

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

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IN THE MATTER OF)
)
CREATIVE LIQUID COATINGS, INC.)
(Formerly doing business as)
Creative Coatings, Inc.)^{1/})
)
U.S. EPA ID NO. INR 000 109 322) DOCKET NO. RCRA-05-2009-0012
)
ELITE ENTERPRISES, INC.)
)
AND)
)
RANDALL GEIST,)
)
RESPONDENTS)

PREHEARING ORDER

As you previously have been notified, I have been designated by the October 19, 2009 Order of the Chief Administrative Law Judge to preside in the above captioned matter.^{2/} This proceeding arises

^{1/} The record before me reflects an inconsistency between the Certificate of Service and actual service. Although the Certificate indicates service only to Respondent Creative Liquid Coatings, Inc. formerly d/b/a Creative Coatings, Inc. ("Respondent Creative"), the record also shows that the Complaint was sent certified mail/return receipt requested to Respondent Randall Geist ("Respondent Geist"). The record does not reflect service on Respondent Elite Enterprises, Inc. ("Respondent Elite"), nor has Respondent Elite filed an Answer to date. Respondent Creative, along with Respondent Geist, has filed an Answer.

^{2/} In response to an inquiry from this office, Respondent Creative and Respondent Geist agreed to participate in the
(continued...)

under the authority of Section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as RCRA ("RCRA"), 42 U.S.C. § 6928(a). In the Complaint, Complainant seeks a civil administrative penalty against Respondents and a Compliance Order.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 22.18(b), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

There is no indication in the record that settlement discussions have been held in this matter.^{2/} The parties are directed to hold a settlement conference on this matter on or before **November 20, 2009**, to attempt to reach an amicable resolution of this matter. See Section 22.4(c)(8) of the Rules of Practice, 40 C.F.R. § 22.4(c)(8). Complainant shall file a status report regarding such conference and the status of settlement on or before **December 2, 2009**.

In the event that the parties fail to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. The parties are advised that extensions of time will not be granted absent a showing of good cause. The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the prehearing requirements or to meet the schedule set forth in this Prehearing Order. Of course,

^{2/}(...continued)

Alternate Dispute Resolution ("ADR") process offered by this office, but Complainant and Respondent Elite did not respond.

^{3/} The file does reflect that an informal settlement conference was scheduled for October 20, 2009, among Complainant, Respondent Creative and Respondent Geist.

the parties are encouraged to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange.

The following requirements of this Order concerning prehearing exchange information are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party^{4/} shall submit:
 - (a) the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called; and
 - (b) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondents'" exhibit^{5/} as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and
 - (c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

See Sections 22.19(a), (b), (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), (d); see also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

^{4/} Respondents Creative and Geist filed a joint Answer and are represented by the same counsel. These Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

^{5/} If Respondents Creative and Geist choose to file separate prehearing exchanges, the proposed exhibits should be identified as "Respondent Creative's" or "Respondent Geist's" exhibit.

2. This proceeding is for the assessment of a penalty and Complainant has not specified a proposed penalty.^{6/} Accordingly, the parties shall include in their prehearing information exchange all factual information they consider relevant to the assessment of a penalty.
3. Within fifteen (15) days after Respondents file their prehearing information exchange, Complainant shall file a document specifying a proposed penalty and explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.
4. If either Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
5. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

The prehearing exchanges delineated above shall be filed in *seriatim* manner, according to the following schedule:

January 7, 2010 - Complainant's Initial Prehearing Exchange

February 3, 2010 - Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence

^{6/} The Complaint states that Complainant will seek a penalty in an amount not greater than \$32,500 per day of violation for each day of violation between March 15, 2004, and January 12, 2009, and not greater than \$37,500 after January 12, 2009, for each of the two counts. Complaint at p. 18.

**February 17, 2010 - Complainant's Rebuttal Prehearing
Exchange (if necessary)**

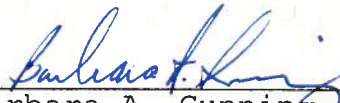
In their joint Answer to the Complaint, Respondents Creative and Geist exercised their right to request a hearing pursuant to Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondents each have the right to defend themselves against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondents are entitled to elect any or all three means to pursue its defense. If either Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all other parties. The parties are advised that E-mail correspondence with the Administrative Law Judge is not authorized. See Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a). The prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001
Telephone: 202-564-6281

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Barbara A. Gunning
Administrative Law Judge

Dated: October 22, 2009
Washington, DC

**In the Matter of *Creative Liquid Coatings, Inc.* (Formerly doing business as *Creative Coatings, Inc.*), (U.S. EPA ID No. INR 000 109 322); *Elite Enterprises, Inc.*, and *Randall Geist*, Respondents.
Docket No. RCRA-05-2009-0012**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated October 22, 2009, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, E-19J
77 West Jackson Blvd., 13th Floor
Chicago, IL 60604-3590

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Copy by Pouch Mail to:

Richard J. Clarizio, Esq.
Associate Regional Counsel
U.S. EPA, Region V, C-14J
77 West Jackson Blvd.
Chicago, IL 60604-3590

Copy by Regular Mail to:

David L. Hatchett, Esq.
Jaime K. Saylor, Esq.
Hatchett & Hauck, LLP
111 Monument Circle, Suite 301
Indianapolis, IN 46204-5124

Dated: October 23, 2009
Washington, D.C.