

**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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In re:)	
)	TSCA Appeal No. 20-06
Build-It Bros., LLC)	
)	
Docket No. TSCA-01-2019-0055)	
)	
_____)	

EPA RESPONSE TO ENVIRONMENTAL APPEALS BOARD ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW AND ESTABLISHING BRIEFING SCHEDULE

On February 9, 2021, the Environmental Appeals Board (“EAB” or “Board”) issued an Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule (“EAB Order”) in the above-captioned case. The EAB Order requires EPA to “file with the Clerk of the Board and all parties its brief, including any supporting documentation, addressing whether service of the Motion for Default and the Default Order upon Respondent was adequate and met applicable regulatory requirements.” Through this response, Complainant addresses the issue of service upon Respondent, Build-It Bros., LLC, under 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” or “Part 22 Rules”), including 40 C.F.R. §§ 22.5(b)(2), 22.6, and 22.7(c).

I. SERVICE UNDER THE PART 22 RULES

Under the Consolidated Rules, 40 C.F.R. § 22.5(b)(2) addresses service of filed documents other than the complaint, rulings, orders, and decisions, and provides the following:

“[a]ll documents filed by a party other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties. Service may be made personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by any reliable commercial delivery service, or by facsimile or other

electronic means, including but not necessarily limited to email, if service by such electronic means is consented to in writing. A party who consents to service by facsimile or email must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the appropriate Clerk. In addition, the Presiding Officer or the Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.”

For the filing and service of rulings, orders, and decisions, 40 C.F.R. § 22.6 of the

Consolidated Rules specifies that:

“[a]ll rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Headquarters or Regional Hearing Clerk, as appropriate, in any manner allowed for the service of such documents. All rulings, orders, decisions, and other documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. The Clerk of the Board, the Headquarters Hearing Clerk, or the Regional Hearing Clerk, as appropriate, must serve copies of such rulings, orders, decisions and other documents on all parties. Service may be made by U.S. mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), EPA’s internal mail, any reliable commercial delivery service, or electronic means (including but not necessarily limited to facsimile and email).”

Completion of service is covered under 40 C.F.R. § 22.7(c) of the Consolidated Rules, as follows:

“[s]ervice of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing, when placed in the custody of a reliable commercial delivery service, or for facsimile or other electronic means, including but not necessarily limited to email, upon transmission....”

II. SERVICE IN THIS CASE

1. Service of the Motion for Default Order

On July 14, 2020, Complainant electronically filed the Motion for Default Order (“Motion” or “Default Motion”) seeking assessment of a \$1,456 penalty against Respondent,

Build-It Bros., LLC, for failure to file an Answer in the above-captioned case. Along with the Default Motion, Complainant simultaneously filed a Memorandum in Support of Motion for Default Order (“Memorandum”), a Proposed Default Order, several supporting documents identified as Exhibit 1 (Complaint, as filed 09/30/2019 [21 pages]), Exhibit 2 (Regional Hearing Clerk Cover Letter and “Green Card” [4 pages]), Exhibit 3 (Joint Motion for Extension of Time to Answer [2 pages]), Exhibit 4 (Order [2 pages]), Exhibit 5 (Penalty Summary [3 pages]), Exhibit 6 (August 2010 RRP Penalty Policy, revd. Apr. 2013 [44 pages]), and Exhibit 7 (GPA Policy [7 pages]), a copy of the Regional Judicial Officer’s June 19, 2020 Standing Order authorizing EPA Region 1 system of electronic filing/service in Part 22 proceedings [5 pages], a cover letter to the Regional Hearing Clerk, and a Certificate of Service. *See* Attachment 1 (Certificate of Service, dated July 14, 2020). The Motion, Memorandum, and all other documents were in portable document format (“PDF”) and directed, in three separate e-mails, to the Hearing Clerk at R1_Hearing_Clerk_Filings@epa.gov, and to Respondent through its owner and principal, Mr. David Magee, via Respondent’s e-mail address at dimagee@dr.com. For each of the three e-mails directed to Respondent’s e-mail address, the undersigned Complainant’s Counsel received an electronic confirmation of delivery completion. *See* Attachment 2 (E-mail Delivery Confirmations). Note that, on May 5, 2020, in anticipation of filing the Default Motion, the undersigned had e-mailed a PDF letter to Respondent at dimagee@dr.com, entitled “Important Notice Regarding Potential Default Action.” The letter informed Mr. Magee that, after a number of unsuccessful attempts to communicate with him over several months in what the undersigned had understood was an effort to settle the case through a negotiated Consent

Agreement, Respondent's "persistent failure to communicate" necessitated a different course of action by EPA, specifically, to resolve the matter through pursuit of a motion for default judgment. I further explained that such a motion, if granted, likely would require payment of the full penalty amount by Respondent. *See Attachment 3* (May 5, 2020 Letter to Respondent).¹

On July 24, 2020, after realizing that no written acknowledgement consenting to electronic filing and service had been filed by Respondent in this proceeding,² the undersigned directed hard copies of the Motion, Memorandum, and all supporting documentation listed above (i.e., the Proposed Default Order, Exhibits 1 through 7, the Regional Judicial Officer's Standing Order on electronic filing and service, cover letter to the Regional Hearing Clerk, and Certificate of Service) to Respondent by Certified U.S. Mail, Return Receipt Requested, to Respondent's address at 38 Mussey Road in Scarborough, Maine. The address used for this July 24, 2020 mailing was Respondent's correct address at 38 Mussey Road in Scarborough, Maine, but included an error in the ZIP Code, listed as "04704" [emphasis added], instead of the proper ZIP Code "04074" [emphasis added]. The mailing had a U.S. Postal Service ("USPS" or "Postal Service") Tracking Number of 70191640000012745087. *See Attachment 4* (Receipt for Certified Mailing).³

¹ In an e-mail reply dated May 6, 2020, Mr. Magee claimed he had already sent EPA a signed Consent Agreement and certification form, both of which had been forwarded to him for signature weeks prior and neither of which Complainant's Counsel ever received back from him, despite Respondent's statements to the contrary.

² Complainant notes that the Consent Agreement that had been under negotiation by the Parties and that Mr. Magee claimed to have signed (see footnote 1, above) did contain a provision whereby Respondent consented to accept digital signatures on the CAFO and electronic service, by e-mail, to dmagee@dr.com.

³ The postal date stamp affixed on the receipt reads "July 42, 2020" even though communication with Regional Mail Room staff and USPS tracking information confirm that the mailing occurred on July 24th.

On August 11, 2020, the undersigned received an e-mail from staff in the EPA Region 1 Mail Room (“Regional Mail Room”) stating that the July 24, 2020 Default Motion mailing had not yet been picked up by Respondent, but that after an attempted delivery reported by the Postal Service on July 27, 2020, another delivery attempt by the Postal Service would be made. Upon hearing from the Regional Mail Room, the undersigned e-mailed Mr. Magee on August 11, 2020 alerting him to the fact that he had not yet taken delivery of EPA's July 24, 2020 certified mailing, and explaining that the package contained important information pertaining to the Default Motion that had been filed against him (including copies of the Motion, Memorandum in Support, Proposed Default Order, and exhibits). I further explained to Mr. Magee that, since the documents related to Build-It Bros., LLC's potential liability in the enforcement case, it was highly advisable that he accept receipt. In an e-mail reply dated August 14, 2020, Mr. Magee stated that he was not avoiding receipt of mail from EPA but that he had not yet received the July 24, 2020 certified mailing, and would have picked it up if he had received notice of its availability. Based on recently available, web-based USPS Tracking data,⁴ tracking for the July 24th certified mailing showed the following specific actions from the date of mailing, on July 24, 2020, to the final entry recorded by the Postal Service, on August 23, 2020:

- July 24, 2020, 8:24 pm: Arrived at USPS Regional Facility (BOSTON MA DISTRIBUTION CENTER)

⁴ Such web-based Postal Service tracking data had been available at https://tools.usps.com/go/TrackConfirmAction?qt_c_tLabels1=70191640000012745087, at least until January 28, 2021 which was the date the undersigned called to inquire about status. Thereafter, it appears that the tracking data was taken down from the website and, at this time, is listed as “Status Not Available.”

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- July 26, 2020, 2:15 am: Arrived at USPS Regional Facility (SOUTHERN ME DISTRIBUTION CENTER)
- July 27, 2020, 7:47 am: Arrived at Unit (SCARBOROUGH, ME 04074)
- July 27, 2020, 7:58 am: Out for Delivery (SCARBOROUGH, ME 04074)
- July 27, 2020, 11:12 am: Notice Left (No Authorized Recipient Available) (SCARBOROUGH, ME 04074)
- July 28, 2020, 8:38 am: Available for Redelivery or Pickup (SCARBOROUGH, ME 04070)
- August 12, 2020, 4:00 pm: Unclaimed/Being Returned to Sender (SCARBOROUGH, ME 04070)
- August 14, 2020, 11:42 am: Arrived at USPS Regional Facility (SHREWSBURY MA DISTRIBUTION CENTER)
- August 18, 2020, 1:28 pm: Arrived at USPS Regional Facility (SOUTHERN ME DISTRIBUTION CENTER)
- August 19, 2020, 2:03 pm: Departed USPS Regional Facility (SOUTHERN ME DISTRIBUTION CENTER)
- August 23, 2020: In Transit to Next Facility
Your package is moving within the USPS network and is on track to be delivered to its final destination. It is currently in transit to the next facility.

See Attachment 5 (USPS Tracking Information).

Based on the above-referenced USPS tracking data, it is clear that the Default Motion package was mailed by EPA, and despite the ZIP Code error, was directed by the Postal Service to the appropriate address using the proper Scarborough, Maine ZIP Code of “04074.”

Information from the Regional Mail Room indicates that while no “Green Card” receipt was ever

returned to EPA, neither was the July 24th package ever returned to EPA as “undelivered” or “unclaimed.” Recent EPA messages directed to and left with Mr. Magee (by e-mail, on February 1, 2021, as well as by telephone, on January 28 and February 9, 2021) have been unanswered. Indeed, since receiving the above-described August 14, 2020 e-mail from Mr. Magee, Complainant’s Counsel has no record of receiving any further communication from Respondent about this enforcement proceeding.

2. Service of Initial Decision and Default Order

The Initial Decision and Default Order (“Default Order”) bears an electronic signature from the Regional Judicial Officer and electronic date of December 29, 2020. On December 31, 2020, the undersigned received an e-mail from the Regional Hearing Clerk which attached the Default Order as well as a Certificate of Service, each in portable document format (PDF). The Certificate of Service bore an electronic signature by the Regional Hearing Clerk that was dated December 31, 2020. In the Certificate of Service, the Regional Hearing Clerk provided a written certification that, on December 29, 2020, the Default Order was “filed with the Regional Hearing Clerk” with copies “e-mailed to Counsel for Complainant” and “e-mailed to Counsel for Respondent.” Although the Certificate of Service did not reference any e-mail addresses, the above-mentioned December 31st e-mail received by the undersigned from the Regional Hearing Clerk clearly showed that the e-mail transmission had been directed to the Clerk of the Board, Eurika Durr, at Durr.eurika@epa.gov and to Respondent, at dmagee@dr.com.

On January 25, 2021, after the EAB had issued a January 21, 2021 Order Directing Re-Service of Initial Decision and Default Order, the undersigned received an e-mail from the

Regional Hearing Clerk with attached PDFs of an electronically signed Certificate of Service and a copy of the Default Order. This Certificate of Service stated, *inter alia*, that on January 25, 2021 the Regional Hearing Clerk sent a copy of the Default Order “via e-mail to Counsel for Complainant” and, also, sent a copy of the Default Order “by certified, Overnight Express, first class mail to Respondent.” The January 25, 2021 Certificate of Service listed the Respondent’s correct address as 38 Mussey Road in Scarborough, Maine, but incorporated the same erroneous ZIP Code of “04704” (instead of “04074”) that had been used for the July 24, 2020 Default Motion mailing. Despite the ZIP Code error, EPA received a “Green Card” receipt indicating delivery to Respondent of the Default Order occurred, on January 26, 2021. *See Attachment 6* (Green Card).⁵

III. CONCLUSION AND RELIEF REQUESTED

Based on the above, Complainant represents that service of the Default Order was adequate and complete, as of January 25, 2021, under 40 C.F.R. §§ 22.6 and 22.7(c) of the Consolidated Rules. Regarding the Default Motion and associated documents, Complainant represents that service was adequate and complete under 40 C.F.R. §§ 22.5(b)(2) and 22.7(c) “upon mailing” on July 24, 2020 because: (a) Complainant mailed the Default Motion package to Respondent via the U.S. Postal Service, (b) Postal Service tracking data shows the USPS directed the package for delivery to Respondent at the proper address using the appropriate ZIP code, (c) notice of the mailing was provided to Respondent by both the Postal Service and

⁵ Note that, due to apparent no-touch pandemic delivery protocols, the Green Card shows a January 26, 2021 date of delivery and a “Signature” which, in pertinent part, reads “CO19.”

Complainant's Counsel, and (d) the Default Motion package was not returned to the sender (i.e., EPA) as "undelivered" or "unclaimed." In the event the Board finds sufficient evidence that, under the Part 22 Rules and applicable principles of fundamental fairness and justice, adequate and complete service of process of the Default Order and Default Motion upon Respondent was provided in this case, Complainant hereby requests that the Board affirm the Regional Judicial Officer's December 29, 2020 Initial Decision and Default Order assessing the \$1,456 penalty against Respondent, Build-It Bros., LLC.

Of course, considering the absence of a returned "Green Card" associated with the mailing of the Default Motion package, on July 24, 2020, and the arguably inconclusive tracking information compiled by the Postal Service, Complainant acknowledges that the Board may find there exists some doubt or ambiguity on the issue of adequate and complete service of the Default Motion. Unfortunately, as stated above, recent repeated efforts by Complainant to communicate with Respondent on this issue via e-mail and telephone have gone unanswered. While, on balance, EPA believes there is sufficient evidence to indicate that adequate and complete service of process of both the Default Order and the Default Motion was accomplished under the Part 22 Rules and applicable principles of fundamental fairness and justice, should the Board find otherwise, EPA respectfully requests that the Board grant the below-listed relief to give Complainant an opportunity to re-file and re-serve the Default Motion upon Respondent. Specifically, in the event that the Board finds insufficient evidence of adequate and complete service of process of the Default Order and/or Default Motion filed in this proceeding, Complainant hereby requests that the Board:

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- a. *REMAND* the matter back to the Regional Judicial Officer for rescission of the December 29, 2020 Default Order;
- b. Upon rescission of the Default Order, *ORDER* that Complainant be provided sufficient time and opportunity to move for default judgment through re-filing and re-serving upon Respondent a motion for default order under the Consolidated Rules; and
- c. *GRANT* such other relief as the Board deems just and proper.

Thank you for your consideration of this EPA Response.

Respectfully Submitted,

electronically signed and dated

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ATTACHMENTS

- Attachment 1 – Certificate of Service, dated July 14, 2020
Attachment 2 – E-mail Delivery Confirmations
Attachment 3 – May 5, 2020 Letter to Respondent
Attachment 4 – Receipt for Certified Mailing
Attachment 5 – USPS Tracking Information
Attachment 6 – Green Card