

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

2013 JUL 12 PM 4:59

IN THE MATTER OF )  
 )  
Mountain Village Parks, Inc. )  
Big Piney, WY )  
PWS ID #WY5600221 )  
 )  
Respondent. )  
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 )  
 )

Docket No. SDWA-08-2012-0026

**COMPLAINANT'S SECOND  
PENALTY INFORMATION  
SUPPLEMENT**

FILED:  
EPA REGION VIII  
HEARING CLERK

**INTRODUCTION**

This Second Penalty Information Supplement is submitted on behalf of Complainant, U.S. Environmental Protection Agency, Region 8 (EPA), by its undersigned counsel, pursuant to the Order to Supplement the Record issued by The Honorable Elyana R. Sutin, EPA Region 8 Regional Judicial Officer, dated June 27, 2013. The Second Penalty Information Supplement is intended to clarify the "Water Technical Enforcement Program protocol" and provide additional information regarding the "other appropriate factors" referenced in the Complainant's Supplemental Penalty Information dated April 12, 2013.

**"PROTOCOL" CLARIFICATION**

The Complainant refers twice to the Water Technical Enforcement Program's protocol for calculating penalties in its previous supplemental penalty information. First, the Complainant states that it considered "other appropriate factors" within the meaning of section 1414(b) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-3(b), including economic benefit, willfulness and negligence, history of noncompliance, and duration of the violation, consistent with the Water Technical Enforcement Program's protocol for calculating drinking water penalties. Comp.'s Supp. Penalty Info., page 8. Second, the Complainant again states on page

14 that its consideration of “other appropriate factors” within the meaning of section 1414(b) is consistent with legal precedent, EPA general enforcement policies GM-21 and GM- 22, and the Water Technical Enforcement Program’s methodology for calculating penalties. Comp.’s Supp. Penalty Info., page 14.

In responding to the Presiding Officer’s (PO) request for a copy of the Water Technical Enforcement Program protocol, a clarification is necessary. The term “protocol” as used in both instances describes the process employed by the program for weighing and evaluating the statutory and other appropriate factors to calculate fair, consistent, and equitable proposed penalty amounts. This protocol, as previously stated in the Complainant’s Supplemental Penalty Information, includes consideration of the guidelines set forth in the New Public Water System Supervision Program Settlement Penalty Policy (Penalty Policy). While there is no written protocol or guidance for adhering to it, a thorough discussion of the Water Technical Enforcement Program’s protocol for calculating the penalty in this matter is set forth in the Declaration of Mario Merida prepared in support of the Complainant’s penalty calculation and clarified in the Complainant’s Supplemental Penalty Information. Comp.’s Supp. Penalty Info, page.8,

**“OTHER APPROPRIATE FACTORS” ADDITIONAL INFORMATION**

“Other appropriate factors” for determining the amount of any penalty to be assessed for violations of the SDWA including, but not limited to those described by the Complainant in the Supplemental Penalty Information, derive from the EPA’s general enforcement policies GM -21 and GM-22. GM-21, EPA’s Policy on Civil Penalties, uses the degree of willfulness and negligence, history of noncompliance, ability to pay, degree of cooperation and noncooperation,

and other unique factors to adjust the preliminary penalty calculation to ensure fair and equitable treatment of the regulated community. GM-21, page 5. GM-22, A Framework for Statute-Specific Approaches to Penalty Assessment, similarly requires that factors including degree of willfulness and/or negligence, history of noncompliance, cooperation/non cooperation, ability to pay, and other unique factors be used to adjust the initial penalty amount based on case-by-case circumstances.

In this instance, the Water Technical Enforcement Program based its penalty calculation on the statutory factors set forth in the SDWA and the Penalty Policy. The Penalty Policy, although a settlement policy, was used to take the statutory and other appropriate factors into account and determine an appropriate penalty amount absent a specific formula in the statute for calculating penalties. Consistent with their intended use as described in GM-21 and GM-22 and as specifically discussed in Mr. Merida's Declaration, the "other appropriate factors" were used to ensure a fair and equitable proposed penalty amount by making case-specific adjustments to the initial gravity calculation.

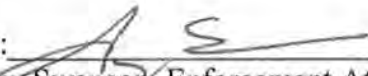
The Complainant's adjustments to the initial gravity calculation using "other appropriate factors" are in accordance with section 1423(b) of the SDWA, GM-21, and GM-22. While the EAB held that the Complainant's use of the Penalty Policy was inconsistent with its express terms, the factors the Complainant evaluated in determining the proposed penalty amount are based on the facts of the case and were applied consistent with the SDWA, GM-21, and GM-22. Further, proposed penalty amounts including "other appropriate factors" generally have been accepted and relied upon by administrative judges in assessing drinking water penalties. *See*, Comp.'s Supp. Penalty Info., page 14. Absent the Respondent disputing the facts alleged by the

Complainant and subject to the PO accepting in whole or in part the recommended penalty amount, the factors used to calculate the penalty including the seriousness of the violation, population at risk, and other appropriate factors are consistent with the administrative record as clarified in the Complainant's Supplemental Penalty Information and conform to the EAB's remanding opinion.

Respectfully submitted,

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8**

Date: 7-12-2013

By:   
Amy Swanson, Enforcement Attorney  
U.S. EPA Region 8  
1595 Wynkoop Street (8ENF-L)  
Denver, Colorado 80202-1129  
Telephone: (303) 312-6906  
Email: swanson.amy@epa.gov

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINTANT'S SECOND PENALTY INFORMATION SUPPLEMENT 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

7.12.2013  
Date

  
Signature