UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	
ROD BRUNER AND CENTURY 21 COUNTRY NORTH	)	**Docket No. TSCA-05-2003-0009**
	)	
	)	
Respondents	)	
_____	)	

ORDER DENYING MOTIONS TO STRIKE AND FOR DEFAULT ORDER

This is a civil administrative proceeding instituted under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a) (TSCA). It is governed by the procedures set forth in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 (CROP). The proceeding was initiated by a Complaint and Notice of Opportunity for Hearing (Complaint), filed by the Complainant, Chief of the Pesticides and Toxics Branch, Waste, Pesticides and Toxics Division, U.S. EPA, Region 5 (EPA or Complainant) on January 28, 2003.

The Respondents, Rod Bruner (Bruner or Respondent) and Century 21 Country North (Century 21 or Respondent) have filed a Motion to Strike the Complaint, requesting dismissal of the case with prejudice, based upon the doctrine of *res judicata*. Complainant has filed a Response to Motion to Strike and Respondents have filed their Reply in Support of Motion to Strike Petitioner's Complaint.

The Complainant has filed a Motion for Default Order on the grounds that the Respondents have not answered the Complaint. While acknowledging the outstanding Motion to Strike based upon the issue of *res judicata,* EPA asserts that the issue of *res judicata* should have been raised as an affirmative defense in an answer, rather than a pre-answer motion. The Respondents have filed a Response in Opposition to Complainant's Motion for Default Order and the Complainant has filed its Reply to Response to Complainant's Motion for Default Order.

As detailed below:

1) the Respondent's Motion to Strike is hereby DENIED;

2) the Complainant's Motion for Default Order is hereby DENIED; and

3) the Respondents shall file an answer to the complaint within 15 days of the date of service of this order. Time shall be computed pursuant to 40 C.F.R. § 22.7 rules concerning service by mail. The fax copy is a courtesy.

MOTION TO STRIKE

1. General Background

Anthony Lowe (Lowe) and Angelic Griffen (Griffen) purchased a house, located at 1610 Bruner Street, Rockford, Illinois. They took possession of the house in May 2001. In the real estate transaction, Respondents, Rod Bruner and Century 21 Country North, acted as the purchasers' agents. In July 2001, the Winnebago County Department of Public Health sent a letter to Lowe and Griffin stating that their six year old child, Keason Lowe, had an elevated blood level of 25 ug/dL. In August 2001, the Winnebago County Department of Public Health conducted an inspection of the Bruner Street house and found harmful lead hazards in the living room, dining room, three bedrooms and

bathroom. On January 28, 2003, EPA issued a Complaint, alleging that the Respondents violated six specific regulatory requirements of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4851 (Lead Hazard Act), and its implementing regulations, 40 C.F.R. § 745. EPA proposed a civil administrative penalty of $34,100 for these violations.

The Respondents argue that a prior lawsuit instituted by Anthony Lowe and Angelic Griffen in the Illinois Circuit Court of the Seventeenth Judicial Circuit, County of Winnebago (Lowe/Griffen Complaint) (Amended Complaint filed February 28, 2002) involves the same cause of action as that set forth in the EPA Complaint. The state court matter was dismissed by Judge Timothy Gill in May 2002. Judge Gill has also denied the plaintiffs' Motion to Reconsider. The Respondents argue that based upon the doctrine of *res judicata*, the matter has been litigated and the current EPA action is barred.

A. State Court Proceeding -Lowe/Griffen Amended Complaint

The Lowe/Griffen Amended Complaint, filed in Winnebago County, alleges that Randy Stultz sold the Bruner Street property to Lowe and Griffen under contract dated April 30, 2001. Lowe and Griffen took possession of the property around May 7, 2001; their minor child became ill with lead poisoning and the Winnebago County Department of Health found high concentrations of lead at the property. The Lowe/Griffen Amended Complaint alleges four counts. Count II alleges violation of 42 U.S.C. § 4852d, the federal Lead Hazard Act, by Stultz, Bruner, and Carter (also a real estate agent - not named in the EPA Complaint). The three other counts of the Lowe/Griffen Amended Complaint allege violations of Illinois law: Count I - Recession of Contract; Count III - Breach of Contract; and Count IV - Violation of Residential Real Property Disclosure Act, 765 ILCS § 77/20.

As remedy for the violation of federal law, Count II, the plaintiffs prayed for 1) a judgment against Randy Stultz, Harold Carter d/b/a Carter Realty, Rod Bruner, and Century 21 Country North in the amount of Twenty-Five Thousand Dollars; and 2) a judgment against Randy Stultz, Harold Carter d/b/a Carter Realty, Rod Bruner, and Century 21 Country North in the amount of Two Thousand Five Hundred Dollars ($2,500), attorneys' fees and costs; and 3) any other relief deemed equitable by the Court.

Pursuant to 735 ILCS 2/5-615, Bruner and Century 21 filed a Motion to Dismiss with prejudice. In a short handwritten Order, containing no legal analysis, Judge Gill dismissed the matter. Lowe and Griffen filed a Motion for Reconsideration which was also denied. The decision has been appealed. The parties are awaiting ruling by the Appellate Court.

B. EPA Complaint

The EPA administrative complaint alleges six violations of the Lead Hazard Act, 42 U.S.C. § 4852d, and its implementing regulations, 40 C.F.R.§ 745. The alleged violations are: 1) 40 C.F.R. § 745.107(a)(1) - failure to provide a U.S. EPA approved lead information pamphlet; (2) 40 C.F.R. § 745.110(a) - failure to allow the purchaser a ten-day period to conduct a risk assessment or lead inspection; (3) 40 C.F.R. § 745.113(a)(1) - failure to include as an attachment to the sales contract a lead warning statement; (4) 40 C.F.R. § 745.113(a)(3) - failure to include as an attachment to the sales contract all records or reports available to the seller regarding lead-based paint and/or lead based paint hazards in the house or a statement that no such reports existed; (5) 40 C.F.R. § 745.113(a)(4) - failure to include as an attachment to the sales contract a statement from the purchaser acknowledging receipt of the information set out at 40 C.F.R. 745.113(a)(2) and (3); and (6) 40 C.F.R.

745.113(a)(7) - failure to include as an attachment to the sales contract an acknowledgment signed by the seller, the agents and the purchaser that their statements are accurate to the best of their knowledge, along with the dates of their signatures.

Based upon the alleged violations of these regulations, EPA asserts that the Respondents have violated 42 U.S.C. § 4852d(b)(5) and Section 409 of TSCA, 15 U.S.C. § 2689. EPA proposes assessment of a civil administrative penalty of $34,100.

2. The Doctrine of *Res Judicata*

A. The General Doctrine as Applied to Private Litigants

Under the doctrine of *res judicata,* a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies. *People, ex rel. Burris v. Progressive Land Developers, Inc.*, 602 N.E.2d 820, 151 Ill. 2d 285 (1992). The doctrine extends not only to what was decided in the original action, but also to matters which could have been decided in the suit. *Wilson v. Hart*, 47 F. Supp. 2d 966. (N.D. Ill. 1999).

The essential elements of *res judicata* are: (1) final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. *Id.; Walsh Construction Company of Illinois v. National Union Fire Insurance*, 153 F.3d 830 (7th Cir. 1998); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986).

Res judicata does not apply unless the party against whom the preclusion is asserted had a "full and fair opportunity" to litigate the claim or issue in the first action. *Kremer v. Chemical Construction Company*, 456 U.S. (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

This principle leads to the corollary that only a party, or a privy to the party, can be estopped from relitigating a matter. The party has already had its day in court. "Privity between parties is established where those parties interests are so closely aligned that they represent the same legal interests. *Secretary of Labor v. Fitzsimmons, supra.* "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." Restatement of Judgments § 83.

B. The Doctrine as Applied to the United States

As a general matter, the United States is not bound by private party litigation, when the government seeks to enforce a federal statute that implicates both public and private interests. However, *res judicata* can apply to the United States when it is not an actual party to prior private litigation, if it acted as a "laboring oar" in prior litigation.

1. General Rule

The principle that the federal government is not bound by private party litigation, when the federal government seeks to enforce a federal statute that implicates both public and private interests is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. *Herman v. South Carolina National Bank,* 140 F.3d 1413 (11th Cir. 1998); citing *Hathorn v. Lovorn,* 457 U.S. 255 268 n. 23 (1982). Federal statutes, such as the Lead Hazard Act, often provide for federal enforcement as well as a private cause of action. The case law has developed the general principle that the government is not bound by private litigation when the government's action seeks to enforce the public interest segment of a federal statute.

As stated in *Herman, supra*,

> [T]he district court's conclusion that [the private plaintiffs and the United States] were identical is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. The principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff be corrected by intervention.

at 1425; see also *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983).

2. "Sufficient Laboring Oar" Exception

The exception to the principle that *res judicata* does not bind the United States when private parties pursue private remedies set out in federal statutes is when the United States is deemed to have a "sufficient laboring oar" in the conduct of the private party litigation to make the application of *res judicata* or *collateral estoppel* fair. *Montana v. United States*, 440 U.S. 147 (1978). If the United States was sufficiently involved in the prior litigation, it may be deemed to be in "privity" with the actual party to the prior litigation. *Drummond v. United States*, 324 U.S. 316 (1945); *Montana, supra.*

3. Arguments of the Parties

Respondents

Of the three elements for application of *res judicata,* Respondents argue that only privity or identity of parties is at issue.

Respondents argue that, based upon Illinois law, EPA is in privity with the private party plaintiffs. In support of its position, Respondents cite *Progressive Land Developers, supra,* for the proposition that private party litigation can bind the government. In *Progressive Land Developers*, the Illinois Attorney General (AG) attempted to impose a constructive trust on assets held by a for-profit corporation, claiming the ultimate beneficiaries and parties in interest were the people of Illinois. The corporation defended on the grounds of *res judicata* claiming that an earlier action, a probate petition by the estate administrator to recover funds, barred the current litigation. The AG was not a party to the earlier petition proceeding, did not receive copies of the three amendments to the earlier petition proceeding and did not receive copies of most filings in the petition proceeding, including the post-trial filings and motions.

The Illinois Supreme Court found that the same facts and evidence were necessary for the maintenance and proof of both the AG's case and the probate petition proceeding. The court found that the extensive pleadings and briefings demonstrated that the AG's interests were adequately represented. The AG was found to be in privity with the private party action. The court held that *res judicata* barred the AG's current lawsuit. *Progressive Land Developers supra,* 826.

B. EPA

EPA argues that it was not a party to the prior litigation; that *res judicata* generally does not bind the United States when the government's action seeks to enforce a federal statute with both public and private causes of action and that EPA was not a "laboring oar" in the prior litigation. EPA argues that the inapplicability of *res judicata* to the United States is based upon the recognition that the United States has an interest in enforcing federal law that is independent of claims of private citizens. *Herman, supra*. EPA rejects the argument that the Lowe/Griffen private party litigation adequately represented EPA's interest in enforcing the Lead Hazard Act. EPA argues that a private party suit to recoup damages for harm suffered as a result of a real estate transaction is different than EPA's interest as a regulatory authority charged with ensuring uniform national implementation and enforcement of environmental laws and regulations. EPA also argues that the case relied upon by the Respondents in their argument that the government's interests have been adequately represented, *Progressive Land Developers, supra,* has been discredited.

DISCUSSION

1. Identity of Cause of Action

As stated previously, it is hornbook law that the essential elements of *res judicata* are (1) final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies.

One cannot conclude from the Complaints submitted as part of the record in this matter that the state and federal cases have an identity of cause of action.

In their Reply Brief, page 5, the Respondents argue that "EPA alleges the same violations as Griffen and Lowe." However, careful reading of the attached complaints does not lead to this conclusion. Both complaints do allege violations of the disclosure requirements of 42 U.S.C. § 4852d. However, the EPA Complaint alleges violation of six specific regulatory requirements, four of which deal with required attachments to any sales contract for target housing. While the Respondents argue that the Lowe/Griffen Complaint also alleges violations of the same regulations, a fair reading of the complaint leads to a different conclusion.

While EPA argues that Lowe and Griffen did not plead violations of the applicable C.F.R. regulations, Respondents argue that they did and compare specific paragraphs in Lowe/Griffen complaint with the allegations in the EPA Complaint. I do not find the Respondents' failure to cite to specific sections of the regulations as fatal to its claim of identity of cause of action. I am willing to look at the specific allegations in the Lowe/Griffen Complaint to determine, if, in fact, they alleged violation of the same regulations as EPA, without citation in proper form to the Code of Federal Regulations. I am willing to look to substance, rather than form of pleadings. However, I find do not find that the Lowe/Griffen Complaint and the EPA Complaint allege identical violations of the Lead Hazard Act.

The count by count comparison of the EPA Complaint and the Griffen/Lowe Complaint is as follows:

Count I - 40 C.F.R. 745.107(a)(1)- failure to provide an EPA approved lead information pamphlet. While Respondent claims the item is contained in the Lowe/Griffen Complaint ¶ 21, I find it in ¶ 20. (Reply page 5). I agree that both complaints allege violation of this regulation.

Count II - 40 C.F.R. 745.110(a)(1) - failure to allow ten day inspection/assessment and recession period. Respondent claims the item is contained in Lowe/Griffen Complaint ¶ 24. (Reply page 5). I agree that both complaints allege violation of this regulation.

Count III - 40 C.F.R. 745.113(a)(1) - failure of the seller to include a Lead Warning Statement as an attachment to the contract to sell target housing. The Respondents claim that this item is contained in Lowe/Griffen Complaint ¶ 21. (Reply page 5). ¶ 21 incorporates by reference the general allegations "Allegations Common to All Counts,"contained in ¶¶s 1-20. A careful reading of ¶¶s 1- 20 does not reveal an allegation of violation of the specific regulatory requirement, attachment of the statement to the sales contract. I do not agree that the Respondents have shown an identity of cause of action as to EPA Complaint Count III.

Count IV - 40 C.F.R. 745.113(a)(3)- failure to include all reports or a statement that no reports exist. Respondents claim that the item is contained in the Lowe/Griffen Complaint ¶ 29. (Reply page 5). A careful reading of ¶ 29 does not lead to this conclusion. ¶ 29 simply states the law:

> ¶ 29: "Section 42 U.S.C. § 4852d(a)(4) provides, "Whatever a Seller has entered into a contract with an agent for the purpose of selling or leasing a unit of target housing, the regulations promulgated under this Section shall require the agent, on behalf of the Seller or Lessor, to ensure compliance with the requirements of this Section."

The EPA Complaint alleges violation of the requirement that a seller include as an attachment to the sales contract a statement by the purchaser that he has received the lead hazard information pamphlet. ¶ 29 of the Lowe/Griffen Complaint simply restates the requirement that the agent shall

ensure compliance with the Act. I do not agree that the Respondents have shown an identity of cause of action as to EPA Complaint Count IV.

Count V - 40 C.F.R. 745.113(a)(4)- failure to include as an attachment to the sales contract a statement from purchaser acknowledging receipt of information set out at 40 C.F.R. 745.113(a)(2) and (3). Respondents claim that the item is contained in Lowe/Griffen Complaint ¶ 24. (Reply page 5). A careful reading of ¶ 24 shows that ¶ 24 is simply a recitation of 42 U.S.C. 4852d.

> ¶ 24. Plaintiffs further allege that 42 U.S.C. § 4852d provides that every buyer of real estate must receive a warning statement containing a statement "signed by the purchaser" that the purchaser has (a) read the lead warning statements and understands its contents; (b) received a lead hazard information pamphlet; and (c) had a 10 day opportunity ... before becoming obligated under the contract to purchase the housing to conduct a risk assessment or inspection for the presence of lead-based paint hazards.

This paragraph states general requirements of the Lead Hazard Act. However, it does not refer to the specific violation alleged in EPA Count V, the requirement that the seller include as an attachment to the sales contract a statement by the purchaser that he has received the lead hazard information pamphlet.

I do not agree that the Respondents have shown an identity of cause of action as to EPA Complaint Count V.

Count VI - 40 C.F.R. 745.113(a)(7) - failure to include as an attachment to the contract the signature of the seller, agents and purchaser certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature, signed by the seller, agents and purchaser that their

statements are accurate. Again, the Respondents claim that allegation of this specific requirement is found in ¶ 24. (Reply page 5). The same reasoning as in Count V, applies to this count.

There is no disagreement that both the Lowe/Griffen Complaint and the EPA Complaint allege violation of the Lead Hazard Act. However, the Lowe/Griffen Complaint does not allege violation of the same regulations. While there is some parallel in the allegations, for *res judicata* to apply, it is only fair that the same issues have been litigated. Assuming *arguendo* that the Lowe/Griffen Complaint was fully litigated, at best, the prior litigation involved two of the six allegations of violation in the EPA Complaint. There is not adequate identity of cause of action for the doctrine of *res judicata* to be applied.

The Respondents' Motion to Strike should be denied.

2. Applicability of Res Judicata to the United States

Respondents cite *Progressive Land Developers, supra,* for the proposition that the Illinois Supreme Court finds privity between private party litigants and a governmental entity for the purposes of *res judicata*. EPA argues that *Progressive Land Developers* has been discredited. EPA Response fn. 7. However, without addressing, the issue of which parts of the case remain good law, nothing in this state court case discusses the applicability of *res judicata* to the United States in litigation which involves independent federal and private causes of action. In *Progressive Land Developers,* the Illinois Supreme Court case held that the Illinois AG was precluded from enforcing state law based upon *res judicata.*, despite the fact that the Illinois AG was not a party to the prior litigation. The decision did not involve a federal statute with parallel public and private rights of enforcement.

The Lead Hazard Act is similar to the Sherman Act, Employee Retirement Income Security Act (ERISA), the Voting Rights Act and Title VII. There is a long line of federal cases which hold that under these statutes, public and private actions are not mutually exclusive. *Sam Fox Publishing Co. v. United States,* 366 U.S. 689; *Donovan v. Cunningham,* 716 F.2d 1455 (5th Cir. 1983); *Secretary of Labor v. Fitzsimmons, supra; Herman v. South Carolina National Bank, supra.* As stated in *Herman, supra*:

> [T]he district court's conclusion [that the private plaintiffs and the United States were identical is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. The principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff be corrected by intervention. At 1425

Similar to the Sherman Act, ERISA and the Voting Rights Act, in passing the Lead Hazard Act, Congress recognized the existence of a problem of national scope that needed remedy. The legislative history of the Lead Hazard Act, shows that Congress found that low-level lead poisoning was widespread among American children affecting as many as three million children under the age of six. The Lead Hazard Act sets out a national strategy to eliminate lead-based paint hazards in housing and a program to educate the public as to the hazards and sources of lead-based paint poisoning. The

intent of the Disclosure Rule[1] of the Lead Hazard Act, allegedly violated by the Respondents, is to help prevent exposure to lead-based paint and lead based paint hazards by requiring disclosure and notification. See 42 U.S.C. 4851(1)-(7). EPA's role in the federal enforcement of the Act is meant to implement these goals. It is a notification and education program of national scope.[2]

The statutory scheme of the Lead Hazard Act distinguishes between government enforcement against violators and private party suits for parties aggrieved by a particular real estate transaction. Compare 42 U.S.C. 4825d(b)(3)[3] with 42 U.S.C. 4825d(b)(5).[4]

Respondents argue that *Secretary of Labor v. Fitzsimmons, supra,* and *Herman v. South Carolina National Bank, supra,* are distinguishable from the case at bar because they involved the United States enforcing a statute to benefit large groups or classes of people. The Respondents note that the current case involves a single transaction, involving the sale of a $69,000 home. As such, Respondents argue that EPA's interests have been adequately protected by the private party litigants.

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[1] Joint regulations were promulgated by EPA and HUD at 40 C.F.R. 745, Subpart F, and 24 C.F.R. Part 35, Subpart H.

[2] To effectively and uniformly administer the program, EPA has issued the Section 1018-Disclosure Rule Enforcement Policy (ERP). It establishes standardized definitions and applications of factors that TSCA requires the Administrator to consider in proposing to assess a civil penalty.

[3] A purchaser or lessee has a separate, private cause of action against "any person who knowingly violates the provisions of the Act for treble damages, court costs and expert and attorney fees. 42 U.S.C. 4852d(b)(3)-(4).

[4] Pursuant to 15 U.S.C. 2615(a),U.S. EPA has the authority to bring an enforcement action to assess penalties against any person who fails or refuses to comply with the Lead Hazard Act or rules issued pursuant to the Act.

While it is true, that the instant case does not involve large numbers of people or money, that is not the determining factor. Looking at the big picture, Congress has declared its intention to eradicate the problem of hazards due to lead-based paint. EPA has been mandated to eliminate lead-based paint in housing as expeditiously as possible and to educate the public. Each real estate transaction may be small, but as a national program, changes will occur. Congress did not intend to leave enforcement to the individual. It legislated both public and private rights of action.

There is nothing in this record which requires distinction of this matter from the train of cases which hold that *res judicata* does not apply to the United States when enforcing statutes with both federal and private rights of action.

In summary, I find that *res judicata* does not apply because the Respondents have not shown an identity of cause of action. I similarly find that *res judicata* does not apply because because the United States has an independent cause of action in enforcing this statute.

II. MOTION FOR DEFAULT ORDER

Pursuant to Sections 22.16 and 22.17 of the Consolidated Rules, EPA moves for a default order finding the Respondents, Rod Bruner and Century 21 North liable for the violations alleged in the Complaint and assessing a civil penalty in the amount of $34,100, as requested in the Complaint.

EPA asserts that the Complaint was filed on January 28, 2003. Pursuant to 40 C.F.R. 22.15, the Answer was due to be filed within 30 days of receipt, namely March 3, 2003. EPA acknowledges that Respondents filed a Motion to Strike, based upon *res judicata* in lieu of filing an answer.

EPA asserts that the Consolidated Rules do not provide for the filing of a Motion to Strike a Complaint in lieu of filing an Answer. EPA asserts that the more appropriate motion would have been a Motion to Dismiss the Complaint after filing an Answer, raising *res judicata* as an affirmative defense.

It is true that 40 C.F.R. Part 22 (CROP), does not specifically authorize pre-answer Motions to Strike. However, 40 C.F.R. 22.16(c) does provide for pre-answer motions. Although not controlling, when looking for guidance in interpreting the CROP, one can look to the Federal Rules of Civil Procedure. *In the Matter of City of Orlando, Fl,* Docket No. CWA-04-501-99, (ALJ decision, December 20, 1999); *In the Matter of Southside Baptist Church,* TSCA Docket no. VI-479C(A) (ALJ decision, November 13, 1992). Federal courts do allow for pre-answer motions to dismiss on the basis of *res judicata. Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337 (7th Cir. 1995).

In the Matter of City of Orlando, Florida, supra, EPA asserted a similar argument about the unavailability of pre-answer motions to support its Motion for Default. The Respondent had filed a Motion to Dismiss in lieu of an answer to an amended complaint. In denying EPA's Motion for Default, the administrative law judge held that:

> ...the City appears to have relied on Rule 12(b) of the Federal Rules of Civil Procedure which allow defenses such as failure to present a claim upon which relief may be granted to be made by motion. Although the FRCP are not binding in this proceeding, the Rules are considered useful guides. For all that appears, the City's motion was made in good faith and not for the purposes of delay. Accordingly, the City will be given another opportunity to file an answer to the amended complaint.[5] at 24.

[5] EPA cites the Environmental Appeals Board (EAB) decision *In re: Cetylite Industries, Inc.* Docket No. FIFRA 950H-13, slip op. (EAB, May 12, 1995) for the proposition that the CROP does not allow for pre-answer motions to strike. However, *Cetylite* was decided under an earlier edition of

This case involves a similar situation. The Motion to Strike was carefully briefed and based upon analogy to the FRCP. There is no indication that the Respondents were attempting to delay the proceedings or any indication of bad faith. Under modern procedure, defaults are not favored. *Davis & Co. v. Fedder Data Center, Inc.*, 556 F.2d 308 (5th Cir. 1977); *In re Rybond, Inc.* 6 E.A.D. 614 (1996). "Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is reason to believe that the defendant's default resulted from bad faith in his dealings with the court or opposing party the district court may properly enter default and judgment against defendant as a sanction." *Moore's Federal Practice*, § 55.05[2], p. 54-24 (1991); see also *In the Matter of Southside Baptist Church*, *supra.*

Under these circumstances, Complainant's Motion for Default Order should be denied.

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the CROP, which has been revised. In *Cetylite* the Respondent moved to dismiss a case prior to answer on the grounds that the action was "arbitrary and capricious." The EAB, having pre-answer jurisdiction over cases filed by EPA Headquarters, held that the CROP did not contemplate pre-answer motions to dismiss until (1) an answer is filed and (2) a Presiding Officer is assigned. Under the CROP in effect at the time of the decision, a "Presiding Officer" was not assigned until an answer to the complaint was filed. The EAB stated that the merits of the motion should be considered by the administrative law judge who is designated to serve as "Presiding Officer."

The 1999 amendments to the CROP, changed the definition of "Presiding Officer' to include the Regional Judicial Officer for purposes of 40 C.F.R. 22.4(b), 22.16(c) and 22.51. Section 22.4(b) states that "Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority ... to act as Presiding Officer until the respondent files and answer in proceedings under these Consolidated Rules of Practice ....

ORDER

Respondents' Motion to Strike is DENIED.

Complainant's Motion for Default Order is DENIED.

Respondent shall file an Answer to the Complaint within 15 days of the date of service of this Order.

Dated May 19, 2003

/S/
Regina M. Kossek
Regional Judicial Officer