

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)
)
ROADWAY SURFACING, INC.) **Docket No. CWA-05-2002-0004**
)
Respondent)

AND

In the Matter of)
)
ANTHONY I. FORSTER) **Docket No. CWA-05-2002-0005**
)
Respondent.)

ORDER CONSOLIDATING RELATED ACTIONS

Respondent Anthony Forster, through counsel, filed a “Motion to Consolidate for Hearing,” dated July 2, 2002. That motion sought consolidation of the above-captioned cases.¹

Complaints in both of the above-captioned matters ² were filed on March 21, 2002, and they arise out of the same set of alleged facts.³ In particular, each complaint alleges there was a discharge of pollutants into navigable waters in violation of the Clean Water Act, although the *Forster* Complaint alleges that Roadway Surfacing filled navigable waters at the direction of Forster whereas the *Roadway Surfacing* Complaint alleges that Forster “caused or allowed” the filling of those navigable waters. Complainant seeks a penalty of \$75,000 in the Forster case but seeks a penalty of \$10,000 against Roadway Surfacing. Forster’s motion states that consolidating these two matters for hearing would serve administrative economy by avoiding

¹By Order of the Chief Administrative Law Judge, on July 22, 2002 the *Roadway Surfacing* matter was transferred from Judge Charneski to the undersigned, who is the presiding judge in the *Forster* case.

²Amended Complaints were filed in both cases on April 4, 2002.

³It should be noted that different legal counsel, from distinct law firms, are representing Forster and Roadway. The Motion advises that Forster’s counsel has conferred with counsel for Roadway regarding the motion and relates that the latter’s counsel supports the motion and notes that Roadway’s counsel also requested consolidation of the cases.

having to call the same witnesses to appear and testify as to the same set of circumstances on two separate occasions.

In response, Complainant voices no objection to a consolidation for the limited purpose of conducting any oral evidentiary hearing, and it admits that the violations alleged “. . . in each of these cases arise out of the same factual basis”⁴ However, Complainant objects to consolidation for any further purpose, expressing concern that full consolidation would preclude the Court from being able to apportion separate and appropriate penalties through individual orders addressed to each respondent. Complainant asserts that the role of each respondent in this matter “differs significantly” and notes that the difference in the penalties sought reflects this difference.

Under the rules governing these proceedings, an Administrative Law Judge may consolidate any or all matters at issue in two or more proceedings where: (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. 40 C.F.R. § 22.12(a).

Overall, as the parties acknowledge, the above-captioned matters concern the same set of alleged facts, but differ as to the role of each respondent regarding the violations. Complainant’s prehearing exchanges in both the *Forster* and *Roadway* matters identify many of the same witnesses. Consolidation of these related matters is appropriate. Although Complainant expressed concern that consolidation for all purposes might interfere with the Court’s power to apportion separate penalties for each Respondent, there is nothing unique about multiple respondents being named in a complaint and nothing to prevent individualized penalties in these circumstances, should liability be established. Each of the factors listed in 40 C.F.R. § 22.12(a) are satisfied. Accordingly, the above-captioned matters are consolidated for purposes of hearing.

So ordered.

William B. Moran
United States Administrative Law Judge

Dated: September 18, 2002
Washington, D.C.

⁴ “Response of the Administrator’s Delegated Complainant to Respondent’s Motion to Consolidate for Hearing” at 1.