

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 2008 JUN 10 P. 3:40
REGION 8

IN THE MATTER OF:)	Docket Nos. CWA-08-2007-0026
)	CWA-08-2007-0025
Burke Oil Company Inc.)	
1200 East King Street)	
Chamberlain, SD 57325-2103)	
Chamberlain Bulk Plant Facility)	MEMORANDUM IN SUPPORT OF
)	MOTION TO CONSOLIDATE
)	
AND)	
)	
Burke Oil Company Inc.)	
d/b/a Presho Oil Company)	
1200 East King Street)	
Chamberlain, SD 57325-2103)	
Presho Oil Facility)	
)	
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 Respondents' counsel, to consolidate two administrative actions involving separate facilities owned and operated by the same company.

Background

On September 27, 2007, EPA filed a Class II administrative action against Burke Oil Company Inc. (Burke Oil) (doing business as Presho Oil Company) (hereafter referred to as "Class II action") under section 311(b)(6)(B)(ii) of the Clean Water Act (Act), as amended by the Oil Pollution Act of 1990, 33 U.S.C. § 1321(b)(6)(B)(ii). Docket no. CWA-08-2007-0025. The Class II action alleges that the Presho Oil facility owned and/or operated by Burke Oil

(d/b/a/ Presho Oil Company) failed to comply with the oil pollution prevention regulations set forth at 40 C.F.R. Part 112, specifically the spill prevention, control and countermeasure (SPCC) requirements applicable to non-transportation onshore facilities. Also on September 27, 2007, EPA filed a Class I administrative action against Burke Oil (hereafter referred to as "Class I action") under section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), alleging similar SPCC violations at the Chamberlain Bulk Plant facility owned and/or operated by Burke Oil. Docket No. CWA-08-2007-0026. In a conversation with Respondents' counsel on January 8, 2008, following his review of the draft motion and memorandum support, the filing of these documents was approved on the Respondents' behalf.

The Class II action proposing a civil penalty of \$34,948 was assigned upon filing to the Office of the Administrative Law Judges for adjudication. On or before November 13, 2007, EPA and Burke Oil (hereafter referred to collectively as "the parties") accepted the Office of the Administrative Law Judges' offer to participate in Alternative Dispute Resolution (ADR) for the Class II action. The initial ADR session tentatively is scheduled to commence the week of January 14, 2008. The Class I action was assigned to the Regional Judicial Officer based on a proposed civil penalty of \$19,273. In accordance with section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), a hearing on a proposed penalty of less than \$25,000 (or, for violations occurring after March 15, 2004, \$32,500 pursuant to the Debt Collection Improvement Act of 1996) is not subject to section 554 or 556 of Title 5 but rather to a reasonable opportunity to be heard and to present evidence.

The purpose of the Motion to Consolidate and the Memorandum in Support is to

expedite consideration and ultimately resolution of both proceedings by consolidating them into one administrative action.

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. 40 C.F.R. § 22.12(a) provides further that where a proceeding subject to subpart I is consolidated with a proceeding to which subpart I does not apply, the procedures of subpart I shall not apply to the consolidated proceedings.

Argument

The parties and issues involved in the above-referenced proceedings clearly satisfy the standard for consolidating two or more proceedings subject to the Rules of Practice and may be consolidated by the Presiding Officer. Burke Oil is the owner and operator of the Chamberlain Bulk Plant Facility at issue in Docket No. CWA-08-2007-0026. Doing business as Presho Oil Company, Burke Oil also is the owner and operator of the Presho Oil Facility in Docket No. CWA-08-2007-0025. Both actions name Burke Oil as the respondent. The same attorney and

company representative is participating in both actions on behalf of Burke Oil. The two proceedings also share common issues of fact and law pertaining to section 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C), and 40 C.F.R. Part 112. Finally, and of paramount importance, consolidation would not unduly prejudice any other parties engaged in separate proceedings because Burke Oil is the only interested party involved in addition to Complainant.

A review of administrative actions wherein the Presiding Officer previously has considered consolidation supports combining the two 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-8-99-14; TSCA-8-99-15; 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.