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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)	Respondents' Response
Valdez, Alaska,)	In Opposition to EPA's Motion
)	For Accelerated Decision
Respondents.)	
_____)	

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ORIGINAL

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is filed by the Respondents, Thomas Waterer and Waterkist Corporation, in opposition to the Environmental Protection Agency's Motion For Accelerated Decision.

Waterkist Corporation operates a fish processing plant in Valdez, Alaska.

Waterkist Corporation does business under the trade name "Nautilus Foods." The plant operates under a number of processing permits issued by the State of Alaska, including a fish processor's license issued by the Alaska Department of Environmental Conservation ("ADEC"). Waterkist's trade name, Nautilus Foods, is the trade name used on its operating licenses issued by the State of Alaska and the U.S. Government, including its ADEC permit to operate, Alaska Department of Revenue Primary Fish Buyer's Certificate and the U.S. NMFS Registered Buyer's Permit. (See Exhibits A, B, C respectively, to Waterer Declaration). At issue in this case is Waterkist's compliance

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with its National Pollutant Discharge Elimination System Permit (“NPDES Permit”).

In overview, the EPA contends that Waterkist has violated three aspects of the NPDES Permit: (1) discharging unprocessed or improperly processed fish waste which resulted in the discharge of “whole fish heads”, (2) failing to properly monitor its discharge systems and the accumulation of discharge waste, and (3) allowing the discharge to accumulate in an area which exceeds the allowable zone of deposit of one acre.

These allegations involve a number of factual matters which will be discussed generally in the Statement of Facts. In general, Waerkist disputes the EPA’s factual allegations, and particularly those relating to EPA’s conclusions involving the alleged discharged of unprocessed waste such “whole fish head, ” and the allegation that Waterkist failed to conduct proper sea, shoreline, and grinder monitoring.

At the outset the court should be aware that the EPA misconstrues a number of material issues and fails to inform the court of other matters relevant to its purported observation of the conditions. With regard to EPA’s purported observations relating to improperly processed fish waste, including whole fish heads, the EPA conveniently forgets to disclose that the area of these purported observations is actually used a number of third parties such as sports fisherman and others who dump large quantities of accumulated unprocessed waste off the City of Valdez, City Dock, which is the dock also used by Waterkist. Moreover, it is a physically impossible for the waste materials such as “whole fish head” to pass through Waterkist’s discharge system, nor can the system be by-passed.

EPA also reports that Waterkist’s monitoring records are spotty, and hence it

argues that Waterkist failed to properly monitor. Once again the EPA fails to inform the court of the circumstances. For safety and security reasons Waterkist relocates all of its business records twice a year relating the commencement and cessation of operations. The facility is not manned during the winter months. In recent years alone winter storms, record snows and water have caused over \$1,000,000.00 dollars damage to the building and its contents. Because of these factors business records are relocated. The records encompass approximately 200 banker boxes. During the moves non-current records frequently get misfiled. More significantly the vessel transporting the records was damaged during a storm which resulted in the hold in which the records were in to be flooded with sea water. Many of the records were destroyed.

STATEMENT OF FACTS

Waterkist's fish processing plant is located along the shores of Prince Williams Sound, near Valdez, Alaska. The plant, contrary to EPA's factual contention, is not located in Valdez, Harbor. (Declaration of David Kaayk). The plant is adjacent to the City of Valdez "City Dock."

The City of Valdez "City Dock" is owned by the City of Valdez, and used by Waterkist and many others. This is a large deep water dock. The face of the dock is approximately 120 feet from the shoreline. The dock itself is over 600 feet in length, 60 feet wide, and runs parallel with the shoreline. The dock is accessed at three dock ramps located at each end and the center. The center ramp leads into the Waterkist fish processing plant. (Waterer Declaration). A portion of the surface of the dock is used by Waterkist for offloading of fish and conveying them into the plant for actual

processing. The remainder of the dock is used by others. Fish cleaning stations are provided by the City of Valdez for sports fisherman, and the unprocessed waste, guts and whole fish heads are dumped directly into the water between the shoreline and dock. (Waterer Declaration).

The water depth at the face of the dock is a minimum of 35 feet and quickly deepens to over 600 feet in depth. The water currents at this location are strong. The area is subject to extremely strong wave action, tides, and back flushing. (Declaration of David Kaayk). Waterkist's discharge outfall line was relocated in 1998, and currently discharges at a depth in excess of 20 fathoms. (Declaration of Thomas Waterer). A survey relating to recent dock repairs places the outline in 25 fathoms of water. (Waterer Declaration).

The EPA contends that its inspectors observed improperly processed fish waste, including "whole fish heads" in the vicinity of the plant and along the shore. The EPA suggests two sources: improper grinding and an above-water fracture in the waste discharge line. EPA conveniently fails to provide the details relating to these observations which contradict its allegations, and fails to inform the Court of the third party users of the dock who directly dump fish waste, including "whole fish heads" into the waters of the dock. (Declarations of Thomas Waterer, Kaayk, and related photographs, attached to Waterer Declaration).

Waterkist properly processes fish waste. Waterkist's fish waste is processed by an industrial high capacity grinder designed to grind the materials to a diameter of less than ½ inch. The processed material passes through screens, and are then pumped under pressure through a discharge pipe to a point located approximately 300 feet from

shore at a water depth in excess of 20 fathoms. (The discharge line was replaced in 1998, and this work is noted in the 1998 dive survey relied on by EPA. Declaration of David Kaayk). The effectiveness of Waterkist's system is noted in the EPA inspection report of September 21, 2000 even though the inspector also visually observed fish wastes, debris, foam and gurry in the waters directly adjoining the plant. With regard to Waterkist's activities, this report (EPA Exhibit 15) states:

Yes	No	
<input type="checkbox"/>	<input checked="" type="checkbox"/>	"Is discharge occurring in one of the prohibited areas listed above."
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Treatment: Are all seafood processing wastes collected and ground to 0.5 inch or less prior to discharging.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Accumulation: Any accumulation of seafood waste on shore. "Physical inspection of outfall area noted no bird attractions or visual accumulations of floating solids."

The inspector separately noted fish waste products along the shore. However, he did not cite Waterkist, nor advise Waterkist that he believed this was from its operations. The inspector, who is a ADEC employee, did not attribute his observations to Waterkist. Had he done so, he would have cited Waterkist.

As alluded to above, the City of Valdez City Dock is not only used by Waterkist but is also used by many others well. The use by others includes sports fisherman, various marine vessels, tourists, outfitters, fishing vessels, tenders, competing processors, and local businesses. *It is important to emphasis that Waterkist does not process, gut, head or fillet or engage in any similar processing activity on the dock.* However, other users in fact engage in these activities directly on the dock.

(Declarations of David Kaayk and Waterer).

Several of the third party users such as local RV park operators accumulate fish waste materials (whole fish heads, unprocessed fish guts, fins, etc.) at processing stations for their customers and then dump the accumulated waste (again including whole fish heads, unprocessed fish guts, and related waste products) off the dock, and frequently between the dock and the shoreline. At times there may be a dozen to several hundred people and fisherman using the dock and gutting their fish there.

(Declaration of David Kaayk).

EPA makes a number of contentions relating to Waterkist's monitoring of shoreline, waste discharge system, and failure to submit dive surveys since 1998. As discussed in more detail in the Declarations of David Kaayk and Thomas Waterer, Waterkist properly monitored the system but many monitoring records were destroyed during transit during a relocation of Waterkist's business records, and others were misfiled during the moves. The relocation of the business records relates to the opening and closing of the plant each season. During the winter the plant is not manned and due to its location it is subject to storm and winter damage.

The EPA relies on a 1998 dive survey to contend that the zone of deposit exceeded one acre, and in particular that the zone is 1.48 acres. (EPA Exhibit 18). The outfall discharge line was relocated into deep water, and as such dive surveys for 1999 to the present are not required by the Permit. (Permit Part V.C.4). The 1998 survey is ambiguous. The dive was commissioned as part of a repair and replacement of the line which apparently had been damaged during the winter, and most likely damaged by a drag anchor catching the line and breaking it. (Waterer Declaration).

The diver describes the waste pile at page 5 of his report as follows: "Over all the main waste extends along the face of the dock on approximately 110' to the west and 140 feet to the east. There is fairly even coverage of 0.8 to 1.1' at the face of the dock. For the waste extends out from the dock approximately one hundred and sixty feet..." The dimensions of the pile are thus 250 feet by 160 feet, or 40,000 square feet, which happens to be less than one acre. (Exhibit 18 page 5).

STATEMENT OF ISSUES

The issues in this case are fundamentally factual issues. The EPA asserts a number of specific violations. For purposes of presentation these issues will each be addressed in the same order as presented in the EPA's Motion.

Waterkist Has Not Violated The Zone of Deposit

Requirements of the NPDES Permits.

The EPA claims that Waterkist violated the zone of deposit limitations of the NPDES Permit in that the zone of deposit has exceeded a 1 acre size for the last five years, i.e., since 1998, and separately, that Waterkist has failed to file annual dive surveys. EPA concedes that waste deposit piles dissipate over time. EPA has not introduced any expert testimony that the conditions noted in the 1998 dive survey exceeded NPDES quality standards, nor that those conditions presently exist. EPA misleads the court by contending that Waterkist has failed to comply with the Permit by its failure to file annual dive surveys.

The Permit limits the size of the zone accumulation which exceeds NPDES standards to one acre. The Permit does not require monitoring when the discharge is in more than 20 fathoms, nor does it expressly address the zone of deposit in that

circumstance.

The EPA contends that a 1998 dive survey indicates that Waterkist's zone of deposit exceeded one acre. This report was performed as part of the relocation of Waterkist's outfall discharge line to deep water. The diver assisted in the relocation of the line. While the report recites the overall area of distribution of processed waste material, it does not indicate the applicable water quality standards, nor define the areas which are within or which exceed the water quality standards. Moreover the narrative of the report at page five describes the size of the pile as being 250 by 160 feet, which is 40,000 square feet, this is less than one acre.

The cornerstone of EPA's argument is its contention that Waterkist violated the zone of deposit since 1998 because it failed to file annual dive surveys. Waterkist's Permit requires monitoring of the waste deposit only if the point of discharge is in less than 20 fathoms of water. Monitoring requirements are set forth in Part V.C. 4 of the Permits, which states that monitoring is required when the "discharging to receiving waters of depths of less than twenty (20) fathoms at a fixed position." In other words, contrary to EPA's contention, Waterkist does not have an obligation under the Permit to file annual dive surveys.

A waste pile is dissipated by water currents, natural deterioration, and is consumed by fish, crabs and other organisms. (Declarations Kaayk, Waterer and Cora). The outfall discharge line is not, as stated by EPA, located in Valdez Harbor, but is in an area of deep water and very strong currents. The EPA concedes that waste dissipates by the current, and has failed to introduce any evidence exceeded any standards for any period of time.

Annual Reports.

The Respondents do not contest annual reports were not filed for 1999, 2000 and 2001.

Shoreline Monitoring.

The Respondents contest the EPA's allegation that Waterkist did not conduct shoreline monitoring for the years 1998, 1999, 2000, 2001 and 2002. (Declaration of David Kaayk). Shoreline monitoring was performed on a daily basis during periods of operation. As stated in Mr. Kaayk's and Mr. Waterer's Declarations many of Waterkist's business records, including plant, dock, and shoreline, monitoring logs, were destroyed during transit when the hold of a vessel transporting the records was flooded with seawater during a severe storm. These records are not required to be submitted to EPA on an annual basis. EPA was apprized of the loss of these records when it requested them in 2002.

The court should note that the EPA has not submitted any evidence or even even made the allegation that these records were not available to it during prior inspections including prior inspections by ADEC or EPA. Certainly, if ADEC or EPA believed this was an issue in 1998, 1999, 2000, or 2001, they would have raised it as a concern at that time or cited Waterkist. They did not.

Floating Solids

The EPA contends that Waterkist violated the Permit by the discharge of waste materials which result in foam or scum on the surface of the water in excess of the mixing zone. The basis of this contention is the observations of an ADEC inspector, Mr. Pressley, on September 21, 2000 that he observed "visual accumulation of floating

solids” in the “waterbody directly adjoining the plant, and under the offloading dock and inclined ramp to the plant.”

Mr. Pressley did not cite Waterkist for any violation. Mr. Pressley did not inform Waterkist that it was in violation. Mr. Pressley did not make any findings that these observations related to Waterkist’s activities. To the contrary, in the same report Mr. Pressly expressly noted that there was no accumulation of floating solids in the outfall area. He wrote at page two: “Physical inspection of outfall area noted no bird attractions, or visual accumulation of floating solids.”

EPA now takes Mr. Pressley’s observations out of context. As noted in Mr. Kaayk’s Declaration, there is a significant problem with third party users who use the dock and dump their fish waste directly into the water between the dock and the shoreline. In contrast Waterkist’s outfall, where no solid accumulation has been observed, is over 300 feet away in deep water.

Ramp Discharge

The EPA contends that Waterkist discharged seafood processing wastes through an open door and down an incline ramp. This again is based on Mr. Pressley’s report of September 21, 2000. Mr. Pressley did not cite Waterkist for any violation and disputes his observations involve a violation of the Permit.

There are several different types of discharges under recognized under the Permit. Seafood process waste products are required to be processed by the waste handling system. (See e.g. Part V.C.b.). Wastewaters are not required to be processed unless they produces a sheen on the water. Transfer water and wastewaters which have not had contact with seafood process waste are not required

to be discharged through the system waste-handling systems.

Waterkist does not discharge waste, or wastewaters, directly into the water. This is captured by the processing equipment, floor channels and drains. Processing occurs only in the central area of the plant. The plant is approximately 30,000 square feet. The intake area of the plant is via a dock ramp. No processing is done at this location.

With any handling of fish is some level of fish materials such as scales and blood which may get on the equipment, a person's hands, or the dock. People and forklifts use the ramp area, and the area is hosed off. These materials are not processing wastes and the hosing off of the dock ramp area is not prohibited by the Permit.

Mr. Pressley's report is taken out of context by the EPA. At times plant ramp area may be hosed down. It also rains. Processing does not occur in this area, however, due to the nature of handling fish, fish scales and blood may be tracked into this area. Mr. Pressley, who is an enforcement officer for ADEC, did not cite Waterkist nor advise it that activities of washing down the ramp area was prohibited, or that the water must be captured and run through the waste processing system.

Broken Outfall

The EPA contends that Waterkist failed to repair a broken outfall line. The EPA intentionally misleads the court. In 2000 there was a below waterline problem with the outfall line. EPA was put on notice of this problem in August. A temporary repair was made but permanent repairs were unable to be performed until after September 21, 2000. The permanent repairs involved the replacement of the line. Two years later Mr. Cora of the EPA observed that the pipe was leaking below the dock. From these two separate events, at different locations, the EPA suggests that Waterkist failed to

repair the pipe for two years. This is incorrect. (Declarations Kaayk and Waterer).

The problem Mr. Cora observed in 2002 was a hair line fracture in an above water joint or union. According to the EPA this is the source of "whole fish heads." The hair line fracture caused the pipe to "leak." It joint was replaced.

Notice of Intent

Waterkist Corporation does business under the trade name Nautilus Foods. This name is noted on Waterkist's Alaska business and processing licenses in compliance with Alaska law. A trade name is a proper name under Alaska law, and may be used for all purposes. (Declaration of Waterer).

Best Management Plan

Waterkist's Best Management Plan, a copy of which is EPA's Exhibit 19, was on site during inspections in 1998 and 1999. In 2000 the plan was on site, albeit the date of the inspection corresponded with the closure of the plant and business records had been packed for shipping. (Declaration Waterer).

Keeping Permit On Premises

Waterkist maintains copies of its business records on the premises. As a general business practice Waterkist relocates its records twice a year corresponding with the commencement and cessation of operations at the Valdez plant. Waterkist disputes that the Permits were not on the premises during all times of operation. It is Waterkist's general business practice to maintain the Permit on the premises. (Declaration of Waterer).

Because of the relocation of records, some records may get mislabeled or incorrectly filed. Depending on the circumstances, it may take time to locate the Permit

particularly if the request is made of a employee who is not personally familiar with maintenance of records. EPA has not provided any information.

Failure to Monitor Grinder

Waterkist did not maintain a separate written monitoring log for the grinder. However, this does not mean that it was not monitored. The system, much like a light in a dark room, is either working or not. Monitoring the system is done visually and audibly. It is on (operating) or off (not operating). The EPA contends that the visual and audibly monitoring of the system and in particular the grinder, is inadequate. The heart of this issue is a factual dispute as to what level of monitoring is required under the Permit.

The grinder is a mechanical device which uses an electric motor to grind waste material. The materials which are less than 0.5 inch pass through a filtering grate and those which do not continue being processed until they do. The processed material passes through a liquid discharge pipe. The size of the discharge pipe increases in size after filtering. The system either works, or not. If the grinder ceases to function or to grind, the system plugs and shuts down. There are various safety features built into the system, including automatic shut offs, and float valves. The operation of the grinder and the system load can be ascertained by listening to it, and visually observing whether it plugged or not. The system works much like a household garbage disposal with filtering screens and grates. It is a factual issue of whether this type of monitoring is adequate.

Failure To Properly Operate and Maintain

The EPA alleges that Waterkist fails to properly operate and maintain the

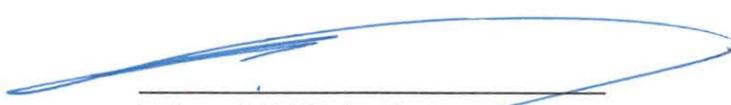
system. The EPA basis this allegation on a number of incorrect factual statements, including an unrepaired break (false), failure to submit annual dive surveys (not required), and failure to produce monitoring records in 2002 (destroyed, as previously mentioned).

Waterkist regularly maintains, inspects, and monitors the waste system and shoreline. While there is room for improvement in the context of record retention or handling, this does not mean that Waterkist violated the Permit for failure to operate the maintain and operate the system.

Conclusion

The issues raised by the EPA involve factual matters. The court should deny the EPA's Motion For Accelerated Decision.

Respectfully submitted this 31 day of December, 2003.



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