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**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**IN THE MATTER OF:**

**Thomas Waterer**

**and**

**Waterkist Corp. dba Nautilus Foods  
Valdez, Alaska**

**Respondents.**

**Docket No. CWA-10-2003-0007**

**REPLY TO RESPONDENTS'  
RESPONSE TO EPA'S MOTION FOR  
DEFAULT FOR FAILURE TO  
SUBMIT PRE-HEARING EXCHANGE**

**I. INTRODUCTION**

Pursuant to 40 C.F.R. §§ 22.16(b), 22.17 and 22.19(g), Complainant submits the following Reply Brief regarding its Motion 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.

**II. RESPONDENTS HAVE FAILED TO SHOW GOOD CAUSE WHY DEFAULT SHOULD NOT BE ENTERED AGAINST THEM.**

In "Respondents' Waterkist and Waterer Reply to Motion for Default and Certificate of Service" (Response Brief), Respondents set out four reasons why they failed to file their pre-hearing exchange on time: (1) EPA did not file its pre-hearing exchange on time, (2) EPA failed to respond to a discovery request filed in February, (3) the records needed for the pre-hearing exchange were lost or damaged, and (4) illness of Thomas Waterer. For the reasons set forth below, none of these rationales reasonably account for Respondents' failure to file their pre-hearing exchange on time.

**A. EPA Is Not Responsible for Respondents' Failure to Receive the Pre-Hearing Exchange on Time.**

Respondents argue that the "chief" reason they were unable to timely file their pre-hearing exchange was EPA's alleged failure to file its pre-hearing exchange on time. Response Brief at 3. First, even if EPA had failed to timely file – which EPA did not – it is not an excuse for Respondents to file late. The Presiding Officer's May 19, 2003, Pre-hearing Order calls for simultaneous exchanges. Therefore, Respondents' argument is without merit.

Second, EPA filed its pre-hearing exchange with the Regional Hearing Clerk on July 21, as required by the Presiding Officer's Order. See Certificate of Service attached to Complainant's Pre-Hearing Exchange. Complainant also served a copy of its pre-hearing exchange on Respondents on July 21. Id. As noted in footnote 1 of the Motion for Default for Failure to Submit Pre-Hearing Exchange, this package was returned as undeliverable (because the address was not quite correct), but EPA re-mailed it on July 24, the same day it was returned to EPA. See U.S. Postal Service Return Receipt, attached as Exhibit A. On August 14, it was again returned by the Post Office, this time as "unclaimed." Declaration of Valerie Badon, attached as Exhibit B. On August 14, EPA mailed it to Respondents for the third time. Id.

**B. Respondents' Lack of Understanding of the Case is Not Good Cause to Not Comply with the July 21 Filing Deadline.**

Respondents' argue that they could not timely file their pre-hearing exchange because EPA refused to respond to their February discovery requests. Response Brief at 3. This argument is without merit. As explained in EPA's letter to Respondents declining to respond to the discovery requests, under 40 C.F.R. § 22.19(e), a party must seek leave of the Presiding Officer to promulgate discovery, and it cannot do so until after the pre-hearing exchange is

complete. See Letter from M. Ryan to E. Weigelt, dated March 11, 2003, attached as Exhibit C. To date, Respondents have filed no motion for leave to take discovery in this case. Even if the information and documents they sought in discovery were critical to filing their pre-hearing exchange, these were provided in EPA's pre-hearing exchange. Thus, Respondents could have responded to these documents and the other information EPA provided when they filed their response to EPA's pre-hearing exchange. In conclusion, Respondents' failure to even move for, much less obtain, leave to take discovery from EPA does not excuse their failure to file their pre-hearing exchange on time.

**C. Lost or Water-Damaged Documents Are Not Good Cause to Not Timely File the Pre-Hearing Exchange.**

Next, Respondents argue that they did not timely file because of "the loss and damage of business records during their relocation from [their] business office in Seattle, Washington to Valdez, Alaska." Response Brief at 3. If Respondents could not locate key documents in time, they should have sought an extension of time to file their pre-hearing exchange, which they did not. This claim is questionable because it is the same excuse they used to not timely file a reply to EPA's 308 Information Request in 2002. See letter from T. Waterer to C. Cora, dated July 8, 2002, attached as Exhibit D. Similarly, past inspection reports show that Respondents' documents have been missing or "in Seattle" virtually every time they have been inspected during the last thirteen years. See Complainant's Exhibits C-6 through C-16. It appears that Respondents have a chronic problem with lost and damaged documents needed to show compliance with their NPDES permit.

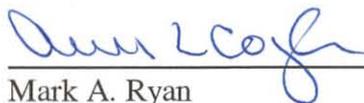
**D. If Respondent Waterer Was Too Ill to Assist in the Filing of the Respondents' Pre-hearing Exchange, He Should Have Filed a Motion for an Extension of Time.**

Finally, Respondents argue that they did not timely file owing to "a debilitating personal illness over the last two months which precluded Mr. Waterer from being able to locate lost records or reconstructing [sic] lost/damaged records." Response Brief at 3 (emphasis added). If Respondents had two-months' notice that serious illness would hinder their timely filing of the pre-hearing exchange, they should have sought an extension of time to answer. Respondents are not *pro se* and there is no claim that their counsel was in any way incapacitated. In the context of attempting to settle the case, Respondents were reminded in early June that a pre-hearing exchange date of July 21 was quickly approaching. See letter from M. Ryan to E. Weigelt, dated June 2, 2003, attached as Exhibit E. They cannot claim they were unaware of the impending date or the need to comply with it.

**III. CONCLUSION**

It is clear Respondents do not take this matter seriously. They filed their Answer to the Complaint more than two weeks late, and only after a Motion for Default was filed. They similarly filed their pre-hearing exchange weeks late, only after EPA filed a second Motion for Default and the Presiding Officer issued a Show-Cause Order. 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 25th day of August, 2003.



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

## CERTIFICATE OF SERVICE

I certify that the foregoing "Reply to Respondents' Response to EPA's 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  
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Copy, by fax and mail:

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Dated: 8/25/03

  
Valerie Badon  
U.S. EPA Region 10