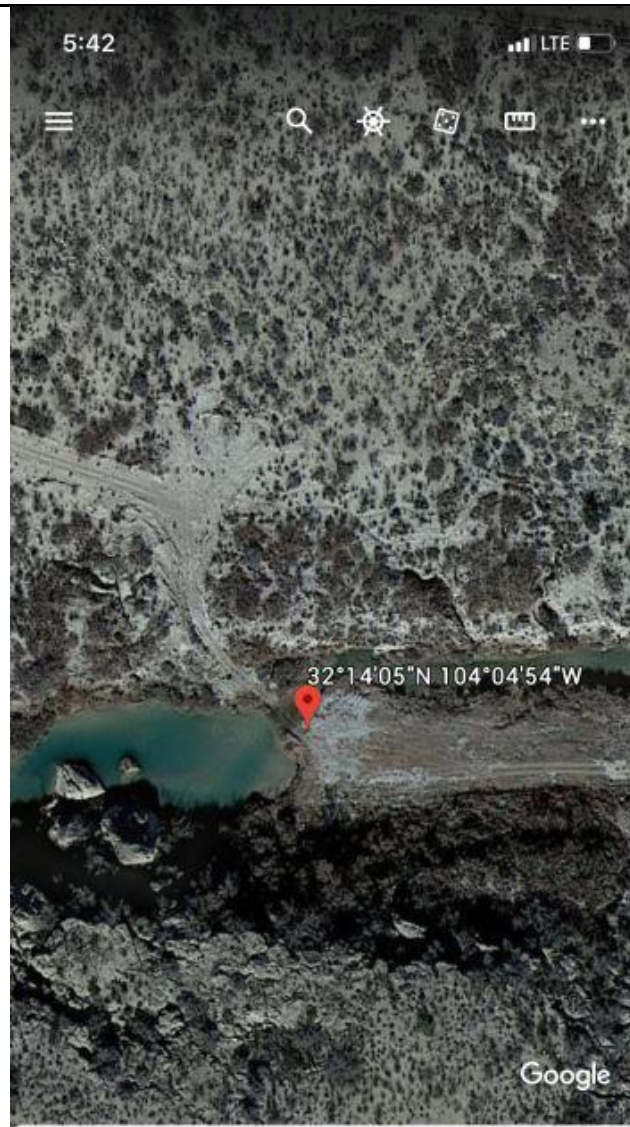
Attorney for the New Mexico Environment Department

/s/ Adam G. Rankin

Adam G. Rankin

EXHIBIT G

Google dropped pin provided by NMED depicting approximate location of the photograph attached as Exhibit 2 to NMED's Response at a at a low-water vehicle stream crossing.



Dropped Pin



32°14'05"N 104°04'54"W - 2,947 ft


Measure

EXHIBIT G

Google map prepared by Respondents showing the location of NMED's Exhibit 2 video snippet relative to the location of the alleged release at the boring operation site. Google's measuring tool indicates the distance is approximately 0.65 miles.



EXHIBIT H

		Company:		Contact:		Well Name:																
		Matador Resources		Clark Collier																		
XRD Results																						
Sample Description			Carbonates			Minerals					Clays		Group									
Measured Depth	Sample Type	Hole Section	Brittleness	Calcite	Dolomite	Siderite	Quartz	K-Spar	Plag.	Pyrite	Gypsum	Halite	Total Clay	Chlorite	Kaolinite	I/M	I/S	Q+F	Carbonates	Others	Clays	Description
Feet			BIDX	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	
1" from Top	Core	Top Core 1	96.7	92	1	Tr	4	1	Tr	Tr	0	0	2					5	93	0	2	Limestone
6" from Bottom	Core	Bottom Core 1	87.6	49	Tr	Tr	39	3	1	Tr	0	0	8					43	49	0	8	Well rounded river rock with some smaller sand
3" from Top	Core	Core 2	95.8	92	Tr	Tr	3	1	Tr	Tr	0	3	1					4	92	3	1	Limestone
4.5" from Bottom	Core	Bottom Core 2	96.7	90	2	Tr	5	1	Tr	Tr	0	0	2					6	92	0	2	Limestone
1" from Top	Core	Top Core 3	77.6	52	Tr	Tr	29	3	1	Tr	0	0	15					33	52	0	15	Limestone with silicates (no discernable grain size)
4" from Bottom	Core	Bottom Core 3	96.7	91	2	Tr	4	1	Tr	Tr	0	0	2					5	93	0	2	Limestone (smaller grain size)
12" from Bottom	Core	Core 4	81.1	36	4	Tr	41	5	1	Tr	1	0	12					47	40	1	12	Soil with some plant material (roots)
5" from Bottom	Core	Core 5	96.7	87	2	Tr	8	1	Tr	Tr	0	0	2					9	89	0	2	Limestone (smaller grain size)

Core 1



Core 2



Core 3



Core 4



Core 5



EXHIBIT H

			Company: Matador Resources		Contact: Clark Collier		Well Name:																														
Sample Description			Major Elements											Elemental Results																							
Measured Depth	Sample Type	Geology Hole Selection	SiO2	TiO2	Al2O3	Fe2O3	MnO	MgO	CaO	Na2O	K2O	P2O5	SO3	Cl	Total	V	Cr	Co	Ni	Cu	Zn	Ga	As	Br	Rb	Sr	Y	Zr	Nb	Mo	Ba	Hf	Pb	Th	U	Elemental Gamma Ray	
Feet			%	%	%	%	%	%	%	%	%	%	%	%	%	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	ppm	API
1	Core	Top Core 1	16.8	0.148	0.546	1.041	0.00	0.944	76.57	0.279	0.744	0.43352	0.221	0.1849	97.91	3.415	6.78	2.92	143.9	16.572	24.38	10.967	0	72.0707	8.06	782.7	15.15	122.1	3.342	0	0	0	16.85	0	1.148	19.37	
2	Core	Bottom Core 1	43.97	0.453	8.005	2.293	0.00	1.704	36.46	0.574	1.739	0.2539	0.229	0.1983	95.88	29.15	16.92	9.889	23.2	17.301	47.01	13.207	0.196	21.7873	45.8	361.4	21.94	331.5	12.37	28.09	0	0.226	17.57	0	0.911	30.926	
3	Core	Core 2	14.86	0.132	0.368	0.932	0.00	0.439	89.27	4.657	0.735	0.40045	1.078	4.8996	117.78	0	3.969	2.443	155	18.197	25.88	9.9108	0	43.8876	5.858	519.9	11.65	61.45	2.454	0	0	0	16.05	0	1.472	21.863	
4	Core	Bottom Core 2	19.31	0.174	1.186	1.12	0.00	1.49	74.97	0.402	0.758	0.46259	0.267	0.2505	100.40	0	5.089	3.227	133.2	16.918	25.41	8.2619	0	84.2627	8.512	745.6	14.63	110.3	3.006	0	0	0	17.01	0	1.224	20.177	
5	Core	Top Core 3	41.25	0.444	7.832	2.855	0.00	1.913	43.84	0.819	1.484	0.26031	0.23	0.2363	101.16	40.86	28.04	13.94	33.5	19.761	43.82	12.837	1.325	26.6687	31.35	362.5	19.74	253.5	10.71	3.901	0	0	18.5	0	1.229	30.046	
6	Core	Bottom Core 3	17.4	0.142	0.634	1.086	0.00	1.176	74.84	0.459	0.72	0.43351	0.256	0.2357	97.38	0	9.01	3.076	139.3	14.03	36.46	9.4889	0	93.9132	7.871	822.7	14.68	126.2	3.463	0.922	0	0	16.86	0	1.206	19.511	
7	Core	Core 4	40.36	0.518	7.953	2.861	0.00	3.238	37.73	0.723	1.758	0.2923	1.838	1.3214	98.59	45.1	23.62	13.92	27.38	17.049	52.14	13.812	1.783	180.951	42.36	711.1	21.73	312.1	10.42	21.77	0	0	18.86	0	0.813	30.397	
8	Core	Core 5	18.42	0.138	0.571	0.997	0.00	1.085	75.49	0.273	0.71	0.4198	0.266	0.173	98.54	0	5.643	2.646	135.9	15.377	24.76	8.9585	0	74.8034	7.761	810.1	15.43	122.2	4.319	0	0	0	16.81	0	1.247	19.708	
			Cautionary Data (Possible Rerun)											Sample is contaminated with Ba							Sample is contaminated with LCM																