



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 6
 DALLAS, TEXAS



)	
IN THE MATTER OF:)	
)	
AIRLINE PLATING, INC.)	DOCKET NO. CWA-6-1630-99
)	
RESPONDENT)	
)	

ORDER TO SHOW CAUSE

On November 24, 1999, the Complainant filed an Administrative Complaint (Complaint) against the Respondent, alleging violations of the Clean Water Act. The Complaint seeks a \$27,500 civil penalty. However, proof of service of the Complaint has not been filed with the Regional Hearing Clerk, as required by 40 C.F.R. § 22.5(b)(1)(iii). Since the certificate of service shows that the Complaint was served by mail, service of the Complaint is complete when the return receipt has been signed. 40 C.F.R. § 22.7(c). Four months have passed, and the Complainant has not shown that the Respondent has actually received the Complaint. Thus, there is no proof that service of the Complaint has been completed. Although 40 C.F.R. Part 22 does not set a time for which proof of service must be

filed, section 4(m) of the Federal Rules of Civil Procedure¹
(F.R.C.P.) provides the following:

If service of the . . . complaint is not made upon a defendant within 120 days after filing the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice, or direct that service be made within a specified time.

In *McGlothlin v. Resolution Trust Corporation*, 913 F.Supp. 15, 19 (D.D.C. 1996), *aff'd* 111 F.3d 963 (D.C. Cir. 1997), the Court found that no evidence existed that a certain defendant was ever served a copy of the complaint within 120 days of filing of complaint, as required by F.R.C.P. 4(m). The Court ordered that the plaintiffs must file proof of timely service within 21 days of the opinion, or the case would be dismissed against that defendant. The Presiding Officer finds that in this instance, 120 days is a reasonable time to prove that service of the complaint was achieved.

Furthermore, even if the Complaint was properly served, but proof of service not filed, the Respondent has not filed an answer. However, the Complainant has not filed a motion for a default order, as provided in 40 C.F.R. § 22.17. The Presiding Officer can not, *sua sponte*, find the Respondent in default for failing to file an answer. The Complainant must file a motion for a default order. 40 C.F.R. §

¹Although the Federal Rules of Civil Procedure are not binding on administrative agencies, they can be used as guidance in applying 40 C.F.R. Part 22. *In the Matter of Rogers Corporation*, Docket No. TSCA-I-94-1079, slip op. at 6, fn 3 (November 13, 1997).

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 2000, I served true and correct copies of the foregoing Order to Show Cause on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Jose Olivarez, President
Airline Plating, Inc.
6829 Airline Drive
Houston, Texas 77076

INTEROFFICE MAIL

Marvin Benton, Chief
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Lorena S. Vaughn
Regional Hearing Clerk