

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

2019 SEP 26 PM 3: 41

BEFORE THE ADMINISTRATOR

In the matter of)
)
SUPERIOR RESTORATION)
& CONSTRUCTION LLC,)
)
Respondent.)
_____)

Docket. No. TSCA-07-2016-0017

**COMPLAINANT’S RESPONSE TO THIRD ORDER
TO SUPPLEMENT THE RECORD**

Pursuant to 40 C.F.R. § 22.5(a), Complainant respectfully submits this response to the Presiding Officer’s Third Order to Complainant to Supplement the Record, issued June 25, 2019 (“Third Order to Supplement”). The Third Order to Supplement requested that Complainant provide additional briefing to specify the legal and factual basis for asserting that Respondent is an “unincorporated association which is subject to suit under a common name” under 40 C.F.R. § 22.5(b)(1)(ii)(A). On July 12, 2019, Complainant filed a motion for extension of time to submit this response, which the Presiding Officer granted by order dated August 5, 2019. Concurrent with this response Complainant has filed a separate motion to supplement the record, which seeks the Presiding Officer’s leave to advance an alternative basis for determining the effectiveness of service of the Complaint on Respondent.

The Presiding Officer’s Third Order to Supplement described the two-part analysis undertaken by the Environmental Appeals Board in the matter of Las Delicias Community to determine whether service of process was properly achieved on a residential community group

through a member of the community. *See* 14 E.A.D. 382, 388-391 2009 WL 5326320, *6-7 (Aug. 17, 2009). In its analysis, the Board emphasized two distinct components of the phrase “unincorporated association which is subject to suit under a common name,” which is not defined by the Consolidated Rules of Practice, or CROP. *Id.* at 389. First, the Board confirmed the community’s status as an unincorporated association by reference to federal court interpretation of the Federal Rules of Civil Procedure,¹ which has 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.’” *Id.* at 390. Second, the Board analyzed whether the community, as an unincorporated association, was “subject to suit under a common name.” Relying on judicial interpretation of Federal Rule of Civil Procedure 17(b), the court concluded that “[a]n unincorporated association’s capacity to sue or be sued in its common name is determined by the law of the forum state.” *Id.* at 391. Presuming Puerto Rico to be the relevant “forum state” for this determination, the Board concluded that the community was appropriately served under Puerto Rico law that permits suit under the common name of two or more persons doing business together. *Id.* at 391 (citing P.R. LAWS ANN. tit. 32 app. III, § 15.3).

As articulated by the Presiding Officer in this matter, Complainant’s analysis of this issue was incomplete in the legal memoranda accompanying its Motion for Default Order, filed on March 28, 2018. Complainant cited to federal precedent treating limited liability companies as unincorporated associations but did not consider whether Respondent, as an unincorporated association, is “subject to suit under a common name.” With the Board’s analysis in Las Delicias

¹ Citing prior rulings, the Board observed that while it is “not bound by the Federal Rules of Civil Procedure, it may, in its discretion, refer to them for guidance when interpreting the CROP.” As such, the Board “[referred] 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.” Las Delicias Cmty., 14 E.A.D. 382, 389 n.13, 2009 WL 5326320, *6-7 (Aug. 17, 2009).

Community as a guide, the two-part test for applicability of 40 C.F.R. § 22.5(b)(1)(ii)(A) is assessed below on the facts of the current case.

Regarding the first requirement, that Respondent be properly classified as an “unincorporated association,” the definition utilized by the Board in Las Delicias Community appears inadequate to determine Respondent’s status as an unincorporated association. For one, the respondent LLC in this case was organized by a single individual, Cory W. Poulsen, not a “group of persons” as stated in the Board’s previous definition. Mot. for Default Order, Ex. A, *Limited Liability Company Articles of Organization* (Dec. 5, 2013); see KAN. STAT. ANN. § 17-7663(f) (2019) (defining LLC as “having one or more members”); KAN. STAT. ANN. § 17-7673 (2019) (enabling “one or more authorized persons” to form an LLC); Las Delicias Cmty., 14 E.A.D. at 390. Second, it is unclear whether a Kansas LLC, which is established by the filing of formal articles of organization, would satisfy the Board’s further definitional requirement that an unincorporated association be formed “without a charter.” KAN. STAT. ANN. § 17-7673 (2019); Las Delicias Cmty., 14 E.A.D. at 390. Allowance should reasonably be made for LLCs in the CROP’s definition of “unincorporated association,” but it must be based on terms other than those previously applied by the Board in Las Delicias Community.

An essential question to answer at the outset is what law—state or federal—determines the definition of “unincorporated association” under the CROP. In Las Delicias Community, the Board did not elaborate on its decision to apply a federal definition derived from Ninth Circuit case law quoting a district court opinion from the Western District of Pennsylvania. See 14 E.A.D. at 390. If careful reference is made to judicial interpretation of the Federal Rules of Civil Procedure, following the Board’s recommendation, the definition ought to turn on facts particular to the action under review. In Committee for Idaho’s High Desert, Inc. v. Yost—the

leading citation on this issue in Las Delicias Community—the Ninth Circuit applied a federal definition of “unincorporated association” after clarifying that federal law governed “[f]or purposes of Rule 17(b)(1).” 92 F.3d 814, 820 (9th Cir. 1996) (emphasis added). As drafted at the time of the Yost decision in 1996, subsection (b)(1) of Rule 17 was equivalent to present-day subsection (b)(3)(A). See H.R. Doc. No. 110-27, at 464 (2007) (comparing Rule 17 before and after the Supreme Court’s 2007 revision of Federal Rules of Civil Procedure). Both before and after revision, that provision stipulated one exception to the general rule that capacity to sue or be sued is determined “by the law of the state where the court is located” FED. R. CIV. P. 17(b)(3). The exception provides that “a partnership or other unincorporated association *with no such capacity under that state’s law* may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws.” FED. R. CIV. P. 17(b)(3)(A) (emphasis added). As applied by the Yost court, therefore, federal law should only be used to determine the definition of “unincorporated association” in exceptional cases arising under present-day Rule 17(b)(3)(A), involving litigants who lack capacity to sue or be sued as an unincorporated association in the forum state. 92 F.3d at 820 (“For purposes of Rule 17(b)(1), the determination of what constitutes an ‘unincorporated association’ is a question of federal law.”).

By contrast, for cases arising under the general rule—involving litigants who do, in fact, have capacity to sue or be sued under the law of the forum state—the definition of “unincorporated association” is determined by the law of the forum state. 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1564 (3d. ed. 2019) (“Moreover, under Rule 17(b) the question of *what constitutes an unincorporated association for capacity purposes* will be determined in accordance with the law

of the state in which the court is sitting.”) (emphasis added). This approach was demonstrated in Kivalina Relocation Planning Committee v. Teck Cominco Alaska, Inc.—also cited by the Board in Las Delicias Community—where the Ninth Circuit first determined that the plaintiff lacked capacity to sue under Alaska law before considering whether the party qualified as an unincorporated association under a federal definition of “unincorporated association.” 227 F.R.D. 523, 526-27 (D. Alaska 2004). In other words, the court determined that the matter at hand was an exceptional (rather than general) case arising under subsection (b)(3)(a) of Rule 17 to conclude that federal law should provide the definition of “unincorporated association.”

Adhering to this analysis, it is therefore necessary to establish first that Respondent has capacity to be sued under the law of the forum state in order to determine that state law, rather than federal law, appropriately governs the definition of “unincorporated association” in this case. Here, the question of Respondent’s capacity should be analyzed under the laws of the state of Kansas, where the Presiding Officer will issue an initial decision in this matter. *See Western States Federal Contracting, LLC v. Dep’t of Veterans Affairs*, CBCA 4612(3359)-REM, 15-1 BCA ¶ 36,094 (“Analyzing limited liability companies pursuant to FRCP 17(b)(3) means that the law of the state where the court is located governs their capacity to sue or be sued. *As the CBCA is located in Washington, D.C., the law of the District of Columbia controls.*”) (emphasis added); *but see Las Delicias Community*, 14 E.A.D. 382, 388-391 2009 WL 5326320, *6-7 (Aug. 17, 2009) (applying the law of Puerto Rico rather than New York, where the Regional Judicial Officer presides for EPA Region 2).

In Kansas, the common law rule prevails that, “in the absence of a statute to the contrary, an unincorporated association is not a legal entity and can neither sue nor be sued in the name of the association.” Kansas Private Club Ass’n v. Londerholm, 408 P.2d 891, 893 (Kan. 1965);

Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 405 (Kan. 2002); *see generally* Wesley A. Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383, 373-84 (1924) (discussing rationale and development of the rule at common law). Nevertheless, Kansas enacted a limited liability company law that supersedes the state’s common law capacity rule. Pursuant to Kansas law, “[a] limited liability company formed under this act shall be a separate legal entity” KAN. STAT. ANN. § 17-7673 (2019). Further, this LLC “may have and exercise all powers which may be exercised by a Kansas professional association or professional corporation under the professional corporation law of Kansas” KAN. STAT. ANN. § 17-7668(c) (2017). The professional corporation law of Kansas provides that “the Kansas general corporation code . . . shall apply to a professional corporation organized pursuant to this chapter.” KAN. STAT. ANN. § 17-2708 (2017). Pursuant to the Kansas general corporation code, “[e]very corporation created under this code shall have power to . . . sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrate or other proceeding, in its corporate name.” KAN. STAT. ANN. § 17-6102(b) (2017). By derivation of state law, therefore, Kansas LLCs may sue and be sued under a common name. This conclusion is amply evidenced by lawsuits and appeals litigated against Kansas LLCs in both state and federal court. *See, e.g., Kansas City Royalty Co., L.L.C. v. Thoroughbred Associates, L.L.C.*, 215 F.R.D. 628 (D. Kan. 2003); Miller v. Glacier Dev’t Co., L.L.C., 270 P.3d 1065 (Kan. 2011). Pursuant to the law of the forum state, Respondent is therefore subject to suit under a common name as an LLC formed in accordance with Kansas law.

Having determined Respondent’s capacity to sue and be sued under a common name, a federal court would appropriately identify this matter as a general case arising under Federal Rule of Civil Procedure 17(b)(3). Accordingly, Kansas law should also guide the definition of

“unincorporated association.” *See* sources cited *supra* pp. 4-5. Unlike certain other states, Kansas’s LLC statute does not provide a convenient statement defining a limited liability company as an unincorporated association. *Cf.* KAN. STAT. ANN. § 17-7663(f) (2019) (defining LLC as “a limited liability company formed under the laws of the state of Kansas and having one or more members”) *with* 18 OKLA. STAT. tit. 18, § 2001 (2017) (defining LLC as “an entity that is an unincorporated association or proprietorship having one or more members”); N.Y. LIMITED LIABILITY COMPANY LAW § 102(m) (McKinney 2006) (defining LLC as “an unincorporated organization of one or more persons having limited liability”); MICH. COMP. LAWS § 450.4102(k) (2016) (defining LLC as “an entity that is an unincorporated membership organization formed under this act”). In the context of the Kansas statutes, however, LLCs are impliedly treated as “unincorporated associations” through the legislature’s use of that generic term to distinguish a corporation from other types of entities. *See, e.g.,* KAN. STAT. ANN. § 21-5111 (defining “person” in the Kansas Criminal Code as “an individual, public or private corporation, government, partnership, or unincorporated association”); § 21-6506 (criminalizing bribery of “an officer, director, partner, manager or other participant in the affairs of a corporation, partnership or unincorporated association”); § 32-701 (“‘Person’ means any individual or any unincorporated association, trust, partnership, public or private corporation or governmental entity”); § 40-3401(k) (“‘Rating organization’ means a corporation, an unincorporated association, a partnership or an individual licensed pursuant to K.S.A. 40-956, and amendments thereto, to make rates for professional liability insurance.”); § 75-2743 (“‘Person’ means an individual, unincorporated association, partnership, limited partnership, corporation or governmental entity.”). Specifically concerning service of process, Kansas law includes LLCs among other business organizations—partnerships, limited partnerships, and

limited liability partnerships—in a list that concludes with the catch-all phrase “or other unincorporated association” KAN. STAT. ANN. § 60-304(e) (2019). Although the provision also refers to “domestic or foreign corporation,” the illustrative effect of the list is reasonably limited to the enumerated non-corporate entities given the legislature’s consistent distinction between corporations and other business organizations. Yates v. U.S., 135 S.Ct. 1074, 1086 (2015) (“Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”) (internal quotation marks omitted); Trego WaKeeney State Bank v. Maier, 519 P.2d 743, 748 (Kan. 1974).

In summary, Kansas law provides an interpretive basis to define Respondent as “an unincorporated association which is subject to suit under a common name,” as that phrase is used at 40 C.F.R. § 22.5(b)(1)(ii)(A). For the purpose of determining Respondent’s capacity to litigate under the CROP, and in keeping with the Board’s example, judicial interpretation of the Federal Rules of Civil Procedure instructs that it is necessary to first determine that the law of the forum state—in this case Kansas—permits an LLC to sue and be sued under a common name. That determination must be made before concluding further that the law of the forum state would also define Respondent as an “unincorporated association.”² *See* sources cited *supra* pp. 3-5. Here, by virtue of the LLC statute under which Respondent was formed, it is evident that Kansas limited liability companies have the power to sue and be sued under a common name. KAN. STAT. ANN. § 17-6102(b) (2017); *see supra* pp. 5-6. Further, LLCs are shown to be distinct, non-corporate business entities through the Kansas legislature’s regular use of the generic term “unincorporated

² If the Presiding Officer finds fault in this analysis, judging that federal law should govern the definition of “unincorporated association” in this case, Complainant respectfully requests an opportunity to further brief the issue in a subsequent supplement to the record.

association” as a counterpoint to the particular term “corporation” in various statutes. *See supra* pp. 6-7. Accordingly, Respondent is appropriately considered “an unincorporated association which is subject to suit under a common name” pursuant 40 C.F.R. § 22.5(b)(1)(ii)(A).

RESPECTFULLY SUBMITTED
this 26th day of September, 2019,



Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

CERTIFICATE OF SERVICE

I hereby certify that the original and one true and correct copy of the foregoing Response to Third Order to Supplement the Record was hand-delivered to the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 7, at 11201 Renner Boulevard, Lenexa, Kansas, on September 26, 2019.


A true and correct copy of the foregoing Response to Third Order to Supplement the Record was sent this day to the following persons in the manner indicated:

By Hand Delivery

Karina Borrromeo
Regional Judicial Officer/Presiding Officer
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By Certified Mail, Return Receipt Requested

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