UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	Docket No. TSCA-05-2006-0012
Willie P. Burrell,	)	
The Willie P. Burrell Trust,	)	
Dudley B. Burrell, and	)	
The Dudley B. Burrell Trust,	)	
	)	
Respondents.	)	
	)	

ORDER ON MOTIONS

On June 22, 2006, the U.S. Environmental Protection Agency Region 5 commenced an administrative proceeding against four respondents, Willie P. Burrell, the Willie P. Burrell Trust, Dudley B. Burrell and the Dudley B. Burrell Trust. The Complaint alleges that each Respondent, as the lessor of certain apartment buildings located in Kankakee, Illinois, violated regulations promulgated under the Toxic Substances Control Act (TSCA) and referred to as the "Lead-Based Paint Disclosure Rule."[1] The allegations of the Complaint are based upon an inspection conducted on May 28, 2003, at a business address where the Respondents conducted an apartment rental business.

No answer or any other pleading was filed in this matter until more than four years later on December 17, 2010, when Complainant filed a motion for default order and supporting documents. The case is now before the Presiding Officer on this and several other motions: (1) the motion to dismiss, motion opposing default judgment[2] and motion for oral argument filed by Respondents Willie B. Burrell and the Willie B. Burrell Trust and (2) the motion to quash service of process, motion to dismiss and motion to strike filed by Respondents Dudley B. Burrell and the Dudley B. Burrell Trust.

1. Background

This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules). As provided in 40 C.F.R. § 22.17(a), a party may be found in default upon failure to file a timely answer to a complaint. A default by the

[1] Section 1018 of TSCA, 42 U.S.C. § 4852d, requires the Administrator to promulgate regulations for the disclosure of lead-based paint hazards in "target housing" which is offered for sale or lease. U.S. EPA promulgated these regulations at 40 C.F.R. Part 745 Subpart F.

[2] This "motion" is being considered as a brief in opposition to Complainant's motion for default, not as a separate and distinct motion.

respondent constitutes an admission of all facts alleged in the complaint concerning the pending proceeding and a waiver of respondent's right to contest those factual allegations. *Id.* Default judgments are generally disfavored as a means of resolving agency enforcement proceedings and, in close cases, doubts are typically resolved in favor of the defaulting party so that adjudications on the merits, the preferred option, can be pursued. *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766 (EAB 2006), Nonetheless, default orders are certainly appropriate where the circumstances of the matter clearly indicate that the imposition of such a remedy is warranted. *Id.*

According to the Consolidated Rules, when the Presiding Officer finds that a default has occurred, he "shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. 40 C.F.R. § 22.17(c). Under EPA precedent, a "good cause" determination, predicate to finding a party in default, takes the "totality of the circumstances" into consideration. *In re Pyramid Chemical Company*, 11 E.A.D. 657, 661 (EAB 2004). The Environmental Appeals Board has considered a number of factors under the "totality of the circumstances" test including the nature of the procedural omission prompting the default and whether there exists a valid excuse or justification for not complying with the procedural requirement. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). The Board has also considered whether the defaulting party would likely succeed on the substantive merits if a hearing were held. *Id.* With regard to this factor, it is respondent's burden to demonstrate a "strong probability" that litigating the defense will produce a favorable outcome. *Id.* The Board has also examined whether the penalty assessed is a reasonable one. *Id.*

In order for a default judgment to enter, however, service of process on the respondent must be valid. Just as a federal court lacks jurisdiction over a defendant if service of process is insufficient under the Federal Rules of Civil Procedure, failure to effectuate valid service of process in an EPA administrative matter would "vitiate all of the subsequent proceeding." *In re Medzam, Ltd.*, 4 E.A.D. 87, 92-93 (EAB 1992).

Service on an individual in an EPA administrative enforcement matter is governed by 40 C.F.R. § 22.5(b)(1)(i), which provides:

> 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. . . . 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.

The Consolidated Rules further provide that proof of service of the complaint shall be made by affidavit of the person making personal service or by "properly executed receipt" and that service of the complaint is complete "when the return receipt is signed." 40 C.F.R. §§ 22.5(b)(iii), 22.7(c). The Rules do not specify what is a "properly" executed receipt or who must sign the receipt for service to be complete.[3] Under the Federal Rules of Civil Procedure, which are often looked to in EPA administrative cases as useful guidance where the Consolidated Rules are

[3] The Consolidated Rules also do not require service by certified mail to include "restricted delivery" to the individual specified.

silent, proof of service creates a rebuttable presumption that service has been validly performed, but once the validity of service has been contested, plaintiff must bear the burden of establishing its validity. *See Moore v. California Department of Corrections and Rehabilitation*, 2011 U.S. Dist. Lexis 44123, at *4 (E.D. Ca. 2011).

In regards to motions to dismiss, the Consolidated Rules provide:

> The Presiding Officer, upon motion of the 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).

In this case, the Complaint was served individually on each of the four named respondents by certified mail, return receipt requested, addressed to each respondent by name and mailed to the same address, 300 N. Indiana Avenue, Kankakee, Illinois. This address is the location where Willie Burrell and Dudley Burrell admit to having conducted an apartment rental business. The return receipt for each piece of certified mail was signed by "Willie Pearl Burrell" and dated July 10, 2006.

2. <u>Motions to Dismiss for Defective Proof of Service</u>

Respondents have filed motions to dismiss for defective proof of service in which they argue that certain "irregularities" with the return receipts render defective the proof of service on them and that a "cloud exists over the true date the green cards were actually filed by the government" with the Regional Hearing Clerk. The Consolidated Rules require that proof of service of the complaint be filed with the Regional Hearing Clerk immediately upon completion of service. 40 C.F.R. § 22.5(b)(1)(iii). In this case, the four return receipts have been entered in the Regional Hearing Clerk docket. All four of the cards have the dates July 17 or 18, 2006, hand-written on the address side of the card, and on two of the cards the dates appear to have been written over whiteout. Respondents argue it cannot be determined when the green cards were actually filed and, therefore, proof of service is defective and the Complaint should be dismissed with prejudice.

In response, the Agency has submitted the Declaration of Ladawn Whitehead, the current Regional Hearing Clerk, in which she attests to the circumstances surrounding the handling of the return receipts. She states that sometime after she assumed the duties of Regional Hearing Clerk in April 2009, she wrote the date of receipt of the return receipts on the signature side of the return receipts for ease of processing and filing. The date of receipt had in fact been previously stamped on the back side of the receipts. Nothing in the record indicates that the return receipts were mishandled or inappropriately altered in any way, and Mrs. Whitehead's explanation of her actions is entirely plausible. The use of the whiteout was intended simply to correct a date she had written in error. This minor "irregularity" in the processing of the proof of service as fully and logically explained by the Regional Hearing Clerk in no way diminishes the fact that the signature of Mrs. Burrell on the return receipts serves as *prima facie* evidence that

she received the complaints as served by Complainant. Thus, Respondents' motions to dismiss for defective proof of service are denied.[4]

3. Service on Dudley Burrell and the Dudley Burrell Trust

The parties do not dispute that the return receipts for the copies of the Complaint that were mailed to Mr. Burrell and the Trust were signed by "Willie Pearl Burrell" and dated July 10, 2006. Mr. Burrell and the Trust, however, have moved to quash service of process and dismiss this matter on that ground that service was not valid and that they did not receive notice -- actual, constructive or otherwise -- of the Complaint.

The relevant facts as attested to by Mr. Burrell are as follows: At all relevant times, Mr. Burrell has been legally married to Willie P. Burrell. From 1965 to 2003, Mr. Burrell was engaged in the business of apartment rentals with his wife, under various corporate names including B&D Management, Inc. From 1979 to 2003, his personal residence was 5495 Muriel Lane, St. Anne, Illinois, and his business address was 300 N. Indiana Avenue, Kankakee. On or about December of 2003, Mr. Burrell states that he became estranged from his wife and since that time she has continued to conduct business at the 300 N. Indiana Avenue address and reside at 5495 Muriel Lane. Since approximately December 2003, Mr. Burrell began to reside and conduct his rental business at 649 N. Rosewood, Kankakee. Mr. Burrell states that on or about January 1, 2004, he specifically told his wife not to accept service for him and to return all of his mail to sender. He remains estranged from his wife and they are currently involved in divorce proceedings. Mr. Burrell states that he had no knowledge of this matter until January 3, 2011, when one of his sons provided him with "constructive notice" of the Complaint. He states that he received actual notice of Complainant's motion for default on January 11, 2011.[5]

Respondents Dudley Burrell and the Dudley B. Burrell Trust argue that service of process was improper and that this matter should be dismissed as a matter of law. They contend that Willie P. Burrell was not authorized to accept service on their behalf and that she never provided them with actual or constructive notice of the Complaint. Mr. Burrell maintains he became estranged and separated from his wife about three years prior to the service of process which was made upon his estranged wife at her business office. Because he never received notice and because he was separated and estranged from his wife prior to the time of the alleged service, he maintains that "service of the government's complaint must be quashed, as a matter of law."

Needless to say, the Agency takes a very different view of the validity of its service on Mr. Burrell and the Trust. Complainant maintains that Dudley Burrell "was served as an individual through his wife, Willie Burrell, at a location previously listed as his address" which constitutes substitute service under Federal Rule of Civil Procedure 4(e) and state law. Complainant cites to *In re C.W. Smith,* 2002 EPA ALJ Lexis 7 (Feb. 6, 2002) as support for the proposition that "where the Complaint was sent by certified mail with return receipt requested and addressed to a mailing address that the Respondent had employed as a mailing address for

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[4] *Cf. United States v. Ayer*, 857 F.2d 881, 885 n.4 (1st Cir. 1988) ("failure to file indicia of service within required time period does not render service untimely.")

[5] These facts are stated in the Affidavit of Dudley B. Burrell, filed March 7, 2011, submitted in conjunction with his motion to dismiss.

legal documents, the Complainant could reasonably expect that service to that address would achieve actual service of process."[6]

Complainant argues that additional factual evidence supports the validity of its service on Mr. Burrell and the Trust. Complainant states that the 300 North Indiana Avenue address "has been listed" as a prior address for Mr. Burrell, it was the address of the inspection and Mrs. Burrell signed for him at that address. In addition, Complainant has submitted internet postings which list Mr. Burrell as a contact for leasing at the Indiana Avenue address. Complainant also points to the return address of 300 North Indiana Avenue on envelopes addressed to agency counsel requesting a settlement conference and the fact that Mr. Burrell used that address as his registered address for his former company. The agency also points out that that it "appears" that Mr. Burrell filed his tax returns jointly with his wife using that address from 2007 to 2009. Based upon these facts, Complainant maintains that it could reasonably expect that service on Mr. Burrell at the 300 North Indiana address achieved actual service and that service on him and the Trust is valid.

Discussion and Analysis

Agencies are free to fashion their own rules of procedure so long as these rules satisfy the fundamental requirements of fairness and notice. *See Katzson Bros., Inc., v. Environmental Protection Agency,* 839 F.2d 1396, 1399 (10th Cir. 1988). Thus, to determine whether service on Mr. Burrell and the Trust is valid, we look to both the Consolidated Rules and the requirements of due process.

The Consolidated Rules do not explicitly state whether, in the case of an individual respondent, that individual must sign the certified mail return receipt. Section 22.5(b)(1)(i) requires complainant to serve a copy of the complaint "on respondent, or a representative authorized to receive service on respondent's behalf." Service of a complaint is complete when the return receipt is signed. 40 C.F.R. § 22.7(c). In this case, the return receipt was never signed by Mr. Burrell and there is no evidence that Complainant served the Complaint directly on Mr. Burrell. He acknowledges receiving a copy of the motion for default in January of this year from his son, and he then proceeded to file the various motions addressed herein.

EPA administrative decisions interpreting the requirements of section 22.5(b)(1)(i) are not conclusive as to what is required for valid service on an individual. At least one Presiding Officer has concluded in effect that section 22.5(b)(1)(i) means service must be made on the respondent or an authorized representative, nothing more and nothing less. Thus, service by certified mail to respondent's mailing address where the return receipt was signed by an individual with the same last name was held to be insufficient because there was no basis in the record to infer that the person who signed for the certified mail was authorized to receive the complaint. *In re Roy C. Bobo*, Docket No. TSCA-07-2001-0022 (RJO Oct. 24, 2001).

Complainant rests much of its argument on *In re C.W. Smith,* 2002 EPA ALJ Lexis 7

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[6] I find Complainant's discussion of service at Respondent's "usual place of abode" to be inapposite here because (1) Mr. Burrell was not served at his place of abode and (2) the Consolidated Rules do not provide for "abode" service as do the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(e)(2)(B).

(Feb. 6, 2002). In that case, a complaint sent by certified mail return receipt requested and addressed to respondent at an address he had used as a mailing address for legal documents on property that he owned was held to constitute valid service. Several facts, however, distinguish *In re C.W. Smith* from this matter. First, in the *Smith* case, the respondent owned the property where the complaint was mailed. Second, the Presiding Officer found that respondent's brother was authorized to sign on his behalf as respondent used his brother's residence as a mailing address for legal documents. Finally, respondent did not claim failure to have actual notice of the complaint. For these reasons, I find that *In re C.W. Smith* is not controlling here.[7]

Federal cases that have examined whether the service of process employed by plaintiffs meets the requirements of due process generally hold that the inquiry is not whether the party whose property interest is at stake actually received notice, but whether the agency has provided "notice reasonably calculated" to inform the interested parties. *Orix Financial Services v. Phipps*, 2009 U.S. Dist. Lexis 530, at *26 (S.D.N.Y. 2009). The Supreme Court as well as several circuit courts of appeal have held that notice sent by ordinary mail is, under most circumstances, "reasonably calculated" to inform interested parties of the impending action. *Tulsa Professional Collection Services*, 485 U.S. 478, 490 (1988); *Weigner v. City of New York,* 852 F.2d 646, 658 (2d Cir. 1988). As the Supreme Court has stated, the mails are an "efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). But courts have held that due process may require something more than just mailing notice to the last address on file and that, in some circumstances, mailed notice may be inadequate. *Weigner*, 852 F.2d at 648 n.4; *Orix Financial Services,* 2009 U.S. Dist. Lexis at *30.

In this case, the record establishes that the Complaint was sent to Mr. Burrell and the Trust by certified mail in 2006 at an address that Mr. Burrell had not used as a business address for more than three years. Mr. Burrell maintains that he has been "locked out" of the business of B&D Management since December 2003. From December 2003 to present, Mr. Burrell has conducted his business and resided at a different address.

Complainant maintains that Mr. Burrell was served "as an individual through his wife, Willie P. Burrell, at a location previously listed as his address and that he continues to use for leasing and other purposes." Nothing in the Consolidated Rules, however, provides for service "through" a spouse, unless that spouse is an authorized representative, which Complainant does not allege and Mr. Burrell flatly denies. Moreover, the record does not establish that Mr. Burrell continues to use the 300 N. Indiana address "for leasing and other purposes." While that address appears with Mr. Burrell's name on various listings that Complainant has obtained from the internet, the source and veracity of that information cannot be ascertained. Mr. Burrell states he has never signed any of the tax returns submitted by Mrs. Burrell and that he has not filed tax returns using the 300 N. Indiana address.[8]

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[7] While the Environmental Appeals Board has not directly ruled on whether a return receipt signed by someone other than respondent complies with the requirement of section 22.5(b)(1), in a 1994 decision the Board concluded that where an amended complaint that was "probably" sent to the wrong address was "coupled with the absence of a return receipt signed by [respondent]" service of the amended complaint on respondent was not accomplished. *In re Patrick J. Neman*, 5 E.A.D. 450, 457 (EAB 1994). .

[8] *See* Affidavit of Dudley Burrell #2, filed April 1, 2011.

Given the passage of time between the date of the original inspection conducted in May 2003 and the filing of Complaint in June 2006, coupled with the information Mr. Burrell has presented to rebut the presumption of valid service and the fact that Mr. Burrell did not sign the return receipt for the mailing of the Complaint, I conclude that service of the Complaint on Mr. Burrell does not comport with the requirements of the Consolidated Rules or due process and Mr. Burrell's motion to quash service of process is GRANTED.

4. Effect of invalid service on Mr. Burrell

Mr. Burrell argues that this matter should be dismissed as to himself and the Dudley Burrell Trust because of improper service and lack of personal jurisdiction. Mr. Burrell also maintain that "any allegations against Dudley B. Burrell or the Dudley B. Burrell Trust for the 1393 E. Chestnut and 1975 Erzinger properties are now barred by the five (5) year statute of limitation. . . . Thus, the government's complaint must be dismissed as a matter of law." Complainant disagrees and argues that in Illinois actions are commenced by the filing of a complaint and that the filing of a complaint tolls the statute of limitations. Thus, Complainant maintains that if service is ineffective as to Mr. Burrell, the statute of limitations has not yet expired.

The Consolidated Rules do not address this issue, and therefore the Federal Rules of Civil Procedure and case law thereunder are again useful as guidance. Under the Federal Rules, 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). FRCP 4(m), however, provides a time limit of 120 days for service after a complaint is filed. The 120 days runs from the filing of the complaint, and the statute of limitations for the underlying claim is tolled during that period. If service is not complete by the end of the 120 days, however, the governing statute of limitations again becomes applicable, and the plaintiff must refile prior to the termination of the statute of limitations period. *See Geiger v. Allen*, 850 F.2d 330, 334 (7th Cir. 1988). Where defendants are not served within the 120-day time period, it is the district court's duty to either dismiss the complaint without prejudice, or order that service must be made within a specified time. The court must grant an extension where good cause for the failure to serve is shown. *Carl v. City of Yonkers,* 2008 U.S. Dist. Lexis 102489 *19 (S.D.N.Y. 2008). Where good cause is lacking, dismissal without prejudice, when combined with the statute of limitations, can result in a dismissal *with* prejudice. *Id.*

The Consolidated Rules do not provide any such time limit to complete service, but 120 days has been held to be a reasonable time period within which the agency should accomplish valid service, absent good cause. *See In re Burnham Associates, Inc.*, Docket No. MPRSA-01-2010-0078 (ALJ Dec. 21, 2010). In this case, the application of the 120-day service rule of FRCP 4(m) and the five year statute of limitations for the claims alleged could operate effectively as a dismissal of the claims against Mr. Burrell. Complainant will be required to supplement the record on this issue, and a ruling on whether to dismiss Mr. Burrell and the Trust from this matter is deferred pending further proceedings in this matter.

5. Service of Process on Mrs. Burrell and the Willie P. Burrell Trust

On the basis of the record in this case, I find that Willie P. Burrell has signed the return receipt for each of these complaints. Willie P. Burrell is a trustee of the Willie P. Burrell Trust. A trust is an unincorporated association, and service upon a trustee of a trust is proper service upon the trust. *See Brungardt v. Allen*, 2006 Bankr. Lexis 3327 (D. Kan. 2006). Thus, service is valid as to each of these respondents under 40 C.F.R. §§ 22.5(b)(1)(i), (ii)(A).

6. Mrs. Burrell's Demonstration of "Good Cause"

The Consolidated Rules provide that when the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. 40 C.F.R. § 22.17(c).

Mrs. Burrell argues that good cause exists in this matter due to ineffective counsel. Mrs. Burrell states that she retained counsel around March 2004 to handle a variety of legal matters regarding B&D Management, Inc., Burrell Property Management, LLC, herself and the Willie P. Burrell Trust. The attorney corresponded with Region 5 on her behalf in September of 2005 and provided the agency with copies of "Lead Safe Home" certificates from the Kankakee County Health Department for certain properties. The agency responded to the attorney in December 2005 requesting additional documentation that the apartments were lead free. There is no evidence in the record of any additional communications from the attorney on behalf of Mrs. Burrell to EPA in the matter. Mrs. Burrell states that the attorney never requested that she provide him with the documentation the agency requested and never informed her that she might be liable for an $89,000 penalty. Mrs. Burrell also states that the attorney advised her in September 2010 that her affairs "were in order" but that her later attempts to communicate with him were futile. Mrs. Burrell argues that her attorney's inaction constitutes gross negligence that should preclude the issuance of a default judgment against her.

Under Environmental Appeals Board precedent, "an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings." *In re Pyramid Chemical Company*, 11 E.A.D. at 667. As a general matter, a client voluntarily chooses its attorney as its representative and thus cannot avoid the consequences of the acts or omissions of its freely selected agent. *Id.* While the Board has recognized that there may be "some circumstances" in which the failure of an attorney might serve as a basis for excusing a party from timely compliance with procedural requirements (such as physical incapacitation during a crucial period in litigation), *see In re B&L Plating,* 11 E.A.D. 183, 191 n.15 (EAB 2003), such circumstances to not exist here. It is undisputed that Mrs. Burrell received a copy of the Complaint and she bears at least some responsibility to recognize the failure of her attorney to act on her behalf and to take appropriate and timely action. *See In re Pyramid Chemical Co.*, 11 E.A.D. at 668.

Mrs. Burrell raises several arguments that, in her view, establish that there is a strong possibility she would prevail should this matter go to hearing, thus constituting "good cause" to

deny the entry of a default order. First, she alleges that respondents have been singled out for enforcement "based upon the impermissible consideration of their race as Afro-Americans and well known political views." This argument is rejected because the mere allegation that other rental companies in the Kankakee area were not selected for enforcement, and cursory, unsupported allegations of illegal motive are not sufficient to establish a defense of selective enforcement.

An evaluation of whether a default judgment should enter may also include an analysis of the likelihood of the defaulting party's success on the merits. *See In re Four Strong Builders, Inc.*, 12 E.A.D. at 767. Mrs. Burrell raises other defenses upon which she maintains she has a strong likelihood of prevailing if a hearing were held in this matter, including: ability to pay; attitude and willingness to cooperate; cooperation; compliance; willingness to settle; size of business; lack of target occupants; and lack of willful violation. While these factors, if proven at hearing, might provide a basis upon which to reduce the penalty assessed against Mrs. Burrell, they do not constitute a defense to liability which would render likely her success on the merits of this case.

Finally, Mrs. Burrell argues that the apartment units that are the subject of this action "were in fact lead-free" and submits "Lead Safe Home" certificates issues by the Kankakee County Health Department and other supporting documentation. This documentation does not, however, conclusively establish that the apartments were in fact "lead-based paint free" as that term is defined by the applicable regulations to qualify for an exemption from the Disclosure Rule. 40 C.F.R. § 745.101, 103. In conclusion, Mrs. Burrell has not established a strong probability that litigating any of these defenses would produce a favorable outcome, and there exists no good cause to deny the entry of the default order Complainant seeks against Mrs. Burrell and the Willie P. Burrell Trust.

7. Resolution of Motions and Further Proceedings

On the basis of the record in this matter:

1. Respondents' motions to dismiss for defective proof of service are DENIED;

2. Respondent Willie Burrell's motion requesting oral argument is DENIED;

3. Respondent Dudley Burrell's motion to strike is DENIED.

A ruling on Complainant's motion for default and Mr. Burrell's motion to quash and motion to dismiss for improper service is deferred to allow the parties the opportunity to supplement the record with respect to the following issues:

1. Whether the Complaint against Mr. Burrell and the Dudley Burrell Trust should be dismissed with prejudice due to invalid service of process and the operation of the statute of limitations;

2. In the event the Complaint against Mr. Burrell and the Dudley Burrell Trust is

dismissed with prejudice, what should be the appropriate penalty to be assessed against the remaining Respondents.

Complainant shall supplement the record with respect to these issues on or before **August 16, 2011**. Respondents shall have an opportunity to reply to Complainant's submission on or before **August 30, 2011.**

IT IS SO ORDERED.

Date: July 26, 2011

Marcy A. Toney
Regional Judicial Officer

In the Matter of Willie P. Burrell, the Willie P. Burrell Trust, Dudley B. Burrell and the Dudley B. Burrell Trust, Docket No. TSCA-05-2006-0012

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated July 26, 2011, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy hand delivered to
Attorney for Complainant:

Maria Gonzalez
U. S. Environmental Protection
Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by U.S. Mail First Class to:

Dudley B. Burrell
The Dudley B. Burrell Trust
c/o Derek S. Burrell
649 N. Rosewood
Kankakee, IL 60901

Willie P. Burrell
The Willie P. Burrell Trust
c/o Derek S. Burrell
300 N. Indiana Avenue
Kankakee, IL 60901

Dated: 7-26-2011

By: _____
Mary Ortiz
Administrative Program Assistant