

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2012 APR 30 AM 9:15

In the Matter of:	)	
Rick Nelson, Owner	)	
Fort Devils Tower	)	Docket No. SDWA-08-2011-0021
	)	
Respondent.	)	SUPPLEMENTAL MEMORANDUM
	)	IN SUPPORT OF MOTION FOR
	)	ASSESSMENT OF PENALTY ON DEFAULT

FILED  
EPA REGION VIII  
PROCESSING CLERK

Pursuant to the Order to Supplement the Record issued by the Honorable Elyana R. Sutin, Regional Judicial Officer, dated April 5, 2012, the United States Environmental Protection Agency (EPA) submits this Supplemental Memorandum and the accompanying Declaration of Mario Merida of the EPA Region 8 Technical Enforcement Program.

The Regional Judicial Officer's April 5<sup>th</sup> order stated that the EPA's filings must state the legal and factual grounds for the penalty or other relief sought. Further the Order states that the amount of the recommended civil penalty must be based upon evidence in the record and in accordance with any civil penalty criteria in the Act.

EPA has requested a penalty of \$2,000. According to 40 C.F.R. §22.71(c), the relief proposed in a complaint or motion for default should be ordered unless the relief requested is clearly inconsistent with the record of the proceeding or the particular statute authorizing the proceeding at issue. As demonstrated in the Mérida Declaration, the requested penalty is consistent with the record in the proceeding, the Safe Drinking Water Act (SDWA), and legal precedent.

Section 1414(g)(3) of the SDWA, 42 U.S.C. §300g-3(g)(3), authorizes EPA to assess 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.)

As indicated in the accompanying Declaration of Mario Mérida, the EPA will supplement the administrative record with respect to the penalty calculation submitted by the Complainant. This declaration will provide additional support for EPA's proposed penalty.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jean Belille". The signature is written in black ink and is positioned above a horizontal line.

Jean Belille

Enforcement Attorney  
Office of Enforcement, Compliance  
and Environmental Justice

U.S.EPA Region 8

1595 Wynkoop Street

Denver, CO 80202

Telephone Number: (303)312-6556

Facsimile Number: (303)312-7519

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

In the Matter of:	)	
Richard (AKA) Rick Nelson, Owner	)	
Fort Devils Tower	)	Docket No. SDWA-08-2011-0021
	)	
Respondent.	)	<b>DECLARATION OF MARIO MÉRIDA</b>
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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. Richard (AKA) Rick Nelson (Respondent) is an individual who owns and/or operates the Fort Devils Tower public water system, located in Devils Tower, Wyoming which provides water to the public in Crook County, Wyoming for human consumption. The Safe Drinking Water Act and National Primary Drinking Water Regulations (NPDWRs) violations alleged in the Complaint occurred at the System located at 601 Highway 24 in Devils Tower, Wyoming.
4. An Administrative Order (Order) was issued on September 24, 2003 for; failure to monitor the System's water for total coliform bacteria during the 2<sup>nd</sup> quarter, and 3<sup>rd</sup> quarter in 2002; failure to monitor for nitrate annually in 2002; failure to notify the public of the violations; failure to report to EPA within 48 hours the instances of noncompliance; and failure to report to EPA any failure to comply with a coliform monitoring requirement within ten days.
5. On April 6, 2010 a letter was issued to Respondent stating that he was in violation of the 2003 Order because of:
  1. failing to monitor the system's water for total coliform bacteria during the fourth quarter of 2009, and

- failing to report to EPA the failure to monitor for total coliform bacteria.

6. On September 27, 2010 a second violation letter was issued to Respondent stating that he was in violation of the 2003 Order because of:

- failing to monitor the system's water for total coliform bacteria during the second quarter of 2010, and
- failing to report to EPA the failure to monitor for total coliform bacteria.

7. Finally, on November 22, 2010 a third violation letter was issued to Respondent stating that he was in violation of the 2003 Order because of:

- failing to monitor the system's water for total coliform bacteria during the third quarter of 2010, and
- failing to report to EPA the failure to monitor for total coliform bacteria.

8. EPA filed a Complaint and Notice of Opportunity for Hearing (Complaint) on February 14, 2011, 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: failing to monitor for total coliform bacteria; untimely reporting of monitoring results; and failure to report coliform monitoring violations to EPA.

9. The Complaint proposes a penalty of \$2,000 based on Respondent's alleged violations of 40 C.F.R. § 141.21 for failure to monitor quarterly for total coliform bacteria; 40 C.F.R. § 141.31(a) for untimely reporting of monitoring results; 40 C.F.R. §141.21(g)(2) for failure to report coliform monitoring violations to EPA.

10. 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 per day for violation of an order issued under § 1414(g)(1) of the SDWA, 42 U.S.C. § 300(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)

11. 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.

12. 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.

13. 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 the duration of the violation are considered in determining the gravity component of a penalty.

14. 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.

15. Respondent failed to monitor for total coliform bacteria during the 4<sup>th</sup> quarter of 2009, for a total duration of non-compliance of three months. (2003, 2004 and 2005 violations are not factored in since they are more than five years prior to the proposed penalty complaint.) The Penalty Policy classifies the gravity factor for a total coliform monitoring violation as 1.4.

16. Respondent failed to report total coliform sampling results to EPA for the duration of 13.37 months. The gravity factor prescribed in the Penalty Policy for a failure to report total coliform sampling result violations to EPA is 1.4.

17. Respondent failed to report the failure to monitor total coliform violation to EPA for the duration of four months. The gravity factor prescribed in the Penalty Policy for a failure to report a failure to monitor total coliform violation to EPA is 1.4.

18. 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 upon 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 \$504.79.

19. 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 lack of cooperation combined with the history of recent enforcement actions undertaken to address the noncompliance warranted high increases. The Respondent failed to monitor for total coliform bacteria during one quarter. Further, Respondent withheld reporting total coliform-

positive results in May and September, 2010 until after he was cited for apparent failure to monitor violations in three separate AOV letters, and after speaking with enforcement personnel, who reminded Respondent of ongoing TCR monitoring and reporting requirements, on April 2, 2010. As a result of this very late reporting by the Respondent, he was able to avoid taking multiple required repeat samples, and thus avoided potential MCL violations, therefore a negligence factor of 1.6 was applied. One violation letter and three administrative order violation letters permitted a history of non-compliance factor of 1.756920. Adding the adjustment factors, the adjusted gravity component of the penalty in this matter is \$1,419.01.

20. I calculated an economic benefit component of \$35 which includes the cost of sampling, and operator's expenses that Respondent would have incurred had he performed the total coliform sampling required by the SDWA and the NPDWRs. This component of the penalty eliminated any economic benefit realized by the Respondent for noncompliance.


21. The gravity and economic benefit components calculated in accordance with the Penalty Policy in addition to a standard increase for pleading purposes totals \$2,000.

22. There was no reduction to the proposed penalty amount based on ability to pay as on July 20, 2011 Respondent notified the EPA through a telephone call that he did not wish to pursue the inability to pay process which he had discussed extensively with the EPA.

23. The penalty calculation worksheets for the alleged violations in this matter prepared by myself are attached hereto.

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

Date: April 26, 2012

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

**Attachment 1, Part A.1  
PWS Settlement Penalty Calculation Worksheet**

**Instructions:** For each type of violation (see Attachment 2) to be alleged in the administrative or Judicial complaint, calculate the statutory maximum penalty, the economic benefit and gravity and record the results in Part A of the Worksheet. Complete a separate Part A worksheet for each type of violation, then complete Part B.

<b>Name of Case:</b>	<b>Fort Devils Tower</b>
Completed by:	Mario Mérida
Date completed:	October 15, 2010

**Part A**

<b>IDENTIFY VIOLATION TYPE:</b>	<u>FTM TCR (4th Q 2009)</u> after January 12, 2009 inflation adjustment
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**1. STATUTORY MAXIMUM PENALTY FOR THIS VIOLATION TYPE**

	a. Length of violation (in days)	90
	b. Penalty Amount (see II. Statutory Basis in text of Policy for amounts)	\$32,500.00
	c. Maximum Penalty (line 1.a x line 1.b if not administrative)	

<b>2. ECONOMIC BENEFIT FOR THIS VIOLATION TYPE (attach BEN computer model printouts or other documentation)</b>	\$20.00
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**3. GRAVITY FOR THIS VIOLATION TYPE**

These totals must remain at zero dollars if there is not a 2nd violation	a. Gravity factor amount (from attachment 2 Types of Violations)	1.4
	b. Service population	150
	c. Months in violation(_____) divided by 12	3
	d. Gravity component: (line 3.a x line 3.b x line 3.c x 1.4163 (DCIA))	\$74.36

<b>4. ECONOMIC BENEFIT + GRAVITY COMPONENT SUM (line 2 + line 3.d)</b>	\$94.36
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**Attachment 1, Part A.3  
PWS Settlement Penalty Calculation Worksheet**

**Instructions:** For each type of violation (see Attachment 2) to be alleged in the administrative or Judicial complaint, calculate the statutory maximum penalty, the economic benefit and gravity and record the results in Part A of the Worksheet. Complete a separate Part A worksheet for each type of violation, then complete Part B.

**Name of Case:** Fort Devils Tower

**Completed by:** Mario Mérida

**Date completed:** October 15, 2010

**Part A**

**IDENTIFY VIOLATION TYPE:** FT report violations (4th Q 2009, FT report May, June and Sept 2010) to EPA after January 12, 2009 inflation adjustment

**1. STATUTORY MAXIMUM PENALTY FOR THIS VIOLATION TYPE**

a. Length of violation (in days)	120
b. Penalty Amount (see II. Statutory Basis in text of Policy for amounts)	\$32,500.00
c. Maximum Penalty (line 1.a x line 1.b if not administrative)	

**2. ECONOMIC BENEFIT FOR THIS VIOLATION TYPE (attach BEN computer model printouts or other documentation)** 0

**3. GRAVITY FOR THIS VIOLATION TYPE**

These totals must remain at zero dollars if there is not a 5th violation	a. Gravity factor amount (from attachment 2 Types of Violations)	1.4
	b. Service population	150
	c. Months in violation ( ) divided by 12	4 0.33333333
	d. Gravity component: (line 3.a x line 3.b x line 3.c x 1.4163 (DCIA))	\$99.14

**4. ECONOMIC BENEFIT + GRAVITY COMPONENT SUM (line 2 + line 3.d)** \$99.14



## Economic Benefit Calculation - FT Report TC results

Per Month

Operator Time for Reporting - \$5

3 mos. X \$5 = \$15

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the original and one copy of the SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR ASSESSMENT OF PENALTY ON DEFAULT and 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 1<sup>st</sup> Class mail to:

Richard A. (Rick) Nelson, Owner  
Fort Devils Tower Public Water System  
601 Highway 24  
Devils Tower, WY 82714

4 | 30 | 2012  
Date

Judith M Mc Ternan  
Signature