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	)	**REPLY BRIEF IN SUPPORT OF MOTION FOR ACCELERATED DECISION**
Respondents.	)	

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INTRODUCTION

Pursuant to 40 C.F.R. §§ 22.16(b) and 22.20(a), Complainant United States Environmental Protection Agency (EPA) submits this reply in support of its Motion for Accelerated Decision Regarding Liability. As set out in detail below, Respondents have failed to show any genuine issues of material fact in dispute regarding whether Respondents discharged pollutants into navigable waters in violation of their National Pollutant Discharge Elimination System (NPDES) permits. Consequently, the Presiding Officer should enter judgment in favor of the Complainant regarding liability in this case.

ARGUMENT

I. RESPONDENTS HAVE SHOWN NO FACTS TO DISPUTE THAT THEY VIOLATED THE REQUIREMENTS OF THEIR NPDES PERMIT OVER THE LAST FIVE YEARS

In the underlying Motion for Accelerated Decision, EPA set forth specific facts establishing all of the elements of a Clean Water Act (Act) section 301 violation; i.e., that Respondents are persons who discharged pollutants from a point source into navigable waters in violation of the NPDES permits issued to their facility. To defeat this Motion for Accelerated Decision, Respondents must provide some evidence showing a genuine issue of material fact that requires an evidentiary hearing to determine liability. "The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment." In re City of Salisbury, Maryland, 1999 WL 608844 at *3 (ALJ Biro, July 30, 1999). Respondents have failed to come forward with such evidence.

As an initial matter, Respondents admit that they are "persons" within the meaning of

section 502(5) of the Act, Answer ¶ 9, and that the facility they operate is a "point source" as defined in section 502(14) of the Act, Answer ¶ 10. They also admit that the facility discharges pollutants into Port Valdez, which is waters of the United States within the meaning sections 502(6), (7) and (12) of the CWA. Answer ¶¶ 10, 12. Therefore, the only issues in dispute relate to Respondent's violations of the NPDES permit.

A. Respondents' Discharges Exceeded the Zone of Deposit

Respondents argue that: they were not required to perform annual dive surveys to determine the size of their zone of deposit (ZOD) because their discharge point is in greater than 20 fathoms of water; the ZOD did not exceed an acre in size at the time of the 1998 dive survey; and/or conditions would have caused the waste pile to dissipate over time. Respondents' Response Brief (Response) at 7-8. Respondents are correct that annual dive surveys are not required for discharge points in greater than 20 fathoms of water;[1] however, the ZOD at issue here was created by a discharge point in approximately 10 fathoms of water. Exhibit 18 at 1. Therefore, until Respondents affirmatively demonstrate (i.e., by conducting a dive survey) that the ZOD created by the original outfall is less than one acre, they are required by Part VI.C.5.c of the 1995 permit and Part VI.C.6.c of the 2001 permit to conduct annual dive surveys. Exhibit 1 at 27, Exhibit 2 at 34. They did not.[2]

Alternatively, Respondents argue that the ZOD is less than an acre based on their

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[1] A fathom equals six feet. Merriam-Webster's Collegiate Dictionary, 10th Ed. 2002.

[2] Part VI.C.5.c of the 1995 permit and Part VI.C.6.c of the 2001 permit require annual followup dive surveys of waste piles that exceeds three-quarters of an acre. There is no evidence in the record that Respondents ever performed these required follow-up dive surveys.

interpretation of the 1998 Dive Survey, which they commissioned. However, the 1998 Dive Survey states that the ZOD was 1.48 acres. Exhibit 18 at 6. Like a discharge monitoring report, Respondents cannot challenge the accuracy of their own reporting; i.e., the 1998 Dive Survey. *See* Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1492, 25 ERC 1801 (9th Cir. 1987), vacated on other grounds, 108 S. Ct. 1102-03 (1988), judgment reinstated, 853 F.2d 667 (9th Cir. 1988); United States v. Sheyenne Tooling, 952 F. Supp. 1414, 1418 (D.N.D. 1996) ("A source may not later question its own reports to the EPA as a method of avoiding liability, and such reports are considered admissions as to liability.").

Finally, Respondents argue that the conditions in the water would have caused the waste pile to dissipate over time. They allege that the facility is located in Prince William Sound, not Port Valdez, as shown in the 1998 Dive Survey, Exhibit 18, and as admitted in their Answer. Answer ¶ 12. Further, Respondents assert that the discharge point is in deep water and subject to strong currents, Kaayk Declaration at 5, Waterer Declaration at 7; however, they provide no demonstrative evidence to support these contentions. Neither Respondent Waterer, nor the plant manager, is qualified to make statements regarding the rates of dissipation of waste piles in Port Valdez. They have not provided information to suggest that either has any expertise in aquatic biology or hydrology, nor do they reference any materials on which their opinions are based. They have provided no information demonstrating that they are in any way qualified to render an opinion regarding the dissipation rate of submerged seafood waste piles. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt").

B. Respondents Do Not Contest that They Failed to File Annual Reports

Respondents do not contest that they did not file annual reports for 1999, 2000, and 2001. Response at 9. Respondents have not produced an annual report for 1998, either in response to EPA's Section 308 information request in 2002, Exhibit 21, or as part of their prehearing exchange. Therefore, there are no genuine issues of material fact regarding Respondents' failure to submit annual reports in 1998, 1999, 2000, and 2001.

C. Respondents Failed to Conduct Shoreline Monitoring

Respondents allege that shoreline monitoring was conducted on a daily basis in 1998, 1999, 2000, 2001, and 2002, and that their shoreline monitoring reports were destroyed during a severe storm. Response at 9. In addition, Respondents assert that "EPA has not submitted any evidence or even made the allegation that these records were not available to it during prior inspections." *Id.* To the contrary, EPA explicitly made this assertion and provided supporting evidence in its Motion for Accelerated Decision. Complainant's Motion for Accelerated Decision at 11. During the 1998 inspection, because Respondents could not provide shoreline monitoring reports, EPA inspectors showed representatives of Respondents how to fulfill the shoreline monitoring requirements. Exhibit 12; *see also* Exhibit 11 (during the 1997 inspection, one of Respondent's employees stated that he was unaware of the shoreline monitoring requirements and that shoreline monitoring was not conducted). At the time of the 1999 inspection, no shoreline monitoring forms had been filled out for the days of processing that year. Exhibit 14. As of the 2002 inspection, the only daily shoreline monitoring records that Respondents could produce were for a few days in 1999 and part of the processing season in

2001. Exhibit 16. Respondents had no records available for the 2002 season. *Id.* Regardless of whether some of these records were allegedly destroyed in a storm, Respondents were not filling out shoreline monitoring reports on a daily basis during the processing seasons; otherwise they would have been available during the annual inspections.

Respondents are required by Part VII.B of the 1995 and 2001 permits to maintain records for five years. Exhibit 1 at 31, Exhibit 2 at 39. Therefore, up to the year of the storm, during any inspection Respondents should have had the previous five years of monitoring records available. Inspection reports from 1997, 1998, 1999, and 2002 indicate that they did not. Exhibits 12, 12, 14 and 16.

D. Respondents Discharged Floating Solids

Respondents allege that EPA takes the 2000 inspection report out of context and blame other users of the Valdez dock for fish solids identified as originating from Respondents' facility. Response at 10. The 2000 inspection report clearly identifies a source of fish solids from the facility. It states: "[p]hysical inspection of the outside dock side areas revealed water and fish gurry running from the plant through an open door, down an inclined ramp, and into the adjoining waterbody," such that there were visual accumulations of "solid fish wastes, debris, foam, and gurry in the waterbody directly adjoining the plant and under the offloading dock and inclined ramp to plant." Exhibit 15 at 3. Respondents would have the Presiding Officer focus on the inspector's finding related to the outfall area (where he observed no floating solids), while the violation actually occurred adjacent to the dock. That there may have been other people disposing of fish wastes in the water near the facility does not obviate Respondents' obligation to

comply with the terms of the permit. Respondents have provided no evidence to refute that fish wastes were discharged from their facility directly into the Port Valdez, resulting in solid fish wastes, debris, foam, and gurry appearing on the water surface.

E. Respondents Discharged Down a Ramp into Port Valdez

Respondents do not dispute that they discharge fish waste, at least blood and fish scales directly from their facility;[3] however, they allege that this was not prohibited under the permit. Response at 10-11. Respondents misinterpret the requirements of the permit. Part V.C.1.b and c of the 1995 permit prohibits the discharge of seafood processing waste, including incidental waste, except through a waste conveyance and treatment system, which ultimately discharges through the outfall. Exhibit 1 at 16. Part V.C.1.h of the 1995 permit requires that any discharges of wastewater must be at least 10 feet below the surface of the receiving water.[4] *Id.* at 18.

Respondents allege that no process wastewater could be flushed from the facility directly into Port Valdez, Kaayk Declaration at 7, Waterer Declaration at 3; however, an inspection report from 1995 clearly describes how process waste dropped into floor channels could escape the facility because the processing floor slopes toward a doorway leading to the dock. Exhibit 10 at 2. The 1995 inspector thought the potential for process water to flow through the door was so high that he suggested Respondents install a berm across the doorway to prevent such discharges. *Id.* The 2000 inspection confirmed the concerns articulated in 1995. The inspector observed

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[3] The 2000 inspector observed far more than fish scales and blood. He noted water and gurry flowing from the facility into the water, and an accumulation of solid fish wastes, debris, foam, and gurry in the water directly adjoining the plant and under the offloading dock and inclined ramp to the plant.

[4] Part V.C.1.b and c and Part V.C.1.m of the 2001 permit contain similar requirements.

water and fish gurry running from the plant through an open door, down an inclined ramp, and into the adjoining waterbody. Exhibit 15 at 3. This waste was not being collected into the central drain channels and discharged through the wastewater treatment system, nor was it discharged 10 feet below the surface of the receiving body. It was being flushed directly into Port Valdez with no treatment at all.

The water and gurry observed during the 2000 inspection had been in contact with seafood and resulted in accumulations of "solid fish wastes, debris, foam, and gurry in the waterbody directly adjoining the plant and under the offloading dock and inclined ramp to plant," Exhibit 15 at 3; therefore, the exemption from the requirement to discharge through the seafood process waste-handling system in Part V.C.1.e of the 1995 permit does not apply to Respondents.

F. Respondents Did Not Timely Repair Their Broken Outfall

Respondent alleges that EPA "intentionally misleads the court" by contending that Respondents failed to repair a broken outfall line between the 2000 and 2002 inspections. Response at 11. Perhaps unsurprisingly, Respondents' Response contains the first mention that there might have been two separate leaks in the outfall line, and provides no documentary evidence to support separate repairs (e.g., invoices, repair records, etc.). As pointed out in Complainant's Motion for Accelerated Decision, when asked for information about the outfall line in EPA's information request in 2002, Respondents stated that they had "none." Exhibit 21 at 2. Now, in response to EPA's Motion for Accelerated Decision, Respondents suddenly have information related to the outfall repair. Moreover, in their August 6, 2000, letter to EPA, Respondents identified the location of the leak as "somewhere under the city dock," Exhibit 15 at

5, which is one of the areas where the EPA inspector observed leaking in 2002. Exhibit 16 at 3. This is corroborated by the declaration of Respondent Waterer, who describes an 18-foot line of separation, caused by a break in the outfall pipe at the base of the dock. Waterer Declaration at 5. Without additional documentary evidence to support Respondents' claims that the outfall was repaired, there is no reason to conclude that the bubbling observed by the EPA inspector in 2002 was not caused by the same break as the one observed in 2000. If anything, the inspector's observations indicate that there were at least two breaks in the pipe, one below the waterline at the base of the dock and the other, a crack in the above-water piping. Exhibit 16 at 3.

G. Respondents Failed to Properly Identify the Permittee in the Notice of Intent

Respondents allege that under Alaska law, a trade name is legally sufficient for "all purposes" under Alaska law; therefore, they were not required to use the registered name of the corporation in submitting a Notice of Intent (NOI). Response at 12. This is a question of law, not fact. Respondents do not dispute that they used the name "Nautilus Foods, a Corporation" in submitting their NOI. *Id.* Thus, no genuine issue of material fact is in dispute.

As to the legal issue of whether it was appropriate to use a trade name rather than the corporate name in submitting the NOI, Respondents do not provide a single citation to Alaska law to support their allegation. *Id.* Rather, Respondents rely on the "understanding" of the plant manager, who is not a lawyer, to determine what their legal obligations are. Kaayk Declaration at 8. The law is clear on this point, however. EPA regulations state that an NOI must include, among other things, "the legal name and address of the owner or operator." 40 C.F.R. § 122.28(b)(2)(ii). Nowhere in the Act, its implementing regulations, or the permit does it state

that an assumed trade name may be used as a substitute for a registered corporate name.

H. Respondents Failed to Keep a Copy of Their Best Management Plan On-Site

Respondents allege that their Best Management Plan (BMP) was on-site during inspections in 1998, 1999, and 2000. Response at 12. This is a striking assertion, given that Respondents could not produce a copy of the BMP during inspections in 1998, 1999, 2000, and 2002. Exhibits 12, 14, 15, and 16. Further, in 2000, Respondents told the inspector that the BMP was "missing." Exhibit 15 at 3. It is remarkable that in January 2004, Respondent Waterer claims that the BMP was packed for transportation to Respondents' Washington office in September 2000, Waterer Declaration at 9, when at the time of the inspection in 2000, Respondents only stated that it was "missing," Exhibit 15 at 3.

I. Respondents Did Not Keep a Copy of the Permit on the Premises

Respondents allege that they keep copies of their business records, including their NPDES permit, on-site during the period of operation. Response at 12. However, during each inspection in 1998, 1999, and 2000, all of which were conducted during the fish processing season, Respondents were unable to produce a copy of the permit. *See* Exhibits 12, 13, 14, and 15. Despite asserting that the permits were on-site, Respondents alternatively claim that in their semi-annual moves to and from Valdez, Alaska, and Bellevue, Washington, documents have gotten lost, misplaced, mislabeled and/or destroyed.[5] Response at 12, Waterer Declaration at 8-9. Respondents' "woe is me" attempt to explain away sloppy recordkeeping and disregard for the

[5] EPA finds it remarkable that even though Respondents transfer their business records to Bellevue, Washington, every winter, it justified its *post hoc* Motion for an Extension of Time in part on "delay in receiving records from Valdez, Alaska." Respondents' Motion for Extension of Time at 2.

law is disingenuous at best. Respondents are required to keep a copy of the permit on-site so that they can ensure that they are in compliance with its terms; therefore, as soon as they realized that the permit was missing–which occurred at least annually as a result of the inspections– Respondents should have replaced the permit. By failing to do so, Respondents violated the Act.

J. Respondents Did Not Properly Monitor Their Grinder

Respondents contend that there is a factual dispute about what level of monitoring is required under the permit. Part V.C.e of the 2001 permit is clear:

> A permittee shall conduct a daily inspection of the grinder system during the processing season to confirm that the grinder(s) is (are) (1) operating and (2) reducing the size of the seafood residues to one-half inch or smaller. This will require inspecting the size of the ground residues reduced in grinding. Logs of these daily inspections shall be kept at the facility.

Respondents admit that they did not maintain a separate written monitoring log for the grinder. Response at 13. Respondents also admit that their monitoring consisted of *listening* to the grinder and visually observing if it was plugged into an outlet or not. *Id.* Respondents did not perform visual inspections of the size of the ground seafood residues as required by the permit.[6]

K. Respondents Did Not Properly Operate and Maintain the Facility

Respondents base their argument that they properly operated and maintained the facility on unsupported statements, misinterpretations of the law, and piteous excuses. Respondents have provided no demonstrative evidence to support their assertion that they repaired the leak(s)

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[6] Despite Respondents' assertion that materials "less than 0.5 inch pass through a filtering grate and those which do not continue to be processed until they do," ensuring that "[t]he system either works, or not," 50 percent of the ground fish waste observed in the ZOD during the 1998 Dive Survey was half an inch or larger, including "large chunks and skin." Exhibit 18 at 5. Clearly Respondents' system does *not* "either work, or not."

in their outfall line, that they were not required to submit annual dive surveys for the ZOD created by their original outfall line, or that they maintained proper monitoring records for their undersea waste piles or sea surface and shoreline. Respondents' longstanding disregard for the requirements of the permit reflects a general failure to properly operate and maintain the facility in accordance with the permit.

CONCLUSION

There is no material issue of fact disputing that Respondents are persons who discharged pollutants (seafood wastes) from a point source (seafood processing plant) into navigable waters (Port Valdez) in violation of the terms of the NPDES permits issued to the facility. For the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant its motion for accelerated decision and find Respondents liable as a matter of law for violations of section 301 of the CWA.

DATED this 22 day of January, 2004.

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CERTIFICATE OF SERVICE

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

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