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April 14, 2010

Via Overnight Delivery

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: *In the Matter of: Creative Liquid Coatings, Inc., Elite Enterprises, Inc. and Randall Geist*
Docket Nos. RCRA-05-2009-0012 and RCRA-05-2009-0013

Dear Clerk:

Enclosed for filing please find an original and two copies of Randall Geist's and Creative Liquid Coatings' Response to Complainant's Motion to Compel Discovery and to Correct Alleged Deficiencies in Respondent's Joint Prehearing Exchange.

Please file-stamp the documents and return one file-stamped copy in the enclosed self-addressed, stamped envelope. Thank you very much for your assistance. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Jaime K. Saylor

JKS:djl
Enclosures

Cc (*w/ encl.*): Judge Barbara A. Gunning, U.S. EPA
Richard J. Clarizio, U.S. EPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF: Creative Liquid Coatings, Inc. (formerly doing business as Creative Coatings, Inc.) 2701 S. Coliseum Blvd. Suite 1284 Fort Wayne, IN 46803 U.S. EPA ID No. INR 000 109 322 Elite Enterprises, Inc. AND Randall Geist Respondents	DOCKET NO. RCRA-05-2009-0012
IN THE MATTER OF: Elite Enterprises, Inc. 2701 S. Coliseum Blvd. Suite 1158 Fort Wayne, IN 46803 U.S. EPA ID No. INR 985 102 607 Creative Liquid Coatings, Inc. (formerly doing business as Creative Coatings, Inc.) AND Randall Geist Respondents	DOCKET NO. RCRA-05-2009-0013

RANDALL GEIST'S AND CREATIVE LIQUID COATINGS' RESPONSE TO COMPLAINANT'S MOTION TO COMPEL DISCOVERY AND TO CORRECT ALLEGED DEFICIENCIES IN RESPONDENTS' JOINT PREHEARING EXCHANGE

Respondents Randall Geist and Creative Liquid Coatings, Inc. ("CLC") (collectively, "Respondents") submit the following response to the U.S. Environmental Protection Agency, Region 5's ("Complainant") Motion to Compel Discovery and to Correct Deficiencies in

Respondents' Joint Prehearing Exchange ("Motion"). For the reasons explained herein, Complainant's Motion should be denied.

I. Complainant's Motion and Requests Are Calculated to Harass Mr. Geist

Complainant's only possible purpose for this Motion and its underlying information requests is to harry and browbeat Mr. Geist and CLC, and as such should not be met with favor: "...motions designed to punish, harass or to gain an unfair advantage are ... subject to denial." *In the Matter of City of Orlando, FL*, EPA Docket No. CWA-04-501-99, 1999 EPA ALJ LEXIS 63, at *9 (Nissen, J., August 24, 1999) (**Exhibit 1**).

As an initial matter, Complainant did not request the information now being sought until it sent a letter dated March 12, 2010. (Complainant's Mem. In Supp. of Mot. to Compel, Ex. 3).[1] Demanding that all documents on that overbroad list be produced within seven days is unreasonably burdensome on its face, especially considering that the request was sent during a typical time for vacations based on Spring Break. Nevertheless, Respondents' counsel emailed Complainant's counsel on March 17 informing that Respondents' counsel would provide a response as soon as possible but that seven days was not enough time. 3/29/10 email string between counsel (**Exhibit 2**). Respondents' counsel refused to provide anything more than seven days for production, using the Court's May 18 hearing date – which had been set for three weeks already – as the excuse for Complainant's unreasonable deadline. *Id.* On March 29, Respondents' counsel informed Complainant's counsel about objections to the scope of the requests but that Respondents were nevertheless working on gathering responsive information.

[1] Complainant chose to file two complaints which each name all three Respondents. Because Complainant's Motion in either matter should be denied and because Mr. Geist's and CLC's arguments supporting that outcome are the same in either case, Respondents are filing this objection under both captions. Citations to pages or exhibits in Complainant's Memorandum in Support of its Motion will specifically be to the unredacted memorandum in support filed in EPA Docket No. RCRA-05-2009-0012. On March 17, 2010, Complainant filed its Corrected Motion to Consolidate Matters, which is pending.

Id. Apparently unsatisfied with Respondents' good faith efforts and unwilling to work with Respondents' counsel on the scope of the requests, Complainant filed this Motion to Compel just 13 business days after initially requesting the information.

In civil litigation, at least 30 calendar days are provided for requests to produce, and a motion to compel would never be appropriate before undergoing the 26(f) meet and confer process. In this case before a tribunal where discovery is far more limited, Complainant seems to think it can strong arm Respondents into producing information far beyond the scope of the RCRA allegations at issue and require that production in seven days or less. This Motion is premature at best, and a tool for harassment at worst.

Turning to the requested information, Complainant's list includes information that is not even available yet ("complete federal income tax returns for 2009" for CLC), information that is extremely burdensome to generate and produce ("the general ledgers from January 1, 2004 to present and the chart of accounts" for CLC), information that is intensely personal and involves other individuals not related to this case ("copy of the divorce, or other settlement agreement, entered into with one Kimm Thomas"), and information that is not properly sought from Mr. Geist or CLC (information concerning finances of Elite and other businesses). (Complainant's Mem. In Supp. of Mot. to Compel, Ex. 3). Complainant filed its Motion without allowing Respondents sufficient time to evaluate Complainant's requests and ascertain what information is even available, let alone discoverable. If receiving the information requested was actually Complainant's primary concern, it would have been well advised to request the information earlier or be more reasonable in its deadlines for document production. Indeed, if timing were so critical, why did Complainant not request this information in the six weeks that elapsed since Respondents' prehearing exchange? Instead, the parties and this Court are wasting

time and resources on a premature Motion to Compel.

Similarly, Complainant's complaints regarding Respondents' prehearing exchange are unfounded and hypocritical considering Complainant's own prehearing exchange. As explained below, Respondents' prehearing exchange materials focus on the elements of Complainant's case which are at issue and contain witness testimony descriptions similar to Complainant's own such descriptions.

II. Complainant's Demand for Additional Information is Excessively Burdensome to Respondents

Complainant can obtain this discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e). Complainant is not entitled to the laundry list of documents it seeks, because many of them are unreasonably burdensome requests. By way of example, Complainant seeks "the general ledgers from January 1, 2004 to present and the chart of accounts" for CLC. (Complainant's Mot., Ex. 3, Encl. 1, Item 4). Mark D. Ewen, Complainant's expert on ability to pay issues, acknowledges that the general ledger is basically a record of every single transaction ever undertaken by a company, *id.* at Ex. 2, ¶11, and Complainant wants it going back over six years. That request is not at all tailored and is incredibly burdensome.[2]

There is also no relevant basis for several of the requests, such as the request that CLC provide its customer list, including sales by customer and copies of written contracts, going back

[2] Complainant cites cases such as *New Waterbury* out of context. That was a penalty case under the Toxic Substances Control Act, where ability to pay is required to be considered by statute, and the issue was which party properly had the burden of proof on ability to pay. *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994). The parties were not arguing about what was produced, and we are also not aware of any case similar to the instant matters allowing such far-reaching discovery of ledgers and the like.

over six years. *Id.* at Ex. 3, Encl. 1, Item 5. A customer list is entirely unrelated to the RCRA allegations of this case, a penalty calculation, or CLC's or Mr. Geist's ability to pay.

Complainant seeks 2009 tax returns for CLC, which CLC is not obligated to have filed yet. "[Respondent] is, however, not obligated to create records to satisfy Complainant's discovery requests." *In the Matter of Stanchem, Inc.*, EPA Docket No. CWA-2-1-95-1040, 1998 EPA ALJ LEXIS 11, at *10 (Nissen, J., February 13, 1998) (**Exhibit 3**).

There is no basis, other than harassment, for seeking information which concerns an individual who has no involvement with this case, yet Complainant is seeking a copy of the divorce decree entered into by Mr. Geist and his ex-wife. (Complainant's Mot., Ex. 3, Encl. 1, Item 15). In any event, Mr. Geist had already provided Complainant information concerning his alimony obligations in Complainant's Financial Data Request form.

Complainant is also seeking year-end financial statements for 2009, "including the auditor's letter, balance sheet, income statement, statement of cash flows and notes," as well as tax returns for several other businesses, *id.* at Ex. 3, Encl. 1, Item 15, none of which has any obligation under the law to pay for any civil penalties which may be assessed against Mr. Geist.

Complainant also added to the list when it filed its Motion. Paragraph 14 of the "Additional Information Request" contains additional information Complainant has now decided it wants; this is the first time Respondents have seen this request. (*Compare* Complainant's Mot., Ex. 1, Item 14 to Ex. 3, Encl. 1, Item 13).[3] It is overly burdensome to require Respondents to hit a moving target and completely inappropriate to move to compel something that has never been requested.

Complainant seeks yet more information which it claims goes to ability of Mr. Geist or

[3] Because the two requests are different and Respondents only had notice of the requests attached as Enclosure 1 to Complainant's March 12, 2010 letter, Respondents are citing to the requests as they appear in Enclosure 1 in its objection to Complainant's Motion.

CLC to pay a penalty. Respondents have already turned over years-worth of financial statements and tax returns, including schedules and attachments, and Mr. Geist has already filled out and returned Complainant's detailed and lengthy Financial Data Request form. Still, and despite the fact that Respondents have provided financial information beyond what is required by U.S. EPA's RCRA Civil Penalty Policy, Complainants demand that Respondents provide information on increasingly broad topics. A claim of inability to pay should not give Complainant the right to overzealous scrutiny of private affairs, such as inquiring who lives in Mr. Geist's household or asking for a copy of a divorce decree. Nor should such a claim give Complainant the right to go on a fishing expedition and seek financial information for entities it has not sought to hold liable for the allegations, yet it seeks financial information for no less than eight non-Respondent businesses. (Complainant's Mot., Ex. 3, Encl. 1, Item 19).

III. Complainant's Demand for Additional Information is Misguided

Because Complainant's Motion seeks to compel information about a non-answering respondent from answering Respondents, is based on an impermissible burden shift by Complainant, and is based on mischaracterized facts, the Motion should be denied.

First, Complainant is requesting that Respondents provide information on eight topics concerning the operations and finances of Elite Enterprises, Inc. ("Elite"). Elite has not operated since March 2006, is not represented by the undersigned counsel, and has not answered either of the complaints filed in this matter, let alone claimed inability to pay. Despite this, Complainant feels that it is justified in seeking financial information related to Elite from Respondents:

> I understand that Elite Enterprises has not submitted any financial or operational information. This means I have no basis for assessing its financial status in the context of this case.... EPA is requesting available financial information for 2009 and a complete disclosure for Elite.

(Complainant's Mot., Ex. 2, ¶9). Complainant simply has no basis for forcing Respondents to

submit information for a non-answering respondent concerning a defense that has not been raised.

Further, Complainant complains that it needs additional discovery "to prepare its rebuttal to Respondents' 'corporate separateness' and 'following of corporate formalities' defense." (Complainant's Mot., p. 17). "Corporate separateness" or "following of corporate formalities" are not defenses. Rather, under the relevant RCRA regulations cited in the complaints, only a "generator" of hazardous waste is required to take certain actions, and Complainant must establish all of the elements of its claims, including that Respondents are each generators for purposes of the particular RCRA allegations. Therefore, the additional discovery is not required to rebut some sort of defense, when the burden of proof is clearly Complainant's.

Finally, Complainant's Motion is improperly supported by mischaracterized facts. By way of example and without fully recounting the facts of these matters,[4] Complainant claims that Elite ceased painting operations in Suite 1284 at Building 13 in 2004. (Complainant's Mot., p. 3). However, Elite did not cease operations at that location until early 2006, due to loss of a key business account. (RPHX 6, Resp. 00050).[5] Also, Complainant cites its own complaint for the proposition that Creative Coatings, Inc. (now CLC) ceased doing business at its Freedom Way location "in or about 2003" and began operating at Suite 1284 in International Park. (Complainant's Mot., p. 4). However, Complainant has within its own documents clear evidence showing that Creative Coatings was still located at Freedom Way in 2004-2005, and actively filing business entity reports with the Indiana Secretary of State. (CPHX 156, CX-0001958).

[4] Respondents do not wish to confuse the fatal flaws in Complainant's Motion with the factual issues that have not yet been briefed by the parties or properly presented to the Court. Respondents' intent here is merely to point to examples in the record that clearly contradict Complainant's assertions.

[5] Any of Complainant's prehearing exchange exhibits submitted in its initial prehearing exchange, rebuttal prehearing exchange, or first supplemental prehearing exchange (which is the subject of Complainant's First Motion to Supplement Prehearing Exchange) will be referred to as "CPHX." Exhibits submitted with Creative Liquid's and Randall Geist's Prehearing Exchange will be referred to as "RPHX."

There are no facts indicating that Creative Coatings left the Freedom Way location prior to this time, and Complainant ignores facts to the contrary. Next, Complainant asserts that CLC took over the lease for Suite 1284 at International Park in June 2003. (Complainant's Mot., p. 4). However, Respondents have already provided Complainant with a copy of Elite's June 2003 lease for Suite 1284, and there is no June 2003 lease of that space to CLC. (RPHX 2, Resp. 00002-00022). Also, Complainants claim that CLC subleased Suite 1284 at International Park from Elite. (Complainant's Mot., p. 4). In reality, Elite subleased this space from CLC. (CPHX 151, CX-0001829). Such mischaracterizations cannot be used by Complainant as the basis to compel discovery.

IV. Respondents' Joint Prehearing Exchange is Appropriate and Similar in Specificity to Complainant's Prehearing Exchange Materials

Complainant argues that Respondents' prehearing exchange is deficient for failing "to adequately describe in narrative format the proposed testimony of several of their witnesses." (Complainant's Mot., p. 20). As an initial matter, the Presiding Officer's October 21, 2009 Prehearing Order requires that a "*brief* narrative summary" of witness' expected testimony be provided. (10/21/09 Prehearing Order, p. 3) (emphasis added). It appears that Complainant is trying to impose a standard beyond what the Order requires. Further, the level of specificity provided in Respondents' prehearing exchange is no more "amorphous" than Complainant's. For example, Complainant may call on Maureen O'Neill to testify about her investigation "into the corporate relationship between the Respondents," may call on Gregg David to testify "as to the operations of and relationship between Creative Coatings, Creative Liquid Coatings, QP2, and Elite Enterprises," and may call on Jan Jackson to testify "as to the daily activities of Respondents." (Complainant's Prehearing Exchange, pp. 2-3). It is unclear why Respondents' brief narrative summaries are deficient, while Complainant's are not, especially when

Complainant had the burden to file its prehearing exchange first.

Complainant also notes that "[Respondents] have failed to submit more than a shred of documentation upon which these witnesses will presumably rely on or refer to when testifying." (Complainant's Mot., p. 21). While the volume may not satisfy Complainant, this is the information, along with the substantial materials already offered by Complainant, which bears on certain crucial elements in Complainant's allegations. Further, Complainant's criticism is premature; just as Complainant filed its First Motion to Supplement Prehearing Exchange, so too could Respondents, and such motion would be subject to the same standards set out in the prehearing orders, the Consolidated Rules of Practice at 40 C.F.R. Part 22, and the relevant case law.

If your Honor decides that more detailed descriptions of witness testimony are necessary, then Complainant should first be required to provide such detailed descriptions for its own witnesses – consistent with the prehearing orders for exchange of such information – followed afterward by Respondents submitting more detailed descriptions.

V. Conclusion

Complainant's Motion is premature and is intended chiefly to harass Respondents. It seeks information that is highly burdensome to produce, nonexistent, irrelevant, or misguided. Finally, Respondents' prehearing exchange was not deficient in its scope of documents provided or possible testimony topics. Accordingly, Complainant's Motion should be denied.

Respectfully submitted,

David L. Hatchett (IN #19383-49)
Jaime K. Saylor (IN #25083-91)
HATCHETT & HAUCK LLP
111 Monument Circle, Suite 301
Indianapolis, Indiana 46204-5124
Phone: 317.464.2620
FAX: 317.464.2629

Attorneys for Creative Liquid Coatings, Inc.
Attorneys for Randall Geist

CERTIFICATE OF SERVICE

I certify that on the 14th day of April, 2010, service of the foregoing was made upon each addressee listed below in the following manner:

Original and One Copy by overnight delivery to:
La Dawn Whitehead
Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Copy by overnight delivery to:
Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th St. NW
Suite 350
Washington, D.C. 20005

Copy by regular mail to:
Richard J. Clarizio
Associate Regional Counsel
Office of the Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590

One

3 of 7 DOCUMENTS

IN THE MATTER OF CITY OF ORLANDO, FL, RESPONDENT

DOCKET NO. CWA-04-501-99

United States Environmental Protection Agency
Office of Administrative Law Judges

1999 EPA ALJ LEXIS 63

August 24, 1999

PANEL:
[*1]

Spencer T. Nissen, Administrative Law Judge

OPINION:

ORDER GRANTING MOTION TO AMEND COMPLAINT

The complaint in this proceeding under Section 309(g) (2) (B) of the Clean Water Act, *33 U.S.C. § 1319*(g) (2) (B), issued and filed on March 12, 1999, charged Respondent, City of Orlando, with the unlawful use or disposal of sewage sludge in violation of Section 405(e) of the Act. Specifically, the complaint alleged that 136.44 metric tons of sewage sludge were disposed of on land in 1997 in violation of the regulation, 40 C.F.R. § 503.13(a) (1), in that molybdenum concentrations in samples of the sludge exceeded concentrations set forth in the table at 40 C.F.R. § 503.13 and thus, land disposal of the sludge was prohibited. This alleged violation was based on the "annual sludge report", required by 40 C.F.R. § 503.18(a), submitted by the City on March 3, 1998. For this alleged violation, it was proposed to assess the City a penalty of $ 60,000.

The City's answer, filed on April 12, 1999, raised certain affirmative defenses, including that the Complainant failed to consider an appropriate margin of error as to test results, contended that the proposed penalty **[*2]** was arbitrary and excessive, and requested a hearing.

Based on its contention that the answer to the complaint was not timely filed, Complainant filed a motion for a default order on May 26, 1999. The motion indicated that Complainant would request a hearing on the recommended penalty, even if its motion for a default order were to be granted. The City's reply to the motion for default, dated June 15, 1999, noted, inter alia, that Complainant appeared to be abandoning its proposed penalty and apparently intended to seek a higher penalty. The City emphasized that in no event should it be subjected to a penalty higher than that proposed in the complaint, absent a motion to amend the complaint approved by the ALJ. On June 18, 1999, while the motion for a default order was pending, Complainant filed a motion to amend the complaint. The motion, which was not accompanied by a copy of the proposed amended complaint, stated Complainant's belief that the prospects of settlement would be enhanced if the complaint were amended to address the City's concerns expressed in its reply to the motion for default and to specifically outline all of the alleged violations of 40 C.F.R. Part 503. On July **[*3]** 1, 1999, the City filed a reply to the motion to amend the complaint, stating essentially that it did not object to the amendment insofar as it would allow a further explanation of the proposed penalty calculation. n1

The City asserts that it has tried to explore and have clarified the proposed penalty amount, but that these efforts have **[*7]** been thwarted by Complainant's refusal to address the rationale for ignoring pre-trial settlement [offers or discussions] and its failure to explain the methodology for the original proposed penalty. The City says that Complainant's disregard of its own policies has been compounded by the proposal to amend the complaint to include new and additional charges, "upping the ante" in an apparent effort to intimidate the City. Assertedly, this is a violation of the Settlement Policy and deprives the City of an opportunity to invoke incentives for which it is qualified. According to the City, granting the motion would constitute an endorsement of this practice and still leave the City without an explanation of how the original penalty was calculated.

For all of the above reasons, the City argues that the motion to amend the complaint should be denied.

Discussion

The general rule is that motions to amend pleadings are liberally granted where the interests of justice are thereby served and no prejudice to the opposing party results. See, e.g., *Foman v. Davis, 371 U.S. 178 (1962);* 3 Moore's Federal Practice P15.08. This is especially true in administrative **[*8]** proceedings, the EAB having stated that: ". . . the Board adheres to the generally accepted legal principle that 'administrative pleadings are liberally construed and easily amended' and that permission to amend a complaint will ordinarily be freely granted." *Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, Final Decision and Order, 4 E.A.D. 170, 209, at 205;* 1992 EPA App. LEXIS 73*72 (EAB, August 5, 1992). The interests of justice are served by amendments which present the real, or all of the issues, in a case and prejudice within the meaning of the foregoing rule requires a showing that respondent will be seriously disadvantaged [in the presentation of its case]. *Port of Oakland, supra.* See also San Antonio Shoe, Inc., EPCRA Docket No. VI-501-S, Order Granting Motion to Amend Complaint, etc., 1992 EPA ALJ LEXIS 525 (ALJ, April 2, 1992).

Applying these principles, motions to amend complaints have generally been denied only where the proposed amendment, made on the eve of trial, would greatly expand the scope of the hearing or alter the nature of the defenses or where the proposed amendment **[*9]** would be futile. See, e.g., Everwood Treatment Company, Inc. and Cary W. Thigpen, RCRA (3008) Docket No. RCRA-IV-92-R, Order Denying Motion to Amend Complaint, 1993 EPA ALJ LEXIS 273 (ALJ, July 28, 1993) (proposed amendment denied as too near scheduled trial date). See also AZS Corporation, Docket No. TSCA-90-H-23, Order Denying in Part Motion to Amend Complaint, 1993 EPA ALJ LEXIS 147 (ALJ, March 18, 1993) and *Hardin County, RCRA (3008) Appeal No. 93-1, Final Decision and Order, 5 E.A.D. 189,* 1994 EPA App. LEXIS 19) (EAB, April 12, 1994) (proposed amendment denied as futile).

Motions to amend a complaint made in bad faith, that is, motions designed to punish, harass or to gain an unfair advantage are also subject to denial. See, e.g., Nassau County Department of Public Works, et. al, Docket No. MPRSA-II-92-02, Order Granting Motion to Amend Complaint, 1992 EPA ALJ LEXIS 386 (ALJ, September 11, 1992) and cases cited. In Nassau County, the claim of bad faith was based primarily on the fact that the motion to amend increasing the penalty by 100% was not filed until after respondents rejected complainant's offer to settle for the penalty **[*10]** sought in the initial complaint. This circumstance warranted scrutiny and required an explanation, but was not, without more, sufficient to warrant denial of the motion.

Here, without being explicit, the City's opposition to the motion appears to be based upon the bad faith exception to the rule that complaints and other pleadings may normally be easily amended. The additional violations alleged in the proposed amended complaint are based upon sludge reports submitted by the City in 1995 and 1996 and Complainant has not, and indeed cannot, claim that these violations are based upon newly discovered evidence. This coupled with fact that Complainant has apparently not extended to the City any offer of settlement in accordance with the Interim Clean Water Act Settlement Policy, notwithstanding the City's apparent eligibility as a minimum for the "quick settlement adjustment factor," provides some support for the City's apparent contention that the motion to amend should be denied as intended to intimidate or punish. Implicit in this contention, however, is the notion that settlement of the

Jaime Saylor

From: David Hatchett
Sent: Monday, March 29, 2010 3:52 PM
To: Steinbauer.Gary@epamail.epa.gov
Cc: Peaceman.Karen@epamail.epa.gov; Clarizio.Richard@epamail.epa.gov; Jaime Saylor
Subject: RE: CLC/R. Geist - request for voluntary production

We're writing to provide an interim response to your requests for information, which were received on March 16. The agency is requesting a very large amount of information but provided very little time to respond. With Spring Break and other schedule conflicts this time of year, it's been a challenge for us to work with our client in evaluating USEPA's latest round of requests. Further, we respectfully disagree on the scope of relevant information given the issues in the case. However, we are working on gathering responsive information.

To avoid any time crunch and allow discovery to progress in a thoughtful manner, the parties could agree to request an extension of the current hearing schedule. Please let us know whether the agency agrees to jointly seeking an extension to the current schedule. Thank you.

David L. Hatchett
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From: Steinbauer.Gary@epamail.epa.gov [mailto:Steinbauer.Gary@epamail.epa.gov]
Sent: Thursday, March 25, 2010 12:38 PM
To: Jaime Saylor
Cc: clarizio.richard@epa.gov; Peaceman.Karen@epamail.epa.gov
Subject: Fw: CLC/R. Geist - request for voluntary production

Jaime,

Do you have any further information regarding your response to our request for discovery? If we are unable to reach an agreement on a specific date for your production and response, we will file a motion. We plan to file our motion early next week if we do not reach an agreement by then.

Please let me know if you have any further information.

Thanks,
Gary

Gary Steinbauer
Office of Regional Counsel
U.S. EPA Region 5 (C-14J)
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law. Do not disclose without consulting Office of Regional Counsel. If you have received this message in error, please do not read it, reply to the sender that you have received it in error, and erase or otherwise destroy the message.

---- Forwarded by Gary Steinbauer/R5/USEPA/US on 03/25/2010 11:33 AM ----

From:	Gary Steinbauer/R5/USEPA/US
To:	"Jaime Saylor" <Jaime.Saylor@h2lawyers.com>
Cc:	clarizio.richard@epa.gov, Karen Peaceman/R5/USEPA/US@EPA
Date:	03/17/2010 02:54 PM
Subject:	Re: Fw: CLC/R. Geist - request for voluntary production

Jaime,

Thank you for your email and for letting us know the status of your response to our request for additional discovery.

As you know, we are working within the confines of a tight schedule before the May 18, 2010 hearing date. Therefore, unless we receive a written response by this Friday, March, 19, 2010, unequivocally stating that you will be producing all of the requested information by a date certain (leaving sufficient time to review the documents and information prior to the hearing), we will have no choice but to file a motion to compel discovery. While we are open to discussing specific dates and arrangements for the production of the requested documents and information, we do not have the luxury of time.

Please feel free to give me a call should you wish to discuss this matter further.

Thanks,
Gary

Gary Steinbauer
Office of Regional Counsel
U.S. EPA Region 5 (C-14J)
77 W. Jackson Blvd.
Chicago, IL 60604
Phone: (312) 886-4306
Fax: (312) 697-2717

From:	"Jaime Saylor" <Jaime.Saylor@h2lawyers.com>
To:	Gary Steinbauer/R5/USEPA/US@EPA
Date:	03/17/2010 11:12 AM
Subject:	Fw: CLC/R. Geist - request for voluntary production

Mr. Steinbauer,
I understand that you are the contact for this case while Richard is out of the office. Please see the email I sent to him below regarding the status of the voluntary production request. Please let me know if you have any questions.
Thanks,
Jaime

Jaime K. Saylor

Hatchett & Hauck LLP
111 Monument Circle, Ste 301
Indianapolis, IN 46204
jaime.saylor@h2lawyers.com

Message sent from my wireless device.

----- Original Message -----
From: Jaime Saylor
To: 'Clarizio.Richard@epamail.epa.gov' <Clarizio.Richard@epamail.epa.gov>
Sent: Wed Mar 17 10:08:50 2010
Subject: CLC/R. Geist - request for voluntary production

If you recall, I am working with David Hatchett on this matter. While we are working on responding to your request, we are not going to be able to provide the information in the timeframe you requested. We will provide a response as soon as we can.
Thanks,
Jaime

Jaime K. Saylor
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Message sent from my wireless device.

Three

8 of 8 DOCUMENTS

In the Matter of Stanchem, Inc.

Docket No. CWA-2-I-95-1040

United States Environmental Protection Agency
Office of Administrative Law Judges

1998 EPA ALJ LEXIS 11

February 13, 1998

PANEL:
[*1]

Spencer T. Nissen, Administrative Law Judge

OPINION:

ORDER ON MOTIONS TO COMPEL AND FOR DISCOVERY

By contemporaneous orders, dated September 26, 1997, the parties' cross-motions for accelerated decision were denied, StanChem's motion for discovery was granted in part, and the parties were directed to exchange specified prehearing information on or before November 14, 1997. Each party has made a prehearing submission by the mentioned date.

By a motion, dated November 24, 1997, Complainant objected to StanChem's prehearing exchange for the reason that it did not comply with the ALJ's order requiring the submission of a summary of the expected testimony of its witnesses and a copy of any documents or exhibits intended to be offered at the hearing. The motion pointed out that the purported summaries submitted by StanChem consisted of three short sentences identifying the area of expected testimony to be given by each of its three witnesses and asserted that these were not summaries. Additionally, while Complainant says that it does not object in principle to StanChem's request that the ALJ take official notice of Federal Register notices and other [widely available reference] materials **[*2]** [such as The Merck Index], it argues that it is entitled to notice of the particular materials upon which StanChem intends to rely. Therefore, Complainant moves that StanChem be directed to submit a supplemental prehearing exchange containing a summary, in reasonable detail, of the expected testimony of each witness on each matter concerning which the witness is expected to testify and a list of cites to the Federal Register to which StanChem expects to refer at the hearing.

On November 26, 1997, Complainant filed a motion for an order of discovery. The motion recited that it seeks discovery in three principal areas: the economic benefit derived by StanChem from its violations of the OCPSF rule at issue here, the applicability of the rule to StanChem's facility, and the timing of StanChem's knowledge that it was subject to the rule. Discovery in these areas is allegedly necessary to enable Complainant to present to the ALJ all information necessary for an informed decision on issues determined to be factual in the order, dated September 26, 1997, which denied the parties cross-motions for accelerated decision. Discovery was also allegedly necessary in order to demonstrate that **[*3]** the penalty claimed by Complainant was appropriate.

Under date of December 12, 1997, StanChem filed an objection to Complainant's motion for an order of discovery, a motion to bifurcate the hearing and to compel discovery, a response to Complainant's objection to prehearing exchange, an objection to Complainant's motion to compel, a motion to compel and a First Amended Prehearing Exchange. Attached to StanChem's objection to Complainant's motion for an order of discovery was a copy of a letter, dated

unreasonable (Objection at 2). Additionally, because of outstanding questions relevant to liability, StanChem argues that the discovery is unwarranted and does not seek information that currently has probative value. StanChem points out that Complainant is seeking a penalty of $125,000 and that it presumably possessed sufficient information to support that penalty [when the complaint was issued]. StanChem further points out that Complainant affirmed that it was seeking a [maximum] penalty of $125,000 after reviewing StanChem's voluminous response to the Agency's Section 308 information request (Objection at 3).

StanChem derides the notion that the ALJ's order of September 26 asked Complainant **[*8]** to "develop" information and "refine" its reasoning to support the proposed penalty rather than to "disclose" the documents, information, and reasoning, including alleged economic benefit, which led to the penalty proposed. StanChem asserts that Complainant calculated or should have calculated the proposed penalty based on information previously furnished by StanChem or developed on Complainant's own initiative (Objection at 4). The matter of Complainant's compliance with the prehearing order is addressed below.

DISCUSSION AND RULINGS

At the outset, it should be noted that Agency penalty policies under other environmental statutes, e.g., FIFRA and TSCA, provide, for example, that "ability to pay" may be presumed at the time a complaint is issued if information regarding this factor is not readily available. n1 While this will not satisfy the Agency's obligation to consider "ability to pay", where the statute so requires, and it is clear that no presumption of ability to pay applies at the hearing stage, n2 it is proper for the Agency to use discovery or other means to obtain information concerning a respondent's financial condition after a complaint is issued. The same rational **[*9]** is applicable to the alleged economic benefit or savings from the violations or noncompliance at issue here. Moreover, there can be no question that, if the right to a hearing is to have any meaning, factors which the statute requires be considered in determining a penalty must be addressed based upon the record developed at a hearing.

n1 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) at 24; Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 16, 17.

n2 Under the Rule 22.24 of the Rules of Practice (40 CFR Part 22), Complainant has the burden of establishing the violation alleged in the complaint and the appropriateness of the penalty.

StanChem's objection that Complainant's requests places an unreasonable burden on StanChem to identify documents and records sought is rejected. While it is recognized that the information sought is detailed and may be voluminous, Section 309(g)(3) provides that among factors to be taken into account in **[*10]** determining the amount of any penalty is "...the economic benefit or savings (if any) resulting from the violation..." n3 It is therefore clear that avoided or delayed costs of installing and operating equipment necessary to comply with the OCPSF rule are relevant to the determination of an appropriate penalty. It is, of course, true that the amount of any penalty will be reached only if the OCPSF rule is determined to be applicable to StanChem and StanChem is found to be in violation thereof. StanChem's motion that the hearing be bifurcated so that the amount of an appropriate penalty, if any, will be determined separately will be denied for reasons set forth below. StanChem is, however, not obligated to create records to satisfy Complainant's discovery requests. In the absence of records, estimates or approximations of applicable costs and an explanation of the basis therefor will suffice.

Paragraph 27 of the proposed discovery order asks for copies of all correspondence between StanChem and all technical consultants and other third parties regarding whether StanChem is subject to 40 CFR Part 414; para. 28 asks for copies of all internal documents, including memoranda, meeting minutes, and other documents relevant to the applicability of 40 CFR Part 414 to StanChem's wastewater; and para. 29 asks for the identification of any trade, lobbying or similar business organization to which StanChem or any of its officers or management have belonged or been a member of since November 5, 1987; for the identification of the dates of such membership; and for a copy of any materials received by StanChem, its officers or management officials from such organizations since November 5, 1987.

StanChem has objected to these requests, asserting that the requests will not lead to the discovery of information having probative value because the requests incorrectly presume that StanChem is subject to the OCPSF rule and that StanChem had knowledge thereof and, inasmuch as Complainant has argued that StanChem's lack of knowledge of the **[*15]** applicability of the OCPSF rule is not a defense, the requests are irrelevant (Objection at 5). StanChem has also objected to these requests as unduly burdensome (Objection at 6).

The Clean Water Act is a strict liablility statute and lack of knowledge of its provisions or of regulations issued thereunder is not a defense to liability for violations thereof. Such knowledge or the lack thereof is or may, however, be relevant to penalty mitigation. It follows that paras. 27 through 29 of the proposed discovery order will be granted except that documents and materials, if any, StanChem is required to furnish in response to para. 29 are limited to those pertaining to the applicability or potential applicability of the OCPSF rule to StanChem's operations.

STANCHEM'S MOTION TO BIFURCATE THE HEARING AND MOTION TO COMPEL DISCOVERY

StanChem's motion to bifurcate the hearing is based upon the contention that the parties should not be required to spend time and effort on issues relevant only to damages (penalty) unless and until liability is found (Motion, dated December 12, 1997, at 1). This motion will be denied because it has the potential for prolonging a proceeding presently **[*16]** in an extended pretrial stage, the complaint having been issued on May 1, 1995. Moreover, issues of liability and penalty or penalty mitigation may readily be presented together and the expense and inconvenience of a second hearing outweigh the burden of any prehearing preparation that may ultimately prove to be unnecessary.

Paragraph 6 of the ALJ's order, dated September 26, 1997, which directed the parties to exchange specified prehearing information, required Complainant to submit a copy of civil penalty computation worksheets and a statement, conforming to Rule 22.14(a)(5), explaining the reasoning behind the proposed penalty. Responding, Complainant states that the Agency has not developed an enforcement response policy (ERP), or other policy, for CWA cases. n5 Therefore, Complainant says that there are no penalty computation worksheets associated with this action.

n5 Prehearing Exchange, dated November 14, 1997, § 6. This statement is not literally accurate, because EPA has issued various penalty policies under the CWA since 1980. These policies are, however, intended for use in determining the Agency's "bottom line" for settlements first, in judicial, and, after enactment of the Water Quality Act of 1987, in administrative litigation. This practice is continued in the most recent version, Interim Clean Water Act Settlement Penalty Policy (March 1, 1995).

[*17]

Complainant contends, however, that the proposed penalty of $ 125,000 is fully warranted, pointing to the number, frequency, and magnitude of the alleged violations; that there is no evidence of StanChem's inability to pay the proposed penalty; that in addition to the violations at issue here, StanChem has also violated lead limits in its state-issued permit; that StanChem should be considered highly culpable for the violations, because with proper

3..StanChem is directed to furnish a list of citations to the Federal Register upon which it expects to refer or rely.

4..Complainant's motion for an order of discovery is granted in part and denied in [*21] part as indicated above.

5..StanChem's motion to bifurcate the hearing is denied.

6..StanChem's motion to compel is granted in part as indicated above.

The parties shall comply with this order on or before March 27, 1998.

Dated this 13th day of February 1998.