UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Conservation Law Foundation, Inc., Plaintiff, v. Shell Oil Products US, Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, and Motiva Enterprises LLC, Defendants.	)	C.A. No. 1:17-cv-00396-WES-LDA

PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Pursuant to Rule 15 of the Federal Rules of Civil Procedure and Local Rule 15 of the United States District Court for the District of Rhode Island, Plaintiff Conservation Law Foundation ("CLF") hereby submits the following Motion for Leave to File its Second Amended Complaint.[1]

PRELIMINARY STATEMENT

1. Plaintiff CLF seeks to further amend the Amended Complaint filed on October 25, 2017, Doc. 11, to ensure that the proper defendants are brought into the case and that all relevant facts and causes of action are before the Court.

2. Specifically, Plaintiff seeks to make the following changes in its proposed Second Amended Complaint:

a. The removal of Royal Dutch Shell as a defendant without prejudice based upon a stipulation reached by the parties entered by the Court on February 1, 2018;

[1] Plaintiff has conferred with Defendants who oppose this Motion. Plaintiff does not believe that there is a need for oral argument or an evidentiary hearing with regard to this Motion.

b. The addition of Triton Terminaling LLC ("Triton") and Equilon Enterprises LLC ("Equilon") as additional defendants in the matter; and

c. The addition of facts regarding Shell Terminal's status as a Resource Conservation and Recovery Act ("RCRA") generator of hazardous wastes— as both a Conditionally Exempt Small Quantity Generator ("CESQG") and a Large Quantity Generator ("LQG")—and a correlating count under RCRA regarding state and federal regulations applicable to such generators.[2]

3. At the time of filing the original Complaint, and the Amended Complaint shortly thereafter, the corporate ownership and operational structure for Shell's Providence Terminal was not entirely clear, as they have changed hands repeatedly over time. Plaintiff conferred with Defendants in an attempt to sort out the proper parties to the litigation to the extent they were able to reach an agreement, and Plaintiff now wishes to amend its complaint accordingly.

4. The parties have stipulated to the dismissal of Royal Dutch Shell as a Defendant without prejudice, *see* Order Granting Stipulation Regarding the Dismissal of Royal Dutch Shell plc and Proposed Amendment to include Triton Terminaling LLC as a Party Defendant (Feb. 1, 2018), Doc. 22 (hereinafter "Feb. 2018 Stipulation"), and Defendants agreed not to oppose Plaintiff seeking leave to amend the Amended Complaint to add Triton as a defendant after the required statutory notice period had passed, and after the Court's ruling on the pending Motion to Dismiss. *Id.* However, Defendants did not consent to an amendment to the Amended Complaint prior to a ruling on the motion to dismiss, and reserved their rights related to any issues arising under Federal Rules of Civil Procedure, Rule 12.[3]

5. In its proposed Second Amended Complaint, Plaintiff also seeks to identify additional regulations under RCRA and associated Hazardous Waste Regulations of Rhode

[2] A signed copy of Plaintiff's Proposed Second Amended Complaint is attached hereto as Exhibit 1 pursuant to Local Rule 15. For the Court's convenience, a draft Second Amended Complaint with proposed changes identified in Track Changes is also attached as Exhibit 2.

[3] An issue also remains between the parties as to the propriety of the continued inclusion of Motiva Enterprises LLC ("Motiva") as a defendant in this matter which was also briefed and argued to the Court. The parties have discussed a potential resolution of this issue.

Island governing the management of hazardous wastes at the Providence Terminal. These factual averments are not new to Defendants, as the previously filed complaints describe the operational insufficiencies associated with the Providence Terminal that are at issue in the case. *See* Amended Complaint, at ¶¶50-51, Doc. 11. However, the application of these facts to Plaintiff's proposed cause of action under RCRA for a failure to comply with provisions related to its status and obligations as a CESQG and/or LQG was not alleged in the prior complaints.

6. Plaintiff's proposed amendments are appropriate for a number of reasons. First, it is imperative that the proper parties are brought into the matter. Further, it is critical that Plaintiff is able to assert all RCRA claims and present facts relevant to these claims to the Court. Allowing Plaintiff to amend its complaint will not cause undue delay or prejudice to the parties given the current posture of the proceedings, specifically, that the Court has yet to rule on any substantive or dispositive motions, discovery has not yet begun, and there have been no pre-trial proceedings or trial date set.

7. To reduce delay, as well as any prejudice to Defendants to the extent there is any, Plaintiff is willing to discuss with Defendants possible limitations to be applied to future Rule 12 briefing in order to make such additional briefing as efficient as possible by avoiding duplication from the prior briefing on Defendants' Motion to Dismiss. For example, as suggested in CLF's August 2018 status update to the Court, the parties could limit the issues to be briefed, subject to court approval, to (1) whether Equilon is a proper defendant for the CWA and RCRA counts, and (2) any aspect of the additional RCRA count Defendants may raise under Rule 12. *See* Letter from E. Petersen, CLF, to the Honorable Judge Smith (Aug. 27, 2018), Doc. 32. Defendants have expressed a willingness to work with Plaintiff towards such an agreement.

8. Plaintiff issued its supplemental notice letter to Defendants on February 12, 2018, attached to the Proposed Second Amended Complaint as Exhibit C, and the 90-day period under 33 U.S.C. § 1365(b)[4] and 42 U.S.C. § 6972(b) has passed; thus, Plaintiff may properly name additional defendants in the action and assert additional facts and claims in its complaint at this time.

9. As such, and as more fully explained below, Plaintiff respectfully requests that this Court grant its Motion for Leave and allow for Plaintiff's filing of its Second Amended Complaint.

PROCEDURAL BACKGROUND

10. Plaintiff CLF filed the original Complaint in this action on August 28, 2017, Doc. 1, asserting claims under Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1265, for violations of the CWA at Shell's bulk storage and fuel terminal in Providence, Rhode Island. CLF filed its Amended Complaint, which is the operative complaint, on October 25, 2017, Doc. 11, asserting additional claims under Section 7002 of RCRA, 42 U.S.C. § 6972.

11. Defendants filed a Motion to Dismiss the Amended Complaint on January 12, 2018, Doc. 20. Briefing on Defendants' Motion was completed on February 22, 2018, and was argued before the Court on June 27, 2018.

12. During the pendency of the briefing period for Shell's Motion to Dismiss the Amended Complaint, the parties reached an agreement and filed a stipulation with the Court, providing that the parties agreed to the dismissal without prejudice of Royal Dutch Shell. *See* Stipulation Regarding the Dismissal of Royal Dutch Shell plc and Proposed Amendment to include Triton Terminaling LLC as a Party Defendant, Doc. 22 (entered Feb. 1, 2018). Defendants also agreed not to oppose Plaintiff seeking leave to amend the Amended Complaint

[4] The Clean Water Act provides for a shorter 60-day notice period, which was also satisfied.

to add Triton as a defendant after the required statutory notice period has passed and after the Court's ruling on the then-pending Motion to Dismiss. *Id.*

13. In anticipation of filing a motion for leave to amend its Complaint, CLF provided Defendants with a supplemental notice letter on February 12, 2018 ("Supplemental Notice"). That letter included, and provided notice to, two additional defendants that were not expressly named in the original or Amended Complaints: (1) Triton Terminaling LLC and (2) Equilon Enterprises LLC. The Supplemental Notice letter also included additional information regarding Shell's status and obligations as a RCRA generator of hazardous wastes, and notified Defendants of Plaintiff's intent to assert an additional RCRA cause of action related to the same. The 90-day notice period for the additional claims expired on May 14, 2018.

14. Because briefing on Defendants' Motion to Dismiss the Amended Complaint had been completed as of the date that the new notice period expired, and because Plaintiff had alerted the Court as to its intention to amend its complaint in its opposition to Defendants' Motion to Dismiss,[5] Plaintiff did not move forward with its intended amendments immediately upon expiration of the notice period.

15. To assure efficient deployment of the Court's resources given the passage of time and in an effort to not violate the letter and spirit of Local Rule 15's direction that a party seeking to file an amended pleading shall make such motion "promptly after the party seeking to amend first learns the facts that form the basis for the proposed amendment," DRI LR Cv 15, Plaintiff submitted a status update to the Court regarding its intention to move for leave to amend its complaint. *See* Letter from E. Petersen, CLF, to the Honorable Judge Smith (Aug. 27, 2018), Doc. 32. Thereafter, the Court dismissed Defendants' Motion to Dismiss without prejudice to

[5] *See* Plaintiff's Memorandum of Objections to the Shell Defendants' Motion to Dismiss (Feb. 12, 2018), at 44 n. 37, Doc. 24-1.

refiling against Plaintiff's Proposed Second Amended Complaint to be attached to this Motion for Leave to Amend. Text Order (Sept. 20, 2018).

16. Plaintiff CLF now moves for leave to file its proposed Second Amended Complaint to remove Royal Dutch Shell as a defendant, add Triton and Equilon as defendants, and include additional facts and a related claim under RCRA.

FACTUAL STATEMENT

A. Shell's Corporate Structure and Interrelationships Between Defendants

17. The corporate ownership and operations of the Rhode Island facility have changed repeatedly over time although the successor entities are typically interrelated to a certain extent. On July 1, 1998, Shell Oil, Texaco Inc., and Saudi Arabian Oil Company announced the formation of a joint venture—Motiva Enterprises LLC—that would "combin[e] major elements of the three companies' eastern and Gulf Coast U.S. refining and marketing business including assets previously held by Star Enterprise . . . ."[6] In 1998, Shell Oil Company also formed the joint venture Equilon with Texaco, combining their Western and Midwestern United States refining and marketing.

18. On February 8, 2002 Chevron Corporation acquired Texaco Inc., and Texaco divested all interests in Equilon and Motiva to Shell. Since 2002, Motiva has been a 50/50 refining and marketing joint venture held by Shell Oil Company and Saudi Aramco, in which the Star Enterprise operations were previously merged with the Eastern and Gulf Coast United States refining and marketing operations of Shell.

19. Shell formally announced the completion of its dissolution of Motiva on May 1, 2017. On May 15, 2017, the RIPDES Permit for Motiva's Providence Terminal, RIPDES Permit # RI0001481, was transferred to Triton, a subsidiary of Shell Oil Company.

[6] *See* Plaintiff's Memorandum of Objections to the Shell Defendants' Motion to Dismiss, at 21, Doc. 24-1.

20. While the corporate name on the RIPDES Permit changed, it had no substantive effect on the Providence Terminal or its operations. For example, the contact individual for the Terminal was the same under Motiva as it is under Triton, though his affiliation has been changed from Motiva to Shell.

21. Given these changes over time and the current nature of ownership and operations at the Providence Terminal, Plaintiff believes that Triton and Equilon are essential parties to the litigation, in addition to the Shell entities previously named in the prior complaints (with the exception of Royal Dutch Shell, who, as discussed above, has been dismissed without prejudice).

B. Shell's Status as a Generator of Hazardous Wastes under RCRA

22. Shell is a generator of hazardous wastes who has contributed and is contributing to the handling, storage, treatment, transportation, or disposal of hazardous and solid waste at the Providence Terminal. The Providence Terminal has been assigned Handler ID No. RID059741520. *See* Amended Complaint, at ¶ 398, Doc. 11.

23. Over the past decade, Shell has at times been categorized as either a CESQG of Hazardous Waste or a Large Quantity Generator ("LQG") of hazardous waste at the Providence Terminal. The category of waste generator is determined based upon volumes of waste subject to regulations.

24. Shell's previous request for CESQG status under RCRA affirmatively indicated that it was a "Generator of Hazardous Waste."

25. Since late February 2018, Shell has been categorized as a Large Quantity Generator of hazardous waste at the Providence Terminal. *See* EPA, *2017 BR/Notification for Shell Oil Products US - Providence Terminal, Site ID RID059741520* (Feb 22, 2018).

26. As a generator of hazardous waste and due to the presence of hazardous waste constituents at the Providence Terminal, Shell must comply with applicable Rhode Island regulations at R.I. Admin. Code 25-15-102:5.0 entitled "Generators."

27. As a CESQG of hazardous wastes, Shell must comply with certain obligations set forth under state and federal laws and regulations. For example, R.I. Code R. 25-15-102:5.15(G)(1) requires that Shell maintain and operate the facility in a manner that "minimizes the possibility of . . . any unplanned spill or release of hazardous waste or hazardous waste constituents to the air, soil, or surface waters of the State." Further, 40 C.F.R. § 262.16(b)(8)(i) requires small quantity generators who accumulate hazardous waste to comply with the following provision:

> Preparedness and prevention – (i) Maintenance and operation of facility. A small quantity generator must maintain and operate its facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

28. To the extent that Shell is, or has been, a Large Quantity Generator, Defendants must also comply with 40 C.F.R. § 262.251, which requires that: "A large quantity generator must maintain and operate its facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment."

29. Despite their CESQG and/or LGQ status, Defendants have contested their status as a generator of hazardous wastes under RCRA. Plaintiff seeks to clarify this issue in its Second Amended Complaint by introducing additional facts related to Shell's status under RCRA.

30. Plaintiff also asserts that Shell is in violation of the aforementioned regulations related to its status as a generator of hazardous wastes and seeks to add a cause of action to its complaint under RCRA in an effort to cure those violations.

LEGAL STANDARD

31. Federal Rule of Civil Procedure 15 provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave." Rule 15 instructs courts to "freely give leave" to amend. *Id.*

32. "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive of the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, etc.—the leave should, as the rule requires, be 'freely given.'" *Forman v. Davis*, 371 U.S. 178, 182 (1962).

33. In deciding whether to allow a plaintiff to amend its pleading, a court should "examine the totality of the circumstances and exercise sound discretion in light of the pertinent balance of equitable considerations." *Quaker State Oil Ref. Corp. v. Garrity Oil Co.*, 884 F.2d 1510, 1517 (1st Cir. 1989).

ARGUMENT

34. Granting Plaintiff's Motion for Leave will not cause undue delay in these proceedings and will not cause undue prejudice to Defendants. Further, there is no bad faith on the part of the Plaintiff in moving to amend, nor is this a repeated attempt by Plaintiff to cure deficiencies in its complaint. Because there is no apparent reason to deny Plaintiff's request, the Court should grant the motion to amend.

35. Royal Dutch Shell was dismissed without prejudice from the pending action by agreement of the parties on February 1, 2018, Doc. 22. Plaintiff has, accordingly, struck the paragraph that specifically identified Royal Dutch Shell as a Defendant in its Second Amended Complaint. Additional references to Royal Dutch Shell remain as factual background.

36. Further, "[t]he parties agree that Triton, which is the current owner of the Providence Terminal and was identified in the Motion to Dismiss . . . is a proper defendant to be joined in this litigation." Feb. 2018 Stipulation, at 2, Doc. 22. As such, Plaintiff has identified Triton as a defendant in its proposed Second Amended Complaint. Plaintiff has also identified Equilon as a defendant in the proposed Second Amended Complaint, given its relationship to the other Defendants in this matter and its involvement with the operations at the Providence Terminal.

37. The parties agree that the removal of Royal Dutch Shell from and the addition of Triton to the complaint are appropriate, and so too is the addition of Equilon, who Plaintiff asserts is also a proper party to the litigation given the similarity and interconnectedness between Equilon and the current Defendants. Adding Equilon as a defendant at this junction in the litigation is also proper as it will not cause undue delay or prejudice to the Defendants.

38. This case is still at its earliest stages of litigation. No substantial or dispositive motions have been decided, discovery has not commenced, no trial date has been set, and no other pre-trial proceedings have taken place. *Cf. Grant v. News Grp. Boston, Inc.*, 55 F.3d 1, 5-6 (1st Cir. 1995) (finding that the district court did not abuse its discretion in denying motion to amend where the motion was filed after the close of discovery, which had already been extended twice, and a motion for summary judgment was nearly completed and trial preparations had begun); *Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.*, 156 F.3d 49, 52 (1st Cir. 1998)

(finding that the district court reasonably denied motion to amend where nearly all of the case's pre-trial work was completed and allowing an amendment would have resulted in additional discovery and delayed trial); *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 933 (1st Cir. 1983) (finding that the district court acted within its discretion in denying motion to amend the complaint where the addition of new claims would require additional discovery and cause further delay).

39. The similarity and interconnection between the current Defendants and the Triton and Equilon entities render any delay in moving to include such defendants harmless. The 2018 Supplemental Notice specifically included these two entities and the notice period has elapsed. Further, Triton and Equilon were arguably constructively placed on notice of the factual and legal bases for CLF's claims when the initial notice was issued on June 28, 2017. *See* 40 C.F.R. § 135.3(a); *see also Waste Action Project v. Draper Valley Holdings LLC*, 49 F. Supp. 3d 799 (W.D. Wash. 2014) (finding notice to be sufficient to allow a defendant to discern which entities were potentially responsible where applicable permit, facility and dates upon which violations allegedly occurred); *Puget Soundkeeper Alliance v. Louis Dreyfus Commodities LLC,* Case No. C14-803RAJ, 2016 WL 7718644 (W.D. Wash. March 11, 2016)[7] (holding notice to be sufficient where service was made on one member of a group of related corporate entities sharing the same registered agents and address where sufficient information was included to identify the party allegedly responsible).

40. Further, the facts that provide the basis of the new RCRA claim (proposed Count Twenty–Two) were already known to both parties, are uniquely available to Defendants and therefore, the addition of that claim does not prejudice Defendants. *See Popp Telcom v. Am. Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000) ("The inclusion of a claim based upon facts

[7] A copy of this unreported case is attached as Exhibit 3.

already known or available to both sides does not prejudice the non-moving party."); *see also id.* ("Generally speaking, reviewing courts have found an abuse of discretion in cases where the district court denied amendments based on facts similar to those comprising the original complaint."). The additional RCRA claim will not require Defendants to devise an entirely new trial strategy, to the extent Defendants have already developed a trial strategy at these early stages of the litigation. *Cf. Acosta-Mestre*, 156 F.3d at 52 ("[T]he prejudice to [defendant] resulting from . . . a likely major alteration in trial strategy . . . fully supports the district court's ruling [to deny a motion for leave to amend].").

41. To avoid unnecessary delay and prejudice to Defendants, to the extent there is any, resulting from Plaintiff's proposed amendments, Plaintiff is willing to work with Defendants to reach an agreement, subject to court approval, as to limitations to apply to future Rule 12 briefing to make such briefing as efficient as possible. For example, as suggested in CLF's August 2018 status update to the Court, limiting the issues to be briefed to (1) whether Equilon is a proper defendant for the CWA and RCRA counts, and (2) whether the addition of the RCRA count and language associated with Defendants' status as a generator of hazardous wastes are appropriate. *See* Letter from E. Petersen, CLF, to the Honorable Judge Smith (Aug. 27, 2018), Doc. 32. Defendants have expressed a willingness to work with Plaintiff towards such an agreement.

CONCLUSION

Accordingly, for the reasons set forth above, Plaintiff CLF respectfully requests that this Court grant its Motion for Leave and file the proposed Second Amended Complaint.

Respectfully submitted, Dated: October 4, 2018

CONSERVATION LAW FOUNDATION, INC.

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, the foregoing Motion for Leave to File Second Amended Complaint was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

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Dated: October 4, 2018