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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
UNITED STATES AIR FORCE)	DOCKET NO. UST- 6- 98-
002- AO- 1		
TINKER AIR FORCE BASE,)	
)	
)	
RESPONDENT)	

ORDER DENYING COMPLAINANT'S MOTION TO CONSOLIDATE

The Complainant's Motion to Consolidate the above-captioned proceeding with another separately docketed proceeding before the undersigned (Matter of United States Air Force Tinker Air Force Base, Docket Number UST-6-98-002-AO-1, and United States Air Force Tinker Air Force Base, Docket Number CAA-R6-P-9-OK-98040) is Denied. ⁽¹⁾ The motion is opposed by the Respondent.

On March 10, 1998, the Chief Administrative Law Judge designated the undersigned to preside in the above-captioned matter (United States Air Force Tinker Air Force Base, Docket Number UST-6-98-002-AO-1). This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6991e, and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq. On March 24, 1998, the undersigned entered a Prehearing Order in the above cited matter directing the parties to submit their prehearing exchange in seriatim manner, commencing with the Complainant's initial submission on June 12, 1998. Pursuant to the Prehearing Order, the parties have submitted their prehearing exchange. ⁽²⁾

On November 17, 1998, the Chief Administrative Law Judge designated the undersigned to preside in the Matter of United States Air Force Tinker Air Force Base, Docket

Number CAA-R6-P-9-OK-98040). This matter arises under the authority of Section 113(d) of the Clean Air Act, as amended, 42 U.S.C. § 7413(d), and also is governed by the Rules of Practice.

In the Complainant's Motion to Consolidate, the Complainant maintains that consolidation of the two proceedings in question is warranted pursuant to Section 22.12 of the Rules of Practice, 40 C.F.R. § 22.12. In this regard, the Complainant argues that there exists common parties or common questions of fact or law, that consolidation would expedite and simplify consideration of the issues, and that consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

Specifically, the Complainant alleges that the parties to both actions are the same and involve violations at the same facility discovered at an inspection in May 1997. The Complainant argues that both actions involve common issues of law and that the authority of the Complainant to assess administrative penalties against a federal agency is in issue in both cases. The Complainant contends that both parties will save Government time, resources, and travel funds by holding one hearing and, therefore, will not be harmed by consolidation.

The Respondent opposes consolidation of the two proceedings in question. The Respondent maintains that the motion to consolidate is premature and that the two cases do not meet the requirements for consolidation under Section 22.12 of the Rules of Practice. Specifically, the Respondent maintains that the issue of jurisdiction in the Underground Storage Tank ("UST") case (Docket Number UST-6-98-002-AO-1) is not yet settled and that judicial economy favors waiting until after the resolution of jurisdiction to decide upon consolidation.

With regard to the requirements of Section 22.12 of the Rules of Practice, the Respondent contends that although there are common parties, there are not common questions of law or fact between the two cases. In essence, the Respondent asserts that in the UST case it strongly contests the Complainant's alleged authority to impose administrative fines and the existence of jurisdiction of this forum to hear the UST Complaint. In contrast, the Respondent states that it does not contest the authority of the Complainant to propose fines and penalties for Clean Air Act ("CAA") violations or this tribunal's jurisdiction to hear the CAA case. In addition, the Respondent asserts that the violations alleged under the UST provisions bear no similarity to the violations alleged under Section 113(d) of the CAA, and that the regulations allegedly violated in the UST Complaint are completely different from the regulations charged in the CAA Complaint. The Respondent maintains that the allegations of fact under the UST Complaint and the CAA Complaint bear no similarity to each other.

The Respondent contends that consolidation would not simplify or expedite consideration of the two cases. In particular, the Respondent maintains that as it is not contesting this tribunal's jurisdiction to hear the CAA case, that case may proceed without delay, independent of and unaffected by the jurisdictional issues in the UST case. The Respondent urges that consolidation would not simplify the hearing process because the two cases allege different facts and present different issues of law. The Respondent anticipates that the two cases will have different witnesses and that the documentary evidence will not be the same in both cases.

Finally, the Respondent asserts that its rights will be adversely affected by consolidation of the two cases. The Respondent argues that consolidation of the cases would bind the UST case to the schedule of the CAA case, which more likely can proceed at a quicker pace. The Respondent points out that the Complainant instituted these proceedings by filing its Complaints separately, months apart. The Respondent argues that the Complainant now should not be heard to complain about the inefficiency of the separate proceedings that it created by its own actions.

I agree with the Respondent's position that consolidation of the two proceedings in question is not warranted pursuant to the regulatory provision governing the consolidation of proceedings found at Section 22.12 of the Rules of Practice. Specifically, I find that the file before me does not adequately support the

findings that there exists common questions of fact or law, consolidation would expedite and simplify consideration of the issues, and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Accordingly, the Complainant's Motion to Consolidate is Denied.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 12-17-98
Washington, DC

1. The Complainant's Motion to Consolidate and the Respondent's Response to Motion to Consolidate were filed prior to the undersigned being designated as the Presiding Officer in the proceeding docketed under Docket Number CAA-R6-P-9-OK-98040.

2. The Respondent's Motions for Dismissal and for Summary Judgment and the Complainant's Motion to Strike and Disregard filed in the proceeding docketed under Docket Number UST-6-98-002-AO-1 are pending.

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