

8/25/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



IN THE MATTER OF

PHIBRO ENERGY USA, INC.  
Houston, Texas

Dkt. No. CAA R6-P-8/9-TX94014

PHIBRO ENERGY USA, INC.  
Houston, Texas

Dkt. No. SARA 6-95-020

PHIBRO ENERGY USA, INC.  
Houston, Texas

Dkt. No. RCRA-VI-502-H

Respondents

Judge Greene

ORDER DENYING MOTION TO CONSOLIDATE

Complainant's motion to consolidate these matters is hereby denied.

The motion recites what Complainant regards as economies in dealing with the violations alleged in these three complaints, which involve the same parties but not the same facts or legal issues. It is urged that, particularly with respect to settlement negotiations and trial, handling of the matters will be simplified. It may well be that some benefits would flow from consolidation, but they have not been well enough particularized. It is not clear why settlement negotiations cannot be carried on with respect to all three matters in the same conferences, since Complainant's counsel is the same individual in all three cases,

and since Respondent is represented in the three matters by counsel from the same firm. With respect to trial, it seems unlikely that the government inspector would be the same individual in all three cases, given the involvement of three different statutes and sets of implementing regulations; and it seems unlikely as well that the same individual would be called to testify about proposed penalty calculations for all three matters. Accordingly, on the ground that it has not been shown that consolidation would be sufficiently beneficial in the pursuit of these matters to overcome possible disadvantages, the motion is denied at this time. The motion may be renewed if at some future point, particularly after pretrial exchange has been made, it appears appropriate to do so.

Respondent argues that Judge Nissen's ruling in Alyeska Pipeline Service Co., Docket Nos. CAA 1091-10-15-113, 1092-05-08-113, and 1092-05-09-113 effectively created a stricter standard for consolidation than is recited at 40 C. F.R. § 22.12<sup>1</sup>, in that common issues of fact or law were made a prerequisite for consolidation of cases. I do not read Judge Nissen's opinion as establishing the presence of common issues of fact or law as a

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<sup>1</sup> 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 [sic] 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.

prerequisite. Indeed, the opinion does not address the matter of prerequisites to consolidation. It seems clear that, since the three Alyeska matters had identical parties, facts, issues of law, and even identical proposed penalties -- only the locations of the three pipeline pumping stations where violations allegedly occurred, a "classic case for consolidation" did in fact exist, as Judge Nissen noted.<sup>2</sup> Complainant's objections were insufficient in the face of the existence of identical parties, facts, and legal issues, and, in any case, the problems noted by complainant's counsel in those matters were present whether or not the matters were consolidated.

Here, the applicable procedural rule specifically envisions that common parties may form the basis for

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<sup>2</sup> 1992 CAA Lexis 136, at 4. The opinion states that "because these proceedings involve common parties and common questions of law and fact, a classic case for consolidation appears to exist." There follows a statement which is perhaps what respondent had in mind in asserting that a new standard had been enunciated, or at least that a "basic requirement" under Alyeska had not been satisfied here (Response to Motion to Consolidate, at 5):

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. [Footnote quoting FRCP Rule 42 (a) omitted].

Unlike 40 C.F.R. § 22.12, FRCP Rule 42 does, in fact, make common issues of fact or law the requirement for consolidation. Unlike § 22.12, also, it provides specifically for joint hearings or trials on "any or all of the matters in issue in the actions," and provides further that the court "may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." FRCP Rule 42(a).

consolidation<sup>3</sup> in appropriate instances, i. e. where consolidation would "expedite and simplify" consideration of the issues, and where the rights of parties engaged in otherwise separate proceedings would not be adversely affected.

In opposing consolidation, Respondent does not point to adverse effects to the "rights of the parties engaged in otherwise separate proceedings." Instead, Respondent urges that Complainant failed to establish that consolidation would -- as opposed to might -- expedite and simplify consideration of the issues.

Respondent proposes as a further basis for urging rejection of the motion that the regulations are highly complex.<sup>4</sup> On the whole, this is true. However, the issues here -- as opposed to the total body of regulations in the statutory areas in question -- are not complex. The alleged violations involve failures to report use and releases, failures to label and mark containers, failure to cover containers, failure to maintain notification and certification forms, failure to specify shelf life of calibration gasses, and failures to maintain records of leak repairs, and other such caretaking and monitoring matters.<sup>5</sup> Without minimizing the importance of such matters to the

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<sup>3</sup> "Where there exist common parties or common questions of fact or law," 40 C.F.R. § 22.12. (Emphasis supplied)

<sup>4</sup> Response to Motion to Consolidate, at 3-4.

<sup>5</sup> The penalties proposed are as follows: in RCRA VI-502-H, \$34,150; in SARA 6-95-020, \$73,250; in CA-R6-P-8/9-TX94014, \$129,666.

regulatory schema, in the circumstances of these three complaints it would surprise no one if settlement discussions revolved chiefly around penalty questions rather than matters of statutory interpretation or other difficult legal and regulatory issues. In addition, these cases are not going to a jury. It is reasonable to suppose that the highly trained individuals assigned to these matters will be able to follow the issues without difficulty in a consolidated case. In other words, respondent's complexity argument is specifically rejected.

ORDER

Complainant's motion for leave to file a reply to Respondent's opposition is granted.

Complainant's motion for consolidation of these matters is denied.

And it is FURTHER ORDERED that the parties shall continue to confer for the purpose of exploring settlement in these matters, and shall report again upon their progress during the week ending October 13, 1995.

  
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J. F. Greene  
Administrative Law Judge

Dated: August 25, 1995  
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on August 25, 1995.

*Shirley Smith*

Shirley Smith  
Legal Staff Assistant  
to Judge J. F. Greene

NAME OF RESPONDENT: Phibro Energy USA, Inc.  
DOCKET NUMBERS: CAA R6-P-8/9-TX94014, SARA 6-95-020 and RCRA-VI-502-H

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