UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Alyeska Pipeline Service Co.,	)	Docket Nos. CAA-1091-10-15-113
	)	CAA-1092-05-08-113
	)	CAA-1092-05-09-113
	)	
Respondent	)	

ORDER GRANTING MOTION TO CONSOLIDATE

The complaints in these proceedings under section 113(d)(1) of the Clean Air Act (42 U.S.C. § 7413(d)(1)), dated May 18 and 19, 1992, are for all intents and purposes identical, alleging the same violations and claiming identical penalties.[1/] The only difference is that the complaint in Docket No. 1091-10-15 refers to Pump Station 6 of Alyeska's Trans-Alaska Pipeline System, Docket No. 1092-05-08 refers to Pump Station 8 on said System and Docket No. 1092-05-09 refers to Pump Station 10 on the mentioned Pipeline System. Alyeska filed answers, identical, except for references to the different pumping stations, on June 19, 1992, raising the same factual issues, contesting the appropriateness of the proposed penalties and requesting a hearing.

By a motion, accompanying its answers, Alyeska requested that the proceedings be consolidated pursuant to 40 CFR § 22.12. Alyeska asserted that the complaints involved the same alleged violations, that the complaints involved common questions of law

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[1/] In fact, paras. 17 of the complaints contain an identical typographical error, referring to a Compliance Order issued on December 3, 1992.

and fact and that Alyeska's defenses to each of the complaints were the same. Alyeska averred that no prejudice would result from consolidation, and that consolidation would save time and expense and be in furtherance of justice.

Under date of July 6, 1992, Complainant filed an opposition to the motion to consolidate. Complainant says that in order for consolidation to be granted the three elements of Rule 22.12(a) must be satisfied[2/] and argues that Alyeska's motion fails to satisfy the second and third requirements of the rule (Opposition at 3). While there appears to be no dispute that the proceedings involve common parties and common questions of fact and law, Complainant points out that consolidation would immediately raise the issue of whether the Agency was seeking penalties in excess of the $200,000 limit for administrative penalties provided in section 113(d)(1) of the Act. According to Complainant, this would raise complex new issues and delay the proceedings rather than expedite and simplify the issues as required by section 22.12(a)(2) (Id. at 4). Moreover, Complainant says that total or unrestricted consolidation could preclude the Agency from addressing the

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[2/] The rule "Consolidation and severance" (40 CFR § 22.12) provides in pertinent part:

> (a) Consolidation. The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice 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.

violations alleged in the complaints in an administrative forum and thus adversely effect EPA's interests. Therefore, Complainant argues that Alyeska's motion fails to comply with the third requirements for consolidation, section 22.12(a)(3) (supra note 2).

Citing cases under the FRCP, Complainant asserts that consolidation is discretionary with the court (ALJ) and contends that partial consolidation on the issue of liability would satisfy the requirements of section 22.12(a) (Opposition at 5, 6). Alternatively, Complainant says that the proceedings might be consolidated for hearing and briefing purposes, but that separate findings and orders be issued for each case. For the above reasons, Complainant suggests that the proceedings be consolidated for hearing and briefing purposes, but that the motion for consolidation with respect to penalty assessment be denied.

Although not authorized by the Rules of Practice, Alyeska submitted a Reply To Complainant's Opposition under date of July 20, 1992, and Complainant submitted a Surreply to the Motion to Consolidate on August 4, 1992. Alyeska points out, inter alia, that it raised the issue of whether EPA exceeded its authority for penalty purposes in issuing separate complaints in its answers and that it intends to pursue this issue irrespective of whether consolidation is granted. For its part, Complainant reiterates its argument that consolidation would delay and complicate, rather than expedite consideration of the issues, and thus does not comply with the requirements for consolidation in section 22.12. Essentially,

Complainant argues that issuance of separate complaints was a matter within its prosecutorial discretion.

D I S C U S S I O N

Because these proceedings involve common parties and common questions of law and fact, a classic case for consolidation appears to exist. Although FRCP Rule 42(a) is not identical to Consolidated Rule 22.12, the basic requirement for consolidation in the two rules is the same, i.e., common issues of law or fact.[3/] Accordingly, court decisions applying or interpreting the FRCP rule are considered to be useful guides as to the proper application of Consolidated Rule 22.12.

The general rule under the FRCP is that consolidation does not cause actions to lose their separate identity and does not affect any of the parties' substantive rights. See, e.g., Johnson v. Manhattan R. Co., 289 U.S. 479, 77 L.Ed. 1331 (1933) (under statute, then 28 U.S.C. § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties or make those who are parties in one suit, parties in

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[3/] FRCP Rule 42(a) provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

another); J.G. Link & Company v. Continental Casualty Company, 470 F.2d 1133 (9th Cir. 1972), cert. den., 414 U.S. 829 (act of consolidation does not affect any of the substantive rights of parties); Miller v. United States Postal Service, 729 F.2d 1033 (5th Cir. 1984) (Rule 42(a) should be used to expedite trial and eliminate unnecessary repetition and confusion; "(c)onsolidation [however] does not so completely merge the two cases as to deprive a party of any substantial rights that he may have had if the actions had proceeded separately, for the two suits each retain their separate identities and each requires the entry of a separate judgment) and Houston v. Mitchell, 908 F.2d 275 (8th Cir. 1990), reh. den., en banc, 1990 U.S. App. LEXIS 1402 (notwithstanding consolidation, separate notices of appeal were necessary). If the principles of the cited cases were applied here, Complainant's objections to consolidation would lack merit. A final ruling will not, however, be made at this time and the parties will be free to argue the question of whether Complainant exceeded its authority or abused its discretion in issuing separate complaints and the effect of consolidation in post-hearing briefs.

Because the issues are present in any event, Complainant's argument that the mentioned issues will delay and complicate, rather than expedite and simplify, consideration of the issues is rejected. If consolidation does not have the effect the Agency apparently claims for it, consolidation cannot adversely affect its rights. Moreover, it is not at all clear that the Agency may properly be considered "a party engaged in otherwise separate

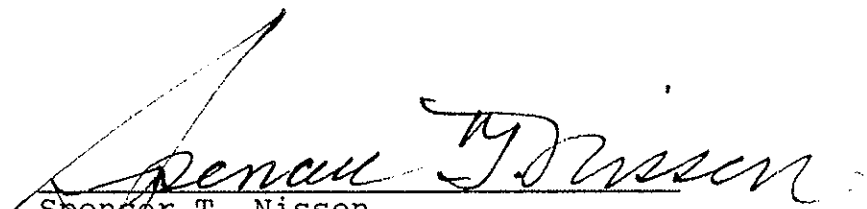
proceedings" within the meaning of the third proviso of section 22.12(a), where the alleged violations involve identical facts and the same respondent, but at separate locations. Complainant's position merely assumes an affirmative answer to this question.

An order consolidating these proceedings will be issued.

O R D E R

These proceedings are consolidated pursuant to 40 CFR § 22.12(a).

Dated this 16th day of October 1992.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION TO CONSOLIDATE**, dated October 16, 1992, in re: Alyeska Pipeline Service Co., Dkt. Nos. CAA-1091-10-15-113, CAA-1092-05-08-113, & CAA-1092-05-09-113, was mailed to the Regional Hearing Clerk, Reg. X, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: October 16, 1992

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