

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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In the Matter of: )

Lester Sykes, )  
Chicago, Illinois, )

Respondent. )  
\_\_\_\_\_ )

Docket No. TSCA-05-2008-0013

**ORDER DENYING MOTION FOR DEFAULT**

This proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a). It is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 (Consolidated Rules).

**I. Background**

On June 26, 2008, the U.S. Environmental Protection Agency, Region 5 (EPA), filed an administrative complaint (Complaint) against Lester Skyes (Respondent), of Chicago, Illinois, alleging 66 violations of the Residential Lead-Based Paint Hazard Reduction Act of 1992 and 40 C.F.R. Part 745. The Complaint seeks a \$159,310 penalty. EPA alleges that, by letter dated June 25, 2008, it attempted to serve the Complaint on Respondent by United States Postal Service (USPS) certified mail, return receipt requested but the Complaint was returned to EPA. Memorandum in Support of Complainant's Motion for Default Order, Finding of Liability and Penalty (Memorandum in Support) at 4, Attach. A to Ex. M.<sup>1</sup> On April 21, 2009, EPA sent a copy of the Complaint to Respondent, this time by USPS priority mail with delivery confirmation. *Id.* at 4, Ex. I. The package was delivered on April 22, 2009. *Id.* Respondent did not file an answer to the Complaint. On January 18, 2011, EPA sent Respondent a letter reminding him of the process for filing an answer to the Complaint and stating that if he did not file an answer within 30 days of his receipt of the letter, EPA would consider its enforcement options, including filing a motion seeking a finding of default against him. *Id.* at 4-5, Ex. K. Respondent did not file an answer to the Complaint and, on October 20, 2011, EPA filed Complainant's Motion for Default Order, Finding of Liability and Penalty (Motion for Default Order), which it sent by United Parcel Service (UPS) express mail to Respondent. Based on a review of the record, to date, Respondent has not filed an answer to the Complaint or a response to the Motion for Default Order.

<sup>1</sup> There is no certificate of service attached to the Complaint, as required by 40 C.F.R. § 22.5(a)(3). In addition, the date of the letter transmitting the Complaint to Respondent predates the date on which the Complaint was filed with the Regional Hearing Clerk.

## II. Applicable Procedural Rules

Under Section 17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), a party may be found to be in default, after motion, upon failure to timely file an answer to the complaint. Default by a respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. *Id.*

EPA's procedural rules for service of administrative complaints are set forth at 40 C.F.R. § 22.5(b)(1) and state, in relevant part:

(i): "Service [of the complaint] shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery."

(iii): "Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service."

Under 40 C.F.R. § 22.7(c), service of the complaint is complete when the return receipt is signed.

## III. Discussion

Default judgments generally are disfavored as a means of resolving agency enforcement proceedings; nonetheless, default orders are appropriate where the circumstances clearly indicate that the imposition of such a remedy is warranted. *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766 (EAB 2006). For a default judgment to enter, however, service of process on the respondent must be valid. *In re Las Delicias Community*, SDWA Appeal No. 08-07, slip op. at 8 (EAB, Aug. 17, 2009), 14 E.A.D. \_\_\_. *See also In re Medzam, Ltd.*, 4 E.A.D. 87, 92-93 (EAB 1992) (defective service vitiates all subsequent proceedings). The Consolidated Rules and requirements of due process determine whether EPA's service was proper. *Katzson Bros., Inc. v. U.S. Environmental Protection Agency*, 839 F.2d 1396, 1399 (10<sup>th</sup> Cir. 1988).

While the case law evaluating whether service of an EPA administrative complaint was proper when sent by certified mail, return receipt requested is extensive,<sup>2</sup> the question of whether a

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<sup>2</sup> *See, e.g., Katzson*, 839 F.2d at 1400 (EPA's service of the complaint by registered mail with return receipt requested and efforts to contact the respondent over a substantial time period satisfied due process concerns); *Medzam*, 4 E.A.D. at 94 (complaint addressed only to the corporate entity was not properly "directed" and service was defective); *In re Burnham Associates, Inc.*, Docket No. MPRSA-01-2010-0078, 2010 EPA ALJ LEXIS 25, at \*4 (ALJ, Dec. 21, 2010) (even though the complaint was sent by certified mail, return receipt requested, Respondent initially was not properly served because there was no signed return receipt); *In re Roy C. Bobo*, Docket No. TSCA-07-2001-0022, at 4 (RJO, Oct. 24, 2001) (service by certified mail, return receipt requested to respondent's mailing address, where the return receipt was signed by an individual with the same last name, was insufficient because there was no basis in the record to infer that the person who signed for the certified mail was authorized to receive the complaint); *In re Herman Roberts*, OPA Docket No. 99-512, 2000 EPA RJO Lexis 211, at \*211 (RJO, Apr. 14, 2000) (service of process was achieved when the complaint was sent by certified mail, return receipt requested and addressed to the respondent at the respondent's post office box because only someone associated with the respondent's business would have the authority to pick up the respondent's mail and sign for the complaint).

complaint can be served in accordance with the Consolidated Rules when it is sent to a respondent by USPS priority mail with delivery confirmation appears to be one of first impression. I address the three elements of proper service of an administrative complaint in turn.

The first element addresses how a complaint is physically served. As noted above, the Consolidated Rules require that when serving a complaint by mail, service must be by certified mail with return receipt requested. 40 C.F.R. § 22.5(b)(1)(i). The Consolidated Rules do not specify if service by mail must be by first class, priority or another method of mailing. *Id.*

USPS priority mail generally provides delivery within two days. *See* USPS.com, Priority Mail, <https://www.usps.com/send/priority-mail.htm> (last visited Aug. 13, 2012). Although it reduces delivery time, priority mailing does not put any restrictions on how, when or to whom mail is delivered. Thus, priority mail, on its own, does not meet the requirements for serving a complaint under the Consolidated Rules.<sup>3</sup>

The USPS offers a range of extra service options if a sender wishes to confirm delivery, such as delivery confirmation, signature confirmation, certificate of mailing, certified mail, return receipt and restricted delivery. *See* USPS.com, Mail with Extra Services <https://www.usps.com/send/insurance-and-extra-services.htm> (last visited August 13, 2012). Depending on the method of mailing (*e.g.*, first class, priority mail or parcel post), different services are available. *Id.* For example, a letter sent by priority mail could require delivery confirmation or be certified mail with (or without) return receipt requested. Among these service options, delivery confirmation provides written confirmation of the date and time of delivery only and is available for most mailing methods. *Id.* Certified mail allows the sender to find out when its item was delivered or delivery was attempted and requires the signature of the recipient. It is only available for first class and priority mail. *Id.* Return receipt provides proof of when an item was delivered by providing the signature of the recipient to the sender via postcard or email and is available for most methods of mailing. *Id.* Therefore, to comply with the requirements of 40 C.F.R. § 22.5(b)(1)(i), regardless of whether serving a complaint by first class or priority mail, EPA also must purchase the certified mail and return receipt requested service options. The other mail service options, including delivery confirmation, are outside the scope of the requirements for service of complaints by mail under the Consolidated Rules.

The second element addresses proof of service. The Consolidated Rules require that proof of service of the complaint must be made by properly executed receipt. 40 C.F.R. § 22.5(b)(1)(iii). Although the Consolidated Rules do not explicitly define “properly executed receipt,” in the context of service by mail, when 40 C.F.R. § 22.5(b)(1)(iii) is read with the requirements at 40 C.F.R. § 22.5(b)(1)(i) (“by certified mail with return receipt requested”) and what the USPS certified mail (“Requires the signature of the recipient.” USPS.com, Mail with Extra Services, *supra*) and return receipt service (“Get proof an item was delivered with a postcard or email showing the recipient’s signature.” *Id.*) options provide, it is clear that a receipt must be signed by the recipient to be properly executed. Because delivery confirmation does not require the signature of the recipient, service by mail with delivery confirmation cannot be proved as required by 40 C.F.R. § 22.5(b)(1)(iii).

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<sup>3</sup> In contrast, the rules for service of rulings, orders, decisions and all filed documents other than the complaint are broader and allow for service by priority mail alone. *See* 40 C.F.R. §§ 22.5(b)(2) and 22.6.

Presiding Officers consistently have held that properly executed receipts are necessary to prove service of a complaint by mail.<sup>4</sup> For example, in *In re Burnham Associates, Inc.*, Docket No. MPRSA-01-2010-0078, 2010 EPA ALJ LEXIS 25, at \*4 (ALJ, Dec. 21, 2010), the Administrative Law Judge (ALJ) found that “[t]here is no dispute that Respondent ... initially was not properly served with the Complaint ..., as evidenced by the lack of a return receipt signed by the Respondent or its authorized representative” after the complaint was sent by certified mail, return receipt requested, but the respondent did not sign the return receipt. There, the complainant tried to cure the defect by sending a copy of the complaint to the respondent’s counsel, who was authorized to receive service on its behalf, but again the ALJ found that the complainant had not demonstrated proof of service by a properly executed receipt, in accordance with the Consolidated Rules. *Id.* at \*5. See also *In re K Indus., Inc.*, Docket No. RCRA-06-2003-0915, 2005 EPA RJO LEXIS 109, at \*1 (RJO, Mar. 2, 2005) (“A properly executed return receipt constitutes proof of service of the Complaint”); *In re Charlie Mortillero*, CWA Docket No. VI-99-1622, 2000 EPA RJO LEXIS 210, at \*210 n.1 (RJO, Apr. 27, 2000) (a certificate of service indicating that the complaint was sent by certified mail, return receipt requested was insufficient by itself to show that the respondent received the complaint); accord *In re Herman Roberts*, OPA Docket No. 99-512, 2000 EPA RJO LEXIS 211, at \*211 n.2 (RJO, Apr. 14, 2000); *In re Donald Haydel*, CWA Docket No. VI-99-1618, 2000 EPA RJO LEXIS 88, at \*88 n.1 (RJO, Apr. 5, 2000).

The third element addresses when service is complete. Under 40 C.F.R. § 22.7(c), service of the complaint is complete when the return receipt is signed. Because delivery confirmation does not require the signature of the recipient, service by USPS mail with delivery confirmation cannot be completed in accordance with 40 C.F.R. § 22.7(c).

In this case, after allegedly unsuccessfully trying to serve the Complaint by certified mail with return receipt requested, EPA sent the Complaint to Respondent by priority mail with delivery confirmation. Mem. in Supp. at 4. The USPS-generated delivery confirmation provides the time and date of delivery, but does not include any form of signature confirmation. *Id.*, Ex. I. EPA did not use one of the methods for service of a complaint specified in 40 C.F.R. § 22.5(b)(1)(i) and, because delivery confirmation does not require the signature of the recipient or create a signature receipt, EPA cannot provide proof of service as required by 40 C.F.R. § 22.5(b)(1)(ii) or demonstrate that it completed service in accordance with 40 C.F.R. § 22.7(c).<sup>5</sup> Therefore, under the Consolidated Rules, EPA did not perfect service of the Complaint when it sent the Complaint to Respondent by USPS priority mail with delivery confirmation.

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<sup>4</sup> Complaints sent by “reliable commercial delivery service with written verification of delivery” also require the signature of the recipient to be properly served. See, e.g., *In re Cheerful Cesspool Serv.*, Docket No. CWA-08-2009-0017, 2011 EPA RJO LEXIS 389, at \*389 & nn.1-2 (RJO, Nov. 15, 2011) (service of the complaint via Federal Express with confirmed delivery was inadequate, but service of the complaint via Federal Express with signature confirmation constituted proper service).

<sup>5</sup> Furthermore, even if delivery confirmation was an allowable method of service of a complaint under the Consolidated Rules, EPA failed to file proof of such service (i.e., the delivery confirmation) with the Regional Hearing Clerk as required by 40 C.F.R. § 22.5(b)(1)(iii). Simply including evidence of its attempts to perfect service of the Complaint within the exhibits of its Memorandum in Support is insufficient under the Consolidated Rules. See *Mortillero*, 2000 EPA RJO LEXIS 210, at \*210 (because proof of service had not been filed with the Regional Hearing Clerk, there was no proof that service of the complaint had been completed); accord *Roberts*, 2000 EPA RJO LEXIS 211, at \*211; *Haydel*, 2000 EPA RJO LEXIS 88, at \*88.

While it is clear that EPA's attempt to serve the Complaint by priority mail with delivery confirmation did not comport with Consolidated Rules, I also must evaluate whether this approach nonetheless satisfied the due process concerns of fundamental fairness and notice. Federal cases examining whether the service of process employed by a plaintiff meets the requirements of due process generally hold that the inquiry is not whether the party whose interest is at stake actually received notice, but whether the agency "employs a procedure reasonably calculated to achieve notice." *Katzson*, 839 F.2d at 1400. See also *Orix Financial Services v. Phipps*, 2009 U.S. Dist. LEXIS 530, at \*27 (S.D.N.Y. 2009) (citing *Weigner v. New York*, 852 F.2d 646, 649 (2d Cir. 1988)). The Supreme Court and several circuit courts of appeal have held that notice sent by ordinary mail is, under most circumstances, reasonably calculated to inform interested parties of the impending action. *Weigner*, 852 F.2d at 650 (citing *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 490 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983)); *Katzson*, 839 F.2d at 1400 (also citing *Mennonite Board of Missions*, 462 U.S. at 800). The Consolidated Rules, however, specify what type of mail service must be used when serving a complaint; therefore, considerations of due process must be examined within that context.

In addition to falling outside the universe of allowable methods of service of a complaint under the Consolidated Rules, USPS priority mail with delivery confirmation is not reasonably calculated to provide notice to a respondent of an impending enforcement action because it is only intended to guarantee delivery to an address on an accelerated delivery schedule. It does not ensure receipt by a particular individual.<sup>6</sup> Therefore, USPS priority mail with delivery confirmation is not a satisfactory method of service of an administrative complaint under a due process analysis.

Due process concerns also arise when there is actual notice of a complaint, despite improper service. EPA's administrative decisions have been split on whether actual notice of a complaint overcomes deficiencies in service.<sup>7</sup> For example, in one case, the ALJ found that, where the return receipt for the complaint was signed by a non-employee and the respondents did not dispute that they had received the complaint, "the achievement of actual service of process obviate[d] the failure of Complainant to strictly comply with the service of process procedures" of the Consolidated Rules. *In re C.W. Smith*, Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7, at \*16-\*17 (ALJ, Feb. 6, 2002) (citing *In re City of Orlando, Florida*, Docket No. CWA-04-501-99, 1999 EPA ALJ LEXIS 38, at \*6-7 (ALJ, Jul. 7, 1999)). More recently, however, actual notice of a lawsuit by receipt of a complaint did not substitute for adequate service of process. See *Burnham*, 2010 EPA ALJ LEXIS 25, at \*5-6, (citing *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 681 (N. D. Iowa 1995)). In *Burnham*, the ALJ held that the respondent's attorney's receipt of the complaint, and complainant's statement that respondent was served by UPS, did not establish adequate service of the complaint. *Id.* at \*6. Here, EPA's inclusion of communications from Respondent regarding the Complaint as evidence that

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<sup>6</sup> Although the Federal Rules of Civil Procedure are not binding on administrative actions, see *Katzson*, 839 F.2d at 1399, they also require more than mere delivery when a complaint is served at a person's residence. Specifically, Fed. R. Civ. P. 4(e)(2)(B) requires that when serving a complaint at an individual's dwelling or usual place of abode, the summons and complaint must be left with "someone of suitable age and discretion who resides there."

<sup>7</sup> These decisions are all in the context of service of the complaint by certified mail with return receipt requested.

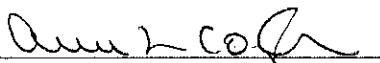
Respondent had received the Complaint, Mem. in Supp. at 4-5, Ex. L, is insufficient to overcome the deficiencies in the way that EPA attempted to serve the Complaint on Respondent.

**IV. Conclusion**

For the foregoing reasons, I find that EPA did not serve the Complaint in this matter in accordance with the Consolidated Rules nor did it meet the requirements of due process. Therefore, EPA's Motion for Default Order is DENIED without prejudice and it is unnecessary to consider the other matters raised in EPA's Motion for Default Order.

**IT IS SO ORDERED.**

Date: August 31, 2012

  
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Ann L. Coyle  
Regional Judicial Officer  
U.S. EPA Region 5

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Docket No.: TSCA-05-2008-0013

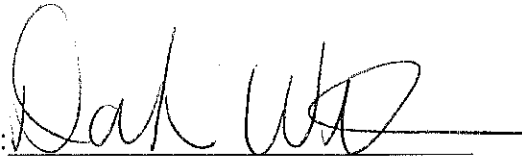
CERTIFICATE OF SERVICE

I certify that I filed with the Regional Hearing Clerk the original and one copy of the foregoing **ORDER DENYING MOTION FOR DEFAULT**, dated August 31, 2012, by hand delivery at the following address:

Ladawn Whitehead  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Boulevard (E-19J)  
Chicago, Illinois  
60604

On the 31 day of August 2012.

By:



Darlene Weatherspoon  
Administrative Program Assistant  
Office of Regional Counsel

In the matter of: Lester Sykes  
Docket No.: TSCA-05-2008-0013

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CERTIFICATE OF SERVICE

I certify that I sent the foregoing **ORDER DENYING MOTION FOR DEFAULT**, dated August 31, 2012, to the following people in the following manner:

Copy, by EPA internal mail, to: Ann Coyle  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Boulevard (C-14J)  
Chicago, Illinois 60604

Copy, by EPA internal mail, to attorney for Complainant: Mary T. McAuliffe  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Boulevard (C-14J)  
Chicago, Illinois 60604

Copy, by United Parcel Service: Lester Sykes  
20 East 96<sup>th</sup> Street  
Chicago, Illinois 50528 60628  
Receipt no:  
On the 31 day of August 2012. By: Ladawn Whitehead  
Ladawn Whitehead  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5