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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	)	MOTION TO STRIKE RESPONSE
Waterkist Corp. dba Nautilus Foods	)	TO MOTION FOR ACCELERATED
Valdez, Alaska	)	DECISION
	)	
Respondents.	)	
	)	
	)	
	)	
	)	
	)	

**INTRODUCTION**

Pursuant to 40 C.F.R. § 22.16(a), Complainant moves to strike Respondents' brief in response to EPA's Motion for Accelerated Decision on the grounds that it was not timely filed. For good cause shown, Respondents' brief should be struck, and EPA's Motion for Accelerated Decision granted.

**BACKGROUND**

On November 5, 2003, the Presiding Officer in this case issued an Order denying EPA's second Motion for Default. In that Order, he stated: "**The Respondent is warned that any further delays in filing, subsequent failures to comply with the procedural rules, as set forth at 40 C.F.R. Part 22, or with the Court's orders, will not be overlooked.**" (emphasis in original). On November 14, 2003, a scheduling conference call was held between the Presiding

Officer, counsel for Respondent and counsel for EPA. During that conference call, the Presiding Officer again advised Respondent to meet all future filing deadlines. On November 18, 2003, the Presiding Officer issued an Order setting a hearing date of February 18, 2003, and requiring that all motions be filed prior to December 31, 2003. In his Order, he stated “[i]n addition to complying with the procedural rules requirements regarding filing, motions are also to be filed by facsimile with the Court.”

On December 12, 2003, Complainant filed two motions: (1) Motion for Accelerated Decision and (2) Motion for Discovery or in the Alternative Motion in Limine. Both motions were served on the Presiding Officer and counsel for Respondents by U.S. Mail and facsimile on December 12. See Certificates of Service attached to Motions. The Consolidated Rules of Practice (“CROP”) require that response briefs to motions be filed within 15 days. 40 C.F.R. § 22.16(b). Five days are added to that time frame for briefs filed by mail. 40 C.F.R. § 22.7(c). The twentieth day after December 12 was January 1, 2004, which was a federal holiday. Consequently, Respondents’ response brief was due on January 2, 2004.

On January 6, 2004, Respondents faxed to counsel for EPA and the Presiding Officer a response to EPA’s Motion for Accelerated Decision. No certificate of service was provided with the filing, so EPA does not know when the brief was mailed. As of the filing of this Motion to Strike, the Regional Hearings Clerk has not yet received Respondents’ response brief to EPA’s Motion for Accelerated Decision. The brief was signed on December 31, 2003, but the attached Declaration of Thomas Waterer was signed on January 5, 2004. The fax cover sheet shows that the brief was faxed to the Presiding Officer and counsel for EPA at 3:21 p.m. on January 6, 2004. Respondents filed no motion for extension of time to file their response brief nor requested of the

undersigned counsel additional time to file their brief.

Respondents to date have filed no response to EPA's Motion for Discovery or In the Alternative Motion in Limine.

### **ARGUMENT**

A major component of EPA's case centers on Respondents' repeated failure to meet deadlines or to comply with filing requirements of their NPDES permits. Consistent with that failure to comply with deadlines, Respondents filed both their Answer to the Complaint and their Prehearing Exchange late, prompting two motions for default from Complainant. Then, despite clear instructions to Respondents to miss no further deadlines, Respondents filed their next pleading late, and filed no response another motion filed by EPA.

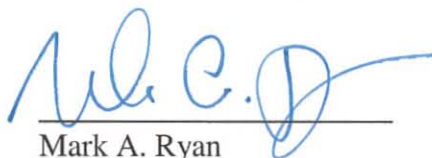
The hearing in this matter is not far off. Under 40 C.F.R. §§ 22.7(c) and 22.16(b), EPA has 10 days plus five days for mailing, or 15 days to file its reply brief. Respondents' delay in responding to EPA's Motion for Accelerated Decision pushes the due date for EPA's reply brief very close to the hearing date, leaving the Presiding Officer little time to review the pleadings and encroaching on EPA's time to prepare for hearing.

Respondents do not take this matter seriously. They filed their Answer to the Complaint and their Prehearing Exchange only in response to motions for default. They have filed no response to EPA's motion for discovery. Even after the Presiding Officer warned them on a conference call and in a written order to miss no more deadlines, they filed their response to EPA's Motion for Accelerated Decision several days late. They have violated the CROP on several occasions and now have ignored a direct warning from the Presiding Officer in this case.

## CONCLUSION

Respondents have violated the rules of procedure on several occasions and have now violated an express order from the Presiding Officer to comply with all applicable deadlines. For good cause shown, EPA's Motion to Strike the response to Motion for Accelerated Decision should be granted, and accelerated decision should be granted in Complainant's favor.

DATED this 7th day of January, 2004.



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

## CERTIFICATE OF SERVICE

I certify that the foregoing "Motion to Strike Response to Motion for Accelerated Decision" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, via pouch mail:

Carol Kennedy, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, Washington 98101

Copy, by FAX and first class certified mail:

Honorable William B. Moran  
Administrative Law Judge  
EPA Office of Administrative Law Judges  
Mail Code 1900L  
Aerial Rios Building  
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Copy, by FAX and first class certified mail, return-receipt requested:

Edward P. Weigelt, Jr.  
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Dated: \_\_\_\_\_

1/7/04

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Judy Versey  
U.S. EPA Region 10