UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Taylor-McIlhenny **Docket No. OPA-09-95-01**

Operating Co., Inc.,

Respondent

ORDER DENYING MOTION TO AMEND COMPLAINT
and
ORDER SCHEDULING HEARING

The Region 9 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed its Complaint against the Taylor-McIlhenny Operating Company, Inc., of Dallas, Texas (the "Respondent" or "Taylor-McIlhenny") on August 8, 1995. The Complaint alleges that the Respondent did not develop and implement a Spill Prevention Control and Countermeasure ("SPCC") Plan for its facility consisting of oil wells and storage tanks near Yorba Linda, California, in violation of the Clean Water Act ("CWA") §311(b) and (j), 33 USC §1321(b,j), and the CWA regulations requiring such a SPCC, 40 CFR §112.3. The Complaint (as amended) seeks assessment of a civil penalty against Respondent in the amount of $85,700.

Complainant filed a motion dated November 22, 1996, for leave to file a Second Amended Complaint in this proceeding. The proposed Second Amended Complaint states the same allegations, but adds two additional Respondents -- the individuals Donald B. McIlhenny and Michael W. Taylor. The hearing scheduled for December 3, 1996 was then canceled by the Administrative Law Judge in order to allow the Respondent an opportunity to respond to that motion. The Respondent, as well as the two individuals sought to be added as respondents, Messrs. McIlhenny and Taylor, have filed responses in opposition to Complainant's motion. Complainant then, on December 30, 1996, moved to withdraw its prior motion with respect to the proposed respondent Michael W. Taylor. Mr. McIlhenny filed a response to that motion.

The Region alleges that Mr. McIlhenny and Mr. Taylor are officers, directors and shareholders of the corporation Taylor-McIlhenny Operating Company, Inc., and have personally directed all of that Respondent's activities at issue in this matter. There is no question that corporate officers can be named as respondents and may be held liable for environmental violations committed by their companies. In the circumstances of this case, however, Complainant's motion must be denied.

The EPA Rules of Practice, at 40 CFR §22.14 (d) , allow amendment of the complaint, after the answer is filed, only upon motion granted by the Administrative Law Judge. The Environmental Appeals Board has generally followed the policy of the Federal courts and the Federal Rules of Civil Procedure, Rule 15(a), which states that "leave to amend shall be freely given, when justice so requires." The instant motion to amend the Complaint seeks to add parties as respondents. This renders it also analogous to F.R.C.P., Rule 21, which allows the court to add or drop parties upon motion of any party "at any stage of the action and on such terms as are just." The factors for the court to consider in deciding such a motion include "undue delay, bad faith, futility of amendment, and prejudice to the opposing party." Howey v. United States, 481 F.2d 1181, 1190 (9th Cir., 1973).

In this proceeding, the Complainant waited virtually until the eve of the scheduled hearing to make the motion to add the individual respondents. The Region offered no reason for this delay. The Complainant was fully aware of Messrs. McIlhenny's and Taylor's positions from the inception of this proceeding. No new evidence or facts were presented to show that anything changed since the Complaint was filed in August 1995 with respect to the potential liability of the respondents. Complainant's motion has already caused delay, since the hearing had to be canceled in order to allow the other parties to respond. Granting the motion would cause further delay since the amended Complaint raises additional factual issues concerning the two individuals' respective actions and degree of responsibility for the alleged violations. They would be required to file answers, and the entire prehearing discovery process would have to begin anew with respect to the new respondents. This undue delay is sufficient reason alone to deny the Complainant's motion. [1]

Complainant has also not shown that complete or adequate relief could not be obtained against the corporate Respondent originally named, Taylor-McIlhenny. The Complainant's vague allusion to its belief that Messrs. McIlhenny and Taylor have stripped Taylor-McIlhenny of its assets, [2] falls far short of a showing of any new evidence. If those individuals have done anything improper

with the corporation, that could be dealt with in the collection phase if any penalty is ultimately imposed in this proceeding.

Mr. McIlhenny in particular could be unduly prejudiced by granting this motion at this time. Mr. McIlhenny has been representing Taylor-McIlhenny thus far on the basis that the company is the sole respondent. The addition of himself and Mr. Taylor as co-respondents would compromise his position as the representative of the company, by potentially raising conflicts between his own interests, those of Mr. Taylor, and those of the company. Of course, both individuals would also both be directly prejudiced by suddenly rendering them potentially personally liable for any civil penalties, in addition to their corporation.

The prejudice to Mr. McIlhenny is further exacerbated by Complainant's motion to withdraw its motion to add Mr. Taylor as a respondent. That motion is based on Mr. Taylor's status as a discharged debtor in bankruptcy. Mr. McIlhenny has submitted a response to that motion indicating that Mr. Taylor, a petroleum engineer with extensive experience in the oil industry, was responsible for the technical and field operations of Taylor-McIlhenny. Mr. McIlhenny further states that he, Mr. McIlhenny, has no technical expertise and was responsible only for the business end of the company. Thus, granting Complainant's motion to amend the Complaint and its motion to withdraw Mr. Taylor as a respondent would leave Mr. McIlhenny in a highly exposed position, and require adjudication of the issue of the individuals' respective responsibilities for the violation.

Complainant's motion to amend the Complaint to add Donald B. McIlhenny and Michael W. Taylor as respondents in this proceeding would cause undue delay, undue prejudice to the putative respondents, and was not shown to be necessary in the interests of justice. Therefore, the motion is denied. This ruling renders moot Complainant's motion to withdraw its prior motion to add Mr. Taylor as a respondent.

Further Proceedings

The hearing in this matter will be rescheduled, as ordered below. A deadline will also be set for the parties to again submit any stipulation to waive the hearing and submit their evidence in written form only. Since the parties had already been prepared for hearing or the submission of evidence in November 1996, the hearing will be scheduled for approximately 30 days from the date of this order.

Complainant has filed a motion dated January 29, 1997, to supplement its prehearing exchange. That motion is granted. The parties may freely supplement their prehearing exchanges, without motion, until 10 days before the date scheduled for hearing.

Order

1. Complainant's motion for leave to file an Amended Complaint to add the individuals Donald B. McIlhenny and Michael W. Taylor as respondents in this proceeding is denied.

2. Complainant's motion to withdraw the above cited motion with respect to Mr. Taylor is moot and is therefore not addressed in these orders.

Order Scheduling Hearing

The hearing in this matter will be held beginning at 9:30 A.M. on March 11, 1997, continuing if necessary through March 14, in Santa Ana, California (or neighboring Riverside or San Bernardino, depending on the availability of a suitable hearing facility). The parties will be notified of the exact location and of other hearing procedures after the arrangements have been made by the Regional Hearing Clerk.

If the parties reach a stipulation to waive the oral hearing and submit evidence in written form, it must be submitted no later than February 20, 1997.

Andrew S. Pearlstein
Administrative Law Judge

Dated: February 4, 1997
Washington, D.C.

In the Matter of Taylor-McIlhenny Operating Company, Inc.

Docket No. OPA-09-95-01

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Motion To Amend Complaint and Order Scheduling Hearing,** dated February 4, 1997, was sent by regular mail and fax to the addressees listed below:

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Dated: February 4, 1997

[1] Examples of cases which upheld denials of motions to amend to add parties, for undue delay in similar circumstances, include: Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir., 1993); James v. McCaw Cellular Communications, Inc., 988 F.2d 583 (5th Cir., 1993); and Giorgio Morandini, Inc. v. Textport Corp., 761 F. Supp. 12 (S.D.N.Y. 1991).

[2] See Complainant's Motion, p. 12