Environmental Appeal Board

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DECISION NO. EAB-EMA-22-A007(a)

In the matter of an appeal under the *Environmental Management Act,* SBC 2003, c. 53

BETWEEN:	93 Land Company	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on October 19, 2022	
APPEARING:	For the Appellant: Adam Mabbott, Representative	
	For the Respondent: Robyn Gifford, Counsel	

FINAL DECISION ON THE MERITS

APPEAL

[1] This appeal is from an administrative penalty determination (the "Determination") issued on April 25, 2022, under section 115 of the Environmental Management Act, S.B.C. 2003, c. 53 (the "Act") against 93 Land Company Inc. (the "Appellant"). The penalty assessed was $26,000 for discharging waste into the environment from March 16, 2019, to August 22, 2021, without authorization, contrary to section 6(2) of the Act.

[2] The Determination was issued by Stephanie Little, Acting Operations Manager, Compliance and Environmental Enforcement, in the Ministry of Environment and Climate Change Strategy (the "Ministry"). Ms. Little was designated to act as a director (the "Director") for purposes of section 115 of the Act.

[3] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 100 of the Act. Under section 103 of the Act the Board has 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 vary the Determination by reducing it from $26,000 to $11,000.

[5] The Director seeks confirmation of the Determination and the dismissal of the appeal.

BACKGROUND

The Appellant's Poultry Litter Storage Facility and the Applicable Regulatory Scheme

[6] The Appellant, (a company incorporated under the laws of British Columbia), operates a commercial-agricultural poultry manure storage, management and sales facility located in Abbotsford, British Columbia. As part of its operations the Appellant receives poultry manure from multiple farms in the Abbotsford area. The manure is stored and mechanically turned at the Appellant's facility for an undefined period until it is transported for sale to customers in B.C. and the USA for application as a fertilizer. The facility consists of two covered storage structures with both ends open to the air ("Storage Huts") with outdoor receiving and temporary storage located on paved surface.

[7] Section 6(2) of the *Act* prohibits persons or businesses from introducing waste into the environment from certain prescribed industry, trade or business without authorization.

[8] The definition of "waste" set out in the *Act* includes air contaminants and effluent.

[9] Section 2(1) and Schedule 1 of the *Waste Discharge Regulation* B.C. Reg. 320/2004 (the "*Regulation*") together prescribe the "commercial waste management or waste disposal industry" as an industry subject to section 6(2) of the *Act*.

[10] The *Regulation* defines "commercial waste management or waste disposal industry" as establishments that are primarily engaged in the commercial collection, handling, storage, treatment, destruction or disposal of waste soil, solids or liquids".

[11] The parties agree that the Appellant's commercial-agricultural poultry manure storage, management and sales operation was a "commercial waste management or waste disposal industry" at all material times and as such is a prescribed industry for purposes of section 6(2) of the *Act.*

[12] As a result, the Appellant requires a site-specific authorization under the *Act* to discharge waste, (including air contaminants or effluent), into the environment from its operations. At the time of the contravention at issue in this appeal, the Appellant did not possess such an authorization. The Appellant does not dispute the fact that it operated continuously from March 16, 2019, to August 22, 2021, without authorization contrary to section 6(2) of the *Act*, as was found in the Determination.

The Appellant's History of Non-Compliance with the *Act* and its Application for a Waste Discharge Authorization

[13] The Ministry received numerous odour and air contaminant complaints from the public with respect to the Appellant's facility, including complaints from

students and faculty at a nearby school. These complaints led Ministry staff to conduct inspections of the Appellant's facility in late 2017 and early 2018.

[14] The first Ministry inspection of the facility on October 3, 2017, was to determine whether it was in compliance with provisions of the *Agricultural Waste Control Regulation* B.C. Reg. 131/92 in effect at the time under the *Act* (the "*AWCR"). The AWCR, (repealed in February 2019),* exempted an agricultural operation from section 6(2) of the *Act* if agricultural waste, (such as poultry manure), that is stored on a farm is produced or used on that farm, (section 4), and stored in a storage facility as defined in the *AWCR*, (section 5).

[15] The October 3, 2017, inspection determined that the *AWCR* exemption from section 6(2) was not available to the Appellant as the poultry manure was brought onto the site from other agricultural operations and was sold to third parties for use off-site as fertilizer. The manure was also not properly contained in a storage facility on the site as required. Leachate seeping from the Storage Huts was observed.

[16] On October 17, 2017, a written advisory was delivered by the Ministry to the Appellant confirming that the Appellant's operations were out of compliance with the *AWCR* and the Appellant was directed to immediately cease its unauthorized operations until it was in compliance.

[17] On November 14, 2017, January 2, 2018, and January 30, 2018, Ministry staff conducted further onsite inspections of the Appellant's facility to assess compliance with the *AWCR;* and found that the Appellant remained out of compliance.

[18] On February 1, 2018, a written warning letter was delivered by the Ministry to the Appellant confirming that the Appellant's operations were out of compliance with the *AWCR*. The letter directed the Appellant to become compliant and to advise the Ministry in writing within 30 days of the steps taken to do so. The Appellant was warned that failure to do so would subject it to escalating enforcement action.

[19] On June 12, 2018, Ministry staff conducted an onsite inspection of the Appellant's facility to determine compliance with section 6(2) of the *Act;* and found that the Appellant's continuing operations were not in compliance.

[20] On August 7, 2018, a written warning letter was issued by the Ministry to the Appellant confirming that the Appellant's operations were out of compliance with section 6(2) of the *Act*. The letter directed the Appellant to immediately get its operations into compliance and to further advise the Ministry in writing within 30 days of the steps taken to do so. The Appellant was warned that failure to do so would subject the Appellant to enforcement action including the imposition of an administrative penalty.

[21] On November 13, 2018, the Appellant submitted a preliminary application form for a Permit under section 14 of the *Act* authorizing it to discharge waste into the environment*.* Meanwhile, the Appellant continued to operate without authorization.

[22] On November 22, 2018, Ministry staff conducted an onsite inspection of the Appellant's facility to determine compliance with section 6(2) of the *Act;* finding that the Appellant was not in compliance.

[23] On January 3, 2019, an administrative penalty referral letter was issued by the Ministry to the Appellant confirming that the Appellant's operations were out of compliance with section 6(2) of the *Act*, advising the Appellant that its inspection record was being referred for an administrative penalty and directing the Appellant to cease all waste discharges until authorized in order to comply with the *Act*.

[24] The Appellant hired TerraWest Environmental Inc. ("TerraWest") to represent it in its dealings with the Ministry in relation to its regulatory compliance.

[25] On January 17, 2019, TerraWest attended a pre-application meeting with Ministry authorizations staff.

[26] On January 23, 2019, the Appellant received the application instruction document from the Ministry in relation to its application for a Permit authorizing it to discharge waste from its operations under section 14 of the *Act*.

[27] On May 21, 2019, a Notice Prior to Determination was provided to the Appellant by the Ministry in relation to contravention of section 6(2) from August 20, 2018, to January 15, 2019, including a preliminary penalty assessment of $11,000.

[28] Following consideration of written submissions from TerraWest dated June 4, 2019, a Determination of Administrative Penalty against the Appellant for its contravention of section 6(2) between August 20, 2018, to January 15, 2019, in the amount of $9,000 was made on June 6, 2019, and issued by the Ministry to the Appellant.

[29] On September 23, 2019, the Appellant submitted a Waste Management Plan, Consultation Report and supporting technical documents to the Ministry in support of its application for a Permit authorizing it to discharge waste from its operations.

[30] After initial review of the Appellant's September 23, 2019 application package, the Ministry advised the Appellant, by letter dated December 11, 2019, that the information related to waste treatment and discharges (air emissions and odour control) was insufficient to assess the potential impacts of emissions from the facility on local air quality and to determine discharge standards for the facility. The Ministry identified the additional information required from the Appellant to complete the review and adjudicate the Permit application.

[31] On February 19, 2020, the Appellant submitted further information to the Ministry and, by letter dated March 9, 2020, the Ministry advised the Appellant that the information remained deficient for reasons identified in the letter.

[32] On May 29, 2020, the Appellant provided the Ministry with some revised information in support of its Permit application but by letter dated July 28, 2020, the Ministry advised the Appellant that its submitted information remained insufficient for the Ministry to adjudicate a waste discharge authorization under section 14 of the *Act.* As an alternative option going forward, the Minister suggested it would consider an application for an Approval under section 15 of the *Act* that would set the terms under which discharge of waste may occur for a particular facility for a short duration up to 15 months without issuing a Permit.

[33] The Appellant proceeded with an application for an Approval under section 15 of the *Act* on August 31, 2020.

[34] On September 17, 2020, in response to complaints from the public of odours and air emissions, Ministry staff conducted an onsite inspection of the Appellant's facility to determine compliance with section 6(2) of the *Act;* Staff concluded that the Appellant was not in compliance.

[35] An Administrative Penalty referral letter dated September 23, 2020 was delivered by the Ministry to the Appellant confirming that the Appellant's operations were out of compliance with section 6(2) of the *Act*, advising the Appellant that its inspection record was being referred for an administrative penalty and directing the Appellant to cease unauthorized waste discharge.

[36] The Appellant did not cease its unauthorized waste discharge from its facility. During this period, the Ministry continued to receive numerous complaints from the public with respect to odour and air contaminants coming from the Appellant's facility. Complainants have said that discharges from the facility have caused nausea, headaches, watery eyes, and respiratory issues.

[37] On November 30, 2020, the Appellant submitted its section 15 Approval application package to the Ministry. By letter dated January 19, 2021, the Ministry advised the Appellant that further specified information in support of the section 15 Approval application would need to be provided by the Appellant within 14 days. The Appellant provided additional information on January 29, 2021.

[38] Following an exchange of email concerning final questions from the Ministry, on August 23, 2021, the Ministry issued a section 15 Approval to the Appellant authorizing the discharge of waste from the Appellant's operations from the issue date of the Authorization to August 31, 2022.

[39] The section 15 Approval authorized the discharge of contaminants to the air from the Appellant's facility, subject to certain operational and monitoring requirements. In particular, the Approval required the Appellant's manure storage buildings be under negative pressure and required the Appellant to install and use a biofilter for air discharges. The Approval also established ammonia discharge limits, required the Appellant to conduct air monitoring, and required the Appellant to establish a procedure to receive and address odour complaints from the public.

Overview of the Administrative Penalty Scheme

[40] Under section 115(1) of the *Act*, a director may issue an administrative penalty to a person that has contravened a prescribed provision of the *Act* or its regulations.

[41] 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*.

[42] 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 12(1) of the Penalties Regulation states that the maximum penalty for contravening section 6(2) of the Act is $75,000.

[43] 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.

[44] 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.

[45] To assist decision-makers in determining an appropriate penalty using the section 7(1) factors, the Ministry has developed and published the *Administrative Penalties Handbook – Environmental Management Act and Integrated Pest Management Act,* updated June 2020 (the "Handbook"). While the Handbook provides "guidance" to the decision-maker, it does not fetter or otherwise limit the decision-maker's discretion when assessing an administrative penalty.

[46] The Handbook contains guidance for statutory decision-makers to assist in ensuring that the principles of administrative fairness are upheld when statutory decision-makers, such as the Director, make decisions that impact a person's rights or interests.

[47] The Handbook provides guidance to statutory decision-makers in their assessment of the quantum of the penalty under section 7(1) of the *Penalties Regulation.* 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).

[48] The Handbook contains base penalty tables which can be used to determine a base penalty for contraventions with maximum penalties of $10,000, $40,000, and $75,000 respectively.

The Determination

[49] On March 15, 2022, a Notice Prior to Determination in the amount of $26,000 was issued to the Appellant by the Ministry in relation to contravention of

section 6(2) from March 16, 2019, to August 22, 2021. On March 21, 2022, the Appellant requested an opportunity to be heard and confirmed to the Ministry that TerraWest was authorized to make submissions on its behalf.

[50] Following consideration of written submissions from TerraWest and information provided by the Ministry at the opportunity to be heard respecting the alleged contravention, the Director issued the Determination on April 25, 2022, finding that the Appellant had contravened section 6(2) of the Act between March 16, 2019, and August 22, 2021, and imposed an administrative penalty under section 115(1) of the Act in the amount of $26,000.

[51] The $26,000 administrative penalty was calculated by the Director under section 7(1) of the Penalties Regulation imposing a $20,000 base penalty, with upward and downward adjustments for:

- previous contraventions, administrative penalties imposed on, or orders issued (plus 10% of base amount = $2,000);
- whether the contravention was repeated or continuous (plus 20% of base amount = $4,000);
- whether the contravention was deliberate (plus 10% of base amount = $2,000);
- efforts to prevent recurrence of the contravention (minus 10% of base amount = $2,000);

[52] The Director took the Handbook into account when determining the administrative penalty.

[53] The Director held the contravention to be "major" on the basis that the Appellant's operation of its facility without the necessary authorization undermined the basic integrity of the overarching regulatory regime and significantly interfered with the Ministry's capacity to regulate. The contravention continued after the Appellant was made aware of it and a warning and a prior administrative penalty had issued.

[54] The Director held that the real or potential adverse effects of the contravention were "medium" on the bases that the unauthorized air contaminant discharge from the site resulted in potential, localized threat to the environment and/or human health and that the unauthorized effluent discharges from the site had the potential to adversely impact local surface water and groundwater in a vulnerable aquifer recharge area of Abbotsford and within the Nooksack River watershed.

[55] The Director's assessment of the potential for adverse effects as being "medium" was supported by the number of complaints received from the public ranging from nausea, headaches, watery eyes, and respiratory issues linked to air emissions from the Appellant's operations. The Ministry received 47 such complaints between June 17, 2019 and September 16, 2020, and the Appellant directly received 10 odour complaints from 2019 through 2021.

[56] The base penalty of $20,000 chosen by the Director was equal to the amount suggested in the base penalty table in the Handbook applicable to contraventions

subject to $75,000 maximum penalty for "major" contraventions with "medium" real or potential adverse effects.

[57] The Director adjusted the penalty upward by $2,000 (10% of base amount) because of the prior June 6, 2019 determination of contravention of section 6(2) of the *Act* by the Appellant in relation to operations at its facility.

[58] The Director adjusted the penalty upward by $4,000 (20% of base amount) because of the contravention being continuous during the period of March 16, 2019, to August 22, 2021 (being the day prior to the issuance of the Approval on August 23, 2021)*.*

[59] The Director adjusted the penalty upward by $2,000 (10% of base amount) because of the contravention being deliberate given that the facility continued to operate without authorization after the Appellant had been warned not to do so and after being penalized for contravention of section 6(2) of the *Act* in June 2019.

[60] The Director adjusted the penalty downward by $2,000 (10% of base amount) because the Appellant received an Approval to discharge contaminants to the air on August 23, 2021 and has therefore returned to compliance with section 6(2) of the *Act* as of that date.

[61] The Director did not apply any other adjustment factors.

[62] In its written submissions on behalf of the Appellant, TerraWest presented submissions to the Director pertaining to a reduction in the number of complaints, operating in good faith to obtain authorization, on-site works undertaken in 2019 to aid in alleviating odour issues, and a submission that the Appellant's operations represented a net-benefit to the agricultural industry while it was working through the Permit authorization process. The Appellant argued these factors should reduce both the base amount and the upward adjustments made to the administrative penalty.

[63] The Determination addressed the Appellant's submissions holding that they did not constitute a basis to reduce either the base amount or the adjustments made to the administrative penalty.

Appeal of the Determination

[64] On May 10, 2022, TerraWest, on behalf of the Appellant, filed a Notice of Appeal with the Board. The Notice of Appeal asserts that the administrative penalty is excessive. Based on the submission that the nature of the contravention was moderate, rather than major, and that the potential adverse effects were minor, the Appellant seeks a reduction of the base penalty to $10,000 from $20,000. The Appellant submits that the penalty adjustment factors should consider the ongoing improvements of the facility and seeks a total penalty of $12,000 rather than $26,000.

[65] 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 has considered the matter afresh, with both evidence that was considered by the Director and new evidence that was not.

[66] The Appellant, through TerraWest, provided written submissions dated August 23, 2022, attaching documents relating to its Permit and Approval applications. In these submissions the Appellant sought a reduction of the total penalty to $11,000 rather than the $12,000 sought in the Notice of Appeal. These submissions will be summarized later in this decision.

[67] The Director provided written submissions dated October 3, 2022, together with a supporting affidavit and documentary evidence, seeking confirmation of the Determination and dismissal of the appeal. These submissions will also be summarized later in this decision.

[68] The Appellant was offered a chance to submit a reply but declined to do so.

ISSUES

[69] The issue on this appeal is whether I should confirm the administrative penalty imposed in the Determination or vary it, either upward or downward.

DISCUSSION AND ANALYSIS

1. Should I confirm the administrative penalty imposed in the Determination or vary it, either upward or downward?

Summary of the Appellant's Submissions

[70] The Appellant seeks a reduction in the administrative penalty from $26,000 to $11,000 based on its submissions that:

i. The nature of the contravention was "moderate", rather than "major";

ii. The potential for adverse effect was "low" rather than "medium"; and

iii. The Appellant made efforts to exercise due diligence and to correct the contravention.

[71] The Appellant acknowledges that when it began exporting poultry manure from its facility that it was no longer entitled to the exemption from section 6(2) of the *Act* under the *AWCR*, however, it submits that it offers an important service to the broader agricultural community: the redeployment of excess nutrients from the region.

[72] The Appellant acknowledged that it was subject to the requirement for authorization under section 6(2) of the *Act* and began working through the administrative permit process in November 2018. During the contravention period March 16, 2019, through August 22, 2021, in relation to which the $26,000 administrative penalty was assessed, the appellant was engaged in applying for, consulting and eventually obtaining its August 23, 2021 Approval to operate the facility and trial test odour mitigation equipment.

[73] The Appellant references the timeline of its efforts to obtain authorization, starting with its preliminary application for a Permit under section 14 of the *Act* on November 5, 2018 and it eventually receiving an Approval under section 15 of the *Act* on August 23, 2021. The Appellant states that the administrative process took

approximately 9 months to complete and, ultimately, be denied a Permit. The successful Approval process took another 12 months to complete.

[74] The Appellant submits that it is unreasonable to apply such a high financial penalty to an operation that has demonstrated it has made efforts to exercise due diligence and to correct the contravention and seek to obtain a permit — which the Ministry continued to decline.

[75] The Appellant further submits it would be unreasonable for it to cease all operations during this permitting process considering that the same operations were allowable under the *AWCR* with little to no regulatory oversight until the moment the export of poultry waste began, which then required significant technical requirements.

[76] In addressing the nature of the contravention, and in submitting that it should be considered as "moderate" rather than "major" the Appellant first references the categorization of contraventions from a fact sheet prepared by the Ministry to assist regulated parties in understanding administrative penalties under the *Act* (the "Fact Sheet"). The Appellant then acknowledges the requirement for it to obtain authorization and submits that it applied for the required authorization in earnest. The Appellant then completes its submission by stating "and we argue that we have failed to fulfill the administrative and operational criteria; thereby deeming the contravention moderate."

[77] The Appellant submits that the potential for adverse effects from its operations was "low" rather than "medium". With respect to air emissions the improvements at the site, such as installing curtains on the Storage Huts and implementing a biofilter, have reduced and will continue to reduce odours and emissions. With respect to effluent discharge, the facility does not discharge liquids, leachates or effluent and all operations are conducted inside enclosed buildings. There are no surface water sources at or near the site to be impacted by operations.

[78] The Appellant submits that if it were not for its operations, the local farms it supports would most likely move into non-compliance with the *Act* and regulations as a result of their poultry manure, to the detriment of the environment and human health. It was not disrespect for the regulatory requirements of the *Act* that saw the Appellant continue operations after the first penalty was assessed. Rather, it was the recognition of the harm to the environment that would have occurred if it stopped operations. The Appellant submits that the "impact" of its continuing operations of its facility on the environment and/or human health — from a broader perspective — was a net positive.

[79] Under a heading "Penalty Adjustment Factors" the Appellant submits it is entitled to downward adjustments in recognition that it is serving to prevent multiple contraventions by individual farms that are not in a position to quickly reach compliance. The Appellant's facility meets a "well known need" of farmers in the Fraser valley to reduce the quantity of manure nutrients applied to the land.

[80] The Appellant summarizes its proposed penalty as follows:

Base penalty for moderate contravention and low effect $10,000			
i.	10% increase for previous contravention		+ $1,000
ii.	20% for repeated contravention		+ $2,000
iii.	10% for deliberate contravention		+ $1,000
iv.	-10% for exercising due diligence		- ($1,000)
v.	-10% for efforts to correct		- ($1,000)
vi.	-10% for efforts to prevent reoccurrence		- ($1,000)
		Total	$11,000

Summary of the Director's Submissions

[81] The Director submits that the administrative penalty in the Determination appropriately reflects the seriousness of the contravention, the Appellant's history of non-compliance with the *Act*, and the continuous and deliberate nature of the Appellant's conduct in discharging waste without authorization for over two years. The penalty as assessed is necessary to ensure future compliance by the Appellant and to deter other, similar, operators from engaging in similar conduct.

[82] The Director refers to the Board decision in *MTY Tiki Ming Enterprises Inc. v Director, Environmental Management Act* (Decision No. 2019-EMA-120(a), September 1, 2016) ("*MTY*") at para. 92, in support of its submission that, when assessing the appropriate quantum for an administrative penalty, an important consideration is whether the penalty will serve as an effective deterrent and promote future compliance by both the non-compliant person and other permit holders generally. If the quantum is set too low, operators may be more likely to take their chances and only comply after they are caught.

[83] The Director submits that the Handbook is a "reasonable guide" for determining the appropriate quantum and that the use of the Handbook "fosters consistency and predictability in decision-making" relying on the Board decision in *United Concrete & Gravel Ltd. v Director, Environmental Management Act* (Decision No. EAB-EMA-21-A005(a), September 27, 2021) ("*United Concrete*") at para. 72.

Nature of Contravention and Adverse Effects

[84] In support of the characterization of the nature of the contravention as "major", the Director relies on the Board decision in *Pacesetter Mills Ltd, v Director, Environmental Management Act* (Decision No. EAB-EMA-20-A023(a), April 21, 2021) ("*Pacesetter*") at para. 40 for two related propositions. Firstly, the controlling of waste discharge and the mitigation of the potential impacts of waste discharge are purposes of the *Act*; and, secondly, the failure to obtain the requisite authorization under the *Act* poses a threat to the integrity of the legislative scheme and, potentially, the environment. The Appellant's conduct of discharging waste without authorization for over two years significantly interfered with the Ministry's

ability to regulate and to protect the environment from the potential impacts of the Appellant's waste.

[85] The Director submits that the characterization as "major" is consistent with guidance in both the Handbook and Fact Sheet. As set out in the Handbook, "major" contraventions include non-compliance that "undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to protect and conserve the natural environment", for example, by engaging in unauthorized discharge.

[86] In support of the characterization of the potential adverse effects of the contravention as being "medium", the Director relies on guidance in the Handbook wherein it states that potential adverse effects are considered "medium" where the contravention "interferes with the Ministry's capacity to protect the environment or human health, or the potential to do so, but does not result in a significant adverse effect or the potential to do so is moderate. Any effect is localized, short-term and can be mitigated or damage repaired within a reasonable timeframe."

[87] For the potential adverse effects of the contravention to be "low" as submitted by the Appellant, the Handbook states that the adverse effects could be characterized as low only if the contravention "does not result in an adverse effect or interfere with the Ministry's capacity to protect the environment or human health, or the potential to do so is low."

[88] The finding in the Determination that the Appellant's unauthorized discharge resulted in a potential, localized threat to the environment and/or human health was supported by the evidence confirming the impact to human health caused by the contravention ranging from nausea, headaches, watery eyes, and respiratory issues. Likewise, inspection reports also indicated the continued presence of leachate seeping from the Storage Huts at the Appellants facility.

[89] The Director submits that the Appellant has failed to advance any cogent evidence in support of its contention that the potential adverse effects of its contravention were "low" rather than "medium" based on improvements it has made at its facility.

[90] The Director submits that the terms of the Approval issued on August 23, 2021, further demonstrate that there is at least a potential for adverse environmental and human health effects from the Appellant's operations, especially through its air discharges. The Approval imposed requirements on the Appellant to minimize and regulate air discharges, (including ammonia levels and odour management), as well as leachate escape from the Storage Huts at the Appellants facility.

[91] Moreover, the Appellant's discharge of waste without authorization during the contravention period prior to the issuance of the Approval interfered with the Ministry's capacity to protect the environment or human health during that time. Accordingly, there is no basis to conclude that the real or potential adverse effects of the contravention were "low" as submitted by the Appellant.

Previous Contraventions

[92] The June 6, 2019, Determination of Administrative Penalty against the Appellant for its contravention of section 6(2) of the *Act* between August 20, 2018,

to January 15, 2019, in the amount of $9,000, taken together with the Appellant's lengthy history of non-compliance with section 6(2) and subsequent failure to correct its non-compliance made the imposition of the 10% ($2,000) increase to the base penalty for this factor reasonable.

Contravention Repeated or Continuous

[93] The increase of 20% ($4,000) applied in the Determination based on the finding that the contravention was continuous, was appropriate given the lengthy period of continuous non-compliance, as well as given that separate penalties for each day of contravention were not imposed under section 7(2) of the *Penalties Regulation*.

Whether the Contravention was Deliberate

[94] The increase of 10% ($2,000) applied in the Determination based on the finding that the contravention was deliberate, was appropriate given that the Appellant was aware, from at least August 2018 that its operations required authorization under the *Act* and nevertheless continued operating in contravention of section 6(2) until the Approval was issued on August 22, 2021. The fact of the Appellant's non-compliance was repeated by the Ministry in letters to the Appellant in August 2018, January 2019, June 2019 and September 2020. The Appellant was also advised in the January 2019 and September 2020 letters to cease unauthorized waste discharge.

Exercise of Due Diligence to Prevent the Contravention

[95] The Director relies on *United Concrete* (at para. 91) and submits that the Appellant bears the burden of proof of due diligence.

[96] To be duly diligent, the Appellant must demonstrate that it took all reasonable care in trying to prevent the contravention. Despite the Ministry's repeated warnings and directions to cease all discharges until authorized, as well as the imposition of an administrative penalty in June 2019 for the same contravention, the Appellant continued to discharge waste without an authorization until August 22, 2021. The finding in the Determination that the Appellant had not exercised due diligence in the circumstances was reasonable.

[97] The Director submits that the Appellant's argument that it was "unreasonable" to expect it to have ceased its operations during the permitting process, (given that other farms that do not export waste are allowed to operate without authorization under another regulatory framework), was irrelevant to the issues on this appeal, including to whether the Appellant had exercised due diligence.

[98] Likewise, the Director submits that the Appellant has failed to produce any evidence in support of its contention that harm would have been caused to its customers and the environment if it had ceased operation pending authorization. Moreover, the Director submits that this alleged impact on the Appellant's customers was not relevant to the question of whether the Appellant took all reasonable care in trying to prevent the contravention.

[99] The Director submits that by continuing with its operations throughout the contravention period, the Appellant failed to exercise due diligence to prevent the contravention, and, as a result, a decrease in penalty is not appropriate here.

The Person's Efforts to Correct the Contravention and Prevent Recurrence of the Contravention

[100] The 10% ($2,000) reduction in penalty for the Appellant's efforts to prevent recurrence of the contravention by obtaining the Approval was appropriate in this case. However, given the Appellant's repeated failure to provide sufficient information and evidence to the Ministry to support its Permit and Approval applications it would not be appropriate to make any further reductions in penalty based on the shortcomings in the Appellants efforts in this regard.

Any Other Factors that, in the Opinion of the Director, are Relevant

[101] The Appellant's argument that the penalty should be reduced because "there is a well-known need in the Fraser Valley" for its services or that it is "one of a very limited number of options available to BC farmers" is unsupported by any evidence and is irrelevant to the amount of administrative penalty in any event. Even if the Appellant had provided such evidence, the comparative value of a business should not be a relevant factor when assessing the appropriate quantum for an administrative penalty. Such a reduction would significantly undermine the authorization process under the *Act*.

[102] The Legislature has established the authorization process under the *Act* that seeks to balance the inherent tension between protecting the environment and authorizing the discharge of waste into the environment. The authorization process is designed to be completed *prior* to the person discharging waste. Reducing a penalty simply because a business provides a valuable service to the community would undermine this careful balancing by encouraging the Appellant and other similar operators to discharge waste without authorization. As held in *MTY,* (at para. 92), to be a true deterrent, a penalty must go beyond simply restoring compliance. If the penalty were to be reduced based on the comparative value of a business, operators may be more likely to take their chances and only obtain an authorization after they are caught.

[103] The Appellant's alleged belief in the importance of continuing to operate without authorization does not exempt it from the requirements of section 6(2) of the *Act*, nor is it relevant to determining the appropriate administrative penalty. No reductions are warranted for this factor.

<u>The Panel's Findings</u>

[104] The parties' submissions and evidence presented on this appeal have been considered in context of the maximum administrative penalty for contravening section 6(2) of the *Act* being $75,000, as well as the relevant factors in section 7 of the *Penalties Regulation*.

[105] An important objective of assessing the amount of penalty is to promote deterrence and future compliance by both the Appellant specifically and other persons subject to the *Act* generally. The Panel agrees with the statement in *MTY*

(at para.92) and in the Handbook (at p.69), that to be a true deterrent, the administrative penalty must go beyond simply restoring compliance or companies may be more likely to take their chances on getting caught and only comply when they are caught.

[106] The Director took the Handbook into account when assessing penalty in the Determination. Having reviewed the Handbook, I find it to be of assistance to decision-makers exercising their discretion when determining the appropriate quantum of penalty under section 7 of the *Penalties Regulation*. Accordingly, and as the application of the Handbook fosters predictability and consistency in making administrative penalty decisions, (as was held in *United Concrete* at para.72), I have been guided by it in my analysis on this appeal.

[107] I agree with the proposition set out in the Handbook that an important principle of administrative fairness is that administrative penalties should be assessed on a consistent and transparent basis. This is important not only to the person against whom the penalty is being assessed, but also to the general public and particularly to those who are subject to the regulatory framework in question under the *Act*.

[108] While the background facts relating to the Appellant's history of non-compliance with the *Act* are relevant to the determination of penalty under section 7 of the *Penalties Regulation*, my assessment of the appropriate penalty on this appeal relates to the Appellant's contravention between May 16, 2019 to August 22, 2021 covered by the Determination, and not to the Appellant's prior contravention.

The Base Penalty

[109] My analysis begins with a consideration of the appropriate base penalty for the Appellant's contravention. The Appellant submits the base amount should be reduced from $20,000 to $10,000.

Factor a) Nature of the Contravention

[110] The Director submits that the contravention here was major as found in the Determination, while the Appellant submits it was moderate.

[111] The Handbook advises that where non-compliance undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to protect and conserve the natural environment, it can be considered a major contravention. Examples given include unauthorized discharges.

[112] The Handbook advises that a moderate contravention refers to failure to perform required tasks or actions, including minor to moderate exceedance of a discharge limit with no sustained impact to the environment or human health.

[113] I will initially address the regulatory importance of compliance by the Appellant with section 6(2) of the *Act.*

[114] The Appellant's operations were prohibited by section 6(2) from discharging waste into the environment without prior authorization under the *Act.* The requisite Permit under section 14 or Approval under section 15 of the *Act* authorize the director to regulate the amount and type of waste that the holder may discharge

and may include requirements for monitoring and reporting waste discharges as conditions of any authorization — all with the objective of protection of the environment. I find that the controlling of waste discharge and the mitigation of the potential impacts of waste discharge on the environment are purposes of the *Act*, and in particular, section 6(2).

[115] As was held in *Pacesetter,* (at para. 40,) I also find that the failure to obtain the authorization required by section 6(2) of the *Act* significantly interferes with the Ministry's capacity to protect and conserve the natural environment and poses a threat to the integrity of the legislative scheme of the *Act.* This finding supports the characterization of the Appellant's contravention as major as suggested in the Handbook.

[116] However, the particular circumstances of each case must be considered to determine whether actions taken by the contravening party might result in the contravention nevertheless being characterized as moderate rather than major when assessing the administrative penalty. Some examples of these actions may include diligently seeking authorization or otherwise minimizing the impact of the contravention.

Do the Actions of the Appellant Justify a Characterization of the Contravention as Moderate rather than Major?

[117] The Appellant submits that throughout the contravention period it was engaged in applying for, consulting on and, eventually, obtaining its Approval to operate the facility. The Appellant states that the administrative process took approximately 9 months after its initial application in November 2018 to complete and ultimately be declined a Permit, and another 12 months to complete and obtain its Approval. The Appellant asserts that it applied for authorization in earnest and submits it would be unreasonable for it to cease all operations during this permitting process considering that the same operations were allowable under the *AWCR* with little to no regulatory oversight until the moment the export of poultry waste began, which then required significant technical requirements.

[118] In finding that the contravention was major as undermining the overarching regulatory regime and significantly interfering with the Ministry's capacity to regulate, the Determination observed that the Appellant's operation of its facility without authorization continued after the Appellant was made aware of it and a warning and a prior administrative penalty had issued.

[119] When the Appellant started its Permit application process in November 2018 it had already been advised by the Ministry in writing that it was operating in contravention of section 6(2) of the *Act* and had been directed to get into compliance. The initiation of the application process did not get the Appellant's facility into compliance, nor did it authorize its continued discharge of waste into the environment in contravention of section 6(2).

[120] In the documentation produced by the Appellant concerning its authorization application, there is nothing to suggest that the Ministry was responsible for any unreasonable delay in responding to the Appellant's submissions. The correspondence from the Ministry makes clear that the information related to waste treatment and discharges (air emissions and odour control) put forward by the

Appellant was insufficient to assess the potential impacts of emissions from the facility on local air quality and to determine discharge standards for the facility.

[121] Even if the facts established there was an extended delay in the assessment of a Permit application, the act of submitting an application for a Permit or Approval does not authorize a person to discharge waste into the environment. Only a validly issued Permit or Approval, with any attendant terms and conditions, may do that.

[122] In January 2019 the Appellant was directed by the Ministry in writing to cease all waste discharges until authorized in order to comply with the *Act*.

[123] The contravention addressed in the Determination covered a period of approximately two years and five months, spanning from March 16, 2019, through August 22, 2021, during which period the Appellant continued to operate without authorization.

[124] I find the Appellant's submissions and documents provided on this appeal do not convince me that its persistent non-compliance should be considered as anything other than a major contravention. The Appellant continued to discharge waste without lawful authorization for well over two years despite the clear directions from the Ministry to stop. This, along with a prior determination of contravention of section 6(2), taken together with continuing potential harm to the public being caused by the contravention, posed a threat to the integrity of the legislative scheme of the *Act* and, potentially, the environment. In result, I agree with the finding in the Determination that the contravention was major.

Factor b) Real or Potential Adverse Effect of the Contravention

[125] The focus of this analysis is the seriousness of the actual or potential harm the contravention has on the environment or human health.

[126] The Director submits that the real or potential adverse effects of the contravention here were medium as found in the Determination, while the Appellant submits that they were low.

[127] The Handbook states that potential adverse effects are considered medium where the contravention interferes with the Ministry's capacity to protect the environment or human health, or the potential to do so, but does not result in an adverse effect or the potential to do so is moderate. A medium effect is localized, short-term and can be mitigated or damage repaired within a reasonable timeframe. For it to be considered as low, the contravention either does not result in any such harm, or the potential to do so is low.

[128] I agree with the finding in the Determination that the Appellant's unauthorized discharge resulted in a potential, localized threat to the environment and/or human health. During the contravention period, further complaints from the public of noxious odours and air emissions were made in relation to the Appellant's unauthorized waste discharges. Complainants have said that discharges from the facility have caused nausea, headaches, watery eyes, and respiratory issues. This evidence from the public confirmed the impact to human health caused by the contravention as ranging from nausea, headaches, watery eyes, and respiratory issues.

[129] The Appellant's submission that improvements at the site such as installing curtains on the Storage Huts and implementing a biofilter have and will continue to reduce odours and emissions does not undermine the finding of potential harm to public health based on the evidence from complainants. Even if it can be accepted that such steps taken by the Appellant may have reduced the frequency or intensity of such harm, I do not accept it as establishing that no harm was caused or that the harm caused should otherwise be considered low, rather than medium.

[130] I find there to be insufficient cogent evidence from the Appellant to support its submission to the effect that if it wasn't for its operations, the local farms it services would most likely move into non-compliance with the *AWCR*, to the detriment of the environment and human health. I also find that there is insufficient evidence to support that the Appellant's submission that the "impact" of its continuing operations of its facility on the environment and/or human health, from a broader perspective, was a net positive. In any event, I find this argument not to be persuasive.

[131] I have also already held above that the Appellant's discharge of waste without authorization during the contravention period interfered with the Ministry's capacity to protect the environment or human health during that time.

[132] In result, I agree with the finding in the Determination that the real or potential adverse effects of the contravention here were medium.

Base Penalty Amount

[133] The base penalty table in the Handbook applicable to contraventions subject to $75,000 maximum penalty for major contraventions with medium adverse effects suggests, but does not dictate, a base penalty of $20,000.

[134] Having concluded that the nature of the Appellant's contravention was major, and its real or potential effects were medium, I conclude, for all the above reasons, that $20,000 is a suitable base penalty in the circumstances.

Penalty Adjustment Factors

[135] The remaining factors in section 7 of the *Penalties Regulation* refer to mitigating or aggravating considerations that may increase or decrease the amount of the penalty from the base amount.

Factor c) Any Previous Contraventions

[136] I agree with the Director that the 10% ($2,000) increase to the base penalty imposed in the Determination for this factor is appropriate.

[137] I note that The Appellant also submits that a 10% increase under this factor would be appropriate, but upon a lower suggested base penalty.

[138] The prior contravention was of section 6(2) of the *Act* related to the same operations over the period between August 20, 2018, to January 15, 2019. The prior contravention was accordingly both directly relevant and close in time to the contravention here. The prior finding of contravention should have deterred the Appellant from doing the same type of thing again, but it did not. Accordingly, I confirm the addition of $2,000 to the base penalty in applying this factor.

Factor d) Whether the Contravention was Repeated or Continuous

[139] The Handbook states that a contravention may be considered continuous from the day the non-compliance is confirmed until the day the person demonstrates compliance. It states a contravention could be considered repeated if the same incident or behavior occurs at two or more separate times. The Handbook also states, if the facts indicate the repeated or continuing nature of the contravention should have alerted the person to the contravention and the need to stop, but the person continued nevertheless, that this would justify a higher penalty.

[140] While the Appellant submits it made efforts to correct the contravention during the contravention period, it has not presented evidence to demonstrate compliance until the Approval was issued. The Appellant having taken some corrective steps does not support its submission that its contravention was repeated, rather than continuous or that a lower upward adjustment is justified. The contravention was for operating without authorization, not the impact on the Appellant's neighborhood. It is also clear from the evidence that the Appellant was aware of its ongoing contravention and was directed to stop by the Ministry, but nevertheless continued operating in contravention of the *Act*.

[141] I agree with the finding in the Determination that the contravention was continuous during the contravention period. Given the lengthy period of the contravention and the Appellant's knowledge of its ongoing contravention and failure to stop nevertheless, the 20% ($4,000) increase to the base penalty imposed in the Determination for this factor is appropriate. I find this to be the case whether it is characterized as repeated or continuous.

[142] I note that the Appellant also submits a 20% increase under this factor would be appropriate, but upon a lower suggested base penalty.

Factor e) Whether the Contravention was Deliberate

[143] The word "deliberate" as used in this factor requires a consideration of whether the person was intentionally in contravention, or at least willfully blind as to whether they were in contravention of the Act.

[144] The evidence is clear that the Appellant was made aware that it was operating out of compliance. The fact of the Appellant's non-compliance was repeated by the Ministry in letters to the Appellant in August 2018, January 2019, June 2019, and September 2020. The Appellant was also advised in the January 2019 and September 2020 letters to cease unauthorized waste discharge.

[145] I agree with the finding in the Determination that the contravention was deliberate given that the facility continued to operate without authorization in contravention of the *Act* after the Appellant had been warned not to do so and after being penalized for contravention of section 6(2) of the *Act* in June 2019.

[146] I find that the 10% ($2,000) increase to the base penalty imposed in the Determination for this factor is appropriate.

[147] The Appellant also submits that a 10% increase under this factor would be appropriate, but upon a lower suggested base penalty.

Factor g) Exercise of Due Diligence to Prevent the Contravention

[148] The Determination did not adjust the penalty under this factor as "there was no indication that the Appellant had exercised due diligence".

[149] On appeal, the Appellant submits that it made efforts to exercise due diligence and that a 10% reduction from the base penalty would be appropriate given its alleged due diligence.

[150] As stated in the Handbook, due diligence has been defined in *Black's Law Dictionary*, 10th ed., as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."

[151] Under this adjustment factor, the objective of the due diligence is expressly described as being to "prevent" the contravention. The Appellant must establish that it took all reasonable steps to prevent the contravention, based on what a prudent person would have known or done.

[152] The burden of proof of due diligence is on the Appellant as the party asserting it. In this regard, I take it that the Appellant intends its submissions to the effect that it was making good faith efforts to obtain authorization and that it had made improvements at the site such as installing curtains on the Storage Huts and implementing a biofilter to reduce odours and emissions, to constitute evidence of due diligence.

[153] I do not consider either the application for authorization or the taking of steps to reduce the impact of the contravention to amount to evidence of diligent steps taken to "prevent" the ongoing contravention during the contravention period. Despite the Ministry's repeated warnings and directions to cease all discharges until authorized, as well as the imposition of an administrative penalty in June 2019 for the same contravention, the Appellant continued to discharge waste without an authorization until August 22, 2021.

[154] The Appellant submits that it was "unreasonable" to expect it to have ceased its operations during the permitting process. The Appellant asserts this is so given that other farms that do not export waste are allowed to operate without authorization under another regulatory framework.

[155] The Director submits this assertion is both unsupported by cogent evidence and irrelevant to this appeal, including whether the Appellant had exercised due diligence.

[156] Whether other farms that qualify for the exemption from section 6(2) of the *Act* under the *AWCR* or otherwise are allowed to discharge waste without authorization under the *Act* is not relevant to whether the Appellant exercised the requisite due diligence.

[157] I also find the Appellant's submission to the effect that its continuing to operate out of compliance was "reasonable" given the alleged "net-benefit" to the local farming community and the environment, to lack a proper evidentiary foundation. Even if such evidence had been forthcoming, I would find it to be irrelevant to the question as to whether the Appellant demonstrated the diligence of a prudent person to prevent the contravention. Contrary to the Appellant's submission, it was not "unreasonable" to expect the Appellant to cease its

operations during the permitting process in order to prevent the continuing contravention.

[158] I find that there is insufficient evidence that the Appellant was duly diligent in preventing the contravention.

[159] For the foregoing reasons, I do not decrease the administrative penalty under this factor.

Factor h) Efforts to Correct the Contravention

[160] The Appellant seeks a 10% reduction of the base penalty under this factor.

[161] The Handbook states that this factor considers what the person did *after* the contravention to mitigate the impacts of the contravention.

[162] The information and submissions advanced by the Appellant address its actions *before* and *during* the contravention period, not *after.*

[163] In any event, the Appellant's initiation of the application process for authorization in November 2018, while it continued to operate without authorization, did not mitigate the impacts of the contravention, at least until the Approval was issued.

[164] I also agree with the finding in the Determination that the installation of new works at the facility by the Appellant during the contravention period were either requirements of the Approval ultimately obtained or done in support of the ongoing Permit application process. As such, I agree with the related finding in the Determination that no additional reduction to that granted under *Factor i*, (see below), was warranted for these requirements of the granting of the Approval being met.

[165] For the foregoing reasons I do not decrease the administrative penalty under this factor.

Factor i) Efforts to Prevent Reoccurrence of the Contravention

[166] The Handbook states that this factor considers whether the person has taken any action to avoid a repeat of the contravention in the future.

[167] Obtaining the Approval was an action taken by the Appellant that would avoid a repeat of the contravention of section 6(2) of the *Act* during the term of the Approval.

[168] The Determination held that the only downward adjustment to the base penalty justified in the circumstances was a 10% reduction under this factor for applying for and obtaining the Approval. I agree with that finding. I also agree that the 10% ($2,000) reduction to the base penalty imposed in the Determination for this factor is appropriate.

[169] The Appellant also submits that a 10% decrease under this factor would be appropriate, but upon a lower suggested base penalty.

Factor j) Any Additional Factors that are Relevant

[170] This factor was described as "not applicable" in the Determination.

[171] On this appeal the Appellant has not expressly submitted that it is seeking a decrease in penalty under this factor. However, in its submissions, the Appellant asserts that its continuing to operate served to prevent multiple contraventions by individual farms that are not in a position to quickly reach compliance, claiming that its facility meets a "well known need" of farmers in the Fraser valley to reduce the quantity of manure nutrients applied to the land.

[172] The Director submits this assertion is both unsupported by cogent evidence and irrelevant to this appeal generally or to this factor in particular.

[173] I agree with the Director's submission that the comparative value of a business should not be a relevant factor when assessing the appropriate quantum for an administrative penalty. Such a reduction would significantly undermine the authorization process under the *Act* that is designed to be completed *prior* to the person discharging waste. Reducing a penalty simply because a business provides a valuable service to the community would undermine the balancing under the *Act* between protecting the environment and authorizing the discharge of waste into the environment by encouraging the Appellant and other similar operators to discharge waste without authorization.

[174] Accordingly, I find that the Appellant has not established that it is entitled to any downward adjustment under this factor based on any of the submissions it has advanced in this appeal.

DECISION

[175] 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.

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

"Mike Tourigny"

Michael Tourigny, Panel Chair
Environmental Appeal Board

December 23, 2022