**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Thomas Waterer** | ) | |
| **and** | ) | **Docket No. CWA-10-2003-0007** |
| **Waterkist Corp. d/b/a Nautilus Foods,** | ) | |
| | ) | |
| **Respondents** | ) | |

## ORDER ON MOTIONS

### I. Introduction.

In this proceeding under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g)(2)(B), EPA has charged that the Respondents violated several requirements of the National Pollution Discharge Elimination System ("NPDES") permits. On December 12, 2003, EPA filed two motions: a Motion for Accelerated Decision Regarding Liability and a Motion for Discovery. In the Motion for Accelerated Decision, EPA argues that no genuine issues of material fact exist regarding whether Respondents violated the requirements of its NPDES permit, and that Waterer and Waterkist are jointly and severally liable for the violations. Although Respondents filed a response to the Motion for Accelerated Decision, the response was late. In the Motion for Discovery, EPA moves for an order compelling Respondents to produce evidence it has requested regarding its ability to pay. As an alternative to its Motion for Discovery, EPA seeks an order precluding Respondent from any offering any evidence on that issue at the hearing. Respondents filed no response to the Motion for Discovery.

### II. EPA's Motion for Accelerated Decision.

As a preliminary matter, the Court must address the consequences of the untimely Response filed by Respondents to EPA's Motion for Accelerated Decision. EPA filed its Motion for Accelerated Decision by U.S. mail on December 12, 2003, making a response to the Motion due on January 2, 2004. 40 C.F.R. §§ 22.7, 22.16(b). Although the Court received a copy of the Respondents' Response, by facsimile on January 6, 2004, the Response was not sent to the Regional Hearing Clerk and thus not officially filed until January 7, 2004. *See* 40 C.F.R. § 22.5(a). Furthermore, Respondent did not file a Motion for Extension of Time until January 9, 2004. *See* 40 C.F.R. § 22.7(b) (requiring any motion for an extension of time to be filed "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").
The Court notes that even if it were to overlook these procedural failures, the Respondents' facsimile filing of its Response was four days late. This latest failure must be placed in context.

Throughout this proceeding, Respondents have failed to comply with deadlines established by the Rules of Practice and the Court. Respondents' Answer was filed one month beyond the deadline in Section 22.15(a) of the Rules of Practice and after EPA had notified Respondents of the deadline and filed a Motion for Default. Similarly, Respondents submitted its prehearing exchange one month beyond the deadline established in the Prehearing Order, and only after a second Motion for Default filed by EPA and the Order to Show Cause issued by the Court. Although the Court denied EPA's second Motion for Default, in its Order issued on November 5, 2003, Respondents were explicitly warned that "any further delays in filings, 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."

While the Court's earlier rulings were intended to give the Respondents the fullest opportunity to contest the issues through the hearing process, it expressly reminded Respondents' counsel of the obligation to follow the Rules of Practice governing this matter. *See* 40 C.F.R. § 22.4(c). Respondents have once again failed to comply with the procedural rules in submitting its Response, and its Motion for Extension of Time was untimely under Section 22.7(b). Consequently, Respondents' Motion for Extension of Time is DENIED, EPA's Motion to Strike the Response is GRANTED, and the Response will not be considered in ruling upon the Motion for Accelerated Decision.[1]

However, given that Respondents have disputed the allegations in its Answer and prehearing exchange, the lack of a timely filed response does not mean that EPA's Motion for Accelerated Decision should automatically be granted. *See* 40 C.F.R. § 22.16(b). As the party with the burden of persuasion at the hearing, EPA must still present evidence that establishes the elements of its prima facie case and entitles it to judgment in its favor as a matter of law.

Section 22.20(a) of the Rules of Practice authorizes the Court to "render an accelerated decision in favor of a party as to any or all parts of the proceeding...if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). As EPA has noted, a motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74 (EAB

---

[1]EPA, for reasons the Court does not fully appreciate, filed a Reply Brief in support of its Motion for Accelerated Decision. Apparently this was a protective measure, unnecessary in the Court's view, as there had been no ruling on the EPA Motion to Strike. Had the Court allowed the Respondent's late Response, it would have allowed a Reply, and such due date for a Reply would have been tolled from the date of any such Order. As it is, the Court did not read, and consequently did not consider, either document.

2000); *In the Matter of Green Oil Co.*, Docket No. CWA-07-2002-0059, 2003 EPA ALJ LEXIS 5 at *3 (ALJ, Jan. 31, 2003) ("Order on Motion for Partial Accelerated Decision as to Liability").

The burden of showing that no genuine issue of material fact exists is on the party moving for accelerated decision. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). If the movant has the burden of persuasion at trial,[2] it must present evidence that establishes the elements of its prima facie case and would entitle the moving party to a directed verdict if the evidence went uncontroverted at trial. *BWX Technologies*, 9 E.A.D. at 76; *see Houghton v. South*, 965 F.2d 1532, 1536-37 (9th Cir. 1992). Once the moving party meets this burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In deciding such motions, the Court must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Adickes*, 398 U.S. at 158-59; *Anderson*, 477 U.S. at 255.

**B. Discussion**

**1. Statutory and Regulatory Framework**

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In pursuit of this objective, the CWA prohibits the discharge of any pollutant by any person into navigable waters without a permit. 33 U.S.C. § 1311(a). The "cornerstone" of the Act's pollution control scheme is the NPDES permit program, which establishes requirements and conditions for the discharge of pollutants. 33 U.S.C. § 1342; *see Natural Resources Defense Council v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987). Seafood processors in Alaska, including Respondents, have been authorized to discharge under NPDES Permit No. AK-G52-0170.[3] Complainant's Prehearing Exchange exhibits ("CX") 1, 2. In order to establish a violation of Section 301(a) of the CWA, EPA must prove that Respondents are (1) "persons" who (2) "discharged" (3) a "pollutant" (4) from a "point source" (5) into "navigable waters" (6) and that the discharge was not authorized by its NPDES permit. *Committee to Save Mokelumne River v. East*

---

[2] Pursuant to Section 22.24(a), EPA "has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a).

[3] According to Paragraph 13 of the Complaint, "On April 12, 1996, 'Nautilus Foods, Inc.' was authorized to discharge under General NPDES Permit No. AK-G52-0170 ('the 1996 permit'). On September 14, 2001, 'Nautilus Foods, A Corporation' was authorized to discharge under the reissued General NPDES Permit No. AK-G52-0170 ('the 2001 permit')."

*Bay Mun. Util. Dist*., 13 F.3d 305, 308 (9th Cir. 1993); *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F.Supp.2d 1129, 1155 (E.D. Wash. 1999).

**2. Joint and Several Liability of Respondents Waterkist and Thomas Waterer**

In its Motion for Accelerated Decision, EPA seeks to establish that Respondents Waterkist Corp. and M. Thomas Waterer are jointly and severally liable for the alleged violations in the Complaint. Motion at 18-19. The liability of Waterkist Corp. is based on the elements stated above that are traditionally required to show a violation of NPDES requirements. In the Answer, Respondents admit that Waterkist and Waterer are "persons" within the meaning of Section 1362(5), and that Waterkist controlled or operated the seafood processing facility in Valdez, AK. Complaint ¶¶ 6, 8, 9; Answer ¶¶ 6, 8, 9. Respondents also admit that the facility "discharged" a "pollutant" (seafood process wastes) from a "point source" (the seafood process waste outfall and other discrete conveyances) into "navigable waters" (Port of Valdez), as those terms are defined in Section 1362(6), (7), (12), (14) and 40 C.F.R. § 122.2. Complaint ¶¶ 10-12; Answer ¶¶ 10-12. However, Respondents deny that they violated any requirements of the NPDES permits authorizing discharges from the facility, and dispute many of the factual assertions made by EPA to support the allegations. Complaint ¶¶ 28-38; Answer ¶¶ 28-38; Respondents' Prehearing Statement ("RPS") at 4-6. As a result, Respondent Waterkist has admitted that discharged a pollutant from a point source into navigable waters, and its liability will depend on whether any genuine issue of material fact exists regarding the alleged permit violations.

The liability of Respondent M. Thomas Waterer, however, is premised upon two separate theories of personal liability involving Waterer's responsibility, control, participation, and knowledge of the alleged violations by Waterkist.[4] Motion at 19-22. In its Motion for Accelerated Decision, EPA argues that Respondent M. Thomas Waterer is the owner, operator, sole director, President, and General Manager of Waterkist Corp. Motion at 21; CX 21, 33. EPA also contends that Waterer has been the primary contact at the facility for inspectors and has signed much of the correspondence and documentation on behalf of the company, including the consent agreement in a previous EPA enforcement action against the company. Motion at 21; CX 6-16, 20, 21, 25, 28, 31. As a result, EPA seeks to hold Waterer jointly and severally liable with Waterkist for the violations alleged in the Complaint. Motion at 21-22.

In its Answer, Respondent admits that Waterer is the President and founder of Waterkist, but denies that he is the General Manager or owns 100% of the stock. Answer ¶ 5. As EPA points out in its Motion, however, Respondents' August 1, 2002 response to a Section 308 information request letter is signed by Waterer as the "President and General Manager" of Nautilus Foods, and states that

[4] EPA states that it "reserves the right to argue veil piercing as well after a record is developed at hearing." Motion at 19, n. 11.

Nautilus Foods' "general manager is also its president, Tom Waterer." Motion at 4, n. 2; CX 21. The response also provides that "[a]s of August 1, 2002, and prior to 1995, 100% of Nautilus Foods' stock was and is now again owned by M. Thomas Waterer." Motion at 4, n. 3; CX 21. Waterer is identified on several NPDES Compliance Inspection Reports as the owner, president "onsite representative," and "responsible official" for the facility, and as the "facility owner/operator" on Nautilus Foods' Notice of Intent to be covered under the NPDES general permit. CX #6-9, 11, 13-15, 28. Furthermore, Respondents' prehearing exchange statement provides that Waterer "has personal knowledge of the facility subject of this action, environmental inspections, and compliance with environmental regulations, and/or efforts to comply with them." Respondents' Prehearing Statement ("RPS") at 1. Based on the evidence presented by the parties, there does not appear to be any genuine issue of material fact that Waterer "had actual hands-on control of the facility's activities, [was] responsible for on-site management, corresponded with regulatory bodies, and [was] directly involved in the decisions concerning environmental matters." *See U.S. v. Gulf Park Water Co.*, 972 F.Supp. 1056, 1063 (S.D. Miss. 1997). Given his level of responsibility and authority at the facility, the Court finds that Waterer may be held jointly and severally liable with Waterkist for the violations alleged in the Complaint.[5]

**3. Alleged Permit Violations**

**a. Failure to Keep Permit at the Facility**

Paragraph 28 of the Complaint alleges that Respondents violated the 1996 and 2001 permits by failing to have a copy of the permits on-site, during inspections in 1998, 1999, and 2000.[6] The 1996 permit states on its cover page that "A COPY OF THIS GENERAL PERMIT MUST BE KEPT AT THE SEAFOOD PROCESSING FACILITY WHERE THE DISCHARGES OCCUR." CX 1. According to NPDES Inspection Reports from May 14, 1998, June 18, 1998, June 16, 1999, and September 21, 2000, Respondents were unable to produce a copy of its NPDES general permit during inspections at the facility. CX 12-15.

Although the Answer denies this allegation, Respondents have failed to raise a genuine issue of material fact that the NPDES permits were at the facility during the 1998, 1999, and 2000 inspections. Respondents have stated generally that its business records have been lost or damaged during their transit between a business office in Seattle, WA and the facility in Valdez, AK, but this problem does not excuse Respondents from the requirements of its NPDES permit
as the requirement provides that the permit must be kept at the processing facility. *See* Respondents' Reply to Motion for Default at 3 and Exhibit B, Declaration of M. Thomas Waterer ("Waterer

---

[5] As a result, EPA's "tort theory" of liability will not be examined.

[6] It is unclear why EPA is alleging that Respondents violated the 2001 permit under this paragraph, since the 2001 permit did not become effective until July 27, 2001. CX 2.

Declaration") at 2. As a result, the Court finds that Respondents are liable for three[7] violations of Section 301(a) of the CWA for failing to have a copy of its NPDES permit at the facility.

**b. Failure to Name Proper Owner on Notice of Intent**

Paragraph 29 of the Complaint alleges that Respondents failed to name the proper owner of the facility on its Notice of Intent ("NOI") in violation of Part IV.C.3 of the 2001 permit. In order to be authorized to discharge under a general NPDES permit, a discharger must submit a NOI in accordance with the terms of the permit. 40 C.F.R. § 122.28(b)(2). Part IV.C.3 of the 2001 permit provides that "[a]n NOI shall include the name and the complete address and telephone number of the owner of the facility and the name of the owner's duly authorized representative." CX 2. Respondents' NOI, submitted on August 3, 2000, identifies "Nautilus Foods, A Corporation" as the "Company Name" for the facility. CX 4. EPA argues that Alaska corporate records show that no such corporation exists, that the facility is actually owned by Waterkist Corp., and that Respondents misrepresented the party responsible for compliance with the permit. Motion at 15.

However, Part IV.C.3 of the 2001 permit requires an NOI to include to the name of "the owner of the facility," and Respondents' NOI identifies "Tom Waterer, President" as the facility "owner/operator." CX 4. While EPA contends that the facility is owned by Waterkist, the Complaint also alleges that Thomas Waterer owns 100 percent of the stock of Waterkist. Complaint ¶ 5. Furthermore, it is unclear if "Nautilus Foods" is a licensed trade name for Waterkist, or if the 2001 permit precludes a corporation from listing such name on its NOI. Waterer Declaration at 1. Thus, genuine issues of material fact exist regarding whether Respondents violated Part IV.C.3 of the 2001 permit.

**c. Zone of Deposit**

Paragraph 30 of the Complaint alleges that Respondents discharged settleable solids beyond a one-acre Zone of Discharge in violation of Part V.C.1.g of the 1996 permit and Part V.C.1.l of the 2001 permit. Part V.C.1.g of the 1996 permit states that "[d]ischarges shall not violate Alaska Water Quality Standards for settleable solid residues beyond a one (1) acre zone of deposit," while Part V.C.1.l of the 2001 permit states that "[t]he [Alaska Department of Environmental Conservation ("ADEC")] authorizes a zone of deposit of one (1) acre for each facility authorized by this general permit...Discharges shall not violate the Alaska water quality standards criteria for residues beyond the authorized zone of deposit." CX 1, 2. EPA contends that a 1998 sea floor survey conducted by Enviro-Tech Diving for the facility documented a zone of deposit of 1.48 acres. Motion at 9; CX 18 at

---

[7] Although there are four inspection reports during 1998-2000 showing the absence of the NPDES permit from the facility, EPA is seeking a penalty for three violations of this requirement. Complaint ¶ 28; Complainant's Prehearing Exchange ("CPE") at 4.

6. Since Respondents have failed to conduct any further surveys of the waste pile, EPA argues that the 1.48 acre zone of deposit has existed for at least five years and resulted in 1,825 violations of the CWA. Motion at 9; CPE at 4.

The permit requirements cited in Paragraph 30 prohibit a discharger from violating Alaska Water Quality Standards for residues beyond an authorized zone of deposit. Although EPA has provided evidence to show that Respondents' zone of deposit in 1998 was greater than one acre, it is has not cited any provisions of the Alaska Water Quality Standards that have been violated. Furthermore, EPA's reliance on the 1998 dive survey to allege 1,825 violations of the CWA is not justified in the absence of additional evidence on the issue, especially given the fact that Respondents moved their outfall to deeper water "sometime after the dive survey." Complaint ¶ 30; Motion at 9. Since EPA has the burden to establish the elements of its prima facie case, the Court finds that genuine issues of material fact exist regarding whether Respondents violated Part V.C.1.g of the 1996 permit and Part V.C.1.l of the 2001 permit.

**d. Failure to Submit Annual Reports**

Paragraph 31 of the Complaint alleges that Respondents failed to submit Annual Reports for 1998, 1999, 2000, and 2001 to EPA in violation of Part VI.B.4 of the 1996 and 2001 permits. Part VI.B.4 of the 1996 permit provides that "a permittee shall submit its annual report by January 31st[8] of the year following each year of operation and discharge under this Permit" to EPA and the responsible ADEC office. CX 1. EPA contends that Respondents failed to submit Annual Reports between 1998-2001, did not produce them pursuant to a Section 308 information request issued in 2002, and also failed to include them in its prehearing exchange. Motion at 10-11; CX 21.

Although Respondents deny this allegation in its Answer, there is not any genuine issue of material fact regarding Respondents failure to submit its Annual Reports. As noted above, Respondents' lost or damaged business records do not excuse it from compliance with the terms of its NPDES Permit. While, in theory lost or damaged records could explain a failure to submit Annual Reports for a single year, this could not explain the absence of submissions for consecutive years. Further, such a Respondent would have a duty to submit a timely notice that the records had been lost or damaged, along with a reconstructed report of the required information. Accordingly, the Court finds that Respondents are liable for four violations of Section 301(a) of the CWA for failing to submit its Annual Reports to EPA in violation of Part VI.B.4 of the 1996 and 2001 permits.

**e. Failure to Conduct Shoreline Monitoring**

Paragraph 32 of the Complaint alleges that Respondent failed to conduct shoreline monitoring

[8] Part VI.B.4 of the 2001 permit extends this deadline to February 14th. CX 2.

in 1999, 2000, and at least parts of 2001 and 2002 in violation of Part VI.D of the 1996 and 2001 permits. Part VI.D requires permittees to "conduct a sea surface and shoreline monitoring program to determine compliance with the authorized mixing zone and Alaska water quality standards for residues in marine waters." CX 2. EPA alleges that during inspections at the facility, Respondents were unable to produce any shoreline monitoring reports for the years 1999-2002. Motion at 11; CX 14-16. In response to the Section 308 information request, EPA contends that Respondents were able to provide just a few scattered monitoring reports from 2001 and 2002, and states that Respondents failed to supply copies of their missing documents in the prehearing exchange. Motion at 11; CX 21. The facility operates about four months a year. EPA alleges that each day of operation between 1999-2002 that Respondents failed to monitor the shoreline constitutes a day of violation, and seeks to hold Respondents liable for "approximately 477" violations of the CWA, based on four years of operations. Motion at 11-12; CPE at 4.

However, there appears to be a genuine issue of material fact regarding Respondents' violation of the shoreline monitoring requirements. First, the NPDES permit provision relied upon by EPA is unclear as to the frequency of shoreline monitoring necessary for compliance. Part VI.D of the 1996 and 2001 permits, as cited by EPA, appears to require only "periodic assessments" of the presence and amounts of residues on the shore during a facility's operation and discharge. CX 1 (Part VI.D.3), 2 (Part VI.D.3.b). The Court notes that Part V.C.5 of the 1996 and 2001 permits requires shore-based seafood processors to conduct "daily shoreline monitoring." CX 1, 2. Even though there is a likelihood that EPA simply referred to the wrong provision, the evidence still reflects that Respondents were conducting shoreline monitoring during some years, and the Court is unable to determine at the present time how many days of violation that the Respondents should be held accountable for. For example, the July 22, 2002 Inspection Report states that "[d]aily shoreline monitoring records were available for a few days in 1999, and from May 18, 2001 through August 11, 2001. There were no records available for the 2002 processing season." CX 16. As a result, although violations have been established, on this record the number of violations is unclear. Accordingly, accelerated decision on this charge is denied as to its scope, so that the number of violations may be more fully developed at the hearing.

**f. Failure to Keep Best Management Practices Plan at the Facility**

Paragraph 33 of the Complaint alleges that Respondents failed to have a copy of their Best Management Practices ("BMP") plan at the facility during the 1998, 1999, 2000, and 2002 inspections in violation of Part VI.A.6 of the 1996 permit and Part VI.A.5.d of the 2001 permit. Part VI.A.6 of the 1996 permit and Part VI.A.5 of the 2001 permit require that a permittee maintain a copy of its BMP Plan at its facility and "make the plan available to EPA or ADEC upon request." CX 1, 2. EPA states that Respondents were not able to produce a copy of their BMP plan during inspections at the facility in 1998, 1999, 2000, and 2002, and seeks to hold Respondents liable for four violations of the CWA. CX 12, 14-16; Motion at 16.

Although Respondents deny this allegation in its Answer, there does not appear to be any genuine issue of material fact regarding the availability of Respondents' BMP plan. While a copy has been included in the prehearing exchange, Respondents were unable to make their BMP available when requested by ADEC and EPA inspectors in 1998, 1999, 2000, and 2002. Respondents' Prehearing Exhibit ("RX") 5; CX 12, 14-16. As noted above, Respondents' lost or damaged business records do not excuse it from compliance with the terms of its NPDES Permit. Accordingly, the Court finds that Respondents are liable for four violations of Section 301(a) of the CWA for failing to make its BMP plan available to EPA or ADEC upon request in violation of Part VI.A.6 of the 1996 permit and Part VI.A.5.d of the 2001 permit.

**g. Floating Solids**

Paragraph 34 of the Complaint alleges that Respondent discharged seafood sludge, deposits, debris, scum, floating solids, oily wastes, or foam which alone or in combination with other substances caused a film, sheen, emulsion, or scum on the surface of the water beyond the authorized mixing zone on September 21, 2000 in violation of Part V.C.1.f(3) of the 1996 permit. EPA asserts that during an inspection of Respondents' facility on September 21, 2000, an ADEC inspector observed seafood processing wastes on the shore and in the water around the facility. Motion at 12; CX 15 ("Visual accumulations of solid fish wastes, debris, foam, and gurry were observed in the waterbody directly adjoining the plant, and under the offloading dock and inclined ramp to plant"). As a result, EPA seeks to hold Respondents liable for one violation of the CWA. Motion at 12.

Respondents deny this allegation in the Answer, and contend that the presence of seafood waste around the facility is the result of a 600 foot dock adjacent to the facility that is used by over one hundred sports fishermen per day. RPS at 5. According to Respondent Waterer, "the sports fisherman, 'gut' and 'fillet' their fish on the dock and throw the waste into the water, specifically including the whole fish heads complained about by the EPA. This is not our waste and we have no control over it." Waterer Declaration at 3. Furthermore, the September 21, 2000 Inspection Report also states that "[p]hysical inspection of outfall area noted no bird attractions, or visual accumulation of floating solids." CX 15. Accordingly, the Court finds that genuine issues of material fact remain regarding allegations about the floating solids on the shore and in the water around the facility on September 21, 2000.

**h. Ramp Discharge**

Paragraph 35 of the Complaint alleges that Respondents discharged food processing waste through a conveyance other than the waste handling system on September 21, 2000 in violation of Parts V.C.1.b and V.C.1.h of the 1996 permit. Part V.C.1.b provides that a permittee "shall route all seafood process wastes through a waste-handling system," while Part V.C.1.h requires that "[a] permittee discharging to marine water shall discharge its wastewaters at a point at least ten (10) feet below the surface of the receiving water." CX 1. EPA contends that during an inspection of

Respondents' facility on September 21, 2000, an ADEC inspector observed "water and fish gurry running from plant through an open door, down an inclined ramp, and into the adjoining water body." Motion at 13; CX 15. As a result, EPA seeks to hold Respondents liable for one violation of the CWA. Motion at 12.

Respondents deny this allegation in the Answer, and argue that 100% of their seafood wastes are processed through a waste handling system and then pumped though a 4-inch discharge pipe to an outfall area in deep water. RPS at 4; RX 6 (facility diagram); Waterer Declaration at 3-4. Furthermore, it is unclear from the Inspection Report if the "fish gurry" running from the plant consisted of "seafood process wastes" or if the "water" was "wastewater," and the report indicates that the "discharge of process waste" is below the water surface. CX 15. Accordingly, the Court finds that genuine issues of material fact exist regarding discharges from the facility on September 21, 2000.

**i. Broken Outfall Line**

Paragraph 36 of the Complaint alleges that Respondents failed to repair all breaks in the outfall line within ten days of the failure in violation of Part V.C.1.f of the 2001 permit. Part V.C.1.f states that a "permittee shall not discharge from a severed, failed or leaking outfall line ten days past its severance, failure or damage unless such damage has been repaired. The permittee shall have replacement parts available on site and shall make every effort possible to repair a damaged outfall line as soon as possible." CX 2. According to an August 4, 2000 letter from Nautilus Foods' plant manager David Kaayk to EPA, Respondents stated that they were experiencing problems with their outfall line and that any repairs or modifications would be completed "in approximately 2-3 weeks." CX 32. EPA argues that Inspection Reports from September 21, 2000 and July 22, 2002 show that the outfall line had not been repaired, and that Respondents failed to provide any information regarding repairs in their August 14, 2002 Section 308 response. Motion at 13-14; CX 15, 16, 21, 30. As a result, EPA seeks to hold Respondents liable for 162 violations of the CWA. Motion at 14.

Although it appears that the Respondents' outfall line was damaged, it is difficult to determine at the present time how many days of violation, if any, that Respondents should be liable for. Respondents contend that EPA is falsely implying that the two observations of a broken outfall line show that repairs were never made when the outfall line was actually "timely" repaired on two separate occasions, "one to repair a hair line fracture in a pipe, and another time a fracture in the pipe at a different location." Waterer Declaration at 3; RPS at 4-5. Furthermore, Respondents claim that the presence of any seafood waste resulted from sports fisherman on an adjacent dock, and the Inspection Report from September 21, 2000 states that "[p]hysical inspection of the outfall area noted no bird attractions, or visual accumulation of floating solids." RPS at 5; Waterer Declaration at 3; CX 15. Accordingly, as there appear to be genuine issues of material fact, accelerated decision on this charge is denied so that the facts may be more fully developed at the hearing.

**j. Failure to Operate and Maintain the Facility to Achieve Compliance**

Paragraph 37 of the Complaint alleges that Respondents failed to properly operate and maintain the facility in a manner to achieve compliance with the NPDES permit requirements in violation of Part VIII.E of the 1996 and 2001 permits. Part VIII.E provides that "[a] permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by a permittee to achieve compliance with the conditions of this Permit." CX 1, 2. EPA argues that Respondents have "routinely and consistently flouted their obligations under the applicable permits," and seeks to hold Respondents liable for 601 violations of the CWA covering five years of operations at the facility. Motion at 18.

However, EPA has not raised any additional facts on this charge beyond what it already discussed for the other allegations in the Complaint, raising the issue of whether a violation of Part VIII.E is an independently assessable charge. *See In the Matter of Cooperative Grain & Supply Co. and David Wademan*, 3 E.A.D. 257, 259 (CJO 1990) ("Two charges are independently assessable only if each charge results from an independent act or failure to act and each charge requires an element of proof not required by the other charge"); *In the Matter of U.S. Army, Fort Wainwright Central Heating & Power Plant*, Docket No. CAA-10-99-0121, 2001 EPA ALJ LEXIS 30 at *27-28 (ALJ, July 3, 2001) (Order on Complainant's Motion for Accelerated Decision and on Other Motions); *see also Blockburger v. U.S.*, 284 U.S. 299, 304 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not"). Accordingly, accelerated decision on this charge is denied so that the facts may be more fully developed at the hearing.

**k. Failure to Monitor Grinder**

Finally, Paragraph 38 of the Complaint alleges that Respondents failed to monitor the grinder during each day of operations in 2002 in violation of Part V.C.1.e of the 2001 permit. Part V.C.1.e requires a permittee to "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." CX 2. According to an Inspection Report from July 22, 2002, "[t]he facility checks the grinder for proper operation by listening to it. There are no daily grinder monitoring procedures and no records are maintained. There is no method to collect a sample of the effluent prior to being discharged to the receiving water." CX 16; Motion at 17-18. Based on this evidence, EPA argues that Respondents failed to monitor the grinder during the 2002 fishing season and seeks to hold Respondents liable for 120 violations of the CWA. Motion at 18.

Although Respondents deny this allegation in the Answer, there is no genuine issue of material fact regarding Respondents failure to monitor its grinder as required by Part V.C.1 of the 2001 permit. While "listening" to the grinder system may help to ensure its proper operation, the NPDES permit requires that a permittee actually inspect the size of the ground residues on a daily basis. CX 2.

Further, Respondents have introduced no evidence that any such inspections took place during the 2002 processing season or that logs of the inspections were kept at the facility during this time. Accordingly, the Court finds that Respondents are liable for 120 violations of Section 301(a) CWA for failing to monitor the grinder system in violation of Part V.C.1 of the 2001 permit.

**III. Motion for Discovery**

On December 12, 2003, EPA filed a Motion for Discovery requesting that the Court issue an order to compel Respondent Thomas Waterer to produce documents regarding Respondents' ability to pay. EPA represents in its Motion that it has sought specific financial information from Respondents on two separate occasions in order to conduct an ability to pay analysis, but that Respondents have not replied to its requests. Although Respondents provided copies of federal tax returns for 1999, 2000, and 2001 for Waterkist Corp. in its prehearing exchange, EPA claims that Respondents have failed to provide additional information "such as financial statements, audits, etc." to explain the corporate finances, current financial information about the company, or documentation regarding the ability to pay for Thomas Waterer. As a result, EPA requests that Respondents produce the specific information set forth in Complainant's March 23, 2003 letter, which is included as an attachment to the Motion. In the alternative, EPA seeks to exclude from evidence any testimony or documents regarding Respondents' ability to pay other than the three tax returns included in Respondents' prehearing exchange.

Respondents' response to the Motion was due on January 2, 2004, and no response has been filed to date. *See* 40 C.F.R. §§ 22.7(c), 22.16(b). According to the Rules of Practice, "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). However, as with the Court's ruling on the Motion for Accelerated Decision, supra, or any motion, this does not equate with the motion being automatically granted. Rather, Section 22.16(b) operates only to waive any objection *by the party* who fails to respond to the motion. The court must still independently assess the merits of a motion.

The Rules of Practice provide that, after the prehearing exchange, a party may move for additional discovery. The motion must "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought." *Id.* The Court may order such discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1).

While the 'no unreasonable delay' factor has been satisfied and 'information most reasonably obtained' factor is, perforce, satisfied where EPA seeks financial information, the third factor has not been satisfied. The procedural rules require that *Other discovery* "describe in detail the nature of the information and/or documents sought." *Id.* Further, *all* motions must "[s]tate the grounds therefor, *with particularity.*" 40 C.F.R. § 22.16(a). (emphasis added). Here, EPA has merely asserted that it needs the Respondent to supply the information from seven EPA forms. EPA appears to believe that it has carte blanche when it comes to demands for financial information. This is not the case. Neither the motion nor the letter attachment contains a single word explaining the nature of the information sought within each of the seven forms nor does it say anything about why this information is important in order for EPA to evaluate the Respondents' financial health. While EPA recites that the information it requests "will allow for a proper assessment of Respondent's financial position and its ability to pay the penalty," it offers nothing beyond that assertion. Accordingly, EPA's Motion for Discovery is DENIED.[9]

Nor is EPA's draconian alternative motion, which seeks to preclude the Respondents from presenting any ability to pay defense, reasonable. EPA apparently believes that by failing to provide the financial information it requested, Respondents should be precluded "from providing *any* testimony at hearing regarding Respondents' inability to pay the proposed penalty." Motion at 6. (emphasis added). Accordingly, EPA's alternative motion is also DENIED.

As set forth by the Environmental Appeals Board, ("EAB"), the procedure for dealing with ability-to-pay issues is not complex and it is even-handed. EPA has the burden of proof in establishing the appropriateness of a penalty after considering all of the statutory factors and, where ability-to-pay is at issue, it must present some evidence to show that it considered that factor. This initial burden is minimal, as EPA need only present some general financial information. Where, as here, the Respondents present some financial information to support an inability-to-pay claim, EPA has options. One is to seek additional financial information, through discovery. Here, as explained above, EPA has utterly failed to satisfy the "significant probative value" requirement to justify such discovery. It does not follow, however, that EPA is defenseless to deal with the information the Respondents seek to introduce, as identified in their prehearing exchanges.[10] As the EAB has noted, EPA can discredit such

---

[9]The Environmental Appeals Board applies an "abuse of discretion" standard in reviewing denials of additional discovery. *See In re: Chempace Corporation*, 9 E.A.D. 119, May 18, 2000, 2000 WL 696821 (EPA EAB).

[10]The Court notes that on January 17, 2004, Respondents submitted a supplemental prehearing exchange that contained several financial documents regarding Waterkist Corp. and Waterer. Subject to the Court's rulings on any evidentiary objections that may be asserted by EPA when the Respondents attempt to introduce this exchanged information, the Court will be able to consider those

information through rigorous cross-examination. *See In re: Chempace Corporation*, 9 E.A.D. 119, May 18, 2000, 2000 WL 696821 (EPA EAB). For example, it is possible that EPA's own financial expert's testimony could explain why the information supplied by the Respondents' presents an incomplete, unreliable or suspect, picture of their ability-to-pay. Theoretically, such an expert could also explain that certain absent financial information is critical for an honest understanding of the Respondents' financial condition. Thus, even without the information it sought, unsuccessfully, through discovery, EPA should be able to demonstrate, if it is in fact the case, that the Respondents have presented a slanted picture of their respective financial condition. Such a presentation, if accepted, would mean that the Respondents inability-to-pay claim would be rejected.

**SO ORDERED**.

_____

William B. Moran
United States Administrative Law Judge

January 28, 2004
Washington, D.C.

documents. It is also possible that EPA's analysis of the new documents submitted by the Respondents could moot EPA's concerns about inadequate financial information for it to assess this issue.

In the Matter of *Thomas Waterer & Waterkist Corp., d/b/a Nautilus Foods*, Respondent
Docket No. CWA-10-2003-0007

CERTIFICATE OF SERVICE

I hereby certify that the following **Order on Motions**, dated January 28, 2004, was sent in the following manner to the addressees listed below.

_____

Nelida Torres
Legal Staff Assistant

Dated: January 28, 2004

Original and One Copy by Pouch Mail to:

Carol Kennedy
Regional Hearing Clerk
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy by Facsimile and Regular Mail to:

Mark A. Ryan, Esq.
Assistant Regional Counsel
U.S. EPA Region X
Idaho Operations Office
1435 N. Orchard Street
Boise, ID 83706

Copy by Facsimile and Regular Mail to:

Edward P. Weigelt, Jr., Esq.
4300 198th Street, S.W. Suite 100
Lynwood, WA 98036