UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
CITY OF SOUTH HOUSTON,	)	**DOCKET NO. CWA VI-97-1603**
	)	
	)	
RESPONDENT	)	

PREHEARING ORDER

The Environmental Protection Agency ("EPA" or "Complainant") filed an "Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing Thereon" on March 20, 1997, charging the Respondent with violations of Section 301(a) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act("CWA"), as amended, 33 U.S.C. § 1311(a). Based on these alleged violations, the EPA proposed to issue a Final Order assessing a civil administrative penalty in the amount of $125,000 pursuant to Section 309(g) of the CWA.[(1)]

The Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing Thereon advised the Respondent of its right to request a hearing but did not directly advise the Respondent of the regulatory provisions concerning the need to file a written Answer to the Complaint within 20 days after service of the Complaint in order to avoid being found in default. The EPA, however, did furnish the Respondent with a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq., and the Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Clean Water Act (the " Supplemental Rules of Practice"), 40 C.F.R. § 22.38, which govern these proceedings.

Section 22.15(a) of the Rules of Practice provides that a written Answer to a Complaint shall be filed with the Regional Hearing Clerk within 20 days after service of the Complaint

where the Respondent contests any material fact upon which the Complaint is based, contends that the amount of the penalty proposed is inappropriate, or contends that it is entitled to judgment as a matter of law. The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which the Respondent has any knowledge or shall clearly state that it has no knowledge as to particular factual allegations in the Complaint. The written Answer shall also state the circumstances or arguments that are alleged to constitute the grounds of defense and the facts that the Respondent intends to place at issue. Sections 22.15(a) and (b) of the Rules of Practice. Failure of the Respondent to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation. Section 22.15(d) of the Rules of Practice.

On May 7, 1997, the Respondent filed a letter response dated April 8, 1997. In this letter, the Respondent requested a hearing and noted that it was attempting to settle this matter informally with the EPA. Specifically, the Respondent stated: "The City is also simultaneously with this request for hearing, attempting to settle this informally with EPA and will be filing information within this 20 day time frame attempting to explain extenuating circumstances and why the City feels this proposed penalty is inappropriate." A request for a hearing or an attempt to settle a matter informally does not constitute an Answer. See Section 22.15 of the Rules of Practice. The file before me does not contain any filing regarding the alleged inappropriateness of the proposed penalty as referenced in the April 8, 1997, response.

A request for a hearing is not properly before me if an Answer has not been filed. A hearing may be held only if issues are raised by the Complaint and Answer. See Section 22.15(c) of the Rules of Practice. Also, Section 22.17(a) provides that a party may be found in default after motion upon failure to file a timely Answer to the Complaint. Accordingly, the Respondent is directed to clarify its position in this matter, and to file an Answer if it intends to do so. In the clarification statement, the Respondent shall state whether it wishes to have a hearing on the CWA charges in the Complaint and the proposed penalty amount, or whether it only seeks a hearing on the proposed penalty amount and does not contest its alleged liability for the CWA charges. This clarification statement and Answer shall be filed on or before July 25, 1997. Failure to file an Answer and clarification statement by the July 25, 1997, deadline will constitute a waiver of the Respondent's hearing in this matter.

See In re Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a(EAB, Mar. 6, 1997).

This order to file an Answer and clarification statement should not discourage the Respondent from engaging in settlement negotiations with the EPA. EPA policy, found in the Rules of Practice at Section 22.18(a), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time and expense associated with a litigated proceeding.

The original of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be sent to the Regional Hearing Clerk and copies (with any attachments) shall be sent to the undersigned and all other parties. The clarifying statement required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning

Office of Administrative Law Judges

U.S. Environmental Protection Agency

Mail Code 1900

401 M Street, SW

Washington, DC 20460

Telephone: 202-260-6703

original signed by undersigned

_____

Barbara A. Gunning

Administrative Law Judge

Dated: 7-01-97

Washington, DC

1. The Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing Thereon cites only Section 309(g) of the CWA as the authority for the proposed penalty but additional references indicate that this is a Class II civil penalty under Subsection 309(g)(2)(B) rather than a Class I civil penalty under Subsection 309(g)(2)(A)(a hearing on a Class I civil penalty case is not subject to Section 554 or 556 of Title 5(Administrative Procedure Act)). In particular, the amount of the proposed penalty exceeds the maximum amount of a Class I penalty and the Respondent was advised that it must request a hearing on the proposed penalty assessment within 20 days to avoid the issuance of a Final Order Assessing an Administrative Penalty rather than 30 days as provided in Section 309(g)(2)(A) for a Class I penalty. The EPA's cover letter to the Respondent dated March 19, 1997, states that this is a Class II civil penalty case.