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EPA--REGION 10

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:)	DOCKET NO. CWA-10-2003-0007
)	
Thomas Waterer)	
and)	COMPLAINANT'S PREHEARING
Waterkist Corp. dba Nautilus Foods)	EXCHANGE
Valdez, Alaska)	
)	
Respondents.)	
_____)	

Pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's Order of May 19, 2003, Complainant Environmental Protection Agency ("EPA") hereby submits the following Prehearing Exchange. EPA respectfully reserves the right to supplement this Prehearing Exchange if necessary prior to hearing with proper notice to Respondents.

I. FACT WITNESSES

1. Christopher Cora. Mr. Cora is an Environmental Scientist with EPA Region 10 in Seattle. Mr. Cora is the compliance officer assigned to this case. He inspected Respondents' facility in July 2002. He will testify regarding his findings during the inspection, Respondents' prior history of violations, and the economic benefit that Respondents realized as a result of their noncompliance.

2. Robert Pressley. Mr. Pressley is an inspector with the Alaska Department of Environmental Conservation. Mr. Pressley inspected Respondents' facility in September 2000. He will testify regarding his findings during the inspection and general compliance status of the facility.

3. Tim Jewel. Mr. Jewel is a diver with Enviro-Tech Diving, Inc. He performed two dive surveys of Respondents' waste pile. He will testify regarding his findings during those dive surveys and his experience with Respondents' efforts at environmental compliance.
4. EPA reserves the right to call all fact witnesses named by Respondent.

II. EXPERT WITNESSES

1. Lloyd Oatis. Mr. Oatis is a financial analyst with EPA Region 10. Mr. Oatis will testify regarding the economic benefit that Respondents gained as a result of noncompliance.
2. Dr. Bruce Duncan. Dr. Duncan is a marine biologist with EPA Region 10. He will testify regarding the environmental harm caused by Respondents' zone of deposit and effluent limit violations.

III. EXHIBITS.

For purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated as "C-." The documents themselves are labeled "Complainant's Ex. No."

- C-1 Seafood Processors in Alaska National Pollutant Discharge Elimination System Permit, (June 21, 1995)
- C-2 Seafood Processors in Alaska National Pollutant Discharge Elimination System Permit, (July 18, 2001)
- C-3 EPA letter to T. Waterer re: Notice of Intent (April 12, 1996)
- C-4 Notice of Intent submitted to EPA by "Nautilus Foods, A Corporation" (August 3, 2000)
- C-5 National Pollutant Discharge Elimination System Permit Authorization Letter (September 14, 2001)
- C-6 Inspection Report (June 27, 1990)
- C-7 Inspection Report (June 3, 1991)

- C-8 Inspection Report (August 15, 1991)
- C-9 Inspection Report (July 28, 1992)
- C-10 Inspection Report (August 17, 1995)
- C-11 Inspection Report (September 10, 1997)
- C-12 Inspection Report (May 14, 1998)
- C-13 Inspection Report (June 18, 1998)
- C-14 Inspection Report (June 16, 1999)
- C-15 Inspection Report (September 21, 2000)
- C-16 Inspection Report (July, 22, 2002)
- C-17 1996 Dive Report
- C-18 1998 Dive Report (unsigned)
- C-19 "Best Management Practices Plan for Nautilus Foods, Inc." (1998)
- C-20 Annual Report for Year 1997
- C-21 August 1, 2002, Nautilus Foods' Response to May 3, 2002, Clean Water Act section 308 Information Request
- C-22 Phone record (August 4, 2000)
- C-23 CV of Dr. Bruce Duncan
- C-24 CV of Lloyd Oatis
- C-25 Consent Agreement and Consent Order, In re Nautilus Marine, Inc. (May 16, 1993)
- C-26 Bill for Collection (February 7, 1996)
- C-27 Financial Data Warehouse Document Review (July 3, 1997)

VI. PROPOSED PENALTY

Paragraphs 28-38 of the Complaint set forth the alleged violations of the National Pollutant Discharge Elimination System Permit ("NPDES") permits. Each day of violation of a permit condition constitutes a day of violation of the Clean Water Act. 33 U.S.C. § 1311(a).

The evidence available to Complainant at the time of the filing of the Prehearing exchange shows that Respondents violated the Act more than 3,199 times prior to the current fishing season. The numbers of days of violation ascribable to each paragraph of the Complaint are as follows:

¶ 28	no permit on site	3
¶ 29	Notice of Intent	1
¶ 30	exceedance of zone of deposit	5 years x 365 days = 1,825
¶ 31	annual reports	4
¶ 32	shoreline monitoring	4 years x days of operation ¹ = 477
¶ 33	Best Management Practices	4
¶ 34	floating solids	1
¶ 35	ramp discharge	1
¶ 36	broken outfall	1.2 years x days of operation = 162
¶ 37	failure to operate and maintain	5 years x days of operation = 601
¶ 38	grinder monitoring	<u>1 year x days of operation² = 120</u>
TOTAL		3,199 days of violation

The penalty proposed in the Complaint represents less than \$43 per violation of the Clean

¹ Respondents operate approximately four to five months out of the year. See Response to EPA CWA section 308 Information Request ("Nautilus Foods, Annual Production Report, Dates of Operation") attached hereto as Complainant's Exhibit 21. Based on the dates of operation set forth in Exhibit 21, and the shoreline monitoring data submitted with the Response to the Section 308 Information Request, it appears that Respondents monitored during part of 2001. Assuming for purposes of this motion that the data submitted indicate complete monitoring for that year, Respondents failed to monitor for four years, which equals approximately 477 days of violation.

² No production data is available for 2002. The Region therefore selected 120 days of operation, which is an average of the five previous years of operation reported by Respondents.

Water Act. Thus, Respondents' large number of violations supports and justifies the proposed penalty. Respondents should be held jointly and severally liable for the alleged violations. See In re Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, (ALJ Biro July 15, 1998) (\$75,000 awarded jointly and severally against three respondents for Clean Water Act violations after one settled for \$40,000 and the other two failed to file an answer to the complaint).

The penalty proposed in the complaint is based on the penalty factors set forth in section 309(g)(3) of the Clean Water Act, which states in relevant part:

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).³

The nature, circumstances, extent and gravity of the violations described above are significant. Respondents' failure to route all seafood process waste through the waste-handling system and failure to properly operate and maintain all facilities and systems of treatment and control that are installed or used to achieve compliance resulted in the deposition of excessive

³ The Agency has never issued a penalty policy for use by Presiding Officers in determining penalties under the CWA. Consequently, Presiding Officers rely on the wording of the statutory penalty factors set out in section 309(g)(3). In re Larry Richner, 10 E.A.D. ____, CWA Appeal No. 01-01 (EAB July 22, 2002) ("Because there are no CWA penalty guidelines, a CWA penalty must be calculated based upon the evidence in the record and the penalty criteria set forth in CWA § 309(g)." slip op. at 23); In re Britton Construction, 8 E.A.D. 261, 278 (EAB 1999) ("The statute requires EPA to take into account a number of factors in assessing penalties, such as the extent of the violations and the violator's culpability, but it prescribes no precise formula by which these factors must be computed." (citations omitted)).

seafood process waste on the sea floor and in the water column. This has caused significant environmental harm to the water and sea bottom near Respondents' outfall. Depositing seafood waste in excess of a one-acre zone of deposit increases the settleable materials on the sea floor. Settleable materials which blanket the bottom of water bodies damage the invertebrate populations and remove dissolved oxygen from overlying waters as the waste materials decompose. Deposition of organic materials on bottom sediments can cause imbalances in biota by increasing bottom animal density—principally worm populations—and diversity is reduced as pollution-sensitive forms disappear.

In addition, Respondents repeatedly failed to monitor discharges from the Facility and the surrounding environment as required by the 1995 and 2001 NPDES permits. Unless a permittee monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permittee is discharging effluent in excess of the permit's maximum levels.

Based on the information available to EPA regarding Respondents' financial condition, Respondents appear able to pay a civil penalty of up to \$137,500. Between 1997 and 2001, Respondents sold 22,584,354 pounds of fish⁴. Respondents did not raise ability to pay as an affirmative defense in their Answer to the Complaint and, as of the date of this Prehearing Exchange, they have not provided EPA with any documentation to support such a defense.

Respondents have an extensive prior history of violations. In 1992, EPA filed complaint against Nautilus Marine, Inc., a seafood processor owned and/or operated by one or more of the

⁴ See Response to EPA CWA section 308 Information Request ("Nautilus Foods, Annual Production Report, Total Production Volumes") attached hereto as Exhibit 21.

Respondents in the present case, alleging violations of the Clean Water Act very similar to the ones in the present case. Prior to 1992, Respondents or predecessor companies owned and operated by Respondents received notices of violation from the Alaska Department of Environmental Conservation ("ADEC"). Inspectors from ADEC have also documented other violations of the Clean Water Act at this facility since 1992.

Respondents' degree of culpability is high. Despite a prior history of violations, and prior knowledge of current and on-going violations, Respondents continue to violate the Clean Water Act. Each inspection of Respondents' Facility has uncovered a large number of violations, and Respondents have been notified during these inspections of on-going noncompliance issues; yet these violations have continued largely unabated.

Respondents realized a sizeable economic benefit. The economic benefit has three components. First, Respondents saved money through the avoided costs of failing to barge their seafood process wastes out to sea to avoid discharging in violation of their zone of deposit. The avoided costs of barging the wastes is estimated to be approximately \$197,000. Second, by delaying the costs associated with properly operating and maintaining all facilities and systems of treatment and control installed or used to achieve compliance and failing to route all seafood process waste through the waste-handling system, Respondents realized an economic benefit of approximately \$1,000. Finally, Respondents realized an economic benefit from failing to conduct sea floor, shoreline and surface water monitoring, or use other methods to ensure compliance with the permit provisions listed above. This economic benefit component is estimated to be approximately \$8,750, resulting in a total economic benefit to Respondents of \$206,750.

V. ESTIMATE REGARDING LENGTH OF HEARING

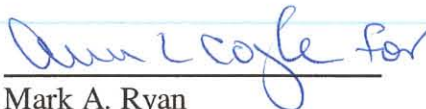
Complainant estimates that it will require approximately two days to put on its case in chief. The length of time required for rebuttal testimony and cross-examination of Respondent's witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondents' Prehearing Exchange.

VI. LOCATION AND DATE OF HEARING

Complainant proposes Seattle, Washington for the hearing location. Courtrooms are available in Seattle. Region 10's Headquarters Office is in Seattle. Most of Complainant's witnesses are located in Seattle. Respondents and Respondents' counsel are located in the Seattle area during the non-fishing season. It is Complainant's understanding that during the non-fishing season, Respondents' Valdez facility is closed.

Allowing 30 days for rebuttal prehearing exchanges, the parties should be ready for hearing by October. Complainant proposes the following dates for a hearing: October (all dates except October 9 and 10 and 28-30); November (all dates are currently open); December (all dates are currently open).

RESPECTFULLY SUBMITTED this 21st day of July, 2003.



Mark A. Ryan
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

I certify that the foregoing "Complainant's Prehearing Exchange" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
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Copy, by mail:

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Dated: 7/21/03


Valerie Badon
U.S. EPA Region 10