

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS, )  
)  
Petitioner, )  
)  
v. )  
)  
U.S. ENVIRONMENTAL PROTECTION ) No. 11-9527  
AGENCY and LISA JACKSON, )  
Administrator, U.S. EPA, )  
)  
Respondents. )  
\_\_\_\_\_)  
)  
KERR-MCGEE GATHERING, LLC, )  
)  
Intervenor, )  
)  
COLORADO DEPARTMENT OF )  
PUBLIC HEALTH AND )  
ENVIRONMENT, )  
)  
Intervenor. )

**SETTLEMENT AGREEMENT**

WHEREAS on April 25, 2011, WildEarth Guardians (“Guardians”) filed petition for review No. 11-9527 (“petition for review”) in the United States Court of Appeals for the Tenth Circuit;

WHEREAS the petition for review challenges EPA’s final action in which EPA denied Guardians’ administrative petition requesting that EPA object to the issuance of the renewed Title V permit for Kerr-McGee’s Frederick Compressor

Station, notice of which was published at 76 Fed. Reg. 10,361 (February 24, 2011);

WHEREAS on November 17, 2010, Guardians petitioned the Environmental Appeals Board (“EAB”) in connection with EPA’s renewal of a Title V permit issued for the Florida River Compression Facility located on the Southern Ute Indian Reservation in La Plata County, Colorado (Appeal No. CAA 10-04);

WHEREAS EPA and Guardians intend to execute or have executed an administrative settlement agreement settling the matters before the EAB in Appeal No. CAA 10-04 as described in Exhibit A attached to this Agreement (the “proposed EAB administrative settlement agreement”);

WHEREAS the petition for review and EAB Appeal No. CAA 10-04 both involve issues concerning Clean Air Act Title V permitting in the oil and gas industry; and

WHEREAS EPA and Guardians wish to implement this Settlement Agreement (“Agreement”) to avoid protracted and costly litigation and to preserve judicial resources;

NOW, THEREFORE, EPA and Guardians, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. Within fifteen days of the proposed EAB administrative settlement agreement becoming final, EPA and Guardians shall file an appropriate pleading in the Tenth Circuit for the dismissal of Guardians' petition for review with prejudice in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure, with each Party to bear its own costs and attorneys' fees.

2. If the proposed EAB administrative agreement does not become final, WildEarth Guardians' sole remedy in this case is to pursue its petition for review in the Tenth Circuit.

3. EPA and Guardians agree and acknowledge that before this Agreement is final, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). After this Agreement has undergone an opportunity for notice and comment, the Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold his/her consent to the Agreement, in accordance with section 113(g) of the Clean Air Act. If the Administrator or Attorney General elects not to withdraw or withhold his/her consent to the Agreement, EPA shall provide written notice to the Parties as expeditiously as possible, and this Agreement shall become final on the date of such written notice.

Associate Regional Counsel  
EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-2466

Attorneys for Respondent EPA

Dated: \_\_\_\_\_

By: \_\_\_\_\_

SAMANTHA RUSCAVAGE-BARZ

NM Bar No. 23276

WildEarth Guardians

312 Montezuma Ave.

Santa Fe, NM 87501

(505) 988-9126 x1158

[Sruscavagebarz@wildearthguardians.org](mailto:Sruscavagebarz@wildearthguardians.org)

Attorney for Petitioner WildEarth Guardians

A

## SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement” or “Settlement Agreement”) is made by, between, and among the U.S. Environmental Protection Agency, Region 8 (“Region 8”); WildEarth Guardians (“Guardians”); and BP America Production Company (“BP”). Region 8, Guardians, and BP are sometimes referred to jointly as the “Parties” and individually as a “Party.”

### RECITALS

A. BP owns and operates the Florida River Compression Facility (“Florida River”) located on the Southern Ute Indian Reservation in La Plata County, Colorado. On October 18, 2010, Region 8 issued a Clean Air Act (“CAA”) renewal Title V Permit to Operate to BP for Florida River. Permit No. V-SU-0022-05.00.

B. Guardians challenged the Florida River Permit to Operate in a Petition for Review submitted to the Environmental Appeals Board (“Board”) on November 17, 2010. That Petition for Review is docketed as Appeal No. CAA 10-04.

C. BP moved to participate in Appeal No. CAA 10-04 on December 10, 2010. The Board granted BP’s request on December 20, 2010. The Parties have fully briefed the issues. Guardian’s Petition for Review remains pending before the Board.

D. The Parties participated in the Board’s pilot Alternative Dispute Resolution process over two days in Denver, Colorado and conducted subsequent deliberations. The Parties have now agreed to settle the matters in Appeal No. CAA 10-04 and avoid further proceedings.

### AGREEMENT

NOW, THEREFORE, the Parties intending to be bound by this Agreement, hereby incorporate by reference and agree to the accuracy of the above recitals and further agree as follows:

1. Board Notification. No later than 10 days from the date this Settlement Agreement is executed (i.e., signed) by the Parties, the Parties will jointly notify the EAB that they have provisionally reached this Settlement Agreement, will submit the Settlement Agreement to the Board, and request that the Board continue to hold Appeal No. CAA 10-04 in abeyance pending completion of the process described in paragraph 19 of this agreement.

2. Dismissal with prejudice. Guardians agrees that within 15 days after receiving notification from EPA of a fully executed Settlement Agreement in accordance with paragraph 19, Guardians will file a motion with the Board to dismiss with prejudice its pending Petition for Review in Appeal No. CAA 10-04.

3. No further proceedings. Guardians agrees that it shall not hereafter institute any legal or other proceedings against any other Party to challenge, litigate, or appeal BP's Florida River Title V October 18, 2010 Permit to Operate.

4. Region 8 pilot program. Region 8 agrees that within 60 days of fully executing this Settlement Agreement in accordance with paragraph 19, Region 8 will implement an Oil and Gas Part 71 source determination "pilot" program as described in Exhibit A attached to this Settlement Agreement. Exhibit A is not intended to be exclusive of the type of additional information Region 8 will request, but provides examples of the types of additional information that will be requested.

5. Limitations on the pilot program. The pilot program is subject to certain limitations and conditions:

- The pilot program and the information obtained by Region 8 pursuant to the pilot program shall not be construed as altering or providing any

interpretation as to the governing source determination legal standard or other requirement under title V of the CAA.

- The pilot program is limited to applications for new or renewal Title V permits for which Region 8 is the initial Part 71 permitting authority. The program does not impact state permitting actions.
- The pilot program is limited to the earlier of: 1) the first six Title V new or renewal permit applications for which Region 8 is the initial Part 71 permitting authority, or 2) two years from the effective date of the Settlement Agreement.
- Region 8 shall provide an opportunity for non-governmental organizations, industry, and other interested stakeholders to submit individual feedback on the pilot program, focusing on the types of information requested by Region 8 in the permit application process and the process used to request that information.

6. BP takes no position on the pilot program. BP takes no position regarding the nature, purpose, or relevance of the (i) additional information Region 8 will request under the pilot program and (ii) baseline analysis Region 8 will prepare as part of the pilot program.

7. No precedent. It is specifically understood and agreed that this Settlement Agreement is executed for the sole purpose of settling Appeal No. CAA 10-04. No Party shall be deemed to have approved, accepted, or consented to any principle, or statutory or regulatory interpretation which underlies CAA source determinations or any of the matters agreed to herein or raised in connection with the issues settled herein. This Settlement Agreement shall have no



precedential value and shall not be binding on any Party as to any claims, issues, or appeals, other than those specifically addressed herein.

8. Successors and assigns. The terms of this Settlement Agreement shall bind and inure to the benefit of the principals, agents, related or affiliated entities, representatives, successors, predecessors-in-interest, and assigns of the Parties. Any change in ownership or corporate or legal status, including but not limited to any transfer of assets or real or personal property shall in no way alter the status or responsibilities of the Parties under this Settlement Agreement.

9. Authority. The Parties represent and warrant that the person executing the Agreement on each Party's behalf has been duly authorized by all necessary and appropriate action to enter into this Settlement Agreement.

10. Counterparts. This Settlement Agreement may be executed in two or more counterparts. It shall not be necessary that the signatures of all Parties hereto be contained on any one counterpart; each counterpart shall be deemed to be an original, and all counterparts together shall constitute one and the same agreement.

11. Construction. This Agreement shall be construed without regard to the Party or Parties responsible for its preparation, and it shall be deemed to have been jointly prepared by all Parties. Any ambiguity or uncertainty existing herein shall not be interpreted or construed against any Party by virtue of drafting the Agreement. This Agreement shall be liberally construed as effecting a full and final settlement of matters and controversies as described herein. This Settlement Agreement shall be governed and construed under the laws of the United States.

12. Effective date. This Settlement Agreement will be effective when executed by all Parties, subject to final approvals pursuant to paragraph 19.

13. Entire agreement. This Settlement Agreement, including Exhibit A, constitutes the sole and entire understanding of the Parties and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Settlement Agreement.

14. Amendments. The provisions of this Settlement Agreement can be amended or modified only by the written mutual consent of all Parties.

15. Region 8's discretion. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded Region 8 by the Clean Air Act, its implementing regulations, or general principles of administrative law.

16. Funding and Authority. The commitments by Region 8 in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that Region 8 obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations. In addition, no provision in this Agreement shall be interpreted as or constitute a commitment or requirement that EPA take action in contravention of the CAA; the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706; or any other law or regulation.

17. Costs and attorney fees. Each Party shall bear its own costs and attorney fees in this matter.

18. Voluntarily entered. This Settlement Agreement is entered into voluntarily by and between each of the Parties. The Parties agree that this Settlement Agreement has been negotiated by the Parties in good faith, that the settlement of the claims against the EPA in this case will avoid prolonged litigation among the Parties and preserve EAB resources, that this Settlement Agreement is fair, reasonable, and in the public interest in accordance with the Clean Air Act.

19. Public Notice. The Parties agree and acknowledge that before this Agreement is final, the EPA must provide notice in the Federal Register and an opportunity for comment for persons not named as parties or intervenors in this matter pursuant to CAA section 113(g), 42 U.S.C. § 7413(g). After this Agreement has undergone an opportunity for notice and comment, the Administrator shall promptly consider any such written comments in determining whether to withdraw or withhold his/her consent to the Agreement, in accordance with section 113(g) of the CAA. If the Administrator elects not to withdraw or withhold his/her consent to the Agreement, the EPA shall provide written notice to the Parties as expeditiously as possible, and this Agreement shall become final on the date of such written notice.

20. EAB ADR Status Conferences. Throughout the duration of the Pilot Program, the Parties agree to participate in status conference calls with the EAB ADR Settlement Judge and Counsel every six months to discuss the status of the Pilot Program.

21. EPA Right to Withdraw. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise any regulations, guidance, or interpretation EPA may issue in accordance with or on matters related to this Settlement Agreement or to promulgate superseding regulations, guidance, or interpretations, or to limit any right that Petitioners may have to seek judicial review in a subsequent case of any

such action by EPA. If such event renders the Pilot Program moot, EPA shall have the right to withdraw from this Settlement Agreement and shall notify the Parties of its reason for doing so.

22. Notices. Any notices required or provided for by this Settlement Agreement shall be in writing, effective upon receipt, and sent to the below signatories or such other person as the Parties may subsequently identify in writing to the other Parties.

23. Use of Settlement Agreement. Except as provided herein, this Settlement Agreement shall not constitute an admission or evidence of any fact. This Settlement Agreement shall not constitute an admission of wrongdoing, misconduct, or liability on the part of the United States, its officers or any person affiliated with it.

IN WITNESS WHEREOF, the Parties' duly authorized representatives have executed this Settlement Agreement on the dates indicated below.

DATE: \_\_\_\_\_

\_\_\_\_\_  
Sara Laumann  
Steve Odendahl  
Associate Regional Counsel  
EPA Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202-2466  
Telephone: 303.312.6443  
303.312.6219

DATE: \_\_\_\_\_

\_\_\_\_\_  
Kristi Smith  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (MC-2344A)  
Washington, D.C. 20460  
Telephone: 202.564.2068

DATE: \_\_\_\_\_

\_\_\_\_\_  
Samantha Ruscavage-Barz  
WildEarth Guardians  
312 Montezuma Ave.  
Santa Fe, NM 87501  
Telephone: 505.988.9126 x.1158  
Facsimile: 505.989.8623

DATE: \_\_\_\_\_

\_\_\_\_\_  
Timothy W. Harrington  
BP America Production Company  
Regional President, NAG  
501 WestLake Park Boulevard  
Houston, Texas 77079-2607  
Telephone: 281.366.3077

DATE: \_\_\_\_\_

\_\_\_\_\_  
Jeffrey C. Conrad  
BP America Inc.  
501 Westlake Park Boulevard  
Houston, Texas 77079-2607  
Telephone: 281.366.1859

As to form

DATE: \_\_\_\_\_

\_\_\_\_\_  
Charles L. Kaiser  
John R. Jacus  
Charles A. Breer  
Davis Graham & Stubbs LLP  
1550 Seventeenth Street, Suite 500  
Denver, Colorado 80202  
Telephone: 303.892.9400  
Facsimile: 303.893.1379

As to form

## SETTLEMENT AGREEMENT – EXHIBIT A

**Title:** EPA Region 8 Oil and Gas (O&G) Part 71 Source Determination Pilot Program

**Purpose:** To conduct a pilot program for the purpose of studying, improving, and streamlining O&G source determinations in new or renewal Title V permits for which Region 8 is the initial Part 71 permitting authority.

**Timeframe:** The pilot program is to be conducted for 2 years or through six initial or renewal Part 71 permit actions, whichever comes first.

### General Process:

- 1) Consistent with Part 71 application information submittals, the Region will request that all information be submitted under certification of truth, accuracy, and completeness by the responsible official. EPA also plans to work with applicant to minimize or eliminate the submittal of CBI claimed information, as appropriate.
- 2) The Region plans to send a request for general information on a source determination screening form (or similar mechanism) to O&G applicants seeking a new or renewal Title V permits for which Region 8 is the initial Part 71 permitting authority . (See outline below for proposed content of the source determination screening form.)
- 3) The Region will apply its professional judgment and determine, based on the general information received, whether additional source determination analysis is necessary.
- 4) If the Region determines that additional analysis is warranted, the Region will request more detailed information from the applicant, as necessary.
- 5) If the Region determines that a written source determination analysis is necessary, the Region will prepare it prior to preparing the draft Part 71 permit.
- 6) If the Region prepares a written source determination analysis, the Region will include it in the Part 71 permit docket.

### Component A – Examples of Information the Region Plans to Request Using Screening Form

1. Emission source information for gas field components within the field owned/operated by applicant. Components include, but are not limited to, well sites, tank batteries, compressor stations, gas plants, etc.
  - a. Applicant System Map:
    - i. Identify gathering pipelines owned/operated and/or used by the applicant; and
    - ii. Identify components owned/operated by the applicant.
  - b. SIC code for each component;
  - c. Description of activities for each component;

- d. Latitude / Longitude for each component;
  - e. Proximity of component to facility location in permit application; and
  - f. Location factors for components (such as surface owner agreements, spacing orders, lease / NEPA requirements, terrain, and/or proximity to existing structures).
2. Gas flow in field
- a. Simple process flow diagram of gas flow among field components owned/operated by and/or used by the applicant;
  - b. General description of gathering pipeline systems in gas field. Are they owned/operated exclusively by the applicant to service components owned/operated exclusively by the applicant or are they a shared resource with third party companies? Do other third party components (i.e. well sites, tank batteries, etc.) send gas to applicant owned/operated gathering pipelines and/or does gas from applicant owned/operated gathering pipelines feed to other third party compressor stations and processing facilities?
  - c. General description of factors influencing percentage of gas flow to compression and processing facilities such as pressure, contractual obligations, gas custody, etc.;
  - d. General description of gas flow from wells to all other field components under control by permittee; and
  - e. General description of system redundancy, if present, if a component goes offline. What emission sources, if any, are capable of operating independently from other components?

Component B: Procedures for Building on Prior Determinations and Information Submitted.

1. Send a request to the applicant for an update to the information the Region may already have regarding operations in the field.
  - a. Allow the applicant to submit information using previously acknowledged facts already provided on an existing screening form or through an existing source determination analysis in the same field.
  - b. Require applicant to specify whether they want the Region to rely on previously acknowledged facts and what those facts are.
  - c. Require the applicant to confirm what, if any, previously acknowledged data continues to accurately represent operations in the field.
2. Review the information provided (either previously acknowledged or new) and determine whether an additional source determination analysis is necessary for the source.
3. If necessary, conduct the additional source determination analysis using the previously acknowledged data and any new information regarding that source's operations in the field.