

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
GENERAL MILLS OPERATIONS,)	DOCKET NO. CWA-05-2003-0020
INC., WEST CHICAGO, IL)	
)	
RESPONDENT.)	

ORDER

On March 9, 2004, the parties filed a Joint Motion of Parties To Enter Into Alternative Dispute Resolution. In the Motion, the parties request that this litigation case be reassigned to the Alternative Dispute Resolution docket.

This case was initiated on September 3, 2003, six months ago. The Complaint alleges in a single count that Respondent discharged wastewater containing pollutants exceeding the maximum allowable concentrations between October 22, 1998 and October 28, 2001, in violation of the Clean Water Act, 33 U.S.C. § 1317(d). *See*, Amended Administrative Complaint filed October 22, 2003. The Complainant seeks a penalty of \$137,500. *Id.* In its Answer, Respondent admitted that on certain occasions within in that time period sampling results indicated that its wastewater exceeded the applicable limits, but Respondent raised 19 affirmative defenses. *See*, Respondent’s Answer filed January 7, 2004

As acknowledged by the parties in their Motion, on January 15, 2004, each party received from the undersigned a separate letter, addressed to each party individually, offering an opportunity to participate in this Tribunal’s alternative dispute resolution (ADR) process. The parties also received a copy of the ADR offer letter sent to opposing counsel. This Tribunal’s ADR offer letter explained to the parties the terms under which ADR is provided including, specifically, that “ADR will be utilized in a case *only with the consent of both parties*. “ *See*, ADR offer letter (emphasis added). The ADR offer letter established deadline of January 29, 2004 to respond “if *you* would like to use the ADR process, “ and stated that “[i]f *you* do not respond by the deadline, it will be assumed that *you do not* wish to participate in ADR and the case will be assigned immediately to a Judge for litigation.” *Id.*

On January 28, 2004, Respondent timely submitted its response to the ADR offer letter. The substance of the response was a single sentence which read, “Pursuant to the offer made in your letter of January 15, 2004, *General Mills Operations, Inc.* is hereby informing you of *its*

intent to pursue Alternative Dispute Resolution in the above-referenced matter.” (Emphasis added.) Respondent’s letter made no reference whatsoever to Complainant’s position with regard to ADR. A copy of the letter was served on Complainant.

Having received no indication that Complainant wished to participate in ADR, on February 3, 2004, this Tribunal assigned this matter to the litigation docket and sent an Order of designation to that effect. That Order was followed three weeks later, on February 24, 2004, with a Prehearing Order establishing various deadlines in this matter. In the interim, no response to the designation order assigning this case for litigation was received from either party.

However, on February 27, 2004, the undersigned received a letter from Respondent noting that *it* had requested ADR and inquiring why it had not received any indication that ADR process had been initiated. The undersigned’s Office responded to the inquiry on March 1, 2004 by telephone explaining to Respondent that since that Complainant had not consented to ADR as well, the case had been assigned to the litigation docket.

Now in their motion the parties both represent that “Neither Party understood the January 15 letter to require that U.S. EPA concurrently make a request for ADR.”

The suggestion that Agency counsel was unaware of the need to respond to the ADR letter on its own behalf if it desired to engage in ADR defies credibility. The ADR letter sent out in this case is a form letter which has been consistently used by this Tribunal for almost seven years. It is sent out to each party in essentially every case filed with this Tribunal. There is nothing in the text of the letter which indicates any ambiguity, and Complainant does not point to any such ambiguity. There are in fact two published decisions, both involving the Region bringing this case, Region 5, wherein it was noted that the case was not assigned to ADR because one party failed to respond to the ADR letter. *See, B & L Plating, Inc.*, 2002 EPA ALJ LEXIS 22 (EPA ALJ , 2002) (“On March 22, 2001, the case was forwarded to the Chief Administrative Law Judge who then advised the parties of the availability of participating in the process of Alternative Dispute Resolution to facilitate settlement. Complainant agreed to participate in ADR *but Respondent did not respond to the offer which was deemed a declination of its participation in ADR.*”); *Lawrence County Agricultural Society*, 2000 EPA ALJ LEXIS 67 *6 (EPA ALJ , 2000) (“On February 28, 2000, the Office of Administrative Law Judges advised the parties of the availability of participating in the process of Alternative Dispute Resolution (ADR) to facilitate settlement. Respondent agreed to participate in ADR *but Complainant failed to respond to the inquiry which was deemed to be a declination of its participation in ADR.*”).

Thus, while this Tribunal and the Agency strongly support settlement, it is simply inappropriate to refer this matter at this point to ADR.

Susan L. Biro
Chief Administrative Law Judge

Dated: March 15, 2004
Washington, DC