



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
WAYNE VAUGHN, SR., WAYNE) DOCKET NO. CWA-9-2001-0002
VAUGHN, JR., AND)
CARRIAGE HOMES,)
)
RESPONDENTS)

ORDER TO SHOW CAUSE

On February 26, 2001, Complainant instituted this administrative enforcement proceeding against three Respondents; Mr. Wayne Vaughn, Sr., Mr. Wayne Vaughn, Jr., and the corporate entity, Carriage Homes. Complainant filed an original Complaint with the Region 9 Hearing Clerk and served separate copies of the Complaint upon Mr. Vaughn, Sr. and Mr. Vaughn, Jr. On March 20, 2001, Respondents Vaughn, Sr. and Vaughn, Jr. filed Answers to the Complaint and requested a hearing in this matter.^{1/} However, the file before me reflects that Respondent Carriage Homes failed to file an Answer to the Complaint.^{2/}

The undersigned issued a Prehearing Order on October 1, 2001. In this Order, the undersigned noted that Carriage Homes had failed to file an Answer to the Complaint. See Prehearing Order at 1 n.1.

^{1/} Although Respondents Vaughn, Sr. and Vaughn, Jr. filed separate Answers to the Complaint they elected to file a joint prehearing exchange. See Prehearing Order at 3 n.4 (allowing Respondents Vaughn, Sr. and Vaughn, Jr., as common parties, to file joint statements or documents, including a prehearing exchange).

^{2/} The file also reflects that three motions are pending before me; Complainant's Motion for Leave to File a First Amended Complaint, Complainant's Motion for Discovery, and Complainant's Motion in Limine and for Order Concerning Attendance of Witnesses and Hearing Procedures, each of which is accompanied by opposition briefs. Disposition of these motions will be forthcoming.

Yet, the Order also recognized that there had been no proof of service upon Respondent Carriage Homes. *Id.* Subsequently, on October 18, 2001, Complainant filed with the Regional Hearing Clerk a document entitled, "Notice Concerning Service; Paperwork Reduction Act Compliance" ("Notice"). In this Notice, Complainant explained that it had served Carriage Homes concurrently with its service upon Mr. Vaughn, Sr., a purported officer of Carriage Homes.^{3/} Attached to the Notice, as Exhibit 1, are copies of the return receipts with the signatures of Messrs. Vaughn, Sr. and Vaughn, Jr.

When serving a complaint upon a domestic corporation, Complainant must comply with Section 22.5(b)(1)(ii)(A) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.5(b)(1)(ii)(A) (2001). Pursuant to this section, service upon a domestic corporation may be made upon "an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process." *Id.* Complainant contends that it has satisfied the service requirements of the Rules of Practice because the Administrative Complaint and the cover letter which accompanied service of the Complaint, placed Respondent Carriage Homes on notice of the impending administrative enforcement proceeding via service upon its President, Mr. Vaughn, Sr.

The undersigned agrees that Complainant provided service of process upon Carriage Homes when it served a copy of the Administrative Complaint upon the-then President of Carriage Homes, Mr. Vaughn, Sr. Under the Federal Rules of Civil Procedure, service upon a named person, personally, can constitute service upon that person in both his representative and individual capacity, provided that such an intent is clear from the complaint.^{4/} See *Malarney v.*

^{3/} Regrettably, Mr. Vaughn, Sr., is now deceased.

^{4/} The Federal Rules of Civil Procedure ("FRCP") are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See *Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n.3 (E.D.N.Y. 1982); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n.10 (EAB 1993). FRCP 4(h), the federal rule governing service upon corporations and associations, provides for service of process upon "an officer, a managing or general agent, or to any other agent authorized by appointment or
(continued...)

Upholsterers' International Union of North America et al., 7 F.R.D. 403, 405 (E.D. Pa. 1947); *American Centennial Ins. Co. v. Handal*, 901 F. Supp. 892, 899 n.17 (D.N.J. 1995)(where service upon an individual was in his individual capacity, and did not indicate that it was meant as service of corporate defendants through him as the managing or general agent, plaintiff could not later claim that such service constituted service on the corporate defendants). It is clear from the Administrative Complaint that this enforcement proceeding was instituted against Mr. Vaughn, Sr., in his individual capacity, Mr. Vaughn, Jr., in his individual capacity, and the corporate entity, Carriage Homes. Such an intent can be gleaned not only from the caption of the proceeding but also from specific language in the Complaint.^{5/}

Under Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), a party may be found to be in default upon failure to file a timely answer to a complaint. To this date, only Messrs. Vaughn, Sr. and Vaughn, Jr. have filed Answers to the Complaint. Therefore, Respondent Carriage Homes is ordered to show cause, if any, on or before **June 28, 2002**, why it failed to file an Answer to the Complaint, and why a default order should not be entered against Respondent Carriage Homes.^{6/}

Barbara A. Gunning
Administrative Law Judge

Dated: June 12, 2002
Washington, DC

^{4/} (...continued)
by law to receive service of process . . ." FRCP 4(h). "The rationale of Rule 4[(h)] is that service be accomplished upon a representative so integrated with the corporation that such person will know what to do with legal papers served. *McCarthy v. Langston*, 23 F.R.D. 249, 250-51 (N.D. Fla. 1959) (FRCP 4 was revised and reorganized in 1993, thereby redesignating FRCP 4(d)(3), which was at issue before the court, as FRCP 4(h)).

^{5/} For instance, the Complaint states that "Carriage Homes, Wayne Vaughn, Sr., and Wayne Vaughn, Jr., (collectively, 'the Respondents') are persons under CWA section 502(5), 33 U.S.C. § 1362(5)." See Complaint at 3 ¶ 4.

^{6/} In the interest of judicial economy, the Respondent may also file a Proposed Answer to the Complaint in conjunction with its Response to the Order to Show Cause.

In the Matter of Wayne Vaughn, Sr., Wayne Vaughn, Jr., and Carriage Homes, Respondents
Docket No. CWA-9-2001-0002

CERTIFICATE OF SERVICE

I certify that the foregoing **Order to Show Cause**, dated June 12, 2002, was sent this day in the following manner to the addressees listed below.

Mary Keemer
Legal Staff Assistant

Dated: June 12, 2002

Original and One Copy By Pouch Mail To:

Danielle E. Carr
Regional Hearing Clerk
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

Copy By Pouch Mail To:

Christopher A. Sproul, Esquire
Assistant Regional Counsel
U.S. EPA, Region 9
75 Hawthorne Street, ORC-2
San Francisco, CA 94105

Copy By Regular Mail To:

Richard C. Brenneman, Esquire
Chern & Brenneman
625 East Chapel Street
Santa Maria, CA 93454

Richard E. Adam, Jr., Esquire
Chern & Brenneman
625 East Chapel Street
Santa Maria, CA 93454