

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>BURNHAM ASSOCIATES, INC.,</b>	)	<b>Docket No. MPRSA-01-2010-0078</b>
	)	
<b>Respondent</b>	)	

**ORDER DENYING RESPONDENT’S MOTION TO DISMISS AND DIRECTING  
COMPLAINANT TO FILE PROOF OF SERVICE OF THE COMPLAINT**

This action was initiated on September 30, 2010 by the United States Environmental Protection Agency, Region 1, Office of Environmental Stewardship (“Complainant” or “EPA”), filing an Administrative Complaint against Respondent, Burnham Associates, Inc., under Section 105(a) of the Marine Protection, Research, and Sanctuaries Act (“MPRSA”), 33 U.S.C. § 1415(a). The Complaint alleges that Respondent violated Section 101(a) of the MPRSA, 33 U.S.C. § 1411(a), by transporting and dumping dredged material into ocean waters in a manner inconsistent with a permit issued under Section 103 of the MPRSA, 33 U.S.C. § 1413. On October 25, 2010, Respondent filed an Answer and Request for Hearing (“Answer”) and a Motion to Dismiss for Insufficiency of Service of Process (“Motion”).<sup>1</sup> On October 28, 2010, Complainant filed a Reply to the Motion.

Respondent’s basis for the Motion is that the Complaint was sent via certified mail, return receipt requested, but that Respondent did not sign a return receipt (“green card”) and therefore the Complaint was not properly served. Respondent cites to Sections 22.5(b)(1) and 22.7(c) of the applicable procedural rules at 40 C.F.R. part 22 (“Rules”), providing, *inter alia*, that a complaint to a corporation must be served on an officer or other authorized person by certified mail with return receipt or delivery service with written verification of delivery, and that service of the complaint is complete when the return receipt is signed.

Complainant in its Reply concedes that Respondent did not sign the green card, but explains that, based on conversations EPA staff had with the U.S. Post Office in Salem, Massachusetts, the green card was no longer attached to the document by the time it reached Respondent. Complainant argues that the Motion should be denied because there was no harm or prejudice to Respondent, where it actually received the Complaint as evidenced by its timely filed Answer. Complainant asserts in the Reply and in the cover letter enclosing the Reply, that it resent the Complaint, via United Parcel Service (“UPS”) to John D. Fitzpatrick, Respondent’s

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<sup>1</sup> Respondent’s Third Affirmative Defense in its Answer requests dismissal of the Complaint for insufficiency of service of process.

attorney, as designee to receive service on behalf of the company as indicated on Respondent's Motion and Answer.<sup>2</sup> Indeed, Respondent's counsel refers to the Reply and enclosed copy of the Complaint in a letter to the Regional Hearing Clerk dated November 30, 2010, served on the undersigned and Complainant.

The Rules provide, in pertinent part:

(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 complaint . . . . 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.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

\* \* \* \*

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or **by properly executed receipt**. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

40 C.F.R. § 22.5(b)(1)(emphasis added).

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. \* \* \* \*

40 C.F.R. § 22.7(c).

There is no dispute that Respondent, Burnham Associates, Inc., initially was not properly served with the Complaint in this proceeding, as evidenced by the lack of a return receipt signed by the Respondent or its authorized representative. In an effort to cure the defect in service, Complainant sent Respondent's counsel a copy of the Complaint on October 28, 2010. The requirement of 40 C.F.R. § 22.5(b)(1)(ii)(A) as to the receiver of service appears to be met, in that the Answer and Motion indicate that Respondent's counsel, John D. Fitzpatrick, is a designee to receive service on its behalf and is therefore authorized by appointment to receive service of process. However, Complainant has not demonstrated proof of service by a properly executed receipt, in accordance with the Rules.

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<sup>2</sup> The Certificate of Service attached to Complainant's Reply indicates that a copy of the Reply was sent via certified mail, return receipt requested, to John D. Fitzpatrick, Esq., Pingitore & Fitzpatrick, LLC, 929 Massachusetts Avenue, Suite 103, Cambridge, MA 02141.

The Rules provide as follows in regard to motions to dismiss:

The Presiding Officer, upon motion of respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant.

40 C.F.R. § 22.20(a).

The Rules do not address "other grounds," and therefore the Federal Rules of Civil Procedure ("FRCP") and case law thereunder are useful as guidance. Respondent's Motion is analogous to a motion to dismiss for insufficient service of process under FRCP 12(b)(5). Courts have held that actual notice of a lawsuit by receipt of a complaint by the defendant does not substitute for adequate service of process, and does not eliminate grounds for dismissal under FRCP 12(b)(5). *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 681 (N. D. Iowa 1995). Conclusory statements that the defendant was properly served are insufficient to establish service of process, as it is the plaintiff's burden to establish that service was adequate upon motion under FRCP 12(b)(5). *Cooper v. Conn. Public Defenders Office*, 480 F.Supp 2d 536 n. 1 (D. Conn. 2007). Therefore, Respondent's attorney's receipt of the Complaint, and Complainant's statement that Respondent was served by UPS, do not establish adequate service of the Complaint.

Rather than dismissing the complaint, however, FRCP 12(b)(5) offers the court the option of quashing insufficient service. *Boateng v. Inter Am. University*, 188 F.R.D. 26, 44 (D.C. P.R. 1999). If service of a complaint is ineffective, a motion to dismiss should not be granted but the court should treat the motion in the alternative, as one to quash service of process, and the case should be retained on the docket pending effective service. *Bailey v. Boilermakers Local 677 of the Int'l Brotherhood of Boilermakers, etc.*, 480 F.Supp. 274, 278 (N.D. W.Va. 1979); *Ansell Healthcare, Inc. v. Maersk Line*, 545 F.Supp. 2d 339, 342-43 (S.D.N.Y. 2008)(Where service had to be quashed for defective service, court declined to dismiss the complaint where the defendant did not establish sufficient evidence that the defective service was the result of "wanton or willful disregard of law" or that the plaintiff gained an unfair advantage by the insufficient process, and a reasonable prospect existed for effecting proper service on the defendant.); *Umbenhauer v. Woog*, 969 F.2d 25, 30-31 (3d Cir. 1992)("[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained."); *Romandette v. Weetabix Co.*, 807 F.2d 309, 311 (2d Cir 1986). The ability to obtain service under the FRCP is limited by FRCP 4(m), which provides a time limit of 120 days for service after the complaint was filed. The Rules applicable to this proceeding do not provide any such time limit, and in any event, 120 days has not elapsed from the date the Complaint was filed.

It would not be appropriate to dismiss this case where Respondent actually received a copy of the Complaint and it appears that Complainant will be able to establish proof of service

within a reasonable amount of time.

Therefore, Respondent's Motion To Dismiss for Insufficiency of Service of Process is **DENIED**.

Complainant is hereby **ORDERED** to file proof of service of the Complaint **on or before January 10, 2011**.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: December 21, 2010  
Washington, D.C.