Environmental Appeal Board

Citation: *G.T. Farms Ltd v Director, Environmental Management Act*, 2024 BCEAB 43

Decision No.: EAB-EMA-22-A020(b) and EAB-EMA-22-A021(b)

Decision Date: 2024-12-19

Method of Hearing: Conducted by way of written submissions concluding on March 25, 2024

Decision Type: Final Decision

Panel: James Carwana, Panel Chair

Appealed Under: *Environmental Management Act,* SBC 2003, c. 53

Between:

G.T. Farms Ltd

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant: R. Brian McDaniel, Counsel

For the Respondent: Robyn Gifford, Counsel

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FINAL DECISION

INTRODUCTION

[1] This is a group appeal by G.T. Farms Ltd. (the "Appellant") from two decisions made by a delegate of the Director, Resource Management (the "Delegate"), in the Ministry of Water, Land and Resource Stewardship (the "Ministry") under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"). The decisions were both made on November 21, 2022 and relate to properties owned by the Appellant in Cobble Hill, BC. One property is located on Hillbank Road (the "Hillbank Property") and the other property is located on Thain Road (the "Thain Property"). The Appellant has appealed both decisions to the Environmental Appeal Board (the "Board").

[2] In the decision on the Hillbank Property (the "Hillbank Decision"), the Delegate found the Appellant had contravened sections 27(1)(a), 49(1), and 51(1) of the Code of Practice for Agricultural Environmental Management, B.C. Reg. 8/2019 (the "Code"). The Delegate imposed an administrative penalty of $10,000 in respect of these contraventions.

[3] In the decision on the Thain Property (the "Thain Decision"), the Delegate found the Appellant had contravened section 6(3) of the *EMA*, sections 25(1), 40(a), (c), (d), and (f), 42(1)(c), 67(3), and 79(b) of the Code. The Delegate imposed three separate administrative penalties, with a total amount of $22,100 listed on the cover sheet. When adding the three administrative penalties in the Thain Decision, however, the total is $23,200.

[4] The Board has the authority under section 103 of the *EMA* to:

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

(b) confirm, reverse, or vary the Decision, or

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

[5] The Appellant requests that the Board reduce the administrative penalties.

[6] In dealing with the appeals in the present case, I will deal first with the appeal of the administrative penalty in the Hillbank Decision, and second with the appeal of the administrative penalties in the Thain Decision. Before dealing with the decisions at issue, however, I will provide an overview of the applicable statutory scheme.

Overview of the Statutory Scheme

[7] Under section 115(1)(a) of the *EMA*, a director may issue an administrative penalty to a person who fails to comply with a prescribed provision of the *EMA* or its regulations. The Code is a regulation made under *EMA*.

[8] 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 *EMA*. Section 7(1) of the *Penalties Regulation* lists the following factors that a director must consider, if applicable, in establishing the amount of an administrative penalty:

(a) the nature of the contravention;

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

(c) any previous contraventions, or failures by, 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.

[9] 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.

[10] Under section 12 of the *Penalties Regulation*, a person who contravenes section 6(3) of the *EMA* is liable to an administrative penalty not exceeding $75,000. Under section 13(1) of the *Penalties Regulation*, a person who contravenes section 27(1)(a), 40(d), or 51(1)(b) of the Code is liable to an administrative penalty not exceeding $75,000. Under section 13(2) of the *Penalties Regulation*, a person contravening section 25, 40(a) or (c), 42(1) (c), 49, 51(d), or 67(3) of the Code is liable to an administrative penalty not exceeding $40,000. Under section 13(3) of the *Penalties Regulation*, a person contravening section 40(f) or 79 of the Code is liable to an administrative penalty not exceeding $10,000.

[11] The Ministry uses the "Administrative Penalties Handbook – *Environmental Management Act* and *Integrated Pest Management Act*" (the "Handbook") as guidance for issuing administrative penalties. The Handbook recommends determining a "base penalty" that reflects the seriousness of the contravention, considering the nature of the contravention and any real or potential adverse effects (being the factors in section 7(1)(a) and (b) of the *Penalties Regulation*). The base penalty is then added to, or deducted from, by considering each of the factors in section 7(1)(c) through (j).

[12] The use of the Handbook in setting administrative penalties has been accepted by the Board as "a reasonable guide for determining the appropriate quantum of an administrative penalty under the [*EMA*]," and it has been determined that the Handbook

"fosters consistency and predictability in decision-making" (see *United Concrete & Gravel Ltd. v. Director, Environmental Management Act*, 2021 BCEAB 21 (CanLII), ("*United Concrete*") at para 72). Similarly in *93 Land Company v. Director, Environmental Management Act*, 2022 BCEAB 37, at para 107, the panel determined that "an important principle of administrative fairness is that administrative penalties should be assessed on a consistent and transparent basis," and I find use of the Handbook in assessing administrative penalties fosters that important principle.

APPEAL OF THE HILLBANK DECISION

Background

[13] The Hillbank Property has a manure storage pit with a capacity of 300,000 gallons.

[14] On January 18 and 19, 2021, the Conservation Officer Service ("COS") received reports of septic waste having been dumped into and pumped from the manure pit.

[15] On January 19, 2021, Conservation Officer ("CO") Kissinger learned that the person making the reports had seen someone using a pump with a hose running from the manure pit into a field. When CO Kissinger attended at the site, the CO observed a pump set up to drain the pit and a hose leading from the pit. Although the pump was not operating at that time, when CO Kissinger followed the hose, the CO could see the drainage area from the hose had been saturated with fecal material.

[16] On January 20, 2021, CO Sano attended at the site. The CO observed liquid being pumped from the manure pit directly onto an adjacent field. The "liquid in the tank had a strong odor of excrement." Photographs taken by the CO show the "hose from the manure pit discharging to a single point on the field below."

[17] On January 20, 2021, CO Sano spoke with a principal of the Appellant, Gordon Truswell, and his son, Lucas Truswell. The CO learned from them that the manure pit contained both waste from a cattle farm operated by the Appellant, as well as fish wastewater. Lucas explained that the pump and hose were set up so that the manure pit would not overflow and that, during the last day, he had drained half the liquid from the manure pit (approximately 150,000 gallons) when it was near the top of the pit.

[18] CO Sano contacted the company which had transported the fish wastewater, Mikes Septic. CO Sano learned that on January 16, 2021, two liquid truckloads of fishpond wastewater had been transported from a commercial fish farm to the Hillbank Property and deposited into the manure pit.

[19] On January 26, 2021, the COS contacted the commercial fish farm, MOWI Canada West. It was confirmed that Mikes Septic had taken the two loads of fish wastewater on January 16, 2021. Documentation was further reviewed, indicating that Mikes Septic had been paid for taking the two loads of fish wastewater. Pursuant to subsequent inquiries,

MOWI Canada West indicated that the wastewater from the fish farm was nitrogen rich sludge or slime which had built up at the bottom of the settling pond tank.

[20] On February 11, 2021, Environmental Protection Officer Devos of the Ministry attended at the site and spoke with Gordon Truswell. Mr. Truswell explained that a board which was "being used to prevent uphill runoff from entering the manure pit had been moved, so with the heavy rains that occurred the week prior, the manure pit level increased beyond what they had planned for." Officer Devos informed Mr. Truswell "that there is no nutrient application to land allowed under the Code during the month of November, December, and January and that the Ministry …should have been contacted to discuss alternate disposal options."

[21] On February 17, 2021, Officer Devos requested "records of nutrient application for the Hillbank Farm to assist with the inspection."

[22] Officer Devos subsequently contacted Ministry hydrogeologist Rusko Martinka for advice on potential impacts from the manure pit being pumped out directly onto the field in the present case. The hydrogeologist advised:

> The geology of the subject site consists of moderately permeable sands, silts and gravels. Groundwater levels in the area are generally shallow (<10 metres from ground surface). The underlying unconfined aquifer is provincial mapped (#197) and characterized as a sand and gravel aquifer. Locally it is an important source of drinking and commercial water supply.
>
> The discharge of organically enriched effluent onto a single point of the field at the subject site is problematic and should be discouraged for the following reasons. Since permeability of soils increase with increasing moisture content, the single point discharge from a hose to ground saturates the subsurface materials which allows the effluent to move rapidly to the shallow aquifer. Given that the soil saturation during the winter months is already high, the rate of flow from the discharge to the aquifer increased. Accordingly, such discharge should occur during the dryer months and should be spread over a large area (e.g. spray irrigation).
>
> Based on the above observations, the discharge at the subject site poses a potentially moderate to high risk of impacting the aquifer with excessive nutrient load, specifically the nitrogen species.

[23] On March 12, 2021, Officer Devos sent an administrative penalty referral letter to the Appellant in respect of the Hillbank Property. The letter alleged the Appellant failed to comply with sections 27(1)(a), 49(1), and 51(1) of the Code.

[24] On September 16, 2021, the Ministry issued a Notice Prior to Determination of Administrative Penalty to the Appellant. This Notice alleged the failure to comply with sections 27(1)(a), 49(1), and 51(1) of the Code in respect of the Hillbank Property. This Notice was accompanied by a Penalty Assessment Form ("PAF") in connection with the

administrative penalty being considered. The PAF consisted of two parts. Part one was entitled "The Contravention" and included a description of the alleged contravention, background information, a summary of relevant facts, and the findings of the Ministry. Part two was entitled "Penalty Calculation," and set out the factors in section 7(1) of the Penalties Regulation relating to the penalty amount being considered. A Base Penalty of $10,000 was calculated on the basis of factors (a) and (b), and an adjustment of the Base Penalty was made on an application of factors (c) through (j), with a brief comment on each of all the factors. The final penalty amount being considered on the basis of all the factors was $11,000.

The Hillbank Decision

[25] The Appellant was provided with an opportunity to be heard on the administrative penalty for the Hillbank Property. A submission dated February 11, 2022, was received from Thomas R. Elliot, PhD, of TRE Environmental Services, on behalf of the Appellant.

[26] On November 21, 2022, the Delegate issued the Hillbank Decision, finding that the Appellant had contravened sections 27(1)(a), 49(1), and 51(1) of the Code. An administrative penalty was imposed pursuant to section 115 of the *EMA* and section 7(1) of the *Penalties Regulation*.

[27] In arriving at the penalty amount, the Delegate determined that there was no basis to warrant any variation in the Ministry's application of factors (a) through (h) in the Penalty Calculation. In respect of factor (i), the Ministry had put forward a $1,000 reduction based on the submissions during the OTBH. The Delegate agreed with that reduction and further found that the Appellant had taken additional steps in terms of record keeping "as an effort to improve operational responsibility" and assigned an additional ten percent reduction of the Base Penalty under factor (i) so that the total reduction under this factor amounted to $2,000. As a result, the Delegate reduced the final penalty amount from the $11,000, which had been proposed in the PAF put forward by the Ministry, to $10,000. The Administrative Penalty imposed by the Delegate was set out in a format identifying the constituent elements of section 7(1) of the *Penalties Regulation,* and the calculation of the amount as follows:

> Penalty Adjustment Factor and Amount Assessed
>
> Base penalty (a) and (b) $10,000
>
> (c) previous contraventions, penalties imposed, or orders issued $0
>
> (d) whether the contravention was repeated or continuous +$1,000
>
> (e) whether the contravention was deliberate +$1,000
>
> (f) economic benefit derived by the party from the contravention +$1,000
>
> (g) exercise of due diligence to prevent the contravention $0
>
> (h) efforts to correct the contravention -$1,000

(i) efforts to prevent reoccurrence of the contravention -$2,000

(j) any other factors that are relevant in the opinion of the Director $0

Adjusted Total Penalty $10,000

[28] In arriving at the base penalty amount, the Delegate accepted that the contravention was "**moderate** in nature due to the timing and method of nutrient application that would cause the nutrients to enter groundwater" (emphasis in original). In that respect, it was noted in the PAF that "nutrient application to land is strictly prohibited on Vancouver Island during January and is further prohibited if carried out on saturated soils in a manner that causes it to go below the seasonally high water table."

[29] The Delegate further accepted the potential for adverse effect was "**medium** due to the fact that nutrients entering groundwater can have adverse effects on human health and the environment and are difficult to treat or manage" (emphasis in original). The Delegate found that the area of the wastewater discharge was over Aquifer 197 as put forward by the Ministry hydrogeologist, which is an aquifer rated to be of moderate vulnerability. At the OTBH, TRE Environmental Services had asserted on behalf of the Appellant that the location of the discharge was over a different aquifer (#198) of a low vulnerability; however, the Delegate noted "no supporting technical information was provided by TRE to support this assertion" and the Delegate gave more weight to the identification by the Ministry hydrogeologist.

[30] Regarding the factors where an upward adjustment in the penalty amount was set out in the PAF, the Delegate accepted the contravention was repeated (as it occurred over two days), involved a deliberate discharge, and there was an economic benefit to the Appellant (as the cost of retaining a vacuum truck to remove the waste to legal disposal was avoided).

[31] Regarding the factors where a downward adjustment in the penalty amount was set out in the PAF, the Delegate accepted that there were efforts to correct the contravention, as the discharge ceased when the COS advised that manure could not be applied in January, and the contravention did not reoccur once the Appellant was advised on the contravention. As previously mentioned, there was also a further reduction under factor (i).

Issue

[32] The issue on the appeal of the Hillbank Decision is whether the administrative penalty should be reduced.

Relevant Legislation

[33] In respect of the Hillbank Decision, the following sections of the Code are relevant:

Restrictions on applying nutrients

27 (1) A person must not apply nutrient sources to land

(a) in a high-precipitation area during the period that begins on November 1 and that ends on February 1 of the next year, …

Prohibitions on applications to land

49 (1) A person must not apply nutrient sources to land

(a) on which there is standing water or water-saturated soil, …

…

(d) at a rate of application, under meteorological, topographical or soil conditions, or in a manner, that may cause nutrient sources or contaminated runoff, leachate or solids to enter a watercourse, cross a property boundary or go below the water table.

General requirements for applications to land

51 (1) A person who applies nutrient sources to land must ensure all of the following:

(a) that nutrient sources are not discharged or applied directly into a watercourse, across a property boundary or below the water table;

…

(d) that the total amount of available nitrogen in the soil, if applicable, and from all nutrient sources applied in one year of application, is equal to or less than the amount of nitrogen needed for optimum crop growth and yield.

Discussion and Analysis

The Appellant's Submissions

[34] The Appellant says that while the discharge of the waste was a technical breach of the relevant statutory provisions, there was no damage to the environment caused by the discharge and in particular, there was no damage or threat of damage to the underlying aquifer. The Appellant argues that "there is no admissible evidence of harm to the environment, particularly the water table or a watercourse", as well as no evidence of an adverse impact to "human health as a result of the discharge of the waste from the manure pit onto the field." The Appellant challenges the determination in the Penalty Calculation that the nature of the contravention was "moderate" and that the actual or potential for adverse effect was "medium". The Appellant says that there was no actual adverse effect, and the assessment by Mr. Elliot suggests that the likelihood of adverse

affects is minimal. The Appellant further says that the information from the Ministry hydrogeologist about the aquifer should either be excluded or given little weight.

[35] The Appellant argues that the discharge "on January 19 and 20, 2021, was done to avoid uncontrolled overflow from a manure pit". In that respect, the Appellant states that "the discharge, while intentional, was prompted by an emergency, namely the potential uncontrolled overflow of liquid from the pit." The Appellant says that "Gordon and Lucas Truswell were simply attempting to control a potential harmful discharge from their manure pit that could cause further damage to their property or migrate to adjacent property."

[36] The Appellant further asserts that the discharge of nutrient material to the field is a normal farming practice, notwithstanding that it was conducted at a time when the regulations prohibited it.

[37] The Appellant says this is a first offence and "there is no suggestion of prior similar offences". The Appellant argues that the "administrative penalty of $10,000 for what is an extremely minor offence with no harm to the environment and a 'first offence' is not proportionate to the statutory breach."

[38] The Appellant requests that the penalty be reduced from $10,000 to a nominal amount of $10.

The Respondent's Submissions

[39] The Respondent says that the administrative penalty was calculated in accordance with the statutory scheme, and the Ministry's guidance documents on administrative penalties. The approach set out in the Handbook was applied and the factors listed in Section 7(1) of the *Penalties Regulation* were considered. The Respondent cites various cases, including *United Concrete*, in support of using the Handbook as a guide for determining the appropriate amount of an administrative penalty and for fostering consistency among penalties.

[40] Applying the factors, the Respondent argues that the Appellant's conduct was deliberate, resulting in the potential for adverse effects to the environment or human health. Further, there was an economic benefit to the Appellant in accepting the fish wastewater and in saving the costs "associated with retaining a vacuum truck to remove the waste to legally dispose of the waste off site."

[41] The Respondent says there is no dispute that the Appellant discharged waste from its manure pit on January 19 and 20, 2021, contrary to s. 27(1), 49(1)(a) and (d), and 51 (1)(b) and (d) of the Code. The Respondent asserts that the administrative penalty is consistent with the evidence and notes that there is no dispute that "the Appellant applied nutrient sources to land in a high-precipitation area between November 1 and February 1, applied nutrient sources to land on which there was standing water or saturated soil, and in a manner that may cause nutrient sources to go below the water table."

[42] In response to the Appellant's argument about there being an emergency, the Respondent says the Appellant has not explained why other actions could not have been taken to avoid the problem. The Respondent argues that the Appellant has not provided adequate evidence or an adequate explanation as to why it could not have transported the waste to another treatment facility, or "why it removed a board that was being used to prevent uphill runoff from entering the manure pit, thus contributing to the increase to the manure pit levels." The Respondent further argues that if there was urgency in the situation, it "was the direct result of the Appellant's actions in removing a board that was being used to prevent uphill runoff and in continuing to accept fishpond waste." The Respondent states that the penalty should not be reduced for this factor.

[43] Regarding the nature of the contravention and potential for harm, the Respondent says the classification of the contravention as "moderate" and the real or potential adverse effects being "medium" are consistent with the Handbook. In the Handbook, moderate contraventions are stated as involving "a failure to comply with operational requirements that at a minimum create a risk of harm to the environment or human health and safety." The Respondent argues that the discharge of a mixture of manure and fishpond waste to a single point on a field with water-saturated soils in a high-precipitation area, as in this case, violates operational requirements and creates such a risk of harm.

[44] In respect of the real or potential adverse effects being "medium", the Respondent points to the provision in the Handbook referring to a medium contravention being one which "interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so, but does not result in a significant adverse effect or the potential do so is moderate." The Respondent notes that potential adverse effects to the environment and human health are to be examined as well as actual adverse effects, and says the evidence supports a finding that the Appellant's discharge had the potential to interfere with the Ministry's capacity to protect the environment or human health. The Respondent argues that the Appellant has conceded that it contravened the provisions of the Code identified by the Respondent and, as such, "has conceded that it discharged nutrients to a high-precipitation area between November 1 and February 1, to land on which there was standing water or saturated soil, in a manner that may cause nutrient sources to go below the water table."

[45] With regard to the Appellant's assertion that this was a normal farming practice, the Respondent says that, even if that is true, the activities of other farming operators do not excuse a violation of the Code requirements. The Respondent says that the Appellant was required to ensure that any nutrient discharge to land was done in accordance with the Code.

[46] In terms of this being a first offence, the Respondent says the Delegate took into account there were no previous contraventions, and the penalty was not increased for this factor.

[47] Overall, the Respondent argues that "an administrative penalty of $10,000 for the Hillbank manure pit Code contravention is reasonable given the potential for adverse

effects, the deliberate nature of the conduct, and the economic benefits to the Appellant." The Respondent says that there has already been a 30% reduction in the penalty considering factors (h) and (i) and that this reduction is significant. The Respondent cites case law to the effect that the penalty must act as "an effective deterrent and promote future compliance by both the non-compliant person specifically and other regulated persons more generally" (see *MTY Tiki Ming Enterprises Inc. v. Director, Environmental Management Act*, 2016 BCEAB 13 (CanLII) [*MTY Tiki Ming*], at para. 92; *Pacesetter Mills Ltd. v. Director, Environmental Management Act*, 2021 BCEAB 9 (CanLII) [*Pacesetter Mills*], at para. 60; and *Nordstrom Enterprises Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 8 (CanLII) [*Nordstrom Enterprises*], at para. 64).

The Appellant's Reply

[48] The Appellant says "there is no significant dispute relating to the facts which are at the root of the Appellant's alleged contravention of [the Code]" and that "what is at issue is the characterization of the severity of the alleged breaches and the imposition of Administrative Penalties pursuant to subsection 7(1) of the … [Penalties] Regulation."

[49] The Appellant says the evidence supporting its position is set out in its submissions and it has filed an Affidavit from Gordon Truswell, attesting to the truth of the facts in its submissions.

[50] The Appellant says "the legislative regime giving rise to the offences which are the subject of this Appeal is very complex and extensive and caters to highly specialized enforcement and administrative personnel."

[51] While the Appellant acknowledges that it was adding nutrients to its soil at a time it was prohibited, it says the fine of $10,000 is excessive.

[52] Regarding factors (a) and (b) in subsection 7(1) of the *Penalties Regulation*, with respect to the Hillbank Property, the Appellant says there is no evidence of a real or potential adverse effect to the environment as a result of the contravention, and in particular no evidence of harm to a water course or the underlying water table.

[53] In terms of factors (c), and (d), the Appellant says there is no prior contravention, and the contravention was not repeated or continuous.

[54] Under factors (e) and (f), the Appellant says the "contravention was deliberate, but not harmful," and argues "there was no economic benefit derived from the contravention". Under subsection (g), due diligence, the Appellant says the "contravention occurred because of a failure of a retaining board to contain the offending material in a holding tank on the farm."

[55] Regarding items (h) and (i), the Appellant repeats that the "contravention occurred due to an emergency." The Appellant says that it has taken steps to ensure the situation will not occur again and that it "has installed barriers to ensure that the material does not escape from the holding tank and that the tank is not filled to capacity where overflow is a risk."

The Panel's Findings

[56] I begin with the Delegate's contravention findings. As previously noted, the Appellant acknowledges that the discharge occurred at a time when it was prohibited to do so and there was a breach of the relevant statutory provisions. More specifically, I agree with the Delegate that the Appellant contravened sections 27(1)(a), 49(1), and 51(1) of the Code. With respect to section 27(1)(a), Vancouver Island is classified as a high-precipitation area, and it is clear that the Appellant applied nutrient sources to land in such an area at a time it was prohibited to do so. With respect to section 49(1) and 51(1)(b), I find that the Appellant applied nutrients to saturated soil in a manner which may cause nutrient sources to go below the seasonal high water table and potentially impact the aquifer. Regarding section 51(1)(d), I find, as set out in the PAF findings accepted by the Delegate, that the total amount of nitrogen from the nutrient sources applied by the Appellant – at approximately 150,000 gallons to a single point - "would far exceed the amount of nitrogen needed for optimum crop growth and yield". I find the Delegate's reasoning regarding the above matters to be sound, and that the Appellant has not provided sufficient evidence to establish the contrary.

[57] Turning to the Appellant's arguments seeking a reduction in the administrative penalty, I find there are basically four arguments in that respect:

(i) the Appellant's actions did not result in harm to the environment;

(ii) this is a first offence and does not warrant the penalty amount;

(iii) the Appellant's actions were due to an emergency; and

(iv) the Appellant's actions of placing nutrients on a field involved a normal farming practice.

[58] I find these arguments may be examined within the framework of the various provisions of section 7(1) of the *Penalties Regulation*. The argument that the Appellant's actions did not result in harm to the environment relates to sub-sections 7(1) (a) and (b) of the *Penalties Regulation* (the nature of the contravention, and the real or potential adverse effect of the contravention) and the base penalty established under those subsections. The Appellant's argument about this being a first offence relates to subsection (c) under s. 7(1) of the *Penalties Regulation* (no prior contravention). While the Appellant's arguments that its actions were due to an emergency and involved a normal farming practice do not directly relate to a specific subsection of section 7(1) of the *Penalties Regulation*, they fall within the scope of other factors which may be relevant under subsection (j).

[59] I now turn to an examination of the penalty amounts in the Hillbank Decision, and my assessment of the factors under section 7(1) of *the Penalties Regulation*, taking into account the Appellant's arguments.

Factors (a) and (b) – nature of the contravention and real or potential adverse effect of the contravention

[60] In terms of section 7(1)(a), I find the nature of the contravention to be at a "moderate" level, involving a failure to comply with operational requirements and a risk of harm to the environment or human health and safety, as set out in the Handbook. The regulatory provisions setting out when, and in what circumstances, nutrients may be applied to land deal with farm operations and are operational requirements. The Appellant has acknowledged that it failed to comply with those requirements by the "spreading of liquid waste on a field when the ground was wet and at a time when the deposit of this material was prohibited."

[61] With respect to the risk involved, I find there was a risk of harm to the environment or human health and safety. I agree with the Delegate's finding in the Hillbank Decision regarding the location of the wastewater discharge at issue being over Aquifer 197. This was identified by the Ministry hydrogeologist who reviewed established groundwater information available on-line through iMapBC and referenced the provincial mapping of the aquifer. I find the Delegate's analysis in giving more weight to the identification of Aquifer 197 by the Ministry hydrogeologist to be persuasive, and that there was insufficient evidence to contradict it. With regard to the Appellant's questioning the admissibility of information from the Ministry hydrogeologist, I find the hydrogeologist's information to be reliable and admissible as being relevant to the determination of this issue. I accept the information provided by the Ministry's hydrologist that Aquifer 197 is a source of drinking and commercial water supply and that Aquifer 197 is rated as being of moderate vulnerability, and I find there were potential adverse effects to the environment and human health with the Appellant's discharge.

[62] I find that the risk of harm was particularly pronounced in the circumstances for several reasons. First, the discharge occurred during the winter months when the soil saturation is high, which increased the risk of discharge flowing to the aquifer. Second, I find that a substantial amount of liquid waste was pumped from the manure pit— approximately 150,000 gallons, according to Lucas Truswell— onto the field which increased the risk of saturation and flow to the aquifer. Third, the manner of discharge used by the Appellant, of a single point discharge from a hose to ground, further increased the risk of saturation and effluent moving to the aquifer. Fourth, the information from Officer Devos was that the nutrient was "applied during one of the wettest months of the year for the area and shortly after heavy rains," again increasing the risk of discharge flowing to the aquifer. The photographs submitted as evidence further show this accumulation and saturation of the area involved.

[63] On the question of real or potential adverse effects and section 7(1)(b), the Appellant argues there was a lack of harm to the environment in connection with its discharge of wastewater. On this issue, I agree with the Respondent that it is the "potential" adverse effects which are to be considered, as well as the actual adverse effects, since section 7(1)(b) of the *Penalties Regulation* specifically refers to "the real or

potential adverse effect of the contravention or failure." The very reason the Appellant did not want the manure pit to overflow was because of the potential for the wastewater to be harmful to the environment. In its submission, the Appellant says the discharge was a result of it "attempting to control a potential harmful discharge from their manure pit that could cause further damage to their property or migrate to adjacent property".

[64] I further find the real or potential adverse effect of the Appellant's discharge to be "medium", as defined in the Handbook, involving that which "interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so." As noted above, the discharge of organically enriched effluent by the Appellant had the potential to interfere with the Ministry's capacity to protect the environment and human health through the manner in which the effluent was discharged to the field, when the discharge occurred, and the amount of effluent discharged.

[65] As a result, I agree with the determination of "moderate" under factor (a) and "medium" under factor (b) and confirm the Base Penalty set at $10,000.

Factors (c) and (d) – prior contraventions and whether the contravention was deliberate or continuous

[66] There were no prior contraventions and no increase to the penalty under factor (c).

[67] With respect to the Appellant's argument seeking a reduction under factor (c), the Handbook states that "this factor could increase or decrease the penalty" and sets out considerations in applying the factor. At paragraph 132 of *Woodland Heights Investments, Ltd. v. Director, Environmental Management Act*, 2020 BCEAB 15 (CanLII), the panel acknowledged that "an amount may be added to or subtracted from the penalty to acknowledge previous contraventions" under this factor. In terms of a potential reduction, the Handbook says the "relevance of a positive compliance history (i.e. no past contraventions) in reducing a penalty may be influenced by how long the person has been operating and how many inspections they've had."

[68] In my view, the application of this factor does not mandate an automatic increase when there has been a previous contravention, nor an automatic decrease where there has not been a previous contravention. The context and particular circumstances must be examined. As indicated in the Handbook, the factors which may be involved in determining whether a reduction is appropriate may include the length of time the person has been operating and the compliance history with the Ministry. Thus, in considering a potential decrease, the situation is different if a facility has been operating for only a short time, than if it has had a positive compliance history for many years.

[69] In the present case, I find there is insufficient evidence of the history and operations relating to the Hillbank Property including how the manure pit has been operating, and for how long, in order to demonstrate that a decrease would be appropriate. As previously noted, it is not enough to simply state that this is a first offence for this factor to apply to reduce the administrative penalty, and I find a decrease is not warranted based on this factor.

[70] Regarding factor (d), I find the contravention was repeated over two days and confirm the 10% increase for this factor imposed in the Hillbank Decision is appropriate.

Factors (e) and (f) – whether the contraventions were deliberate and involved an economic benefit

[71] I agree with the Hillbank Decision that: the contraventions were deliberate, as the Appellant intentionally discharged the liquid waste from the manure pit; there was an economic benefit as the Appellant saved the costs associated with hiring a vacuum truck to remove the waste and legally dispose of it elsewhere; and that a 10% increase for each of these factors is appropriate.

Factors (h) and (i) – efforts to correct the contravention, and efforts to prevent recurrence

[72] The penalty was reduced by $1,000 under factor (h) since the discharge ceased "as soon as the COS informed [the Appellant] that manure could not be applied in January." Similarly, the penalty was reduced by $2,000 under factor (i) based on the contravention not reoccurring once the Appellant was advised of the matter, and the submissions made during the OTBH. I agree with these reductions from the Base Penalty.

[73] Although the Appellant stated in its reply that it has taken steps to avoid an escape or overflow in the future, I find that insufficient evidence was provided about such matters to warrant a further reduction. I find the reductions which have already been made to be significant and sufficiently account for the Appellant's efforts in respect of these factors.

Factors (g) and (j) – due diligence to prevent the contravention, and any additional factors

[74] With regard to the Appellant's argument that its actions were due to an emergency, I find the Appellant has not adequately explained how this situation arose and why the Appellant decided upon this course of action to deal with it. Although the Appellant says it took the impugned actions because a board was removed, which was being used to prevent uphill runoff from entering the manure pit, the Appellant has not adequately explained why the board was removed or why it was not replaced. Further, it has not been adequately established when the board was removed or whether the fish wastewater was received after the board's removal. In that respect, the fish wastewater had been trucked to the Appellant's manure pit just a few days prior to the Appellant's impugned waste discharge, during a week when there was heavy rainfall, and the Appellant did not adequately explain why it accepted the wastewater or why wastewater in the pit could not likewise be removed by pump truck. The Appellant did not provide satisfactory evidence about any attempts to relocate the wastewater to a facility for legal disposal or the consideration of other alternatives. While the Appellant argued that the alleged emergency related to a potential overflow, the Appellant did not adequately explain why it needed to pump out such a large quantity of waste material, amounting to approximately half of what the pit held (i.e., approximately 150,000 gallons). I find that the Appellant's claim of an emergency does not warrant reducing the administrative penalty.

[75] Regarding the Appellant's argument that its actions involved a normal farming practice, I make several findings. First, I find that the Appellant has not proven that other

farming operators were discharging this type of waste material, in the volume involved, at the time of year involved, and in the manner of a single point discharge from a hose to the ground, or that it was otherwise normal to do so. Second, even if it is normal to apply nutrients to a field at a time of year and in conditions where it is permitted to do so, that does mean such activity is less of a concern where it is prohibited. Third, even if it were proven that others had been acting in a manner contrary to the law, it would not relieve the Appellant from its own failure to follow the law.

[76] The Delegate did not make any revisions to the Base Penalty amount regarding these factors, and I find that there should be no reduction based on the above arguments by the Appellant.

Conclusion on the Hillbank Property

[77] I agree with using the Handbook and applying the Section 7(1) factors under the *Penalties Regulation* in order to set the administrative penalty, as previously explained. In the present case, I find such factors apply as set out above and I confirm the administrative penalty of $10,000 imposed by the Delegate in respect of the Hillbank Property.

APPEAL OF THE THAIN DECISION

Background

[78] The Appellant has a large compost pile on the Thain Property.

[79] On January 23, 2020, the Ministry conducted an on-site inspection relating to the compost pile on the Thain Property. The Ministry determined the Appellant had failed to cover the compost pile during the rainy season and leachate had been allowed to escape and enter a watercourse. Furthermore, the Ministry determined the compost pile had not been monitored and the Appellant had accepted chicken slaughter offal from a nearby chicken slaughterhouse facility without being registered under the Organic Matter Recycling Regulation, B.C. Reg. 18/2002 ("OMRR"). As a result of these circumstances, the Ministry determined that the Appellant was not in compliance with the Code.

[80] An Advisory Letter was issued to the Appellant, by Environmental Protection Officer Kurinka, on February 6, 2020. Among other things, the Appellant was advised that: i) the area of the compost pile is classified as a "High Precipitation Area" under the Code and was required to be covered from October 1 to April 1 of each year; ii) the Code now required that a compost pile not remain in the same location for more than 12 months; iii) the compost pile was not being maintained in a manner required under the Code to deter the attraction of wildlife, as bald eagles and ravens had been observed on top of the compost pile; and iv) leachate had been observed escaping the on-site collection area.

[81] On November 25, 2020, Ministry staff conducted another on-site inspection regarding the compost pile on the Thain Property. Ministry staff determined that there was again non-compliance with the Code in several respects: a failure to cover the compost pile during the rainy season; allowing leachate to escape and enter a watercourse; the compost pile remaining in the same location for more than 12 months; accepting chicken slaughter offal from a nearby chicken slaughterhouse facility without being registered under the OMRR; and a failure to provide requested records. The Appellant was issued a Warning Letter dated January 12, 2021, by Environmental Protection Officer Devos, regarding non-compliance with section 6(3) of the *EMA*, and sections 25(1), 40, 42(1), 45, 46, 67(3), and 79 of the Code.

[82] On February 11, 2021, Officer Devos inspected the compost pile and subsequently issued an Administrative Penalty Referral Letter dated March 1, 2021 to the Appellant regarding non-compliance with the same sections of the legislation as from the previous inspection. In particular, the Referral Letter pointed out that the compost pile was still not covered, leachate was still escaping from the compost pile, and work needed to be done to prevent leachate further escaping. During a discussion between Gordon Truswell and Officer Devos, Mr. Truswell indicated that he was in the process of creating a compost operation that would be compliant with the OMRR.

[83] On June 15, 2021, there was a further on-site inspection in respect of the compost pile. Gordon Truswell indicated that the Appellant was still receiving chicken slaughterhouse waste. He had explored sending the waste elsewhere without success, and indicated that they were continuing work towards creating a site which was compliant with the OMRR. The Officer noted the amount of compost and reminded Mr. Truswell that the compost should be managed in such a way that the compost is utilized within a 12-month period to avoid such a large compost pile.

[84] On September 16, 2021, the Ministry issued a Notice Prior to Determination of Administrative Penalty to the Appellant, with accompanying PAFs. The format of the accompanying PAFs for the Thain Property was the same as for the Hillbank Property, as previously described. In the material presented at the OTBH, the Ministry proposed a total administrative penalty of $24,200 for the various contraventions of the *EMA* and Code in respect of the Thain Property.

[85] As with the Hillbank Property, the Appellant was provided with an opportunity to be heard, and a submission dated February 11, 2022 was received from Thomas R. Elliot PhD of TRE Environmental Services on behalf of the Appellant.

[86] On August 16, 2022, the Appellant received notice that the site to be used for relocation of the compost pile was a "mine" requiring a permit under the *Mines Act*, R.S.B.C. 1996, c. 293 (the "*Mines Act*"). The Appellant did not have a permit, and work on the relocation of the compost pile to the site was ordered to cease until the Appellant obtained a permit.

The Thain Decision

[87] On November 21, 2022, the Delegate issued the Thain Decision. There were three administrative penalties imposed: an administrative penalty of $12,000 in respect of the failure to comply with Section 6(3) of the *EMA*; an administrative penalty of $10,000 in respect the failure to comply with Sections 25(1), 40(a), (c), (d) and (f), 42(1) (c), and 67(3) of the Code; and an administrative penalty of $1,200 for the failure to comply with Section 79 of the Code. Thus, the Delegate reduced the total amount of the administrative penalties relating to the Thain Property from $24,200 to $23,200.

[88] The three administrative penalties relating to the Thain Property were each set out in chart form, identifying the constituent elements of section 7(1) of the *Penalties Regulation* and the calculation of the penalty amount.

[89] The calculation of the penalty amount for the contravention of section 6(3) of the *EMA* was as follows:

> Penalty Adjustment Factor and Amount Assessed
>
> Base penalty (a) and (b) $10,000
>
> (c) previous contraventions, penalties imposed, or orders issued $0
>
> (d) whether the contravention was repeated or continuous +$1,000
>
> (e) whether the contravention was deliberate +$1,000
>
> (f) economic benefit derived by the party from the contravention $0
>
> (g) exercise of due diligence to prevent the contravention $0
>
> (h) efforts to correct the contravention $0
>
> (i) efforts to prevent reoccurrence of the contravention $0
>
> (j) any other factors that are relevant $0
>
> Adjusted Total Penalty $12,000

[90] In arriving at the administrative penalty for the failure to comply with section 6(3) of the *EMA*, the Delegate accepted that the base penalty under factor (a) was "moderate" in nature due to discharging waste from a composting operation of slaughterhouse waste without a valid authorization, and the actual or potential for adverse effect was "medium" under factor (b) "as leachate from a large compost operation entering the environment can have adverse affects on both surface water and groundwater" and the operation was not registered under the OMRR. The Delegate accepted the determinations as put forward in the proposed Penalty Calculation form for the other factors, although the Delegate noted that if the Appellant had been actively engaged in the application process for an OMRR registration, the Delegate would have considered reducing the penalty.

[91] The calculation relating to the penalty under Sections 25(1), 40(a), (c), (d) and (f), 42(1) (c), and 67(3) of the Code was as follows:

Penalty Adjustment Factor and Amount Assessed

Base penalty (a) and (b) $10,000

(c) previous contraventions, penalties imposed, or orders issued $0

(d) whether the contravention was repeated or continuous +$1,000

(e) whether the contravention was deliberate +$1,000

(f) economic benefit derived by the party from the contravention $0

(g) exercise of due diligence to prevent the contravention $0

(h) efforts to correct the contravention -$1,000

(i) efforts to prevent reoccurrence of the contravention -$1,000

(j) any other factors that are relevant $0

Adjusted Total Penalty $10,000

[92] The Delegate accepted the nature of the contravention under factor (a) was "moderate in nature due to the magnitude of the compost pile that has remained uncovered and improperly managed", the escape of leachate entering surface waters, and the "large amount of eagles and ravens attracted to the site due to large amount of chicken offal". Regarding factor (b), the Delegate accepted that the actual or potential for adverse effect was "medium as leachate from a large compost operation entering the environment can have adverse affects on both surface water and groundwater" and the compost operation is located on a vulnerable aquifer. Regarding the other Section 7(1) factors, the Delegate accepted the items as put forward except for factor (i) where the amount was reduced by $1,000, being 10% of the base amount. In the Reasons for Decision, the Delegate referenced the Appellant's more recent purchase of bird-resistant tarps to cover the entire compost pile and work done by the Appellant to relocate the compost pile in making this reduction.

[93] The calculation relating to the penalty under Section 79 of the Code was as follows:

Penalty Adjustment Factor and Amount Assessed

Base penalty (a) and (b) $1,000

(c) previous contraventions, penalties imposed, or orders issued $0

(d) whether the contravention was repeated or continuous +$100

(e) whether the contravention was deliberate +$100

(f) economic benefit derived by the party from the contravention $0

(g) exercise of due diligence to prevent the contravention $0

(h) efforts to correct the contravention $0

(i) efforts to prevent reoccurrence of the contravention $0

(j) any other factors that are relevant $0

Adjusted Total Penalty $1,200

[94] The Delegate accepted the nature of the contravention was “minor” under factor (a) and the actual or potential for adverse effect under factor (b) was “low.” The Delegate accepted the amounts attributed to the remaining factors.

Issue

[95] The issue on the appeal of the Thain Decision is whether the administrative penalties should be reduced.

Relevant Legislation

[96] Section 6(3) of the *EMA* provides:

> 6 (3) Subject to subsection (5), a person must not introduce or cause or allow to be introduced into the environment, waste produced by a prescribed activity or operation.

[97] Section 6(5) of the *EMA* provides for the disposition of waste if it is in accordance with legislative requirements and section 2 of the OMRR provides for an exemption under section 6(3) of the *EMA* where the compost is produced and used in accordance with the Regulation, which includes having a permit under the OMRR. It states:

> **General application**
>
> **2** (1) For the purposes of the Act, compostable materials and recyclable materials continue to be a waste until dealt with in accordance with this regulation.
>
> (2) A person who produces or uses biosolids or compost is exempt from section 6 (2) and (3) of the Act if the person produces and uses the biosolids or compost only in accordance with this regulation.
>
> (3) This regulation applies in British Columbia to
>
> (a) the construction and operation of composting facilities, and
> (b) the production, distribution, storage, sale and use or land application of biosolids and compost.
>
> **Permit required**
>
> **3.1** (1) Section 2 (2) applies to a discharger in relation to a composting facility that processes food waste or biosolids and has a design production capacity of 5 000 tonnes or more of compost per year only if the

discharger holds a permit for the composting facility, unless the discharger holds an approval or operational certificate for that composting facility.

[98] The relevant provisions of the Code are:

Temporary field storage and outdoor agricultural composting piles

25 (1) A person who uses temporary field storage or an outdoor agricultural composting pile in a high-precipitation area must cover the stored materials or the pile during the period that begins on October 1 and that ends on April 1 of the next year.

General agricultural composting process requirements

40 A person who carries out an agricultural composting process must ensure all of the following:

(a) that only agricultural by-products and wood residue are used in the agricultural composting process;

...

(c) that the agricultural composting process is maintained so as to prevent contaminated runoff, leachate and solids from escaping;

(d) that, if contaminated runoff, leachate or solids escape from the agricultural composting process, they do not enter a watercourse, cross a property boundary or go below the water table;

...

(f) that the agricultural composting process will be carried out in a manner that will deter the attraction of, and access by, domestic pets, wildlife and vectors.

Requirements for outdoor agricultural composting piles

42 (1) A person who uses outdoor agricultural composting piles must ensure all of the following:

...

(c) that the pile does not remain for a period of more than 12 months;

...

Allowable disposal

67 3) A person may dispose only of processing waste that comes from livestock or poultry that were reared, kept or slaughtered on the person's agricultural land base.

General record-keeping requirements

79 A person who must make or keep records under this code must …

(b) submit the records to a director or an officer within 5 business days of being required by the director or officer.

Discussion and Analysis

The Appellant's Submissions

[99] The Appellant accepts that "there are technical breaches of certain regulations set forth in [the Code]." However, the Appellant says that the essence of its submissions "is that while there may have been a technical breach of the many statutory provisions alleged, none of these breaches resulted in any substantial harm to the environment and the penalties are excessive."

[100] The Appellant complains that the contraventions which have been alleged and the penalties which have been imposed "are heavy handed and excessive." The Appellant raises four main arguments in support of this position. First, the Appellant says the genuine efforts it had in place to address the concerns before the Code was enacted have not been acknowledged. Second, the Appellant says that the storage of compost is a "normal farm practice" protected by the *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c.131 ("*Farm Practices Act*"). Third, the Appellant argues that there has not been a recognition that "this is a first offence which should not warrant the significant penalty" in this case. Fourth, the Appellant asserts "that there is little or no evidence of environmental harm, particularly to property or watercourses beyond the boundaries of property belonging to [the Appellant]."

[101] Dealing first with the Appellant's efforts to address the Ministry's concerns, the Appellant says that prior to the complaint and involvement of the Ministry regarding the compost pile, "[the Appellant] was attempting to address issues relating to the location of the compost pile" by "excavating a rock pit which was to be used as the location of the compost pile." The Appellant had further obtained a permit from the Agricultural Land Commission ("ALC") to excavate rock from the pit for this purpose.

[102] The Appellant asserts that "on August 16, 2022 the Provincial Ministry of Mines ordered [the Appellant] to stop work on the rock pit site which was intended as a new location for the compost pit until a permit under the *Mines Act* was obtained." The Appellant says that the "effect of the directive from the Ministry of Mines was to prevent the intended relocation of the compost pile notwithstanding that the ALC had authorized the use of the rock pit for this purpose." The Appellant states that it currently "finds itself in a regulatory stalemate that involves three provincial authorities, namely the ALC, the [Ministry of Environment and Climate Change Strategy], and the Ministry of [Energy, Mines and Low Carbon Innovation]."

[103] Regarding the *Farm Practices Act*, the Appellant relies in particular on subsection 2(1)(a) of that statute which the Appellant says provides that a farmer is not liable in nuisance to any person for a disturbance resulting from the farm operation.

[104] In terms of it being a first offence, the Appellant says that "prior to the complaint and the issues giving rise to this Appeal in early 2020, Mr. and Mrs. Truswell had operated a dairy farm on the subject property for close to thirty-five years without complaints, charges or penalties." The Appellant says the compost pile existed at the time the Code was enacted and, as previously indicated, the Appellant has been attempting to comply with the regulatory requirements. The Appellant asserts that the penalty amount is excessive in the circumstances of the case.

[105] Regarding the question of environmental harm, the Appellant relies on the expert report of Thomas Elliot, PhD (the "Elliot Report") filed on behalf of the Appellant. The Appellant says the Elliot Report suggests that the location of the compost pile and the discharge of leachate posed minimal risk of environmental harm due to the natural soil conditions and mitigation efforts by the Appellant. The Elliot Report indicates that the likelihood of transmission of contaminated leachate to groundwater was reduced with the duric hardpan soil base and the wood residue underlaying the compost pile.

[106] With respect to the statutory provisions alleged to have been violated, the Appellant makes various submissions.

[107] Regarding section 6(3) of the *EMA*, the Appellant says that it was in the process of developing an OMRR facility, but this effort was suspended as a result of requirements of the Ministry of Energy, Mines and Low Carbon Innovation (as it then was).

[108] Regarding section 25 (1) of the Code, the Appellant says that it had suitable compost tarps and that the only exposed portions of the pile were those areas actively being worked on and used as nutrient sources for the property.

[109] Regarding section 40 of the Code, the Appellant says that leachate concerns have been addressed in several ways. First, the Appellant says the hardpan and slope of the soils where the compost pile is located reduce the likelihood of leachate transmission or runoff to groundwater sources. Second, the Appellant says there was two meters of sawdust underlaying the compost pile intended to capture any leachate released by the agricultural compost process. Third, the Appellant says that although leachate breached the containment measures and travelled down slope to a ditch line, once the discharge was detected the ditch line was blocked off and a pump truck was subsequently used to capture the leachate. Fourth, regarding the presence of birds at the compost pile, the Appellant says that occurs when the compost pile is being worked on or is associated with feed production on the farm.

[110] Regarding section 42 of the Code and the prohibition against the pile remaining in the same location for over 12 months, the Appellant says it was trying to relocate the pile but ran up against a regulatory barrier created by the requirement of a mines permit under the *Mines Act*.

[111] Regarding section 67(3) of the Code and the disposal of poultry waste, the Appellant again notes that it is attempting to construct a compliant compost facility, but the requirement of a *Mines Act* permit has impeded its efforts, and further notes that it stopped receiving poultry waste in early 2023.

[112] Regarding section 79(b) of the Code, the Appellant says that records are now being maintained.

The Respondent's Submissions

[113] The Respondent notes that the Appellant "does not dispute that it contravened the *EMA* and the Code." Regarding section 6(3) of the *EMA*, the Respondent says the Appellant accepted slaughterhouse waste from third parties without having complied with the applicable requirements of the OMRR, such as having a facility design and facility operation plans. With respect to the contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code, the Respondent says the Appellant does not dispute that it "had failed to cover the compost pile, failed to contain leachate, failed to manage the compost pile in a manner that would deter wildlife, and failed to remove the pile after 12 months." Regarding section 79 of the Code, the Respondent says the Appellant failed to provide the records requested by the Ministry inspector as required, and the Appellant does not dispute it contravened this provision.

[114] The Respondent says the focus of the Appellant's submissions is on seeking reductions to the penalties, based on various assertions as previously described.

[115] Regarding the Appellant's arguments that it made efforts to address the Ministry's concerns, the Respondent notes the Appellant received warning letters and explicit instructions from the Ministry about meeting the *EMA* and Code requirements, yet the Appellant remained in non-compliance.

[116] In terms of subsection 2(1) of the *Farm Practices Act*, the Respondent says that: i) nuisance is a civil cause of action and not relevant to the regulatory issues in this case; and ii) the protection, if it did apply, requires compliance with the EMA and the Appellant contravened section 6(3) of the *EMA*.

[117] In terms of the Appellant's arguments about this being a first offence, the Respondent says that the question of previous contraventions is a consideration under the Handbook and the penalty was not increased for this factor.

[118] Regarding the issue of environmental harm, the Respondent says that it is both the actual harm and potential harm to the environment which is to be examined. Further, it is the potential adverse effects to both groundwater and surface water resulting from the contravention. Regarding groundwater, the compost operation is located on a vulnerable aquifer and, although the Appellant relies on the Elliot Report, the Respondent argues that there are several issues with the Report including a lack of scientific sources or information to support the assertions in the Elliot Report. Regarding surface water, the Respondent says that there have been potential adverse effects to surface water with

Ministry inspectors having observed that leachate from the compost pile was escaping the Appellant's containment berm and entering the ditch that flowed along Thain Road, which flows to a stream that is a tributary to the Koksilah River.

[119] The Respondent says there was potential harm to the environment through the Appellant conducting a compost operation without the required plans and permit in place to ensure that waste was appropriately handled. The lack of a proper permit and an environmental impact assessment interfered with the Ministry's capacity to protect the environment. The Respondent further notes that a large portion of compost pile remained uncovered and improperly managed which attracted a significant number of eagles and ravens to the large amount of chicken offal on the compost pile.

[120] Regarding section 79(b) of the Code, the Respondent says that the Appellant has provided no evidence or details to support the claim that records are now being maintained and there should be no reduction given the lack of supporting evidence.

The Appellant's Reply

[121] As with the Hillbank Appeal, the Appellant acknowledges "there is no significant dispute relating to the facts which are at the root of the Appellant's alleged contravention of [the Code]" and that "what is at issue is the characterization of the severity of the alleged breaches and the imposition of Administrative Penalties pursuant to subsection 7(1) of the … [Penalties] Regulation".

[122] The Appellant relies on the affidavit of Gordon Truswell attesting to the facts in its submissions as well as the Elliot Report. With regard to the items in section 7(1) of the *Penalties Regulation*, the Appellant makes several submissions.

[123] Regarding items (a) and (b), the Appellant says the contravention "is essentially for the failure to cover and remove a compost pile on a dairy farm that consisted primarily of wood residue" and "there is no real or potential adverse effect to the environment and particularly the water table from the contravention or failure."

[124] In terms of items (c), and (d), the Appellant says there "were no previous contraventions or orders relating to the compost pile involving G. T. Farms or Mr. Truswell." Further, the contravention was not repeated or continuous as it "involved a compost pile that had been in the same location for a number of months while efforts were made to relocate it."

[125] Under subsections (e) and (f), the Appellant says the "contravention was deliberate, but necessary as efforts to create a new location for the compost pile were met with permitting issues from the Ministry of [Energy, Mines and Low Carbon Innovation]" and there was no economic benefit derived from the contravention to G.T. Farms.

[126] Under subsection (g) and due diligence, the Appellant says it exercised due diligence to prevent harm to the environment by covering compost pile and monitoring the surrounding area to ensure there was discharge of leachate.

[127] Regarding item (h), the Appellant repeats that G.T. Farms remains actively engaged in attempting to move the compost pile and says the practice of depositing poultry waste onto the compost pile has ceased.

The Panel's Findings

[128] As previously noted, the Appellant does not dispute that there have been contraventions. I agree with the Respondent that the Appellant contravened section 6(3) of the *EMA* by accepting slaughterhouse waste from third parties without having complied with the applicable requirements such as having a permit, a facility design, and facility operation plans. I further find that the Appellant contravened sections 25(1), 40, 42(1), and 67(3) of the Code. The Officers' reports indicate that the compost pile remained in the same location for more than 12 months, the compost pile was not covered during a period of high-precipitation, bald eagles and ravens were on top of the compost pile, the compost pile was not being managed in a manner that would deter wildlife, and it was not being monitored at least once each week. The Officers' reports further establish that "contaminated runoff and leachate was escaping from the site and entering the ditch systems," and the Appellant continued to bring chicken slaughter offal to the compost pile after being advised that doing so was not in compliance with the Code. Regarding section 79 of the Code, the evidence establishes that the Appellant had not been keeping the required records and had not submitted them to the Officer pursuant to the Officer's request.

[129] As with the analysis involving the Hillbank Decision, I find the Appellant's arguments for a reduction of the administrative penalties relating to the Thain Property may be examined within the framework of the various sub-sections of section 7(1) of the *Penalties Regulation*. In that regard, I find:

(i) the Appellant's argument based on its efforts to correct the contraventions regarding the compost pile relates to sub-sections (h) and (i) of section 7(1) of the *Penalties Regulation;*

(ii) the Appellant's argument based on the *Farm Practices Act* falls within the scope of "other factors" which may be relevant under sub-section (j);

(iii) the Appellant's argument about this being a first offence relates to sub-section (c); and

(iv) the Appellant's argument about a lack of harm relates to sub-sections (a) and (b) of section 7(1) of the *Penalties Regulation*.

[130] I now turn to an examination of the penalty amounts in the Thain Decision, and my assessment of the factors under section 7(1) of the *Penalties Regulation*, taking into account the Appellant's arguments.

The Penalty Assessment in respect of the Contravention under section 6(3) of the *EMA*

[131] I assess the factors relating to the penalty amount under s. 6(3) of the *EMA* as follows.

Factors (a) and (b) – nature of the contravention and real or potential adverse effect of the contravention

[132] With respect to factor (a), I find the nature of the contravention to be at a "moderate" level as defined in the Handbook, involving a failure to comply with operational requirements and a risk of harm to the environment or human health and safety. The regulatory provisions of the OMRR that set out the requirements for a composting facility and deal with composting operations are operational requirements. In terms of non-compliance, the Appellant acknowledged that it accepted chicken offal from a nearby slaughterhouse and caused such waste to be introduced into the environment without OMRR registration. Although the Appellant argues there was a lack of harm with the contravention, I find the failure of the Appellant to operate the composting operation in accordance with the OMRR "interferes with the Ministry's capacity to protect the environment or human health or has the potential to do so" as set out in the Handbook. The purpose of requiring registration is to ensure that the Ministry can do its job of monitoring the facility and ensuring compliance, and the purpose of requiring compliance with the regulatory standards is to ensure the environment and human health are protected. In the present case there was a particular risk of harm to the environment through the introduction of chicken offal which attracted wildlife to the compost pile.

[133] In terms of factor (b), the Delegate accepted this factor as "medium" for the contravention of section 6(3) of the *EMA*. Similar to the "moderate" designation for factor (a), the Handbook indicates the "medium" designation applies under factor (b) when "the contravention interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so, but does not result in a significant adverse effect or the potential to do so is moderate." It includes a situation where "any effect is localized, short-term and can be mitigated or damage repaired within a reasonable timeframe."

[134] For the same reasons as finding the "moderate" designation applies under factor (a), I find the adverse effect, or potential for adverse effect, under factor (b) to be "medium" as set out in the Handbook and confirm the Delegate's finding in that regard. In particular, I find the operation of the composting operation without registration under the OMRR interferes with the Ministry's capacity to protect the environment or human health or has the potential to do so.

[135] As a result, I agree with and confirm the finding of "moderate" under factor (a) and "medium" under factor (b). I also agree with and confirm the base penalty being set at $10,000 regarding the section 6(3) contravention of the *EMA*.

Factors (c) and (d) – prior contravention and whether the contravention was deliberate or continuous

[136] With respect to the Appellant's argument about this being a first offence, I find, similar to my finding on the Hillbank Property, that there is insufficient evidence of the history and running of the compost operation to demonstrate a penalty decrease would be warranted for the Thain Property. Such evidence would include how and for how long the composting operations were carried out, and any prior interactions with the Ministry including inspections, permitting, or inquiries regarding the composting operation. I therefore find that a decrease is not appropriate based on the evidence presented. There were no prior contraventions, and I confirm the Delegate's finding that there should be no increase in the penalty under factor (c).

[137] Regarding factor (d), I find the contravention was repeated with slaughterhouse waste continuing to be received on a weekly basis after being advised it was a contravention of the OMRR. I confirm the Delegate's finding of a 10% ($1,000) increase for this factor.

Factors (e) and (f) – whether the contraventions were deliberate and involved an economic benefit

[138] I find that the contravention was deliberate under factor (e), as Appellant continued to receive slaughterhouse waste after knowing that it lacked the registration which was necessary under the OMRR. The penalty amount was not increased based on factor (f), and none was sought.

Factors (h) and (i) – Efforts to correct the contravention, and efforts to prevent recurrence

[139] In my view, the Appellant has made efforts to correct the s. 6(3) *EMA* contravention and prevent its recurrence. The affidavit of Gordon Truswell attests to the efforts described in the Appellant's submissions and that the Appellant has been in the process of developing an OMRR facility. I further accept that work has been done on an alternate site for the compost pile. While the Delegate's reasons indicate that an application under the OMRR had not been made, the information in the Penalty Calculation portion of the Delegate's section 6(3) determination states that "Mr. Truswell is in the process of preparing a site to meet the requirements of the OMRR for composting the slaughterhouse waste", "hopes to have it completed in a few months", and "has hired a consultant to help them register under the OMRR". At the present time, the compost pile has been moved and the Appellant stopped receiving poultry waste in early 2023.

[140] Based on the foregoing, I find the Appellant has undertaken work in respect of obtaining OMRR registration and has moved the compost pile. A significant concern had been the Appellant receiving poultry waste at the site, and that has now ended. I reduce the administrative penalty by $1,000 under factor (h) and another $1,000 under factor (i), in respect of the contravention under section 6(3) of the *EMA*, for a total reduction of $2,000.

Factors (g) and (j) – Due diligence to prevent the contravention, and any additional factors

[141] The Delegate did not make any revisions to the penalty amount based on these factors. As the Respondent notes, in order to establish the defence of due diligence the Appellant must demonstrate that it took all reasonable care to prevent the contraventions. The Appellant has failed to provide adequate evidence in that regard; rather, the evidence indicates that the Appellant continued to accept slaughterhouse waste until 2023 after being told on multiple occasions that doing so was contrary to the OMRR. With respect to the Appellant eventually discontinuing the acceptance of such waste in 2023, I have taken that into account in reducing the penalty under factors (i) and (h) as set out above. I find no reductions should be made in respect of factors (g) and (j).

Conclusion on the Penalty Assessment in respect of the Contravention under section 6(3) of the EMA

[142] In conclusion, for the reasons set out, I find the Section 6(3) EMA contravention penalty amount should be reduced by $2,000 for a total penalty assessment of $10,000.

The Penalty Assessment in respect of the contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code

[143] I assess the factors relating to the penalty amount under the above provisions of the Code as follows.

Factors (a) and (b) – nature of the contravention and real or potential adverse effect of the contraventions

[144] Dealing first with factor (b) and the Appellant's arguments about a lack of harm to the environment, I find the Appellant's contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code created a potential for harm in a number of ways. The compost pile was not covered during a period of high precipitation, increasing the potential for saturation and risk of harm to groundwater in the vulnerable aquifer in the area below. In addition, there was potential harm involving surface water, with Ministry inspectors having observed the escape of leachate on multiple occasions and that leachate was flowing in a ditch to a stream that is a tributary to the Koksilah River. The potential harm further involved wildlife, as bald eagles and ravens had access to the compost pile and were seen on top of it. There was a lack of appropriate management of the compost pile and an increased potential for harm since the compost pile was not being monitored at least once each week to ensure compliance with the Code, and as required by the Code. Thus, while I recognize that the Elliot Report indicates that certain circumstances reduced the likelihood of transmission of leachate to groundwater, with the duric hardpan soil base and underlay of wood residue below the compost pile, I find the potential for harm and interference with Ministry's capacity to protect the environment nevertheless existed with the compost pile and reject the Appellant's arguments in that regard.

[145] Like my finding regarding the section 6(3) *EMA* contravention, I find the contraventions of these provisions of the Code interfered with the Ministry's capacity to

protect the environment or human health or had the potential to do so. I find factor (b) to be at a "medium" level as set out in the Handbook and I confirm the Delegate's finding in that regard.

[146] Turning to factor (a), I find the nature of the contravention to be at a "moderate" level as set out in the Handbook, involving a failure to comply with operational requirements and a risk of harm to the environment or human health and safety. I find the regulatory provisions of the Code that set out the requirements for items such as the location and monitoring of compost piles are operational in nature and satisfy that portion of the "moderate" definition in the Handbook. I also find that the Appellant failed to comply with those operational requirements by, for example, having the compost pile in the same location for more than 12 months and not monitoring the pile once each week in order to ensure compliance with the Code. I further find, for the reasons previously given in rejecting the Appellant's argument about a lack of harm to the environment, that there was such a risk of harm. In reaching this conclusion on the risk of harm, I place particular emphasis on Ministry staff observing the escape of leachate on multiple occasions and wildlife having access to the compost pile.

[147] As a result, I find the contraventions were "moderate" under factor (a) and "medium" under factor (b). I confirm the base penalty set at $10,000.

Factors (c) and (d) – prior contraventions and whether the contravention was deliberate or continuous

[148] For the same reasons as previously mentioned in my explanation for denying a decrease in respect of the contravention under section 6(3) of the *EMA*, I find that there is insufficient evidence of the history and operation of the compost pile to demonstrate a penalty decrease is warranted for contraventions of the Code under factor (c). There is insufficient evidence to establish how and for how long the compost pile was in operation and monitored, and any prior interactions with the Ministry including inspections, permitting, or inquiries regarding the compost pile. There were no prior contraventions, and I agree with the Delegate's finding that there should be no increase in the penalty under factor (c). As a result, I confirm the Delegate's finding of no change in respect of factor (c).

[149] Regarding factor (d), I find the contraventions were continuous with the contraventions continuing over the course of several inspections. For example, Ministry staff observed leachate escaping from containment areas during each of three visits to the site. I find the 10% ($1,000) increase as set out in the Penalty Calculation for factor (d) to be appropriate and confirm the Delegate's finding in that regard.

Factors (e) and (f) – whether the contraventions were deliberate and involved an economic benefit

[150] I find the contraventions were deliberate, as the Appellant failed to cover and monitor the compost pile after it was aware of the Code requirements in that regard, and I

confirm that the $1,000 increase to the penalty amount under factor (e). There was no increase in the penalty amount based on factor (f) and no change is sought in that regard.

Factors (h) and (i) – efforts to correct the contravention, and efforts to prevent recurrence

[151] In terms of the contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code, I find that the efforts of the Appellant have been appropriately recognized in the reductions of $1,000 already made for each of factors (h) and (i) in the Delegate's determination of the Penalty Calculation for those contraventions. I agree with and confirm these findings of the Delegate for a total reduction of $2,000 for these factors. Greater reductions are not warranted since it took a number of warnings for the Appellant to take those steps and there is still work which needs to be done to correct the contraventions or prevent their recurrence.

Factors (g) and (j) – due diligence to prevent the contravention, and any additional factors

[152] The Delegate did not make any revisions to the penalty amount based on these factors. The Appellant has not established that it took all reasonable precautions to prevent the contraventions, particularly given that the compost pile was improperly covered for several months and the Appellant failed to monitor the compost pile at least once a week. With respect to the steps the Appellant has taken to correct the contraventions or prevent a reoccurrence, those matters have been appropriately considered in reducing the penalty under factors (i) and (h). I find no reductions should be made in respect of factors (g) and (j).

Conclusion on the Penalty Assessment in respect of the contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code

[153] Based on all of the foregoing, I find that the penalty amount in respect of the contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code should be a total penalty assessment of $10,000 as set out in the Thain Decision and I confirm that finding of the Delegate.

The Penalty Assessment relating to section 79 of the Code

[154] In its submission to this Board, the Appellant states that "as a result of the complaint, records are now being maintained," and Gordon Truswell has attested to the truth of that fact. In the circumstances, I find that there should be a reduction under factor (i) for these efforts to prevent the reoccurrence of the section 79 contravention. I place this reduction at 10% of the Base Penalty for this contravention (or $100) and vary the penalty to that extent.

[155] I have reviewed the application of the other factors in the penalty assessment and agree with the assessment of those other factors as set out in the Penalty Calculation and accepted by the Delegate. The result is that the total penalty amount for the section 79 contravention is reduced by $100 from $1,200 for a total penalty assessment of $1,100.

Conclusion regarding all the penalty assessments for the Thain Property

[156] As with the Hillbank Property, I agree with using the Handbook and applying the Section 7(1) factors under the *Penalties Regulation* in order to set the administrative penalties for the Thain Property as previously explained. I vary the total administrative penalties relating to the Thain Property by reducing the total of the administrative penalties to $21,100. This amount consists of an administrative penalty of $10,000 relating to the contravention of section 6(3) of the *EMA*; an administrative penalty of $10,000 relating to the contraventions of sections 25(1), 40, 42(1), and 67(3) of the Code; and an administrative penalty of $1,100 relating to the contravention of section 79 of the Code.

DECISION

[157] For the reasons given, I confirm the administrative penalty imposed by the Delegate in respect of the Hillbank Property at $10,000. I vary the administrative penalties imposed in respect of the Thain Property to a total of $21,100.

[158] In reaching my decision, I considered all of the submissions and relevant evidence provided by the parties, whether specifically referenced in my reasons or not.

[159] In the result, the Appellant's appeal is allowed in part.

"James Carwana"

James Carwana, Panel Chair
Environmental Appeal Board