UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Taylor-McIlhenny Operating Co., Inc.,

Respondent

Docket No. OPA-09-95-01

ORDER

Complainant has filed a Motion for Accelerated Decision as to Liability in this matter, dated November 5, 1996. The Complaint alleges that 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. Respondent filed a letter in response to this motion on November 18, 1996. The hearing in this matter is scheduled to begin on December 3, 1996 in Santa Ana, California.

As an initial matter, Complainant's motion for an accelerated decision on liability is untimely. Such a motion filed less than 30 days before the scheduled hearing does not allow sufficient time for a considered response by the respondent and ruling by the judge under the motion practice and service rules found in 40 CFR §§22.16and 22.07. Therefore, I will not make any formal ruling or decision on the motion. However, since Respondent has filed a response, I will take this opportunity to establish some guidelines and procedures for moving this proceeding to a hearing or other resolution.

Respondent does admit that it did not f ile a SPCC for the subject oil facility. While it remains the Complainant's burden to prove the jurisdictional elements of the alleged violation, it seems likely that the central issue for hearing will be the determination of the appropriate amount of the civil penalty. Under the CWA §311 (b) (8), 33 USC §1321 (b) (8) , the factors to be considered in determining the amount of a civil penalty are: the seriousness of

the violation, the economic benefit to the violator, respondent's degree of culpability, any other penalty for the same incident, any history of prior violations, the efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

There is no dispute that the occurrence of an oil spill at Respondent's facility on or about March 13, 1994 led to the filing of this Complaint. The facts surrounding that spill and the resulting alleged impacts on a nearby waterway, Aliso Creek, relate to several of the statutory penalty factors and form much of the basis for the Complainant's penalty calculation. In its Answer, correspondence, the prehearing exchange materials, and in its recent letter, Respondent has disputed Complainant's assessment of several of the penalty factors. Respondent may be able to present evidence, or challenge Complainant's evidence, on facts relating to the seriousness of the violation, Respondent's culpability, history of past violations, and efforts to mitigate the effects of the discharge. In addition, although I have not received copies of the documents, I understand Respondent has also raised the issue of its inability to pay the proposed penalty in its discussions with the Complainant. Thus, there are substantial factual issues appropriate for resolution at a hearing concerning the appropriate amount of a civil penalty, assuming liability is first established. The Complainant bears the burden of going forward with evidence to support its proposed penalty.

I understand that Respondent is not represented by an attorney and its representative, Donald McIlhenny, has stated he cannot afford to travel from Dallas to California for a hearing. This statement alone does not impress me. Respondent apparently had the wherewithal to purchase and operate a large oil production and storage facility in California for over four years. The hearing has been scheduled since August 23, 1996, allowing ample time to obtain discount air fare and arrange for reasonable accommodations for the hearing. I ordered the hearing held in Southern California, near the site of the alleged violations, specifically to accommodate Respondent if it wished to call any witnesses, such as his contract pumper, with firsthand knowledge of the facts. If and when Respondent's inability to pay the penalty becomes a genuine issue, the costs of attending the hearing could be considered as well. If Respondent does not appear at the scheduled hearing, it is subject to a default order assessing the full amount of the civil penalty pursuant to 40 CFR §22.17.

At this juncture, as always, the parties remain encouraged to pursue settlement negotiations that could completely resolve the matter. Otherwise, I expect the

hearing to begin as scheduled. Another possible procedural route, as suggested in my Prehearing Order of August 23, 1996, could be derived upon both parties' agreement to submit their positions in written form only. I do not recommend this procedure primarily because it is less likely to ferret out the relevant facts than a live hearing. It is possible that I may view the written submissions as inadequate and order that the hearing be held in any event, unless the proceeding is settled. Unless I hear otherwise, therefore, the hearing will proceed as scheduled.

Hearing Procedures

As you should have been previously notified, the hearing is scheduled to begin at 9:30 A.M. on December 3, 1996, in Courtroom #1, California Court of Appeal, 925 Spurgeon Street, Santa Ana, California 92701. Before going on the record, we will hold a brief prehearing conference to address housekeeping matters such as the receipt of exhibits, order of witnesses, and daily schedule. We will also attempt to reach stipulations on undisputed facts, on the receipt of exhibits into evidence, and other matters to foster a fair and efficient hearing. I recognize that Respondent's representative is not an attorney. If Mr. McIlhenny has any questions about the hearing procedures, he is welcome to contact my legal assistant, Maria Whiting (202-260-7953), or my law clerk, Negin Mohtadi (202-260-4652).

As indicated above, the parties remain encouraged to engage in settlement negotiations. If a settlement is reached that could eliminate the need for the hearing, or if the parties agree to waive the hearing and instead rely only on written submissions, I must be notified no later than 3:00 P.M., Eastern Standard Time, on Wednesday, November 27, 1996.

Andrew S. Pearlstein
Administrative Law Judge

Dated: November 19, 1991
Washington, D.C.

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

Docket No. OPA-09-95-01

CERTIFICATE OF SERVICE

I certify that the foregoing **Order,** dated November 19, 1996, was sent by regular mail to the addressees listed below:

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Dated: November 20, 1996