

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KS 66219

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2019 JUN 25 AM 10:40

IN THE MATTER OF)
)
SUPERIOR RESTORATION)
& CONSTRUCTION LLC,)
)
Respondent.)
_____)

Docket No. TSCA-07-2016-0017

THIRD ORDER TO COMPLAINANT TO SUPPLEMENT THE RECORD

Complainant, the U.S. Environmental Protection Agency (EPA), Region 7, has filed a Motion for Default Order against the Respondent under the Consolidated Rules of Practice (CROP), 40 C.F.R. § 22.17(a). Accompanying its Motion, EPA also filed a Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order. To support a finding of default, there must be proof that the Respondent was properly served with the complaint. *See id.* § 22.15(a) (requiring an answer be filed "within 30 days after service of the complaint"); *see also, e.g., In Re Las Delicias Community*, 14 E.A.D. 382, 2009 WL 5326320 (Aug. 17, 2009).

Where Respondent is "a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name," EPA is required to "serve 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." 40 C.F.R. § 22.5(b)(1)(ii)(A). In the case of service by mail, proof of service is demonstrated by a "properly executed receipt." *Id.* § 22.5(b)(1)(iii), 22.7(c). The CROP, however, does not include a definition of "unincorporated association which is subject to suit under a common name."

As noted above, 40 C.F.R. § 22.5(b)(1)(ii)(A) discusses service on "an unincorporated association which is subject to suit under a common name." Thus, in addition to meeting the definition of "unincorporated association," the regulation also requires that the unincorporated association "is subject to suit under a common name." This plain reading is supported by Environmental Appeals Board precedent. In its analysis of whether service of the complaint was proper, the Board, in *In Re Las Delicias Community*, first determined that the respondent Community was an unincorporated association within the meaning of 40 C.F.R. § 22.5(b)(1)(ii)(A). *In re: Las Delicias Community*, 14 E.A.D. 382,

390, 2009 WL 5326320, *6 (Aug. 17, 2009). In addition, once the Board concluded that the respondent Community was an unincorporated association within the meaning of 40 C.F.R. § 22.5(b)(1)(ii)(A), the Board then addressed the issue of whether the unincorporated association, in this case, the Community, was “subject to suit under a common name.” Ultimately, the Board determined that under Puerto Rican law, the Community was subject to suit under a common name and thus “the Community has met the threshold requirement that state law allow an unincorporated association to be sued under its common name.” *Id.*, 14 E.A.D. at 390-391; 2009 WL at *7.

The only discussion of the definition of “unincorporated association” in EPA’s Memorandum in Support of Motion for Default Order is a brief footnote. *See Memorandum of Points and Authorities in Support of Complainant’s Motion for Default Order*, p. 3, n. 1. In that footnote, EPA states that the CROP does not define “unincorporated association,” nor does it appear that the Environmental Appeals Board (Board) has previously discussed the status of limited liability companies under 40 C.F.R. § 22.5(b)(1)(ii)(A). *See Memorandum of Points and Authorities in Support of Complainant’s Motion for Default Order*, p. 3, n. 1. However, EPA concludes, without much substantive legal and factual analyses, that limited liability companies are generally considered unincorporated associations. *Id.* Additionally, nowhere in EPA’s Memorandum of Points and Authorities in Support of Complainant’s Motion for Default does the Agency discuss the second part of the regulation’s requirement that the unincorporated association “is subject to suit under a common name.” This must be shown to support a finding that service of process was proper.

Accordingly, EPA is ORDERED to provide additional briefing to specify the legal and factual basis that the Respondent in this matter is an “unincorporated association which is subject to suit under a common name,” as required for 40 C.F.R. § 22.5(b)(1)(ii)(A) to apply. EPA must address whether respondent, as a limited liability company, is an unincorporated association and, if so, whether it is subject to suit under a common name. Such additional briefing should address both relevant Board case law and any other applicable or relevant legal authorities. EPA must file its brief no later than July 12, 2019.

SO ORDERED.

Date: June 25, 2019

Karina Borromeo

Karina Borromeo
Regional Judicial Officer/Presiding Officer

IN THE MATTER OF Superior Restoration & Construction, LLC, Respondent
Docket No. TSCA-07-2016-0017

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Third Order to Complainant to Supplement the Record was sent this day to the following persons in the manner indicated:

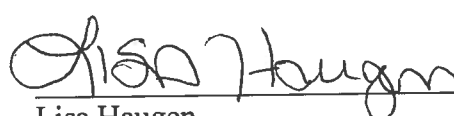
By Hand Delivery

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By Certified Mail, Return Receipt Requested

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 6/26/19

Lisa Haugen
Region 7 Hearing Clerk