UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Burke Oil Company, Inc., d/b/a	)	**DOCKET NO. CWA-08-2007-0025**
Presho Oil Company	)	
	)	
Burke Oil Company, Inc.	)	**DOCKET NO. CWA-08-2007-0026**
	)	
RESPONDENTS	)	

ORDER GRANTING MOTION TO CONSOLIDATE PROCEEDINGS
AND
PREHEARING ORDER

As you previously have been notified, I have been designated by two separate April 10, 2008, Orders of the Chief Administrative Law Judge to preside in the above captioned matters. These civil administrative proceedings arise under the authority of Section 311(b)(6)(B)(i)-(ii) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6)(B)(i)-(ii), as amended by the Oil Pollution Act of 1990. The proceedings are governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

The United States Environmental Protection Agency Region VIII ("Complainant") filed a Complaint against Burke Oil Company, Inc. ("Respondent") in the proceeding entitled *In the Matter of Burke Oil Company, Inc., d/b/a Presho Oil Company*, Docket No. CWA-08-2001-0025, ("*Presho Oil* Complaint") on September 27, 2007. This matter is a CWA class II civil administrative penalty proceeding that proposes administrative penalties against Respondent in the amount of $34,948. *Presho Oil* Compl. at 5; *see* 33 U.S.C. § 1321(b)(6)(B)(ii). Section 311(b)(6)(B)(ii) of the CWA mandates that, except as otherwise provided in that subsection, a class II civil penalty shall be assessed and collected only after notice and opportunity for a hearing on the record is provided in accordance

with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554.

Concurrently, Complainant filed a Complaint against Respondent in the proceeding entitled *In the Matter of Burke Oil Company, Inc.*, Docket No. CWA-08-2001-0026, ("*Chamberlain Bulk* Complaint") on September 27, 2007.[1/] This matter is a CWA class I civil administrative penalty proceeding that proposes administrative penalties against Respondent in the amount of $19,273. *Chamberlain Bulk* Compl. at 5; *see* 33 U.S.C. § 1321(b)(6)(B)(i). Like class II civil penalties under the CWA, class I civil penalties may only be assessed after notice and opportunity for a hearing is provided to the person against whom the penalty is proposed. 33 U.S.C. § 1321(b)(6)(B)(i). However, unlike class II civil penalties, the CWA does not require that hearings concerning class I civil penalties be subject to section 554 or 556 of the APA; the CWA only requires that such hearings provide a reasonable opportunity to be heard and to present evidence. *Id*.

Complainant sent Respondent both the *Presho Oil* Complaint and the *Chamberlain Bulk* Complaint as enclosures under a single cover letter dated September 27, 2007. In response, Respondent filed a Request for Hearing and a Request for Settlement Conference in the *Presho Oil* proceeding ("*Presho Oil* Answer") as well as a Request for Hearing and a Request for Settlement Conference in the *Chamberlain Bulk* proceeding ("*Chamberlain Bulk* Answer"), each dated October 19, 2007, with the Regional Hearing Clerk (collectively "Respondent's Answers"). Subsequently, the *Presho Oil* class II civil administrative penalty proceeding was assigned to the United States Environmental Protection Agency's Office of Administrative Law Judges ("OALJ") for adjudication.[2/] In contrast, pursuant to

---

[1/] "Respondent" refers to Burke Oil Company, Inc., who is identified as the respondent in both proceedings (*Presho Oil Facility* and *Chamberlain Bulk Facility*). Although the two proceedings concern two separate facilities owned and operated by Respondent, neither party has indicated that Respondent should be treated as two separate respondents. If such question or concern should arise, the respondents shall be individually identified for evidentiary purposes, as well as for purposes of establishing liability and the appropriateness of a penalty, if any.

[2/] As *Presho Oil* is a CWA class II civil administrative penalty proceeding governed by Section 554 of the APA, an Administrative Law Judge ("ALJ") holds the authority to preside over and rule on all motions that are made after Respondent filed its *Presho Oil*

(continued...)

the Rules of Practice, the Regional Judicial Officer ("RJO") remained as the Presiding Officer in the *Chamberlain Bulk* class I civil administrative penalty proceeding. 40 C.F.R. §§ 22.16(c), 22.51; *see* 33 U.S.C. § 1321(b)(6)(B)(i).

In letters dated October 30, 2007, the undersigned's office, the OALJ, through its Chief ALJ, offered the parties the option to participate in an Alternative Dispute Resolution ("ADR") process concerning the allegations as alleged in the *Presho Oil* Complaint. Respondent accepted participating in ADR for the *Presho Oil* proceeding by letter dated November 9, 2007, and expressed its desire to similarly participate in ADR with regard to the *Chamberlain Bulk* proceeding.[3/] Complainant accepted participating in ADR for the *Presho Oil* proceeding by e-mail letter dated November 13, 2007. On November 15, 2007, the Chief ALJ issued an Order Initiating Alternative Dispute Resolution Process and Appointing a Neutral for the *Presho Oil* proceeding.[4/]

On January 10, 2008, upon consultation with and concurrence by Respondent's Counsel, Complainant filed a Motion to Consolidate and a Memorandum in Support of Motion to Consolidate pursuant to 40 C.F.R. § 22.12(a). The Motion to Consolidate was addressed to both the RJO presiding over the *Chamberlain Bulk* proceeding and the ALJ presiding over ADR in the *Presho Oil* proceeding. In this Motion, Complainant seeks to consolidate the *Presho Oil* proceeding (class II penalty) with the *Chamberlain Bulk* proceeding (class I penalty) stating, "because the facilities subject to the administrative actions . . . are owned and operated by the same company, consolidating the cases into one administrative action would expedite and simplify consideration of the issues and not adversely affect the rights of parties otherwise engaged in separate proceedings." M. to Consol. at 1. Complainant further argues that consolidation of the two proceedings is appropriate because both actions involve the same attorney and company representative

---

[2/] (...continued)
Answer to the *Presho Oil* Complaint, with the exception of any interlocutory review under 40 C.F.R. § 22.29(c). 40 C.F.R. § 22.16(c); *see* 33 U.S.C. § 1321(b)(6)(B)(ii).

[3/] As discussed, *supra*, at the time Respondent made this ADR request, the record before me does not reflect that the OALJ had possession of the *Chamberlain Bulk* proceeding, a CWA class I civil penalty proceeding.

[4/] The Order designated Judge Spencer T. Nissen as the Neutral ALJ assigned to initiate and conduct the ADR process.

participating on behalf of Respondent, because both actions share common issues of fact and law pertaining to CWA Section 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C), and 40 C.F.R. part 112, and because Respondent is the only interested party involved in addition to Complainant. Mem. in Support of M. to Consol. at 3-4.

On January 17, 2008, the RJO issued an Order granting the Motion to Consolidate. As such, the RJO forwarded the *Chamberlain Bulk* proceeding to the OALJ, noting that the Rules of Practice make it clear that when a proceeding subject to the APA, such as a CWA class II penalty proceeding, is consolidated with a proceeding not subject to the APA, such as a CWA class I penalty proceeding, the consolidated proceedings "must be adjudicated by an Administrative Law Judge presiding over the Class II penalty proceeding." Order on M. to Consol. at 2; *see* 40 C.F.R. § 22.12(a). On January 22, 2008, the Chief ALJ issued an Order Initiating Alternative Dispute Resolution Process and Appointing a Neutral for the *Chamberlain Bulk* proceeding, assigning it to the same Neutral conducting ADR for the *Presho Oil* proceeding.

The ADR process for both proceedings was terminated on April 9, 2008, with no settlement having been reached. The matter was assigned to the undersigned the following day.

The text of the CWA provides, in pertinent part, that class II civil administrative penalty proceedings, such as the *Presho Oil* proceeding, are accorded the protections provided under the APA, while class I civil administrative penalty proceedings, such as the *Chamberlain Bulk* proceeding, need only provide the respondent with a reasonable opportunity to be heard and to present evidence. 33 U.S.C. 1321(b)(6)(B)(i)-(ii). Under the APA, an ALJ, not an RJO, must preside over adjudications in proceedings governed by the APA. 5 U.S.C. § 556; see 5 U.S.C. §§ 554, 3105.

Section 22.16(c) of the Rules of Practice generally designates the Presiding Officer's authority to rule on motions. Under this section, in CWA class II penalty proceedings (APA proceedings) the RJO holds authority to preside over and rule on all motions made before an answer to the complaint is filed, while the ALJ holds authority to preside over and rule on all motions made after an answer to the complaint is filed, with the exception of any interlocutory review. 40 C.F.R. § 22.16(c); *see* 33 U.S.C. § 1321(b)(6)(B)(ii). Conversely, under Section 22.16(c), for CWA class I penalty proceedings (non-APA proceedings), the Rules of Practice provide the RJO with authority to preside over and rule on all motions made both prior to and after the answer is filed. 40 C.F.R. § 22.16(c); *see* 33 U.S.C. § 1321(b)(6)(B)(i). In fact, the Rules of Practice explicitly provide that in Subpart I administrative proceedings, which are not governed by the APA, "[t]he Presiding Officer shall be a Regional Judicial Officer . . . [who] shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed." 40 C.F.R. § 22.51.

Section 22.12(a) of the Rules of Practice governs consolidation of matters at issue in two or more proceedings. Specifically, Section 22.12(a) of the Rules of Practice in its entirety 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 these 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. Proceedings subject to Subpart I of this part [*i.e.* administrative proceedings not governed by Section 554 of the APA] may be consolidated only upon the approval of all parties. *Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.*

40 C.F.R. § 22.12(a)(emphasis added).

Although the Rules of Practice explicitly contemplate the consolidation of APA-governed proceedings with non-APA-proceedings, and clearly state that the procedures followed in such consolidated proceedings should comply with the APA, the Rules of Practice do not specify which Presiding Officer has the authority to rule on such motions for consolidation.

While Sections 22.16(c) and 22.51 of the Rules of Practice provide that the RJO has authority to rule on post-answer motions in a CWA class I penalty proceeding, Section 22.12(a) provides that the RJO has only limited authority in CWA class II penalty proceedings, as the RJO may only rule on pre-answer motions in these proceedings. In the instant case, the Motion to Consolidate was made after the Respondent filed Respondent's Answers, *i.e.* it was made at a time when an ALJ presided over the class II *Presho Oil* proceeding and the RJO presided over the class I *Chamberlain Bulk* proceeding.

Because the Motion to Consolidate seeks to consolidate a proceeding subject to subpart I of the Rules of Practice (*i.e.* a non-APA proceeding) with a proceeding not subject to subpart I (*i.e.* an APA proceeding), the Rules direct that "the procedures of subpart I ... shall not apply to the consolidated proceeding." 40 C.F.R. § 22.12(a). As discussed, *supra*, only an ALJ may preside over proceedings subject to the APA in accordance with APA procedures. Thus, while neither the text of the CWA nor the Rules of Practice specify which Presiding Officer has the authority to

rule on motions seeking to consolidate a class II civil administrative penalty proceeding with a class I civil administrative penalty proceeding, because ruling on such a motion requires applying an analysis to an APA proceeding, I find that it is more appropriate for an ALJ to rule upon the Motion to Consolidate. Therefore, although the Motion to Consolidate in the instant case was addressed to and ruled upon by the RJO, I treat the Motion to Consolidate as pending before me. Based on the parties' representations, the Motion to Consolidate is hereby **GRANTED**.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 22.18(b), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

The parties engaged in settlement discussions through their participation in ADR for both the *Presho Oil* proceeding and the *Chamberlain Bulk* proceeding. However, the ADR period for these proceedings expired and ADR was terminated on April 9, 2008. Since that time, I have not received any information or correspondence from either party that indicates they have reached a settlement. As such, the parties shall strictly comply with the requirements of this order and prepare for hearing. The parties are advised that extensions of time will not be granted absent a showing of good cause. The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the prehearing requirements or to meet the schedule set forth in this Prehearing Order. Of course, the parties are encouraged to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange.

The following requirements of this Order concerning prehearing exchange information are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party shall submit:

   (a) the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called; and

   (b) copies of all documents and exhibits which each party intends to introduce into evidence at the

hearing. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (*e.g.*, "Complainant's Exhibit 1"); and

(c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

See Sections 22.19(a),(b),(d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a),(b),(d); *see also* Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. Complainant shall submit a statement explaining in detail how the proposed penalties were determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalties.

3. Respondent shall submit a statement explaining why the proposed penalties should be reduced or eliminated. If Respondent intends to take the position that it is unable to pay the proposed penalties or that payment will have an adverse effect on its ability to continue to do business, Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.

4. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

The prehearing exchange delineated above shall be filed *in seriatim* manner, according to the following schedule:

June 3, 2008 -	Complainant's Initial Prehearing Exchange
July 2, 2008 -	Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence

July 16, 2008 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In its *Presho Oil* Answer to the *Presho Oil* Complaint, Respondent exercised its right to request a hearing under Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), pursuant to Section 554 of the APA, 5 U.S.C. § 554. Moreover, in its *Chamberlain Bulk* Answer to the *Chamberlain Bulk* Complaint, Respondent exercised its right under Section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(i), to request a hearing in which Respondent would have a reasonable opportunity to be heard and to present evidence. If the parties cannot settle with a Consent Agreement and Final Order a hearing will be held on the consolidated *Presho Oil* proceeding and *Chamberlain Bulk* proceeding in accordance with Section 556 of the APA, 5 U.S.C. § 556. *See* 40 C.F.R. § 22.12(a).[5/]

Section 556(d) of the APA provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondent has the right to defend itself against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defense. If Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its prehearing

---

[5/] The *Presho Oil* Complaint alleges violation of Section 311(b)(6)(A) of the CWA, 33 U.S.C. § 1321(b)(6)(A), and proposes a civil administrative penalty against Respondent in the amount of $34,948. A hearing on the record in accordance with Section 554 of Title 5 shall be held in civil penalty cases under Section 311 (b)(6)(B)(ii) of the CWA (class II civil penalty). Section 311 (b)(6)(C) of the CWA provides that before issuing an order assessing a class II civil penalty, the Administrator shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order and that any person who comments on a proposed assessment of a class II penalty shall be given notice of any hearing and of the order assessing such penalty. *See* 40 C.F.R. § 22.45. The file for the *Presho Oil* class II civil administrative penalty proceeding before me contains no documentary proof of the publication of the public notice or the filing of comments, if any, described above. Moreover, because the *Presho Oil* class II civil penalty proceeding is consolidated with the *Chamberlain Bulk* class I civil administrative penalty proceeding, notice, as described above, must now similarly be provided in the *Chamberlain Bulk* proceeding. 40 C.F.R. § 22.12(a).

exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. *See* Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all other parties. The parties are advised that E-mail correspondence with the Administrative Law Judge is not authorized. *See* Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a). The prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001
Telephone: 202-564-6281

_____
Barbara A. Gunning
Administrative Law Judge

Dated: April 23, 2008
Washington, DC