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DECISION NO. 2019-EMA-009(a)

In the matter of an appeal under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53.

BETWEEN:	Delfresh Mushroom Farm Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Norman E. Yates, Panel Chair	
DATE:	Conducted by way of written submissions concluding on September 27, 2019	
APPEARING:	For the Appellant: Huu Quach For the Respondent: Graham N. Rudyk, Counsel	

APPEAL

[1] Delfresh Mushroom Farm Ltd. ("Delfresh") appeals a June 10, 2019 determination (the "Determination") by Leslie Payette in her capacity as Director (the "Director"), Ministry of Environment and Climate Change Strategy ("MoE"). In the Determination, the Director imposed an administrative penalty of $27,400 on Delfresh in respect of four contraventions of the *Mushroom Compost Facilities Regulation*, B.C. Reg. 133/2014 (the "*MCFR*").

[2] This appeal is filed pursuant to section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"), namely:

> **100**(1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

[3] Under section 99(f) of the *EMA*, "a decision of a director" includes a determination to impose an administrative penalty. The "appeal board" is the Environmental Appeal Board, an independent agency established to hear quasi-judicial appeals from a broad spectrum of decisions made by government officials. I have authority to hear this appeal as a member of the appeal board pursuant to section 102(2) of the *EMA*. After hearing the appeal, I have the power under section 103 of the *EMA* to:

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[4] Delfresh does not dispute that the contraventions occurred. It argues, however, that I should rescind or reduce the penalty in the circumstances.

[5] The Director asks me to confirm the administrative penalty and dismiss the appeal. She submits that the penalty is fair and reasonable given the nature of the contraventions and Delfresh's history of non-compliance with the *MCFR*. The Director also asks me to order costs against Delfresh in connection with the appeal.

The Hearing

[6] The appeal is based on written submissions by the parties. Delfresh filed a letter dated August 21, 2019 and supporting documents. The Director replied with submissions dated September 10, 2019 (with supporting documents, and a book of authorities). Delfresh did not file any materials in rebuttal to those filed by the Director. The time for submissions closed on September 27, 2019.

BACKGROUND

The Parties

[7] Delfresh operates a mushroom compost facility in Abbotsford, British Columbia (the "Compost Facility"). It has been doing so for over a decade. The Compost Facility uses manure, straw, hay, and other vegetative materials to produce compost that is used by mushroom farmers. Mr. Huu Quach is the president of Delfresh, and the representative of Delfresh with whom MoE officials generally interact.

[8] The Director is a government employee designated as a director of waste management by the Minister responsible for the MoE.

Overview of the Statutory Scheme

[9] The *EMA* regulates waste management in British Columbia, with the goals of preventing pollution and protecting human health and the environment.

[10] Composting at an industrial level has the potential for pollution due to the nature of the wastes and emissions associated with the process. The mushroom farming industry is primarily regulated under the *EMA* and the *MCFR.* Section 6 of the *EMA* generally prohibits the introduction of waste into the environment from a prescribed industry, trade or business, or from a prescribed activity, subject to specified exceptions such as compliance with a valid permit, approval, order or a regulation—in this case, the *MCFR*. The *MCFR* is made under authority of the *EMA*

and applies to businesses and facilities producing compost that is subsequently used as a medium for growing mushrooms.

[11] The *EMA* and *MCFR* are a comprehensive regulatory scheme. Section 2 of the *MCFR* allows an exemption to section 6 of the *EMA* if a mushroom compost facility has submitted an acceptable pollution prevention plan and complies with the six sections of the *MCFR* Schedule (the "Schedule"). Among other things, the Schedule addresses the design and operation of mushroom compost facilities, record keeping, reporting, and the posting of adequate security. It restricts the discharge of liquid waste—principally leachate[1]—and solid waste into the environment. The Schedule also establishes requirements for the containment and storage of "goody water"[2] and other materials used and produced in the composting process. The decision under appeal relates to contraventions of the Schedule.

[12] By authority of section 115(1)(c) of the *EMA*, a director may issue an administrative penalty to a person who contravenes the *MCFR*. Additionally, the *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Administrative Penalties Regulation*") governs the determination of administrative penalties under section 115(1) of the *EMA*.

[13] Of particular significance in this appeal, section 7(1) of the *Administrative Penalties Regulation* lists the factors that a director must consider to establish the amount of an administrative penalty. In summary, those factors are:

a) the nature of the contravention;

b) the real or potential adverse effect of the contravention;

c) any previous contraventions, administrative penalties imposed on, or orders issued to the person[3] that is the subject of the determination;

d) whether the contravention was repeated or continuous;

e) whether the contravention was deliberate;

f) any economic benefit derived by the person from the contravention;

g) whether the person exercised due diligence to prevent the contravention;

h) the person's efforts to correct the contravention;

i) the person's efforts to prevent recurrence of the contravention; and

j) any other factors that, in the opinion of the director, are relevant.

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[1] "leachate" is defined in section 1 of the *MCFR* as "(a) liquid effluent originating from organic materials being received, processed, composted, cured or stored at a mushroom compost facility, or (b) any water, precipitation or runoff that has come into contact with, or mixed with, the liquid effluent described in paragraph (a)"

[2] "goody water", also known as brown water, is defined in section 1 of the *MCFR* as "… a combination of leachate and any water, precipitation or runoff that is (a) collected by drainage from the mushroom composting facility, or (b) contained in a piping system or lagoon, or enclosed facility … in the mushroom compost facility."

[3] "Person" includes a corporation.

[14] Under section 7(2) of the *Administrative Penalties Regulation*, separate administrative penalties may be imposed for each day the contravention continues.

[15] To determine an appropriate penalty using these factors, the MoE has adopted a process that begins with a "base penalty" for each contravention. The base penalty is intended to reflect the seriousness of the contravention based on factors a) and b) above (i.e., the nature of the contravention and any perceived adverse effects). Additional amounts are added to, or deducted from, the base penalty after considering the "penalty adjustment factors" in subsections c) to j).

History of Non-compliance Leading to the Determination

[16] On May 24, 2016, the MoE issued Pollution Abatement Order 108377 (the "2016 Pollution Abatement Order") against Delfresh, having concluded that the Compost Facility was causing pollution by discharging effluent containing levels of fecal coliform, E. Coli and ammonia nitrogen into a ditch connected to a nearby fish-bearing stream, at levels significantly exceeding provincial water quality guidelines. Among other things, the 2016 Pollution Abatement Order ordered Delfresh to cease operations pending submission of a pollution prevention plan "to the satisfaction of the Director" and cautioned Delfresh to comply with the *MCFR*, other legislation and any relevant municipal bylaws.

[17] Delfresh's contractor, SYLVIS Environmental, submitted to the MoE "Pollution Prevention Plan Including Maintenance and Air Monitoring Program", dated November 2016, and revised as of February 21, 2017 (the "Pollution Prevention Plan"). By letter dated April 11, 2017, the Director, Compliance - Environmental Protection Division, Delfresh was advised that the Pollution Prevention Plan was satisfactory.

[18] The MoE subsequently inspected the Compost Facility on May 29, 2018 (the "May 2018 Inspection"). On June 22, 2018, the MoE issued Inspection Report 87450, titled "Warning Letter" (the "June 22 Warning"), intended to put Delfresh on notice that it was "out of compliance" with the *MCFR* and needed to "immediately implement the necessary changes or modifications to correct the non-compliance(s)", more particularly:

- failing to keep its goody water in an enclosure maintained under negative pressure with air emissions directed to collection and treatment, contrary to section 3(1)(f) of the Schedule;
- failing to conduct pre-wetting of straw or hay on an aerated floor or in a dunk tank within an enclosed storage area, and storing pre-wetted straw or hay on a non-aerated floor, contrary to sections 3(4)(a) and (b) of the Schedule;
- failing to report the Compost Facility's "design annual production capacity", contrary to section 4(2)(e) of the Schedule; and
- failing to post an acceptable security deposit, contrary section 5(1) of the Schedule.

[19] The June 22 Warning was then re-issued as Inspection Report 87450, dated July 3, 2018 (the "July 3 Warning") to address incorrect references to the relevant legislation in the June 22 Warning. Both the June 22 Warning and the July 3 Warning were sent to Delfresh by registered mail and emailed to Mr. Quach. Both required "immediate implementation" of the same necessary corrective measures, and both requested Delfresh to advise the MoE, by letter or email "within 30 days of this letter", to identify the corrective measures that had been taken and what else was being done to prevent similar non-compliances in the future.

[20] For reasons apparently unrelated to the non-compliances identified by the May 2018 Inspection, MoE officials inspected the Compost Facility again on August 1, 2018 (the "August 2018 Inspection"). They found that Delfresh continued to be out of compliance with the previously identified sections of the Schedule. In a consequent inspection report dated August 27, 2018, the MoE advised Delfresh that it was referring the non-compliance issues to the Conservation Officer Service for investigation. The August 27th report was sent to Delfresh by registered mail and by email to Mr. Quach.

[21] On November 16, 2018, Delfresh provided the MoE with a "Performance Review (9-Month) of Wastewater Management Operations of Delfresh Composting Facility" prepared by InnoWater Technologies Inc. ("InnoWater"). Based on its site assessment on October 16, 2018, InnoWater advised that, as of early October 2018, straw pre-wetting was being done within the process building—rather than outdoors—in compliance with section 3(4)(a) and (b) of the Schedule. However, it stated that the goody water was still not enclosed nor maintained under negative pressure. InnoWater suggested options to rectify this issue and to address odour emission issues to achieve compliance with section 3(1)(f) of the Schedule.

[22] The MoE performed a compliance inspection on November 29, 2018 (the "November 2018 Inspection"). Among other things, this inspection determined that an activity related to goody water management (different from that which was identified by the May 2018 Inspection) was being carried out in a manner that was likely to cause pollution. It further determined that the Compost Facility was still out of compliance with sections 3(1)(f), 4(2)(e) and 5(1) of the Schedule, but was now in compliance with section 3(4). As a result of its findings, the MoE issued Pollution Prevention Order 109748 on December 5, 2018 (the "Pollution Prevention Order").

[23] In an inspection report dated December 7, 2018, the MoE advised Delfresh of the November 29th issues of non-compliance with sections 3(1)(f), 4(2)(e) and 5(1) of the Schedule, and that it was referring this inspection record for an administrative penalty.

[24] In January 2019, Delfresh submitted documentation specifying "the design annual production capacity in cubic meters" to address non-compliance with section 4(2)(e) of the Schedule, identified by the May 2018 Inspection.

[25] On January 21, 2019, the MoE performed another site visit to the Compost Facility (the "January 2019 Inspection"). It found that Delfresh was still not complying with sections 3(1)(f) and 5(1) of the Schedule. The MoE notified Delfresh

of the continued non-compliance in Inspection Report 115346, dated February 5, 2019, and advised that the matter was being referred for an administrative penalty.

The Proposed Penalty

[26] On February 20, 2019, the Director issued a "Notice Prior to Determination of Administrative Penalty" (the "Notice") offering Delfresh an Opportunity to be Heard by way of written submissions. The Notice advised Delfresh that the Director was considering imposing administrative penalties to address the non-compliance issues identified by the inspections referred to above (collectively, the "Inspections"). A "fact sheet" on administrative penalties was also provided, and a copy of the documentation that would be used to determine whether administrative penalties should be levied and how the amount of penalty would be assessed.

[27] Important to this appeal, the Notice included a copy of the Penalty Assessment Form, which set out the four contraventions that were being considered for a penalty and the timeframes of non-compliance. All of the timeframes began with the June 22 Warning. The contraventions are as follows:

1. Failure to comply with goody water requirements in section 3(1)(f) of the Schedule from June 22, 2018 to present;
2. Failure to comply with the requirement to pre-wet straw or hay on an aerated floor or dunk tank within an enclosed storage facility pursuant to section 3(4)(a) of the Schedule from June 22, 2018 to November 16, 2018, and failure to store pre-wetted straw or hay on an aerated floor contrary to section 3(4)(b) of the Schedule from June 22, 2018 to November 16, 2018;
3. Failure to report the design annual production capacity as required by section 4(2)(e) of the Schedule from June 22, 2018 to January 24, 2019; and
4. Failure to post the required security deposit as required by section 5(1) of the Schedule from June 22, 2018 to present.

[28] Regarding the amount of the proposed penalty, the Notice advised that section 30 of the *Administrative Penalties Regulation* sets a maximum penalty of $40,000 for a contravention of section 3(1)(f) and 3(4)(a) and (b) of the Schedule, and a maximum penalty of $10,000 for a contravention of section 4(2)(e) and 5(1) of the Schedule. The Notice informed Delfresh of the preliminary penalty assessment for the four contraventions. Attached to the Notice was a Penalty Assessment Form which described the factors in the *Administrative Penalties Regulation* and how they were assessed in relation to each alleged contravention.

Opportunity to be Heard

[29] Delfresh provided a submission dated March 11, 2019 to the Director, prepared by InnoWater. It summarized what had been done, or would be done, to bring the Compost Facility into compliance with the *MCFR*. Among other things, Delfresh advised of its efforts and intention to achieve compliance by modifying the

goody water piping system, only using the pre-wetting basin for emergency storage, and implementing changes to manage air emissions from the storage tank. Delfresh also said that it had taken steps towards determining the amount and form of a security deposit, and that it was "willing to work with the Ministry of Environment [sic] to address the non-compliance issues in a timely manner", including developing a website on which monitoring information would be posted.

The Director's Determination

[30] As previously noted, the Determination was dated June 10, 2019, containing the administrative penalty made by the Director. She confirmed that Delfresh had contravened sections 3(1)(f), 3(4)(a) and (b), 4(2)(e) and 5(1) of the *MCFR* Schedule during the specified timeframes set out in the Notice. While noting Delfresh's efforts to address the Compost Facility's deficiencies related to goody water, she concluded that Delfresh was still non-compliant at the time of her Determination (it did not have an enclosed facility maintained under negative pressure for all goody water with air emissions directed to collection and treatment, nor had Delfresh complied with the requirement to provide an acceptable security deposit). However, the Director accepted that Delfresh had taken corrective measures to address the hay dunk tank and storage issues, and was now in compliance with the design annual production capacity reporting.

[31] In the Determination, the Director confirmed the proposed administrative penalties set out in the Notice for the reasons given in the Notice. She stated:

> Delfresh is expected to comply with all applicable requirements of the MCFR at all times. Multiple inspections have previously identified the non-compliances in this administrative penalty and the potential for adverse effects to the environment and human health due to the contraventions continues. The ongoing failure to comply led to the Ministry issuing a separate Pollution Prevention Order (109748) to address potential pollution from the operations on site. The written submission provided in response to the Notice highlighted the lack of action to correct the non-compliances. The penalty remains the same as described in the Penalty Assessment Form and no changes were made for the final determination.

[32] Accordingly, the Director confirmed the following penalties for the four contraventions:

1. Failure to comply with section 3(1)(f) of the Schedule (non-compliance with goody water management requirements): $14,000;
2. Failure to comply with sections 3(4)(a) and (b) of the Schedule (non-compliance with straw or hay wetting and dunk tank and storage requirements): $9,000;
3. Failure to comply with section 4(2)(e) of the Schedule (failure to report annual production capacity): $1,600; and

4. Failure to comply with section 5(1) of the Schedule (failure to post required security deposit): $2,800.

Total Penalty: $27,400

[33] The rationale and calculations underlying these amounts are discussed later in this decision.

[34] The penalty was due 30 calendar days after the Determination was served on Delfresh. Any appeal had to be filed within that period.

ISSUES

[35] This appeal was conducted as a new hearing. In accordance with section 103 of the *EMA*, I am authorized to confirm, reverse or vary the Determination, or make any decision that the Director could have made and that I consider appropriate in the circumstances.

[36] The issues to be decided in this appeal are as follows:

1. Whether the penalties should be reduced or rescinded taking into account the evidence and the factors in section 7 of the *Administrative Penalties Regulation*.
2. If the appeal is not successful, should the Respondent be awarded costs?

DISCUSSION AND ANALYSIS

1. Whether the penalties should be reduced or rescinded taking into account the evidence and the factors in section 7 of the *Administrative Penalties Regulation.*

[37] In summary, Delfresh submits that it has either achieved compliance or is committed to working towards full compliance within a realistic timeline. It argues that the financial penalties are counterproductive and will reduce the already limited funds available for achieving full compliance, upgrading the Compost Facility, and avoiding negative environmental impacts.

[38] The Director submits that the administrative penalties are appropriate given Delfresh's repeated non-compliance over an extended period of time, and the lack of effective response to the MoE's warnings and inspection reports. In particular, the Director notes that the Compost Facility was still out of compliance at the time of the August 2018 Inspection (which was more than 30 days after the June 22 Warning was sent to Delfresh). In addition, although the straw pre-wetting contraventions had been rectified prior to the November 2018 Inspection, the Compost Facility was still out of compliance with the other contraventions identified six months earlier during the May 2018 Inspection. The Director points out that Delfresh remained out of compliance with sections 3(1)(f) and 5(1) of the Schedule following the inspection on January 21, 2019, which led to Delfresh being given the Notice on February 20, 2019.

[39] The Director argues that I should reject Delfresh's argument that the penalties are counterproductive and ought to be rescinded or reduced so the funds could be put to better use upgrading the Compost Facility. She points out that Delfresh did not provide any evidence to support its financial claims. She notes that, at the very least, Delfresh ought to have submitted financial statements and banking records to support its assertions of being financially "strapped".

[40] The Director asks me to conclude that Delfresh has not established any reasonable basis upon which the Panel ought to reverse or vary the penalties.

[41] Although I will review the specific submissions on the appropriateness of the penalties under each of the four contraventions, I will first address three matters arising from the general submissions.

Preliminary Issues

[42] I find that Delfresh has not presented any evidence to substantiate its assertion that the company has been experiencing financial difficulties. I can only make decisions based on the evidence placed before me: by way of example, see *Re Village of Cache Creek Landfill*, 1987 CarswellBC 531, 2 CELR(NS) 289 (headnote). I also note that the responsibility for proving a fact is on the person who asserts it, on a "balance of probabilities" (see the Board's *Practice and Procedure Manual*, at page 31). I agree that Delfresh ought to have submitted at least some relevant financial and banking records to reflect its financial health.

[43] I also reject Delfresh's argument that financial penalties are counterproductive because the associated funds could be better spent. If that general proposition was accepted, it might well be used to argue against the rationale behind all administrative penalties. This would defeat the purpose of the administrative penalty regime: these penalties are used as both a specific and a general deterrent, intended to encourage compliance with the regulatory scheme. They are a useful tool to bring a person into compliance and to deter future contraventions.

[44] Finally, I find that there is a potential issue with the Director's use of June 22nd as the starting point for calculating non-compliances. I note that all of the contraventions are found to commence on June 22, 2018, when the June 22 Warning was issued, and were found to continue until Delfresh came into compliance if, indeed, it did so. The administrative penalties are based upon this time frame. Importantly, I note that Delfresh acknowledged having received the June 22 Warning.

[45] The July 3 Warning effectively replaced the June 22 Warning. Both warnings told Delfresh to advise the MoE "within 30 days of this letter" on the corrective measures that had been taken, and what else was being done to prevent similar non-compliances in the future. The July 3 Warning started a new "30-day clock" in relation to the period within which Delfresh was directed—and expected—to take immediate steps to come into compliance. I find that Delfresh was to notify the MoE within 30 days of "receipt" of the warning, as opposed to 30 days from the date of the letter.

[46] I am satisfied that Delfresh received the July 3 Warning by registered mail on July 12, 2018. That was the effective "trigger date" to the deadline for its response to the MoE. I recognize that the July 3 Warning arguably reset the 30-day deadline within which Delfresh was to advise the MoE about steps it had taken (or planned to take) to address the non-compliance issues; however, Delfresh did not respond, let alone rectify the concerns within that grace period, and the July 3 Warning did not alter the fact that the contraventions existed and Delfresh had *de facto* notice of them as a result of the June 22 Warning. I find that the Director was correct in using June 22nd as the starting date for assessing an administrative penalty for the contraventions. Ultimately, nothing of real consequence turns on this.

[47] The first indication that Delfresh had addressed any of the non-compliances was InnoWater's 9-Month Performance Review—confirmed to the Director's apparent satisfaction by the November 2018 Inspection—advising that the issues related to the section 3(4) contravention had been rectified in early October 2018. I note that, although Delfresh had not corrected the compliance issues until October, the August 27 inspection report contains a note that, on August 9, 2018, a MoE official spoke with a consultant whom Delfresh had retained "to bring Delfresh into compliance with the Mushroom Composting Facilities Regulation and the Environmental Management Act [sic]." This is relevant because it shows that Delfresh took some steps to address the MoE's concerns shortly after receiving the June 22 Warning; however, no additional information was provided to me regarding any follow-up or relevant communication to the MoE prior to mid-November 2018.

The Penalties

[48] Delfresh did not specifically dispute the Director's assessments of a "base penalty" in relation to any of the contraventions, albeit this is the most significant amount assessed—and the starting point—for each contravention. I have considered the Director's rationale for the base penalties, as well as the maximum penalties for each of the contraventions. I find that the base penalties assessed by the Director are appropriate and consistent with the MoE's purpose and rationale for base penalties contained in its "Administrative Penalties Handbook", Version 2, December 2017 (a copy of which was included in the submissions). I have included reference to the base penalties in the following discussion.

A) Section 3(1)(f) of the Schedule - Failing to have an enclosed facility maintained under negative pressure for all goody water with air emissions directed to collection and treatment as required

[49] The Director assessed an administrative penalty in the amount of $14,000 for this contravention starting on June 22, 2018. The rationale and calculations underlying this penalty are as follows:

Base penalty (seriousness) *Nature of contravention is "moderate"; failure to properly install the equipment or construct works is operational in nature.* *Real or potential adverse effect is "medium"; the potential impacts due to overflow, rainfall, health impact (odour) air emissions has the potential to result in an adverse effect.*	$10,000
Previous contraventions: Yes *Ten items listed: 2016 Pollution Abatement Order, Warnings, Pollution Prevention Order, and Referrals for investigations and administrative penalties*	+ $ 1,000
Repeated or continuous: Yes, continuous *Continuous from June 22 Warning to present*	+ $ 1,000
Deliberate: *Aware of non-compliance from three inspection reports & warnings*	+ $ 1,000
Economic benefit from contravention: Yes *By not incurring costs related to enclosing facility*	+ $ 1,000
Due diligence to prevent contravention: No	$ 0
Efforts to correct contravention: No	$ 0
Efforts to prevent reoccurrence: No	$ 0
Additional relevant factors: Yes *Pollution Prevention Order was issued on December 5, 2018 on the grounds that Delfresh was likely to release goody water that will cause pollution*	$ 0

The Parties' Submissions

[50] Delfresh states that it was "was under the impression" that the Compost Facility had been designed and constructed in compliance with the requirements of the *MCFR*. It further points out that a director approved the Pollution Prevention

Plan by letter dated April 11, 2017. The Pollution Prevention Plan (with photos and diagrams) specifically addressed the design and operation of the Compost Facility "as-built". The design included a large outdoor storage pond for all goody water that was obviously not enclosed nor maintained under negative pressure with air emissions directed to collection and treatment. Delfresh says that it was not aware of any non-compliance or deficiency with this design until it received the June 22 Warning (addressing the May 2018 Inspection).

[51] Delfresh points out that it took action after being made aware that the Compost Facility did not comply with this section but states that it takes time to assess the options and complete the required modifications, and it is costly. Delfresh says that it has been challenging to comply with this requirement because it has experienced negative cash flow since the start-up of the Compost Facility. Despite this, Delfresh ordered a new storage tank in November 2018 after deciding which option to pursue. The tank was installed in July 2019, photos of which were included with its submissions in this appeal. Delfresh states that tank covers had been ordered but had not been installed before the appeal submissions closed. In addition, Delfresh says that it is "sourcing a suitable blower" to incorporate into the air emissions management system and hopes to have this new tank and air control system ready for service by late September or early October 2019. Delfresh also has plans to modify the existing goody water tank "to maintain a negative pressure under the cover", notwithstanding that this tank would only be used "when necessary".

[52] In conclusion, Delfresh asks me to take into consideration the fact that implementing modifications to its operations to address this contravention is challenging and takes significant time. Delfresh states that it is committed to work with the MoE, and that the ultimate goal is to achieve full compliance within a practically possible time frame. For all of these reasons, it asks me to rescind the penalty or, alternatively, to keep it to a minimum.

[53] In reply, the Director submits that Delfresh remains out of compliance regarding goody water management. The Director points out that the Pollution Prevention Plan was a requirement of the 2016 Pollution Abatement Order, and that nothing in that order relieved Delfresh from complying with the *MCFR* requirements and any other legislation or bylaws. If Delfresh is arguing that its non-compliance was due to an officially induced error of law (i.e., by virtue of the fact that a director accepted the Pollution Prevention Plan), the Director points out that the legal test for officially induced error of law is restricted to very limited circumstances which, she submits, do not exist in this case. Moreover, the Director argues that any misconception that Delfresh may have been under was clearly dispelled by the June 22 Warning and the multiple follow-up inspection reports.

[54] Regarding the administrative penalty, the Director submits that it is well below the $40,000 prescribed maximum amount and is lenient in the circumstances. She submits that the penalty needs to have some financial impact on Delfresh because of the nature of the contravention and Delfresh's pattern of disregard for the rules and regulations governing this activity, as demonstrated by the 2016 Pollution Abatement Order and the 2018 Pollution Prevention Order. The Director maintains that the amounts she assessed are fair and reasonable and take

into consideration the factors required by section 7 of the *Administrative Penalties Regulation*.

The Panel's Findings

[55] Delfresh does not dispute that it contravened this section of the *MCFR*; however, to assess the section 7 factors and the appropriate penalty, I must consider some of the underlying facts and background to the contravention.

[56] Delfresh states that it thought the Compost Facility had been designed and constructed in compliance with the *MCFR*'s goody water requirements and that a director's approval of the Pollution Prevention Plan supported this belief.

[57] I find it difficult to comprehend that the Compost Facility was designed and built with an open-air storage tank and basin for goody water—let alone that the 2017 Pollution Prevention Plan made mention of this but was nonetheless approved. I further note that the 2016 Pollution Abatement Order addressed the obvious concerns related to effluent being discharged onto the land in an unauthorized manner that could have impacted nearby watercourses, but did not address the issues of non-compliance that underly this appeal: those issues of non-compliance apparently existed at the time of the 2016 Pollution Abatement Order, yet the Compost Facility was allowed to re-commence operations in the spring of 2017.

[58] The Compost Facility had obviously been operating in a manner that did not comply with the *MCFR* for some time prior to the May 2018 Inspection, and it would seem that Delfresh—or whomever was advising Delfresh—was under a misapprehension in that regard. However, a misapprehension is not a defence in this case, and nor has Delfresh established an officially-induced error. As noted by the Director, if Delfresh is suggesting that it relied upon a director's acceptance of the Pollution Prevention Plan as an excuse for the contravention on the grounds of an officially induced error, Delfresh has not met the legal test. That test is set out in *R v. Jorgensen*, [1995] 4 S,C.R. 55, Lamer, C.J., states at paragraph 36:

> In summary, officially induced error of law functions as an excuse rather than a full defence. … In order for an accused to rely on this excuse, she must show, after establishing she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions. … Ignorance of the law remains blameworthy in and of itself. …. [My emphasis]

[59] At paragraphs 37 and 38, the Court states that the elements of the officially induced error excuse are to be proven on a balance of probabilities and emphasized that "an officially induced error of law argument will only be successful in the clearest of cases."

[60] I find that Delfresh has not provided information to establish an officially induced error of law. That notwithstanding, I have reviewed the penalty assessment with Delfresh's explanation for this non-compliance in mind.

[61] Delfresh assures me that a new brown water storage tank was ordered in November 2018 and installed in July 2019, that a cover for the new tank was going

to be installed, and that it hopes to have a blower connected to the air emission control system by late September or early October 2019. I was not provided with any update about these matters prior to the closing of submissions. In any event, Delfresh was clearly out of compliance when the various inspections were done and when the Determination was made. I consider that to be the relevant time frame, notwithstanding that some of the submissions received for this appeal, and some of my comments, extend beyond that period.

[62] Further, the available evidence is that Delfresh did not maintain proactive communications with the MoE regarding its plans and the difficulties it experienced when implementing corrective measures. Delfresh's explanation is that it was unable to address this concern in a more timely way, stating "implementing any modification to the operations to address the non-compliance is challenging and also takes [a] significant amount of time." Those assertions having been made, I have not been provided with sufficient evidence to take this into consideration when reviewing the penalty.

[63] Although Delfresh has taken steps to address this potentially serious contravention, it remained out of compliance when it made its submissions on this appeal. While not specifically addressed, it is apparent from the materials provided to me that the concern regarding goody water management is the source of many complaints by local area residents, and was likely the reason for the August 2018 Inspection and the 2018 Pollution Prevention Order (which resulted from the November 2018 Inspection). I agree with the Director's assessment of the seriousness of the contravention: the nature of the goody water contravention is operational in nature and of moderate seriousness; the potential adverse effect is in the range of "medium". I agree that the appropriate base penalty for this contravention is $10,000.

[64] I have reviewed the record related to the Inspections and the Director's considerations of the remaining factors under section 7 of the *Administrative Penalties Regulation*. I note that the Director added $1,000 to the base penalty in consideration of "previous contraventions". However, only two items in the list resulted in a formal determination or enforcement action of some sort: the 2016 Pollution Abatement Order and the 2018 Pollution Prevention Order. Of those, only the 2016 Pollution Abatement Order predates the June 22 Warning for the non-compliance issues that underlie this Determination and the assessed penalties.

[65] In a recent decision of the Board, *Randy Carrell, doing business as Iron Mask Trailer Park v. Director, Environmental Management Act*, (Decision No. 2019-EMA-010(a), November 27, 2019) [*Iron Mask*], the Chair of the Environmental Appeal Board considered a similar issue and held as follows, at paragraph 62:

> I have considered whether to add an amount for previous contraventions based on those letters issued in 2012, 2016, and 2017. The letters document the Ministry's investigations and conclusions that contraventions had occurred. However, no formal determination of contravention (or administrative penalty) was issued as a result of the events documented those letters. Therefore, I find that no amount should be added to the base penalty for previous contraventions. [My emphasis]

[66] I agree with and adopt this reasoning: the Board's interpretation is consistent with the language used in section 7(1)(c) of the *Administrative Penalties Regulation*. I also find that neither a prior warning letter nor a subsequent enforcement action that relates to the same contravention as that which is the subject of a determination by a director—in this case, the Determination under appeal—ought to be considered a "previous contravention" for the purposes of a penalty assessment. In context, I have considered all of the inspections and the warning letters about which I was advised (beginning with the May 2018 Inspection) and the 2018 Pollution Prevention Order. I am of the view that the warnings are categorically not a formal record of contraventions *per se*, and the 2018 Pollution Prevention Order is not a previous contravention. Prior inspections, warnings and other enforcement that identified or dealt with the same or a related contravention may, however, be relevant to other section 7 factors, such as "repeated or continuous" and "efforts to correct the contravention".

[67] In this case, of the 10 items that the Director listed under "previous contraventions", only the 2016 Pollution Abatement Order should be considered as a previous contravention in this case. I am satisfied that it was a formal enforcement response to a contravention, rather than a compliance measure or warning, and it is an appropriate consideration. There is sufficient evidence before me to take it into account as an aggravating factor. Accordingly, I find that $500 (rather than $1,000 ordered by the Director) should be added to the base penalty.

[68] The Director also added $1,000 to the base penalty in consideration of the continuous nature of the non-compliance from June 22, 2018 to the date of her Determination (and the Opportunity to be Heard). Delfresh had still not fully complied with this section when it made its submissions to me. In the circumstances, I find that the additional $1,000 is a reasonable addition.

[69] The Director also added $1,000 to the base penalty on the grounds that the contravention was deliberate. This is based on her finding that Delfresh was aware of the contravention (by referencing three inspection reports and associated warnings). The term "deliberate" connotes not doing or correcting something when you are aware of it, or reasonably ought to have been aware—in this case, being out of compliance with the *MCFR* requirements. I have given due consideration to whether to reduce the penalty on this basis but have decided that a reduction is not warranted.

[70] I note that mushroom compost facilities must comply with only six sections in the *MCFR* Schedule to be exempt from section 6 of the *EMA*. It is Delfresh's responsibility to know the law and to ensure compliance with the main regulation that applies to its operations. According to the evidence, Delfresh has been operating its Compost Facility for over a decade. It has had many years to meet those requirements, all of which are important to protecting the environment. Once it was formally notified of the non-compliance, Delfresh should have taken more immediate and proactive steps to ensure that the Compost Facility fully complied with the requirements in the *MCFR*. It is apparent, however, that this non-compliance was not addressed until half-way through 2019. In the meantime, the MoE issued the 2018 Pollution Prevention Order (on December 5, 2018) due to ongoing concerns with the goody water. As of September 27, 2019 (when the

appeal submissions closed) there was no indication that Delfresh had fully complied with this requirement. I find that the non-compliance since the Director's determination is an aggravating factor. I agree that adding $1,000 for deliberateness is reasonable and appropriate.

[71] The Director also added a $1,000 penalty to remove the economic benefit to Delfresh from the contravention. She found that Delfresh benefitted by not incurring costs related to enclosing this part of the Compost Facility. Delfresh acknowledged that rectifying this is an expensive undertaking. I agree with this conclusion and that adding $1,000 in relation to this factor should be added to the base penalty.

[72] I agree with the Director's penalty assessments for the remaining factors. Although I have considered the confusion that may have been caused by the acceptance of the Pollution Prevention Plan in April 2017, this confusion would be relevant Delfresh's efforts at due diligence to prevent the contravention or to "Additional Relevant Factors". The Director did not add to the base penalty under either factor, so I considered whether to subtract an amount for any confusion. I conclude that no subtraction is warranted. The only reason that Delfresh produced the Pollution Prevention Plan at all was because it was a requirement of the 2016 Pollution Abatement Order. There is no indication that Delfresh made any effort to ensure compliance with the *MCFR* until it was ordered to do so in 2016—and even if Delfresh thought that the April 11, 2017 letter indicated that it complied with all requirements, given the significant defects in the way the Compost Facility dealt with goody water, it cannot be said that Delfresh was sufficiently diligent in its efforts to prevent the contravention.

[73] In addition, given that the penalty is being assessed after Delfresh was given a formal warning of the contraventions and a grace period during which to rectify them (as opposed to when it built the non-compliant facility), any confusion about the April 11, 2017 letter has been adequately factored into the calculations. I find that no additional adjustment for Delfresh's apparent confusion is warranted.

[74] For the reasons given above, the Director's $14,000 penalty assessment is reduced by $500. Accordingly, the administrative penalty for this contravention is $13,500.

B) Sections 3(4)(a) & (b) of the Schedule – Failing to pre-wet the straw or hay on an aerated floor or in an enclosed storage facility & failure to store pre-wetted straw or hay on an aerated floor

[75] The Director assessed an administrative penalty of $9,000 for this contravention starting on June 22, 2018. The rationale and calculations underlying this penalty are as follows:

Base penalty (seriousness) *Nature of contravention is "moderate"; failure to properly install the equipment or construct works.* *Real or potential adverse effect is "medium"; the potential impacts due to overflow, and health impact (odour) air emissions has the potential to result in an adverse effect.*	$10,000
Previous contraventions: Yes *Ten items listed: 2016 Pollution Abatement Order, Warnings, Pollution Prevention Order, and Referrals for investigations and administrative penalties*	+ $ 1,000
Repeated or continuous: Yes, repeated *Non-compliances were observed during May 29, 2018 and August 1, 2018 inspections*	+ $ 2,000
Deliberate: *Aware of non-compliance from four inspection reports & warnings*	$ 0
Economic benefit from contravention: Yes *By not incurring costs related to pre-wetting and storing*	+ $ 1,000
Due diligence to prevent contravention: No	$ 0
Efforts to correct contravention: Yes *Took measures to correct after second inspection (August 1st). Was corrected November 16, 2018*	- $ 5,000
Efforts to prevent reoccurrence: No	$ 0
Additional relevant factors: N/A	$ 0

The Parties' Submissions

[76] Delfresh states it was unaware of this compliance issue until it received the June 22 Warning. It notes that the Pollution Prevention Plan approved by a director in 2017 described the brown water storage tank, an in-ground brown water storage pond and a concrete straw-wetting basin (i.e., dunk tank) as being outdoors in

order to avoid accumulation of dangerous gases. Delfresh points out that the MoE accepted the final submission of the Pollution Prevention Plan on April 11, 2017, apparently without comment; therefore, Delfresh submits that it was under the impression that the design and operation of this part of the Compost Facility was in compliance with the *MCFR*.

[77] Once notified of the compliance issue, Delfresh points out that it took steps to address this non-compliance. In October 2018, Delfresh achieved compliance by installing the "necessary piping system" for pre-wetting of straw in a bunker located within the process building. Having achieved compliance in a relatively timely manner, Delfresh argues that no penalty should be imposed: the $9,000 penalty ought to be rescinded. Although the Director agreed in the Determination that Delfresh had come into compliance, Delfresh maintains that she incorrectly said that compliance came *after* November 16, 2018, whereas Delfresh had started pre-wetting operations inside the Phase 1 process in early October 2018.

[78] The Director submits that she recognized Delfresh's efforts to comply with this section of the Schedule by subtracting $5,000 from the base penalty. Regarding the Ministry's acceptance of the Pollution Prevention Plan, the Director reiterates her comments regarding contravention "A" (goody water storage and odour management, discussed above) that Delfresh has not established a legal excuse of officially induced error of law to this contravention.

[79] The Director submits that her administrative penalty assessment is well below the $40,000 prescribed maximum amount and is lenient in the circumstances. She submits that the penalty needs to have some financial impact on Delfresh because of the nature of the contravention and Delfresh's pattern of apparent disregard for the rules and regulations governing this activity, as demonstrated in part by the 2016 Pollution Abatement Order and the 2018 Pollution Prevention Order. The Director maintains that the amounts she assessed are fair and reasonable in the circumstances, having considered each of the factors required by section 7 of the *Administrative Penalties Regulation*.

The Panel's Findings

[80] The Director assessed a base penalty of $10,000 on the grounds that the contravention was "moderate" (failure to properly install the equipment or construct works) and that the real or potential adverse effect was "medium" (the potential impacts due to overflow, and health impact (odour) air emissions has the potential to result in an adverse effect). I agree with the Director. Similar to the goody water contravention, this contravention has the potential to adversely impact the environment and health.

[81] Considering previous contraventions, the Director added $1,000 to the base penalty. However, as I found when considering contravention "A" (above), only one of the items listed—namely, the 2016 Pollution Abatement Order—resulted in a formal determination of some sort, and only it should be considered. As with the goody water contravention, I am therefore inclined to reduce the amount added to the base penalty. However, having already taken this previous enforcement response into account as an aggravating factor in contravention "A", I am of the

view that it would be inappropriate to do so again as part of the global administrative penalty in this appeal. Further, I am not satisfied that there is evidence that the 2016 Pollution Abatement Order was sufficiently related to the concerns regarding hay or straw pre-wetting underlying this contravention to be considered a previous contravention. In the result, I am rescinding this amount.

[82] The Director added $2,000 to the base penalty due to the repeated nature of the non-compliance as a result of inspections in May and August 2018. However, she only added $1,000 in relation to the goody water contravention, despite finding that contravention to be "continuous" from the June 22 Warning onward. There is no explanation for this inconsistency. I also note that the period of non-compliance with the goody water requirements is considerably longer than the non-compliance with the pre-wetting requirements: Delfresh complied with the pre-wetting sections by October 2018.

[83] I find that the contravention of section 3(4) of the Schedule ought to be considered continuous or repeated, but the assessed penalty should not be greater than for the goody water issues previously discussed. In addition, I note that Delfresh was in the process of attempting to comply with this requirement in early August of 2018 (per the MoE's note in its August 27 inspection report) and implemented the required changes by October of 2018. I find that the contravention was only continuous or repeated for less than four months. Accordingly, the assessed penalty for this factor should be reduced from $2,000 to $500.

[84] The Director did not add anything to the base penalty for "deliberateness". This is inconsistent with her assessment of the goody water contravention where she added $1,000 to the base penalty because Delfresh was aware of the contravention from three inspection reports and warnings. In her assessment of this factor for the pre-wetted straw contraventions, the Director noted that Delfresh was aware of the contravention from previous inspection reports and warnings but added nothing to the base penalty. No reason for this inconsistency is offered.

[85] I find that, similar to my findings regarding goody water, the contravention of section 3(4) was deliberate; however this contravention was rectified to the Director's satisfaction once it became a priority. I find that a minor penalty of $200 should be added to the base penalty to account for this factor.

[86] The Director added a $1,000 penalty to remove the economic benefit to Delfresh from the contravention. She found that Delfresh benefitted from not incurring costs related to pre-wetting and storing. This appears to be purely speculative. In respect of this contravention, I find no evidentiary basis for the Director's finding that Delfresh derived any economic benefit from the manner in which it had been doing straw pre-wetting and storage. I, therefore, rescind the $1,000 assessment.

[87] Overall, I am of the view that Delfresh attempted to correct this non-compliance to the Director's satisfaction in a relatively timely manner. Based on the MoE's note in its August 27, 2018 inspection report, I find that there was a constructive discussion on August 9 between a representative of Delfresh and the MoE addressing what needed to be done. While Delfresh did not communicate its

plans and progress in writing as had been stipulated in the warning letters, and the required modification took until October 2018 to implement, Delfresh self-reported that it was in compliance as of early October 2018 (although there is no explanation as to why it took until the middle of November to notify the MoE). I find that the Director's $5,000 adjustment is an appropriate amount to reduce from the base penalty to take into account Delfresh's corrective action. My finding that Delfresh corrected the contravention at least one month before the date referenced by the Director (November 16, 2018) does not warrant a modification to this amount. The $5,000 deduction is generous given the relative seriousness of the contravention.

[88] I agree with the Director's penalty assessments for the remaining factors. As I did with the goody water contravention, I have considered the confusion that may have been caused by the acceptance of the 2017 Pollution Prevention Plan; however, for the reasons given under contravention "A", no adjustment for Delfresh's confusion is warranted.

[89] Accordingly, for the reasons given above, the $9,000 penalty assessment is reduced to $5,700.

C) Section 4(2)(e) of the Schedule – Failing to report the design annual production capacity in cubic metres

[90] The Director assessed an administrative penalty of $1,600 for this contravention starting on June 22, 2018. The rationale and calculations underlying this penalty are as follows:

Base penalty (seriousness) *Nature of contravention is "minor"; the contravention is administrative in nature.* *Real or potential adverse effect is "low"; the contravention is administrative in nature and does not directly impact the environment.*	$1,000
Previous contraventions: Yes *Ten items listed: 2016 Pollution Abatement Order, Warnings, Pollution Prevention Order, and Referrals for investigations and administrative penalties*	+ $ 100
Repeated or continuous: Yes, repeated *Non-compliances were observed during inspections on May 29, August 1 and November 29, 2018*	+ $ 300

Deliberate: *Aware of non-compliance from three inspection reports & warnings*	+ $ 100
Economic benefit from contravention: Yes *By not incurring costs related to hiring qualified professional to obtain information*	+ $ 100
Due diligence to prevent contravention: No	$ 0
Efforts to correct contravention: Yes *It has made efforts and says this has been corrected in letter January 24, 2018 [this should be 2019]*	$ 0
Efforts to prevent reoccurrence: No	$ 0
Additional relevant factors: N/A	$ 0

The Parties' Submissions

[91] Delfresh submits that the information on design annual production capacity was left out of the original report due to the "availability of relative information" that goes into this calculation at the time of preparation of the three-month report. However, it started collecting the necessary information for performing such calculations after receiving the June 22 Warning.

[92] Delfresh argues that the contravention is administrative in nature and there has been no harm done nor economic benefit from this omission. It submits that it simply "took time" to subsequently "review and collect" the necessary information. Delfresh further submits that the information was submitted to the Ministry in January 2019 bringing it into compliance with the Schedule.

[93] The Director submits that Delfresh was required to provide this information within three months after commencement of its operation (see section 4(1)(a) of the Schedule) and that providing the report six months after it was first warned does not constitute grounds to overturn the Determination or penalty.

[94] The Director points out that the administrative penalty she assessed is well below the $10,000 prescribed maximum amount and is lenient in the circumstances. She argues that the penalty needs to have some financial impact on Delfresh because of the nature of the contravention and Delfresh's pattern of disregard for the rules and regulations governing this activity. The Director maintains that the amounts she assessed are fair and reasonable in the circumstances and take into consideration the factors required by the *Administrative Penalties Regulation*.

The Panel's Findings

[95] The Director assessed a base penalty of $1,000 on the grounds that the contravention was "minor" (administrative) in nature and that the real or potential adverse effect was "low" (it does not directly impact the environment). I agree with both Delfresh and the Director that this is a relatively minor contravention, at least in this case, and I find that the base assessment is appropriate.

[96] Considering previous contraventions, the Director added $100 to the base penalty. However, as I have discussed when considering contraventions "A" and "B" (above), only one of the items listed—the 2016 Pollution Abatement Order—resulted in a formal determination of some sort, and only it should be considered. Further, I am of the view that there is an insufficient connection between that Order and this contravention for it to be considered relevant. Accordingly, as I did with the previous contravention, I am rescinding the amount that the Director added to the base penalty for this factor.

[97] The Director added $300 to the base amount on the grounds that the contravention was repeated or continuous. The non-compliance was observed during three inspections. I note that Delfresh was in the process of attempting to comply with this requirement in early August of 2018 (per the note contained in the August 27 inspection report), and provided this information in January of 2019. I agree with the Director that $300 should be added to the base penalty in consideration of this contravention being continuous or repeated.

[98] The Director added $100 to the base penalty because she concluded the contravention was deliberate. More particularly, she concluded that Mr. Quach was aware of the non-compliance as there were three inspection reports advising of this. I find that Delfresh was not sufficiently proactive about advising the MoE of any efforts being made to review and collect this information, and it still took over six months after the warning letters, until January 2019, to comply with the requirement. For this transgression and time frame, I agree with the Director that an addition of $100 is appropriate.

[99] The Director also added $100 to the base penalty to account for economic benefit to Delfresh from the contravention. She surmised that Delfresh benefitted by not incurring costs related to hiring a qualified professional to obtain the required information. Delfresh argues that no economic benefit resulted from this contravention. It submits that it just took time to collect and report the required information.

[100] When compared to other contraventions, I agree with the Director that there was an apparent financial benefit to Delfresh for not having hired a qualified professional to determine and report this measure of annual production capacity. In the circumstances, I find that adding $100 to the base penalty is appropriate.

[101] Finally, I note that the Director considered whether Delfresh made efforts to correct the contravention, noting that Delfresh came into compliance with this requirement on January 24, 2019; however, she did not deduct any amount from the base penalty for this factor. I have considered whether to deduct an amount for Delfresh's eventual compliance, but decided not to do so. I find that this

contravention is not a matter of miscommunication or confusion. Periodic professional review and reporting are mandatory requirements in this industry. Delfresh did not communicate with the MoE regarding the reporting issue, and should not be given a deduction when it took several months to comply and did not keep the MoE apprised of its plans and progress on this matter. I further agree with the Director that Delfresh should have complied with this requirement within three months of commencing its operation, and note that its confusion regarding the April 11, 2017 letter does not relate to this requirement.

[102] I agree with the Director's penalty assessments for the remaining factors.

[103] Accordingly, for the reasons given above, the penalty assessment is reduced by $100. The administrative penalty for this contravention is $1,500.

D) Section 5(1) of the Schedule – failure to post a security deposit

[104] The Director assessed an administrative penalty of $2,800 for this contravention starting on June 22, 2018. The rationale and calculations underlying this penalty are as follows:

Base penalty (seriousness) *Nature of contravention is "moderate"; the contravention is administrative in nature but undermines the MoE's ability to protect the environment if the company goes bankrupt-public tax dollars would have to be used to address impacts.* *Real or potential adverse effect is "low"; the contravention is administrative and does not directly impact the environment.*	$ 2,000
Previous contraventions: Yes *Ten items listed: 2016 Pollution Abatement Order, Warnings, Pollution Prevention Order, and Referrals for investigations and administrative penalties*	+ $ 200
Repeated or continuous: Yes, continuous *Security was required when Delfresh registered under the MCFR and remains outstanding*	+ $ 200
Deliberate: *Aware of non-compliance from three site inspections, all with Mr. Quach present*	+ $ 200

Economic benefit from contravention: Yes *By not incurring costs related to providing security deposit*	+ $ 200
Due diligence to prevent contravention: No	$ 0
Efforts to correct contravention: No	$ 0
Efforts to prevent reoccurrence: No	$ 0
Additional relevant factors: N/A	$ 0

The Parties' Submissions

[105] Delfresh refers to the challenges it has faced since the start-up of the Compost Facility. One has been to satisfy a financial institution that the Compost Facility is financially viable. As a result, getting an acceptable form of credit is "taking longer than Delfresh initially expected". Delfresh says that it has been "actively working with the financial institute" [sic] and on more than one occasion has asked the MoE to comment on a draft line of credit. Delfresh received the MoE's "final comment" on August 19, 2019.

[106] Delfresh proposes that it will continue to work with the MoE and the financial institution to meet the requirement for a security deposit acceptable to the Director. While still not in compliance (as of September 27, 2019, the closing of the appeal submissions), Delfresh argues that the $2,800 penalty should be rescinded on the grounds that no negative environmental impacts have occurred during the period of non-compliance, and emphasizes that these funds could be put to better use to upgrade the goody water management systems, which would have negative environmental impacts if not properly managed.

[107] The Director submits that Delfresh has been out of compliance with section 5(1) of the Schedule since commencing operations. She submits that the penalty is well below the $10,000 prescribed maximum amount and is lenient in the circumstances. She submits that the penalty needs to have some financial impact on Delfresh because of the nature of the contravention and Delfresh's pattern of disregard for the rules and regulations governing this activity. The Director maintains that the penalty is fair and reasonable.

The Panel's Findings

[108] Delfresh asks me to treat this contravention as administrative in nature and of little consequence because there has been no "direct negative impact on the environment".

[109] In the determination under appeal, the Director emphasized the importance of complying with the requirement for a security deposit. She states:

> Failure to provide a security deposit undermines the ministry's ability to protect the environment if the company went bankrupt as there would be no security available to address any impacts and this would be incurred by the ministry (and the public tax dollars). …

[110] Delfresh contends that this contravention is due to circumstances beyond its control—and re-asserts the argument that it has had cash-flow problems. Delfresh says it is continuing to work with the MoE and a financial institution to achieve compliance. In its August 21, 2019 appeal submissions, Delfresh said that it hoped to have the necessary security "issued immediately", yet no evidence nor updated submission was provided to me. Delfresh submits that the penalty ought to be "reduced to zero" so that its "limited funds" can be used for upgrades to "address the critical deficiencies" with a view to avoiding potential "negative impacts on the environment." The Director, on the other hand, asserts that this is an important aspect of the regulatory scheme and that Delfresh has been given more than adequate opportunity to make the necessary arrangements.

[111] In terms of the base penalty, the Director's determination of $2,000 reflects the fact that this type of security arrangement is administrative in nature and non-compliance doesn't directly impact the environment, but that the absence of security could have serious consequences to the MoE's ability to protect the environment should it need to do so. While Delfresh maintains that the penalty is too high, in my view this base penalty is on the low side in the circumstances of this case: a security or surety arrangement is all-the-more necessary for a business, such as Delfresh, that has tenuous finances and a history of non-compliance and pollution-related concerns. Nevertheless, I am prepared to accept this as the base penalty.

[112] Considering previous contraventions, the Director added $200 to the base penalty. However, as I found when considering the contraventions above, only one of the items listed—the 2016 Pollution Abatement Order—resulted in a formal determination of some sort, and only it should be considered. Further, I am left to speculate as to how it might be a relevant factor in my consideration, in terms of what was addressed by the 2016 Pollution Abatement Order; if it is relevant, then I am left to wonder why it was not a mentioned as a concern prior to the May 2018 Inspection. As a result, I am rescinding the $200 that the Director added to the base penalty due to previous contraventions.

[113] The Director added $200 to the base amount on the grounds that the contravention was continuous: the non-compliance started when Delfresh was registered under the *MCFR* and "remains outstanding". Although I might assume otherwise, there is no evidence before me that the MoE advised Delfresh that it was non-compliant with this section of the Schedule before issuing the June 22 Warning (which was replaced by the July 3 Warning).

[114] In its March 11, 2019 submissions to the Director during the Opportunity to be Heard, Delfresh pointed out that, on March 6, 2019, it sought advice from the MoE as to what form of security would be acceptable to the Director. That was close to nine months after the June 22 Warning, without any apparent efforts by Delfresh to correct the situation. There is evidence before me that Delfresh and the MoE corresponded during the summer of 2019 about the security deposit. In its

submissions for this appeal, Delfresh stated that, after the acceptable form was confirmed in writing with the MoE, the security deposit would be posted "in a timely manner"; however, as of September 27, 2019 (when the appeal submissions closed), there was no evidence that the security deposit had been provided and I must conclude that the it remained outstanding.

[115] There is no compelling evidence before me as to why this type of credit has not been extended, nor why such a seemingly straight-forward requirement has not been rectified. I find that the Director's addition of $200 to the base penalty in consideration of this contravention being continuous or repeated is appropriate.

[116] The Director also added $200 to the base penalty on the grounds that the contravention was deliberate. I find that the failure to put an acceptable security deposit in place has been deliberate. This continuing non-compliance has not been adequately explained. Although administrative in nature, this contravention is not synonymous with record-keeping and, while it does not equate with having an immediate environmental impact, it foreseeably impedes the government's efforts to find a balance between protecting the environment and allowing industry to undertake activities that have a potential to adversely impact the environment. Having adequate financial security—or some form of insurance—in place in the event of a potentially harmful incident, is as fundamental to a regulatory scheme under the umbrella of the *EMA*, as having operational and emergency response plans and the exercise of due diligence to avoid and prevent foreseeable harm. Compliance with this requirement ought to have been a priority for Delfresh. Albeit at the low end, I agree with the Director's assessment related to this consideration.

[117] Lastly, the Director added $200 on the grounds that Delfresh did not incur the costs related to providing a security deposit and, therefore, benefitted economically. Given the economic nature of the security requirement and Delfresh's submissions that it has limited cash flow, I agree with this addition.

[118] I also agree with the Director's penalty assessments for the remaining factors. While I considered whether to add a penalty for Delfresh's failure to correct the contravention, I am satisfied that my concerns with this failure have been incorporated under one of the other factors; any further penalty would amount to an exercise in "piling on".

[119] While I may sympathize with Delfresh to some degree, the lack of security remains an unsatisfactory situation. I am concerned that Delfresh remained out of compliance prior to the close of the appeal. The failure to have adequate security in place is a significant transgression.

[120] For these reasons, I have reduced the administrative penalty for this contravention by $200, bringing it to $2,600.

Conclusion

[121] For people operating in a regulated industry, administrative penalties are used to both encourage compliance and deter future non-compliance. They are an integral and effective enforcement tool in a regulatory scheme that allows industry to operate while protecting vulnerable public resources.

[122] I have considered the applicable factors set out in section 7 of the *Administrative Penalties Regulation*, the maximum penalties for each contravention, as well as the parties' submissions and admissible evidence. I have taken into account that Delfresh did not dispute the contraventions in its submissions to the Director or to me, and I have considered Delfresh's efforts to come into compliance both prior to, and since, the Director's determination. My findings are premised on the evidence presented to me. In the circumstances, I find that administrative penalties are warranted which meet the objectives that I have identified and discussed.

2. Should the Board order costs against Delfresh in connection with the appeal?

[123] The Director argues that if I dismiss the appeal, then costs should follow. She argues that Delfresh ought to have, at the very least, submitted financial statements and banking records in support of its claims of limited financial resources (e.g., that paying the administrative penalties is counterproductive as the funds could be used to upgrade the facility).

[124] The Director submits that she reasonably and properly exercised her authority to issue the Determination, and the penalties were appropriate, if not lenient, given the much greater penalties Delfresh potentially faced. She submits that an award of costs will not have a "chilling effect" and deter others from bringing an appeal in appropriate circumstances because Delfresh did not deny the contraventions. Delfresh simply argued that the penalty ordered by the Director should be rescinded, or a lesser penalty should have been imposed, because: the money could be put to better use; that Delfresh has learned its lesson; and that Delfresh has either complied—or is trying to comply—with the requirements prescribed by the *MCFR*. The Director submits that this is not a basis upon which the MoE should have to bear the costs of defending the appeal. As noted above, the Director emphasizes that Delfresh did not provide any documentary evidence to support its claims of financial hardship and, therefore, this "bare assertion" should not be accepted as fact.

[125] Delfresh did not make submissions regarding this application for costs.

The Panel's Findings

[126] Section 47 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, gives me the power to award costs. More particularly:

Power to award costs

47(1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay all or part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay all or part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay all or part of the actual costs and expenses of the tribunal in connection with the application.

[127] The tribunal in this instance is the Environmental Appeal Board. The Board's policy is to award costs only in "special circumstances" (section 13.0 of the Board's *Practice and Procedure Manual*). Section 13.0 sets out certain matters that may qualify as "special circumstances", without being exhaustive. The matters referred to in section 13.0 include: bringing an appeal for an improper purpose; bringing a "frivolous or vexatious" appeal; failure to take steps in a timely manner to the prejudice of other parties; and failure to comply with an order or direction of the Board.

[128] Delfresh had the right to appeal the Director's determination under the *EMA*. I have considered the Board's decision in *Seaspan ULC v British Columbia (Ministry of Environment)*, [2014] BCEA No. 19, in which the Board found that an award for costs may be appropriate "to encourage responsible conduct" where a party's conduct "is deserving of reproof or rebuke" because it "falls far short of the standard of practice which the Board wishes to encourage in the appeals process" (paragraph 208).[4] While not bound by that decision, I adopt this test and the reasoning behind it.

[129] I also note the recent Board decision in *Gibsons Alliance of Business and Community Society and Marcia Timbres v. Director, Environmental Management Act and The George Gibsons Development Ltd.*, (2017-EMA-010(d), November 29, 2019), in which the Board thoroughly canvassed its discretion to award costs. In particular, the Board states at paragraph 49:

> … The Board's policy expressly states that costs are not awarded based on an unsuccessful outcome. Parties, participants, and interveners in appeals must have enough latitude to fully present their cases. This is especially so in the context of an administrative tribunal. Granting an award for costs where the law is misstated or where a submission is not supported by evidence may discourage poor quality submissions, but it would also pose challenges for access to justice. The Appellants' conduct in this case did not deviate so significantly from a reasonable standard as to warrant an order for costs.

[130] I do not find that Delfresh's conduct in this appeal has been improper, vexatious, frivolous or abusive in relation to the appeal process, nor otherwise deserving of rebuke. It met a reasonable standard. Although not the test, I also

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[4] The Board's authority to award costs in Seaspan was section 95 of the *EMA*. This section was repealed when the Board was given the authority to award costs in section 47 of the *Administrative Tribunals Act*.

note that the appeal has not been decided entirely in favour of either party. Accordingly, I make no award as to costs.

DECISION

[131] I have carefully considered all of the evidence and submissions. For the reasons set out above, the appeal is allowed, in part.

[132] Pursuant to section 103(b) of the *EMA*, I order the Director to vary the administrative penalties as follows:

1. Section 3(1)(f) of the Schedule - Goody Water Management and Air Emissions: the penalty is reduced from $14,000 to $13,500.

2. Sections 3(4)(a) and (b) of the Schedule - Straw Pre-Wetting: the penalty is reduced from $9,000 to $5,700.

3. Section 4(2)(e) of the Schedule - Reporting Annual Production Capacity: the penalty is reduced from $1,600 to $1,500.

4. Section 5(1) of the Schedule - Arranging an Acceptable Security Deposit: the penalty of $2,800 is $2,600.

[133] The aggregate penalty of $23,300 is payable within 45 days after the date of this decision.

[134] The application for costs is denied.

"Norman E. Yates"

Norman E. Yates, Panel Chair
Environmental Appeal Board

April 14, 2020