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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	)	RESPONSE TO MOTION FOR
Waterkist Corp. dba Nautilus Foods	)	EXTENSION OF TIME
Valdez, Alaska	)	
	)	
Respondents.	)	
	)	
	)	
	)	
	)	

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**INTRODUCTION**

Pursuant to 40 C.F.R. § 22.16(b), Complainant responds to Respondents’ Motion for Extension of Time to File Opposition to EPA’s Motion for Accelerated Decision. Respondents have filed their motion out of time and have failed to show good cause why it should be granted. Consequently, Respondents’ motion should be denied.

**ARGUMENT**

**I. RESPONDENTS’ MOTION IS UNTIMELY**

The Consolidated Rules of Procedure are clear. In order to seek leave of the Presiding Officer to file a late brief, the moving party must file its motion for extension of time “sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer . . . reasonable opportunity to issue an order.” 40

C.F.R. § 22.7(b) (emphasis added). Respondents filed their motion for extension of time seven days after their response brief was due. This motion was not even filed contemporaneously with their late response brief; it was filed still later, only after EPA filed a motion to strike the late brief.<sup>1</sup>

As noted in EPA's Motion to Strike, the Presiding Officer in the present case twice expressly warned Respondents to not miss any more deadlines. See EPA's Motion to Strike Response to Motion for Accelerated Decision at 1-2. Despite this warning, Respondents filed their Response to the Motion for Accelerated Decision late and then, only after Complainant filed its Motion to Strike, filed their Motion for Extension of Time late. Respondents argue, without any evidentiary support, that they have once again missed a deadline for reasons allegedly beyond their control.<sup>2</sup> They argue that their futile search for missing documents in their closed Alaska seafood factory caused delays in filing. If Respondents were having trouble locating the documents, they should have sought an extension of time before their brief was due, not after.

## **II. RESPONDENTS HAVE FAILED TO SHOW GOOD CAUSE**

Under 40 C.F.R. § 22.7(b), a motion for extension of time shall be granted only upon a showing of good cause. Respondents' good cause arguments fail for several reasons. First, as

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<sup>1</sup> Respondents appear to react only to motions for default or to strike. They filed their Answer to the Complaint only after EPA filed a Motion for Default. They filed their Prehearing Exchange, again, only after EPA filed a second Motion for Default. Similarly, they filed the present Motion for Extension of Time only after EPA filed a motion to strike their tardy response to EPA's Motion for Accelerated Decision.

<sup>2</sup> Respondents Motion for Extension of Time refers to alleged efforts by Mr. Waterer to locate documents, but supports none of these statements with an affidavit or declaration from Mr. Waterer.

noted above, they have offered no reason why they did not file their Motion for Extension of Time prior to the due date as required by the rules.

Second, the documents for which they claim they were searching are missing monitoring logs and other documents that would constitute the core of Respondents' defense in the present case. Consequently, those documents should have been part of their prehearing exchange several months ago. It is inconceivable that Respondents first began looking for these documents after they filed their prehearing exchange, just six weeks prior to hearing, and only in response to a motion for accelerated decision. It is worth noting that EPA asked for these documents over a year ago in its 308 Information Request, and they were not produced. See Exhibits 21 and 30. Supposedly, Respondents made a good-faith search of their files at that time in an effort to respond to the 308 Information Request.

The case of In re Starkist Caribe, Inc., Docket No. CWA-02-2001-3404 (ALJ Biro Sept. 17, 2001) is instructive. In that case, despite an express warning from the ALJ to timely file a prehearing exchange, respondent filed its prehearing exchange three weeks late and did not file a motion for extension of time. The respondent's stated reason for missing the deadline, similar to the present case, was that the information was difficult to compile because the facility had closed. The ALJ rejected this excuse, and found respondent in default.

Finally, Respondents' history of missing deadlines shows a complete lack of respect for this proceeding, the rules of procedures, and the orders of this Presiding Officer. Respondents have managed to miss every deadline set in this case. Each time, they have failed to file a motion for extension of time or to seek from EPA additional time to answer, as summarized below:

Deadline

Excuse

Response to Motion for  
for Accelerated Decision

looking for documents

Prehearing Exchange

sickness of Mr. Waterer

Answer to Complaint

no excuse offered

Answer to 308 Information Request

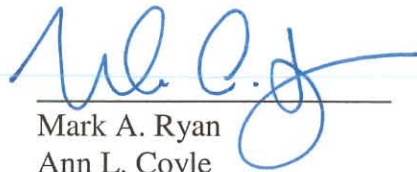
lost the Information Request.

Respondents' excuses for untimely filings ring hollow. What has become clear is that not even express warnings from the Presiding Officer to meet deadlines will instill in these Respondents any respect for the rules of procedure or for the orders of the Presiding Officer. They have failed to show good cause why they did not timely file their Response to Motion for Accelerated Decision or their Motion for Extension of Time on time as required by the rules and the Order of the Presiding Officer.

**CONCLUSION**

Respondents failed to file their Motion for Extension of Time prior to the applicable deadline as required by the rules and they have failed to show good cause why such an extension should be granted after the deadlines for filing the Motion for Extension of Time and the Response to EPA's Motion for Accelerated Decision were missed. Complainant respectfully requests that Respondents' Motion for Extension of Time be denied.

DATED this 12th day of January, 2004.



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

## CERTIFICATE OF SERVICE

I certify that the foregoing "Response to Motion for Extension of Time" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, via FAX and pouch mail:

Carol Kennedy, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
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Copy, by FAX and first class certified mail:

Honorable William B. Moran  
Administrative Law Judge  
EPA Office of Administrative Law Judges  
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Dated: 1-12-04

  
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Judy Versey  
U.S. EPA Region 10