



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
LAFOURCHE PARISH,) DOCKET NO. CWA-06-2007-2725
)
)
)
RESPONDENT)

**ORDER GRANTING MOTION TO ENROLL AS COUNSEL AND HOLDING RULING ON
MOTION FOR HEARING IN ABEYANCE**

This proceeding arises under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1319(g). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32.

Respondent, in its letter Answer, filed September 24, 2007, did not request a hearing.^{1/} Accordingly, the undersigned issued an Order Seeking Clarification and Directing Settlement Conference, dated November 20, 2007. That Order directed Respondent to clarify whether it was requesting a hearing before an Administrative Law Judge ("ALJ") by filing a clarification statement on or before December 28, 2007.

In response to the undersigned's November 20, 2007, Order, Respondent submitted a Motion for Hearing and a Motion to Enroll as

^{1/} Section 22.15(b) of the Rules of Practice provides, in pertinent part, that the answer to a complaint shall state whether a hearing is requested. However, subsection (c) of Section 22.15 further provides that if the respondent does not request a hearing, a hearing may be held by the Administrative Law Judge if issues appropriate for adjudication are raised in the answer. See *In re Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, 6 E.A.D. 782, 786-94 (EAB, Mar. 6, 1997).

Counsel,^{2/} each dated December 20, 2007. Respondent's Motion to Enroll as Counsel is **GRANTED**. Respondent's Motion for Hearing "moves that a hearing before an Administrative Law Judge be granted at a time to be fixed by the court by future order."

Complainant subsequently filed Complainant's Response to Motion for Hearing, on January 3, 2008. Complainant asserts that neither party has a right to a hearing because under the Rules of Practice a hearing "may be held, if requested by respondent in its answer," [40 C.F.R. § 22.15(c)] and "shall" be held, "if the proceeding presents genuine issues of material fact" [40 C.F.R. § 22.21(b)]. Thus, Complainant argues, granting Respondent's Motion for Hearing "would be premature . . . without a finding by the Presiding Officer that the proceeding presents genuine issues of material fact." Compl.'s Response to Mot. for Hr'g at 1.

Respondent's Motion for Hearing is considered premature. I agree with Complainant that the parties do not have an absolute right to a hearing under the Rules of Practice, which provide that a respondent may *request* a hearing in its answer. Nonetheless, because the Rules of Practice direct that a hearing shall be held if the proceeding presents genuine issues of material fact, I will afford Respondent the full opportunity to present its case and will hold a hearing if such is appropriate. 40 C.F.R. §§ 22.15(c), .21(b); see *In re Green Thumb Nursery*, 6 E.A.D. at 786-94. Generally, as a practical matter a respondent need not file a motion for a hearing after the filing of an answer requesting a hearing before an ALJ. Furthermore, the Rules of Practice allow for liberal amendment of pleadings, and Respondent may seek permission to amend its Answer.^{3/} 40 C.F.R. § 22.15(e); *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992); *In the Matter of Overcash Gravel and Grading Company, Inc.*, CWA-04-2004-4530, 2005 EPA ALJ LEXIS 40, at *1 (EPA ALJ

^{2/} The Motion to Enroll as Counsel requests that Christopher H. Riviere be enrolled as counsel of record for Respondent in this matter.

^{3/} On January 7, 2008, Respondent proffered a document entitled "Respondent's Answer" to the Regional Hearing Clerk and requested that it be "file[d] into the suit record." Respondent previously filed its Answer on September 24, 2007. It appears that Respondent is attempting to amend its Answer with its January 7, 2008, submission. Respondent's newly enrolled counsel is advised that this proceeding is governed by the Rules of Practice. Under 40 C.F.R. § 22.15(e), Respondent's Answer may be amended only "upon motion granted" by the ALJ.

2005) (citing Fed. R. Civ. P. 15(a) and *In Re Lazarus, Inc.*, 7 E.A.D. 318, 333 (EAB 1997)); See *In the Matter of Liston Brick of Corona*, CAA-9-2005-0018, 2007 2007 EPA ALJ LEXIS 36, at *88 (EPA ALJ 2007).

Therefore, for the reasons set forth, *supra*, Respondent's Motion for Hearing at this time is deemed premature and hereby **HELD IN ABEYANCE**.

Barbara A. Gunning
Administrative Law Judge

Dated: January 29, 2008
Washington, DC