

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:)
)
Pamela L. Long)
Gulf Breeze, Florida)
)
)
)
)
Respondent)
_____)

Docket No.: CWA-04-2009-5502

2010 JUN 10 11:46 AM
EPA REGION 4
COMMUNICATIONS SECTION

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

By Motion for Default (Motion) filed on June 4, 2010, pursuant to Sections 22.16 and 22.17 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits* (Consolidated Rules), 40 C.F.R. §§ 22.16 and 22.17, Complainant, U.S. Environmental Protection Agency (EPA), Region 4, seeks issuance of a default judgment. Specifically, Complainant seeks a default order assessing a civil penalty of \$130,000 against Respondent, Pamela Long, for alleged violations of Sections 301(a) and 404(a) of the Clean Water Act (Act), 33 U.S.C. §§ 1311(a) and 1344(a). According to *Complainant's Brief in Support of Motion for Default*, the case involves alleged unauthorized land clearing and filling of wetlands by or at the direction of Respondent associated with residential development in Gulf Breeze, Florida. In the event the Motion is denied, Complainant requests a finding that pursuant to 40 C.F.R. § 22.15(d), Respondent's failure to admit, deny or explain any of the material factual allegations contained in the Administrative Complaint is an admission of those allegations and a violation of the Act. The basis for Complainant's Motion is Respondent's failure to timely and properly file an Answer to the Administrative Complaint as required by Section 22.15 of the Consolidated Rules, 40 C.F.R. § 22.15.

Based upon a review of the record in this matter for the reasons discussed below, Complainant's Motion is denied.

Procedural Background

This above-captioned matter first commenced under Part 22 of the Consolidated Rules with the filing of an Administrative Complaint against Respondent on May 7, 2009. Although Complainant's Motion was filed with the Regional Hearing Clerk on June 4, 2010, it did not come to the attention of the undersigned at that time. Orders were issued to address that and other procedural matters: a) On October 14, 2010, Complainant was ordered to complete service of the Motion for Default Judgment on the undersigned; and b) On November 9, 2010, Complainant was ordered to file and serve the Exhibits to the Motion for Default Judgment with the Regional Hearing Clerk and verify service of the Exhibits upon Respondent. Complainant timely complied with all orders.

Thereafter, on November 19, 2010, by *Order for Complainant to Clarify Respondent's Address for Service* (Order to Clarify Service), the undersigned first raised issues regarding sufficiency of service of the Motion upon Respondent. An Administrative Complaint had previously been served on March 6, 2009, via First Class Mail – Return Receipt Requested. The copy of the green card evidencing receipt of that Administrative Complaint is contained in the record. However, due to the fact that Complainant failed to file that document prior to service, a second Administrative Complaint, properly filed with the Regional Hearing Clerk, on May 7, 2009, in accordance with Section 22.5 of the Consolidated Rules, 40 C.F.R. § 22.5, was then served upon Respondent via hand delivery by EPA Special Agent R. Knight on July 26, 2009. Upon closer review of the record, it appeared that the first unfiled Administrative Complaint had been mailed to 1206 Soundview Trail, Gulf Breeze, Florida. The latter filed Administrative Complaint had been served via hand-delivery 1247 Ramblewood Drive, Gulf Breeze, Florida.

The Motion before this tribunal for determination was sent via Overnight Mail to the first used Soundview Trail address, rather than that on Ramblewood Drive.

It would appear that personal service at Ramblewood Drive was not Complainant's initial service of choice for the second Administrative Complaint. Attached to the second Administrative Complaint, is a standard typed Certificate of Service dated May 7, 2009, and signed by Mary E. Halback, U.S. EPA, Region 4, certifying mailing of the Administrative Complaint, via certified mail, return receipt requested, to Ms. Long at the initial Soundview Trail address. There is nothing in the record to indicate receipt of that document. Furthermore, that Certificate of Service is then edited to indicate service by hand-delivery over two months later, on July 25, 2009, by Special Agent R. Knight, EPA-CID. The Soundview Trail address is crossed out and replaced with 1247 Ramblewood Drive. The hand-written note is signed "SA R.D. Knight." An attached email message from Special Agent Knight, dated July 26, 2009, sent to a number of recipients, including Mr. Kevin Smith, counsel for EPA in this matter, reflects Mr. Knight having served the Administrative Complaint upon Pamela Laverne Long, also known as Pamela Long Wiggins, via hand-delivery on Ramblewood Drive, in Gulf Breeze, Florida, and that Long accepted service without incident. Mr. Knight's email also refers to the attached copy of the signed Certificate of Service, provides Respondent's mobile phone number and email address, and most importantly notes: **"Please note an address change for LONG. LONG's current physical address is 1247 Ramblewood Drive, Gulf Breeze, Florida 32561."** Exhibit 7 to Complainant's Motion for Default (bold emphasis added). Absent is any explanation as to why Special Agent Knight even followed up with personal service and what, if anything, Complainant learned of the attempt to serve Ms. Long at Soundview Trail on May 7, 2009, via Certified Mail."

Notwithstanding successful service of the Administrative Complaint at Ramblewood Drive, and most importantly, Mr. Knight's notice of Respondent's change of address to that location, Complainant mailed the Motion at hand to Respondent at the previously used Soundview Trail address. It was this discrepancy that the undersigned sought to better understand with the Order to Clarify Service, directing Complainant to a) indicate the address it deemed correct for service upon Respondent in this proceeding; and b) explain why it did not continue to use the Ramblewood Drive address for service of the Motion and other filings, after effective service of the Administrative Complaint at that address.

In response, counsel for Complainant explained that: the Soundview Trail address was the last known address of record and that he is unaware of any notice by Respondent of a change of address; Soundview Trail was used for prior correspondence; and that service provided by Agent Knight on Ramblewood Drive was "at the address where the Special Agent physically found the Respondent at the time he was effectuating service," in essence couching the Ramblewood Drive location as one where agent Knight happened to find Respondent at that particular time. Counsel then attached a November 24, 2010, UPS Delivery Notification, as indication that Respondent has been receiving "its pleadings." All that the UPS Delivery Notification reflects is that a UPS Next Day Air letter was indeed shipped to Pamela L. Long, at 7130 Chapel Street, Pensacola, Florida, and signed by Wiggins [aforementioned alternate name for Long] on November 24, 2010. Left with more unanswered questions, this tribunal can best deduce that a *Notice Regarding Service of Exhibits*, mailed on November 16, 2010, was the document received by Respondent at Chapel Street, Pensacola. If Complainant's counsel has information that pleadings other than this one document were received by Respondent, including the Motion for Default at hand, he has not provided that information. Mr. Smith also notified

this tribunal that on November 24 and 29, 2010, Complainant received information that Respondent may now be using one or more new addresses, a Post Office Box and an address on Chapel Street, Pensacola, the U.S. mail and UPS forwarding addresses, respectively.¹ Complainant indicated intention to send copies of all *subsequent* pleadings to those addresses.

Discussion

Section 22.5 of the Consolidated Rules, 40 C.R.R. § 22.5, differentiates methods required for service of complaints from other documents, such as motions for default. Service of a complaint is not complete until proven to have been served; and for all authorized methods - personal, certified mail or a commercial service - written verification of delivery is required. Service is deemed complete for computation of time purposes, when the return receipt is signed. There is no such requirement controlling service of motions; and a Complainant serving a motion may choose to serve the document personally, by first class mail (including certified mail, return receipt requested, Overnight Express or Priority Mail), or by any reliable commercial delivery service. Service of motions and other such documents is deemed complete upon mailing or when placed in the custody of a commercial delivery service. 40 C.F.R. § 22.7

Additionally, relevant to the issue of sufficiency of service in this matter, is the following provision at Section 22.5(c)(4) of the Consolidated Rules:

“The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any

¹ It is also not clear whether these are forwarding addresses for mail sent to Ramblewood Drive, not Soundview. Had it been from Soundview, it is also unclear why mail, including the undersigned’s Orders sent to that address, were returned as “forward time exp,” rather than forwarded as well. Also omitted from the record is any information pertaining to the whereabouts of the Administrative Complaint mailed to Soundview, as well as subsequently filed documents, and whether or not they were returned undeliverable.

changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6."
40 C.F.R. § 22.5(c)(4) (Emphasis Added)

It appears that Complainant viewed the last known address on record as Respondent's Soundview Trail address where the first "unfiled" Administrative Complaint had been served, and justifies use of that address based upon Respondent's failure to furnish another address, presumably in accordance with 40 C.F.R. § 22.5(c)(4). However, that conclusion is problematic for two reasons: a) this matter commenced with the filing of the Administrative Complaint on May 7, 2009, rather than with the service of the previous Complaint that had not been entered into the record. 40 C.F.R. § 22.13(a). Therefore, the address of record in this proceeding was actually Ramblewood Drive, the location at which Respondent was personally served that second Administrative Complaint; and b) most significantly, this position overlooks SA Knight's notification of Respondent's change of address to Ramblewood Drive in Gulf Breeze.

Default orders have long been considered a harsh remedy not favored by the courts; therefore, cases should be decided on their merits whenever possible. See In the Matter of James Bond, Owner, Bond's Body Shop, Docket No., 2005 EPA ALJ Lexis 1 (January 11, 2005), citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986), Lacy v. Sitel Corp., 227 F.3d 290 (5th Cir. 2000), and Davis v. Musler, 713 F. 2d 907 (2nd Cir. 1983). Notwithstanding the warning contained in Administrative Complaints generally that failure to respond may subject a Respondent to being held in default, it is undisputed that due process requires separate notice if and when that default process begins. While actual proof of receipt of such notice is not required by the rules governing this proceeding, there should still be a showing that reasonable and diligent efforts were used to accomplish service in delivering any notice of legal process by a government agency. In the Matter of Scotts-Sierra Crop Protection Company, 1997 EPA ALJ

LEXIS 144 (February 11, 1997). Therefore, to the extent notice needs to be sent to a Respondent's last known address, there must be a showing that reasonable and diligent efforts were made to use the correct last known address. *Id.*

There are certainly challenges to locating parties with multiple residences or those who move frequently, which could be the case here. However, particularly problematic in this instance is the attempted service of the Motion for Default at Soundview Trail, which appears in the record to be an incorrect address. This is especially so given SA Knight's deletion of the Soundview Trail address and notification of the precise change of address to Ramblewood Drive. One arm of EPA, its Criminal Investigation Division, was not only aware of Respondent's change of address, but passed that information directly along to the arm of the Agency responsible for the pending civil administrative proceeding. *See McPartlin v. Commissioner of the Internal Revenue Service*, 653 F. 2d 1185, 1190-1192. Granting Complainant's Motion under these circumstances could result in finding Respondent liable for violations of the CWA, and subject to significant penalty, without having afforded her the right to appear in the default proceedings against her.

Therefore, based upon the conclusion that Complainant failed to establish proper service of the pending Motion upon Respondent, it is appropriate that Complainant's Motion be denied.

IT IS ORDERED:

1. For the above reasons Complainant's Motion for Default Judgment is hereby **DENIED** without prejudice.
2. This Order does not preclude Complainant from pursuing future default proceedings pursuant to 40 C.F.R. §§ 22.16 and 22.17, seeking resolution of all or part of the proceeding.

Should Complainant initiate a default proceeding in the future, Respondent shall respond within the time required by 40 C.F.R. § 22.17(a). This tribunal will have jurisdiction over any future default proceeding under 40 C.F.R. § 22.16(c).

Complainant indicated that as of November 30, 2010, Respondent was using two new addresses. In an effort to provide the greatest likelihood of notice to Respondent of this determination, this Order will be served upon Respondent at those addresses as well as the previously used Ramblewood Drive address.

Date: March 10, 2011

Susan B. Schub
Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Order Denying Complainant's Motion for Default Judgment in the Matter of Pamela L. Long, Docket No., CWA-04-2009-5502, on the parties listed below in the manner indicated:

Certified Mail—

Return Receipt Requested:

Pamela L. Long	and	and
Post Office Box 10058	7130 Chapel Street	1247 Ramblewood Drive
Pensacola, FL 32524-0058	Pensacola, FL 32504	Gulf Breeze, Florida 32561

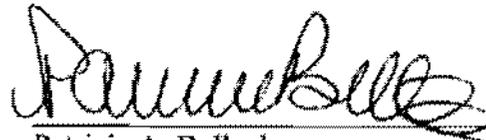
Mr. Jim Stoutamire
Florida Department of Environmental Protection
Twin Towers Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Via Intra-Office Mail:

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Laurie Lindquist
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Date: 3-10-11



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