BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

File d
DEC - 6 2013
Clerk, Environmental Appeals Board
INITIALS

In re:	)	
Berry Petroleum Company Docket No. CAA-08-2013-0014	)	CAA Appeal Nos. 13-03, 13-04, and 13-05
Samson Resources Company Docket No. CAA-08-2013-0015	)	
Colorado Interstate Gas Company, LLC Docket No. CAA-08-2013-0016	)	

ORDER TO DISMISS FOR LACK OF JURISDICTION

The final orders issued in the above-captioned matters arise from the issuance of three consent agreements and final orders pursuant to 40 C.F.R. sections 22.13(b) and 22.18 by the Regional Judicial Officer ("RJO") for the U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 8 ("Region"). Consolidated Response to Orders to Show Cause ("Consolidated Resp.") at 1. Berry Petroleum Company, Samson Resources Company, and Colorado Interstate Gas Company each separately reached settlements with the Region, and these settlements were reduced to consent agreements and filed with the Regional Hearing Clerk in late September 2013. *Id.* at 2. For each of the above-captioned matters, the RJO issued final orders that approved "certain provisions" of the consent agreements but did not authorize "[a]ny paragraph that provides for compliance or corrective action." *E.g.*, *In re Berry Petroleum Co.*, Docket No. CAA-08-2013-0014, at 1 (RJO Sept. 30, 2013) (Final Order). The final orders further directed the parties to execute and file with the RJO "[a]dministrative [o]rder[s] on [c]onsent or functionally equivalent order[s] that incorporate[] the compliance and corrective action provisions in the [c]onsent [a]greement[s]." *E.g.*, *id.*

By three motions dated October 25, 2013, the Region's Office of Enforcement, Compliance and Environmental Justice sought from the Environmental Appeals Board ("Board") thirty-day extensions of time in which to file motions for reconsideration of the final orders. On November 1, 2013, the Board directed the Region to show cause as to why the Board should not dismiss the matters. In its orders, the Board observed, "it does not appear that the Board is authorized to consider either a motion for reconsideration in this matter or an associated motion for extension of time in which to file such a motion for reconsideration." *E.g.*, *In re Berry Petroleum Co.*, CAA Appeal No. 13-03, at 1 (EAB Nov. 1, 2013) (Order to Show Cause). The Board explained:

> Under the Consolidated Rules of Practice at 40 C.F.R. part 22, the Environmental Appeals Board may consider motions for reconsideration of final orders "issued pursuant to 40 C.F.R. § 22.30." 40 C.F.R. § 22.32. The title of 40 C.F.R. § 22.30 specifies that it covers those final orders that resolve "appeals from or review of initial decision[s]." 40 C.F.R. § 22.30. In contrast, the above-captioned matter appears to arise from the issuance of a consent agreement and final order pursuant to 40 C.F.R. §§ 22.13(b) and 22.18, and the final order issued in the matter did not result from the issuance of an initial decision under 40 C.F.R. § 22.27.

E.g., *id.*

The Region filed a consolidated response to the orders to show cause on November 18, 2013.[1] In its response, the Region concedes that "the Board should dismiss these matters from its docket." Consolidated Resp. at 1. The Region further requests that the Board "clarify in its dismissal order that the RJO must either ratify or reject a [c]onsent [a]greement *in its entirety* and cannot ratify only portions of a [c]onsent [a]greement" and clarify that the RJO's order has "no

[1] Although the Region does not explicitly seek consolidation of the above-captioned matters, the Region seeks the same relief in all three cases and filed a consolidated response to the November 1, 2013 orders to show cause. Therefore, the Board consolidates the matters in the interests of preserving scarce administrative decisionmaking resources and promoting efficiency.

legal effect" because she failed to ratify the agreement as a whole."[2] *Id.* at 2.

As the Board noted in the orders to show cause, the final orders of which the Region seeks reconsideration were issued pursuant to 40 C.F.R. § 22.18(b). Section 22.18 grants the RJO or Regional Administrator sole authority to approve consent agreements for enforcement actions commenced outside of EPA Headquarters. 40 C.F.R. § 22.18(b)(3); *see also* EPA Delegations Manual 7-41-C (delegating authority "to issue consent orders memorializing settlements between the Agency and respondents resulting from administrative enforcement actions under the Clean Air Act * * * [and] [t]o issue final orders assessing penalties under the Clean Air Act" to Regional Administrators, who "may redelegate this authority to their respective Regional Judicial Officers"). Because the consent agreements underlying this matter were commenced outside of EPA Headquarters in the Region, the Board lacks jurisdiction to consider motions for reconsideration of the final orders and any associated motions for an extension of time in which to file such motions for reconsideration.

In conceding the Board should dismiss the above-captioned matters, the Region essentially concedes that the Board lacks jurisdiction over the motions for reconsideration of the RJO's final orders. The Consolidated Rules of Practice do not explicitly provide for motions for reconsideration of final orders issued under 40 C.F.R. § 22.18(b), but such motions would lie more properly with the authority who issued the order in the first instance.

Given that the Board lacks jurisdiction to consider the merits of the motion for reconsideration, the Region's requested clarification regarding the legal authority or effect of the RJO's orders would constitute an advisory opinion on the merits of the RJO's final orders. The Board generally avoids issuing advisory opinions. *E.g.*, *In re Rhee Bros.*, 13 E.A.D. 261, 269 (EAB 2007) (citing *In re Cavenham Forest Indus., Inc.*, 5 E.A.D. 722, 731 n.15 (EAB 1995), and *In re Simpson Paper Co.*, 4 E.A.D. 766, 771 n.10 (EAB 1993)).

---

[2] The Region represents that the Respondents in these three matters "ha[d] no objection to the positions expressed in the Region's response." Consolidated Resp. at 1 n.2.

The Board notes that it has its own authority under section 22.18(b)(3) to approve consent agreements and proposed final orders for enforcement actions that are initiated at EPA Headquarters. To address concerns about the appropriateness of particular consent agreements or elements thereof, the Board typically has sought additional information from the appropriate EPA Headquarters official and/or a reformation of the consent agreement to resolve the Board's concerns. *See, e.g., In re Consent Agreements and Proposed Final Orders for Animal Feeding Operations*, at 4-5, 8 (EAB Jan. 27, 2006) (ratifying consent agreements after obtaining additional information at hearing and requesting reformation of final order to reflect representations made at hearing). In exercising its section 22.18(b)(3) authority, the Board has not unilaterally modified a consent agreement or ratified only portions thereof.

Accordingly, the Board **DISMISSES** the above-captioned matters for lack of jurisdiction. The motions for extensions of time in which to file motions for reconsideration of the final orders issued in these matters are **DENIED AS MOOT**.

So ordered.

Dated: December 6, 2013

ENVIRONMENTAL APPEALS BOARD[3]

By: _____
Randolph L. Hill
Environmental Appeals Judge

[3] The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Catherine R. McCabe.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order to Dismiss for Lack of Jurisdiction in the matters of *Berry Petroleum Company*, CAA Appeal No. 13-03; *Samson Resources Company*, CAA Appeal No. 13-04; and *Colorado Interstate Gas Company*, CAA Appeal No. 13-05, were sent to the following persons in the manner indicated:

By Certified U.S. Mail, Return Receipt Requested:

Lawrence E. Volmert
Holland & Hart, LLP
555 Seventeenth Street, Ste. 3200
Denver, CO 80202-3979

Scott C. Weatherhold, Assistant General Counsel
Samson Resources
Two West Second Street
Tulsa, OK 74103

Daniel Schnee, Senior Counsel
Legal Department - El Paso Corporation/Kinder Morgan
Two North Nevada Avenue
Colorado Springs, CO 80903

By EPA Pouch Mail:

Dana J. Stotsky, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop Street, Mail Code: 8ENF-L
Denver, C0 80202

David Rochlin, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop Street, Mail Code: 8ENF-L
Denver, C0 80202

Elyana R. Sutin, Regional Judicial Officer
U.S. EPA Region 8
1595 Wynkoop Street, Mail Code: 8RC
Denver, CO 80202

Tina Artemis, Regional Hearing Clerk
U.S. EPA Region 8
1595 Wynkoop Street, Mail Code: 8RC
Denver, CO 80202

By EPA Intraoffice Mail:

Gary A. Jonesi
Office of Enforcement and Compliance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W., Mail Code 2241A
Washington, DC 20460

Date: 12/6/2013

Annette Duncan
Secretary