BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:	)	DOCKET NO. CWA-10-2003-0007
Thomas Waterer and Waterkist Corp. dba Nautilus Foods Valdez, Alaska	)	MOTION FOR DEFAULT FOR FAILURE TO SUBMIT PRE-HEARING EXCHANGE
Respondents.	)	

INTRODUCTION

Pursuant to 40 C.F.R. §§ 22.16(a), 22.17 and 22.19(g), Complainant moves for default. For good cause shown, Respondents should be held liable for the violations alleged in the complaint and the proposed penalty should be assessed against them.

BACKGROUND

In the pre-hearing Order dated May 19, 2003, the Presiding Officer ordered the parties to file their pre-hearing exchanges no later than July 21, 2003. Complainant filed its pre-hearing exchange on time.[1] As of the date of filing of this motion, Respondents have not filed their pre-hearing exchange(s) with the Regional Hearing Clerk or served the same on the undersigned.

[1]Respondents' copy of the Complainant's pre-hearing exchange was returned as undeliverable owing to a typographical error in the Certificate of Service. The package was remailed to the correct address as soon as it was received by EPA.

This is Complainant's second motion for default in the present matter. On February 14, 2003, Complainant moved for default for Respondents' failure to file an answer to the Complaint which was due on January 31, 2003. In response to that motion, which is attached as Exhibit A, Respondents filed their answer to the Complaint, and there was no ruling on the motion.

ARGUMENT

I. Default is Appropriate Where Respondents Have Failed to Submit a Pre-hearing Exchange.

Respondents failed to file their pre-hearing exchange(s) on July 21 as required by the Presiding Officer's Order dated May 19, 2003 and 40 C.F.R. section 22.19. Paragraph (g) of this section states that any respondent that fails to file a pre-hearing exchange may be found in default. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

Because Respondents have failed to file their pre-hearing exchange(s), they should be held liable for all violations alleged in the Complaint, and a penalty should be assessed against them as set forth in paragraph 40 of the Complaint pursuant to 40 C.F.R. section 22.17(b). See In re Asbestex, Environmental Group Co., Docket No. CAA 3-2001-004 (ALJ Gunning April 24, 2002); In re Ronald C. Palimere, 2000 WL 33126605 (ALJ Moran, December 13, 2000); In re Lawrence County Agricultrue Society, 2000 WL 1770502 (ALJ Gunning, October 26, 2000).

II. The Complaint Establishes All of the Prima Facie Elements of the Alleged Violations.

Because Respondents are in default, all of the factual allegations in the Complaint are deemed admitted by Respondents. 40 C.F.R. § 22.17(a). Thus, in order to prevail in the instant matter, all Complainant must show that it has met its prima facie burden of establishing the elements of the violations alleged in the Complaint.

The Complaint establishes that Respondents are persons, Complaint ¶¶ 5 - 9, who discharged pollutants from a point source to waters of the United States. Id., ¶¶ 10-12. The Complaint also establishes that Respondents were issued two NPDES permits, Id., ¶ 13, and that they violated the terms of those permits. Id., ¶¶ 28-38.

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 currently available to Complainant 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	no notice of intent	1
¶ 30	exceedance of zone of deposit	5 years x 365 days = 1,825
¶ 31	no annual reports	4
¶ 32	no shoreline monitoring	4 years x days of operation[2] = 477

[2] 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 to Complainant's Pre-Hearing Exchange as Exhibit 21. Based on the dates of operation set forth in Exhibit 21, and the shoreline monitoring data submitted with

¶ 33	no 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	no grinder monitoring	1 year x days of operation[3] = 120
TOTAL		3,199 days of violation

III. The Proposed Penalty is Supported by the Facts.

Section 309(g)(2)(B) of the CWA provides for penalties up to $11,000 per day per violation. 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. Part 19. The penalty proposed in the Complaint represents less than $43 per violation of the Clean 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

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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.

[3] No production data is available for 2002. Complainant therefore selected 120 days of operation, which is an average of the five previous years of operation reported by Respondents.

> 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).[4]

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 seafood process waste on the sea floor and in the water column. Complaint, ¶ 42. This has caused significant environmental harm to the water and sea floor 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 its seafood

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[4] 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)).

processing facility and the surrounding environment as required by the 1995 and 2001 NPDES permits. Complaint, ¶¶ 31, 32, 38. 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 fish[5]. Respondents did not raise ability to pay as an affirmative defense in their Answer to the Complaint and, to date, 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 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. See Complaint, ¶ 44, Complainant's Pre-Hearing Exchange, Exhibits 6-16.

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

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[5] See Response to EPA CWA section 308 Information Request ("Nautilus Foods, Annual Production Report, Total Production Volumes"), Exhibit 21.

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 ("ZOD"). The avoided costs of barging the wastes is estimated to be approximately $196,000. 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 $4,560. This results in a total economic benefit to Respondents of approximately $200,560.[6] See Declaration of Christopher Cora, attached hereto as Exhibit B.

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[6]This economic benefit is smaller than the amount disclosed in Complainant's Pre-Hearing Exchange owing to an error which was discovered after the filing of the Pre-Hearing Exchange. That error will be corrected if and when Complainant submits a Rebuttal Pre-Hearing Exchange.

CONCLUSION

For the reasons set forth above, the Presiding Officer should enter a Order finding Respondents in default, and assess the penalty proposed in the Complaint.

RESPECTFULLY SUBMITTED this 5th day of August, 2003.

Mark A. Ryan
Ann L. Coyle
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion for Default for Failure to Submit Pre-Hearing 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
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101.

Copy, by mail:

Hon. William B. Moran
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Edward P. Weigelt, Jr.
4300 198th St. S.W., Suite 100
Lynnwood, WA 98036.

Dated: Aug. 5, 2003 Valerie D. Badon

Valerie D. Badon
U.S. EPA Region 10