

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2015 MAY 19 PM 1:05

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF)

Mackay Investments, LLC)

Jackson Hole Campground)
Teton County, Wyoming)
PWS ID #WY5600520)

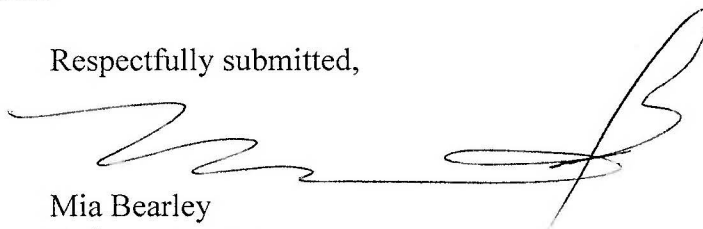
Respondent.)
_____)

Docket No. SDWA-08-2013-0058

**COMPLAINANT'S
MOTION FOR DEFAULT**

Pursuant to 40 C.F.R. § 22.17, Region 8 of the United States Environmental Protection Agency (EPA) respectfully requests that the Regional Judicial Officer: (1) find the Respondent Mackay Investments, LLC, in default and liable for the violations alleged in the Complaint and Notice of Opportunity for Hearing filed in this matter on September 18, 2013, due to Respondent's failure to file an answer in this matter; and (2) assess an administrative civil penalty of \$6,949.38 in favor of EPA. A memorandum setting forth EPA's request in further detail is being filed in support of this motion.

Respectfully submitted,



Mia Bearley
Enforcement Attorney
Office of Enforcement, Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202
Telephone Number: (303) 312-6554
Facsimile Number: (303) 312-7202

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

FILED
EPA REGION VIII
HEARINGS CLERK

Docket No. SDWA-08-2013-0038

IN THE MATTER OF)
)
Mackay Investments, LLC)
)
Jackson Hole Campground)
Teton County, Wyoming)
PWS ID # WY5600520,)
)
Respondent.)
)
)

**MEMORANDUM IN SUPPORT OF
MOTION FOR DEFAULT**

INTRODUCTION

This memorandum supports a motion for default filed by the United States Environmental Protection Agency (EPA). As set forth below, the respondent in this action has failed to answer a complaint that EPA filed in this matter over a year ago and has continued to violate the requirements at issue in this proceeding.

BACKGROUND

Mackay Investments, LLC, (Respondent) owns and/or operates the Jackson Hole Campground public water supply system (System), located in Teton County, Wyoming. The System uses one well to access a groundwater source and serves an average of approximately 178 individuals per day through 78 service connections at least 60 days out of the year. As such, the System is a “public water system” as that term is defined in section 1401(4) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f(4) (2012), and is a “transient non-community water system” within the meaning of 40 C.F.R. § 141.2. Further, Respondent is a “supplier of water” within the meaning of section 1401(5) of SDWA, 42 U.S.C § 300f(5), and 40 C.F.R. § 141.2 (2014). Respondent is, therefore, subject to the requirements of part B of SDWA, 42

U.S.C § 300g and its implementing regulations, the National Primary Drinking Water Regulations (NPDWRs), 40 C.F.R. part 141.

EPA issued Respondent an Administrative Order (Order) on May 5, 2011, citing violations of the NPDWRs, including: failure to monitor (FTM) total coliform (TC) during the 3rd quarter of 2006, the 4th quarter of 2008, and the 3rd and 4th quarters of 2010; FTM nitrate during 2010; failure to notify the public of certain violations; failure to report TC monitoring requirements to EPA; and, failure to report other violations of the NPDWRs to EPA. In summary, the Order required Respondent to: (1) monitor for TC quarterly and report the results to EPA; (2) monitor for nitrate annually; (3) notify the public of various violations; and (4) notify EPA of any future TC or other violations.

Respondent did not comply with the Order. EPA notified the System of its noncompliance with the Order, but the System did not come into compliance. *See* Mario Merida's Declaration, Attachment 1 to this Memorandum (Attachment 1). On December 21, 2011, EPA issued Respondent an Administrative Order violation letter (AOV) for FTM for TC during the 3rd quarter of 2011, for failure to report to EPA the System's FTM for TC during the 3rd quarter of 2011, and for failure to notify the public of various violations. EPA issued a second AOV letter on August 27, 2012, for FTM for TC during the 2nd quarter of 2012, and for failure to notify the public of various violations. EPA issued a third AOV letter on May 9, 2013, for FTM for nitrate during calendar year 2012, and for failure to notify the public of various violations.

EPA filed a Complaint and Notice of Opportunity for a Hearing (Complaint) with this Court on September 18, 2013. The Complaint charged Respondent with four counts of multiple NPDWRs and Order violations and proposed a civil administrative penalty of \$7,400. After EPA

served Respondent the Complaint by certified mail on September 27, 2013, Respondent did not file an answer or otherwise respond to the Complaint.

EPA attempted to resolve the Complaint's alleged violations and the proposed penalty with Respondent. As stated in its January 27, 2014, Status Report on this matter, EPA attempted to contact Respondent but was unsuccessful, and Respondent did not return messages. Therefore, EPA indicated in the Status Report its intention to file a motion for default. In the interim, however, EPA continued its efforts to contact Respondent. As indicated in EPA's March 19, 2014, Second Status Report, Respondent ultimately did establish contact and undertook actions to come into compliance. EPA agreed to enter into negotiations with Respondent in an effort to resolve the matters identified in the Complaint.

On April 14, 2014, EPA filed a Notice of Substitution of Counsel and continued negotiations with Respondent. After initial exchanges regarding payment of EPA's penalty, Respondent ultimately claimed that it had an inability to pay the proposed penalty. Subsequent negotiations between the parties focused on Respondent's finances and EPA's processes in evaluating Respondent's ability to pay (ATP) claims. *See Attachment 1.* On May 23, 2014, EPA agreed to email ATP evaluation forms to Respondent, to be completed and returned by June 9, 2014. Respondent submitted incomplete records on June 25, 2014. EPA notified Respondent of the insufficiencies and granted an extension to July 11, 2014. Respondent sent additional information on July 21, 2014, however, the information remained incomplete.

While waiting for Respondent's information, EPA learned of an opportunity to request funding for EPA's contractor, Industrial Economics, Inc., (IE) to conduct a financial analysis. On July 15, 2014, EPA submitted a referral to EPA's headquarters office for financial analysis case support and the support was granted. Upon receipt of Respondent's second (yet still incomplete)

submission of financial information, EPA amended the scope of the referral and IE began its case analysis on July 29, 2014.

EPA received the IE financial analysis report on November 4, 2014. EPA evaluated the report and then contacted Respondent to request a joint review. On December 12, 2014, the parties reviewed Respondent's ATP together by phone. During that call, Respondent raised a substantial debt that was not listed in Respondent's tax returns. EPA stipulated that consideration of this new amount would likely not alter the ATP analysis (as key profit and other figures would not change), but stated that it would review information Respondent committed to email EPA that day. Respondent responded approximately one month later, providing a partial answer to clarification requested by EPA and claimed continuing inability to pay. EPA consulted IE regarding the additional debt and concluded that Respondent did have the ability to pay EPA's penalty. On January 14, 2015, EPA requested that Respondent communicate its response to EPA's final settlement offer (which included a reduced penalty amount and installment plan) by January 16, 2015. To date, Respondent has not provided a response to that offer.

Despite expending extensive efforts and programmatic resources, EPA has been unsuccessful in resolving this matter with Respondent. Further, the System has continued to incur additional violations of SDWA and the NPDWRs. It is critical to the credibility of the program and to maintain fairness amongst the regulated community that EPA collect the penalty proposed herein for the violations alleged in the Complaint. Assessment and collection of the proposed penalty will also help protect human health by serving as a deterrent for this and other public water systems that choose not to comply with the law. Based on Respondent's failure to answer the Complaint, a default order and penalty is necessary to protect human health and fully resolve this matter.

STANDARD FOR FINDING DEFAULT

A respondent may be found in default upon failure to file a timely answer to an administrative complaint. A respondent's default 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. 40 C.F.R. § 22.17(a). Where EPA requests a penalty in a motion for default, EPA must specify the amount of, and explain the legal and factual grounds for, the penalty it seeks. 40 C.F.R. § 22.17(b). When a Presiding Officer finds that a default has occurred, s/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. The relief proposed in a complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the particular statute authorizing the proceeding at issue. 40 C.F.R. § 22.17(c).

ARGUMENT

I. Respondent Failed to File an Answer

According to 40 C.F.R. §22.15(a), a respondent must file an answer to a complaint with the Regional Hearing Clerk within 30 days after service of the complaint. EPA filed the Complaint in this matter on September 18, 2013, and, as indicated on the return receipt filed with the Regional Hearing Clerk, served such Complaint to Respondent on September 27, 2013. Respondent's 30-day timeframe for filing an answer expired on October 28, 2013.

Respondent not only failed to file a timely answer, but has failed to file an answer altogether. EPA warned Respondent of the consequences for failing to file a timely answer in both the Complaint and its accompanying cover letter. See, Attachment 2. The cover letter provided information regarding the process for Respondent to file an answer. 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. Despite such warnings, 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 the answer. Such failure to respond provides an appropriate basis for finding Respondent in default.

II. Prima Facie Case of Liability

For a default order to be entered, EPA must establish a prima facie case of liability against the respondent. *See, Raber, Jr.*, 2004 EPA RJO LEXIS 188 (July 22, 2004). To prove a prima facie case of liability in this matter, EPA must prove that Respondent: (1) is a person that owns and/or operates a public water supply system; (2) has been issued an administrative order under section 1414(g) of SDWA, 42 U.S.C. § 300g-3(g); and (3) has violated that order. The factual allegations in the Complaint satisfy all three elements necessary to establish a prima facie case of liability:

- the System, which has at least 15 service connections and/or regularly serves at least 25 individuals at least 60 days out of the year, is a “public water system” and Respondent, a “person” as defined in SDWA, owns and/or operates the Jackson Hole Campground public water system;
- on May 5, 2011, EPA issued an administrative order under section 1414(g) of SDWA, 42 U.S.C. § 300g-3(g), to Respondent; and
- Respondent has incurred four counts of violations of the Order, as set forth in Section III. of the Complaint.

By failing to file an answer, Respondent has admitted all factual allegations in the Complaint and is liable to EPA for a civil penalty pursuant to section 1414(g)(3) of SDWA, 42 U.S.C. § 300g-3(g)(3).

III. Grounds in Support of the Requested Penalty

SDWA authorizes EPA to assess a civil penalty of up to \$25,000 per day for violation of an order issued under section 1414(g). 42 U.S.C. § 300g-3(g)(3). This amount has been adjusted for inflation to \$32,500, as provided in 40 C.F.R. part 19, for violations occurring March 16, 2004, through January 12, 2009, and to \$37,500 for violations occurring after January 12, 2009. *See*, Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66643, 66647 (Nov. 6, 2013) (codified at 40 C.F.R. pt. 19). Respondent's violations at issue occurred beginning in 2011, and fall within the most recent inflation adjustment of \$37,500 per day of violation.

EPA does not, in its motion for default, seek the statutory maximum, nor does it seek the \$7,400 cited in the Complaint. Rather, as set forth below and in Attachment 1, EPA has arrived at the total penalty amount of \$6,949.38 by assigning numeric values to the factors set forth in SDWA, based on the facts of this case. *See, Serv. Oil, Inc.*, 2008 EPA App. LEXIS 35 (EAB July 23, 2008), vacated, and remanded on other grounds, 590 F.3d 545 (8th Cir. 2009), where EPA proposed far less than the statutory maximum and provided no details as to the methodology it used to calculate the proposed penalty. *See also, City of Salisbury*, No. CWA-III-219 (February 8, 2000), *aff'd*, 10 E.A.D. 263 (EAB 2002), where EPA had not issued any civil penalty guidelines, the Court applied statutory penalty factors alone in assessing penalty. The statutory factors which SDWA requires EPA to take into account in assessing a civil penalty are: the seriousness of the violation, the population at risk, and other appropriate factors. 42 U.S.C. § 300g-3(b).

A. Seriousness of Violations

Respondent has consistently incurred failure to monitor violations for close to a decade. Beginning in 2006 and continuing through to current violations, Respondent has failed to monitor for total coliform bacteria. Additionally, Respondent repeatedly has failed to monitor for nitrate, incurring violations in 2010, 2012 and 2013. *See* Attachment 1. Many of these violations remained unreported, compromising the ability of EPA's drinking water program to protect the public by means of compliance assistance or regulatory enforcement. This, in turn, results in ongoing and continued threats of harm to the public.

Failures to monitor and failures to report represent serious violations and present substantial risks of harm, as reflected in several Administrative Law Judge decisions. *See, Durham*, 1997 EPA ALJ LEXIS 107 (April 14, 1997), where a public water supply system failed to sample for coliform bacteria for eleven months and the Administrative Law Judge held that EPA's calculations had understated the seriousness of the violations:

Expert testimony at the hearing indicated that coliform analysis involves testing for the presence of coliform bacteria, which are bacteria which come from the gastrointestinal tracts of warm-blooded animals ... some coliform organisms can, by themselves, be very dangerous to the health of persons with compromised immune systems. [citation omitted] However, coliform is mainly used as a secondary pathogen, to suggest the presence of other organisms dangerous to the health of humans. [citation omitted] Exposure to such organisms can result in gastrointestinal diseases, nausea, vomiting, dizziness, and convey illnesses like hepatitis, typhoid, giardiasis and cryptosporidiosis. [citation omitted] Mr. Durham's failure to have the water analyzed for months at a time left the health of men, women, and children drinking it exposed to these conditions. *Id.* at 44-45.

Although coliform had been detected in the system, EPA presented no evidence of anyone becoming sick from drinking the system's water. Nonetheless, the Administrative Law Judge found that the system's failures to analyze coliform samples and report the results constituted serious violations:

[The violations] directly undermin[ed] the purpose of the SDWA enforcement program, which is the foundation of EPA's ability to generally protect human health by maintaining water potability. Without the results of periodic water analysis the Agency cannot effectively exercise its power under the Act to take measures to prevent the consumption of contaminated water and demand water improvement efforts. *Id.* at 47.

Similarly, in *Village of Glendora*, the Administrative Law Judge observed:

Without adequate monitoring and monitoring data supplied by [Glendora], EPA is unable to determine whether [Glendora] is supplying water to the public that does not exceed the maximum contaminant levels established by national primary drinking water regulations. [Glendora's] violations of the AO as they relate to coliform bacteria testing analysis, reporting and public notification are grave. 1992 EPA ALJ LEXIS 712, *11-12 (May 20, 1992).

Respondent's longstanding failures to monitor and report violations to EPA and the public are serious violations. The toxicological risks of harm are referenced in the discussion regarding gravity, below, in Section C.2. The seriousness of Respondent's violations and the associated threats of harm are necessarily interrelated with the number of people exposed to the threat, and, therefore, the statutory factor regarding the population at risk, is discussed immediately below.

B. Population at Risk

The System serves an average population of approximately 178 individuals per day. The number of potentially affected individuals may be greater than 178, however, due to the fact that the System serves a transient population and the particular individuals affected may change on a frequent basis. As Respondent has failed to provide EPA with results of testing or even to alert EPA that it had not performed the required sampling, EPA has been unable to assess whether Respondent's customers are drinking safe water or the extent to which the customers are at risk of contracting diseases from coliform or other pathogens. This factor, the number of persons potentially exposed to the contaminants at issue and the associated human health risks, supports EPA's proposed penalty.

C. Other Appropriate Factors

EPA has not developed a guidance policy for proposing penalty amounts in pleadings for public water supply enforcement actions. However, EPA has published a related guidance, *Policy on Civil Penalties*, Env'tl. Prot. Agency, *The Policy on Civil Penalties # GM-21* (Feb. 16, 1984), Env'tl. Prot. Agency, *A Framework for Statute-Specific Approaches to Penalty Assessment # GM-22* (Feb. 16, 1984), (GM-21 and GM-22, respectively), included as Attachment 3 to this Memorandum. As stated in *Lincoln Road RV Park, Inc.*, 2009 EPA RJO LEXIS 197 (July 30, 2009), although GM-21 cannot be used by itself as a basis for determining an appropriate penalty, the policy is instructive in how to incorporate the statutory factors:

[GM-21] sets a framework to consider the Respondent's degree of willfulness and/or negligence, history of noncompliance, if any and ability to pay. These are considered the "other appropriate factors" under Section 1414(b) of the Act. 42 U.S.C. § 300g-3(b) *Id.* at n.3.

The Administrative Law Judge further states that GM-22 is a sister policy to GM-21, and that it sets forth the actual framework for calculating a penalty. According to GM-21 and GM-22, "other appropriate factors" to consider in calculating a penalty include:

1. economic benefit; and
2. gravity, *e.g.*, actual/possible harm, importance to regulatory program.

Additional gravity-related "adjustment factors" (to better distinguish amongst cases and promote consistency) are:

3. degree of cooperation/noncooperation
4. degree of willfulness and/or negligence
5. history of noncompliance
6. ability to pay (optional)
7. other unique factors.

1. Economic Benefit

The amount of money that Respondent saved by failing to monitor, failing to report such violations and failing to provide public notice was likely minimal. In similar cases,

Administrative Law Judges have found relatively low amounts of economic benefit for these types of violations. *See, Glendora, supra*, (finding an economic benefit of \$25 for each month of failing to sample for coliform bacteria). In the case at hand, based upon a 2008 price survey of Wyoming laboratories, EPA identified an amount of \$20 for each month of failing to monitor for total coliform and \$15 for Respondent's FTM for nitrate. Finally, EPA added a \$5 amount for Respondent's failure to provide public notice of its FTM and to report such violation to EPA. In total, EPA calculated Respondent's economic benefit to be \$80. *See Attachment 1.*

2. Gravity

As referenced in GM- 21, a gravity component is central to a penalty that serves to deter people from violating the law:

Successful deterrence is important because it provides the best protection for the environment The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure the violator is economically worse off than if it had obeyed the law. This additional amount should reflect **the seriousness of the violation ... [and] is referred to as the "gravity component"** (emphasis added). *Id.* at 3-4.

Consideration of deterrence and the gravity component, then, includes an analysis of the seriousness of the violations. Section III.A., above, identifies issues related to this statutory factor, the seriousness of violations, and outlines how the threats of harm posed by Respondent's violations are significant and serious. More specifically regarding these associated risks, EPA has determined that exposure to coliform bacteria can present serious health risks, especially for small children, the elderly and individuals with compromised immune systems. Further, monitoring for coliform bacteria identifies whether the water may be contaminated with organisms that cause disease, including gastrointestinal disorders. *See, Office of Water, Water on*

Tap: What You Need to Know (Envtl. Prot. Agency Dec. 2009),

http://www.epa.gov/ogwdw/wot/pdfs/book_waterontap_full.pdf (last visited Mar. 10, 2015).

Obtaining reports of violations is critical to EPA's regulatory drinking water program. Respondent's violations for failure to monitor for total coliform and related reporting present many of the same risks identified in *Lincoln Road, supra*. As the Court noted:

By not monitoring for this contaminant, Respondent puts water consumers of this System at risk by possibly exposing them, without their knowledge, to harmful levels of coliform bacteria. Also important to the health of consumers of this System is the fact that, in contravention of the Act [and the MPDWRs,] Respondent never provided the public with notification of its failures to conduct the monitoring. If the System is not regularly monitoring and reporting any failures then the regulators, and more importantly, the consumers are unable to determine if the water is safe to drink. Congress clearly intended the Act to provide this information when it stated "...consumers served by the public water systems should be provided with information on the source of the water they are drinking and its quality and safety, as well as prompt notification of any violation of drinking water regulations." n7 [Pub. L. 104-182 Section 3(10). (Aug. 6, 1996)]. Respondent's System serves approximately 134 individuals. The violations are significant and need to be available to those who are impacted. These violations cannot be taken lightly. *Id.* At 8.

In addition to the coliform violations, Respondent failed to monitor for nitrate. An EPA public health fact sheet, Office of Water, *Basic Information about Nitrate in Drinking Water* (Envtl. Prot. Agency Feb. 5, 2014),

<http://water.epa.gov/drink/contaminants/basicinformation/nitrate.cfm> states that nitrate's health effects are serious and can be particularly toxic on infants. Children below six months of age who drink water containing nitrate in excess of the maximum contaminant level could become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blue baby syndrome.

Respondent exposed the public to these health threats for a substantial period of time. Respondent failed to conduct nitrate monitoring for 12 months (in 2012) and failed to monitor for coliform for 9 months (during the 3rd quarter of 2011, the 2nd quarter of 2012, and the 1st

quarter of 2013). Respondent failed to provide public notice for approximately 32 months: public notice was due within 30 days of Respondent's receipt of the Order (June 26, 2011) calculated through February 28, 2014, a date by which EPA had anticipated that Respondent would return to compliance (Respondent never did provide such public notice). Respondent also failed, for each of the 3 coliform violations, to report the violations to the EPA within 10 days of discovery, equaling a minimum duration of 3 months (including only the month the reporting was due to EPA). These above-listed violations comprise the subject of EPA's penalty, and the noted durations include neither the violations identified in the Order nor those incurred subsequent to issuance of the Complaint. Considering the subset of violations in the Complaint only (those used to calculate the penalty), Respondent failed to comply with the requirements of the NPDWRs and the Order for a duration of more than 55 months. Further, in addition to these violations, and not including those originally cited in the Order, Respondent continues to incur new violations. *See Attachment 1.*

Respondent's violations, cumulatively, add up to multiple years of harmful exposures of the public to human health risks, and evidence a fundamental recalcitrance. The effect of this recalcitrance on the penalty amount is discussed, below, in the context of the "adjustment factors" identified GM-21 and GM-22.

3. Degree of Cooperation/Noncooperation

Although Respondent has had over nineteen months to answer the Complaint and repeated opportunities to settle this matter with EPA, Respondent has failed to do so. In addition, resolution of this matter was delayed by Respondent's claim of inability to pay, associated extensions given regarding submission of financial information and missed deadlines. To date, Respondent has not provided the entirety of information originally requested by EPA. As set

forth in the Background section, above, EPA has expended significant resources in an attempt to resolve this matter with Respondent.

4. Degree of Willfulness or Negligence

Respondent's violations have occurred since 2006 and continue to occur. As described in Attachment 1, EPA has sent Respondent many notices of noncompliance and taken many steps in an attempt to bring Respondent into compliance. This includes, but is not limited to: eight violation letters; issuance of an Order; three notices of violations of the Order; multiple compliance assistance phone calls and emails; a visit to the System; offers of settlement; a referral to accommodate Respondent's request for special ATP consideration; and the initiation of this proceeding. Even subsequent to EPA's issuance of the Complaint, Respondent continues to be unwilling to comply with drinking water regulations and fails to monitor as required, incurring three additional violations of the Order, as well as new violations related to not correcting significant deficiencies identified by EPA, as required. *See*, Attachment 1. Respondent's continued violations in the face of notices from EPA demonstrate that Respondent has acted knowingly and willfully in ignoring its responsibilities to meet the requirements of the NPDWRs.

5. History of Noncompliance

Respondent has, in this case, continued to violate provisions of the NPDWRs over a period of eight years. Such violations range from failures to monitor coliform and nitrate, reporting and public notice violations, and failures to address significant deficiencies (the latter violation of the Ground Water Rule is cited only to reflect Respondent's noncompliance, and is not a subject of the original Complaint). Respondent's history of noncompliance evidences a

fundamental recalcitrance, a persistent disregard of the law and supports the penalty sought herein.

6. Ability to Pay

Respondent claimed an inability to pay during negotiations with EPA, however, after engaging a forensic accountant financial analyst to evaluate the claim, EPA found that the Respondent did have an ability to pay \$7,400 and that the penalty would comprise an insignificant effect on Respondent's finances. Further, having failed to respond to the Complaint, Respondent has not appropriately raised this issue to the Court; there is no information in the record to indicate that Respondent is unable to pay the proposed penalty. Where a respondent does not raise the claim that it is unable to pay a proposed penalty, there is no reason for a court to consider it. *Taylor*, 1992 EPA ALJ Lexis 713 (August 14, 1992). Further, as stated in GM-21, "[m]itigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigations." *Supra*, at 5. Respondent has not demonstrated an inability to pay and, therefore, there is no reason for the penalty to be reduced for this factor.

7. Other Unique Circumstances

EPA has spent a significant amount of time and effort in an attempt to resolve this matter. The many years of Respondent's noncompliance has caused EPA to expend considerable programmatic resources. Further, EPA has incurred substantial expense in an attempt to negotiate a settlement with Respondent. To deter similar violations by other systems in the future, a penalty in the amount identified immediately below is warranted.

8. Total Penalty Calculation

EPA considered the two SDWA statutory factors, seriousness of the violations and population at risk, to arrive at an amount representing the gravity of harm presented by

Respondent's violations. As indicated above, EPA calculated this preliminary gravity penalty amount and adjusted this amount based on the other appropriate factors outlined in GM-21 and GM-22. Adding in Respondent's economic benefit obtained, the final penalty that EPA seeks is a total amount of \$6,949.38. *See* Attachment 1.

CONCLUSION

Respondent failed to answer EPA's Complaint. For the reasons set forth above, EPA requests that the Presiding Officer find that Respondent is in default and issue a default order assessing a penalty of \$6,949.38.

Respectfully submitted,



Mia Bearley
Enforcement Attorney
Office of Enforcement, Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202
Telephone Number: (303) 312-6554
Facsimile Number: (303) 312-7202

Attachments:

1. Declaration of Mario Merida
2. Cover letter for September 18, 2013, Complaint and Notice of Opportunity for Hearing
3. EPA General Enforcement Policies GM-21 and GM-22, February 16, 1984

Attachment 1
Declaration of Mario Merida

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

_____)	
IN THE MATTER OF)	
)	Docket No. SDWA-08-2013-0058
Mackay Investments, LLC)	
)	
Jackson Hole Campground)	
Teton County, Wyoming)	
PWS ID #WY5600221,)	
)	DECLARATION OF MARIO MÉRIDA
Respondent)	
)	
_____)	

Based upon information and belief, I, Mario E. Mérida, declare under the penalty of perjury and in accordance with 28 U.S.C. § 1746, as follows:

1. I am employed by the Environmental Protection Agency (EPA) Region 8 Water Technical Enforcement Program, Drinking Water Enforcement team, located at 1595 Wynkoop Street, in Denver, Colorado. I have been designated as the case officer responsible for developing the enforcement case against, and following compliance with the Administrative Order issued to Mackay Investments, LLC (Respondent), owner and operator of the Jackson Hole Campground public water system (System), and therefore have personal knowledge of the matters set forth in this declaration.

Background – Administrative Order Issued to the Respondent.

2. On May 5, 2011, the EPA issued an Administrative Order (Order) to the Respondent citing multiple violations of the National Primary Drinking Water Regulations (drinking water regulations) at the System, including: failure to monitor for nitrate (during 2010), failure to monitor for total coliform bacteria (during the 3rd quarter of 2006, 4th quarter of 2008, and 3rd and 4th quarters of 2010), failure to notify the public of certain violations, failure to report to the EPA the violations of total coliform monitoring requirements cited in the Order, and failure to report various other violations of the

drinking water regulations to the EPA. After issuance of the Order, I discussed its contents and associated requirements with Mr. Tom Hedges, the Respondent's on-site manager, including during a telephonic conversation on July 5, 2011, in which I reminded the then newly arrived manager of immediate and long-term requirements of the Order.

Violations of the Order

3. Despite my contacts with the Respondent's on-site representative at the System, the Respondent soon incurred violations of the Order (and drinking water regulations). The EPA's Order violation notice of December 21, 2011, cited the Respondent's failure to monitor the System's water for total coliform bacteria during the 3rd quarter of 2011, failure to report that violation to the EPA, and failure to post the required public notice on-site and provide a copy of the same to the EPA.

4. On August 27, 2012, the EPA issued a second Order violation notice to the Respondent, citing its failure to monitor the System's water for total coliform bacteria during the 2nd quarter of 2012, along with an ongoing violation of the Order's requirements related to public notice. Following that second notice of violation, the EPA began work on a penalty complaint against the Respondent. However, before a complaint could be prepared, the Respondent incurred an additional violation of the Order, failure to monitor the system's water for nitrate during calendar year 2012. This violation, along with the still outstanding required public notice, was cited in a third Order violation notice issued to the Respondent by the EPA on May 9, 2013. (An additional, subsequent violation by the Respondent – failure to monitor the System's water for total coliform bacteria during the 1st quarter of 2013, while not cited in a separate Order violation notice, was later included in the penalty complaint.)

5. On May 15, 2013, I was able to reach the Respondent's new on-site manager, Ms. Judy Rogers, and discussed the nitrate monitoring requirement violation (failure to monitor

for 2012) and the third notice of violation. After discussing the drinking water monitoring requirements at the Jackson Hole Campground, I sent her a copy of the site's annual monitoring and reporting requirements letter sent annually by the EPA. The Respondent's representative promised to immediately collect the required annual water sample for nitrate analysis for 2013, in the interest of quickly returning to compliance. However, the Respondent never collected the required sample for nitrate analysis for 2013.

Penalty Complaint and Settlement Negotiations with the Respondent

6. ***Penalty Complaint Issued:*** On September 18, 2013, the EPA issued a Complaint and Notice of Opportunity for Hearing (Complaint) to the Respondent. The Complaint proposed a penalty of \$7,400, pursuant to Section 1414(b) of the SDWA, 42 U.S.C § 300g-3(b), taking into account the following factors in assessing a civil penalty: the seriousness of the violation, the population at risk, and other appropriate factors.

7. ***Failure to File Written Answer – and Additional Violations:*** Although the Complaint required the Respondent to file a written answer within 30 days, the Respondent failed to do so. After repeated efforts by myself and EPA counsel, the EPA was not able to establish contact with the Respondent until approximately February 6, 2014, when Mr. Jamie Mackay, president of Mackay Investments, LLC, contacted the EPA by telephone and email and proposed settling the outstanding penalty. However, between the issuance by the EPA of its Complaint, and Respondent's February 6, 2014, communication with the EPA, the Respondent incurred additional violations of the Order and drinking water regulations, namely, failure to monitor for total coliform bacteria during the 2nd and 4th quarters of 2013, and failure to monitor for nitrate during calendar year 2013, as previously noted. (In October of 2014, the Respondent incurred another violation: failure to address significant

deficiencies identified by the EPA at the System. Neither this violation, nor the above additional total coliform bacteria or nitrate monitoring violations were included in EPA's original Complaint.) Given these subsequent violations and the Respondent's resulting ongoing status as out-of-compliance with the Order and the drinking water regulations, the EPA counsel advised the Respondent that the EPA would not enter settlement negotiations until the Respondent returned the System to compliance.

8. ***Returning to Compliance:*** The same day, February 6, 2014, I received a call from the Respondent and advised him that in order to return to compliance, the Respondent would have to submit laboratory results for the missing total coliform samples (2nd and 4th quarters of 2013) and nitrate sample (calendar year 2013). I reconfirmed the need for the above missing samples via email on February 11, 2014. While the Respondent reported that missing total coliform and nitrate samples had not been collected for the required periods in question, on February 11, 2014, the Respondent reported via email that current samples for analysis would be delivered to the laboratory the following day.

9. On February 13, 2014, I received copy of lab results for a water sample collected on February 12, 2014, for total coliform analysis. On February 27, 2014, the Respondent delivered to the EPA, via email, analytical results for a water sample for nitrate analysis, which had been collected on February 17, 2013. Those nitrate results, along with the total coliform results reported on February 13, 2014, returned the System to compliance with ongoing monitoring requirements. As a result, the EPA counsel advised the Respondent via email on March 24, 2014, that the EPA was now prepared to enter into discussions with the Respondent aimed at resolving the outstanding penalty.

10. ***Penalty Settlement Negotiations:*** Beginning on March 24, 2014, the EPA and the Respondent exchanged a series of penalty payment offers and counter offers. Newly assigned EPA counsel contacted the Respondent, via email, exploring his interest in continuing penalty settlement negotiations. On May 2, 2014, after restating a minimal offer, the Respondent claimed an inability to pay

the proposed penalty. The EPA agreed to consider the Respondent's claim.

11. ***Penalty – Inability to Pay Concerns:*** During a May 21, 2014, conference call, the Respondent outlined its concerns regarding its ability to pay the proposed penalty. In response, counsel outlined the EPA's ability to pay assessment process and separately, on May 23, 2014, emailed detailed guidance to the Respondent on the process, including required forms and financial information, which were to be submitted, with a deadline of June 9, 2014. Despite additional reminders on the due date, it was not until June 25, 2014, that the Respondent submitted records, which were incomplete. Following the EPA's extension until July 11, 2014, the Respondent submitted additional information on July 21, 2014, although the information remained incomplete.

12. On July 15, 2014, the EPA submitted a referral to the EPA headquarters for financial analysis support. On July 29, 2014, the EPA's financial analysis contractor, Industrial Economics, Inc. (IE) began its assessment of the records provided by the Respondent. The EPA received that contractor's financial analysis report on November 4, 2014, and after an internal review of the analysis, on December 9, 2014, the EPA contacted the Respondent to request a joint review of the report. On December 12, 2014, the parties reviewed the IE analysis together by telephone. During that call, the Respondent raised the matter of a substantial debt that was not listed in the Respondent's tax returns previously submitted for analysis. Although the EPA counsel expressed the view that this new information would not substantially impact the financial analysis (as key profit and other figures would not change), counsel agreed that the EPA and its contractor would review additional information on this matter, which the Respondent agreed to provide the same day by email. The Respondent responded approximately one month later, providing a partial answer to clarification requested by the EPA and claimed continuing inability to pay. Nonetheless, the EPA consulted with IE regarding the additional debt and concluded that the Respondent did have the ability to pay the penalty amount proposed in the EPA's Complaint. On

January 14, 2015, the EPA counsel advised the Respondent of this finding and requested that the Respondent communicate its response to the EPA's final settlement offer (a reduced penalty amount and instalment plan) by January 16, 2014. To date, a response has not been forthcoming.

Penalty Assessment for Default Motion Purposes

13. As noted above, the original penalty Complaint proposed a penalty of \$7,400 based upon the EPA's assessment of the statutory factors in this case. For purposes of the EPA's motion for default ruling, however, the EPA proposes an administrative civil penalty of \$6,949.38, an amount calculated by assigning numeric values to the statutory factors set forth in the Safe Drinking Water Act: the seriousness of the violation, the population at risk, and other appropriate factors, as well as components from the EPA guidance document, *Policy on Civil Penalties* (Environmental Protection Agency, *The policy on Civil Penalties # GM-21* (Feb. 16, 1984), Environmental Protection Agency, *A Framework for Statute-Specific Approaches to Penalty Assessment # GM-22* (Feb. 16, 1984), (GM-21 and GM-22, respectively). (Please see the attached worksheet.).

14. ***Modified penalty calculation approach:*** This approach builds upon the penalty calculation method used by the Regional Judicial Officer (RJO) in her August 8, 2013, Remand Order ruling in *Mountain Village Parks, Inc.*, SDWA Appeal No. 12-02 (EAB, February 26, 2013). As with that case, this assessment uses a seriousness of violation and population at risk calculation to determine the gravity component of the penalty. To calculate the seriousness of violation, the RJO used (and the current calculation uses) the scale established in the New Public Water System Supervision Program Settlement Penalty Policy, with assigned values ranging from 1.1 to 2.5. The population at risk is calculated by multiplying the length in years of the violation in question by the population served by the System, or 178 individuals for Jackson Hole Campground. Finally, the seriousness of violation value is

multiplied by the population at risk amount, as calculated, to reach the initial gravity component of the penalty.

15. The gravity component is then multiplied by a factor from GM-21 and GM-22 representing the degree of willfulness/negligence, which can range from a factor of 1 to 2, to yield an “other appropriate factors” subtotal. In the Mackay Investments, LLC, case in question, the violations assessed in the Complaint occurred after the EPA had been in direct contact with the Respondent’s on-site representatives and provided reminders on requirements of the original Order, on February 6, 2014. This suggests a relatively high degree of willfulness/negligence. However, after establishing contact with the EPA in February 2014 regarding the Complaint, the Respondent reported management difficulties on-site leading to complications with compliance. Further, as previously noted, shortly thereafter, the Respondent returned the System to compliance – after directly assuming oversight for compliance procedures on-site. Given these considerations, the EPA assessed a factor of only 1.2 for each of the violations cited in the penalty Complaint.

16. The EPA’s calculation includes another factor from GM-21 and GM-22, the public water system’s history of non-compliance/degree of cooperation. This factor, multiplied against the “other appropriate factors” penalty assessment subtotal, ranges from 1 to 10. It is determined by assessing the number of informal and formal enforcement contacts the System has had related to the violations cited in the original Order and penalty Complaint, and identifying the factor associated with that number of contacts. The EPA has sent to the Respondent at least 12 total informal and formal enforcement contacts in this case, and therefore the EPA assessed a factor of 8.

17. Pursuant to GM-21 and GM-22, the EPA’s calculation also allows for an ability to pay factor to reduce the penalty amount. However, in this instance, as noted, the EPA determined that the Respondent was able to pay the proposed penalty. Thus, the ability to pay factor as assessed is 1, which

is multiplied by the preceding subtotal calculation.

18. Finally, the resulting subtotal is multiplied by a factor for “other unique circumstances.” The EPA applied a factor of -0.4, meant to adjust for the initial use of the penalty calculation approach detailed above. This factor, multiplied against the preceding subtotal, with that sum being subtracted from the same, yields an overall gravity total. To this amount, Economic Benefit is added, as calculated, for the final assessed penalty amount.

Count 1

19. The Respondent failed to monitor the water for total coliform bacteria during the 3rd quarter of 2011, a duration of 90 days or 0.247 years. This amount, multiplied by the population served by the System (178), yields a population at risk amount of 43.89. This amount multiplied by the seriousness of violation factor of 1.4 for this violation yields an initial gravity amount of \$61.45. This amount multiplied by the degree of willfulness/negligence factor of 1.2 yields an initial gravity of \$73.74 for this count.

Count 2

20. The Respondent failed to monitor the water for total coliform bacteria during the 2nd quarter of 2012, a duration of 90 days or 0.247 years. The duration multiplied by the population of 178 yields a population at risk amount of 43.89. This amount multiplied by the seriousness of violation factor of 1.4 for this violation yields an initial gravity amount of \$61.45. This amount multiplied by the degree of willfulness/negligence factor of 1.2 yields an “other appropriate factors” subtotal of \$73.74 for this count.

Count 3

21. The Respondent failed to monitor the water for total coliform bacteria during the 1st quarter of 2013, a duration of 90 days or 0.247 years. The duration multiplied by the population of 178

yields a population at risk amount of 43.89. This amount multiplied by the seriousness of violation factor of 1.4 for this violation yields an initial gravity amount of \$61.45. This amount multiplied by the degree of willfulness/negligence factor of 1.2 yields an “other appropriate factors” subtotal \$73.74 for this count.

Count 4

22. The Respondent failed to issue the required public notice from June 26, 2011, to February 28, 2014, a duration of 978 days or 2.679 years. The duration multiplied by the population of 178 yields a population at risk amount of 476.94. This amount multiplied by the seriousness of violation factor of 1.5 for this violation yields an initial gravity amount of \$715.41. This amount multiplied by the degree of willfulness/negligence factor of 1.2 yields an “other appropriate factors” subtotal of \$858.50 for this count.

Count 5

23. The Respondent failed to monitor the water for nitrate during calendar year 2012, a duration of 1 year. The duration multiplied by the population of 178 yields a population at risk amount of 178. This amount multiplied by the seriousness of violation factor of 1.3 for this violation yields an initial gravity amount of \$231.40. This amount multiplied by the degree of willfulness/negligence factor of 1.2 yields an “other appropriate factors” subtotal of \$277.68 for this count.

Count 6

24. The Respondent failed to report the above three total coliform monitoring violations, representing a total duration of 90 days or 0.247 years. The duration multiplied by the population of 178 yields a population at risk amount of 43.89. This amount multiplied by the seriousness of violation factor of 1.4 for this violation yields an initial gravity amount of \$61.45. This amount multiplied by the degree of willfulness/negligence factor of 1.2 yields an “other appropriate factors” subtotal of \$73.74 for this

count.

25. ***Totalling “Other Appropriate Factors”***: The “other appropriate factors” subtotals for counts 1 through 6 are summed to yield an overall “other appropriate factors” subtotal of \$1,431.12. This overall subtotal is, in turn, multiplied by the “history of non-compliance/degree of cooperation” factor of 8, and by the ability to pay factor of 1, to yield a rolling subtotal of \$11,448.96. Finally, that amount is multiplied by the “other unique circumstances” factor of -0.4, yielding \$4,579.58, which is then subtracted from the \$11,448.96 subtotal, yielding the overall gravity total of \$6,869.38.


26. **An Additional Factor – Economic Benefit**: Finally, the Economic Benefit amount of \$80 is added to the overall gravity total amount. This Economic Benefit represents the total of the monitoring and reporting costs avoided by the Respondent in incurring the violations cited in the penalty Complaint, that is, \$20 for each of the three total coliform failure to monitor violation, and \$15 for the nitrate failure to monitor violation (as estimated in the EPA’s 2008 price survey for Wyoming drinking water laboratories), plus an estimated \$5 in avoided System operator work costs for the public notice violation. This Economic Benefit total amount, summed with the overall gravity total amount, yields a final assessed penalty of \$6,949.38.

Motion for Default Ruling

27. As previously noted, the Respondent has neither answered the Complaint nor responded to the EPA's final settlement offer. As such, the EPA is seeking a default ruling against the Respondent.

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

Date: 19 May 2015

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

Viol	TCR FTM Q3 2011	TCR FTM Q2 2012	TCR FTM Q1 2013	FT Issue PN (6/26/2011 - 2/28/2014)	NO3 FTM 2012	FT Report TCR viols
Seriousness of violation (1)	1.4	1.4	1.4	1.5	1.3	1.4
Population	178	178	178	178	178	178
Duration	90	90	90	978	365	90
Duration (years)	0.247	0.247	0.247	2.679	1.000	0.247

Pop. At Risk: pop. X duration (yrs)	43.89	43.89	43.89	476.94	178.00	43.89			
Gravity: (Seriousness X (Pop X Duration))	\$ 61.45	\$ 61.45	\$ 61.45	\$ 715.41	\$ 231.40	\$ 61.45		\$ 1,192.60	Subtotal1

Other appropriate factors									
Degree of willfulness/negligence (2)	1.2	1.2	1.2	1.2	1.2	1.2			
	\$ 73.74	\$ 73.74	\$ 73.74	\$ 858.50	\$ 277.68	\$ 73.74		\$ 1,431.12	Subtotal2

History of non-compliance / Degree of cooperation (3)							8	\$ 11,448.96	Subtotal3	12 ENF contacts	NOVs, AO, AOVs sent to Respondent
Ability to Pay							1	\$ 11,448.96	Subtotal4		
Penalty Policy Inflation Adjustment Rule							N/A				
Other Unique Circumstances							-0.4	\$ (4,579.58)			
								\$ 6,869.38	Gravity Total		
Economic Benefit	\$ 20.00	\$ 20.00	\$ 20.00	\$ 5.00	\$ 15.00	\$ -		\$ 80.00			
								\$ 6,949.38	Total		

Notes:

- (1) Seriousness of violation uses scale in settlement policy (1.1 to 2.5 scale).
- (2) Degree of willfulness/negligence on a scale of 1 to 2.
- (3) History of non-compliance / Degree of Cooperation per the History / Cooperation Factor selected from the grid of the same name.
(See History / Cooperation Factors Grid tab.)

Attachment 2
Complaint Cover Letter



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET

DENVER, COLORADO 80202-1129

Phone 800-227-8917

<http://www.epa.gov/region08>

Ref: 8ENF-L

SEP 18 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO.

Mr. Jamie Mackay, Registered Agent for
Mackay Investments, LLC
2780 N. Moose Wilson Rd
P.O. Box 1827
Wilson, WY 83014

Re: Complaint and Notice of Opportunity for Hearing
Docket No. SDWA-08-2013-0058

Dear Mr. Mackay:

Enclosed is an administrative "Complaint and Notice of Opportunity for Hearing" (Complaint) filed against Mackay Investments, LLC (Mackay) under section 1414(g)(3) of the Safe Drinking Water Act (SDWA), 42 U.S.C § 300g-3(g)(3). The U.S. Environmental Protection Agency (EPA) alleges in the Complaint that Mackay failed to comply with an administrative order issued by the EPA on May 5, 2011. The violations are described in the Complaint.

By law, Mackay has the right to request a hearing regarding the matters set forth in the Complaint. Please pay particular attention to those parts of the Complaint entitled "Opportunity to Request a Hearing" and "Failure to File an Answer." If Mackay does not file an answer to the Complaint within 30 days of receipt, a default judgment may be entered and the proposed civil penalty may be assessed without further proceedings. In its answer Mackay may request a hearing. Mackay has the right to be represented by an attorney at any stage of these proceedings.

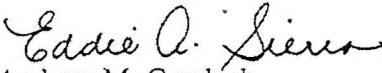
The EPA encourages all parties against whom it files any complaint proposing assessment of a penalty to pursue the possibilities of settlement through an informal conference. Any such settlement shall be finalized by the issuance of a final order by the Regional Judicial Officer, EPA Region 8. If a representative of Mackay signs a consent agreement that is finalized by a final order, Mackay will waive its right to request a hearing on any matter to which it has stipulated in that agreement.

Whether or not Mackay requests a hearing, its representative(s) may confer informally with the EPA concerning the alleged violation and/or the amount of the proposed penalty. However, an informal settlement conference does **not** substitute for filing a written answer and requesting a hearing. A request for an informal conference also does not extend the 30-day period during which Mackay must submit a written answer and a request for a hearing. Mackay may pursue settlement and have an informal conference even if it is also litigating the case.

For any questions specific to the violations or penalty, the most knowledgeable people at the EPA regarding this matter are Mario Mérida, Environmental Protection Specialist, who can be reached at 1-800-227-8917, extension 6297, and, for questions from counsel, if any, Dana Stotsky, Enforcement Attorney, who can be reached at 1-800-227-8917, extension 6905.

We urge your prompt attention to this matter.

Sincerely,

for 
Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosure

cc: Tina Artemis, EPA Regional Hearing Clerk

Attachment 3

EPA Policies GM-21 and GM-22

page 1

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one true and correct copy of the Complainant's **MOTION FOR DEFAULT** and **MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT** (together with attachments) were served upon each of the following on Tuesday, May 19, 2015 as indicated below:

to

Mr. Jamie Mackay, Registered Agent
Mackay Investments, LLC
2780 North Moose Wilson Road
P.O. Box 1827
Wilson, WY 83014

By Certified Mail/Return Receipt Requested # 7008 3230 0003 0726 1204 – one true copy

and

Tina Artemis
Region 8 Hearing Clerk
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
By Hand Delivery – Original and one true copy

and

Hon. Elyana R. Sutin
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
By Hand Delivery – one true copy

Date: Tuesday, May 19, 2015

By: Dayle Aldinger
Dayle Aldinger