IN RE LAS DELICIAS COMMUNITY

SDWA Appeal No. 08-07

FINAL DECISION AND ORDER

Decided August 17, 2009

Syllabus

This case concerns an enforcement action undertaken by the Director of the Caribbean Environmental Protection Division for Region II of the Environmental Protection Agency ("Region") against the Las Delicias Community ("Community") for violating section 1414(g) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300g-3(g), and the Surface Water Treatment Rule ("SWTR") promulgated under the SDWA. On September 29, 2008, Regional Judicial Officer Helen S. Ferrara ("Presiding Officer") issued a Default Order and Initial Decision finding the Community liable for violating the SDWA and the SWTR, respectively, based on the Community's failure to comply with the requirements for the treatment of drinking water obtained from a surface source. The Presiding Officer assessed a civil administrative penalty against the Community in the amount of $500.

The Presiding Officer's decision discussed at length whether service of process on the Community was proper because the certified return receipts for service of both the Complaint and the Motion for Entry of Default were not signed by the intended recipient, Community member and representative Iris Reyes, but instead were signed by another Community member, Lydia Collazo. The Consolidated Rules of Practice ("CROP") state that service of process shall be made on the respondent or the respondent's representative, in this case Ms. Reyes. The CROP also allows for service to be effected on an officer, partner, managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process, when the respondent is an unincorporated association subject to suit under a common name. The Presiding Officer concluded, without providing an analysis, that the Community is an unincorporated association. The Presiding Officer further stated that she need not rely on the presumption that the Community is an unincorporated association to determine whether service of process was proper because the Community had actual notice of the enforcement action.

The Board elected, pursuant to 40 C.F.R. § 22.30(b), to exercise *sua sponte* review of the Presiding Officer's decision to discern whether the Community is an unincorporated association, and based on that analysis, determine whether the Region's service of process complied with the CROP.

Held: The Board upholds the Default Order and Initial Decision. Although the CROP does not define the term unincorporated association, the Board looked to federal case law interpreting the Federal Rules of Civil Procedure ("FRCP") because the concept of an unincorporated association under the FRCP is analogous to an unincorporated association under the CROP. Based on that case law, the Board concludes that the Community is an unincorporated association. In addition, the FRCP provides that an unincorporated asso-

ciation's capacity to be sued is determined by the law of the forum state, and the Board holds that the Community is subject to suit under Puerto Rico law.

The Board examines whether Ms. Collazo properly received service of process on behalf of the Community as a general agent of the Community, one of the classes of persons authorized to receive service under the CROP. The CROP does not define the term general agent. The Board again looked to federal law and the FRCP to guide its analysis of whether Ms. Collazo is a general agent of the Community under the CROP because a general agent under the CROP is comparable to a general agent under the FRCP. Based on federal precedent, the Board concludes that Ms. Collazo is a general agent of the Community because a factual analysis of several elements indicative of Ms. Collazo's authority within the Community satisfies the threshold requirement for her to act as a general agent of the Community.

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *STATEMENT OF THE CASE*

The current matter concerns whether the Director of the Caribbean Environmental Protection Division for Region II of the United States Environmental Protection Agency ("Complainant" or "Region") achieved proper service of process of a Complaint and subsequent Motion for Entry of Default Judgment against the Las Delicias Community ("Respondent" or "Community") through service on one of its members. Having determined service was proper, on September 29, 2008, Regional Judicial Officer Helen S. Ferrara ("Presiding Officer") issued a Default Order and Initial Decision finding the Respondent liable for violating section 1414(g) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300g-3(g), and the Surface Water Treatment Rule ("SWTR") promulgated under the SDWA, and assessed a civil administrative penalty against Respondent in the amount of $500. *See In re Las Delicias Community*, Docket No. SDWA-02-2003-8265, Default Order and Initial Decision, at 1 (RJO Sept. 29, 2008) ("Default Order").

In her decision, the Presiding Officer discussed at length whether service of process was proper. The issue arose because the certified return receipts for service of both the Complaint and the Motion for Entry of Default were not signed by Iris Reyes, the Community's representative, but instead were signed by another Community member, Lydia Collazo. Default Order at 6-11. The Consolidated Rules of Practice ("CROP")[1] state that service of process shall be made upon ei-

[1] The full name of the Consolidated Rules of Practice is: "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspen-
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ther the respondent or a representative authorized to receive service on the respondent's behalf. 40 C.F.R. § 22.5(b)(1)(i). The Presiding Officer noted that under the CROP, where a respondent is an unincorporated association subject to suit under a common name, the complainant shall 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. Default Order at 7 (citing 40 C.F.R. § 22.5(b)(1)(ii)(A)). After examining supplemental evidence offered by the Complainant, the Presiding Officer concluded that service was proper, although the Presiding Officer did not provide an analysis of whether the Respondent is an unincorporated association subject to suit under a common name, which is required for 40 C.F.R. § 22.5(b)(1)(ii)(A) to apply, and a predicate to finding Ms. Collazo's receipt of service of process proper. *See* Default Order at 7, 9 ("Respondent is a community of members served by the Las Delicias public water system, and is therefore an unincorporated association. * * * It is [sic] also appears reasonable that Ms. Collazo be presumed * * * to be authorized to receive service on behalf of the Las Delicias Community"). The Environmental Appeals Board ("Board") elected, pursuant to 40 C.F.R. § 22.30(b), to exercise *sua sponte* review of the narrow component of the Presiding Officer's decision concerning whether Respondent is an unincorporated association subject to suit under a common name, and whether, based on that analysis, the Region's service of process complied with the CROP. Order Electing to Review *Sua Sponte* (Nov. 14, 2008). For the reasons stated below, the Board agrees with the Presiding Officer's conclusion that the Community is an unincorporated association, and that service of process was proper in this instance.

II. *BACKGROUND*

A. *Factual and Regulatory Background*

The Community consists of approximately forty-eight individuals residing within twelve households in the municipality of Ciales, Puerto Rico. *See* Complainant's Brief to Order Electing to Review *Sua Sponte* (Dec. 15, 2008) ("Complainant's Br.") at 2-3 & Ex. 2. It is undisputed that the Community owns and/or operates a "public water system" and is therefore considered a "supplier of water" under the SDWA because the forty-eight Community members draw and pipe water from a creek for the Community's use.[2] *Id*. at 2-3 & Exs. 2 & 3. A public

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sion of Permits." 40 C.F.R. pt. 22. The Consolidated Rules of Practice govern all administrative adjudicatory proceedings for, *inter alia*, the assessment of any administrative civil penalty under section 1414(g) of the SDWA. 40 C.F.R. § 22.1(a)(9).

[2] The SDWA defines a public water system as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at
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water system using a surface water source must utilize treatment techniques detailed within the SWTR promulgated under the SDWA, to prevent the spread of waterborne diseases.[3] 40 C.F.R. § 141.70. The Community's failure to comply with the regulations requiring the treatment of drinking water obtained from a surface source gave rise to this complaint. Complainant's Br. at 3.

When the SWTR came into effect on June 29, 1989, it specified that public water systems using a surface water source are required to install disinfection and filtration systems that meet the criteria set forth in 40 C.F.R. §§ 141.72(b) and 141.73, respectively, unless the surface water body meets all of the water quality conditions detailed in § 141.71(a)-(b) for avoiding filtration. 40 C.F.R. § 141.70. The SWTR imposes these obligations by June 29, 1993, or within eighteen months of failing to meet the criteria for avoiding filtration detailed in 40 C.F.R. § 141.71(a)-(b), whichever is later. *Id.* § 141.73; *see also* Default Order at 4. Failure to comply with the requirements set forth in 40 C.F.R. §§ 141.72(b) and 141.73 within the time frame specified constitutes a treatment technique violation.

The Region issued an Administrative Order on June 30, 1994, to the Honorable Angel M. Otero, former mayor of Ciales and the previous operator of the Las Delicias Public Water System, under the authority of section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g). Default Order at 4. The order addressed violations of the SDWA and the SWTR and required the Las Delicias Public Water System to provide water filtration. Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty and Notice of Opportunity to Request a Hearing (July 11, 2003) ("Complaint") at 7; *see* Default Order at 4. On August 3, 1999, the Region issued an amended Administrative Order granting the Community an additional two years to obtain filtration for the Las Delicias Public Water System. Complaint at 7; *see* Default Order at 4. After the Community's failure to comply with the amended Administrative Order, the Region filed the Complaint and subsequent Motion for Entry of Default at issue here. Complaint at 7; Motion for Entry of Default ¶¶ 9-11 (Mar. 8, 2007).

The Region filed its Complaint on July 11, 2003, and sent a copy of the Complaint as well as the amended Administrative Order and other documents to

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least fifteen service connections or regularly serves at least twenty-five individuals." 42 U.S.C. § 300f(4)(A). A supplier of water "means any person who owns or operates a public water system." 42 U.S.C. § 300f(5). The Las Delicias Community Public Water System is one of approximately 250-280 public water systems in the Commonwealth of Puerto Rico that is not connected to the government water supplier, the Puerto Rico Aqueduct and Sewer Authority ("PRASA"), and thus is commonly referred to as a non-PRASA system. Complainant's Br. at 7, n.3.

[3] The SWTR encompasses the national primary drinking water regulations, promulgated to prevent the spread of contaminants such as *Giardia lamblia*, viruses, and *Legionella*. 40 C.F.R. § 141.70.

Ms. Reyes, a Community member, on behalf of the Community, via certified mail return receipt requested.[4] Default Order at 5. All documents were sent to Ms. Reyes's last known address; however, the certified return receipt was signed not by Ms. Reyes, but by another Community member, Lydia Collazo, and returned to the Region on August 1, 2003. Motion for Entry of Default ¶ 13 & Ex. 2 (certified mail return receipt bearing Ms. Collazo's signature); Default Order at 5. On March 12, 2007, the Region filed a Motion for Entry of Default, similarly served on the Community through Ms. Reyes at her last known address, and the Region again received the return receipt card signed by Ms. Collazo. Default Order at 5.

B. *The Presiding Officer's Decision*

Recognizing that proper service is essential to "the fundamental guarantees of fairness and notice," the Presiding Officer issued an order on August 20, 2008, directing the Region to supplement the record and address whether service of process on the Community was proper. *In re Las Delicias Community*, Docket No. SDWA-02-2003-8265, at 4 (RJO Aug. 20, 2008) (Order to Supplement the Record). The Presiding Officer expressed concern regarding Ms. Collazo's status in relation to both the Community and Iris Reyes, whether the address where service was sent was for a business or a residence, and whether all members of the Community are authorized to receive process.[5] *Id.* at 2-4. In its response to the Order to Supplement the Record, the Region provided, among other things: (1) confirmation that to the best of the Region's knowledge both Ms. Reyes and Ms. Collazo are members of the Community; (2) a letter from the Municipal Assembly of Ciales dated April 17, 2007, inviting Complainant's counsel and the Enforcement Officer[6] assisting the Community with its compliance to attend a meeting to discuss the enforcement action against the Community; (3) verification that the En-

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[4] We note, as the Presiding Officer did, that other than her membership in the Community, the specifics regarding Ms. Reyes' status as the Community's "representative" are unclear. *See In re Las Delicias Community*, Docket No. SDWA-02-2003-8265, at 3 (RJO Aug. 20, 2008) (Order to Supplement the Record). After a visit to the Community in 1999, a PRASA inspector indicated he spoke with Ms. Reyes, and he described her as "the person in charge of the system." Complainant's Br., Ex. 2. Although no further information is provided, the Region's pleadings refer to Ms. Reyes as the Community's representative. *See* Administrative Order at 1 (July 11, 2003); Motion for Entry of Default ¶ 3.

[5] In the Order to Supplement the Record, the Presiding Officer stated, without further explanation, that the Community "appears to be an unincorporated association." *Id.* at 2.

[6] The Enforcement Officer handling the Community's case is Ms. Cristina Maldonado, an Environmental Scientist within the Region's Caribbean Environmental Protection Division, whose duties include visits to rural water supply systems, inspections, and the support of enforcement actions against such water systems in pursuit of compliance with the SDWA. Complainant's Br., Ex. 1, Declaration of Cristina Maldonado in Support of Complainant's Brief to Order Electing to Review *Sua Sponte*, at 1 ("Declaration"). Over the course of several years, Ms. Maldonado has attempted to provide compliance assistance to the Community, and has visited the Community on several occasions. *Id.* at 2.

forcement Officer voluntarily attended a meeting called by the Municipal Assembly to discuss the enforcement action against the Community; and (4) a letter Ms. Reyes sent on January 25, 2005, that was signed by Community members, including Ms. Reyes and Ms. Collazo, to the Enforcement Officer regarding the compliance order included with the Complaint. *In re Las Delicias Community*, Motion to Supplement the Record at 1-2, Attachs. 1 & 2 (Sept. 11, 2008); *see* Default Order at 8-9. At no point has the Community challenged the legitimacy of the service of process, nor has it responded to the Complaint, the Motion for Entry of Default, or the Presiding Officer's Order to Supplement the Record. After reviewing the supplemental information, the Presiding Officer issued the Default Order and Initial Decision, holding that the Community was an unincorporated association, and stating further that she "need not rely on this presumption" in determining whether service was proper because "actual service [on the Community] was obviously achieved." Default Order at 9.

III. *ANALYSIS*

A. *Standards for Default Judgment and Service of Process Under the CROP*

In order for a default judgment to enter, service of process on the respondent, here the Community, must be valid.[7] *E.g.*, *In the Matter of Medzam, Ltd.*, 4 E.A.D. 87, 92-93 (EAB 1992) (defective service vitiates all subsequent proceedings). Agencies are free to craft their own rules, reflecting requirements of due process, that determine whether service is proper, and they are not required to follow the Federal Rules of Civil Procedure ("Federal Rules" or "FRCP"). *Katzson Bros., Inc. v. U.S. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (Consolidated Rules of Practice and the requirements of due process alone determine whether

[7] As provided in 40 C.F.R. § 22.17(a), a party may be found in default upon failure to file a timely answer to a complaint. A default by the respondent constitutes an admission of all facts alleged in the complaint concerning the pending proceeding and a waiver of respondent's right to contest those factual allegations. *Id.* Default judgments are generally disfavored as a means of resolving Agency enforcement proceedings. *In re Four Strong Builders, Inc.*, 12 E.A.D 762, 766 (EAB 2006); *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005) (stating general principle); *In re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992) (same). Although the Board prefers to resolve close cases in favor of the defaulting party to allow adjudication on the merits, it has not hesitated to affirm or enter default orders in cases where it is clear a default judgment is warranted. *Four Strong Builders*, 12 E.A.D at 762-63, 766-72; *JHNY*, 12 E.A.D. at 374, 382-83, 385-401; *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 664-68, 675-82 (EAB 2004); *In re B & L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-38 (EAB 1996); *In re House Analysis & Assocs.*, 4 E.A.D. 501, 506-08 (EAB 1993); *Thermal Reduction*, 4 E.A.D. at 130-32. While the Board agrees with the outcome of the Presiding Officer's determination that the Community in this case is in default, this result warrants full elucidation of the principles on which the default judgment properly stands.

EPA's service is proper); *see also In re Pyramid Chem. Co.*, 11 E.A.D. 657, 660 n.7 (EAB 2004) (citing *Katzson* holding that Agency is entitled to set its own procedural rules and is not bound to follow the FRCP); *In re B & L Plating, Inc.*, 11 E.A.D. 183, 188 n.10 (EAB 2003) (same).

Under the CROP, service of a complaint shall be "on respondent, or a representative authorized to receive service on respondent's behalf," and can be accomplished, *inter alia*, by certified mail return receipt requested. 40 C.F.R. § 22.5(b)(1)(i). The CROP also provides that if the respondent is an unincorporated association subject to suit under a common name, service of the complaint shall be on "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.* § 22.5(b)(1)(ii)(A). Service of a complaint is complete when the return receipt is signed. *Id.* § 22.7(c). We review this unresolved issue because unless the Community is an unincorporated association, receipt of service by Ms. Collazo would render the Region's service of the Complaint incomplete because it is Ms. Reyes, and not Ms. Collazo, who is the Community's representative.[8, 9, 10]

B. *Community's Status Under the CROP*

The Board's sole purpose in electing to review this case *sua sponte* is to discern whether the Community is an unincorporated association and, based on that analysis, to determine whether the Region's service of process complied with the CROP.

Despite expressing concern over service of process on the Community and requesting further information from the Region prior to issuing her decision, the Presiding Officer merely concluded that the Community "apparently" is an unincorporated association subject to suit under a common name within the meaning

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[8] *See supra* note 4.

[9] A complainant shall serve the respondent or a representative authorized to receive service on the respondent's behalf. 40 C.F.R. § 22.5(b)(1)(i). Thus, service on Ms. Collazo, rather than Ms. Reyes, can only be upheld if the Community is an unincorporated association subject to suit under a common name because the CROP allows for several classes of persons to receive service on behalf of an unincorporated association. 40 C.F.R. § 22.5(b)(1)(ii)(A).

[10] Upon electing to review the Presiding Officer's decision *sua sponte*, the Board also ordered the Region to file a brief by December 15, 2008, addressing whether the Community is an unincorporated association and whether applicable law subjects the Community to suit under a common name. Order Electing to Review *Sua Sponte* at 3. The Community did not reply to the Region's brief.

of 40 C.F.R § 22.5(b)(1)(ii)(A), without providing an analysis of the issue.[11] Order to Supplement the Record at 2-3 ("Respondent is a community of members served by the Las Delicias public water system, and therefore appears to be an unincorporated association. * * * The service issue in this matter is complicated by the nature of the Respondent, apparently an unincorporated association * * * ."); Default Order at 7 (concluding without analysis that "Respondent is a community of members served by the Las Delicias public water system, and is therefore an unincorporated association").

Instead, the Presiding Officer focused on the achievement of actual service on the Community to find that service was proper, without addressing the Community's status under the CROP. Default Order at 10-11. The Presiding Officer concluded that the Community had actual notice of the enforcement action no later than January 25, 2005, the date of the correspondence Ms. Reyes sent to the Region addressing the enforcement action against the Community.[12] The Presiding Officer relied on legal precedent stating that actual service of process can cure a complainant's failure to strictly comply with service of process procedures under the CROP. *See* Default Order at 10-11 (citing *In re Smith*, Docket No. CWA-04-2001-1501, at 7 (ALJ Feb. 6, 2002) (Order on Motions)). However, actual service does not resolve the fundamental question of the Community's status under the CROP, nor does it afford the Community the notice and fairness required by the CROP if service was effected upon a person not authorized to receive it.

Upon examination of the record, we find sufficient evidence supporting the Community's status as an unincorporated association. The CROP does not define the term "unincorporated association." For elucidation of this term we turn to analogous case law under the Federal Rules of Civil Procedure.[13]

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[11] Similarly, the Region has not undertaken an analysis of the Community's status as an unincorporated association, either in the proceedings below or in response to the Board's *sua sponte* order. Instead, the Region appears to rely on the Community's ability to fit within the meaning of a "person" as defined in both the SDWA, section 1401(12), 42 U.S.C. § 300f(12), and the concomitant regulation under the SWTR, 40 C.F.R. § 141.2, which together state that a "person" means an individual, corporation, company, association, partnership, municipality, State, or Federal, State, or tribal agency. *See* Complaint at 6; Motion for Entry of Default ¶ 3; Complainant's Br. at 3. The Region never specifies which type of entity the Community is, and the Community is referenced only as "Respondent." Complaint at 1; Administrative Order at 1; Motion for Entry of Default ¶¶ 1, 3.

[12] *See* Declaration, Attach. 1, Letter from Iris Reyes, Las Delicias Community, to Cristina Maldonado, Caribbean Environmental Protection Division (Jan. 25, 2005) (discussing compliance order included with the complaint and signed by members of the Community, including Ms. Reyes and Ms. Collazo) ("Community Letter"). A copy of the Community Letter was also included in the Complainant's Motion to Supplement the Record. *See* Motion to Supplement the Record, Attach. 2.

[13] Although the Board is not bound by the Federal Rules of Civil Procedure, it may, in its discretion, refer to them for guidance when interpreting the CROP. *E.g., Pyramid Chem. Co.*,
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Federal courts have defined an unincorporated association as "a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common objective." *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 820 (9th Cir. 1996) (quoting *Local 4076, United Steelworkers v. United Steelworkers*, 327 F. Supp. 1400, 1403 (W.D. Pa. 1971)); *see also Kivalina Relocation Planning Comm. v. Teck Cominco Alaska, Inc.*, 227 F.R.D. 523, 526 (D. Alaska 2004).[14]

The Community has existed since at least 1999.[15] Complainant's Br. at 3 & Ex. 2; Declaration at 2. While the Community is not formally organized or incorporated,[16] it is composed of the members of the Las Delicias Public Water System, who share the common purpose of obtaining piped water from a nearby creek for the consumption of all Community members. *See* Default Order at 3-4; Complainant's Br. at 3, 6 & Ex. 3. Although the Community is a non-profit organization that does not realize any economic benefit from operating the Las Delicias Public Water System, Default Order at 14, it nonetheless is an entity that exists to serve its members as a whole, and the Community is the common name encompassing those persons who obtain water from the Las Delicias Public Water System. The Community therefore is an unincorporated association within the meaning of 40 C.F.R. § 22.5(b)(1)(ii)(A).

The CROP refers to unincorporated associations that are subject to suit under a common name. 40 C.F.R. § 22.5(b)(1)(ii)(A). We again refer to the Fed-

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11 E.A.D. at 683 n.34; *B & L Plating*, 11 E.A.D. at 188-89 n.10; *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 & n.25 (EAB 1997); *In re Neman*, 5 E.A.D 450, 455 n.2 (EAB 1994). In this instance we refer to federal case law interpreting the Federal Rules of Civil Procedure because the concept of an unincorporated association under the FRCP is analogous to an unincorporated association under the CROP.

[14] While the definition of an unincorporated association in these cases is discussed in the context of whether a particular group has the capacity to sue or be sued in federal court pursuant to Federal Rule 17(b), the Board nonetheless finds this definition helpful in analyzing whether the Community is an unincorporated association for purposes of service of process under the CROP.

[15] We note that the record reflects some ambiguity regarding the length of time the Community has existed. *Compare* Complainant's Br. at 3 (stating the Community has existed "[t]hroughout the years, and at least since 1999") *and id.* at 8 ("Since 1999, EPA has tried to bring Las Delicias Community into compliance with the SWTR.") *with id.* at Ex. 2 (PRASA inspector's report describing a visit to the Community in 1999 to follow up on the Community's "efforts to comply with [the administrative order] which expired on June 30, 1997"), *and* Declaration at 2 (stating Ms. Maldonado has worked for the Region since December 1996 and has, "[i]n [sic] several occasions during the past years," visited and is "well-acquainted" with the Community). Because this does not affect our analysis we need not pursue it any further.

[16] See Default Order at 14; Complainant's Br. at 4 & n.1; *id.* at Ex. 2; Declaration at 3.

eral Rules for guidance in interpreting section 22.5(b)(1)(ii)(A) of the CROP.[17] An unincorporated association's capacity to sue or be sued in its common name is determined by the law of the forum state.[18] Fed. R. Civ. P. 17(b); *see Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 53 (2d Cir. 1991); *Jaser v. New York Prop. Ins. Underwriting Ass'n*, 815 F.2d 240, 244 (2d Cir. 1987). Under Puerto Rico law, two or more persons doing business under a common name may be sued under that common name. P.R. Laws Ann. tit. 32 App. III, § 15.3. Thus, the Community has met the threshold requirement that state law allow an unincorporated association to be sued under its common name.

C. *Ms. Collazo's Receipt of Service on Behalf of the Community*

We next turn to the method of service utilized in this instance. While the CROP is clear that certified mail is an acceptable means to deliver service, as was the case here, the question remains whether, pursuant to 40 C.F.R. § 22.5(b)(1)(ii)(A), Ms. Collazo is "an officer, partner, a managing or general agent, or any other person authorized * * * by Federal or State law to receive service of process," such that her receipt of service on behalf of the Community is valid.

Ms. Reyes and Ms. Collazo are both members of the Community. *See* Community Letter at 1; Declaration at 2 (listing both Ms. Reyes and Ms. Collazo as individuals known by Ms. Maldonado to be members of the Community). Insofar as the record shows, Ms. Reyes is the named representative of the Community, indicating she holds some authority to act on the Community's behalf. *See* Community Letter (written by Iris Reyes and sent to the Region on behalf of the Community); *see also* Complainant's Br., Ex. 2 (PRASA inspector's report describing Iris Reyes as "the person in charge of the system"); Motion for Entry of Default ¶ 3; Administrative Order at 1. However, beyond Ms. Collazo's membership, the record is silent with respect to her status within the Community.[19] Given this record, we analyze Ms. Collazo's receipt of service of process under the CROP, 40 C.F.R. § 22.5(b)(1)(ii)(A), looking to either state law, or the CROP and FRCP provisions to determine if her receipt of service was proper.

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[17] *See supra* note 13.

[18] The Commonwealth of Puerto Rico is included in the term "state" under the Safe Drinking Water Act, 42 U.S.C. § 300f(13)(A), and in turn the CROP incorporates the SDWA's definition because the term "state" is not defined within the CROP. 40 C.F.R. § 22.3(b).

[19] At no point does the Region address receipt of service of process by Ms. Collazo instead of Ms. Reyes in the Motion for Entry of Default. After receiving the certified mail return receipt for the Complaint bearing Ms. Collazo's signature, rather than Ms. Reyes', the Region noted only that "[t]he Complaint was received by Respondent on August 1, 2003." Motion for Entry of Default ¶ 13.

1. *Authorization to Receive Process Under Puerto Rico Law*

In its response to the Board, the Region elaborates on Ms. Collazo's authorization to receive service of process according to state law, first noting that the CROP allows for service upon an unincorporated association to be made upon anyone authorized by, *inter alia*, state law. Complainant's Br. at 6 (quoting 40 C.F.R. § 22.5(b)(1)(ii)(A)). Citing the Rules of Civil Procedure for the Commonwealth of Puerto Rico, the Region further notes that in Puerto Rico, service of process on an association or any other artificial person may be made by delivering a copy of the summons and of the complaint to an officer, managing or general agent, or to any other agent authorized by appointment or designated by law to receive service of process. P.R. Laws Ann. tit. 32 App. III, § 4.4(e); *see* Complainant's Br. at 6-7. Finally, the Region points out that under Puerto Rico law, whenever two or more persons are doing business under a common name, not only can they be sued under that common name, but also, "service upon one of them shall be sufficient." P.R. Laws Ann. tit. 32 App. III, § 15.3; *see* Complainant's Br. at 7. Thus, the Region relies on Ms. Collazo's membership in the Community to validate her receipt of process because under Puerto Rico law, any member of an unincorporated association doing business under a common name may receive process on its behalf.

However, while Puerto Rico law authorizes service on any person doing business under a common name, we must also analyze the method of service utilized in this case. Here, the Region's service of process was via certified mail, addressed to Ms. Reyes, and received by Ms. Collazo. Motion for Entry of Default, Ex. 2 (certified return receipt displaying Ms. Reyes' name and address in the box entitled "Article Addressed to," and Ms. Collazo's signature in the box entitled "Received by"). This method of service does not comport with the procedural requirements for service under Puerto Rico law.

The Rules of Civil Procedure for the Commonwealth of Puerto Rico specify that, except in limited circumstances,[20] service upon a domiciliary of Puerto Rico shall be made personally. P.R. Laws Ann. tit. 32 App. III, § 4.4; *see Peguero v. Hernandez Pellot*, 139 P.R. Dec. 487, 503-04, 506 (P.R. 1995), 1995 WL 905624 (personal service required under Puerto Rico Rule of Civil Procedure 4.4(e) for those physically present in the forum). Although the CROP allows for anyone authorized under state law to receive service of process on behalf of an unincorporated association, such service must also comport with the procedural rules of

[20] For example, the Rules of Civil Procedure for the Commonwealth of Puerto Rico allow for service by edicts and publication thereof when, *inter alia*, the person to be served is within Puerto Rico but cannot be located, or the person goes into hiding to avoid being served, whereupon service by certified mail with return receipt shall be made within ten days of publishing the summons in a newspaper. P.R. Laws Ann. tit. 32 App. III, § 4.5.

the state where service is made. In Puerto Rico, a party must attempt personal service before a court will issue an order providing for service by publication, and even then certified mail is used only to buttress service by publication. P.R. Laws Ann. tit. 32 App. III, § 4.5; *see also Hach Co. v. Pure Water Systems*, 14 P.R. Offic. Trans. 78 (P.R. 1983) ("Service by publication shall be made only in the circumstances mentioned in [Puerto Rico Rule of Civil Procedure] Rule 4.5."). Because the Region effected service solely via certified mail, and not personally, it cannot rely on the CROP's allowance for service on an unincorporated association pursuant to Puerto Rico law to justify Ms. Collazo's receipt of service. We now consider whether Ms. Collazo qualifies as a general agent of the Community under the CROP, which would also validate her receipt of service of process.

2. *Authorization to Receive Process as a General Agent Under the CROP*

We look to federal law and the FRCP to guide our analysis of whether Ms. Collazo is a general agent of the Community[21] because a general agent under the CROP, 40 C.F.R. § 22.5(b)(1)(ii)(A), is comparable to a general agent under FRCP Rule 4(h)(1).

Whether a given individual may be considered a general agent depends on a factual analysis of that person's authority within the organization. *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988); *Gottlieb v. Sandia Am. Corp.*, 452 F.2d 510, 513-14 (3d Cir. 1971), *cert. denied*, 404 U.S. 938 (1971). Federal courts have developed a standard to determine whether someone is a general agent under Federal Rule 4(h)(1) that acknowledges the central purpose of service of process in providing notice of a pending action, and also deems service of process not limited solely to designated or titled agents and officials. Under this standard, service may be made:

> [U]pon a representative so integrated with the organization that he will know what to do with the papers. Gener-

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[21] The language detailing who is authorized to receive process on behalf of an unincorporated association under both the CROP and the FRCP is very similar. *Compare* 40 C.F.R. § 22.5(b)(1)(ii)(A) ("Where the respondent is * * * an unincorporated association which is subject to suit under a common name, complainant shall 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.") *with* Fed. R. Civ. P. 4(h)(1)(B) ("[An] unincorporated association that is subject to suit under a common name must be served * * * by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process * * * ."). Because the record contains no information indicating that Ms. Collazo serves as an officer, partner or managing agent of the Community, nor is there any indication that she is an appointed agent, we limit our analysis to whether she may be a general agent of the Community, which would make her eligible to receive process on the Community's behalf.

> ally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service.

Direct Mail, 452 F.2d at 688; *accord Estate of Klieman v. Palestinian Auth.*, 547 F. Supp. 2d 8, 13-14 (D.D.C. 2008) ("Klieman III"); *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 89-90 (D.R.I. 2001) (citing *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 867 (S.D.N.Y. 1990), *vacated on other grounds*, 937 F.2d 44 (2d Cir. 1991)); *Am. Inst. of Certified Pub. Accountants v. Affinity Card, Inc.*, 8 F. Supp. 2d 372, 376 (S.D.N.Y. 1998); *Am. Football League v. Nat'l Football League*, 27 F.R.D. 264, 269 (D. Md. 1961).

When tasked with evaluating whether it is "fair, reasonable and just" to serve a particular individual as a general agent under Federal Rule 4(h)(1), federal courts consult a variety of factors in making their determination. These factors include the person's independent discretion, responsibility, and integration within the organization, the continuity of that person's authority within the organization, and whether the organization received actual notice of the pending action. *See Direct Mail*, 840 F.2d at 688-89 (independent discretion, actual notice); *Gottlieb*, 452 F.2d at 513 (independent discretion, continuity of authority); *Estates of Ungar*, 153 F. Supp. 2d at 90-91 (same); *Certified Pub. Accountants*, 8 F. Supp. 2d at 376-77 (independent discretion, actual notice); *Am. Football League*, 27 F.R.D. at 269 (independent discretion, continuity of authority, actual notice). We now consider each of these factors in turn with respect to Ms. Collazo and her relationship to the Community.

A central consideration when evaluating whether a person may act as an organization's agent is whether that person possesses independent discretion and responsibility, and how well-integrated within the organization that person is. Typically a general agent's duties are "sufficiently necessary" for the organization to function, and he or she is "a responsible party in charge of any substantial phase" of the organization's activity. *Gottlieb*, 452 F.2d at 513 (citations omitted).[22]

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[22] We note that these descriptions are often more appropriate in the context of analyzing who may be the general agent of a corporation, where the agent would likely be substantially involved in the corporation's commercial activities. *Am. Football League*, 27 F.R.D. at 269 ("It is true that in most cases an agent upon whom process may be effectively served is directly engaged in the commercial activities of his principal; but that is because of the nature of the business enterprise in [which] he is engaged, and is not a test which is universally applicable."). An unincorporated association, by definition, is not structured in the same manner as a corporation, and thus we are mindful that evidence of Ms. Collazo's activities, or lack thereof, may not be dispositive regarding her status as a general agent of the Community.

Furthermore, we note that particularly with respect to unincorporated associations, where organizational structure may be more fluid, it is appropriate to effect service on members who act as agents on an organization's behalf. *See United States v. Rainbow Family*, 695 F. Supp. 294, 298 (E.D. Tex. 1988). The court in *Rainbow Family* upheld service of process on six individual members of the Rainbow Family who either negotiated on the unincorporated association's behalf or scouted for sites where the organization could hold gatherings. *Id.* Despite its "informal and loosely-knit" existence, the court reasoned that the Rainbow Family nonetheless operated as an organization, complete with decision-making councils, individuals who acted as leaders on a voluntary basis, and an informational network for disseminating decisions. *Id.* To invalidate service of process on individual members of an unincorporated association because they "merely associate" on a voluntary basis "would permit organizations to maintain a fiction that they have no leaders or agents and hence evade legal process altogether." *Id*.

The logic set forth in *Rainbow Family* regarding service upon agents of an unincorporated association seems especially apt here. It is precisely the informal nature of an unincorporated association that makes it likely that members acting on the organization's behalf could be general agents, where conventional distinctions including titled positions and formal divisions of labor are absent. In this instance, the Community is an informal association that, while its operation may be less structured, nonetheless functions to serve the needs of its members. Like in *Rainbow Family*, the Community is an "informal and loosely-knit" organization, and thus, it is appropriate to effect service on an individual member acting as an agent of the organization. It is reasonable to assume that Ms. Collazo, upon signing for a piece of mail addressed to Ms. Reyes on behalf of the Community, and as a neighbor and fellow Community member, would be willing and able to deliver it to Ms. Reyes in a timely manner.[23]

In addition, courts may look at the size of an organization to gauge whether someone's authority to act on its behalf might increase, relatively, the smaller the organization is. *See Direct Mail*, 840 F.2d at 688-89; *see also Union Asbestos & Rubber Co. v. Evans Prods. Co.*, 328 F.2d 949, 952-53 (7th Cir. 1964) (service on

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[23] The certified mail receipt Ms. Collazo signed to receive the parcel containing the Complaint was ostensibly addressed to Ms. Reyes in her capacity as Community representative, containing her name on the first line of the address with the Community's formal title directly beneath it. Motion for Entry of Default, Ex. 2. It seems reasonable to assume that Ms. Collazo would be sufficiently integrated within the Community to ensure that service addressed to Ms. Reyes would be delivered to Ms. Reyes. *Cf. Am. Football League*, 27 F.R.D. at 269 (reasoning that National Football League teams organized as partnerships were properly served when their respective coaches, although not partners themselves, received process because "[i]n each instance his relationship to the defendant and the responsibility of his position were such that it was reasonable to expect that the partners would be apprised of the suit, as in fact they were").

defendant's secretary appropriate given that he was out of the office 75-80% of the time and notice was immediately communicated to the defendant). The *Direct Mail* court held that service upon the receptionist of a small corporation was proper, presuming that the receptionist's role within the structure of the company was commensurately larger due to the corporation's small size. *Direct Mail*, 840 F.2d at 688. Similar to the corporation in *Direct Mail*, the Community is a small organization, consisting of approximately forty-eight members residing in twelve households. We are inclined to attribute greater authority to Ms. Collazo to act as a general agent of the Community, based solely on her membership, given the Community's small size and the close proximity of members' households. Complainant's Br., Ex. 3 (map of Community residences drawn by visiting PRASA inspector).

Apart from the size of an organization, courts have looked to the continued authorization of the individual to act on the organization's behalf over a period of time as a factor in determining whether that individual may be a general agent. *Gottlieb*, 452 F.2d at 513-14 (citations omitted) (invalidating service of process where agent's sole purpose was to serve as counsel negotiating a sale and exchange of stock on defendant's behalf); *see also Estates of Ungar*, 153 F. Supp. 2d at 90 (noting agent's five-year service within the Permanent Observer Mission of Palestine to the United Nations as a factor in finding him a managing or general agent of both the Palestinian Liberation Organization and the Palestinian Authority); *Am. Football League*, 27 F.R.D. at 269 (highlighting coaches' full control of their teams in the preparation and playing of games over the course of a football season in finding coaches were agents of defendant). Over the course of a four-year period, Ms. Collazo received and signed for both the Complaint and the Motion for Entry of Default sent by the Region, and was ostensibly a member of the Community throughout. Ms. Collazo's continued authorization to act on behalf of the Community over the course of that four-year period is also supported by evidence that the Community actually did receive notice of the action pending against it.

Courts may also evaluate whether the correct person actually received process in assessing whether someone is a general agent of an unincorporated association. *Direct Mail*, 840 F.2d at 688 ("[A]ctual receipt of process by the correct person may be a factor in finding process valid when there are other factors that make process fair."). While actual notice of a pending action cannot by itself cure service that is otherwise defective, actual receipt of service is nonetheless an important factor in determining the effectiveness of service. *Certified Pub. Accountants*, 8 F. Supp. 2d at 377. In this instance, the Community sent a letter dated January 25, 2005 to the Region regarding the compliance order included with the Complaint. *See* Motion to Supplement the Record; Community Letter. The letter was sent by Ms. Reyes, and both Ms. Reyes and Ms. Collazo signed it as members of the Community. Although this letter was sent roughly eighteen months after the Region initially served the Complaint, it nonetheless denotes that the

Community had actual notice of the action against it. *See* Community Letter; *see also* Default Order at 9 ("[A]ctual service [on the Community] was obviously achieved."). Finally, at no point has the Community challenged the Region's service of process, despite its awareness of the pending action since at least 2005.

Based on our analysis of the factors federal courts use to determine whether someone is a general agent under Federal Rule 4(h)(1), the board finds that Ms. Collazo falls within the scope of a general agent under the CROP, and thus was authorized to receive service of process on behalf of the Community.

IV. *CONCLUSION*

Under the CROP, the Community is an unincorporated association subject to suit under a common name. Ms. Collazo properly received service of process of both the Complaint and the Motion for Entry of Default on behalf of the Community because under the CROP, she falls within the scope of a general agent of the Community.

The Board otherwise agrees with the result of the Presiding Officer's Default Order and Initial Decision, including the penalty determination. The Community's payment of the entire amount of the civil penalty of five hundred dollars ($500.00) shall be made within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America. The check should contain a notation of the name and docket number of this case. 40 C.F.R. § 22.31(c). Payment shall be remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

A copy of the payment shall be mailed to:

Regional Hearing Clerk
EPA Region 2
290 Broadway, 16th Floor
New York, NY 10007

So ordered.