

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)
)
Wolco, Inc.,) **Docket No. CWA-07-2001-0067**
)
Respondent)

**ORDER DENYING EPA'S
MOTION TO AMEND COMPLAINT**

On August 7, 2001, the United States Environmental Protection Agency ("EPA") filed a complaint against Wolco, Inc. ("Wolco"), charging that respondent violated the Clean Water Act, 33 U.S.C. § 1252 *et seq.*, by failing to comply with the Oil Pollution Prevention regulations at 40 C.F.R. Part 112 at its bulk storage and transfer facility. EPA alleged that Wolco violated the Clean Water Act because it either had no Spill Prevention Control and Countermeasure Plan ("SPCC Plan") in effect at its facility, as required, or that the Plan that it did have in effect was so deficient as to constitute non-compliance.

Wolco filed an answer denying the charge. Thereafter, both parties submitted prehearing exchanges identifying their respective witnesses and exhibits. On May 9, 2002, an order was issued setting this matter for hearing on September 24-25, 2002. Also, on September 4, 2002, an order was issued denying EPA's motion for accelerated decision as to liability.

Against this background, EPA moves to amend the complaint by adding another count. In that regard, EPA states that a follow-up investigation of respondent's facility on May 15, 2002, showed that the SPCC Plan in effect at Wolco's facility still failed to satisfy the regulatory provisions at 40 C.F.R. Part 112. Specifically, EPA seeks to allege in this new count that the SPCC Plan failed to discuss 40 C.F.R. 112.7(e)(2)(vii), 112.7(e)(3)(iv), 112.7(e)(4)(ii), and 112.7(e)(9)(i)(ii) and (iv), and also that the Plan failed to implement 40 C.F.R. 112.7(c)(1)(i), 112.7(e)(1)(i), 112.7(e)(2)(ii), 112.7(e)(2)(viii), 112.7(e)(4)(ii), and 112.7(e)(8). In addition, EPA seeks to increase the proposed penalty from \$74,217 to \$108,501, to account for the new violation.

Wolco opposes the motion to amend arguing that amending the complaint approximately one month before the hearing does not provide enough time for respondent to prepare a defense to this charge. Moreover, respondent essentially disagrees with EPA's assertion that the violation alleged in the newly proposed count involves the same basic issues raised in the initial complaint. A reading of the two complaints supports respondent's view.

All things considered, EPA's motion to amend is not timely and allowing complainant to add an additional count at this late stage would prejudice respondent in its ability to challenge the new allegation. As noted, the complaint initiating this case was filed on August 7, 2001, the case was set for hearing on May 9, 2002, and yet EPA has waited until August 22, 2002 (just one month prior to the hearing), to allege a new violation based upon an inspection that occurred May 15, 2002. This time line does not present a sympathetic picture for complainant.

Moreover, EPA has offered no explanation as to why it waited so long to seek an th amendment to the complaint. While EPA's assertion that the new count is essentially the same as e violation charged in the initial complaint may ultimately be proven to be correct, that is not at all clear at this time. Also, respondent should not be required to gamble that EPA is right in its assessment of the issues presented .

Accordingly, EPA's motion to amend is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: September 9, 2002
Washington, D.C.