UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 JUL 23 PM 1:14

IN THE MATTER OF Mountain Village Parks, Inc. Big Piney, WY PWS ID #WY5600221, Respondent.	Docket No. SDWA-08-2012-0026 **COMPLAINANT'S MOTION FOR DEFAULT**

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Complainant, United States Environmental Protection Agency, Region 8 (EPA), by its undersigned counsel, files this MOTION FOR DEFAULT pursuant to 40 C.F.R. § 22.17. Complainant seeks a default order finding the Respondent liable for the violations alleged in the Complaint and Notice of Opportunity for Hearing (Complaint) filed in this matter on May 10, 2012. Complainant also seeks the assessment of the penalty proposed in the Complaint in the amount of $5,000. This request for a default order and assessment of penalties is based on Respondent's failure to file a timely answer to the Complaint, and subsequent waiver of Respondent's right to contest all facts alleged in the Complaint.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8

Date: 7·23·2012

By: _____

Amy Swanson, Enforcement Attorney
U.S. EPA Region 8
1595 Wynkoop Street (8ENF-L)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the MOTION FOR DEFAULT and MEMORANDUM IN SUPPORT were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1159

Via Certified Mail to:

Diana Alexander, Registered Agent
Mountain Village Parks, Inc.
P.O. Box 1226
Big Piney, WY 83113

7/23/2012
Date

Judith M McTernan
Signature

UNITED STATES
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IN THE MATTER OF	Docket No. SDWA-08-2012-0026
Mountain Village Parks, Inc. Big Piney, WY PWS ID #WY5600221,	**MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT**
Respondent.	

INTRODUCTION

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by Complainant, the United States Environmental Protection Agency (EPA), in accordance with 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

BACKGROUND

Respondent Mountain Village Parks, Inc. (Respondent) owns and/or operates the Mountain Village Parks Public Water System (system), located in Sublette County, Wyoming. The system is supplied by a groundwater source consisting of two wells. It serves approximately 150 persons per day year-round through at least 74 active service connections at a mobile home park. Using an additional two wells, the system serves up to 1,000 people through three active service connections at an adjacent housing facility. Respondent is a supplier of water within the meaning of the Safe Drinking Water Act (SDWA) and is therefore subject to the requirements of the SDWA and the National Primary Drinking Water Regulations (NPDWRs).

EPA issued Respondent an Administrative Order (Order) on July 13, 2009, citing violations of the NPDWRs including, but not limited to: failure to monitor bimonthly for total coliform bacteria, failure to monitor for lead and copper contamination, failure to prepare and deliver an annual Consumer Confidence Report (CCR) to the system's customers, failure to notify the public of the violations, and failure to report the violations to EPA.

EPA issued an Amended Administrative Order (Amended Order) to Respondent on September 29, 2009, adding a violation for exceeding the maximum contaminant level (MCL) for total coliform bacteria in May 2009 to the other previously-cited NPDWR violations. The Amended Order required the Respondent to perform the following: (1) comply with the total coliform MCL; (2) monitor the system's water for total coliform bacteria twice per month and report the results to EPA; (3) monitor the system's water per the regulations for lead and copper between June 1 and September 30, 2009, and annually thereafter; (4) provide public notice of the violations within 30 days; (5) prepare, distribute, and copy EPA on a CCR for calendar year 2007, and annually thereafter; (6) notify EPA by the end of the following business day after discovering a violation of total coliform MCL; (7) report to EPA any failure to comply with total coliform monitoring requirements within 10 days after discovering the violation; and (8) report to EPA any other failure to comply with the NPDWRs within 48 hours.

EPA issued Respondent an Administrative Order Violation (AOV) letter on September 16, 2010, citing the following noncompliance with the Amended Order and the NPDWRs: (1) failure to prepare, distribute to its customers, and copy EPA on CCRs for calendar years 2007 and 2009; and (2) failure to report any NPDWR violation to EPA within 48 hours. On September 7, 2011, EPA issued Respondent a second AOV letter, citing the following

noncompliance with the Amended Order and the NPDWRs: (1) failure to collect required lead and copper samples between January 1 and June 30, 2011; (2) failure to prepare, distribute, and copy EPA on CCRs for calendar years 2007 and 2010; and (3) failure to report any NPDWR violation to EPA within 48 hours.

EPA filed a Complaint and Notice of Opportunity for a Hearing (Complaint) on May 9, 2012, charging Respondent with violations of the SDWA, the NPDWRs and the Amended Order. Specifically, the Complaint includes four counts of SDWR, NPDWR and/or Amended Order violations and proposes a civil administrative penalty of $5,000. After being served by certified mail with the Complaint on May 16, 2012, the Respondent did not file an answer or otherwise formally respond to the Complaint.

The system remains out of compliance with the SDWA and the NPDWRs. Thus, it is critical to the credibility of the program and to maintain fairness amongst the regulated community that EPA collect the penalty proposed for the violations alleged in the Complaint. Assessment and collection of the proposed penalty also may help protect human health by serving as a deterrent for this and other public water systems that choose not to comply with the regulations or communicate the results. EPA has been unsuccessful thus far in addressing the Complaint with the Respondent. Based on the Respondent's nonresponsiveness, a default order is necessary to protect human health and fully resolve the Complaint, the violations, and the proposed penalty set forth therein.

STANDARD FOR FINDING DEFAULT

The regulation governing default in the Consolidated Rules of Practice is found at § 22.17 of the Rules of Practice, 40 C.F.R. § 22.17. Section 22.17(a) of the Rules of Practice provides as follows:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; ...or upon failure to appear at a conference or hearing...Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

Additionally, 40 C.F.R. § 22.17(b) provides that when a default motion requests the assessment of a civil penalty, the moving party must specify the penalty and give the legal and factual grounds for the relief requested.

40 C.F.R. § 22.17(c) provides when the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision...The relief proposed in the complaint...shall be ordered unless the requested relief is clearly inconsistent with the SDWA.

ARGUMENT

I. Respondent Failed to File an Answer

40 C.F.R. § 22.17(a) provides in pertinent part: "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . ." 40 C.F.R. § 22.15(a) specifies that an "answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint."

EPA filed the Complaint in this matter on May 9, 2012. In accordance with 40 C.F.R. § 22.5(b)(1) (Filing, service, and form of all filed documents; business confidentiality claims), the Complaint along with a copy of the Consolidated Rules were served on the Respondent on May 16, 2012 according to the return receipt. In accordance with 40 C.F.R. § 22.5(b)(1), Respondent's thirty-day timeframe for filing an answer expired on Wednesday, June 13, 2012.

In this instance, Respondent failed not only to file a timely answer, but failed to file an answer altogether. Respondent was warned of the consequences of failure to file a timely answer in the Complaint and the accompanying cover letter. The Complaint included specific, highlighted language, informing Respondent of its right to request a hearing and file an answer. Additional language specified the potential consequences of not filing an answer, including a possible default judgment and assessment of a penalty. The cover letter stressed the need for a timely answer, and provided information regarding the process for Respondent to file an answer.

Despite such warning, Respondent failed to comply with the answer requirements set forth in the Consolidated Rules, and/or failed to seek an order from the Presiding Officer granting an extension of time in which to file his answer. Such failure to respond provides an appropriate basis for finding the Respondent in default.

II. Prima Facie Case of Liability

A default order is appropriate when EPA has established a prima facie case of liability against the Respondent. A prima facie case is shown by establishing jurisdiction and facts sufficient to conclude Respondent violated the SDWA. EPA has jurisdiction over Respondent as the agency responsible for monitoring Respondent's compliance with the SDWA. The facts

underlying Respondent's noncompliance with the NPDWRs establishing a prima facie case of liability are clearly demonstrated by the administrative record.

When a Respondent fails to file an answer, the Respondent presents no evidence to contradict the alleged violations, and Respondent waives its right to contest them. *See In the Matter of: John C. Jones*, Docket No. TSCA-01-2010-0035 (February 29, 2012, Acting RJO Jill T. Metcalf); *In the Matter of: John Laughter*, Docket No. TSCA-01-2010-0007 (December 13, 2011, Acting RJO Jill T. Metcalf); *In the Matter of: Pan American Growers Supply, Inc.*, Docket No. FIFRA-04-2010-3029 (November 30, 2010, ALJ Barbara A. Gunning); *In the Matter of: James Bond, Owner, Bond's Body Shop*, Docket Nos. CWA-08-2004-0047 and RCRA-08-2004-0004 (January 11, 2005, Chief ALJ Susan L. Biro); *In the Matter of: Alvin Raber, Jr., and Water Enterprises Northwest, Inc.*, Docket No. SDWA-10-2003-0086 (July 22, 2004, RJO Alfred C. Smith). The strict language set forth in 40 C.F.R. § 22.17(a) for not filing an answer, and the number of administrative decisions consistently enforcing this language, support a waiver of Respondent's rights and imposition of the proposed penalty amount in this matter.

III. Respondent's Noncompliance with the SDWA, NPDWRs, and Administrative Proceedings Pose a Potential Health Threat to Persons Served by the System

Respondent's disregard for the NPDWRs, EPA's authority, and the Consolidated Rules governing this proceeding pose a potential health threat to the persons served by the system. Residents of, and visitors to, Sublette County, Wyoming, rely on the system's adherence to and compliance with the drinking water requirements when they drink tap water. If the system fails to regularly monitor for contaminants and/or notify the appropriate regulatory agency of its failure to monitor, then the consumers and regulatory agency are without knowledge whether the

water is safe to drink. Such negligent disregard for public health and safety cannot be condoned. A default order holding the Respondent accountable for its inaction is necessary to ensure adequate protection of the persons served by the system.

The failure to monitor and report violations alleged in the Complaint illustrates not only a significant duration of time in which the safety of the water served was unknown, but also a pattern of irresponsible operation of a public water system. The Respondent's failure to monitor for lead and copper during 2011, and failure to report total coliform monitoring violations to EPA, put the system's consumers at risk by potentially exposing them without their knowledge to harmful levels of lead, copper and coliform bacteria.

Consumption of contaminated water may cause serious short and long term health conditions. Coliform bacteria may cause short term effects such as diarrhea, cramps, nausea, and headaches. Coliform bacteria may pose a special health risk for infants, young children, the elderly, and persons with compromised immune systems. *See EPA Guidance Water on Tap: What You Need to Know* (EPA-816-K-03-007, October 2003). Consumption of lead by infants and children can cause delays in physical and mental development. Lead consumption by adults can lead to kidney problems and high blood pressure. *See Id.* Short term exposure to copper can result in gastrointestinal distress, while long term exposure can cause liver or kidney damage. *See Id.*

IV. Legal and Factual Grounds in Support of the Penalty Sought

40 C.F.R. § 22.27(b) provides that ". . . the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the SDWA. The Presiding Officer shall consider any civil penalty

guidelines issued under the SDWA. If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by the Complainant in the Complaint . . . , or motion for default, whichever is less."

The legal authority for assessing a penalty for alleged violations of the SDWA and NPDWRs is set forth at section 1414(g)(3) of the SDWA, 42 U.S.C. § 300g-3(g)(3), and 40 C.F.R. § 19.4. Section 1414(g)(3)(A) of the SDWA, 42 U.S.C. § 300g-3(g)(3)(A), authorizes the assessment of a civil administrative penalty of up to $27,500 for violation of an order issued under section 1414(g)(1) of the SDWA, 42 U.S.C. § 300g-3(g)(1). This amount has been increased for inflation to $37,500 per day for violations occurring after January 12, 2009. (40 C.F.R. Part 19.)

Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), sets forth the applicable statutory penalty factors to consider in assessing a penalty, including the seriousness of the violation, the population at risk, and other appropriate factors, including the Respondent's degree of willfulness and/or negligence, history of noncompliance, and ability to pay. EPA uses the "Public Waters System Supervision Program Settlement Penalty Policy" (Penalty Policy) to apply the statutory penalty factors in a fair and consistent manner. The Penalty Policy includes both a gravity and economic benefit component.

Gravity is a monetary value reflective of the seriousness of the violations and the population at risk. Factors including the degree of willfulness/negligence, history of noncompliance, and duration are considered in determining the gravity component of a penalty. In the instant matter, the Complaint alleges that Respondent failed to prepare, distribute, and copy EPA on annual CCRs as required by the regulations and the Amended Order. Respondent

was in violation of this requirement for a total of 26.23 months. Furthermore, Respondent failed to issue and distribute CCRs even after various reminders from EPA including the September 16, 2010 AOV letter and Monitoring and Reporting Requirement letters. The gravity penalty for Respondent's failure to issue CCRs for calendar years 2007, 2009, and 2010 was calculated to be $696.64.

The Complaint also alleges that Respondent failed to monitor for lead and copper for a total of 12 months and failed to report violations for 3 months. The gravity penalties for Respondent's failure to monitor for lead and copper and failure to report violations to EPA were calculated to be $233.69 and $58.42, respectively.

The EPA increased the initial gravity amounts in accordance with the Penalty Policy based on the degree of willfulness/negligence factor (1.5), and history of noncompliance factor involving similar violations (2.572307) for an adjusted gravity amount of $3,815.07.

In addition to gravity, EPA calculated an economic benefit component of $259 which consists of the costs of sampling, laboratory analysis, and operator expenses that Respondent would have incurred had it performed the lead and copper monitoring required by the SDWA and the NPDWRs. The economic benefit component also includes the costs of operator expenses and mailing that Respondent would have incurred had it prepared and distributed the CCRs as required by the SDWA and the NPDWRs. By including these costs in the penalty, the economic benefit enjoyed by Respondent for not complying with the regulations is eliminated. The gravity and economic benefit components combined, as a result of applying the Penalty Policy as described above, and in addition to a standard increase for pleading purposes, totals $5,000.

Complainant filed the attached Declaration of Mario Mérida, EPA Region 8 Drinking Water Program, in support of the legal and factual grounds for the penalty requested and to demonstrate compliance with the Penalty Policy. Mr. Merida is the Agency representative responsible for calculating the proposed penalty in this matter.

The penalty proposed in the Complaint is consistent with the applicable statutory factors, the Penalty Policy and the record of proceedings. Courts have readily imposed penalties in default actions where the requested relief is consistent with the SDWA. See *In the Matter of: Sector Peep Hoyas Community*, Docket No. SDWA-02-2—3-8261 (2005), *In the Matter of: John Gateaux*, Docket No. SDWA-06-2003-1590 (2003), *In the Matter of: W.N. Bunch, W.N. Bunch Water System*, Docket No. SDWA-3-99-002 (2000).

CONCLUSION

Respondent failed to file an answer to the Complaint. For the reasons set forth above, Complainant requests that the Presiding Officer find the Respondent in default and issue a default order assessing the proposed penalty amount of $5,000.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 JUL 23 PM 1:15

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IN THE MATTER OF Mountain Village Parks, Inc, Big Piney, WY PWS ID #WY5600221, Respondent	Docket No. SDWA-08-2012-0026 **DECLARATION OF MARIO MÉRIDA**

To supplement the administrative record with respect to the penalty calculation submitted by Complainant, Environmental Protection Agency (EPA), in the Memorandum in support of its Motion for Default Judgment, Mario Mérida, EPA Region 8 Drinking Water Program, hereby submits the following declaration with regard to the penalty calculated in this matter.

I, Mario Mérida, declare as follows:

1. I am employed by the EPA Region 8 Drinking Water Program located at 1595 Wynkoop Street, in Denver, Colorado.

2. As the EPA representative responsible for calculating the proposed penalty in this matter, I have personal knowledge of the matters set forth in this Declaration.

3. Mountain Village Parks, Inc. (Respondent) is a corporation that owns and/or operates the Mountain Village Park Water System (System), which provides piped water to the public in Sublette County, Wyoming, for human consumption. The Safe Drinking Water Act (SDWA) and National Primary Drinking Water Regulations (NPDWRs) violations alleged in the Complaint occurred at the System located approximately 1.5 miles south of Big Piney, WY, on U.S. Highway 189.

4. An Administrative Order was issued on July 13, 2009, and an Amended Administrative Order (Order) was issued on September 29, 2009 for: failure to monitor total coliform during September 2007; failure to monitor for lead and cooper during the 2004 – 2006 monitoring period; failure to monitor for lead and copper during the 2007 and 2008 monitoring periods; failure to notify the public of the above violations; failure to prepare a Consumer Confidence Report (CCR) for calendar year 2007; failure to report violations of the total coliform monitoring requirements, and; failure to report other violations to EPA. The Order required the Respondent to: monitor the system's water for total coliform bacteria twice per month, and report analytical results to EPA within the first ten days following the month in which the results are received; between June 1 and September 30, 2009, monitor the system's water for lead and copper, continue to monitor for lead and copper annually per the regulations thereafter, and report analytical results to EPA within the first ten days following the end of the monitoring period; within 30 days of receipt of the Order, provide public notice of the total coliform and lead and copper monitoring violations; within 30 days of receipt of the Order, prepare and distribute an annual CCR for the calendar year 2007 to the system's customers, and prepare and distribute to the system's customers a CCR by July 1 annually thereafter; if the system's water exceeds the total coliform maximum contaminant level, notify EPA of that violation by the end of the business day after discovering the violation; report any failure to comply with coliform monitoring requirements to EPA within 10 days after the system discovers the violation, and; notify EPA of any violation within 48 hours.

5. An Administrative Order Violation letter (AOV) was sent September 16, 2010 for failure to prepare and distribute to the system's customers a CCR for calendar year 2007 within 30 days of receipt of the Order, for failure to prepare and distribute a CCR for calendar year

2009 by July 1, 2010, and for failure to report the failure to issue an annual CCR for calendar year 2009. A second Administrative Order Violation Letter was issued on September 7, 2011 for failure to collect a lead and copper sample required between January 1 and June 30, 2011; for ongoing failure to prepare and distribute to the system's customers an annual CCR for calendar year 2007, for failure to prepare an annual CCR for calendar year 2010 by July 1, 2011, and; for failure to report its failure to collect the required lead and cooper samples between January 1 and June 30, 2011 and for failure to prepare an annual CCR for calendar year 2010.

6. EPA filed a Complaint and Notice of Opportunity for Hearing (Complaint) in this matter on May 9, 2012, citing alleged violations of § 1414 of the SDWA, 42 U.S.C. § 300g-3. In the Complaint, EPA alleges that Respondent failed to comply with the Order under § 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g), for alleged violations of the SDWA and the NPDWRs including, but not limited to: failure to prepare, distribute, and submit to EPA Consumer Confidence Reports; failure to monitor for lead and copper; failure to report to EPA non-compliance with the NPDWRs, and; failure to report to EPA total coliform noncompliance.

7. The Complaint proposes a penalty of $5,000 based on the Respondent's alleged violations of 40 C.F.R. §§ 141.152-155 failure to prepare, distribute, and submit to EPA Consumer Confidence Reports; 40 C.F.R. §§ 141.86(c) – (d) for failure to monitor for lead and copper; § 141.31(b) for failure to report to EPA noncompliance with the NPDWRs; 40 C.F.R. § 141.21(g)(1) for failure to report to EPA within ten days after discovering the failure to monitor total coliform violation.

8. Section 1414(g)(3) of the SDWA, 42 U.S.C. § 300g-3(g)(3), authorizes the assessment of a civil administrative penalty of up to $27,500 for violation of an order issued under § 1414(g)(1) of the SDWA, 42 U.S.C. § 300g-3(g)(1). This amount has been increased

for inflation to $37,500 per day for violations occurring after January 12, 2009. (40 C.F.R. Part 19.)

9. Section 1414(b) of the SDWA, 42 U.S.C § 300g-3(b), requires EPA to take into account the following factors in assessing a civil penalty: the seriousness of the violation, the population at risk, and other appropriate factors

10. EPA also uses the "Public Water System Supervision Program Settlement Penalty Policy" (Penalty Policy), adopted May 25, 1994, to determine the penalty in a fair and consistent manner. The Penalty Policy takes additional factors into consideration in determining a civil penalty under § 1414(b) of the SDWA: Respondent's degree of willfulness and/or negligence, history of noncompliance, if any, and ability to pay. This document is attached hereto.

11. The Penalty Policy includes both a gravity and economic benefit component to the penalty. Gravity is a monetary value reflective of the seriousness of the violations and the population at risk. Factors including the degree of willfulness/negligence, history of noncompliance, ability to pay, and duration of the violation are considered in determining the gravity component of a penalty.

12. I personally calculated the proposed penalty in this matter consistent with the SDWA §1414(b), 42 U.S.C §300g-3(b), statutory factors described above and the Penalty Policy.

13. Respondent failed to prepare, distribute and submit to EPA a CCR for calendar year 2007 from November 9, 2009 through December 31, 2011 (the expected issuance date of the Complaint when the penalty calculation was made), for calendar year 2009 from July 2, 2010 through August 10, 2010, and for calendar year 2010 from July 2, 2011 through December 31, 2011 (the expected issuance date of the Complaint), for a total duration of non-compliance of

787 days, or 26.23 months. The Penalty Policy classifies the gravity factor for failure to issue public notice (include CCRs) as 1.5.

14. Respondent failed to monitor for lead and copper from January 1, 2011 through December 31, 2011, for a total duration of noncompliance of 365 days or 12 months. The gravity factor prescribed in the Penalty Policy for a lead and copper monitoring violation, which is a violation of the SDWA and the Order, is 1.8. In this instance, I inadvertently applied a lower gravity factor of 1.1 ((Monitoring and Reporting violations of "chronic" contaminants.) This worked out in the Respondent's favor.

15. Respondent failed to report the failure to prepare, issue or submit CCR violations for calendar years 2009 and 2010, and the failure to monitor for total coliform bacteria to EPA, for a duration of 90 days, or three months. The gravity factor prescribed in the Penalty Policy for a general violation of the Order is 2.4. Again, I inadvertently applied a lower gravity factor of 1.1, This worked out in the Respondent's favor.

16. The Penalty Policy's initial gravity component for noncompliance is based upon the gravity factor established by the Penalty Policy, the population served, and the duration of the violations and is adjusted by a factor of 1.4163 for each violation (post 2008) in accordance with the 1994 Penalty Policy Inflation Adjustment Rule. Based on careful consideration of all of the factors set forth in the gravity component of the Penalty Policy, I calculated the initial gravity component of the penalty in this matter at $696.64.

17. The initial gravity amounts were then increased in accordance with the Penalty Policy based on the degree of willfulness/negligence factor, and history of noncompliance factor involving similar violations for an adjusted gravity amount. The Respondent's multiple violations of the Order and ongoing noncompliance related to CCR and lead and copper

requirements, among other areas, warranted an increase. Therefore, a negligence factor of 1.5 was applied. Six violation letters and two administrative order violation letters permitted a history of non-compliance factor of 2.572307. Adding the adjustment factors, the adjusted gravity component of the penalty in this matter is $3,890.21.

18. I calculated an economic benefit component of $259.00 which includes the cost of sampling, laboratory analysis, and operator expenses that Respondent would have incurred had it performed the prepared, issued and submitted to EPA the several required CCRs, properly sampled for lead and copper, and reported related violations to EPA as required by the SDWA and the NPDWRs. This component of the penalty eliminated any economic benefit realized by the Respondent for noncompliance.

19. The gravity and economic benefit components calculated in accordance with the Penalty Policy in addition to a standard increase for pleading purposes totals $5,000.

20. There was no reduction to the proposed penalty amount based on ability to pay absent notice or information from the Respondent indicating that he was otherwise unable to pay the proposed penalty amount.

I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

Date: 4-23-2012

By: _____
Mario Mérida
U.S. EPA, Region 8,
Drinking Water Program

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the DECLARATION OF MARIO MÉRIDA were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1159

Via certified mail to:

Diana Alexander, Registered Agent
Mountain Village Parks, Inc.
P.O. Box 1226
Big Piney, WY 83113

7/23/2012
Date

Judith M. McTernan
Signature

U.S. Environmental Protection Agency
Public Water System Supervision Program Settlement Penalty Policy for Civil Judicial Actions and Administrative Complaints for Penalties

Effective May 25, 1994

I. INTRODUCTION

This document sets forth the policy of the U.S. Environmental Protection Agency for establishing appropriate settlement penalties in civil judicial actions and in administrative complaints for penalties in the Public Water System Supervision (PWSS) Program. This policy applies to all civil judicial actions and to all administrative complaints for penalties initiated after the effective date of this policy, and to all pending civil judicial actions in which the government has not yet transmitted to the defendant an oral or written proposed settlement penalty figure which has been approved by Agency Headquarters. This policy provides, based on the circumstances of the case, the lowest penalty figure which the Federal Government is generally willing to accept in settlement; however, there may be circumstances so egregious that the Federal Government should instead seek the statutory maximum and should not even consider acceptance of a lower figure. This policy implements the Agency's Policy on Civil Penalties (#GM-21) and A Framework for Statute Specific Approaches to Penalty Assessments (#GM-22).

An appropriate penalty is one that accomplishes three objectives. First, it should deter violations of the law by placing the violator in a worse position financially than those in the regulated community who have complied in a timely fashion. Second, there must be fair and equitable treatment of the regulated community. Therefore, the penalty should be consistent with the Agency's penalty policy and promote a consistent and logical approach to the assessment of civil penalties, while allowing for factors unique to the PWSS Program. Third, the penalty should result in expeditious resolution of the identified problem(s). Such resolution can be achieved through an incentive, such as mitigating the penalty for supplemental environmental projects, or a disincentive, such as increasing the penalty figure for recalcitrance or for degree of willfulness if settlement negotiations are drawn out.

Penalty figures are calculated using several components which are based on the three objectives set forth above. The quantitative application of each of these components is described in detail in Section III of this policy.

II. STATUTORY BASIS

The Safe Drinking Water Act (SDWA) requires the Agency to protect public water supplies (PWSs). Part B of the SDWA requires EPA to promulgate National Primary Drinking Water Regulations (NPDWRs). Part D provides the Agency with the authority to deal with "emergencies" and Part E (among other things) provides the Agency with the

authority to order monitoring and reporting for contaminants and conduct inspections. To promote effective enforcement of the NPDWRs, several sections of the SDWA grant civil penalty authority to the Agency. These sections are as follows:

PART B:

(a) **Section 1414(b):** The court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty not to exceed $25,000 for each day in which such violation occurs.

(b) **Section 1414(g)(3):** Violation of an administrative order can result in a $5,000 maximum penalty assessed administratively; up to $25,000 per day of violation may be obtained in a civil action to enforce the order.

PART D:

(c) **Section 1431(b):** The statutory maximum is $5,000 per day in a civil action for violation of an emergency order.

(d) **Section 1432(c):** Tampering with a PWS carries a maximum civil penalty of $50,000; a maximum civil penalty of $20,000 can be imposed for an attempt or threat to tamper with a public water supply.

PART E:

(e) **Section 1445(c):** The statutory maximum penalty is $25,000 in a civil judicial action for failing or refusing to keep appropriate records, make reports or conduct monitoring, or allow the Agency or the Comptroller General (or his or her representatives) to conduct any audits or inspections to assist in the development of regulations.

III. PENALTY CALCULATION

Development of a settlement penalty amount under this policy is a two-step process. First, the calculation includes computation of an economic benefit component and a gravity component, which incorporates the concepts of seriousness of the violation and population at risk. Then, this figure is adjusted using other components, such as degree of willfulness and/or negligence, history of noncompliance, litigation considerations, and ability to pay.

The result of these adjustments, within the constraints of the policy, is the lowest penalty figure which the Federal government is generally willing to accept in settlement, or in other words, the "bottom-line" penalty amount. In accordance with the Agency's Policy on Civil Penalties (#GM-21), this represents the penalty figure that is the minimum acceptable settlement in civil judicial actions and administrative penalty actions. As new or better information is obtained in the course of litigation or settlement negotiations, or if protracted litigation or settlement negotiations unduly extend the expected duration of the violation, this "bottom-line" penalty amount shall be adjusted further, either upward or downward, consistent with the various policy factors, and subject to concurrence by Headquarters.

The overall equation for the settlement penalty calculation under this policy is generally:

Penalty = economic benefit + (gravity x degree of negligence/willfulness x history of noncompliance) - litigation considerations - ability to pay.

Attachment 1 contains a worksheet to be used to calculate the settlement penalty.

As a general goal, the Agency should always seek a penalty that, at a minimum, recovers the economic benefit of noncompliance, plus some amount reflective of the gravity or seriousness of the violation. Legitimate litigation considerations or ability-to-pay considerations, however, may preclude that goal in some specific instances. Regardless of calculations, as a matter of policy, absent unusually compelling circumstances, in no instances shall the "bottom-line" settlement penalty be less than $1,000 in adminstrative cases and $5,000 in civil judicial cases.

If the calculated "bottom-line" settlement penalty amount exceeds the maximum penalty that can be obtained administratively, the Agency shall instead proceed judicially. In rare circumstances, the calculated "bottom-line" settlement penalty in civil judicial cases may exceed the statutory maximum; in such circumstances, the statutory maximum penalty will serve as the new "bottom-line" penalty.

A. Economic Benefit

PWSs that violate the SDWA are likely to have obtained an economic benefit or savings as a result of expenditures that were delayed or completely avoided during the period of noncompliance. In calculating economic benefit in a PWSS Program case, one must consider the amount of money saved by avoiding or delaying expenditures such as, but not limited to:

- Sampling and analysis (including laboratory fees, cost of mailing samples, and the cost of the operator's time to take the samples);
- Capital equipment improvements or repairs, including engineering design, purchase, installation, and replacement;
- Public notifications, including printing and mailing;
- Operation and maintenance expenses and other annual expenses;
- One-time acquisitions (such as land purchase); and
- Development and implementation of a source water protection program.

The Agency's standard method for calculating the economic benefit of delayed and avoided pollution control expenditures is through the use of the Agency's BEN model. Please refer to the "BEN User's Manual" (Office of Enforcement, December 1993, or any subsequent revision) for specific information on the operation of BEN. In some circumstances, it may be necessary to perform a series of BEN runs in order to better account for different types of violations involving different avoided costs occurring over different periods of noncompliance.

The standard BEN model may not be appropriate in situations in which the violator is a privately-owned regulated utility. The Agency is exploring the possibility of developing a separate benefit model to estimate the savings that a regulated utility may have obtained by delaying compliance expenditures. In the interim, a privately-owned regulated utility's economic benefit may be computed through a profit analysis specific to the particular utility. A profit analysis can be performed by financial consultants available to the Agency.

B. Gravity Component

The gravity component includes two factors which are quantified and then multiplied together for each type of violation: 1) a factor related to the seriousness of the violation, in terms of actual or potential harm to human health; and 2) a factor related to population exposure, which reflects the extent of time that the service population was subjected to actual or potential risk due to noncompliance. The gravity component must be at least $1,000 for

all PWSs, in order for the penalty to have some deterrence value in addition to just recapturing economic benefit.[1]

The gravity factor related to the seriousness of the violation is selected separately for each type of violation. In Attachment 2, violations by type are listed in priority order (from highest, with a corresponding factor of 2.5, to lowest, with a corresponding factor of 1.1), based on actual or potential impact on human health. The current significant noncompliance (SNC) definition is incorporated into these types. If the maximum contaminant level (MCL) and the SNC level are the same numerical values for a particular contaminant, the gravity factor chosen shall correspond to the higher violation level, based on Attachment 2.

These gravity seriousness factors represent only the minimum factors that should be used; the Agency may choose to use higher factors in some circumstances. For example, if the violator has monitoring or reporting (M/R) violations and has a past history of MCL violations for those same contaminants, those M/R violations are considered as if they were MCL violations for the purposes of this settlement penalty calculation. If the violator has not sampled for those contaminants as required, and therefore does not have a demonstrated history of compliance for those contaminants, these M/R violations should be considered more serious and should be considered as MCL violations, for the purposes of this penalty calculation. (Note that continued M/R violations would generally make the violator an M/R significant noncomplier (SNC) by definition, increasing the associated gravity seriousness factor, as shown in Attachment 2.)

In calculating the gravity factor related to the population exposure, the number of years in violation (computed separately for each type of violation as the number of months

[1] EPA should be particularly firm in calculating the gravity component for violations of orders issued under, or civil cases filed under §1431 of the SDWA (e.g., the emergency provisions). Because §1431 actions address "imminent and substantial endangerment" to human health, EPA should respond swiftly and severely. In civil judicial cases where the water system owner/operator violated a §1431 order, the gravity shall reflect the seriousness of the violation. The maximum statutory penalty is $5,000 in a civil judicial action for violation of the emergency order itself. If, however, the §1431 order was issued in response to violations of the NPDWRs, and if the Region determines that a higher penalty is more appropriate, then the Region could choose to prove these underlying violations and could assess a penalty of up to $25,000 per day per violation in a civil judicial action taken under §1414 and/or §1431. For guidance on using §1431 authorities, please refer to the "Final Guidance on Emergency Authority under Section 1431 of the Safe Drinking Water Act", dated September 27, 1991 (PWSS Water Supply guidance # 87).

divided by twelve) is multiplied by the population served by the water system in violation.[2] For example, for a water system in violation of one requirement for one contaminant for 18 months and serving 5,000 people, the gravity component related to the population exposure would be $7,500 (i.e., [5,000][18/12]). (For the purposes of this part of the calculation only, the Agency may choose to use the population served at the time of the violation, rather than the current population served.) The gravity factor related to the seriousness of the violation is then multiplied by the gravity factor related to population exposure to determine the actual total gravity portion of the penalty for each type of violation. The gravity components for each type of violation are then added to determine the total gravity portion of the penalty.

C. Adjustment Components

After the economic benefit and gravity components are calculated, these amounts may be modified according to several adjustment components. Adjustment components address the following four concerns: degree of willfulness and/or negligence, history of noncompliance, litigation considerations, and ability to pay. Adjustment components for the degree of willfulness and/or negligence and for history of noncompliance are applied only to the gravity component; adjustment components for litigation considerations and for ability to pay are applied to the entire penalty amount. In general, adjustment components can either increase or decrease the penalty. The penalty calculation worksheet in Attachment 1 incorporates the range of possible values for each of these adjustment components, as discussed below.

1. Degree of Willfulness and/or Negligence: Ignorance of the law or regulation is not a reason to reduce a penalty. Therefore, the "sophistication" of the violator would only serve to increase the penalty. Given the relatively ample resources and personnel of the larger water systems, this adjustment component should be frequently applied to large water systems, but it could well apply to smaller systems too.

In assessing the degree of willfulness and/or negligence of the water system operator/owner, all persons are expected to comply completely with applicable requirements. If a violator has shown disregard for regulations and has been uncooperative with the Agency and/or the State in its efforts to return the system to compliance, the Agency uses this component to increase the penalty by up to 100% of the gravity component. However, if the

[2] In computing the duration of noncompliance for M/R violations, for the settlement penalty calculation, estimate the length of time that monitoring has been and will be delayed or avoided, starting from the last day of the compliance period, or, if applicable, from the date specified in an order or consent decree.

violator has been only mildly uncooperative, the penalty will be increased by a smaller amount, reflecting the degree of cooperation. Therefore, this factor, if appropriate, could increase the gravity component by 1% to 100%, by multiplying the gravity by a factor between 1.01 and 2.00. Otherwise, this factor remains at 1.00.

2. History of Noncompliance: The history of noncompliance of the violator must be considered in setting a penalty. The Agency must consider whether any enforcement actions had previously been taken by the Agency or by the State against the water system for violations within the past five years, and whether the violator returned to compliance in response to those enforcement actions. Other considerations could include similarity of current violations to previous violation(s), how recent any previous violations were, the number of previous violations, and the violator's responsiveness to addressing these violations.

This factor increases the total gravity by between 10% and 30% for each enforcement action against this violator as follows:

10% for each notice of violation or equivalent action;
20% for each administrative order or equivalent action; and
30% for each emergency order, complaint for penalties, or equivalent action).

Further, if the violator has a history of previous violations and an absence of ensuing enforcement actions, this factor is set at 20%. Even if the enforcement actions address the same violations, this factor is still applied for each enforcement action. This factor is applied regardless of whether enforcement actions are taken by States or by EPA, and regardless of distinctions among types of administrative orders (e.g., "boil-water" orders or consent orders).

As an example of the correct application of factors for history of noncompliance, consider a system which has been issued a notice of violation and two administrative orders in the past five years. The adjustment to the gravity component of the penalty for history of noncompliance equals: 1.10 (for the notice of violation) x 1.20 x 1.20 (for the two administrative orders). In this example, the gravity component would be multiplied by this total adjustment of 1.58 (1.10 x 1.20 x 1.20) for history of noncompliance, and also multiplied by the adjustment factor for degree of willfulness/negligence in order to obtain the adjusted gravity component.

3. Litigation Considerations: Some enforcement cases may have weaknesses or equitable problems that may persuade a court to assess a penalty less than the statutory maximum amount. The simple existence of weaknesses in a case, however, should not automatically result in a litigation consideration reduction of the preliminary penalty amount (i.e.,

economic benefit + gravity + adjustments for willfulness and history of noncompliance). The government should evaluate every penalty with a view toward the potential for protracted litigation and attempt to ascertain the maximum civil penalty the court is likely to award if the case proceeds to trial. The basic rule for litigation considerations is that the government may reduce the amount of the civil penalty it will accept at settlement to reflect these considerations (*i.e.*, weaknesses or equitable issues) where the facts demonstrate a substantial likelihood that the government will not achieve a higher penalty at trial.

Because the settlement penalty is meant to represent a reasonable compromise of EPA's claim for the statutory maximum, before making a settlement offer, EPA must determine the statutory maximum penalty and estimate how large a penalty the government might obtain if the case were to proceed to trial. Given the limited number of judicial opinions on the issue of penalties in cases involving PWSs, Agency legal staff must use their best professional judgment in determining what penalty a court might assess in the case at hand. Any adjustments for litigation considerations must be taken on a factual basis specific to the case.

Although there is no universal list of litigation considerations, there is a list of factors that should be considered in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial. Potential litigation considerations could include:

a. Known problems with the government's evidence proving liability or supporting a civil penalty;

b. The credibility, reliability, and availability of witnesses;[3]

c. The informed, expressed opinion of the judge assigned to the case (or person appointed by the judge to mediate the dispute), after evaluating the merits of the case.[4]

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[3] The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial. The inconvenience or expense of producing the witness at trial is not a litigation consideration and therefore, should not affect the bottom-line penalty.

[4] This factor should not be applied in anticipation of arguments, or at the stage of initial referral. The Agency should not be unduly influenced by taking at face value what a judge attempting to encourage a settlement might say.

d. The record of the judge in any case presenting similar environmental issues. (In contrast, the reputation of the judge, or the judge's general demeanor, without a specific penalty or legal statement on a similar case, is rarely sufficient as a litigation consideration.)

e. Statements made by Federal, State or local regulators that the respondent or defendant may credibly argue led it to believe it was complying with the Federal law under which EPA is seeking penalties.

f. The payment by the defendant of civil penalties for the same violations in a case brought by another plaintiff.[5]

g. The development of new, relevant case law.[6]

h. A blend of troublesome facts and weak legal positions such that the Agency faces a significant risk of obtaining a negative precedent at trial of national significance.

In evaluating the list of possible litigation considerations set forth above, the Region shall evaluate each consideration for the impact it is likely to have on the Agency's ability to obtain a trial penalty in excess of the "bottom-line" penalty amount. The application of litigation considerations before a complaint is filed would usually be premature, because at that time the Agency generally does not have enough information to fully evaluate litigation risk. Reductions for litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement activities, of the weaknesses in its case and how the specific court views penalties in the case.

The Agency recognizes that this evaluation of litigation considerations often reflects subjective legal opinions. Thus, except as discussed below in instances in which a special litigation consideration for non-profit entities may apply, a Regional office may reduce the

[5] If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations. Because a violator is generally liable to more than one plaintiff, the prior payment of a civil penalty should not generally result in a dollar-for-dollar reduction of the Agency penalty settlement amount. If the previous case included other violations, only a portion of the penalty already paid should be considered in reducing the penalty in the case at hand.

[6] Between the time the Region initiates or refers a case, new case law relating to liability or penalty assessment may affect the strength of the Agency's legal arguments. In that circumstance, the Region may apply litigation considerations to adjust its initial penalty settlement figure. Of course, favorable new case law would be used to bolster the preliminary settlement amount.

penalty by up to one-third of the adjusted gravity amount (after adjustments for degree of willfulness and/or negligence and adjustments for history of noncompliance) for litigation considerations without Headquarters approval. Of course, this reduction must be clearly explained in the settlement case file.

In evaluating possible litigation considerations, Agency staff should recognize that litigation considerations do not include:

a. The Region's desire to minimize the resource investment in the case.

b. A generalized goal (in opposition to established Agency policies) to avoid litigation or to avoid potential precedential areas of the law.[7]

c. A duplicative statement of elements included or assumed elsewhere in the Penalty Policy, such as inability to pay, "good faith" or a "lack of willfulness" by a respondent or defendant.

d. Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case, that large penalties are not appropriate, are generally, by themselves, not a reason to reduce the preliminary settlement penalty amount.

e. By itself, the failure of a regulatory agency to initiate a timely enforcement action is not a litigation consideration.

Cases in which the owner of the PWS is a non-profit entity, such as a municipality, may involve special litigation considerations because of the perceived reluctance of some Federal courts to order non-profit entities to pay very large penalty amounts to the Federal Treasury: In these cases in which the penalty amount is extremely large relative to the size of the municipality, the Agency may elect to reduce the penalty, based on a "per capita" national litigation consideration. This litigation consideration, to be used only in actions involving non-profit entities, is calculated as follows:

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[7] There are times when the Agency and the Department should fully litigate a civil or criminal case as it may create a beneficial precedent for the Federal government.. An example is U.S. v. Midway Heights County Water District (695 F. Supp. 1072, 1076, E.D. Cal. 1988), in which the court found that 1) the definition of human consumption extends beyond just ingestion and is broader than merely whether the service population drinks the water, and 2) the presence of organisms that were accepted indicators of the potential for the spread of serious disease presented an imminent (and substantial) endangerment, regardless of whether actual illnesses had been reported.

Step 1. Calculate the product of the service population multiplied by $2 per person, times the total number of months in which any violation occurred in the past five years (without "double-counting" months, up to a maximum of 60 months), divided by 12.

Step 2. If this product is **greater** than the preliminary penalty amount (calculated as economic benefit + [gravity x adjustments for willfulness and history of noncompliance]), then this litigation consideration does **not** apply and the preliminary penalty amount remains unchanged.

Step 3. If the product calculated in step 1 (above) is less than the preliminary penalty amount (as defined in step 2 above), calculate the difference between the preliminary penalty amount and the product. Next, take 10% of that difference and add it to the product, thus computing the adjusted penalty amount.

This calculation may be simplified and represented as:

$$A = (0.9 \times B) + (0.1 \times C)$$

where A represents the adjusted penalty (not just the deduction for litigation considerations) after applying this "per capita" national litigation consideration, B represents the product calculated in step 1, and C represents the preliminary penalty amount (calculated as economic benefit + [gravity x adjustments for willfulness and history of noncompliance]).

This special litigation consideration may only be used for non-profit entities, and, even then, only if the preliminary penalty amount (as defined above) is more than the product calculated in step 1. This litigation consideration may be taken before the complaint is filed.[8] If this special litigation consideration is used, any additional penalty reductions must be justified by compelling and extraordinary litigation problems or demonstrated financial inability to pay and receive prior approval from Headquarters. If this special litigation consideration for non-profit entities is used, the Region may not also reduce the penalty by up to one-third of the adjusted gravity amount (including adjustments for degree of willfulness and/or negligence and adjustments for history of noncompliance) for litigation considerations without Headquarters approval. Further, supplemental environmental projects (SEPs) shall not be used to reduce the cash penalty below the amount calculated according to this special litigation consideration.

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[8] This national generic litigation consideration may be removed based on changes in the Act, settlements, or case law.

4. Ability to Pay: The Agency typically does not request penalties/settlements that are clearly beyond the means of the violator. The ability-to-pay adjustment component reduces the penalty to the highest penalty amount that the violator can reasonably pay and still provide safe drinking water to its customers.

An adjustment for ability-to-pay may **only** be made if the violator demonstrates and documents that it has and will continue to have insufficient economic resources to pay the calculated penalty. The violator must submit the necessary information demonstrating actual inability to pay as opposed to unwillingness to pay. If the violator is unwilling to cooperate in demonstrating an inability to pay the penalty, this adjustment should not be considered in the penalty calculation, because, without the cooperation of the violator, the Agency will generally not have adequate information to determine accurately the financial position of the violator.

At a minimum, the owner of a privately-owned water system should provide Federal tax returns from the previous three years and should submit a list of assets and liabilities. This list of assets and liabilities generally gives a truer picture of the violator's financial assets than do tax returns. In addition, the violator can be required to provide a certified financial statement prepared by a certified public accountant.

Municipal water systems do not submit Federal tax returns, but can submit documents pertaining to the financial health of the community, such as bond ratings, median income of residents, unemployment rate, user fees, and other socio-economic indicators. The government should carefully assess the accuracy of the actual or anticipated claim of inability-to-pay. Evaluation by an outside expert or consultant may be necessary to fully evaluate the claim.

If the violator demonstrates an inability to pay the entire negotiated penalty in one lump sum (usually within 30 days of consent decree entry), a payment schedule should be considered. The penalty could be paid in scheduled installments with appropriate interest accruing to delayed payments. Appropriate interest for a privately-owned PWS would be at least the existing prime interest rate; for a municipal PWS, the appropriate interest rate would be at least equal to that municipality's prevailing bond rate. The period allowed for such installment payments should generally not extend beyond three years from the date of entry of the settlement or the issuance of the final complaint for penalties.

If a payment schedule will not resolve the violator's ability-to-pay issue, as a last recourse, the Agency can reduce the amount it seeks in settlement to a more appropriate amount in situations in which inability-to-pay can be clearly documented and reasonably quantified.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS (SEPs)

According to Agency policy[9], where the Agency has legal authority, violators may perform environmentally beneficial projects in exchange for receiving a smaller settlement penalty. In order for a violator to receive a penalty reduction in exchange for performing such a project, the Agency's SEP Policy, requires, inter alia, that the project constitutes actions that go beyond compliance (and which otherwise are not legally required) and improves the injured environment or reduces the total risk posed to public health or the environment by the violations. If such projects are used, the provisions of the settlement must ensure that the project is completed as expected, and that the designated funds for the project are expended.

Any penalty action that has the total cash payment amount reduced by inclusion of such a SEP must be approved by the Office of Enforcement. The maximum penalty reduction for a SEP shall not exceed the after-tax net present value of the SEP.

Although SEPs help to fulfill EPA's goal of protecting and restoring the environment, the existing Agency policy requires the **assessment of a substantial monetary penalty** in addition to any SEP. A substantial monetary penalty is one that recaptures the violator's economic benefit of noncompliance plus some appreciable (i.e., non-trivial) portion of the gravity component.

Evaluation as to whether particular types of SEPs are acceptable should be performed based on the specifics of a particular case. The following are examples of such projects:

- Pollution Prevention Projects. Pollution prevention projects would serve to greatly reduce contamination of ground or surface water supplies in the surrounding community and therefore enhance public health by improving the quality of drinking water. Source water protection programs and wellhead protection programs are examples of pollution prevention projects (and are possible SEPs, if the public water system is not otherwise required to implement the protection program).

- Pollution Reduction Projects. These projects could involve enhanced treatment, or earlier or increased monitoring for certain pollutants by the violator, beyond measures required to come into compliance. For example, the water system owner/operator could start sampling for contaminants which are either in the process of being regulated or not regulated (e.g., Phase VIb contaminants).

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[9] See "EPA Policy on the Use of Supplemental Environmental Projects in Enforcement Settlements", transmitted on February 12, 1991 by the Assistant Administrator for Enforcement, or subsequent revisions.

V. PLEADING -- Other Types of Penalties

This policy only establishes how the Agency calculates the minimum penalty for which it would be willing to settle a case. The development of the penalty amount to plead in an administrative or judicial complaint is developed independent of this policy, except to the extent the Agency may not seek a settlement penalty in excess of the statutory maximum penalty it is seeking in the complaint. Further, at trial the Agency will seek a penalty based on the statutory maximum and the penalty factors which the court is instructed to consider. Of course, the Agency will not use this settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing. In pleading for penalties in civil or administrative complaints, please refer to guidance by the Office of Enforcement regarding the distinctions among pleading, negotiating, and litigating civil penalties for enforcement cases.[10] Although the aforementioned guidance was written for cases brought under the Clean Water Act, it is also useful in Safe Drinking Water Act actions.

VI. DOCUMENTATION AND RELEASE OF INFORMATION

Each component of the settlement penalty calculation (including adjustments) must be clearly documented with supporting materials and written explanations in the case file and provided to Headquarters for review and approval as required. Any subsequent recalculations of the penalty based on new information must also be included in the file.

Documentation and explanations of a particular settlement penalty calculation constitute confidential information that is exempt from disclosure under the Freedom of Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While individual settlement penalty calculations are confidential documents, this penalty policy is a public document and may be released to anyone upon request. Further, as part of settlement negotiations between the parties, the Agency may choose to release parts of the case-specific settlement calculations. The release of such information may only be used for settlement negotiations in the case at hand and, of course, may not be admitted into evidence in a trial or hearing.

This policy is purely for the use of U.S. EPA enforcement personnel in settling cases. EPA reserves the right to change this policy at any time, without prior notice, or to act at variance to this policy. This policy does not create any rights, implied or otherwise, in any third parties.

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[10] See *Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act*, OECM/OW, January 19, 1989.