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

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ENVIR. APPEALS BOARD

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

CONSOLIDATED RESPONSE[1] TO ORDERS TO SHOW CAUSE

INTRODUCTION AND SUMMARY

By Order dated November 1, 2013, the Environmental Appeals Board (EAB or Board) directed the U.S. Environmental Protection Agency (EPA), Region 8, Office of Enforcement, Compliance and Environmental Justice, to show cause, by November 18, 2013, why the Region's Motion for Extension of Time to File a Motion for Reconsideration should not be dismissed in these three matters. For the reasons that follow in this consolidated Response, the Region, in consultation with the EPA Headquarters Office of Enforcement and Compliance Assurance (OECA), agrees that the Board should dismiss these matters from its docket and respectfully requests that such dismissal order confirm the bases for dismissal as described below.[2]

[1] This Consolidated Response in the three captioned matters is respectfully submitted to the Board to facilitate efficient review of the identical issues presented in the three matters.

[2] Counsel for EPA Region 8 contacted counsel for Respondents by telephone during the week of November 12-15, 2013. During such communications, EPA counsel orally summarized this Consolidated Response to Orders to Show Cause (then in draft form) and counsel for Respondents stated that they have no objection to EPA's approach as described.

BACKGROUND

The parties herein reached settlements and reduced them into Consent Agreements, which were filed with the Regional Hearing Clerk in late September, 2013[3], pursuant to 40 C.F.R. §§ 22.13(b) and 22.18. The Regional Judicial Officer (RJO) issued "Final Orders" in these matters on September 30, 2013. In these "Final Orders," the RJO approved a portion of each Consent Agreement (*i.e.*, the penalty assessment), but not the "compliance or corrective action" portion.[4] The RJO then imposed a requirement on the parties to enter into "an Administrative Order on Consent [(AOC)] or a functionally equivalent order" that incorporates the rejected Consent Agreement paragraphs, and file such AOCs within 30 days. By terms of each "Final Order," there would be no review or ratification by the RJO of each AOC, only filing in the case docket. Region 8 then filed in each matter a Motion for Extension of Time with the EAB on October 25, 2013, stating that additional time was needed to file a Motion for Reconsideration in part because of the potential nationally significant issues involved and the need to coordinate with U.S. EPA offices nationwide.

ARGUMENT

As discussed further below, the RJO's action to unilaterally modify the settlements is legally impermissible; consequently, each Final Order is void and without effect. If valid, the RJO's actions could severely undermine the enforcement program's ability to reliably and predictably negotiate settlements. The Board should exercise its broad authority under 40 C.F.R. § 22.4(a)(2) to clarify in its dismissal order that the RJO must either ratify or reject a Consent Agreement *in its entirety* and cannot ratify only portions of a Consent Agreement. An RJO's purported approval of only a portion of a Consent Agreement is, in effect, a rejection of the entire Consent Agreement. Any order purporting to approve a portion of a settlement must be determined to have no legal effect. Also, the RJO's imposition of a mandate forcing the Region to enter into and issue an AOC was *ultra vires* and the Board should clarify that it has no legal effect for that additional reason.

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[3] The Consent Agreement in *Berry Petroleum Company* was filed on September 24, 2013. In each of the other two matters, the Consent Agreement was filed on September 30, 2013.

[4] *E.g.*, "Any paragraph that provides for compliance or corrective action in the Consent Agreement, including but not limited to, paragraphs 16-23 and 34, are [sic] not authorized under this Final Order." *Final Order* in *Berry Petroleum Company* at p. 1.

The "*Final Orders*" Issued by the RJO Are a Legal Nullity

Region 8 submitted these Consent Agreements to the RJO for approval pursuant to 40 C.F.R. § 22.13(b), which allows a proceeding to be "*simultaneously* commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3)." [Emphasis added.] Section 22.18(b)(3) provides that a Consent Agreement does not dispose of a Part 22 proceeding unless a final order is issued by an RJO (or Regional Administrator or the EAB, as appropriate) "ratifying the parties' consent agreement." Importantly, there is no provision in Part 22 for *partial* ratification by the RJO. Action that approves only a portion of a settlement is not "ratifying the parties consent agreement" under § 22.18(b)(3). In effect, it is a rejection of the proposed Consent Agreement. As a result, each of the RJO's "Final Orders" did not conclude a proceeding under § 22.18(b)(3) and is a legal nullity.[5] Moreover, because these Final Orders did not conclude a proceeding pursuant to § 22.18(b)(3), it appears that no proceedings have been commenced (at least before the RJO) because § 22.13(b) contemplates that such streamlined settlement proceedings can only be initiated without a complaint by being *simultaneously* commenced and concluded using a Consent Agreement (which must contain complaint-like allegations of violation) and a final order. Without a conclusion, there cannot be a "simultaneous" commencement of a proceeding.

The Board Has Authority to Clarify the Bases for Its Dismissal of This Matter

Under 40 C.F.R.§ 22.4(a)(2), the Board, in exercising its duties and responsibilities under Part 22, is authorized to "do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding." Although, for the reasons stated above, "proceedings" may not have been commenced by the RJO, the Board accepted these matters on its docket. The Region is sensitive to the Board's concern about its authority to entertain this matter through a Motion for Reconsideration. Nevertheless, in dismissing this

[5] The RJO's purported Final Orders support this conclusion because they approve identical paragraphs (*e.g.*, Paragraph 31 in *Berry Petroleum)* providing that "[t]he terms, conditions, and compliance requirements of this Agreement may not be modified or amended except upon the written agreement of the Parties, and approval of the Regional Judicial Officer." Since the parties did not provide such written agreement, the terms of the Agreements cannot be modified (including by the RJO).

matter from its docket, Region 8 urges the Board to exercise its inherently broad authority under section 22.4 to explain why it is doing so (*e.g.*, for the reasons set forth in this Response). *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) (dismissing EPCRA citizen suit based on lack of Article III constitutional standing but extensively discussing in its opinion the reasons for its lack of jurisdiction).

Potentially Severe Harm to EPA's Enforcement Program

It is important for the Board to state clearly in its dismissal order that an RJO may not approve a settlement other than the *entire* deal struck by the parties.[6] Obviously, settlement negotiations involve give and take.[7] Negotiations often contemplate a reduction in the penalty assessment where a settling Respondent agrees to undertake significant corrective measures. In addition, a Respondent's commitment to undertake corrective actions, or lack of agreement to do so, may be a significant factor for both parties in reaching an acceptable negotiated penalty amount. If considered to have legal effect, the RJO's actions here would undermine not only the carefully negotiated settlements in these three cases but also the Agency's longstanding penalty policies, which expressly provide flexibility to allow for penalty adjustments where a settling party agrees to undertake corrective actions.

Part 22 does not authorize what has occurred here, *i.e.*, a unilateral action by the RJO to alter the parties' agreement by bifurcating the Consent Agreement, approving a portion of the Consent Agreement, and ordering the parties to execute an administrative order on consent (AOC) incorporating the unapproved portion of the Consent Agreement and file that document in the case docket without further review or ratification. An RJO's approval of a portion of a Consent Agreement, if allowed to stand, would allow RJO's to choose, for example, only the

[6] Similarly, a federal court may only accept or reject the settlement agreed upon by the parties and may not modify a consent decree before entry. *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351–52 (6th Cir. 1986); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 630 (9th Cir. 1982); *Wis. Elec.*, 522 F. Supp. 2d at 1112; *United States v. Cannons Eng'g Corp*, 720 F. Supp. 1027, 1036 (D. Mass. 1989), *aff'd* 899 F.2d 79 (1st Cir. 1990) (court determines "not whether the settlement is one which the Court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute").

[7] The Board has recognized that an overall sense of a settlement must take into account all claims that are compromised. *E.g.*, Memorandum from Environmental Appeals Judge Scott C. Fulton to David Nielsen, Director, Multi-Media Enforcement Division: Consent Agreement and Proposed Final Order *In the Matter of Cognis Corporation*, Docket No. MM-HQ-00-002 (March 26, 2002) (40 C.F.R. § 22.45 legally required public notice of Clean Water Act (CWA) proposed penalty settlements must also discuss non-CWA violations that do not require any such public notice).

provisions that favor one party and could undermine the ability of parties to meaningfully negotiate entire settlement packages. Moreover, the RJO lacks authority, under 40 C.F.R.§ 22.4 or otherwise, to order Region 8 to issue an AOC.

By confirming Region 8's position that the RJO's purported Final Orders are a legal nullity, the Board would clarify the situation so that the RJO's orders are not mistakenly thought to be in effect. Doing so also would clarify prospectively that RJOs are acting *ultra vires*, or beyond their legal authority, when they act to approve only a portion of a Consent Agreement or purport to order Regions to issue AOCs.

It is important for the Board to affirm the Region's reasons for dismissal because doing so will inform not only the enforcement program's future efforts but also the Region's next steps in these three cases. Region 8 understands the RJO's discomfort with these three Consent Agreements as submitted and intends to remedy such concerns, albeit in a manner that might differ from the RJO's instruction that the Region issue an AOC. Given its belief that the RJO's Final Orders are a legal nullity, the Region is considering resubmitting to the RJO revised executed Consent Agreements that expressly provide that the compliance and corrective action requirements are conditions of the "effect of settlement" covenant paragraph[8] in these penalty-assessing Consent Agreements. Such an approach would be consistent with agreements the Board has approved, beginning with the January 27, 2006 Final Order in the Animal Feeding Operations CAFO (Docket Nos. CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx) (failure to comply with such corrective requirements would simply void the covenant not to sue, *id.,* at 37).[9]

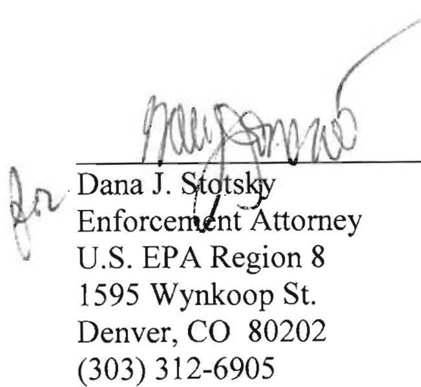
PRAYER FOR RELIEF

Region 8 respectfully requests that the Board issue an order dismissing these matters from its docket for the reasons stated herein. Should the Board conclude that it has authority to consider this matter on Reconsideration, the Region renews its request for an extension of time in which to file such a formal Motion for Reconsideration.

[8] The referenced paragraph is Paragraph 30, Paragraph 21 and Paragraphs 22 and 23 in the Consent Agreements filed in *Berry Petroleum Company*, *Samson Resources*, and *Colorado Interstate Gas Company*, respectively.

[9] The Region believes that such revised Consent Agreements would not be barred (*e.g.,* on *res judicata* grounds) because of its assertion that the RJO's original "Final Orders" have no legal effect.

Respectfully submitted,



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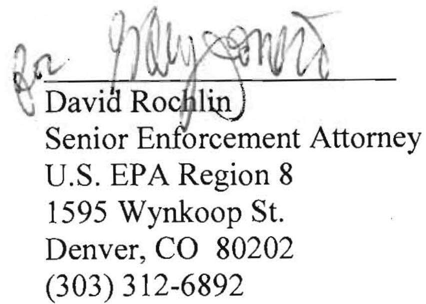

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CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of the attached CONSOLIDATED RESPONSE TO ORDERS TO SHOW CAUSE in the matters, *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 hand delivered on November 18, 2013, to the following address:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334
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Further, I hereby certify that one copy of the attached CONSOLIDATED RESPONSE TO ORDERS TO SHOW CAUSE in the matters, *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), was placed in the United States Postal Service, postage prepaid, and sent via first-class mail on November 18, 2013, to the following addresses:

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Further, I hereby certify that one copy of the attached CONSOLIDATED RESPONSE TO ORDERS TO SHOW CAUSE in the matters, *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), was hand-delivered to the following address:

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