

11/17/98

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
PERMA-GUARD, INC.,) IF&R DOCKET NO. VIII-97-02
 and)
UNIVERSAL DIATOMS, INC.,)
)
 Respondents)

ORDER DISMISSING COMPLAINT AGAINST
RESPONDENT UNIVERSAL DIATOMS, INC.

Over a year ago, on September 25, 1997, this action was initiated by the filing of an Administrative Complaint against the two corporate Respondents, Perma-Guard, Inc. and Universal Diatoms, Inc. On October 17, 1997, Respondent Perma-Guard, Inc., responded to the Complaint, asserting defenses and requesting a hearing. However, to date, Universal Diatoms, Inc., has not responded to the Complaint and the record is devoid of evidence that proper service was ever made upon it.¹ On October 2, 1998, the undersigned issued an Order requiring the Complainant to Show Cause on or before October 13, 1998 why this proceeding should not be dismissed against Universal Diatoms, Inc. due to lack of service. In its response, the Complainant acknowledges that it "is unable to show service of the complaint upon Universal Diatoms, Inc." The Complainant asserts that Perma-Guard's President, Wallace Tharp, has represented that Universal is a defunct corporation, but has not substantiated that claim. Complainant asserts further that, despite efforts made (computer searches), it has been unable to confirm claims that the corporation is defunct.²

¹ The procedural rules that apply to this proceeding require service of the complaint to be made personally or by certified mail, return receipt requested, on the corporation's "officer, partner . . . or to any other person authorized by appointment or Federal or State law to receive service of process" respondent or his representative," and "[p]roof of service of the complaint shall be made by affidavit of the person making personal service or by properly executed return receipt." 40 C.F.R. §§ 22.05(b)(1)(i), 22.05(b)(v).

² This claim is rather specious since it took the undersigned less than 10 minutes, spent in a single telephone call to the New Mexico Corporation's Commission in Santa Fe (505-827-4500), to confirm that Universal Diatoms, Inc. was no longer a corporation in

While the Consolidated Rules of Procedure do not explicitly provide for dismissal of a Complaint, *sua sponte*, due to lack of service, such authority can be implied by section 556 of the Administrative Procedure Act, 5 U.S.C. §556, and by reference to the Federal Rules of Civil Procedure, which provides at Rule 4(m), for *sua sponte* dismissal without prejudice where service is not made within 120 days after filing. Therefore, the Complaint filed in this action against Universal Diatoms, Inc. is hereby DISMISSED without prejudice.



Susan L. Biro
Chief Administrative Law Judge

Dated: October 27, 1998
Washington, D.C.

good standing, authorized to do business in the State of New Mexico, due to its failure to file its annual corporate report. Universal last filed its corporate report in November 1992. Its last registered agent was Mr. Tharp.

In the Matter of Perma-Guard, Inc., & Universal Diatoms, Inc., Respondent
IF&R Docket No. VIII-97-02

Certificate of Service

I certify that the foregoing **Order Dismissing Complaint Against Respondent Universal Diatoms, Inc.**, dated October 27, 1998, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to: Tina Artemis
Regional Hearing Clerk
U.S. EPA
999 18th Street, Suite 500
Denver, CO 80202-2466

Copy by Regular Mail to:

Attorney for Complainant: Dana Stotsky, Esquire
Assistant Regional Counsel
U.S. EPA
999 18th Street, Suite 500
Denver, CO 80202-2466

Attorney for Respondent: Wallace Tharp, President
Perma-Guard, Inc.
P.O. Box 25282
Albuquerque, NM 87125

Marvin Haney, Vice President
Perma-Guard, Inc.
625 E. 2150 S.
Bountiful, UT 84010



Maria Whiting-Beale
Legal Staff Assistant

Dated: October 27, 1998