

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)	Docket No. RCRA-08-2008-0001
)	Docket No. RCRA-08-2008-0002
The Three Affiliated Tribes)	Docket No. RCRA-08-2008-0003
and Sharon Jacobs, individually,)	
Highway 8 Convenience Store,)	
)	
The Three Affiliated Tribes)	MEMORANDUM IN SUPPORT
and Yolanda Bears Tail, individually,)	OF MOTION TO CONSOLIDATE
White Shield Ree Store,)	
)	
The Three Affiliated Tribes)	
and Dave Williams, individually,)	
West Dakota Service,)	
)	
Respondents.)	

Introduction

This memorandum is filed in support of a motion brought by Complainant, the United States Environmental Protection Agency, Region 8 (EPA), upon consultation with and approval by Damon K. Williams, Attorney for the Three Affiliated Tribes (Tribes), to consolidate three administrative actions involving separate facilities owned by the Tribes. Consolidation of these matters will simplify and expedite resolution of these pending actions by enabling the parties to file a single Consent Agreement fully resolving the violations alleged in each separate action.

Background

On December 14, 2007, EPA filed three separate administrative complaints with penalties against the Tribes and individual facility representatives for alleged underground storage tank (UST) violations at the Highway 8 Convenience Store, White

Shield Ree Store, and West Dakota Service facilities. The complaints allege that the facilities are owned by the Three Affiliated Tribes and operated by Sharon Jacobs, Yolanda Bears Tail, and Dave Williams, respectively.

Mr. Williams responded to the complaints on behalf of the Tribes and the named individuals by filing answers in each separate action on February 1, 2008. Mr. Williams and Mr. Elton Spotted Horse, the Tribe's Environmental Director, have represented both the interests of the Tribes and the named individuals in several informal settlement discussions.

On April 25, 2008, EPA and the Tribes on behalf of all named respondents reached a settlement-in-principle concerning the alleged violations. The proposed settlement includes a civil penalty and performance of specified compliance activities to fully resolve the alleged violations. The settlement wholly is to be paid and performed by the Tribes with no requirements or obligations imposed on the named individual respondents. The parties seek to consolidate these actions to file a single Consent Agreement fully resolving the violations alleged in each separate complaint.

Standard for Consolidation of Two or More Proceedings

The regulation governing consolidation of two or more matters at issue in two or more proceedings subject to the Consolidated Rules of Practice is found at Section 22.12(a) of the Rules of Practice, 40 C.F.R. § 22.12(a). Section 22.12(a) of the Rules of Practice provides as follows:

The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to the Consolidated Rules of Practice where: there exist common parties or 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.

40 C.F.R. § 22.12(a) provides that proceedings subject to subpart I of the Rules of Practice may be consolidated only upon the approval of all parties.

Argument

The parties and issues involved in the above-referenced proceedings satisfy the standard for consolidating two or more proceedings subject to the Rules of Practice and may be consolidated by the Presiding Judge. The Three Affiliated Tribes, as legal owner of the USTs at issue, is named as a Respondent in all three pending administrative actions. The attorney for the Tribes also has represented the named individuals. There is no separate proceeding involving other parties whose rights could be affected by consolidating these actions.

Based on the Respondents' answers and informal settlement discussions, Mr. Williams represents both the interests of the Tribes and the named individuals in the above-referenced matters. EPA has had no interaction with any attorney other than Mr. Williams concerning the interests of Ms. Jacobs, Ms. Bears Tail and Mr. Williams. The proposed settlement will address all alleged violations, involving each facility. Mr. Williams, on behalf of the Tribes and named individuals, affirmatively supports consolidation. There are no other parties engaged in separate proceedings that may be unduly prejudiced by consolidation of these proceedings.

In addition to the same representatives, the pending actions share common issues of fact and law associated with the underground storage tank regulations at 40 C.F.R. Part 280 Subpart D and Section 9006 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e.

A review of administrative actions wherein the Presiding Officer previously has considered consolidation supports combining the three proceedings at issue. *In the Matter of: C.G.N.B. Associates, Dr. Robert T. Greenfield, Dr. Sylvester C. Booker, and Ross Clark Trust, Respondents, AND In The Matter of: Willoughby Real Estate Col, Inc. Respondent*, Docket Nos. TSCA-3-2000-0020 and TSCA-3-2000-0022, 2001 EPA ALJ LEXIS 35 (July 23, 2001), the Presiding Officer granted a motion to consolidate based on circumstances similar to those in the above-referenced proceedings, e.g. common parties and questions of fact or law existed and the respondents approved of consolidating the actions. Because of the commonality of parties and issues, the Presiding Officer *In the Matter of: C.G.N.B. Associates* stated that “[i]n these circumstances, it is concluded that consolidation is appropriate, as it will expedite and simplify consideration of the issues, and it does not appear that consolidation would result in prejudice to any of the parties.” *Id.*

The Presiding Officer similarly found consolidation appropriate *In the Matter of: Safety-Kleen (Grassy Mountain), Safety-Kleen (Aragonite), Safety-Kleen (Clive), PPM, Inc., and Safety-Kleen (PPM, Inc.)*, Docket Nos. TSCA-8-99-03; TSCA-8-99-06; TSCA-8-99-08; TSCA-8-99-09; TSCA-8-99-12; TSCA-8-09-14; TSCA-8-09-15; TSCA-8-99-16; TSCA-8-99-17; TSCA-8-99-19; TSCA-8-99-20; TSCA-8-99-21; TSCA-8-99-22, 1999 EPA ALJ LEXIS 86 (November 18, 1999). *In the Matter of: Safety-Kleen*, the Presiding Officer found in favor of consolidating separate administrative actions filed against several facilities on the bases that they were owned by or affiliated with the same company and that the alleged violations in each proceeding pertained to the Toxic Substances Control Act. The Presiding Officer determined based on circumstances

similar to those in the above-referenced actions that consolidation was appropriate and would expedite and simplify consideration of the issues.