

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 FIRST MOTION FOR LEAVE  
TO SUPPLEMENT THE RECORD**

Pursuant to 40 C.F.R. § 22.16(a) and § 22.5(b)(2), Complainant respectfully requests the Presiding Officer’s leave to supplement the Memorandum of Points and Authorities in Support of Complainant’s Motion for Default Order, as well as the Proposed Findings of Fact, Conclusions of Law, Default Order, and Initial Decision, both of which Complainant filed concurrently with its Motion for Default Order on March 28, 2018. Since filing these pleadings, Complainant learned that several prior administrative enforcement matters reached inconsistent determinations regarding the status of limited liability companies, or LLCs, under the Consolidated Rules of Practice, or CROP. As detailed below, respondent LLCs have been considered corporations in at least three cases while one other found that the LLC was an “unincorporated association which is subject to suit under a common name.” Despite inconsistent application, however, the same service of process rule applies to both corporations and unincorporated associations. *See* 40 C.F.R. § 22.5(b)(1)(ii)(A). As such, Complainant believes that service of the complaint on Respondent was effective under the CROP whether it is

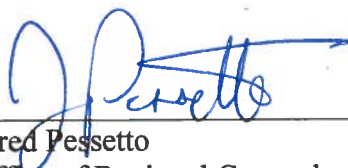
defined as an unincorporated association, as previously argued, or, alternatively, a corporation. Accordingly, Complainant files this motion for leave to supplement its memorandum in support of the Motion for Default Order to present an argument in the alternative that Respondent may be appropriately considered a corporation under 40 C.F.R. § 22.5(b)(1)(ii)(A).

As briefly noted in Complainant's previous motion for extension of time, the Office of Administrative Law Judges recently issued a default order that reached a different procedural definition of LLC than Complainant advanced in its Motion for Default Order. In that case, Administrative Law Judge Buschmann concluded that the respondent LLC was "a corporation organized under the laws of North Carolina." Spartan Diesel Technologies, LLC, Docket No. CAA-HQ-2017-8362, p. 3 (Oct. 30, 2018). This initial decision became a final order when the Environmental Appeals Board declined to exercise *sua sponte* review of the case. Spartan Diesel Technologies, LLC, CAA Appeal No. 18-(03). Further research revealed initial decisions in two additional administrative enforcement actions that treated respondent LLCs as corporations. *See Atkinson Developers, LLC*, Docket No. CWA-04-2010-5515, at p. 4 (Aug. 9, 2016) (granting order and finding "[Respondent is] a limited liability *corporation* incorporated under the laws of the State of South Carolina."), CWA Appeal No. 16-03 (Oct. 16, 2016) (declining *sua sponte* review); Mardaph II, LLC; Mardaph III LLC; and Vinnie Wilson, Docket No. TSCA-05-2008-0019 (June 18, 2019), Memorandum from Eurika Durr, Clerk to the Environmental Appeals Board, to LaDawn Whitehead, Regional Hearing Clerk, EPA Region 5 (July 29, 2010) (notifying region that the EAB declined *sua sponte* review). In one other matter, however, Administrative Law Judge Buschmann found that the respondent LLC was an unincorporated association, an initial decision that was also made final by the EAB's election not exercise review authority. Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich, Docket No. CWA-05-2013-

0003 (Feb. 6, 2015) (“A limited liability company is not a corporation, but rather is an ‘unincorporated association.’”) and Email from Eurika Durr, Clerk to the Environmental Appeals Board, to LaDawn Whitehead, Regional Hearing Clerk, EPA Region 5 (May 11, 2016) (notifying region that the EAB declined *sua ponte* review). None of the decisions provides explanation of the determination between corporation and unincorporated association.

Due to the uncertainty of these outcomes, Complainant separately files this motion for leave to raise for the Presiding Officer’s consideration the alternative argument that Respondent may be appropriately considered a corporation under 40 C.F.R. § 22.5(b)(1)(ii)(A). Concurrent with this motion, Complainant has filed a proposed supplement to the Memorandum of Points and Authorities in Support of Complainant’s Motion for Default Order. Complainant has also 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 Complainant's First Motion for Leave 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 Complainant's First Motion for Leave 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  
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



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