UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2013 APR 12 PM 3:43

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

FILED
EPA REGION VIII
HEARING CLERK

INTRODUCTTION

The following Supplemental Penalty Information is submitted on behalf of Complainant, United States 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 March 11, 2013, and subsequent Order on Motion for Extension of Time to Supplement the Record dated March 25, 2013.

BACKGROUND

On September 28, 2012, the Presiding Officer (PO) issued a Default Initial Decision and Order finding the Respondent Mountain Village Parks, Inc. (Respondent) in default pursuant to 40 C.F.R. § 22.17 of the Consolidated Rules of Practice and based on the record for alleged violations of the Safe Drinking Water Act (SDWA) and the National Primary Drinking Water Regulations (NPDWRs). In accordance with 40 C.F.R. § 22.27(b), the PO assessed the total penalty proposed by the Complainant of $5,000. The underlying record includes Complainant's Motion for Default, Memorandum in Support of Motion for Default (Memorandum in Support), and the Declaration of Mario Mérida prepared in support of Complainant's penalty calculation. The record also includes a Complaint and Notice of Opportunity for Hearing (Complaint), an

Administrative Order, Amended Administrative Order, and two Administrative Order Violation letters citing noncompliance with the Amended Order and NPDWRs.

The Environmental Appeals Board (EAB) issued an Order Remanding the Default Order to the PO on February 26, 2013, for clarification of the liability findings and determination of a penalty consistent with such findings and the EAB's decision. The EAB held that the Complainant and the PO failed to notice a difference in the dates of the reporting violations and underlying substantive violations alleged in Counts II and III of the Complaint, resulting in the assessment of a higher penalty than the liability allegations support. The EAB further held that calculation and other errors in the penalty determinations make the penalty proposed by the Complainant, and adopted by the PO, inconsistent with the record and the SDWA. The EAB found that the Complainant and the PO used the New Public Water System Supervision Program Settlement Penalty Policy (Penalty Policy) in a manner inconsistent with the Penalty Policy's express terms and that the use of a "standard increase for pleading purposes" is without legal support.

On March 11, 2013, the PO subsequently directed the Complainant in an Order to Support the Record (Order) to supplement the record first by clarifying the discrepancy between Count II and Count III of the Complaint and addressing how, if at all, the discrepancy impacts the penalty analysis for the two counts. Additionally, the PO requested that the Complainant explain the difference between the six month violation period in Count II and the twelve month penalty period. Second, the PO ordered the Complainant to clarify the difference between the penalty assumptions for gravity included in the Declaration of Mario Mérida and in the Memorandum in Support of Default. Third, the PO ordered the Complainant to provide a

breakdown of the total economic benefit calculation for each count in the Complaint. Fourth, the Complainant is required to justify the basis of using a "standard increase for pleading purposes" in the penalty calculation and explain how the increase was calculated for the penalty. This information is provided below to comply with the PO's Order and address the EAB's concerns.

Because the penalty and duration arithmetic calculations derive from, and the standard increase for pleading purposes relates to, the Penalty Policy, the Complainant further supplements its penalty information by providing a reasoned application of the statutory penalty factors and citation of legal precedent in support of the proposed penalty calculation. The result is that the $5,000 penalty proposed by the Complainant is justified, if not conservative, strictly based on the evidence in the record and the penalty criteria set forth in the SDWA.

This analysis is provided absent a specific formula under section 1414 of the SDWA for calculating penalties. However, it is consistent with two EPA enforcement documents that set forth the Agency's general enforcement policy for assessing civil penalties: "The Policy on Civil Penalties" (GM -21) and "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties" (GM-22) Two EPA General Enforcement Policy Documents, "Policy on Civil Penalties" (GM-21) and "A (Feb. 16, 1984.[1] A prior PO upheld using these policies in assessing penalties under the SDWA. *In the Matter of Bar Development Water Users' Association, Patrick E. Anson, Robert Allgood, and Maria Del Rosario Arevalo*, 2006 RJO LEXIS 545 (RJO Alfred C. Smith January 10, 2006).

---

1 This approach also is consistent with the methodology used for calculating penalties under the Clean Water Act which similarly has a settlement policy only. *See* "Clean Water Act Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases" (January 19, 1989) at 1.

SUPPLEMEMENTAL INFORMATION

I. EXPLANATION OF PENALTY AND DURATION ARTHMITEC CALCULATION DISCREPANCIES DERIVED FROM AND INCREASE FOR PLEADING PURPOSES RELATING TO THE PENALTY POLICY

A. Explanation of Count II and III Duration and Penalty Calculation Discrepancies and Impact, If Any, on Penalty Analysis

In the Amended Administrative Order issued to the Respondent on September 29, 2009, the EPA (paragraph 14, page 3) ordered the Respondent to monitor the system's water for lead and copper between June 1 and September 30, 2009 and "[to] continue to monitor for lead and copper annually per the regulations thereafter." The reference to annual monitoring anticipated the EPA's placing the system on an annual schedule following collection of the required sample during 2009. However, since lead results in the sample collected by the system on September 22, 2009, exceeded the lead "action levels," the system was placed on a six-month cycle, requiring lead and copper samples to be collected between January 1 and June 30, 2011, in accordance with the regulations. The Respondent failed to collect the set of required samples for lead and copper analysis during the first half of 2011.

The EPA cites this single violation for failing to monitor for lead and copper between January 1 and June 30, 2011 in its Complaint. In her Order, the PO requests that the Complainant reconcile the six month violation duration with the twelve month penalty period. By way of explanation, the violation and penalty timeframes are not the same. The violation period reflects the six-month cycle in 2011 the Respondent had but failed to monitor the system for lead and copper. The penalty period, as a matter of Water Technical Enforcement Program protocol, commences as the beginning of the reporting period, which in this case was January 1,

2011, and extends through the anticipated date of issuance of a complaint unless the violation is resolved sooner. In this case, that date was December 31, 2011. As a result, the sum of the penalty duration purposefully totaled twelve months for the Respondent's failure to sample for lead and copper. The Complainant actually benefitted from a lower than appropriate penalty calculation for Count III because although the EPA did not ultimately issue the Complaint until May 10, 2012, and the Respondent did not properly sample for lead and copper before that date, the Complainant did not increase the penalty duration by an additional five months.

The EPA in Count III of the Complaint cites the Respondent for failing to report to the EPA its lead and copper sampling violation for the periods January 1 to June 30, 2011 and July 1 to December 31, 2011. As noted by the EAB, inclusion of the latter six month period is in error. Commensurate with the duration of the underlying violation set forth in Count II, the duration in Count III should also be January 1 to June 30, 2011. This discrepancy, however, is immaterial to the applicable penalty calculation. The Complainant did not calculate the penalty based on the six month sampling periods cited in Count III. Instead, consistent with the Water Technical Enforcement Program's protocol, a thirty-day duration of noncompliance was used in calculating the penalty for this violation based on when the Respondent should have reported to the EPA the underlying failure to monitor violation immediately following the end of the sampling period. This is the standard duration applied for this type of violation. As a result, the additional six month period of noncompliance included in Count III for failing to report to the EPA the failure to sample for lead and copper does not impact the EPA's penalty analysis or, ultimately, the proposed penalty amount.

B. Explanation of Discrepancy Between the Gravity Penalty Assumptions in the Declaration of Mario Mérida and the Memorandum in Support

In the Memorandum in Support, the Complainant correctly cites the adjusted gravity amount of $3,815.07. This is the amount originally calculated by the Water Technical Enforcement Program. Mr. Mérida referred to a revised draft penalty calculation that included the adjusted gravity figure of $3,890.21 and mistakenly used this figure in preparing his Declaration. However, this discrepancy does not impact the total proposed penalty amount of $5,000 consistently cited in Mr. Mérida's Declaration and the Memorandum in Support.

C. Explanation of Total Economic Benefit Calculation

The total economic benefit component of the proposed penalty is $259.00. This amount represents real costs the Respondent avoided by not complying with the requirements cited in the Complaint. $125.00 of this amount represents the expense the Respondent would have incurred had it collected the five required samples for lead and copper analysis at an estimated cost of $25.00 per sample. The remaining $134.00 represents the expense the Respondent would have incurred had it properly prepared and issued the required Consumer Confidence Reports. This amount includes estimated preparation, printing and/or copying, and delivery costs. The Respondent avoided these costs expended by other public water system owners and operators by not complying with the requirements, and as a result received an unfair economic benefit.

D. Explanation of "Standard Increase for Pleading Purposes"

The Complainant applied a 20% standard increase to the settlement amount calculated by applying the Penalty Policy to the statutory penalty factors to create a fair and reasonable pleading amount. Absent a specific formula under section 1414 of the SDWA for calculating

penalties and/or a PWS pleading policy, the Water Technical Enforcement Program as a matter of protocol when using the Penalty Policy applies a standard upward adjustment of 20% to the settlement figure to arrive at a slightly higher pleading amount to allow for negotiation above the EPA's bottom-line penalty.

While there is no case law directly on point in support of this practice, this standard increase for pleading purposes has been regularly proposed in complaints prepared by the Water Technical Enforcement Program. Furthermore, the Complainant proposed the penalty including this increase for the PO's consideration. Ultimately the PO has the discretion to determine the amount of the recommended penalty pursuant to 40 C.F.R. § 22.27(b).

II. JUSTIFICATION OF PROPOSED PENALTY AMOUNT BASED ON THE STATUTORY FACTORS

Section 1414(g)(3)(B) of the SDWA authorizes civil administrative penalties up to $27,500 per day per violation. This amount has been adjusted upwards for inflationary purposes to $32,500 per day per violation for violations occurring after January 12, 2009. 40 C.F.R. § 19.4 and 73 Fed. Reg. 75340 (Dec. 11, 2008) (2008 Civil Monetary Penalty Inflation Adjustment Rule). The EPA alleged that the Respondent is liable for four violations of the NPDWRs, SDWA, and Amended Administrative Order. Specifically, the EPA alleges in the Complaint: (1) that the Respondent failed to prepare, distribute and submit to its customers and the EPA Consumer Confidence Reports (CCRs) required by 40 C.F.R. §§ 141.152-155 for calendar years 2007, 2009 and 2010; (2) that the Respondent failed to collect lead and copper samples between January 1 and June 30, 2011 required by 40 C.F.R. § 141.86(c)-(d); (3) that the Respondent failed to report to the EPA the 2007, 2009, and 2010 CCR violations and the lead and copper

sampling violations required by 40 C.F.R. § 141.31(b) for the periods January 1 to June 30, 2011, and July 1 to December 31, 2011[2]; and (4) that the Respondent failed to report to the EPA the February 2012 total coliform monitoring violation required by 40 C.F.R. § 141.21(g)(1).

Section 1414(b) of the SDWA , 42 U.S.C. § 300g-3(b), in determining the amount of any penalty to be assessed, requires the Complainant to take into account the seriousness of the violation, the population at risk, and other appropriate factors. "Other appropriate factors" considered by the Complainant in this case included 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. After taking into account the statutory factors based on the administrative record, the Complainant proposed a total penalty of $5,000. The penalty proposed by the EPA for the violations is only a small percentage of the statutory maximum penalty the PO may assess.

As stated previously, The Complainant used the Penalty Policy to assist in applying the statutory factors absent a specific formula in the statute for calculating penalties. Without using the framework provided by the Penalty Policy, the total proposed penalty equally is justified by directly applying the statutory penalty factors to the facts in the record. Based on applicable case law, this analysis actually supports an increased penalty greater than $5,000. Legal precedent demonstrates awards of amounts per violation and/or statutory factor equal to the total amount proposed herein.

---

2 As noted by the EAB and explained in section I.A. above, the correct violation period for failing to report the violation is from January 1 to June 30, 2011, commensurate with the duration of the failing to monitor/report violation alleged in Count II of the Complaint.

A. Seriousness of violation

i. Failure to Monitor for Lead and Copper and Total Coliform

As previously argued in Complainant's Memorandum in Support, the Respondent's disregard for the NPDWRs, the EPA's authority, and the Consolidated Rules governing this proceeding poses a serious threat to the consumers served by the system and the EPA, responsible for overseeing the system's safe provisioning of water to the public. By not monitoring for required contaminants and/or reporting the sampling results to the EPA, the Respondent jeopardizes the system's consumers by putting them at risk and possibly exposing them to harmful pathogens, metals, and other contaminants without their knowledge.

The Respondent in this case failed to monitor for lead and copper during the period January 1 to June 30, 2011, and failed to report to the EPA total coliform monitoring violations which occurred in February 2012. As a result, the Respondent placed the system's consumers at risk by serving them water of unknown lead and copper quality and potentially exposing them to harmful lead and copper levels from January 1, 2011, until December 18, 2012, when the Respondent next properly monitored these contaminants. The Respondent posed an additional risk to the system's consumers during the month of February 2012, when it failed to report to the EPA its failure to monitor for coliform bacteria.

As set forth in Complainant's Memorandum in Support, 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 EPA Guidance Water on Tap: What You Need to Know* (EPA-816-K-03-007, October 2003). Short term exposure to copper can result in gastrointestinal distress, while long term exposure can cause liver or kidney damage. *Id.*

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. *Id.* Coliforms are bacteria that are naturally present in the environment and are used as indicators that other, potentially harmful bacteria may be present.

Administrative tribunals have found failure to report and/or monitor violations to be serious. In a drinking water penalty action where the system chose not to sample or report the quality of its water similar to this case, the Administrative Law Judge (ALJ) held "The self-submission of data is critical to the success of our public water supply program under the SDWA. Without this data, EPA and the State of New Jersey cannot know whether a drinking water supply is safe. Therefore, any failure to submit data significantly undermines the fundamental mechanism of the public water supply program and requires the use of Agency enforcement resources." *In the Matter of Anthony J. Taylor, Andover Water Corporation*, 1992 ALJ LEXIS 713, (ALJ Yost, August 14, 1992).

Significant penalties have been assessed by these tribunals as a result of not monitoring or reporting pursuant to the NPDWRs. The ALJ assessed the respondent the full $5,000 proposed penalty *In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water System* for violations including failure to monitor for total coliform bacteria, failure to report monitoring results to the appropriate agencies, and failure to notify users of the system that their water had not been adequately tested for the presence of coliform bacteria. *In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water. In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water System*, 1997 EPA ALJ LEXIS 107, (ALJ Biro, April 15, 1997). The ALJ concluded that

the EPA's proposed penalty of $5,000 for a failure to sample for coliform bacteria for eleven months understated the seriousness of the violation, stating:

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

An ALJ in a separate administrative case involving a variety of monitoring, reporting and public notice violations similarly found the assessment of the $5,000 proposed penalty lawful and appropriate. *In re the Village of Glendora,* 1992 EPA ALJ LEXIS 712, *11-12, (ALJ Yost, May 20, 1992). The complainant in *Glendora* assessed $100 per month for 11 months ($1,100) for the gravity component of failing to monitor and report violations and an additional $100 per month ($1,100) for the gravity component of failing to notify the public. An additional upward adjustment of $1,000 was made for the respondent's failure to provide the EPA with the required reports for a total initial gravity assessment of $3,200. Additional adjustments for willfulness or negligence in responding to the EPA resulted in a total proposed penalty of $5,000. Reiterating the PO's sentiment in *Durham,* the ALJ in *Glendora* found:

> Without adequate monitoring and monitoring data supplied by Respondent, EPA is unable to determine whether Respondent is supplying water to the public that does not exceed the maximum contaminant levels established by national primary drinking water regulations. Respondent's violations of the AO as they relate to coliform bacteria testing, analysis, report and public notification are grave. *Id.*

The PO in this matter previously awarded a proposed penalty of $3,000 for twenty failure to monitor violations. *In the Matter of Lincoln Road RV Park, Inc.,* 2009 EPA RJO LEXIS 197 (RJO Elyana R. Sutin July 30, 2009). These and other cases support a significant penalty based

on the seriousness of the Respondent's failure to monitor violations.

ii. Failure to Prepare, Distribute and Submit CCRs to the EPA

Failures to prepare, distribute, and submit CCRs to consumers and the EPA have been penalized previously by administrative tribunals based, in part, on the seriousness of the violation. For example, the PO *In the Matter of John Gautreauax* assessed a penalty of $750 for a one year CCR violation, finding that "The very nature of the information to be provided to the customers of a water system informs as to whether the water is healthy to consume. Therefore, a violation of the CCR regulations could be a very serious violation." *In the Matter of John Gautreauax*, 2003 EPA RJO LEXIS 176 (RJO Ben J. Harrison, December 4, 2003). *See also, In the Matter of Shaded Acres Water Company*, 1992 EPA RJO LEXIS 15 (July 20, 1992).

iii. Failure to Report NPDWR and Total Coliform Noncompliance

The Respondent's failure to report its lead and copper and total coliform monitoring violations to the EPA is equally serious and deserving of a significantly penalty. The ALJ *In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water* held: "[without the results of periodic water analysis the agency cannot effectively exercise its power under the SDWA to take measures to prevent the consumption of contaminated water and demand water improvement efforts." *In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water System*, 1997 EPA ALJ LEXIS 107, (ALJ Biro, April 15, 1997). The ALJ further stated "Mr. Durham was also fortunate in this regard since, undoubtedly, the penalty sought in this case is insignificant next to any award which might have been given in a legal action instituted against him, had someone become seriously ill or worse yet, died from imbibing water from his unmonitored system." *Id.*

B. Population at Risk

As supported by the facts in the record, the Respondent's system serves approximately 150 people per day year-round through at least 74 service connections at a mobile home park. An additional 1,000 people may be served by the system through three active service connections at an adjacent housing facility known as a man camp.

POs taking into consideration this statutory factor previously have assessed penalties at or above $5,000 in cases where the systems serve the same or fewer number of persons. *See*, *In the Matter of: Board of Directors of Rural Aqueduct, et al.*, 2005 EPA RJO LEXIS 340, (RJO Helen S. Ferrara, June 16, 2005), the PO awarded a penalty of $5,000 where the system served 120 individuals; *In the Matter of Anthony J. Taylor, Andover Water Corporation*, 1992 ALJ LEXIS 713, (ALJ Yost, August 14, 1992), the ALJ assessed a penalty of $5,000 where the system served a population of 160; *In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water. In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water System*, 1997 EPA ALJ LEXIS 107, (ALJ Biro, April 15, 1997), the ALJ assessed a penalty of $5,000 despite the system serving the minimum number of persons required to qualify a system as a public water system. The PO in this matter taking into consideration a population of 34 persons recently assessed a penalty of $3,000. *In the Matter of Lincoln Road RV Park, Inc.*, 2009 EPA RJO LEXIS 197 (RJO Elyana R. Sutin July 30, 2009).

Examples of administrative tribunals that awarded higher penalties with fewer persons than in the instant case include *In the Matter of Sunbeam Water Company, Inc, et al.*, where the ALJ awarded a penalty of $9,000 to a system that served 23 households and guests for monitoring and failing to public notice violations. *In the Matter of Sunbeam Water Company.*

Inc, et al., 1999 EPA ALJ LEXIS 79, (ALJ Pearlstein, October 28, 1999). A PO for the EPA Region 10 assessed a penalty of $13,320 taking into account that the system served 171 persons. *In the Matter of Alvin Raber, Jr., & Water Enterprises NW, Inc.*, 2004 WL 2163202 (RJO Alfred C. Smith July 22, 2004).

C. Other Appropriate Factors

The Complainant in this matter considered "other appropriate factors" within the meaning of section 1414(b) of the SDWA to include degree of willfulness and/or negligence, history of noncompliance, duration of violation, and economic benefit. This consideration is consistent with legal precedent, GM- 21 and 22, and the Water Technical Enforcement Program's methodology for calculating penalties. *See United States v. Ritz*, 1:07-CV-1167-WTL-DML, 2011 WL 1743740 (S.D. Ind. May 3, 2011); *United States v. Alisal Water Corp.*, 326 f. Supp. 2d 1032, 1035-38 (N.D. Cal. 2004); *United States v. City of N. Adams*, CIV.A.89-30048-F, 1992 WL 391318 (D. Mass. May 18, 1992); *In the Matter of Paul Durham, d/b/a Windmill Hill Estates Water System*, 1997 EPA ALJ LEXIS 107, (ALJ Biro, April 15, 1997); *In the Matter of Anthony J. Taylor, Andover Water Corporation*, 1992 ALJ LEXIS 713, (ALJ Yost, August 14, 1992). *In the Matter of Leisure Valley West, Central and East Water Systems; Olan Hott*, 1999 EPA ALJ LEXIS 53, (ALJ Moran, June 25, 1999); *In re the Village of Glendora,* 1992 EPA ALJ LEXIS 712, *11-12, (ALJ Yost, May 20, 1992).

i. Duration

The lengthy duration in this case when lead and copper was not sampled and total coliform was not reported supports a significant penalty increase. While the lead and copper monitoring and reporting violation cited by the EPA for the Complaint covered the period

of January 1 to June 30, 2011, the Respondent failed to monitor for lead and copper between January 1, 2011, and December 18, 2012, when it next properly monitored for those contaminants. As a result, the Respondent provided water to the public for nearly two years without knowing the levels of lead and copper its customers were ingesting. In addition, the Respondent did not report the total coliform monitoring violation which occurred in February 2012, which means its customers again were drinking water of unknown bacteriological quality for thirty days.

ii. Willfulness/Negligence; History of Noncompliance

The Respondent's willfulness in disregarding its responsibilities under the NPDWRs, the SDWA, and the Consolidated Rules further warrants a significant penalty increase. In addition to knowingly placing its customers at risk by failing to monitor and report the quality of the system's drinking water, Respondent's non responsiveness to the EPA's compliance assistance efforts compelled the EPA to initiate formal action to protect the health and safety of the persons served. Throughout the enforcement process, beginning in 2009, the Respondent purposefully thwarted the EPA's efforts to return the system to compliance by disregarding all of the EPA's communications and orders. The Respondent further has ignored the penalty assessed by the EPA as a consequence for not complying and to prevent the Respondent from realizing an economic benefit from not complying. Meanwhile, the Respondent has continued to operate a for-profit public water system, knowingly placing the system's consumers at risk for contracting diseases from ingesting possibly unsafe drinking water.

For similar reasons, the PO in the case at hand determined that "The Agency's increase in the gravity amounts for willfulness/negligence, history of noncompliance for similar violations,

and Respondent's lack of cooperation is justified." *In the Matter of Rick Nelson,* 2012 EPA RJO LEXIS 200 (RJO Elyana R. Sutin July 23, 2012). See also, *In the Matter of Bryan Pownell, Owner/Operator, Bryan's Place Public Water System,* 2011 EPA RJO LEXIS 309 (RJO Elyana R. Sutin September 22, 2011). The ALJ in *Glendora* reiterated upwardly adjusting the penalty based on the degree of willfulness, stating that "[A]n adjustment amount for deterrence and Respondent's willfulness is appropriate in this case and an additional $925 was assessed by the Complainant under the deterrence criteria."

iii. Economic Benefit

The Complainant calculated an economic benefit amount of $259 as discussed above in section 1.C. The economic benefit for failing to monitor lead and copper was calculated at $25 for each of the five required samples for a total of $125. The economic benefit for failing to provide CCRs was $134. Comparatively, the PO *In the Matter of Alvin Raber, Jr., and Water Enterprises Northwest, Inc.,* found economic benefit of $410 per round of lead and copper sampling for a system that served 171 persons. In addition, the PO found economic benefit of $480 for failure to provide CCRs and $40 for failure to notify the state. *In the Matter of: Alvin Raber, Jr., and Water Enterprises Northwest, Inc.,* (RJO Alfred C. Smith July 22, 2004).

The PO *In the Matter of Apple Blossom Court a/k/a Apple Blossom Mobile Home Park, Bruce Benz, and Patricia Benz* determined that economic benefit was recoverable as an "other appropriate factor." *In the Matter of Apple Blossom Court a/k/a Apple Blossom Mobile Home Park, Bruce Benz, and Patricia Benz*, 2007 WL 1793253 (RJO Steven W. Anderson, February 13, 2003). The PO included the full amount of economic benefit totaling $967.50 in his assessment of a $15,000 penalty. The breakdown of costs included $15.76 for testing each

coliform sample, $65 for each radiological sample, and $15 for testing each lead and copper sample. The PO held the amounts were based on "typical sampling and analysis from random private laboratories in the state of Oregon and local county of the Apple Blossom public drinking water system." The PO further held that in calculating economic benefit, EPA "could have also taken into account the costs avoided for not having provided public notifications, consumer confidence reports, printing and mailing." *Id.*

The PO in *Durham* held that the EPA's determination that respondent derived only $309 in economic benefit from failures to monitor was "far too low." Although the actual cost of analyzing the eleven months of samples would probably have been more than that figure, and probably far less, the cost of obtaining and submitting the samples for analysis would have been far higher. Respondent would have had to hire and pay an operator, at a cost he stated was $600-$800 per month or to do so himself. Thus, he saved potentially $88 to $6,600. *Id. See also, In the Matter of Leisure Valley West, Central and East Water Systems; Olan Hott*, 1999 EPA ALJ LEXIS 53, (ALJ Moran, June 25, 1999).

D. Mitigation

The Complainant did not consider the Respondent's ability to pay because the Respondent did not provide the EPA with any additional financial information than was available to the Agency at the time it calculated the penalty. When a Respondent does not raise the claim that it is unable to pay a proposed penalty, there is no reason to consider it. *In the Matter of Anthony J. Taylor, Andover Water Corporation*, 1992 ALJ LEXIS 713, (ALJ Yost, August 14, 1992). Further, because the Respondent has not participated in any phase of this administrative process, the EPA is without the ability to consider any other mitigation factor(s).

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8

Date: 4/12/2013

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 COMPLAINANT'S SUPPLEMENTAL PENALTY INFORMATION 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

4/15/2013
Date


Signature