

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

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In the Matter of: )  
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)  
Lester Sykes )  
Chicago, Illinois, )  
)  
Respondent )  
\_\_\_\_\_ )

**Docket No. TSCA-05-2008-0013**

**RESPONSE TO ORDER TO SHOW CAUSE, AND MOTION FOR LEAVE TO FILE  
EXHIBITS TO DEMONSTRATE PROOF OF SERVICE OF COMPLAINT AND  
RETURN RECEIPT SIGNED**

As required by the Presiding Officer, the Regional Judicial Officer, in her March 8, 2013 Order to Show Cause (Response), Complainant, the U.S. Environmental Protection Agency, Region 5, files this Response to Order to Show Cause, and in accordance with 40 C.F.R. § 22.16(a), moves for leave to file Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V to demonstrate proof of service of Complaint and return receipt signed.<sup>1</sup> Allowing Complainant to file these Exhibits does not prejudice Respondent because Exhibits A through N were already filed by Complainant as part of Complainant's Motion for Default Order, Finding of Liability and Penalty (Motion for Default). Certain documents were previously provided to Respondent by Complainant (Exhibits B, C, H, K, and P); one document was previously provided to Respondent by the Northern District of Illinois (Exhibit D); two documents were provided to Respondent by the City of Chicago (Exhibit F and G); and certain documents were provided by Respondent to Complainant (Exhibits L, Q, and U). The remaining Exhibits R, S, T, U and V are previously filed Exhibits I and L to the Motion for Default, along with copies of mailing envelopes. Complainant seeks the Presiding Officer's permission to allow Complainant to file Exhibit O, the Second Declaration of Julie Morris that authenticates Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V.

**BACKGROUND**

As indicated in Complainant's Motion for Default, Complainant has been involved with this Respondent since 2005. The Respondent's recalcitrance precedes EPA's involvement, as demonstrated by his litigation with the City of Chicago over his refusal to address lead hazards in his properties, including properties where children were lead-poisoned, until he was sued and was compelled to address hazards in his properties by the City (Exhibits F, G, and R).

<sup>1</sup> Complainant included Exhibits A through N in support of Complainant's Motion for Default Order, Finding of Liability and Penalty. Complainant is seeking the Presiding Officer's permission to have certain of these Exhibits filed, along with the Second Declaration of Julie Morris (Exhibit O), and Exhibits P through V, in support of this Response.

Respondent would not cooperate with EPA's investigation to ascertain Respondent's compliance with the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Section 1018) and its implementing regulations (the Lead Disclosure Rule). After letters and calls to Respondent, EPA was forced to ask the U.S. Attorney's office to file an action in federal district court to get a simple response from the Respondent about rental properties he owns (Exhibits C, D, P and Q).

Respondent failed to respond to EPA's April 17, 2008 letter advising Respondent that EPA was preparing to file a Complaint (Exhibit H). Respondent failed to file an Answer to the Complaint, even after receiving a call and a letter from EPA explaining how Respondent could file his Answer (Exhibit K). Since his letter to EPA in February 15, 2011, Respondent has not acknowledged or responded to any filings by Complainant. See Julie Morris' Second Declaration at Exhibit O.

There is no dispute that Respondent received the Complaint in this matter. Given Respondent's actual receipt of the Complaint, and/or for the reasons set forth below, this Respondent has received full protection of his due process rights.

EPA is very cognizant and respectful of each respondent's due process rights. However, such rights must be balanced against the limited and responsible use of resources by this Agency. A recalcitrant individual such as the Respondent in this matter has forced Complainant to expend significant resources that could have been better used to serve the public's interest had Respondent ever attempted to cooperate with Complainant. In each of the many interactions Complainant has had with this Respondent, beginning with Respondent's refusal to allow an inspection, Respondent's due process rights have been fully protected while he has consistently refused to cooperate with the Complainant.

On June 25, 2008, Complainant filed its Complaint assessing a civil penalty against the Respondent in this matter under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). The Complaint notified Respondent that he had thirty (30) days from receipt of the Complaint to file an Answer. As set forth in the Second Declaration of Ms. Morris, Complainant mailed copies of the Complaint via certified mail, return receipt requested, to Mr. Lester Sykes at 200 East 96<sup>th</sup> Street, Chicago Illinois 60628. Because Mr. Sykes did not sign for receipt of the certified mailing, the U.S. Postal Service returned the Complaint to EPA. In a second attempt at delivery, on April 21, 2009, Complainant mailed a second copy of the Complaint by U.S. Postal Service, Priority Mail, to Mr. Lester Sykes at 200 East 96<sup>th</sup> Street, Chicago, Illinois 60628, as indicated in EPA's Certification of Service (Exhibit R). EPA received confirmation of receipt of the priority mailing, which was delivered on April 22, 2009, via the U.S. Postal Service website (Exhibit T).

As set forth in the Second Declaration of Ms. Morris, on or about April 30, 2009, Mr. Sykes sent a one-paragraph letter responding to EPA's Complaint in which he confirmed ownership of the Residential Properties at 7002 South Steward and 622-24 West 79<sup>th</sup> Street, and stated he had "3 complaints" filed by the City, that he told tenants there was no evidence of any Lead-Based Paint Hazard, and that he only gave leases on request as most tenants only live from 3 to 6 months in

his properties. A copy of this letter is included as Exhibit U. Exhibit U is a copy of Respondent's signed April 30, 2009 letter, along with a copy of the envelope bearing a date-stamp of May 4, 2009 from the U.S. Postal Service which Respondent used to send his April 30, 2009 letter to EPA's Enforcement Officer.

As set forth in the Second Declaration of Ms. Morris, on January 18, 2011, EPA sent a letter to Mr. Sykes advising him that he had failed to file an Answer to the Complaint, and reminded him to file an Answer (Exhibit K). On February 15, 2011, Respondent sent a letter with the same limited information provided in his April 30, 2009 letter, along with a copy of his April 30, 2009 letter, again acknowledging receipt of the Complaint (Exhibit V).

As set forth in the Second Declaration of Ms. Morris (Exhibit O), there is no record of any correspondence or communication between Complainant and Respondent since receipt of Respondent's February 15, 2011 letter.

As set forth in the Order to Show Cause, on August 31, 2012, the Presiding Officer issued her Order Denying Motion for Default (Order Denying Default), finding that EPA did not complete or prove service of the underlying Complaint filed in this matter in accordance with the Consolidated Rules at 40 C.F.R. Part 22 or meet the requirements of due process. EPA did not file a motion for reconsideration or seek interlocutory appeal of the Order Denying Default. Thus, the Presiding Officer's August 2012 Order Denying Default remains in effect.

On November 8, 2012, Complainant filed the following: (1) "Filing of Certification of Service and Filing of Proof of Service of Complaint" (Service Filing); and (2) "Filing of Answer." The Service Filing, together with the Filing of Answer, demonstrates that by no later than April 30, 2009, as confirmed by Respondent's April 30, 2009 letter acknowledging receipt of the Complaint, Respondent had actually received the complaint in this matter.

#### SERVICE FILING

In the Presiding Officer's March 8, 2013 Order to Show Cause, the Presiding Officer notes that Complainant filed two filings without moving for leave to file under 40 C.F.R. § 22.16(a). The Presiding Officer orders Complainant to show cause, as follows:

1. How its Service Filing and the attached "Track & Confirm search results" establish completed service and proof of service of the Complaint. In responding, EPA must address, at a minimum:
  - a. Why it should be allowed to demonstrate proof of service by U.S. Postal Service priority mail with delivery confirmation when that is not one of the methods of service by U.S. Postal Service mail specified in the Consolidated Rules at 40 C.F.R. § 22.5(b)(1)(i);
  - b. Why the requirements for service of a complaint by a reliable commercial delivery service should be applicable to its attempt at service of the Complaint by U.S. Postal Service mail; and

- c. How the "Track & Confirm search results" attached to its Service Filing prove service of the Complaint as required by 40 C.F.R. § 22.5(b)(1)(iii) and demonstrate completed service in accordance with 40 C.F.R. § 22.7(c).

EPA's procedural rules for service of an administrative complaint are set forth at 40 C.F.R. § 22.5(b)(1):

Service of complaint. (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

40 C.F.R. § 22.5(a)(3) provides that a certificate of service be attached to the complaint. 40 C.F.R. § 22.5(b)(1)(i) provides that service of a complaint shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. 40 C.F.R. § 22.5(b)(1)(iii) provides that proof of service of the complaint shall be made by affidavit of the person making personal service or by properly executed receipt, and shall be filed with the Regional Hearing Clerk immediately upon completion of service. 40 C.F.R. § 22.7(c) provides that service of the complaint is complete when the return receipt is signed.

In the November 8, 2012 Service Filing, Complainant argued that EPA's Enforcement Officer's April 21, 2009 Certification of Service of the administrative complaint sent by U.S. Postal Service, priority mail, to Respondent, along with the U.S. Postal Service Delivery Confirmation Receipt for Priority Mailing to Respondent and U.S. Postal Service "Track & Confirm search results," confirm delivery for that same Confirmation Receipt number showing that the Complaint was delivered to Respondent's address on April 22, 2009. Complainant argued that these documents demonstrate that the elements of service and receipt required by the Rules at 40 C.F.R. Part 22 (Consolidated Rules) had been satisfied.

EPA believes that Respondent's April 30, 2009 letter (Exhibit U), confirmed by Respondent's February 15, 2011 letter (Exhibit V), in conjunction with Complainant's correspondence to Respondent on April 21, 2009 (Exhibits R, S and T) and January 18, 2011 (Exhibit K), demonstrate that Respondent actually received EPA's administrative complaint on or before April 30, 2009. Thus, Complainant did complete service of the administrative complaint. Further, the Respondent reviewed and responded to EPA's administrative complaint on two separate occasions (Exhibits U and V), providing the return receipt signed by Respondent.

Complainant respectfully requests leave to file Exhibits R, S and T as Proof of Service required by 40 C.F.R. § 22.5(b)(1)(iii). Complainant respectfully requests leave to file Exhibits U and V as the return receipt signed required by 40 C.F.R. § 22.7(c), which provides that service of the complaint is complete when the return receipt is signed.

While Complainant cannot offer an eyewitness to attest to personal service of the Complaint, Mr. Sykes has unequivocally acknowledged his receipt of EPA's Complaint. In this regard, the delivery confirmation, while insufficient to demonstrate mail service, can be combined with his letters referring to the content of the administrative complaint to create a strong inference that he was served because he actually received the Complaint.

Complainant also notes that communications with Respondent, as evidenced in Exhibits C, D, F, G, H, P and Q, demonstrate that Mr. Sykes has received and responded to mailings sent to the same address EPA used to deliver his Complaint. Complainant respectfully requests leave to file these Exhibits to illuminate the communications between Complainant and Respondent at Respondent's address at 200 E. 96<sup>th</sup> Street in Chicago.

#### FILING OF "ANSWER"

In preparing to respond to the Presiding Officer's August 31, 2012 Order Denying Default, Complainant noted that in Respondent's February 15, 2011 letter, Respondent had captioned this letter, "Answer to Docket No. TSCA-05-2008-0013," and had attached Respondent's April 30, 2009 letter to show that he had previously responded to Complainant's administrative complaint. Complainant thought it appropriate and fair to file Respondent's letter on behalf of a *pro se* respondent, and thus filed Respondent's February 15, 2011 letter and April 30, 2009 letter as Respondent's Answer on November 8, 2012. However, in her Order to Show Cause, the Presiding Officer orders Complainant to show cause as follows:

2. Why its Filing of Answer should not be excluded from the record. In responding, EPA must address, at a minimum:
  - a. What legal authority EPA has to file an answer to its own complaint;
  - b. Whether EPA ever sought or obtained permission from Respondent to submit the Filing of Answer filing on his behalf;
  - c. How the correspondence EPA attached to the Filing of Answer complies with the form and content requirements for answers under the Consolidated Rules and, if it does not, why it should not be excluded under 40 C.F.R. § 22.5(c)(5); and
  - d. How "justice will be best served" by allowing the Filing of Answer when the Complaint has not been properly served.

In response to questions 2.a. and b., Complainant has identified instances where EPA has filed an Answer on behalf of a respondent, but in each of those instances, EPA had made such filing with permission of a respondent, or after respondent failed to respond to Complainant's motion proposing to file such respondent's letter as an Answer. For example, In the Matter of: Michael McDonald, Docket No. SWDA-06-2007, the Chief Administrative Law Judge reviewed a request by EPA, Region 6, to file Respondent's Letter that apparently responded to EPA's Complaint as Respondent's Answer. Complainant advised Respondent that Respondent's Letter did not meet the requirements for an "Answer" to a Complaint under the Consolidated Rules, but that Complainant would assume this was his Answer and would file it with the Regional Hearing Clerk if EPA did not receive an Answer meeting the requirements in the Consolidated Rules

within 5 days. In her January 14, 2008 "Order on Complainant's Motion for Determination of Whether Letter May Be Filed As An Answer," Judge Biro found that, "Respondent's Letter fails to meet the requirements of Rule 22.15(b) regarding directly responding to each and every allegation in the Complaint, and does not contain any specific request for a hearing. However, it does indicate that Respondent disputes certain material facts alleged in the Complaint and arguably raises grounds for a defense." As Complainant did not seek default and has no objection to the Respondent's Letter being filed as his "Answer," the Chief Judge granted EPA's Motion allowing Respondent's Letter to be filed as an Answer. 2008 WL 170436 (E.P.A.).

In this matter, while EPA filed Respondent's correspondence as his Answer and copied Respondent on such filing, EPA did not seek Respondent's permission, nor advise Respondent that it intended to file his correspondence as his Answer.

In response to questions 2.c. and d. in the Presiding Officer's Order to Show Cause, Respondent's April 2009 letter disputes some of the facts included in EPA's Complaint, but does not meet the requirements of Rule 22.15(b) regarding directly responding to each and every allegation in the Complaint, and does not contain a specific request for a hearing.

As the filing of Respondent's letter by Complainant was done without the permission of Respondent or of the Presiding Officer, and as Complainant cannot argue that the letter complies with the requirements in 40 C.F.R. § 22.15, Complainant will not pursue seeking the Presiding Officer's permission to file Respondent's Answer on his behalf. Accordingly, Complainant seeks permission to withdraw the November 8, 2012 "Filing of Answer" in this matter.

With respect to the issue of whether Respondent has been afforded due process with respect to the matter of service of the Complaint, the 10<sup>th</sup> Circuit considered a respondent's due process in the context of service on a corporation. In Katzson Bros., Inc., v. United States Environmental Protection Agency, 839 F.2d 1396 (10<sup>th</sup> Cir., Feb. 22, 1988), the Court of Appeals upheld EPA's service of a complaint by certified mail, return receipt requested, addressed to the secretary-treasurer of the company. The Court of Appeals reviewed the provisions of the then-applicable version of the Consolidated Rules, and found:

Furthermore, where the Consolidated Rules seek to require actual delivery, they quite clearly use the appropriate language. *See, e.g.*, 40 C.F.R. Sec. 22.05(b)(1)(iv)(A) (service upon a state or a local government shall be accomplished "by delivering a copy of the complaint to the chief executive officer thereof"). The plain language of the second section, on the other hand, indicates that when service is effectuated by certified mail, the letter need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual. This provision ensures that the representative who actually receives the mail will know to whom it should be delivered. Any other interpretation would severely hinder service of process on corporations by certified mail, since the postal service employee would have to wait on the corporation's premises until the officer, partner, or agent could sign the return receipt. (Footnote omitted.) Nor did EPA's service of process violate the requirements of due process. The mails may be used

to effectuate service of process if the notice reasonably conveys the required information and affords a reasonable time for response and appearance. E.g., Mennonite Board of Missions v. Adams, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983). Due process does not require actual notice. If an agency employs a procedure reasonably calculated to achieve notice, successful achievement is not necessary to satisfy due process requirements. Day v. J. Brendan Wynne, Inc., 702 F.2d 10, 11 (1st Cir.1983); Stateside Mach. Co. v. Alperin, 591 F.2d 234, 241 (3d Cir.1979). EPA's service of the complaint by registered mail with return receipt requested, as well as its substantial efforts to contact Katzson over a sixteen-month period, satisfies these due process concerns. (Footnote omitted.)

In this matter with this individual Respondent, Complainant made multiple efforts to contact Respondent, and there is no question that Respondent actually received and reviewed EPA's administrative complaint. Accordingly, Respondent has been afforded due process.

By this Response, accompanied by the Second Declaration of Julie Morris at Exhibit O, Complainant requests leave to file Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V to demonstrate that EPA has corresponded in the past with Respondent at the address used to serve EPA's Complaint, to demonstrate that Respondent has been served with the Complaint, to file the required proof of service, and to demonstrate that Respondent has acknowledged receipt of EPA's Complaint.

As set forth in greater detail below:

- (1) Respondent has acknowledged his actual receipt of the Complaint; and
- (2) Complainant has provided written verification of delivery as required by 40 C.F.R. § 22.5(b)(1), as demonstrated in EPA's Certification of Service and written verification of delivery from the U.S. Postal Service; Complainant has filed proof of service, as required by 40 C.F.R. § 22.5(b)((1)(iii); and Respondent's April 30, 2009 letter constitutes return receipt signed, as contemplated by 40 C.F.R. § 22.7(c), thus satisfying the procedural requirements for proper service of the Complaint

**1. The Procedural Rules Pertaining to Service of the Administrative Complaint in this Matter Have Been Satisfied Because Respondent has Acknowledged His Actual Receipt of the Complaint**

Because Respondent refused to accept a certified mailing of the Complaint, on April 21, 2009, Complainant sent a second copy of the Complaint via U.S. Postal Service, Priority Mail, to Respondent.

Eight days later, by letter dated April 30, 2009, Respondent sent a letter to Complainant, to the name and address for contacting EPA set forth in the Complaint, stating as follows:

In response to your complaint, since I have been the Landlord of these properties: 7002 South Stewart, and 622-24 West 79<sup>th</sup> Street, in the twenty (20) years that I have been a Landlord, I have only had three (3) complaints. I went to Court for those complaints, city Inspectors came and inspected these properties and found no evidence of Residential Lead-Based Paint Hazards. Also, each time a unit was rented to a tenant the tenant was informed that there was no evidence of any Lead-Based Paint Hazards.<sup>2</sup> Most tenants only live in these Apartments from three (3) to six (6) months. Therefore I only give Leases on request.

Thus, by his letter dated April 30, 2009, Respondent's signed letter clearly acknowledges receipt of the Complaint.

Because Respondent failed to file an Answer with the Regional Hearing Clerk, while not required by any statute or regulation, but to ensure that Respondent was aware of the legal requirement to file his Answer, on January 18, 2011, EPA's Enforcement Officer called the Respondent, and confirmed the information conveyed in the call with a letter to Respondent advising him to file an Answer, and explaining how to do so (Exhibit K). Respondent responded by letter dated February 15, 2011, as follows:

Dear Mr. Cooper,

Answer to Docket No. TSCA-05-2008-0013

In response to the administrative complaint that you sent me I did response by sending you a letter. I am enclosing a copy of the letter that I sent you.

The properties: 7002 South Stewart, and 622-24 West 79<sup>th</sup> Street, I have only had (3) complaints. As I aforementioned I went to court for those complaints, city inspectors came and inspected those properties, and found no evidence of residential lead-based paint hazards. Also each time a unit was rented to a tenant, the tenant was informed that there was no evidence of any lead-based paint hazards.

*See Exhibit V.* Respondent chose to respond to Complainant with a letter he captioned as an "Answer," but he chose not to file his "Answer," even after Complainant took extra steps to ensure that Respondent understood that he was required to file an Answer. While Respondent did not file an answer to the Complaint, Respondent's letter dated April 30, 2009, as confirmed by his second letter on February 15, 2011, clearly acknowledges his actual receipt of the Complaint. *See Exhibits U and V.*

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<sup>2</sup> Note that Respondent's letter contradicts the City of Chicago's findings of lead hazards present in his properties. *See Exhibit F*, which identifies a lead-poisoned child in Respondent's property at 411 W. 70<sup>th</sup> Street, which prompted the City's lead inspection. Respondent finally addressed the lead hazards identified at this property almost 3 years after the child was poisoned, but only after being sued by the City. *See also Exhibit G.*



The matter of actual service of a complaint was considered in In re C.W. Smith, Grady Smith & Smith's Lake Corporation, Docket No. CWA-04-2001-1501 (2002 WL 257696) (E.P.A. ALJ, Feb. 6, 2002). There, ALJ McGuire considered Complainant's motion for accelerated decision on liability and penalty, and Respondent's motion for dismissal. In that matter, the receipt for service of the complaint was signed by a person who leased a shop adjoining the property of the residence of the corporate respondent, but that person was not employed by the corporate respondent and was not authorized to accept process on behalf of the corporate respondent. Nonetheless, ALJ McGuire found that despite the defects in service, actual service of process of the complaint was achieved on both respondents where the record included information indicating that respondents were aware that a complaint had been filed. As the Regional Judicial Officer's Order notes, ALJ McGuire stated, "The achievement of actual service of process obviates the failure of Complainant to strictly comply with the service of process procedures" of the Consolidated Rules. In re C.W. Smith, at \*5-6 (citing In re City of Orlando, Florida, Docket No. CWA-04-501-99, 1999 EPA ALJ LEXIS 38, at \*6-7 (E.P.A. ALJ, Jul. 7, 1999).

In this matter, there is no question that Respondent received the Complaint, the record includes information indicating that the Complaint was actually received, Respondent acknowledged receipt of the Complaint, but Respondent failed to file his Answer.

**2. The Procedural Rules Pertaining to Service of the Administrative Complaint in this Matter Have Been Satisfied Because EPA has Provided Written Verification of Delivery as Required by 40 C.F.R. § 22.5(b)(1), as Demonstrated in EPA's Certification of Service and Written Verification of Delivery from the U.S. Postal Service; Complainant has Filed Proof of Service as Required by 40 C.F.R. § 22.5(b)(1)(iii); and Respondent's April 30, 2009 Letter and February 15, 2011 Letter Satisfy the Return Receipt Signed, as Contemplated by 40 C.F.R. § 22.7(c), Thus Satisfying the Procedural Requirements for Proper Service of the Complaint**

As set forth in greater detail above, on June 25, 2008, Complainant mailed the Complaint via certified mail, return receipt requested, to Mr. Lester Sykes at 200 East 96th Street, Chicago Illinois 60628. Because Mr. Sykes did not sign for receipt of the certified mailing, the U.S. Postal Service returned the Complaint to EPA. On April 21, 2009, Complainant mailed a second copy of the Complaint via U.S. Postal Service, Priority Mail, to Mr. Lester Sykes at 200 East 96th Street, Chicago Illinois 60628. EPA obtained confirmation of receipt of the priority mailing from the U.S. Postal Service website, indicating the Complaint mailed on April 21, 2009 was delivered on April 22, 2009 (Exhibits S and T). Eight days later, by letter dated April 30, 2009, Respondent sent a letter to Complainant, to the name and address for contacting EPA set forth in the Complaint (Exhibit U). Respondent's signed letter dated April 30, 2009 clearly acknowledges receipt of the Complaint.

Because Respondent failed to file an Answer with the Regional Hearing Clerk, while not required by any statute or regulation, but to ensure that Respondent was aware of the legal requirement to file his Answer, on January 18, 2011, Complainant contacted the Respondent and

sent another letter to Respondent. In that letter, Complainant responded to matters Respondent raised in his April 30, 2009 letter, advised Respondent that he failed to file an Answer, and explained what Respondent had to do to file an Answer (Exhibit K).

In response, Respondent sent Complainant a letter he captioned as an "Answer," but he did not file that Answer, even after Complainant took additional measures steps to ensure that Respondent understood that he was required to file an Answer.

40 C.F.R. 22.5(b)(1) sets forth the ways in which a complaint may be served. Service may be made "personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery."

As stated above, Respondent refused to accept the original June 25, 2008 Complaint sent via certified mail, return receipt requested, as provided by 40 C.F.R. § 22.5(b)(1). Thus, on April 21, 2009, Complainant sent a second copy of the Complaint by U.S. Postal Service, Priority Mail, overnight mail, with delivery confirmation. *See* Exhibits R, S and T which includes Complainant's Certification of Service for the Complaint and which provides written confirmation that the U.S. Postal Service delivered the Complaint to Respondent's home address on April 22, 2009, as required by 40 C.F.R. § 22.5(b)(1).

As 40 C.F.R. § 22.5(b)(1)(iii) requires the Complainant to file a proof of service with the Regional Hearing Clerk, following receipt of the Regional Judicial Officer's Order, Complainant filed Complainant's Certification of Service and written confirmation that the U.S. Postal Service delivered the Complaint to Respondent's home address on April 22, 2009.

40 C.F.R. § 22.7(c) states that "service of the complaint is complete when the return receipt is signed." As noted by the Regional Judicial Officer in her Order, 40 C.F.R. § 22.7(c) does not specify a definition for what constitutes "return receipt is signed." This rule contemplates that the Respondent's signature on a green card receipt from the U.S. Post Office or from a commercial delivery service is a type of return receipt signed. However, there is no limitation on what constitutes "return receipt signed" in the regulations.

Note that 40 C.F.R. § 22.5(b)(1) provides that service of a complaint may be made by personal service. With personal service, the proof of written return receipt is an affidavit from the Complainant's representative who accomplishes personal service. However, the procedures do not require a specific acknowledgement by a respondent that he understands he has received a Complaint, and further, that he has reviewed that complaint.

In this matter, the written return receipt is Respondent's own signature on his April 30, 2009 letter to EPA acknowledging receipt of the Complaint. Within 8 days of the April 22, 2009 delivery of the Complaint, on April 30, 2009, Mr. Lester Sykes submitted a letter to EPA, signed by Mr. Lester Sykes, acknowledging receipt of the Complaint (Exhibit U). Thus, Respondent's April 30, 2009 letter sent after Respondent received the Complaint sent via U.S. Postal Service, Priority Mail, with delivery confirmation, in which Respondent acknowledges that he received

the Complaint, may be considered a properly executed receipt as required by 40 C.F.R. § 22.5(b)(1)(iii).

In her Order Denying Motion for Default, one of the concerns noted by the Presiding Officer is the method of delivery employed by Complainant, finding the method lacks written verification of delivery of the Complaint. However, Respondent has provided written verification of delivery of the Complaint in his April 30, 2009 letter (Exhibit U). Delivery of the Complaint is further validated when considered in conjunction with the documents included in Exhibits R, S and T, specifically Complainant's Certification of Service and contemporaneous U.S. Postal Service "Delivery Confirmation Receipt."

The Regional Judicial Officer's Order notes the matter of actual service of a complaint was considered, and the achievement of actual service obviated the failure to comply with service of process procedures in In re C.W. Smith, Grady Smith & Smith's Lake Corporation, Docket No. CWA-04-2001-1501 (2002 WL 257696) (E.P.A. ALJ, Feb. 6, 2002). The matter of actual service was also addressed by the Chief Administrative Law Judge in In the matter of Burnham Associates, Inc., Docket No. MPRSA-01-2010-0078, 2010 WL 7127648 (E.P.A. ALJ, Dec. 21, 2010). There, the Chief Administrative Law Judge (ALJ) considered a Motion to Dismiss filed by Respondent where Complainant had failed to file a properly executed receipt of delivery of the complaint in that matter sent to Respondent's attorney. In her December 21, 2010 "Order Denying Respondent's Motion to Dismiss and Directing Complainant to File Proof of Service of the Complaint," the Chief ALJ deemed it not appropriate to dismiss a complaint where a Respondent had actually received a copy of the Complaint, and it appeared that Complainant would be able to establish proof of service. The Chief ALJ ordered Complainant to file proof of service of the complaint. As ordered by the Chief ALJ, on the same day, December 21, 2010, Complainant promptly filed the United Parcel Service (UPS) Shipping Document with tracking number, and the UPS Internet Tracking Information, including the "Proof of Delivery" page, for that tracking number. These filed documents do not include respondent's written signature. Complainant filed these documents to show that on October 28, 2010, Complainant had mailed the complaint that was delivered to Respondent's counsel's address on October 29, 2010, and thus served Respondent's counsel with the complaint in that matter. A copy of the filed proof of service is available on the OALJ's website for this matter at <http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/7b598669425eac47852575400050b7e2/adb2608452be4bfb852577bb001b82ce!OpenDocument>. The docket does not indicate that Complainant was required to file anything further to satisfy the Consolidated Rules and/or due process concerns. Thereafter, the matter proceeded to litigation and finally settlement.

Consistent with the Chief ALJ's Order in Burnham Associates, Docket No. MPRSA-01-2010-0078, 2010 WL 7127648 (E.P.A. ALJ, Dec. 21, 2010), in the matter at hand, Complainant requests permission to file the required proof of service, at Exhibits R, S, T, U and V.

In her Order Denying Motion for Default in this matter, the Presiding Officer notes that the Supreme Court and several circuit courts of appeal have held that notice sent by ordinary mail is, under most circumstances, reasonably calculated to inform interested parties of impending

actions, but the Consolidated Rules specify the type of mail service that must be used. In this matter, Complainant is not simply relying on its use of ordinary mail. Rather, the Complaint was sent via U.S. Postal Service, Priority Mail to the home address of Respondent. Complainant's Certification of Service explains how service was accomplished, and the contemporaneous print out from the U.S. Postal Service provides confirmation of delivery. Complainant has filed the required proof of service as required in Burham Associates, Docket No: MPRSA-01-2010-0078, 2010 WL 7127648 (E.P.A. ALJ, Dec. 21, 2010). Further, Respondent's 2 letters that each acknowledge receipt of the Complaint, are further proof of service, showing that Respondent actually received the Complaint.

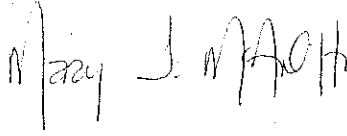
### **PRAYER FOR RELIEF**

In response to the Order to Show Cause, and in accordance with 40 C.F.R. § 22.16(a), Complainant respectfully moves for leave to file Complainant's Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V to demonstrate proof of service and return receipt signed. As stated above, allowing Complainant to file these Exhibits does not prejudice Respondent because Exhibits A through N were already filed by Complainant as part of Complainant's Motion for Default. Certain documents were previously provided to Respondent by Complainant (Exhibits B, C, H, K, and P); one document was previously provided to Respondent by the Northern District of Illinois (Exhibit D); two documents were provided to Respondent by the City of Chicago (Exhibit F and G); and certain documents were provided by Respondent to Complainant (Exhibits L, Q, and U). The remaining Exhibits R, S, T, U and V are previously filed Exhibits I and L to the Motion for Default, along with copies of mailing envelopes.

Complainant seeks the Presiding Officer's permission to allow Complainant to file Exhibit O, the Second Declaration of Julie Morris. Ms. Morris's Second Declaration authenticates Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V.

In particular, Complainant's Exhibit O, the Second Declaration of Julie Morris, includes information supporting each of these Exhibits. Complainant's Exhibits R, S and T demonstrate proof of service of the Complaint as required by 40 C.F.R. § 22.5(b)(1)(iii). Exhibit U is a copy of Respondent's signed April 30, 2009 letter and envelope providing the return receipt signed as required by 40 C.F.R. § 22.7(c), and demonstrating Respondent's actual receipt of the Complaint. Exhibit K is a copy of Complainant's January 18, 2011 letter to Respondent advising Respondent he had failed to file an Answer to the Complaint. Exhibit V is a copy of Respondent's February 15, 2011 letter, including a copy of Respondent's April 30, 2009 letter, and envelope, which further demonstrate Respondent's actual receipt of the Complaint.

Respectfully submitted,



Mary T. McAuliffe  
Associate Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd. (C-13J)  
Chicago, Illinois 60604  
(312) 886-6237  
[mcauliffe.mary@epa.gov](mailto:mcauliffe.mary@epa.gov)

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RECEIVED  
REGIONAL COUNSEL  
U.S. EPA REGION 5

## EXHIBITS

- B. August 12, 2005 TSCA Administrative Subpoena
- C. October 13, 2005 and January 18, 2006 letters regarding failure to respond to Subpoena
- D. April 10, 2006 District Court Summons in Response to EPA's Subpoena
- F. Documentation from the Chicago Department of Public Health regarding lead hazards at Respondent's property at 411 W. 70<sup>th</sup> Street, 1<sup>st</sup> floor, Chicago, Illinois
- G. Documentation from the Chicago Department of Public Health regarding lead hazards at Respondent's property at 622 W. 79<sup>th</sup> Street, 3<sup>rd</sup> floor, Chicago, Illinois
- H. EPA's April 17, 2008 prefiling letter regarding EPA's intent to file Complaint against Respondent
- K. January 18, 2011 letter from EPA to Mr. Sykes advising him that he had failed to file an Answer to the Complaint
- O. Second Declaration of Julie Morris of EPA.
- P. May 19, 2006 letter from Scott Cooper of EPA to Mr. Lester Sykes, summarizing that Mr. Sykes would provide a prompt response to Question 2 of EPA's Subpoena
- Q. Envelope bearing the name and address of Mr. Lester Sykes, addressed to Scott Cooper at EPA's address, that is date-stamped "Received June 2, 2006," indicating that the envelope arrived at EPA's offices on June 2, 2006. Attached to the envelope are 20 pages that include names and addresses, including units, of tenants.
- R. Certification of Service of the administrative complaint prepared on April 21, 2009 by Complainant's Enforcement Officer Scott Cooper in the above-captioned matter. In his Certification of Service, Mr. Cooper certifies that the Complaint in this matter was sent on April 21, 2009, by U.S. Postal Service, priority mail, delivery confirmation No. 0308 0070 000 4820 2310, to Respondent Lester Sykes
- S. U.S. Postal Service Delivery Confirmation Receipt for Priority Mailing No. 0308 0070 000 4820 2310 to Respondent Lester Sykes
- T. Internet copy of U.S. Postal Service confirmation of delivery for Receipt Number 0308 0070 000 4820 2310, showing the Complaint was delivered on April 22, 2009
- U. Copy of Respondent's signed April 30, 2009 letter, and copy of envelope Respondent used for mailing
- V. Copy of Respondent's February 15, 2011 letter, in which he has included a copy of Respondent's April 30, 2009 letter, and copy of envelope Respondent used for mailing.

In the Matter of: Lester Sykes  
Docket No. TSCA-05-2008-0013

CERTIFICATE OF SERVICE

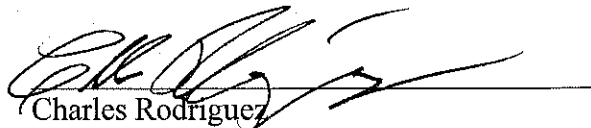
On this 28 day of March, 2013, I certify that I hand-delivered the original and one copy of Complainant's Response to Order to Show Cause to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency.

I also mailed a copy of Complainant's Response to Order to Show Cause, via first class mail, addressed as follows:

Mr. Lester Sykes  
200 East 96<sup>th</sup> Street  
Chicago, Illinois 60628

I also certify that I forwarded an intra-Agency copy to:

Ann Coyle  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Blvd (C-14J)  
Chicago, Illinois 60604

  
Charles Rodriguez  
Student Aide  
U.S. EPA, Region 5  
Office of Regional Counsel

RECEIVED  
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U.S. EPA-REGION 5  
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