BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

DECISION NO. EAB-EMA-21-A005(a)

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

BETWEEN:	United Concrete & Gravel Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on July 30, 2021	
APPEARING:	For the Appellant: David Zacharias For the Respondent: Robyn Gifford, Counsel	

FINAL DECISION

APPEAL

[1] This appeal concerns a determination (the "Determination") issued to United Concrete & Gravel Ltd. (the "Appellant"). The Determination levies a $16,824 administrative penalty against the Appellant for contravening section 8(1) of the *Code of Practice for the Concrete and Concrete Products Industry*, B.C. Reg. 329/2007 (the "*Code*") by failing to sample for analysis process water and establishment run-off.

[2] The Determination was issued on April 19, 2021, by Stephanie Little (the "Director"), who has been appointed as a Director under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). The Director works in the Ministry of Environment and Climate Change Strategy (the "Ministry").

[3] The Environmental Appeal Board has the authority to hear this appeal under section 100 of the *Act*. Under section 103 of the *Act*, the Board has the power to:

a) send the matter back to the Director, with directions,

b) confirm, reverse or vary the Determination, or

c) make any decision that the Director could have made, and that the Board considers appropriate in the circumstances.

[4] The Appellant asks the Board to reverse the penalty, among other things (discussed below).

BACKGROUND

The Facility and the regulatory scheme for the concrete/concrete products industry

[5] The Appellant corporation operates a facility that produces concrete and glass abrasives (the "Facility"). The Facility is located in Quesnel, British Columbia.

[6] Sections 6(2) and (3) of the *Act* prohibit certain persons and businesses from introducing waste into the environment without authorization. Section 4 of the *Waste Discharge Regulation*, B.C. Reg. 154/2019 (the "*Waste Discharge Regulation*") provides an exemption from sections 6(2) and (3) of the *Act* if the person or business is registered under, and complies with, a code of practice that applies to their industry or activity, which in this case is the *Code*.

[7] The *Code* regulates the discharge of wastewater by the concrete and concrete products industry. There are various requirements imposed under the *Code*, including those found in section 8.

[8] Section 8 of the *Code* applies to "… establishments, except home-based businesses, educational facilities and establishments of hobbyists or artisans, engaged in manufacturing ready-mix concrete or concrete products".[1] Section 8(1) requires that, for any such establishments, process water and establishment runoff (but now sewage) is sampled and analyzed at least once per month. Sections 8(2) to 8(4) of the *Code* set out requirements for sampling procedures, analysis procedures, and associated reporting.

[9] On January 31, 2013, the Appellant received Registration #106562 under the *Code* for its concrete operations.

Inspections and prior issues related to the Facility

[10] Since its registration under the *Code*, the Appellant has a history of non-compliance with section 8 of the *Code*. On June 6, 2016, Ministry staff inspected the Facility and found that the Appellant was not sampling process water or runoff as required by section 8(1) of the *Code*. On July 15, 2016, the Ministry issued a warning letter (the "First Warning Letter"), advising that the Appellant needed to do so.

[11] On August 24, 2017, the Ministry inspected the Facility and found that the Appellant was still not sampling process water or runoff. As a result, on June 4, 2019, the Ministry issued an $11,000 administrative penalty against the Appellant, for contraventions of section 8(1) of the *Code*. On the same date, the Ministry issued other administrative penalties for other contraventions of the *Code*: $14,000 for contravening section 4(3); $1,300 for contravening section 9(1); and $1,200 for contravening section 11(1).[2]

---

[1] This definition is contained in section 1 of Schedule 2 of the *Waste Discharge Regulation*. That definition is imported into the *Code* by section 1 of the *Code*.

[2] Section 4(3) of the *Code* requires concrete and concrete products facilities' particulate control systems be inspected at least once per month to verify that they are in good working order. Section 9(1) requires concrete and concrete products facilities to maintain records of inspections for their particulate emissions control systems and

[12] On July 11, 2019, a Ministry compliance officer inspected the Facility and found process water and runoff analyses to be present for only seven of 21 months from October 2017 to June 2019.

[13] On October 9, 2019, the Ministry issued a warning letter (the "Second Warning Letter") to the Appellant, advising that the Appellant was noncompliant with section 8(1) of the *Code*, amid other contraventions. The Second Warning Letter noted that process water and runoff analyses were present only for seven of 21 months, from October 2017 to June 2019.

[14] The Second Warning Letter states that contraventions of the Code may result in fines under the *Waste Discharge Regulation* or administrative penalties levied under the *Act*. The Second Warning Letter requests that the Appellant immediately address the contraventions it outlines.

[15] The Second Warning Letter also asks the Appellant to notify the Ministry, within 30 days, to advise what corrective actions had been taken and what else was being done to prevent similar non-compliances in the future. The Second Warning Letter advises that the Appellant will be subject to escalating enforcement action if it does not restore compliance with the *Act* and the *Code*. The Second Warning Letter further states that it would form part of the Appellant's compliance history, in the event of any future contraventions.

[16] On October 13, 2020, a Ministry compliance officer inspected the Facility and found wastewater analyses to be present for only six of the fourteen 14 months preceding October 2020.

[17] On November 25, 2020, the Ministry notified the Appellant that the matter formed the basis for a referral for an administrative penalty (the "Penalty Referral"). The Penalty Referral notes the Appellant had contravened section 8(1) of the *Code* eight times between October 2019 and September 2020. The Penalty Referral noted the Appellant had previously been found to be noncompliant with section 8(1), during inspections performed in July 2016, September 2017, and October 2019.

Overview of the Administrative Penalty Scheme

[18] Under section 115 of the *Act*, a director may issue an administrative penalty to a person who fails to comply with a prescribed provision of the *Act* or its regulations. The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Penalties Regulation*"), governs the determination of administrative penalties under section 115(1) of the *Act*.

[19] Part 2 of the *Penalties Regulation* specifies which sections of the *Act* and its regulations are prescribed for the purposes of section 115(1) of the *Act*, and the maximum penalties for contraventions. Section 20(1) of the *Penalties Regulation*

---

process water and runoff water treatment systems (if discharging into surface water or marine water). Section 11(1) requires concrete and concrete products facilities to maintain records gathered under sections 8(1) and 9(1) to be retained onsite for at least five years.

states that the maximum penalty for contravening section 8(1) of the *Code* is $40,000.

[20] Section 7(1) of the *Penalties Regulation* lists factors that a director must consider, if applicable, in establishing 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 who 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.

[21] Under section 7(2) of the *Penalties Regulation*, if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues.

[22] To assist decision-makers in determining an appropriate penalty using these factors, the Ministry has developed the *Administrative Penalties Handbook – Environmental Management Act and Integrated Pest Management Act*, dated January 2020 (the "Handbook"). The Handbook recommends first assessing a "base penalty" for the 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 real or potential adverse effects). Additional amounts are then added to, or deducted from, the base penalty after considering the "penalty adjustment factors" in subsections c) to j).

The Notice Prior to Penalty

[23] According to the Director, on March 2, 2021, the Ministry issued a Notice Prior to Determination of Administrative Penalty (the "Penalty Notice") to the Appellant.[3]

[24] According to the Director, on October 13, 2020, the Appellant provided a one-sentence submission to the Director on the question of the administrative penalty.[4]

[3] The Penalty Notice was not provided to the Board.

[4] The submission was not provided to the Board; however, it was quoted by the Director.

The Determination

[25] On April 19, 2019, the Director issued the Determination. The Determination states that the Appellant contravened section 8(1) of the *Code* eight times from October 2019 to October 2020. The Determination states that the Appellant addressed its contravention with only one sentence in its submissions, saying, "I have assigned a company employee to fill out all applicable requirements the first Monday of every month."

[26] The penalty was calculated based on a $10,000 base, with upward adjustments for:

- previous contraventions, penalties imposed or orders issued ($2,000);
- a repeated or continuous contravention or failure ($2,000);
- a deliberate contravention or failure ($2,000); and
- economic benefit having been derived by the Appellant for the contravention or failure ($824).

[27] The base penalty was chosen because the Director classified the nature of the contravention as "moderate", because "… it creates a risk of harm to the environment and/or human health. The purpose of sampling is to determine whether pollution of ground or surface water is occurring or may occur."

[28] According to the Handbook, a "… failure to conduct required sampling or studies; [or] a failure to undertake required monitoring …" is an example of a moderate contravention.

[29] The Director classified the actual or potential for adverse effect as "medium" because the contravention impacted the Ministry's ability to protect the environment or human health, but on a localized and mitigable scale. This language echoes the language of the Handbook, which describes such actual or potential for adverse effects as "medium".

[30] The Handbook states that the appropriate base penalty is $10,000 when the maximum allowable is $40,000; the nature of the contravention is "moderate"; and the actual or potential for adverse effect is "medium".

[31] The Director adjusted the penalty upward by $2,000 (20% of the base amount) because of the Appellant's "… poor demonstrated compliance history, including a previous monetary penalty that resulted in only slight improvements in compliance."

[32] The Director adjusted the penalty upward by $2,000 (20% of the base amount) because the Appellant repeatedly contravened section 8(1) of the *Code*, despite having been informed of the contraventions in July 2016, September 2017, and October 2019.

[33] The Director adjusted the penalty upward by $2,000 (20% of the base amount) because she found the contraventions to be deliberate. The Director stated that Appellant knew about the contraventions based on the discussions in and following July 2016, September 2017, and October 2019.

[34] The Director adjusted the penalty upward by $824 due to the economic benefit realized by the Appellant because of the contraventions. This figure is equal to eight months of water analyses, based on an environmental consultant's "General Price List" for the water analyses the Appellant did complete.[5]

[35] The Director found there to be no basis to reduce the penalty because of due diligence to avoid the contravention, or efforts to correct the contravention or prevent reoccurrence. The Director noted that contraventions were more frequent over the last inspection period than over the preceding one. The Director did not apply any other adjustment factors.

Appeal of the Determination

[36] On April 28, 2021, the Appellant appealed the Determination by filing a Notice of Appeal with the Board. The Notice of Appeal asserts a landfill near the Facility has contaminated the groundwater in an upper aquifer at the Facility. The Notice of Appeal asserts a lower aquifer is separated from that by 100 feet of clay. The Notice of Appeal argues there is no common sense to sampling surface water runoff into contaminated groundwater. The Appellant asks that it be excused from this sampling requirement and that it not have to pay the administrative penalty.

[37] On June 17, 2021, the Appellant provided submissions with respect to its appeal. Those submissions are summarized later in this decision. The Appellant reiterated the two remedies it identified in its Notice of Appeal, and added two more:

1. the return of "a previous fine" which it says never should have been imposed; and
2. the Ministry should focus on the landfill if it is concerned about the groundwater under the Facility being unsafe.

[38] The Board directed that the appeal be conducted by way of written submissions. The appeal was conducted as a new hearing of the matter. Consequently, the Board considered the matter afresh, with both evidence that was considered by the Director and new evidence that was not.

[39] The Appellant provided written submissions.

[40] The Director provided written submissions and an affidavit with documentary evidence.

[41] The Appellant was offered a chance to submit a reply but it did not do so.

[5] ALS Environmental's General Price List for 2020 provides prices of $85 to test for extractable hydrocarbons, $12 to test for total suspended solids, and $6 to test for pH. These are the three analyses that the Appellant had done, when competing its required process water and runoff analyses. The total monthly figure is, accordingly, $103. Eight months at that rate equals $832.

ISSUES

[42] The Appellant has raised four issues in this appeal. I have summarized the issues as follows:

1. Should the Appellant be excused from the process water and runoff sampling requirements described in section 8(1) of the *Code*?
2. Should the Appellant have a "previous fine" returned to it?
3. Should the Ministry be required to assess or take action with respect to the landfill near the Facility?
4. Should the April 19, 2021 administrative penalty be reversed?

[43] The Board does not have the authority to address the first three issues raised by the Appellant. As noted previously, section 103 of the *Act* grants the Board the authority to refer the appealed decision back to the original decision-maker, with directions; confirm, reverse or vary the appealed decision; or make any decision the original decision-maker could have made in those circumstances, that the Board considers reasonable in the circumstances. Section 103 of the *Act* does not grant the Board the authority to excuse appellants from regulatory requirements generally, inquire into or change previous decisions that were not appealed, or compel the Ministry to do anything outside of the scope of the appeal.

[44] Specifically, with respect to the first ground of appeal, section 4(1)(c) of the *Waste Discharge Regulation* requires that the discharge of any waste (in this case, runoff and process water) into the environment must be done in accordance with the *Code*. This includes section 8(1). The Appellant has not provided any statutory or regulatory authority that would allow the Director to order that the Appellant need not comply with the *Code*, and I am aware of none. As a result, I will not consider, in any more detail, whether the Appellant should be excused from the process water and runoff sampling requirements described in section 8(1) of the *Code*.

[45] With respect to the second question, it is not clear to me what "fine" the Appellant is referring to. In any event, the Board may only vary or rescind the decisions appealed to it. The Appellant has not appealed any other fines. For this reason, I will not consider in any greater detail whether the Board should order the return of a "previous fine" to the Appellant.

[46] With respect to the third question, the Board's authority is constrained to the issues contained in any decision appealed to it. This does not grant the Board the authority to order the Ministry to inquire into or undertake any action about any other environmental issues affecting the property that is the subject of the appeal. For this reason, I will not address, in any greater detail, whether the Board should require the Ministry to assess or take action with respect to the landfill near the Facility.

[47] The only remaining issues are whether the Appellant violated section 8(1) of the *Code*, and whether the administrative penalty should be reduced or removed in its entirety. I will discuss each issue in turn.

DISCUSSION AND ANALYSIS

1. Is the Facility required to comply with the *Code*, and if so, did the Appellant contravene the *Code*?

Summary of the Appellant's submissions

[48] The Appellant argues that a nearby landfill has contaminated the groundwater at the Facility and at the home of the Appellant's representative, who lives between the Facility and the landfill. The Appellant's representative says the Ministry did not inform him that his domestic wellwater was unsafe to drink; the representative had to test his own wellwater to confirm this, and the Ministry is now regularly testing that water. The Appellant argues the city, which reportedly owns the landfill, is not being subjected to the same standard as the Appellant, or to any standard. The Appellant queries why the city is allowed to contaminate the Facility's groundwater.

[49] Subsequently, the Appellant wrote to the Board and advised it was undertaking environmental sampling at the Facility for other purposes. The Appellant enclosed communications from an agrologist, Mr. Jasper, and a hydrogeologist, Mr. Grafton.

[50] According to Mr. Grafton, five monitoring wells on the Facility's property reveal levels of ammonia, chloride, and/or dissolved metals in excess of certain water quality standards.

[51] According to Mr. Jasper, groundwater migrating onto the Facility's property has been contaminated by the local landfill but, by the time it leaves the Facility's property, it meets applicable drinking water standards. The Appellant says that, if this is insufficient to show that the Facility's property was contaminated by the landfill, perhaps the Appellant could have more time to submit evidence, as further analyses will become available in the future.

Summary of the Director's submissions

[52] The Director says that any contamination of the groundwater at the Facility is not a reason to reduce the administrative penalty. The Director argues that the *Code* does not apply differently depending on local environmental conditions. The Director also argues that the penalty should not be reduced, regardless of whether any compliance actions have been taken with neighbouring properties.

The Panel's findings

[53] I understand that the Appellant is arguing that, because the groundwater of the property on which the Facility is located has been contaminated by another source, the Appellant should not have to comply with section 8(1) of the *Code*. However, I find that even if the site or the groundwater is already contaminated, that is irrelevant to the Appellant's obligation to comply with section 8(1) of the *Code*.

[54] The *Code* does not exempt facilities from compliance in such circumstances. Additionally, from a policy perspective, I note that such an exemption would run

counter to the intentions of the *Act*. It is not the case that, simply because a site is contaminated in some way, that other contaminants can then be added without effect. Such additional contamination may be harmful for the environment on its own, or it may exacerbate the effect of existing contamination, depending on the circumstances and the contaminants involved.

[55] As a result, I find that it is irrelevant whether the local landfill, or any other source, has contaminated the groundwater of the property on which the Facility is found. I do not consider that it would be helpful to wait for any additional evidence to establish that the groundwater at that location is contaminated. Regardless of any contamination at the site, the Appellant is required to comply with section 8(1) of the *Code*.

[56] Furthermore, there is no dispute in the evidence that the Appellant contravened section 8(1) of the *Code*. It is required to undertake monthly analyses of its runoff and product water. It has failed to do so.

[57] For the reasons above, I dismiss the Appellant's appeal on this issue.

2. What is the appropriate penalty in the circumstances?

Summary of the Appellant's submissions

[58] The Appellant argues that the damage done by the nearby landfill "far exceeds" any imaginable harm that the Facility could cause. As a result, the risk to the environment or human health cannot appropriately be classified as "moderate". The Appellant asserted the requirement to "… do this sampling is insulting and fining [it] is simply unfair bureaucratic harassment."

Summary of the Director's submissions

[59] Referencing prior Board decisions, the Director argues that the amount of the penalty should be such that it deters contraventions of the *Act*, by the Appellant and others. This means that the penalty must be greater than the cost of noncompliance, as otherwise there is not enough incentive to go to the expense of complying with the *Act*.[6]

[60] The Director argues that the amount of the penalty is appropriate, given the seriousness and repetitive nature of the contraventions, the Appellant's history of non-compliance with the *Code*, and the statutory objectives of deterring contraventions and encouraging compliance.

[61] The Director says that the base penalty was appropriately calculated, based on the guidance in the Handbook for a "moderate" contravention with a "medium" real or adverse effect.

---

[6] See, for example, MTY Tiki Ming Enterprises Inc. v. Director, Environmental Management Act (Decision No. 2016-EMA-120(a), September 1, 2016); Randy Carrell v. Director, Environmental Management Act (Decision No. 2019-EMA-010(a), November 27, 2019); Pacesetter Mills Ltd. v. Director, Environmental Management Act (Decision No. EAB-EMA-20-A023(a), April 21, 2021); and Delfresh Mushroom Farm Ltd. v. Director, Environmental Management Act (Decision No. 2019-EMA-009(a), April 14, 2020).

[62] The Director argues that section 8(1) of the *Code* is intended to determine whether pollution of groundwater or surface water is occurring or may occur. Persistent noncompliance with section 8(1) would interfere with the Ministry's ability to regulate discharges from the concrete industry. The Director says this is a "moderate" contravention.

[63] The Director also argues that she correctly determined the real or adverse effect of the contravention was "medium" because the waste the Appellant introduced into the environment has the potential to interfere with the Ministry's ability to protect the environment, although on a localized and mitigable scale.

[64] The Director submits that she appropriately increased the penalty amount because of the Appellant's history of non-compliance, including the fact that the Appellant previously received multiple administrative penalties, totaling $27,500, due to non-compliance with the *Code*.

[65] The Director also says she appropriately increased the amount of the penalty due to the repetitive nature of the Appellant's contravention, as eight contraventions between October 2019 and October 2020 represent a "significant" number, in a "relatively short" time period.

[66] The Director also says she appropriately increased the amount of the penalty because the contraventions were deliberate. The Director notes that the Appellant has not disputed that it was repeatedly notified that it was contravening the *Code*, yet it did not ensure that it conducted product water and runoff water analyses, as required by the *Code*.

[67] The Director submits that she appropriately increased the penalty to account for the economic benefit realized by the Appellant because it did not pay for water analyses as required under the *Code*. The Director notes the Appellant did not dispute her calculations, used to derive the $824 quantum of this economic benefit.

[68] The Director argues that she correctly did not reduce the penalty because of any due diligence on the part of the Appellant to prevent the contraventions. The Appellant was aware of its contraventions from at least 2016 and, while it may have hired an employee to ensure environmental compliance, it did not take adequate measures to ensure this employee was consistently conducting the monthly sampling and analyses required by the *Code*. There is no evidence that the Appellant exercised due diligence to prevent the contraventions, according to the Director.

[69] According to the Director, the Appellant did not make any efforts to correct the contraventions and, as a result, no reduction of the penalty is appropriate.

[70] The Director submits that, while the Appellant reportedly "… assigned a company employee to fill out all applicable requirements the first Monday of every month", this is not enough to warrant a reduction in the penalty to reflect efforts to prevent recurrent contraventions. The Director argues that the Appellant did not describe any other steps it took to ensure compliance with the *Code*. For example, it did not describe the supervision of this employee or contingency plans should the employee leave the Appellant's employ. The Director argues, given the Appellant's

history of non-compliance, simply assigning an employee is insufficient to warrant a reduction of the administrative penalty.

The Panel's findings

[71] I have concluded that the Appellant contravened section 8(1) of the *Code*. Below, I have considered the parties' submissions and evidence in light of the maximum penalty for contravening this section of the *Code*, which is $40,000[7], and the relevant factors in section 7 of the *Penalties Regulation*.

[72] Throughout my reasons, I have referred to the Handbook. After having reviewed the Handbook, I find it to be a reasonable guide for determining the appropriate quantum of an administrative penalty under the *Act*. It fosters consistency and predictability in decision-making. No other resources or authorities were provided to me. For these reasons, I have found the Handbook persuasive in my reasoning.

Factors a) and b): nature of the contravention, and real or potential adverse effect of the contravention

[73] I agree with the Director that the nature of this contravention is "moderate" because of the risk of harm it creates, to the environment and/or human health. Without the required sampling and analysis, no one has an accurate understanding of what the Appellant is discharging into the environment. There is no way to promptly or effectively respond if any discharges of process water or runoff from an establishment exceed the limits in section 7(2)(b) of the *Code*, or if pollution takes place, for example.

[74] While the Appellant asserts that it could do nowhere near the damage that is already done by the existing contamination, I do not find that argument to be persuasive. The environmental fate and potential toxicity of the Appellant's discharges requires evidence on the nature of those discharges, as well as expert evidence. Neither of these have been provided to the Board. Absent this information, it is impossible to gauge what risks are associated with the Appellant's discharges and whether they would be subsumed by or exacerbate any risks associated with any pre-existing contamination of the groundwater around the Facility. The Appellant has not met its burden of proof in this regard.

[75] Because the lack of sampling and analysis in this case poses an increased risk of undetected contamination or pollution, and a more difficult response to any such issues that arise (given the lack of information on the discharges and the ensuing need for more investigation in such a circumstance), I agree with the guidance provided in the Handbook, that a "… failure to conduct required sampling or studies; [or] a failure to undertake required monitoring …" is an example of a moderate contravention. The circumstances of this case fit that description.

[76] I also find that the adverse effect of the Appellant's contravention was "medium". As stated by the Director and in the Handbook, the contravention impacted the Ministry's ability to protect the environment or human health, but on

[7] As set out in section 20(1) of the *Penalties Regulation.*

a localized and mitigable scale. I agree that this is a "medium", in terms of the adverse impact or potential impact of the contravention.

[77] For all of these reasons, I conclude that $10,000 is a suitable base penalty, given the "moderate" nature of the contravention and the "medium" nature of the adverse effect of the contravention.

Factor c): any previous contraventions, administrative penalties imposed on, or orders issued to the Appellant

[78] I agree with the Director that the Appellant has a "… poor demonstrated compliance history". The Ministry issued the First Warning Letter, warning the Appellant about contraventions including of section 8(1) of the *Code*, in 2016. The contraventions continued and the Ministry imposed an administrative penalty in 2017, including $11,000 for contraventions of section 8(1). The contraventions continued into 2019, when the Ministry issued the Second Warning Letter, again advising the Appellant to comply with section 8(1) of the *Code*. As the contraventions continued, the Determination was issued to again impose an administrative penalty on the Appellant for noncompliance with section 8(1).

[79] This history of contraventions is recent. While it is inconsistent, it was ongoing as of the date of the Determination. There is a history of poor compliance otherwise, but the Appellant has shown an enduring unwillingness or inability to comply with section 8(1) of the *Code*. This warrants an increase of the administrative penalty.

[80] I find the 20% increase to be reasonable for the reasons provided above. Based on the information available to me, I would not have hesitated to increase the administrative penalty for a larger amount due to this history of noncompliance; however, that was not argued for and so I will simply confirm the increase imposed by the Director. I confirm the addition of $2,000 to the base penalty in applying this factor.

Factor d): whether the contravention was repeated or continuous

[81] I find that there is clear evidence that this contravention was repeated over a considerable length of time. The evidence shows that for only seven of the 21 months from October 2017 to June 2019, the Appellant completed the required process water and runoff sampling and analyses. The Ministry issued the Second Warning Letter and warned that the contraventions described in it could be considered in later enforcement actions.

[82] Even after receiving the Second Warning Letter, the Appellant was noncompliant with the requirements of section 8(1) of the *Code* for a further eight months, between July 2019 and September 2020. This demonstrates a regular pattern of noncompliance, for which an increase in the administrative penalty is appropriate. The Director added 20% to the base penalty for this factor, and I agree that this is appropriate in the circumstances. I confirm the addition of $2,000 to the base penalty in applying this factor.

Factor e): whether the contravention was deliberate

[83] I find that the contravention was deliberate. The evidence shows that Ministry staff provided repeated reminders and warnings to the Appellant over several years, particularly in July 2016, September 2017, and October 2019. As noted by the Director, the Appellant has not disputed being aware of its obligations to comply with section 8(1) of the *Code*. Even on appeal, it argues that it is "insulting" that it must do so, given the contamination that it says already exists in the area.

[84] As I have said, the Appellant must comply with section 8(1) of the *Code* regardless of whether there is any other contamination onsite. I see no sound reason why this need should be "insulting" to the Appellant, but the nature of its submissions indicate an ongoing, intentional disregard for its obligation to comply with the *Code*.

[85] The Director applied a 20% increase to the base penalty in considering this factor. I find this to be reasonable, and I would not have had any difficulty imposing a larger increase given the repeated warnings offered to the Appellant, and the Appellant's ongoing stance. I confirm the addition of $2,000 to the base penalty in applying this factor.

Factor f): any economic benefit derived by the Appellant from the contravention

[86] The Director estimated that the Appellant saved $824 by not completing the sampling and analyses of its product water and runoff in the eight incidents giving rise to the Determination. I consider this estimate to be reasonable and supported by the "General Price List" that the Director submitted to the Board.

[87] The Appellant has not argued that it did not realize an economic benefit from its noncompliance with section 8(1) of the *Code*. The Appellant did not provide any evidence that its cost savings was less than the $824 estimated by the Director.

[88] For these reasons, I find that the Appellant derived an economic benefit from the contravention, in the form of saving money on water analyses. I agree with the Director, that the estimated $824 saved should be added to the base penalty. I do so in applying this factor.

Factor g): whether the Appellant exercised due diligence to prevent the contravention

[89] I find that there is insufficient evidence that the Appellant was duly diligent in preventing this contravention. As noted by the Director, the rate of contravention has increased over time, despite repeated warnings from the Ministry that the Appellant must comply with section 8(1) of the *Code*. The Appellant has not identified any circumstances that made it more difficult or impossible to do so.

[90] While the Appellant has reportedly hired someone to take the water samples required under section 8(1), and/or has assigned that task to an existing employee, these steps on their own do not constitute due diligence. As I did in *Western Aerial Applications Ltd. v. Administrator, Integrated Pest Management Act*, Decision No. EAB-IPM-20-A002(a), April 16, 2021, I find that relying on an employee to satisfy regulatory compliance does not meet the requirements of due diligence.

[91] The Appellant has not provided any evidence about the selection of the employee(s) tasked with ensuring compliance with section 8(1) of the *Code*. The Appellant has not described how the employee(s) was/were instructed to carry out these tasks, the training they received, the supervisory structure, or any other mechanisms of quality assurance. Absent such information, it is impossible to determine whether the Appellant exercised due diligence in assigning the required tasks to its employee(s). The Appellant bears the burden of proof in this matter and it has failed to meet that burden. For these reasons, I do not decrease the administrative penalty in applying this factor.

Factor h): the Appellant's efforts to correct the contravention

[92] I find no persuasive evidence that the Appellant has made efforts to correct the contravention. Each time the Appellant was informed that it was noncompliant with section 8(1) of the *Code*, it did not seek to sample its product water and runoff as required or to otherwise immediately bring its operations into compliance. Rather, the Appellant has argued that it should not have to do so because the groundwater at the Facility may already be contaminated. As I have already indicated, that argument has no merit, and reflects the Appellant's refusal to comply with the requirements of the *Code*, despite repeated warnings and progressive enforcement action. For these reasons, I do not reduce the penalty based on this factor.

Factor i): the Appellant's efforts to prevent recurrence of the contravention

[93] I find no persuasive evidence that the Appellant has made any efforts to prevent recurrence of the contravention. The only measure the Appellant has indicated it has taken to prevent recurrence is to hire and/or assign an employee to complete the water sampling duties required under section 8(1) of the *Code*. The Appellant has not described the work process, how any employees responsible are selected, trained, or supervised. The Appellant has not provided any satisfactory explanation for why, despite having hired and/or assigned one or more employee(s) to complete the tasks, they have repeatedly not been done. The mere assertion that someone has been hired and/or assigned to complete the task is insufficient to warrant a reduction in the administrative penalty, when applying this factor. As a result, I do not reduce the penalty for this factor.

Factor j): any other factors that, in the opinion of the Director (and now the Board), are relevant

[94] The Director says there were no additional factors to consider.

[95] The Appellant did not argue that it was a small operator or that the penalty would create economic hardship. There is insufficient evidence to indicate as much.

[96] There is insufficient evidence to indicate any other factors that might change the amount of the administrative penalty. As such, I do not adjust the base penalty in respect of this factor.

Conclusion

[97] Based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*, I conclude that a penalty of $16,824 is appropriate for the Appellant's contravention of section 8(1) of the *Code.*

DECISION

[98] In making this decision, I considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[99] For the reasons set out above, I confirm the Determination. The appeal is dismissed.

"Darrell Le Houillier"

Darrell Le Houillier
Chair

September 27, 2021