

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

2019 SEP 26 PM 3: 4 1

BEFORE THE ADMINISTRATOR

In the matter of )

SUPERIOR RESTORATION )  
& CONSTRUCTION LLC, )

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

Docket. No. TSCA-07-2016-0017

**PROPOSED SUPPLEMENT TO MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF COMPLAINANT'S MOTION FOR DEFAULT ORDER**

Complainant filed a Memorandum of Points and Authorities in Support of its Motion for Default Order on March 28, 2018. For the purpose of arguing effectiveness of service of the complaint under 40 C.F.R. § 22.5(b)(1)(ii)(A), Complainant's memorandum presumed that Respondent was properly considered "an unincorporated association which is subject to suit under a common name." The Presiding Officer's Third Order to Supplement the Record prompted additional research into the definition of a limited liability company, or LLC, as an unincorporated association under the laws of Kansas, which Complainant provided today in a separate filing. This research also revealed, however, that the U.S. Environmental Protection Agency, or EPA, has previously characterized LLCs as corporations under 40 C.F.R. § 22.5(b)(1)(ii)(A), which is detailed further in Complainant's First Motion for Leave to Supplement the Record. That motion seeks the Presiding Officer's leave to enter into the record this proposed supplement to the legal memorandum in support of Complainant's Motion for Default Order.

Under Kansas law, an 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). This provision is cited also in Complainant’s Response to the Third Order to Supplement, which Complainant filed in support of its initial position that Respondent is an unincorporated association. Nevertheless, this authority could also be reasonably interpreted to conclude that Kansas LLCs function as corporations to such an extent that they may be characterized as such under 40 C.F.R. § 22.5(b)(1)(ii)(A). With this supplement, Complainant raises this alternative interpretation for the Presiding Officer’s consideration.

In either instance—whether Respondent is classified as an unincorporated association or a corporation—Complainant believes that service of the complaint on Respondent was effective under 40 C.F.R. § 22.5(b)(1)(ii)(A). Complainant has already provided briefing on the effectiveness of service on Respondent as an unincorporated association. If, in the alternative, Respondent is considered a corporation, then the outcome of the matter is governed directly by prior decisions of the Environmental Appeals Board and United States District Court for the Tenth Circuit. Peace Industry Group (USA) Inc., 17 E.A.D. No. 16-01, 2016 EPA App. LEXIS 56, \*36 (Dec. 22, 2016) (“[P]roper service on a corporation by certified mail does not require that the named addressee be the person who signs the return receipt. . . . [I]n serving a corporation, if EPA properly addresses and mails the complaint by certified mail, and an individual at that address signs and returns the receipt, service is complete.”); Jonway Motorcycle (USA) Co., Ltd., 2014 EPA App. LEXIS 45, \*14 and n.13 (Nov. 14, 2014) (“[The designated agent’s] signature on the return receipt . . . [is] not a necessary prerequisite to a finding of valid service on a corporation. . . . [T]here is nothing in the rules that prevents EPA

from serving [a corporation's] designated agent at an address where he can be found.”); Katzson Bros., Inc. v. U.S. Env'tl. Prot. Agency, 839 F.2d 1396, 1399 (10th Cir. 1988) (upholding the Board's determination that service on a corporation by certified mail, return receipt requested, “need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual”).

In consideration of this alternative argument, Complainant has prepared and separately filed a proposed amendment to the Proposed Findings of Fact, Conclusions of Law, Default Order, and Initial Decision.

RESPECTFULLY SUBMITTED  
this 26<sup>th</sup> day of September, 2019,



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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 Proposed Supplement to Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order 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.

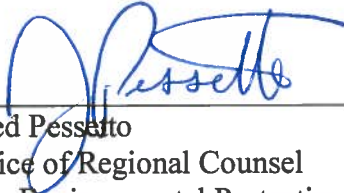
A true and correct copy of the foregoing Proposed Supplement to Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order was sent this day to the following persons in the manner indicated:

By Hand Delivery

Karina Borrromeo  
Regional Judicial Officer/Presiding Officer  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

By Certified Mail, Return Receipt Requested

Mr. Cory Poulsen  
Superior Restoration & Construction LLC  
7861 Mastin Drive  
Overland Park, Kansas 66204

  
\_\_\_\_\_  
Jared Pessatto  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 7