



Environmental Appeal Board

Citation: *Columere Park Developments Ltd., 2024 BCEAB 32*

Decision No.: EAB-EMA-23-A010(a)

Decision Date: 2024-10-18

Method of Hearing: Conducted by way of written submissions concluding on May 17, 2024

Decision Type: Final Decision

Panel: Norman Tarnow, Panel Chair

Appealed Under:

Between:

Columere Park Developments Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Dave Rae

For the Respondent: Brian Blunt

FINAL DECISION

INTRODUCTION

[1] This decision concerns an appeal by Columere Park Developments Ltd. of an April 12, 2023, decision (“the Decision”) of the Director, *Environmental Management Act*, S.B.C. 2003, c.53 (the “Act” or “EMA”) of an administrative penalty in the amount of \$8,000 (“the Penalty”) imposed under the *Administrative Penalties Regulation*, B.C. Reg. 133/2014 (the “Regulation”) for the Appellant’s contravention of Section 75(1) of the *Municipal Wastewater Regulation*, B.C. Reg. 87/2012 (the “MWR”). The Appellant seeks a substantial reduction or complete elimination of the Penalty.

[2] Section 75(1) of the *MWR* requires dischargers of municipal effluent to meet the applicable municipal effluent quality requirements set out under Table 3 of Section 75(1). The Appellant was issued the Penalty as a result of five contraventions of Section 75 which included four exceedances of the fecal coliform requirements, and one exceedance of the total suspended solids (TSS) requirements set out in Section 75 of the *MWR*.

[3] The Appellant does not deny contravening Section 75(1) of the *MWR*; however, it seeks the substantial reduction or complete elimination of the Penalty.

[4] The Respondent agreed that the Penalty should be reduced to \$7,000 in order to correct an arithmetic error; however, it has not agreed that a reduction of the amount of the Penalty is warranted on the facts and evidence submitted by the Appellant and that would defeat the purpose of the administrative penalty regime in achieving deterrence of contraventions by those it regulates.

[5] The Respondent submitted that the Appellant has failed to discharge the burden of proof required to prove its case, and therefore the appeal should be dismissed pursuant to Section 18 of the *Administrative Tribunals Act*, S.B.C 2004. C. 45 (the “ATA”).

[6] Should the Board not dismiss the appeal under Section 18 of the ATA, the Respondent submits that the evidence supports a finding of a contravention of the *MWR* and the imposition of an administrative penalty pursuant to Section 115 of the Act of at least \$7,000.

BACKGROUND

[7] The Appellant operates a sewage treatment facility at 94606 Columbia View Road, Fairmont Hot Springs, British Columbia (the “Facility”).

[8] The Facility is registered under the *MWR* as Registration 18215 (the “Registration”). This Registration authorizes the discharge of 54 m³/ day of Class B treated effluent to the ground in accordance with the *MWR*.

[9] Part 5 of the *MWR* sets out the requirements for discharge to ground. Section 69(b) of the *MWR* sets out that Class B effluent is high quality municipal effluent resulting from advanced treatment.

[10] Section 75 (1) of the *MWR* provides that:

“75(1)A discharger of class A, B or C municipal effluent must meet the applicable municipal effluent quality requirements set out in this section and listed in Table 3.

Table 3 — Municipal Effluent Quality Requirements

Requirement	Class A	Class B	Class C
BOD ₅ (mg/L)	10	10	45
TSS (mg/L)	10	10	45
fecal coliform (MPN / 100 mL)	median: 2.2 any sample: 14	400, if maximum daily flow is $\geq 37 \text{ m}^3/\text{d}$	n/a
turbidity (NTU)	average: 2 any sample: 5	n/a	n/a
nitrogen (mg/L)	Nitrate-N: 10 total N: 20	n/a	n/a

[11] On March 6, 2019, Ministry of Environment and Climate Change Strategy (the “Ministry”) staff conducted an on-site inspection of the Facility to assess the Appellant’s compliance with the *MWR*. The Ministry determined that the Appellant was out of compliance with the *MWR* requirements, including 8 exceedances of the municipal effluent quality requirements under Section 75(1). As a result of the inspection, the Ministry issued inspection report 119060 (“IR119060”) with a compliance outcome of a warning.

[12] On September 18, 2019, Andrew Cradduck of Corix Utilities Inc. (“Corix”) responded to IR 119060 on behalf of the Appellant. Corix is a company that the Appellant contracted with in 2019 to complete monitoring, carry out reporting, and provide assistance with ongoing problems for the Facility. Mr. Cradduck is the Area Manager for Corix Utilities Inc. (the wastewater system manufacturer) that oversees the operation of the Wastewater Treatment Plant formerly owned by Columere Park Developments.

[13] In his response, Mr. Cradduck stated:

“Columere Park Developments Ltd will contract with Corix Utilities Inc. to provide facility monitoring and operator oversight to ensure the operation adheres to EMA regulations. This will include data collection and retention, and the production and submission of quarterly and annual reports to satisfy the EMA permit requirements,”

[14] On March 15, 2021, the Ministry conducted an office inspection of the Facility to assess the Appellant’s compliance with the *MWR*. It determined that the Appellant was out of compliance with the *MWR* requirements, including 11 exceedances under Section 75(1). The Ministry issued IR 164310 as a result of the inspection, with a compliance outcome of a warning.

[15] On April 1, 2021, the Appellant and members of Corix including Mr. Cradduck met with the Ministry to discuss IR 164310. As a result of these discussions, the Ministry reissued IR 164310 on April 7, 2021 (“Re-issued IR 164310”). In Re-issued IR 164310, the Ministry determined that the Appellant was out of compliance with Section 75(1) of the *MWR*, including 11 exceedances under Section 75(1). The compliance outcome for Re-issued IR 164310 was a warning.

[16] On May 18, 2022, the Ministry conducted an inspection of the Facility to assess the Appellant’s compliance with the *Regulation*. The Ministry determined that the Appellant remained out of compliance with the *MWR*, including 8 exceedances under Section 75(1). As a result of the inspection, the Ministry issued inspection report 187129 (“IR 187129”). The compliance outcome for IR 187129 was determined to be a referral for administrative penalty.

[17] On December 12, 2022, the Respondent issued a Notice Prior to Determination of Administrative Penalty in which it provided a Preliminary Penalty Assessment of \$22,000 and provided the Appellant with an opportunity to be heard (“OTBH”).

[18] According to the OTBH:

- In 2020 Corix and the Appellant entered into negotiations for Corix to take over the system, and on October 1, 2022, Columere Park finalized the sale of the system for \$1.00 to Corix.
- Columere Park did not operate the system as a profit-making business but provided it as a service to 34 homeowners. By relinquishing control of the wastewater system to the manufacturer (Corix), Columere Park has given the system to someone better positioned to operate and maintain the system more effectively.

[19] It was noted that there must be a name change Amendment to transfer *MWR* Registration #18215 to Corix. Until that time, all liability rests with Columere Park Developments Ltd. until a transfer is completed.

[20] Following receipt of the Appellant's OTBH submissions on February 16, 2023, the Respondent issued the following Decision under Section 75 of the *MWR* in relation to five exceedances under Section 75 of the *MWR* as follows:

April 21, 2021:	Fecal Coliform Exceedance
September 15, 2021:	Fecal Coliform Exceedance
November 17, 2021:	Fecal Coliform Exceedance
January 5, 2022:	TSS (Total Suspended Solids) and Fecal Coliform Exceedance

[21] The Respondent considered the Appellant's OTBH submissions and reduced the penalty from \$22,000 to \$8,000 in consideration of the matters that a director must consider, if applicable, set out in Section 7(1) of the *Regulation* as follows:

Factors to be considered in penalty calculation	Notice	Final Determination
a) Nature of contravention of failure	major	major
b) Actual or potential adverse effect	medium	medium
Base Penalty:	\$20,000	\$20,000
c) Previous contraventions, penalties imposed, or orders issued	\$0	\$0
d) Whether contravention or failure was repeated or continuous	+ \$2,000	+ \$2,000
e) Whether contravention or failure was deliberate	\$0	\$0
f) Economic benefit derived by the party from the contravention or failure	\$0	\$0
g) Exercise of due diligence to prevent the contravention or failure	\$0	\$0
h) Efforts to correct the contravention or failure	\$0	\$0
i) Efforts to prevent reoccurrence of the contravention or failure	\$0	- \$4,000
j) Additional relevant factors	\$0	- \$10,000
(add factors (c) to (j)) Total Penalty Adjustments:	+ \$2,000	- \$12,000

Penalty after considering all factors: <i>(base penalty plus penalty adjustments)</i>	\$22,000	\$8,000
Application of daily multiplier: Choose	N/A	N/A
Final Penalty:	\$22,000	\$8,000

SUBMISSIONS

The Appellant

[22] In its April 12, 2023, Notice of Appeal, repeated in its written submissions, the Appellant submitted that the decision should be changed because:

“The following was outlined in the OTBH. We still believe these factors are relevant.

1. The decision said we were not proactive. We believe we were very vigilant when issues did arise. We brought in the manufacturer to review our operations as well as hired a third party (Corix) to provide monitoring and reporting.
2. Every time there was an issue we addressed it to the best of our ability. We carried out what we thought was due diligence.
3. Even though we may have exceeded our sampling parameters, the sample well tests showed that there was no adverse effect on the water table and in effect, no adverse impact on the environment.
4. The company we turned over the system to (Corix) which has much more experience and resources than us has still not been able to bring the system fully into compliance.
5. The fine is excessive considering the size of the system and the number of users on it. It is the equivalent of almost 30% of the annual income. As we have done everything in our power to correct the situation, including the sale of the system (before this fine was issued), the fine seems entirely punitive.”

[23] In response to the Administrative Penalty Determination for Columere Park Developments, the Appellant submitted its expert witness letter as an “Expert Report” dated November 10, 2023, prepared by Andrew Cradduck, B.E.Sc., MBA of Corix Utilities Inc. plus Mr. Cradduck’s resume (received on November 20, 2023) in accordance with Board Rule 25.

[24] The Appellant sold the Facility to Corix on October 1, 2022. As of the date of the Respondent's Decision, the Appellant had not transferred title to the Facility, therefore, liability remained with the Appellant, Columere Park Developments Ltd.

[25] The response to the Administrative Penalty Determination submitted by the Appellant in its expert witness letter, that was submitted as an Expert Report, was as follows:

"CORIX Utilities

November 10th, 2023

Subject: Columere Park Developments – Spirits Reach Wastewater Treatment Plant

To Whom it May Concern

As the Area Manager for Corix Utilities Inc, I oversee the operation of the Spirits Reach Wastewater Treatment plant (WWTP) that was formerly owned and operated by Columere Park Developments. Since starting with Corix in 2018, I have had supervisory involvement in the operation of the Spirits Reach WWTP. Specifically, Corix personnel coordinated, monitored and reported on, the wastewater effluent sampling from Spirits Reach WWTP.

Prior to Corix assuming ownership of this system in Oct. 2022, Corix certified Operators and myself were consulted by Columere Park Developments when effluent quality was non-compliant with the permitted thresholds.

Corix personnel participated in an inspection in May 2022 when Ministry of Environment inspectors brought to our attention the requirement to adhere to the Municipal Wastewater Regulation (MWR) thresholds. Specifically, fecal coliform counts must be less than 400 MPL for a Class B effluent. Up until that time, the plant successfully complied with the Operating Permit thresholds.

Since taking ownership of the Spirits Reach WWTP, Corix have made numerous attempts to resolve the exceedances on fecal coliforms. We carried out many of the same actions as the previous owners including;

- Excess sludge removal from the Rotating Biological Contactor main and clarifier chambers
- Cleaning of the sampling effluent chamber
- Cleaning and eventual replacement of the UV bulbs and sleeves
- Replacement of the sand filter medium

- Analyzing fecal coliform counts pre-UV, post UV and in the effluent chamber, where effluent samples are to be collected.

There is no apparent correlation between the maintenance activities, and effluent quality results that we have detected. At this point, Corix intends to downgrade the plant capacity to be exempt from the MWR, as the historical flows do not warrant a permitted capacity of 54 m³/day. It is worth noting that the monitoring wells have shown zero to negligible fecal coliform counts in the groundwater.

In conclusion, what Mr. Rae did to try and bring his system into compliance is what Corix would have done.

Regards

Andrew Cradduck, B.E.Sc., MBA
Corix Utilities Inc.
Kootenay Region Area Manager”.

[26] On April 22, 2024, the Appellant requested to have an oral hearing component of its appeal. On May 3, 2024, the Appellant withdrew its application for an oral hearing component.

The Respondent

[27] In response to the Appellant’s Expert Report submission, the Respondent made submissions on the following issues that it submitted should be decided in the appeal:

1. Whether the Appellant discharged the burden of proof to prove its case.
2. Whether the administrative penalty should be reduced.
3. What weight, if any, should be given to the Expert Report.

[28] Rule 20 Section 2 of the Environmental Appeal Board’s Rules provides that:

2. All evidence (including affidavits and documents) and legal authorities must be included with the written submission.¹

[29] The Board’s Practice and Procedure Manual instructs parties as follows:

“If an appeal is conducted by written submissions, the parties are required to present their entire cases in writing (Rule 20). This means that all evidence (which includes all means of proof including correspondence, maps, charts, graphs, affidavits, studies, reports, etc.), legal authorities,

¹ *Environmental Appeal Board Rules*, July 1, 2016 (the “Rules”)

and argument that the party wants the Board to consider must be included in the submissions....

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a “balance of probabilities”.”²

[30] Section 18 of the *ATA* sets out the following with respect to a party’s failure to comply with tribunal orders and rules:

18 If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:

- (a) schedule a written, electronic or oral hearing;
- (b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;
- (c) dismiss the application.³

[31] The Board has held that the appellant bears the burden of proving its case and that it is not enough for the appellant to simply file notices of appeal against decisions it does not like. The appellant must provide some evidence to support its claims.

[32] The Board has held that an appellant, in filing an appeal, is responsible for being aware of the obligation to prove its case.

[33] The Respondent argues that the Appellant’s submission restates the grounds of appeal outlined in its original notice of appeal and no argument is introduced that properly supports the grounds of appeal.

[34] The Respondent says that the Appellant’s submissions only contain evidence introduced via the Expert Report; however, the Appellant has made no attempt to relate the contents of the Expert Report to its grounds of appeal, and leaves it to the Board to determine how, if at all, the Expert Report is relevant or necessary to their appeal.

[35] The Respondent submitted that Board Rule 20 requires all evidence must be included with written submissions, that the Board’s Practice and Procedure Manual requires that “an appellant’s written submission should contain all evidence and argument in support of the grounds for appeal. It should also explain why the decision that has been appealed should be different, and how it should be changed... The general rule is that the

² *Environmental Appeal Board Practice and Procedure Manual*, July 1, 2016

³ *The Administrative Tribunals Act*, S.B.C. 2004, c.45

burden or responsibility for proving a fact is on the person who asserts it.” The Respondent submitted that the Appellant failed to discharge its burden of proof, and the appeal should be dismissed pursuant to Section 18 of the ATA without further consideration of remaining issues.

[36] The Respondent submitted that if the Board disagreed with the Respondent’s submission that the Appellant failed to discharge its burden of proof to prove its case, that the appeal should be dismissed on the ground, that the Board should consider that:

- The Administrative Penalty is appropriate in the circumstances, as the nature of the contravention in this case was “major” in four exceedances of the municipal effluent quality requirements for fecal coliform and one exceedance of the municipal effluent quality requirements for TSS in Section 75 of the MWR by 70% to 3,450%.
- The Appellant admits that for a class B system, the nature of the contravention is major which is appropriate.
- The Respondent determined that the real and potential adverse effects of the contravention in this case was medium.
- The Respondent determined that the exceedance of the discharge limit was repeated on four occasions. The Respondent applied a 10% increase to the base penalty for this factor.
- The Appellant did not provide evidence that it took all reasonable care to avoid the contraventions. The Appellant submitted that it was “duly diligent”; however, it did not detail what it did to prevent the contravention. The Appellant’s Expert Report states “what Mr. Rae did to try and bring his system into compliance is what Corix would have done”. Mr. Craddock also outlines in the Expert Report, a series of actions performed by Corix that were done as attempts to resolve the fecal coliform exceedances. However, the Appellant provides no evidence as to what was done to prevent the contraventions.
- The Respondent submitted that, in applying the 25% reduction to the base penalty, an arithmetic error was introduced under this factor. The Respondent only reduced the penalty by \$4,000, when the reduction of the base penalty should have been by \$5,000.
- The Respondent considered the Appellant’s submission at the OTBH with respect to “(j) *Additional relevant factors*”, including that the Appellant hired Corix to complete monitoring, carry out the reporting and provide assistance with ongoing problems on an as needed basis; the Appellant did not operate the Facility as a profit-making business; and the Appellant relinquished control of the Facility to someone that appeared better positioned to operate and maintain the Facility more effectively. The Respondent applied a 50% reduction to the base penalty as a result of this factor.

- The Respondent submitted that the Expert Report should be given no weight in deciding the appeal.
- The Appellant only restated the grounds of appeal as set out in its Notice of Appeal and did not provide further argument or relate its evidence to these points.
- Given the applicable factors under Section 7(1) of the *Regulation*, an administrative penalty of \$7,000 is appropriate in the circumstances. The Respondent submitted that the Penalty only be adjusted to reflect the correction of the arithmetic error.

DISCUSSION AND ANALYSIS

[37] The Appellant failed to discharge its burden of proof to prove its case and the appeal should be dismissed on that ground.

[38] The Appellant failed to provide persuasive evidence that it took all reasonable care to avoid the contraventions. It did not detail what was done to prevent the contraventions.

[39] The Appellant only restated the grounds of appeal as set out in its Notice of Appeal and did not provide further argument or relate its evidence to these points.

[40] I agree that the Expert Report should be given no weight. Mr. Cradduck is not an independent expert; he has been directly involved in the operation of the system in question throughout. He fails to provide support or explanation for the opinion provided, and the Report contains factual inaccuracies. There is nothing in the Expert Report that addresses the appropriateness of the administrative penalty.

[41] Board Rule 20 requires that all evidence must be included with written submissions and the Board's Practice and Procedure Manual requires that "an appellant's written submission should contain all evidence and argument in support of the grounds for appeal. It should also explain why the decision that has been appealed should be different, and how it should be changed... The general rule is that the burden or responsibility for proving a fact is on the person who asserts it." The Appellant failed to discharge its burden of proof that the penalty was excessive, and the appeal should be dismissed on that basis pursuant to Section 18 of the *ATA*.

DECISION

[42] In reaching this decision, I have carefully considered all the arguments, relevant documents, evidence, and submissions before me, whether or not they are specifically referred to.

[43] For the reasons stated above, the appeal is dismissed. As the Respondent has agreed that the Penalty should be reduced to \$7,000 to correct an arithmetic error I so order.

"Norman Tarnow"

Norman Tarnow, Panel Chair
Environmental Appeal Board