Environmental Appeal Board

Citation: *Coeur Silvertip Holdings Ltd. v. Director, Environmental Management Act*, 2025 BCEAB 7

Decision No.: EAB-EMA-23-A021(a)

Decision Date: 2025-02-26

Method of Hearing: Conducted by way of written submissions concluding on March 24, 2024

Decision Type: Final Decision

Panel: Michael Tourigny, Panel Chair

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

Between:

Coeur Silvertip Holdings Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant(s): Michelle Jones

For the Respondent: Robyn Gifford

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FINAL DECISION

INTRODUCTION

[1] This is an appeal from an administrative penalty (the "Penalty") imposed in a Determination of Administrative Penalty dated September 14, 2023, (the "Determination"). The Penalty was imposed by Michael Lapham, a Compliance Section Head in the Ministry of Environment and Climate Change Strategy (the "Ministry") acting as a designated delegate (the "Delegate") of the Director (the "Director") under the *Environmental Management Act, S.B.C. 2003, c. 53* (the "*EMA*"). The Penalty is against Coeur Silvertip Holdings Ltd. ("Coeur").

[2] Coeur is a USA-based mining company that owns the Silvertip silver-zinc-lead mine ("Silvertip") in BC, located approximately 9 km south of the BC/Yukon border and 90 km southwest of Watson Lake, Yukon.

[3] The provincial regulatory authorization governing the discharge of effluent from Silvertip is Permit 7337 (the "Permit") issued pursuant to the *EMA.* The Permit was issued by the Ministry and authorizes the discharge of treated effluent to surface waters and ground at Silvertip. While the Permit was first issued on June 21, 1990, and most recently amended on December 5, 2022, the version relevant to this appeal is dated November 20, 2019. Unless otherwise stated, this is the version of the Permit referred to in this decision.

[4] Section 4.1 of the Permit required Coeur to maintain suitable flow measuring devices and sampling facilities, and to undertake toxicity testing, flow monitoring, sampling and analyses of the effluent discharge, and of the receiving environment surface water and groundwater at Silvertip, in accordance with a schedule mandated in Appendix B of the Permit ("Appendix B"). Groundwater testing, monitoring, sampling, and analyses was to occur at locations (the "Wells") identified in the Permit. Appendix B sets out the groundwater monitoring schedule for each of the monitoring Wells in question on this appeal, to be every calendar quarter ("Q1" to "Q4" for each calendar year).

[5] Following an opportunity to be heard (the "OTBH"), the Delegate concluded that Coeur had failed to comply with the groundwater monitoring requirements under section 4.1 of the Permit on 12 occasions between January 1, 2021 (2020 Q4), and October 1, 2021 (2021 Q3), at 8 Wells.

[6] The Penalty imposed by the Delegate for the 12 contraventions under section 115 of the *EMA* and the *Administrative Penalties* (*Environmental Management Act*) *Regulation*, B.C. Reg. 133/2014 (the "*Regulation*") was $19,000.

[7] Coeur appealed the Penalty to the Environmental Appeal Board (the "Board").

[8] The Board directed that the appeal be conducted by way of written submissions. The appeal was conducted as a new hearing of the matter as provided for in section 102(2) of the *EMA*.

[9] In this appeal, Coeur argues that it did not commit some of the Permit contraventions as found in the Determination and says that, in relation to the remaining contraventions, the Penalty should be reversed or reduced.

[10] The Director argues that the Board should confirm both the Delegate's findings of contraventions and the Penalty imposed and dismiss the appeal.

[11] The Board has jurisdiction to hear this appeal under section 100 of the *EMA*. Under section 103 of the *EMA,* The Board may:

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

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

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

BACKGROUND

Background facts

[12] In addition to Silvertip, Coeur operates four active metal mines in the USA and Mexico, employing approximately 2,000 people across all locations.

[13] Coeur acquired 100% ownership of Silvertip in October 2017. Ore mining and concentrate production at Silvertip was suspended in 2020 pending further development of its mineral resources and changes in market conditions.

[14] On October 11, 2018, a Ministry officer conducted an inspection of Silvertip to verify compliance with the Permit. The officer determined that Coeur was out of compliance with section 4.1 of the Permit on multiple occasions during 2017.

[15] On December 13, 2018, the Ministry issued a non-compliance advisory letter (the "Advisory Letter") to Coeur. The Advisory Letter indicated that, based on a review of Coeur's 2017 Annual Monitoring Report, certain Wells were not monitored in accordance with the Permit. These Wells did not include those at issue in this appeal. Some of the missed samples were due to Wells having been destroyed during mining operations or having been covered by a drill pad or crusher. The Advisory Letter also stated that Coeur had failed to immediately notify the Director of certain non-compliances as required by section 5.4.1 of the Permit.

[16] Under section 5.1 of the Permit, Coeur was required to collect and maintain all monitoring data specified under Appendix B and to, each month, submit the data from the

previous month to the Director. Under section 5.2 of the Permit Coeur was required to submit an annual report by March 31 of each year.

[17] Section 5.4.1 of the Permit required Coeur to immediately notify the Director at a specified email address of any non-compliance with the requirements of the Permit and to immediately take remedial action to remedy any effects of such non-compliance.

[18] On January 8, 2020, a Ministry natural resource officer again inspected Silvertip to verify compliance with the Permit. The officer determined that Coeur was out of compliance with section 4.1 of the Permit for failure to monitor Wells, as required, including those in question on this appeal, on multiple occasions during 2018.

[19] On January 14, 2020, the Ministry issued a first warning letter to Coeur (the "First Warning Letter") advising Coeur that it had failed to monitor Wells, including those in question on this appeal, in 2018.

[20] In response, Coeur advised the Ministry on February 13, 2020, that it would adjust its routine monthly and annual reporting under section 5 of the Permit to address this non-compliance item and to explain the reasons for missed instances of groundwater monitoring.

[21] As part of its response to the First Warning Letter, Coeur retained Hatfield Consultants ("Hatfield") to improve its groundwater monitoring program at Silvertip. Consultants employed by Hatfield working for Coeur are "Qualified Professionals" ("QPs") as defined in the Permit for the purpose of this work. In July 2020, Hatfield developed version 14 of a Water Monitoring and Adaptive Management Plan for Silvertip (the "WMAMP") which proposed an annual monitoring frequency for two of the Wells in question because they were chronically dry.

[22] Relying on the WMAMP, Coeur began monitoring those two Wells annually, rather than each calendar quarter as required by the Permit. This practice continued until Coeur was alerted by the Ministry in 2022, by way of the administrative penalty referral in this matter, that quarterly monitoring was required until the Permit was amended to reflect the WMAMP.

[23] On August 6, 2020, a Ministry natural resource officer again inspected Silvertip to verify compliance with the Permit. The officer determined that Coeur was out of compliance with section 4.1 of the Permit for failure to monitor Wells including those in question as required on multiple occasions during 2019 and 2020. The officer subsequently issued a second warning letter to Coeur (the "Second Warning Letter") in respect of those alleged contraventions.

[24] On December 16, 2020, Coeur responded to an early version of the Second Warning Letter and explained that some of the Wells had been destroyed in or before 2016, stated it would work with Hatfield to replace Wells as needed, and committed to adjusting its routine reporting to address the non-compliance item regarding documentation of sample collection compliance.

[25] On January 18, 2021, The Ministry issued a final version of the Second Warning Letter to Coeur stating that Coeur had failed to monitor Wells, except for one particular Well, in 2020. Coeur advised the Ministry that it would work with its QP to ensure the appropriate Wells were monitored and replaced if needed.

[26] In 2021 Coeur had Hadfield identify Wells which were permanently or seasonally dry, not locatable, damaged, or destroyed. Hatfield prepared a technical report dated August 25, 2021, summarizing the condition of each surveyed Well, proposing priorities for Well re-conditioning, and recommending actions to be taken and pathways for regulatory notification or approval. Coeur paid Hatfield over $11,000 for this work and a drilling contractor over $60,000 for the decommissioning of certain Wells and drilling new wells.

[27] On January 17, 2022, a Ministry natural resource officer again inspected Silvertip to verify compliance with the Permit. The officer determined that Coeur was out of compliance with section 4.1 of the Permit for failure to monitor Wells as required, including those at issue in this appeal, on multiple occasions during 2020 and 2021.

[28] On February 7, 2022, the Ministry issued an Administrative Penalty Referral Letter to Coeur for failure to monitor the Wells at issue in this appeal, along with other Wells during 2020 and 2021, noting that annual monitoring at Wells had not been approved by the Ministry. Coeur was advised the inspection record was being referred for an administrative penalty. In response, Coeur advised the Ministry by letter of March 7, 2022, of its efforts to improve the Permit's groundwater monitoring program.

[29] Prior to the contraventions in issue, Coeur had reported to the Ministry in its monthly and annual reports submitted under sections 5.1 and 5.2 of the Permit that a number of the Wells in question were either damaged or destroyed. The parties agree that Coeur did not, however, comply with the non-compliance notification and remediation requirements of section 5.4.1 of the Permit in relation to those damaged or destroyed Wells.

[30] In May 2022, Coeur applied to the Ministry to amend the Permit. Coeur says it did not submit the Permit amendment application until May 2022 because it required time to assess which Wells were viable through the 2021 field program and have Hatfield review the application.

[31] During the summer of 2022, Coeur had two new monitoring wells drilled and decommissioned two dry wells at a total cost of just under $100,000.

[32] On December 5, 2022, the Ministry issued the amended Permit which excludes five of the eight Wells at issue in this appeal that had been damaged or destroyed and included other replacement wells. The amended Permit also does not require monitoring at two of the Wells until they produce water.

[33] In 2023, Coeur drilled another five new monitoring wells and decommissioned two dry or damaged Wells, costing approximately $188,000.

[34] On June 13, 2023, the Director issued a Notice Prior to Determination of Administrative Penalty to Coeur for contravening section 4.1 of the Permit 73 times between 2020 Q4 and 2021 Q3 at 16 Wells, for which the total preliminary penalty assessed was the maximum of $40,000 allowed by the *Regulation*.

[35] In response, Coeur exercised its right under the *Regulation* to make representations before the Delegate and provided OTBH written submissions on July 24, 2023.

Overview of the Administrative Penalty Scheme

[36] Under section 14 of the *EMA,* the Director may issue a permit, such as the Permit in this case, authorizing the introduction of waste into the environment, subject to requirements for the protection of the environment that the Director considers advisable.

[37] Failure to comply with a permit issued under the *EMA* could be prosecuted as an offence under sections 120(6) or 120(7) of the *EMA*. As an alternative to prosecution for an alleged offence, the Ministry may impose an administrative penalty. This was the enforcement option chosen by the Ministry for Coeur's alleged contraventions of section 4.1 of the Permit.

[38] Under section 115(1)(c) of the *EMA*, the Director may issue an administrative penalty to a regulated person that has contravened a requirement of a permit. The decision to issue an administrative penalty is therefore a matter of discretion.

[39] The *Regulation* governs the determination of administrative penalties under section 115(1) of the *Act*.

[40] Section 6 of the *Regulation* states that "A requirement that a person pay an administrative penalty applies even if the person exercised due diligence to prevent the contravention…" In other words, this amounts to "absolute liability" for a contravention in the context of the imposition of an administrative penalty.

[41] Section 12 of the *Regulation* specifies which sections of the *Act,* and its regulations, are prescribed for the purposes of section 115(1) of the *Act*, and the maximum penalties for contraventions. Section 12(5) of the *Regulation* states that a person that fails to comply with a permit issued under the *EMA* is subject to a maximum administrative penalty of $40,000.

[42] Section 7(1) of the *Regulation* lists factors that a director must consider, if applicable, in establishing the amount of an administrative penalty (the "Factors"). In summary, those Factors are:

(a) the nature of the contravention or failure;

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

(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 or failure was repeated or continuous;

(e) whether the contravention or failure was deliberate;

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

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

(h) the person's efforts to correct the contravention or failure;

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

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

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

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

[45] The Handbook provides guidance to statutory decision-makers in their assessment of the quantum of the penalty under section 7(1) of the *Regulation.* The Handbook recommends first assessing a "base penalty" for the contravention. The base penalty is intended to reflect the seriousness of the contravention based on Factors (a) and (b) above (i.e., the nature, and any real or potential adverse effects of the contravention). The Handbook also contains base penalty tables which can be used to determine a base penalty for contraventions with maximum penalties of $10,000, $40,000, and $75,000 respectively.

[46] Additional amounts are then added to, or deducted from, the base penalty after considering the "penalty adjustment" Factors set out under section 7(1) of the *Regulation* in Factors (c) through (j). The Handbook states these factors are intended to assist the decision maker to determine an appropriate penalty that:

- Reflects the gravity and magnitude of the contravention;
- Acknowledges the actions the person took before, during or after the incident; and
- Creates an effective deterrence against future non-compliance without being excessively punitive.

[47] The Handbook states that considering these mitigating and aggravating Factors provides the decision maker flexibility to consider more than simply what happened, and this flexibility encompasses why the contravention happened, whether it has happened

before, and the person's past and current actions and attitude. However, use of this discretion requires the consideration of all the relevant Factors and calls for reasons to be given for any adjustments (or lack thereof) to the base penalty.

[48] 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), at para. 72.

Determination

[49] Following consideration of written submissions from Coeur and information respecting the alleged contraventions, provided by the Ministry at the OTBH, the Delegate issued the Determination on September 14, 2023. The Delegate found that a total of 12 contraventions had occurred at eight Wells: 11-03D, 10, 39, 65, 68, 87, TH2, and EW1.5-10-24.

[50] At the OTBH, Coeur submitted that rather than 73 contraventions of section 4.1 as alleged in the Notice Prior to Determination of Administrative Penalty, it had only contravened section 4.1 on three of the alleged occasions.

[51] Coeur admitted in its OTBH submissions that it had missed three groundwater samples contrary to section 4.1 of the Permit: two from well 65 (one in 2021 Q2 and one in 2021 Q3) and one from well 68 in 2021 Q2.

[52] The Delegate agreed that those contraventions took place and found that Coeur had also failed to comply with section 4.1 of the Permit on a further nine occasions, for a total of 12 contraventions from the 73 alleged in the Notice Prior to Determination of Administrative Penalty. In addition to the three admitted to by Coeur, the Delegate found:

a. With respect to Well 87, Coeur had switched its monitoring from quarterly to annual at some point prior to 2020 Q4, contrary to the Permit requirements. The failure by Coeur to take water quality measurements or take groundwater samples from Well 87 in 2020 Q4 constituted two contraventions of section 4.1.

b. For Wells 11-03D, 10, 39, TH2, and EW1.5-10-24, groundwater samples had not been taken. Coeur stated it didn't take these samples as these Wells had been destroyed or damaged by operations at Silvertip in the past and that it had so stated in its monthly and annual reports submitted to the Ministry under sections 5.1 and 5.2 of the Permit. Coeur submitted that it understood that reporting these issues in its monthly and annual reports alone was an appropriate method of notifying the Director to justify why later samples were missed. The Delegate did not accept this submission as an answer to the fact that the groundwater samples had not been taken and held that a further seven contraventions of section 4.1 had occurred.

[53] In relation to all 12 of the contraventions, the Delegate held that Coeur had contravened section 4.1 of the Permit by failing to take the samples. Further, Coeur was required by section 5.4.1 of the Permit to immediately notify the Director by email of any non-compliance with the requirements of their authorization and take remedial action to remedy any effects of the non-compliance but failed to do so. Wells that were continually reported as destroyed or damaged in quarterly reports or samples that were switched to an annual frequency would have required a direct notification to the Director by email and further correspondence.

[54] Of the 12 contraventions, 11 were missed groundwater level samples and one was a missed water quality sample. A summary identifying the Well, the nature of the missed monitoring, the calendar quarter missed, and the number of samples missed is as follows:

Well #	Missed Monitoring	Dates	Total Missed
11-03-D	Groundwater level	2021 Q1, 2021 Q2, and 2021 Q3	3
10	Groundwater level	2021 Q3	1
39	Groundwater level	2021 Q3	1
65	Groundwater level	2021 Q2 and 2021 Q3	2
68	Groundwater level	2021 Q3	1
87	Water quality and Groundwater level	2020 Q4	2
TH2	Groundwater level	2021 Q3	1
EW1.5-10-24	Groundwater level	2021 Q3	1
		Total	**12**

[55] Having found that 12 contraventions had occurred, the Delegate considered the 12 contraventions together for purposes of assessing an administrative penalty. The Delegate considered all the Factors, assisted by the high-level guidance in the Handbook and the OTBH submissions of Coeur and the Ministry.

Factor (a) Nature of the contravention or failure

[56] The Delegate held the nature of the 12 contraventions under Factor (a) to be "moderate" because failure to conduct required sampling is listed as a moderate

contravention in the Handbook. The Delegate noted, under this factor, that Coeur had been previously advised in 2018, and warned in 2020 and 2022 of their groundwater monitoring requirements of the Permit.

Factor (b) Real or potential adverse effect of the contravention or failure

[57] The Delegate held the real or potential adverse effect of the contraventions under Factor (b) was "medium" as the characterization of groundwater quality is a crucial step in determining the impact of the discharges on the environment. Therefore, these contraventions interfered with the Ministry's ability to protect the environment.

[58] The base penalty reflecting the gravity component of the Penalty—factors (a) and (b)—was therefore confirmed by the Delegate at $10,000 following the applicable base penalty table in the Handbook.

[59] The Delegate then went on to address the application of the penalty adjustment Factors to reflect the unique circumstances, including what happened before, during, and after the failure, and Coeur's OTBH submissions.

Factor (c) Any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the person who is the subject of the determination

[60] The Delegate held that the fact that Coeur had been previously advised in 2018 and warned in 2020 and 2022 of the groundwater monitoring requirements of their Permit called for a 20% increase (+$2,000) in the penalty under Factor (c).

Factor (d) Whether the contravention or failure was repeated, or continuous

[61] Under Factor (d) the Delegate held a 20% increase (+$2,000) in penalty was appropriate for 12 contraventions.

Factor (e) Whether the contravention or failure was deliberate

[62] Under Factor (e) the Delegate accepted that, for a majority of the samples missed, Coeur had attempted to report in their monthly reports that specific Well sites were either damaged, destroyed, or dry. While this did not amount to an answer to the Permit breach, there appeared to be some effort by Coeur to report their missed samples, and a 10% increase (+$1,000) in penalty was appropriate in the circumstances.

Factor (f) Any economic benefit derived by the person from the contravention or failure

[63] When considering Factor (f), the Delegate determined that Coeur had derived economic benefit from the contraventions and increased the base penalty by $10,000. This amount was based on:

- Estimated economic benefit from delaying the estimated costs of retaining a QP to prepare an alternate monitoring program and applying for a Permit amendment by at least four years.
- Estimated economic benefit from delaying Permit amendment fees for four years.

- Estimated avoided sampling analysis and shipping fees of the missed samples.
- Economic benefit from avoiding personnel time to undertake the missed groundwater measurements determined by the "applied value" method described below.

[64] The Delegate was guided in his penalty calculations under Factor (f) by the Ministry's supplement to the Handbook titled "Economic Benefit Guidance for Administrative Monetary Penalty Program under the *EMA* dated May 25, 2022" ("Guidance").[1]

[65] The Delegate employed the "estimated value"[2] method set out in the Guidance to calculate the economic benefit from avoiding or delaying the costs associated with collecting and analyzing samples ($1,062.91) as well as the delayed costs of retaining a QP and developing an alternate monitoring program and applying for a Permit amendment. Estimating the cost of the QP's work at $19,200 and using four years as the length of the delay and an interest rate based on the average central bank rate from 1990-2022 of 5.8% used as an example in the Guidance, the Delegate calculated the economic benefit of delaying the alternate monitoring program as $4,857.13 and the savings from a four-year delay in paying the Permit amendment fee at $101.19. The total for all these items was $5,920.04.

[66] The Delegate then used the "applied value"[3] method set out in the Guidance to calculate the economic benefit from avoiding personnel time to undertake the missed groundwater measurements calculated at $4,100. As set out in the Guidance, the applied value method is used in the absence of true or estimated values and is a percentage increase to the base penalty, calculated based on the nature of the class of entity and class of contravention. Here, Coeur was a class 2 entity, given it has more than 100 employees and the contravention was low cost, for which the Guidance tables suggest a value range of 41-60% of the base penalty. The Delegate used 41%, being the lowest in the applicable range.

[67] Adding all these amounts together, the Delegate found the estimated economic benefit derived by Coeur under Factor (f) to be $10,000 (+$10,000).

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[1] The Guidance identifies several methods as options to determine economic benefit, with the chosen option depending on the available information. The Guidance defines "economic benefit" to be the gross benefit gained by the regulated entity (directly or indirectly), such that removal of the benefit would place the regulated party in the same financial position as if they had complied.

[2] The Guidance defines "estimated value" as an estimated economic benefit acquired by the regulated entity, where the value is modeled on scenarios with a similar regulated entity or contravention. Estimated value is often determined by evidence or information provided by previous administrative penalties and industry experts.

[3] The Guidance defines "applied value" as the amount of economic benefit that acknowledges a gain in the absence of true or estimated values, and it is a percentage increase of the base penalty based on the type of regulated entity and contravention.

Factor (g) Whether the person exercised due diligence to prevent the contravention or failure

[68] The Delegate held that no adjustment would be applied under Factor (g).

Factor (h) The person's efforts to correct the contravention or failure

[69] Under Factor (h) the Delegate held that a 30% decrease (-$3,000) in base penalty was appropriate in the circumstances. In addition to having a QP review their monitoring program, Coeur provided the Delegate with a summary of their efforts to ensure they were in compliance with the sampling requirements of the Permit.

Factor (i) The person's efforts to prevent recurrence of the contravention or failure

[70] Under Factor (i), the Delegate held that a 30% decrease (-$3,000) in base penalty was appropriate in the circumstances. Coeur explained that they have received a Permit amendment and progress is underway to improve their program. Coeur had shown an effort to improve their monitoring program and the Permit amendment addresses the stated non-compliances and changes in the groundwater monitoring program.

Factor (j) Any other factors that, in the opinion of the director, are relevant

[71] Under Factor (j) the Delegate held no adjustment would be applied.

Conclusion on Penalty Amount

[72] After determining a base penalty of $10,000 for the contraventions and applying the mitigating and aggravating Factors (+$9,000), the Delegate set the Penalty in the Determination at $19,000.

ISSUES

[73] Based on the submissions of the parties, I have considered the following issues on this appeal:

a. Whether the evidence on this appeal supports a finding of 10 contraventions as submitted by Coeur, or 12 contraventions as found by the Delegate; and

b. Whether the Penalty for Coeur's contraventions of section 4.1 of the Permit should be confirmed, reversed or reduced, taking into account the evidence and the Factors.

RELEVANT LEGISLATION

[74] The relevant sections of the *EMA* and the *Regulation* are summarized or reproduced where they are referred to in this decision.

DISCUSSION AND ANALYSIS

a. Was the number of contraventions 12 or 10?

Coeur's submissions

[75] The Delegate held in the Determination that Coeur had failed to monitor groundwater levels or water quality in breach of section 4.1 of the Permit on 12 occasions. In its Notice of Appeal, Coeur submitted that the Delegate erred in finding that nine of the 12 groundwater samples had been missed. However, Coeur's position evolved in its written submissions.

[76] The 12 failures to monitor found by the Delegate included two groundwater samples that Coeur had agreed at the OTBH that it had missed from Well 65 for 2021 Q2 and Q3. In its submissions in this appeal, Coeur now submits that since the OTBH, it has reviewed its records and determined that those two groundwater samples had in fact been taken and reported for Well 65, making the total number of contraventions 10.

[77] Coeur has provided the Board with an affirmed statement from its Environmental Manager for Silvertip that was not put before the Delegate at the OTBH. It states:

> Upon further review of Coeur's records, it was discovered that its personnel did in fact attend at Well 65 in 2021 Q2 and Q3 to take water level measurements; they recorded that the well was dry, meaning that the depth to water was greater than the depth of the well.

Director's submissions

[78] With respect to the two groundwater samples that Coeur had agreed at the OTBH that it had missed from Well 65 for 2021 Q2 and Q3, and now asserts it had monitored groundwater levels as required by the Permit, the Director submits that Coeur has failed to provide any documentary evidence in support of this claim and has failed to explain why it stated in multiple submissions to the Ministry that Well 65 was not monitored as required under the Permit. The Director points to written statements by Coeur to the Ministry in December 2020 and February 2021 and to the Delegate at the OTBH that measurements were not taken at Well 65 as the Well was covered by a drill pad and/or destroyed. The Director submits that on the totality of the evidence, it is more likely than not that Well 65 was not monitored as required by the Permit. In the alternative, if the Board accepts Coeur's submissions on Well 65, the Director submits this is a minor adjustment to the number of contraventions and should not affect the total Penalty quantum.

Panel's findings on the number of contraventions

[79] Before considering whether the Penalty should be confirmed, reversed or reduced, I will address the evidence on this appeal and the submissions of the parties on whether the two groundwater samples that Coeur had agreed at the OTBH that it had missed from

Well 65 for 2021 Q2 and Q3 were in fact missed. If I find they were in fact missed, then the number of contraventions of section 4.1 of the Permit will remain at 12, as found by the Delegate. If I find they were not missed, then the number of contraventions of section 4.1 of the Permit will be reduced to 10.

[80] No documentary evidence was provided by Coeur in support of the statement from its Environmental Manager. If Coeur's personnel "recorded" that Well 65 was dry, as stated by its Environmental Manager, there should have been a written record available to Coeur to support this assertion, but no such record has been put forward in evidence on this appeal.

[81] The Director points to written statements by Coeur to the Ministry in December 2020 and February 2021 and to the Delegate at the OTBH that measurements were not taken at Well 65 as the Well was covered by a drill pad and/or destroyed.

[82] I agree with the Director that the statement from the Environmental Manager is inconsistent with Coeur's other repeated explanations for its failure to make the requisite groundwater measurements at Well 65. This inconsistency is not explained by Coeur's Environmental Manager in her statement.

[83] On the totality of the evidence, I find that it is more likely than not that Well 65 was not monitored as required by the Permit in 2021 Q2 and Q3. In result, I confirm the Delegate's finding of 12 contraventions of section 4.1 by Coeur.

[84] I will now consider the Delegate's Penalty assessment, considering the 12 contraventions together.

b. Should the Penalty be confirmed, reversed or reduced?

Assessment of the administrative penalty

Coeur's Submissions

[85] As a starting point, Coeur submits that in the circumstances of this case, it was not reasonable to assess any administrative penalty for the contraventions.

[86] While Coeur does not dispute that it failed to conduct the requisite monitoring on a number of occasions, it submits that many of these Wells were either damaged or destroyed (which it had reported in its monthly and annual reports) and that the other Wells were not monitored on a quarterly basis as required by the Permit, as Coeur had set monitoring annually rather than quarterly, relying on the draft WMAMP prepared by its QP.

[87] Coeur says it was actively working to amend the Permit to reflect these changes, spending over $350,000 on groundwater monitoring program improvements since 2021, and that many of these Wells were subsequently removed when the Permit was amended in December 2022.

[88] Coeur submits the non-compliances at issue were minor and did not cause any actual or potential adverse impacts to the environment or human health as demonstrated by the removal of the requirement to monitor most of the Wells in question under the amended Permit.

[89] The decision whether to impose the Penalty under section 115 of the *EMA* is discretionary. The Handbook sets out that the imposition of a penalty should:

a. aim to deter future contraventions;

b. aim to eliminate any financial gain or benefit from the contraventions;

c. be responsive and consider what is appropriate for the offender and the regulatory issue; and

d. be proportionate to the nature of the offence and the harm caused.

[90] Coeur submits that, in the above circumstances, the imposition of the Penalty was inappropriate and should be reversed. In the alternative, Coeur submits that the Penalty should be reduced.

Director's submissions

[91] The Director submits that Coeur failed to conduct groundwater monitoring at the eight Wells in question for a total of 12 occasions from 2020 Q4 through 2021 Q3, as determined by the Delegate. Coeur stated that these failures were due to Wells having been damaged or destroyed by its mining operations, or due to a change Coeur made in its monitoring schedule based on its QP's draft WMAMP; however, the Director submits this is not an answer to the fact that the Permit contraventions occurred.

[92] In support, the Director refers to section 6 of the *Regulation* which provides that administrative penalties are imposed on an absolute liability basis. Therefore, relying on *Mount Polley Mining Corporation v Environmental Appeal Board,* 2022 BCSC 1483, paras. 64-69 (*Mount Polley*), [confirming the Board decision on this point in *Mount Polley Mining Corporation v Director, Environmental Management Act*, EAB_EMA_21-A001(a)], the defences of due diligence or impossibility of compliance are not available under the administrative penalty regime as set out in the *EMA* when determining whether Coeur contravened the Permit. However, due diligence is listed as a Factor in determining the penalty amount (Factor (g)).

[93] The Director submits the $19,000 Penalty imposed was reasonable in that it is consistent with the evidence, statutory scheme, and the Ministry's guidance documents on administrative penalties.

[94] The Director relies on Board decisions including *MTY Tiki Ming Enterprises Inc. v Director, Environmental Management Act*, 2016-EMA-120(a) (*MTY Tiki Ming*) and *93 Land Company v Director, Environmental Management Act*, EAB-EMA-22-A007(a) (*93 Land*), which confirmed that when assessing the appropriate quantum for an administrative penalty, an important consideration is whether the penalty will serve as an effective deterrent and

promote future compliance by both the non-compliant person specifically and other regulated persons more generally. To be a true deterrent, the penalty must go beyond simply restoring compliance. If the quantum is set too low, companies may be more likely to take their chances and only comply after they are caught.

Panel's findings

[95] Coeur submits that in the circumstances of this case, no administrative penalty should have been imposed, or alternatively, the amount of the Penalty should be reduced. In response, the Director submits the $19,000 Penalty imposed was consistent with the evidence, statutory scheme, and the Ministry's guidance documents on administrative penalties.

[96] As already noted, by virtue of section 6 of the *Regulation,* absolute liability applies in the context of an administrative penalty for a contravention. This interpretation of section 6 has been confirmed in *Mount Polley* as referenced in the Director's submissions. Further, as found by the Delegate, Coeur failed to take the samples, or to comply with the requirements of section 5.4.1 of the Permit to immediately notify the Director via the specified email of any non-compliance with the requirements of their authorization and to take remedial action to remedy any effects of the non-compliance.

[97] I am satisfied that given the background facts summarized above in this decision, the Delegate reasonably exercised his discretion under section 115 of the *EMA* in deciding that the imposition of an administrative penalty was called for in relation to the contraventions in question. I agree that the imposition of a penalty is appropriate in the circumstances. The number and nature of Permit contraventions found to have occurred raise concerns for the protection of the environment mandated by the *EMA* which are appropriate to address by way of an administrative penalty. The objectives of general and specific deterrence of future contraventions would not be met if no penalty was imposed. Therefore, the question is whether the quantum of Penalty for Coeur's Permit contraventions was appropriate.

[98] I have considered the parties' submissions and evidence presented in this appeal in the context of the maximum administrative penalty for contravening section 4.1 of the Permit being $40,000 (as set out in the *Regulation*), as well as the relevant Factors. I will consider each of the Factors, if applicable, in the context of the 12 contraventions of section 4.1 of the Permit, taken together, before confirming, reversing or reducing the Penalty. My primary focus will be on the three Factors where the Delegate's findings have been put in issue by the Appellant.

[99] An important objective of assessing the amount of penalty is to promote deterrence and future compliance by both Coeur specifically and other persons subject to the *EMA* generally. I agree with the statements in *MTY Tiki Ming* and *93 Land* referenced in the Director's submissions that to be a true deterrent, the administrative penalty must go beyond simply restoring compliance. If the quantum is set too low, companies may be

more likely to take their chances on getting caught and only comply when they are caught.

[100] The Director took the Handbook into account when assessing the Penalty. While not binding on a statutory decision maker, the Handbook contains guidance to assist statutory decision makers in ensuring that the principles of administrative fairness are upheld when making decisions that impact a person's rights or interests when determining the appropriate quantum of penalty under the Factors. Accordingly, I have been guided by the Handbook in my consideration of the Penalty on this appeal.

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

Consideration of the Factors and whether the Penalty should be confirmed, reversed or reduced

Coeur's submissions

[102] Coeur acknowledges that the Delegate assessed all the Factors, but submits that he erred in his findings when considering:

- Factor (b) the real or potential adverse effect of the contravention or failure;
- Factor (c) any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the person who is the subject of the determination; and
- Factor (f) any economic benefit derived by the person from the contravention or failure.

[103] Coeur does not dispute the Delegate's assessment of the remaining Factors and made no submissions on Factors other than Factors (b), (c), and (f).

Factor (b) - The real or potential adverse effect of the contravention was "low to none"

[104] Coeur submits the real or potential adverse effect of the contravention under Factor (b) was "low to none" and not "medium" as held by the Delegate. Accordingly, the base penalty should be reduced from $10,000 to $5,000 to be consistent with the Handbook.

[105] Referencing the Handbook, Coeur submits that the "low to none" classification under Factor (b) is appropriate where the contravention did not result in an immediate adverse effect or interfere with the Ministry's capacity to protect the environment or human health, or the potential to do so is low. Unauthorized discharges or permit exceedances with no discernable environmental or human health impacts may also be classified as "low to none."

[106] In support of its position, Coeur relies on previous Board decisions in *Randy Carrell, doing business as Iron Mask Trailer Park v. Director, Environmental Management Act*, 2019 BCEAB 24, ("*Carrell*"), and *1782 Holdings Ltd. v Director, Environmental Management Act*, 2024 BCEAB 2, ("*1782 Holdings*").

[107] In *Carrell* (at para. 106) the Board characterized the potential adverse effects of non-compliance with a permit requirement to report or notify the Director of water quality exceedances as "low". In *1782 Holdings* (at para. 105), the Board characterized the potential adverse effects of a failure to meet permit annual reporting requirements for effluent and groundwater data as "low" because this failure did not result in direct adverse effects.

[108] Coeur submits that similar to the facts in *1782 Holdings*, here Coeur's Permit contraventions have not caused any direct adverse effects. Coeur submits the fact that the amended Permit does not currently require monitoring at the Wells in question indicates that there is minimal potential for adverse effects associated with failure to monitor these Wells, and that failure to monitor these Wells had little potential to interfere with the Ministry's capacity to protect the environment or human health.

Factor (c) - The previous warnings and advisories issued to Coeur are not previous contraventions

[109] In his Determination, the Delegate characterized the Advisory Letter and Warning Letters sent by the Ministry to Coeur as previous contraventions, justifying a 20% increase in the base penalty under Factor (c). Coeur submits that this finding contradicts the guidance set out in the Handbook and the Board's decision in *1782 Holdings.* In result, Coeur submits the 20% increase in the base penalty should be reduced to zero.

[110] The Handbook (at p. 39) states that evidence to support an increase to the base penalty under Factor (c) should not include prior enforcement responses to the current contravention (e.g., advisories or warnings that preceded the administrative penalty). The Handbook states that previous enforcement responses to the same contravention are better considered under Factor (d) as repeated or continuous contraventions.

[111] In *Carrell,* the Board refused to consider prior warning letters as previous contraventions stating at para. [62]:

> The letters document the Ministry's investigations and conclusions that contraventions had occurred. However, no formal determination of contravention (or administrative penalty) was issued as a result of the events documented in those letters. Therefore, I find that no amount should be added to the base penalty for previous contraventions.

[112] In *1782 Holdings* (at para. 70), the Board reaffirmed that warning letters or other similar communications should not be considered under Factor (c) concluding only orders or formal findings of a contravention, such as previous determinations of administrative

penalties or violation tickets issued under section 120(7) of the *EMA*, are properly considered under Factor (c) of the Penalties *Regulation*.

[113] Coeur submits the approach taken by the Board in *Carrell* and *1782 Holdings* on this point is sound and fair.

Factor (f) - The Delegate's estimate of economic benefit derived from the contraventions is unreasonable

[114] Coeur challenges the reasonableness of the Delegate's calculation of economic benefit of $10,000.

[115] Coeur relies on the Handbook for the proposition that the test for estimating economic benefit under Factor (f) is reasonableness and says that the Delegate's findings were unreasonable.

[116] With respect to the $4,100 amount (based on 41% of the base amount determined by the Delegate using the "applied value" method), associated with personnel time saved from not monitoring the Wells in question, Coeur estimates this amount values the personnel time saved at approximately $455 per hour which is a grossly inflated rate. Coeur personnel were already on-site monitoring other Wells and the failure to monitor the Wells in question yielded minimal economic benefit.

[117] With respect to the $5,920 amount associated with avoiding or delaying the costs associated with collecting and analyzing samples as well as the development of an alternate monitoring program, Coeur disputes the use of a four-year time period as a basis for this estimation. Coeur only acquired Silvertip in October 2017 and began the process to retain its QP after it received the First Warning Letter and before the first alleged contravention in 2020 Q4. Coeur submits it was actively working to improve the groundwater monitoring program at Silvertip when the matter was referred for administrative penalty. Coeur therefore submits that there was no delay, or minimal delay that was reasonable in the circumstances, with respect to QP retention and development of an alternative monitoring program. Coeur submitted its Permit amendment application in a timely basis in May 2022 after assessment by its QP. The time taken to submit this application should not be interpreted as a delay, but rather as a reasonable amount of time to develop a thorough permit amendment application.

[118] Further, they submit that the 5.8% interest rate used by the Delegate is unreasonable. Neither the Handbook, the Guidance, the *Regulation* nor the *EMA* dictates the interest rate that the Director must use in estimating economic benefit. The Delegate used the Bank of Canada's average rate between 1990 and 2022, which was 5.8%. This rate is much higher than the actual average rate during the period covered by the Penalty, which was 0.25%. A more appropriate and reasonable rate is easily ascertainable from Bank of Canada records and should be used instead of the 1990-2022 rate, where applicable for this Penalty.

[119] Coeur submits that the economic benefit associated with the contraventions was minimal and the upward adjustment under Factor (f) should be eliminated from the Penalty.

[120] Coeur submits that the fact that it spent over $350,000 on improving its groundwater monitoring program since 2021 should be considered when estimating whether any economic benefit derived from the contraventions.

[121] Coeur submits that a reduction in Penalty is consistent with the principles underlying an administrative penalty. This is the first administrative penalty for Coeur. The non-compliances subject to the Penalty did not cause any harm. Coeur took no financial gain or benefit from the non-compliance and was, in fact, spending significant sums to ensure future compliance with the Permit. The imposition of the Penalty was therefore not necessary to deter future contraventions.

Director's submissions

[122] The Director submits that the Delegate's determinations and assessments of the Factors that Coeur does not dispute on appeal were reasonable and should be confirmed by the Panel. With respect to Factors (b), (c) and (f), put in issue by Coeur, the Director submits as follows.

Factor (b) Real/potential adverse effects of the contraventions or failures

[123] The Director sets out the language from the Handbook describing both "medium" and "low to none" adverse effects. I have set out that language in my findings below.

[124] Section 4.1 of the Permit establishes a comprehensive groundwater monitoring program. Results from the monitoring were essential for the Ministry to have an accurate understanding of the impact on groundwater around Silvertip, including the characteristics of flow, and water quality of groundwater. Without this information, there would be no way for the Ministry to respond promptly or effectively to any adverse effects occurring at the mine. Coeur's failure to monitor the Wells on 12 occasions from 2020 Q4 through 2021 Q3 interfered with the Ministry's capacity to protect the environment.

[125] The amendment to the Permit in 2022 further illustrates the importance of section 4.1 and Appendix B. While it is true that the Director removed some of the monitoring locations at issue in this appeal, the Director also added other monitoring locations at various sites around the mine and made changes to the type and frequency of monitoring required at many of the sites.

[126] Accordingly, the Director submits that the Delegate reasonably concluded that the adverse effect was "medium" and not simply administrative in nature. The Delegate reasonably held that the characterization of the groundwater quality is a crucial step in determining the impact of the discharges on the environment; therefore, Coeur's failure to conduct required groundwater monitoring interfered with the Ministry's capacity to

protect the environment. Imposing a base penalty of $10,000 as suggested in the Handbook was appropriate.

Factor (c) Previous contraventions or failures

[127] The Director submits it was reasonable in the unique circumstances of this case for the Delegate to conclude that the prior conduct of Coeur amounted to previous contraventions of section 4.1 of the Permit and to increase the base penalty by 20% as a result.

[128] While the Director acknowledges that in *1782 Holdings,* the Board held there must be a formal finding of a contravention or administrative penalty imposed to increase the penalty for this Factor, the Director relied on *Western Aerial Applications Ltd. v. Administrator, Integrated Pest Management Act,* 2021 BCEAB 7, 2021 BCEAB 7 ("*Western Aerial*") for the proposition that an advisory or warning letter, in conjunction with other evidence, might support an increase to the penalty under section 7(1)(c). In *Western Aerial*, while no such finding was made on the facts in that case, the Board acknowledged at paras. 69 and 70 that it was at least possible for an advisory or warning letter from the Ministry to result in an increase to the penalty.

[129] The Director sets out the relevant language of Factor (c) and the definition of the phrase term "contraventions or failures" in the *Regulation.* I have set out that language in my findings below.

[130] The Director submits that the definition of "contraventions or failures" as used in Factor (c) should be interpreted broadly and is not limited to contraventions that have been subject to tickets, administrative penalties, order or other "formal" statutory decisions.

[131] They say that from reading Factor (c) as a whole, referring to "previous contraventions or failures" as well as "administrative penalties" or "orders", it is clear that Cabinet intended for the Director to consider both contraventions for which penalties or orders had been issued and contraventions for which no penalties or order had been made. Otherwise, the reference to "previous contraventions or failures" would be meaningless.

[132] On the facts here, Coeur did not dispute that it had contravened section 4.1 of the Permit when it received the First and Second Warning Letters, but rather said it would work to improve its performance. In its OTBH submissions, as well as in its submissions in this appeal, Coeur had the opportunity to dispute that it had contravened section 4.1 of the Permit in 2019 and 2020 but did not.

Factor (f) Economic benefit derived by the person from the contravention

[133] The Director submits it was reasonable for the Delegate to increase the base penalty by $10,000 for the economic benefit derived by Coeur from the contraventions.

[134] With respect to the four-year period that the Delegate held Coeur had taken to seek an amendment to its Permit, Coeur had known since at least 2017 that many of the Wells listed in Appendix B of the Permit were destroyed or dry and the Permit had required regular monitoring at those Wells since an amendment to the Permit in June 2018. There was at least a four-year delay between the time when Coeur knew that the Permit needed to be amended and when it submitted its application for an amendment in May 2022. The Delegate's calculation of delayed costs using a four-year period was reasonable in the circumstances.

[135] The Director submits that using the average central bank rate from 1990-2022 of 5.8% was also reasonable.

[136] The Director submits that the Delegate using the "applied value" method to estimate avoided personnel time in the absence of true or estimated costs was reasonable. The increase of 41% was consistent with the Guidance. Coeur has failed to provide any evidence to the Delegate or on this appeal to allow for a calculation of the true or estimated costs of personnel time saved by not complying with section 4.1 of the Permit, and accordingly the Delegate's methodology and conclusion on this issue is reasonable.

[137] The Director submits that Coeur's expenses incurred to comply with the Permit and to seek an amendment to the Permit should not be considered under this Factor as such expenses are not relevant to the question of economic benefit resulting from non-compliance. Doing so would result in an administrative penalty that is ineffective in deterring future non-compliance by Coeur and similar permit holders. Also, these expenses incurred by Coeur were acknowledged by the Delegate in significantly reducing the base penalty by 60% under Factors (h) and (i) [the person's efforts to correct the contravention and prevent a reoccurrence].

[138] Having considered all of the applicable Factors, the Director says the Penalty of $19,000 was appropriate and reasonable in the circumstances in order to ensure future compliance and to deter similar mine operators from contravening their discharge permit terms.

Coeur's reply

[139] The Director's position under Factor (c) [previous contraventions], that Coeur's failure to specifically deny prior contraventions in response to the Advisory or Warning Letters was an admission of prior contraventions, is unsupportable. The Handbook and previous decisions of the Board, including *Carrell* and *1782 Holdings* both pre-dating and post-dating *Western Aerial*, provide permittees comfort that advisory or warning letters will not constitute previous contraventions. Given the lack of legal remedy to appeal guidance, it is to be expected that parties would not expressly deny every alleged non-compliance in an advisory or warning letter.

[140] If the Advisory or Warning Letters were to be part of the basis for the Penalty, they should have been included as alleged contraventions subject to penalty affording Coeur an opportunity to defend itself against such allegations. They were not. Instead, the Delegate unfairly (and contrary to the Handbook guidance) treated the Advisory and Warning Letters as prior contraventions to the prejudice of Coeur.

Panel's findings on the Factors and whether the Penalty should be confirmed, reversed or reduced

[141] On this appeal, Coeur acknowledges that the Delegate assessed all the Factors and does not dispute the Delegate's assessments other than with respect to Factors (b) real or potential adverse effect, (c) any previous contraventions or failures, and (f) any economic benefit derived. Since this is a new hearing, I can consider all of the Factors, including those that were not disputed by Coeur, to reach a conclusion on whether the Penalty should be confirmed, reversed or reduced. As my findings on Factors not disputed by Coeur did not prejudice either party, there are no concerns with whether the parties were aware that the new hearing could involve consideration of undisputed factors.

[142] I will now consider all the Factors in sequence with particular emphasis on those in which the Delegate's findings are in dispute.

Factor (a) Nature of the contraventions

[143] The Delegate held the nature of the contraventions was "moderate" because failure to conduct required sampling is considered to be a moderate contravention in the Handbook. The Delegate noted that Coeur was previously advised and warned of the groundwater monitoring requirements of the Permit. This assessment was not challenged by Coeur on appeal.

[144] As stated in the Handbook, categorization of the nature of a contravention is linked to how important compliance with the requirement is to the Ministry's ability to regulate discharges or otherwise protect the environment. In describing a 'moderate" contravention, the Handbook specifically includes failure to undertake required monitoring as an example. I find the Delegate's assessment that the contraventions of section 4.1 of the Permit were "moderate" in nature was reasonable and confirm it.

Factor (b) Real/potential adverse effects of the contraventions

[145] The Delegate held the "real or potential adverse effect of the contraventions" was "medium" as the characterization of groundwater quality is a crucial step in determining the impact of the discharges on the environment. Therefore, these contraventions interfere with the Ministry's ability to protect the environment.

[146] The Handbook states that the categorization under Factor (b) relates to the real or potential harm the contravention has on the environment, human health or safety. The focus of this characterization should be on how serious the actual or potential harm is. Potential adverse effects are an important consideration when considering the gravity of

the contravention, although they may not be given the same weight as actual adverse effects.

[147] On the evidence on this appeal, we are not dealing with real adverse effects resulting from Coeur's contraventions. I agree with the Delegate's finding that Coeur's Permit breaches denied the Ministry data concerning the groundwater quality at Silvertip. I find that these contraventions could therefore interfere with the Ministry's ability to protect the environment. Accordingly, I find that the Ministry being deprived of data relevant to the determination of groundwater quality, which may or may not have led it to take steps to protect the environment, resulted in a potential adverse effect on the environment.

[148] Reference has been made in the parties' submissions to the guidance in the Handbook on the assessment of whether the real or potential adverse effects are medium or low and the characteristics of each category. The Handbook descriptions of the categories "low to none" and "medium" adverse effects are as follows:

> **Low to None**: the contravention does not result in an adverse effect or interfere with the Ministry's capacity to protect the environment or human health, or the potential to do so is low. Generally, administrative requirements fall into this category – providing security; not signing a stewardship plan; or it could include an unauthorized discharge or permit exceedance with no discernable environmental or human health impact.
>
> **Medium**: 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. Any effect is localized, short-term and can be mitigated or damage repaired within a reasonable timeframe.

[149] Both of the above descriptions from the Handbook identify two different but related possible results of a contravention upon which the seriousness of the actual or potential adverse effects should be assessed.

[150] One possible result is described in both categories as the contravention resulting in an "adverse effect" (under the "low to none" category), or "significant adverse effect", (under the "medium" category). The Handbook makes clear that the focus of Factor (b) is on the real or potential harm the contravention has on the environment, human health or safety. Accordingly, I find that the "adverse effect" referred to in both descriptions is referencing adverse effects on the environment, human health or safety resulting from the contravention. In the "low to none" category, the potential of the contravention resulting in an "adverse effect" is described as "low". In the "medium" category, the potential of the contravention resulting in a "significant adverse effect" is described as "moderate".

[151] The other possible result from a contravention described in both categories is "interfering with the Ministry's capacity to protect the environment or human health". I find that "interfering with the Ministry's capacity to protect the environment or human health" is intended to mean something other than "adverse effect" as they are addressed as separate considerations in both categories. Logically, this possible impact of a contravention is relevant as if the Ministry's capacity to protect the environment or human health is interfered with, it could potentially result in inaction by the Ministry that could result in an otherwise avoidable "adverse effect" on the environment or human health.

[152] The Delegate determined that Coeur's contraventions interfered with the Ministry's capacity to protect the environment or human health. However, the Delegate did not address whether the resulting potential for "adverse effects" on the environment was low ("low or none" category) or, alternatively, whether the potential for "significant adverse effects" on the environment was moderate ("medium" category). This question is a critical element of the guidance for Factor (b) from the Handbook, to assist in determining whether potential adverse effects of a contravention is "medium" or "low." It follows that the Delegate's characterization of the potential adverse effects of the contraventions as "medium" as opposed to "low" is incomplete.

[153] Coeur submits the non-compliances at issue did not cause any actual or potential adverse impacts to the environment or human health. The description of "low to none" in the Handbook says it could include an unauthorized discharge or permit exceedance with no discernable environmental or human health impact as was the case here.

[154] In support, Coeur relies on findings made in both *Carrell* and *1782 Holdings* where, it submits, in factual circumstances similar to this case, the potential adverse effects under Factor (b) were categorized as being "low". Similar to the facts in *1782 Holdings*, here Coeur's Permit contraventions have not caused any direct adverse effects.

[155] *Carrell* involved an appeal from a determination by a decision maker under the *EMA*, issuing a penalty for failure to comply with a sewage effluent discharge permit for a treatment system at a trailer park. When considering the appropriate penalty for contravening the permit requirement to provide reporting and notification to the Ministry, the Panel in *Carrell* agreed with the decision maker below that the potential adverse effect on the environment was "low", but without further comment. Accordingly, I do not find this decision of assistance on this point other than to confirm that contraventions of reporting requirements of discharge permits can be categorized as "low" under Factor (b).

[156] I find *1782 Holdings* to be of more assistance in my analysis. *1782 Holdings* was an appeal from an administrative penalty issued for failure to comply with a wastewater discharge permit for two wastewater treatment facilities at Lake Okanagan Resort. Part of the penalty was in relation to the failure to comply with a permit requirement to submit data reports of effluent and groundwater analyses, flow measurements, and groundwater elevations to the Ministry, similar to section 4 of the Permit in this case. The Panel in *1782 Holdings* held at para. 105:

> The failure to maintain and report data affects the Ministry's ability to assess compliance with the Permit's effluent limits. The reports for the 2020-2021 penalty assessment period were submitted, however, they were submitted late. The potential for adverse effects to the environment is low because this failure in itself does not physically affect the environment. Therefore, I find the nature of the contraventions to be minor. I find a base penalty of $1,000 is appropriate for this contravention.

[157] The finding in *1782 Holdings* provides an example where Factor (b) has been characterized as "low" when the contravention interferes with the Ministry's ability to assess compliance with the Permit's effluent limits, but the contravention does not physically affect the environment and is minor in nature.

[158] The Director's submissions focus on and support the Delegate's finding that Coeur's failure to monitor the Wells on 12 occasions from 2020 Q4 through 2021 Q3 interfered with the Ministry's capacity to protect the environment, justifying his "medium" assessment under Factor (b) making the $10,000 base penalty appropriate.

[159] I agree with the Director's submission that results from Coeur's groundwater monitoring program, as required by the Permit, were important for the Ministry to have an accurate understanding of the impact on groundwater around Silvertip, including the characteristics of flow, and water quality of groundwater. I also agree that the absence of this data from Coeur could therefore interfere with the Ministry's ability to protect the environment. However, in my opinion, a finding of potential interference with the Ministry's capacity to protect the environment is not determinative of the matter without also considering the far more important factual questions of whether the potential for "significant adverse effects" on the environment resulting from that interference was moderate (associated with the "medium" category), or, if not, whether the potential for "adverse effects" on the environment resulting from that interference was low (associated with the "low or none" category).

[160] I also cannot accept the Director's submission to the effect that the "low to none" category is limited to contraventions that are "simply administrative in nature". The Handbook description expressly contemplates potential adverse effects as a characteristic of a contravention within the "low to none" category. Such a contravention is not "simply administrative in nature". As pointed out in Coeur's submissions, the description of "low to none" contraventions in the Handbook provides that "it could include an unauthorized discharge or permit exceedance with no discernable environmental or human health impact." This example is also not "simply administrative in nature."

[161] Based on the evidence and submissions from the parties in this appeal, I have considered whether any interference with the Ministry's ability to protect the environment arising from Coeur's contraventions resulted in either a moderate potential for "significant adverse effects" on the environment as contemplated in the Handbook description of

"medium" or alternatively, a low potential for "adverse effects" on the environment as contemplated in the Handbook description of "low to none".

[162] The history of the interactions between the Ministry and Coeur concerning the Ministry's repeated assertions that Coeur was out of compliance with section 4.1 of the Permit is relevant to the question of whether Coeur's failure to provide the required groundwater data resulted in moderate potential for significant adverse effects on the environment or alternatively a low potential for adverse effects on the environment.

[163] In December 2018, the Ministry issued a non-compliance Advisory Letter to Coeur indicating that, based on a review of Coeur's 2017 Annual Monitoring Report, certain Wells were not monitored in accordance with the Permit. In January 2020, the Ministry issued a First Warning Letter advising Coeur that it had failed to monitor Wells including those in question on this appeal in 2018. In January 2021, a Second Warning Letter addressing non-compliance with section 4.1 of the Permit during 2019 and 2020 was sent by the Ministry to Coeur. No further enforcement action was taken by the Ministry with respect to those alleged failures to provide the required groundwater data to the Ministry for the years 2017 through 2020. The Ministry sought to impose an administrative penalty only in relation to non-compliance with section 4.1 of the Permit from 2020 Q4 to 2021 Q3, including the 12 instances found to be contraventions in this case.

[164] If the failure to provide groundwater data as required by section 4.1 of the Permit was seen by the Ministry as resulting in a moderate potential for "significant adverse effects" on the environment, then I would have expected the Ministry to take more enforcement action than it did with respect to Coeur's alleged non-compliance for the four years from 2017 through 2020. A moderate potential for "significant adverse impacts" would call for a significant response from the Ministry, which was absent on the facts of this case.

[165] I find that the enforcement history supports a finding that Coeur's failure to provide required groundwater data on 12 occasions from 2020 Q4 through 2021 Q3 in contravention of the Permit had a low potential for adverse effects on the environment.

[166] On the facts on this appeal, I find that the potential adverse effects of Coeur's contraventions are more appropriately categorized as "low" under Factor (b) and not "medium" as was held by the Delegate. I vary the assessment of Factor (b) to low.

[167] Accordingly, having found the nature of the contraventions to be "moderate" under Factor (a) and the potential adverse effects of the contraventions to be "low" under Factor (b), I vary the base penalty from $10,000 to $5,000 to be consistent with the base penalty tables in the Handbook.

Factor (c) Previous contraventions or failures

[168] The relevant portion of Factor (c) in effect at the times relevant to this appeal states:

(c) any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the following:

(i) the person who is the subject of the determination;

[169] The *Regulation* defines "contraventions or failures" as follows:

"contravention or failure" means

(a) a contravention of a prescribed provision of the Act or the regulations,

(b) a failure to comply with an order under the Act, or

(c) a failure to comply with a requirement of a permit or approval issued or given under the Act.

[170] The Handbook provides guidance on what should be considered under Factor (c). Relevant to this appeal, the Handbook states:

> This factor considers the person's compliance history. This can include 'determined contraventions' – tickets, previous administrative penalties, administrative sanctions and prosecutions – as well as advisories and warnings (although be aware there are conflicting appeal decisions on including these). Where a person may not have had an opportunity to respond to the alleged non-compliance, they may challenge its use as an aggravating factor.

[171] The Delegate held that the fact that Coeur had been previously advised in 2018 and warned in 2020 and 2022 of the groundwater monitoring requirements of their Permit called for a 20% increase in penalty under Factor (c).

[172] The Delegate's stated reasons for increasing the Penalty by 20% was that Coeur had been previously advised in 2018 and warned "in 2020 and 2022" of the groundwater monitoring requirements of their Permit. I read the reference to 2022 as a minor drafting error and find it should have referred to 2021. The evidence on this appeal shows that the 2018 "advice" Coeur received was through the December 2018 Advisory Letter. The "warnings" were through the January 2020 First Warning Letter and the January 2021 Second Warning Letter. I will proceed on the basis that these are the advisory and warnings relied upon by the Delegate.

[173] In February 2022, the Ministry issued an Administrative Penalty Referral Letter to Coeur for failure to monitor the Wells that was a prior enforcement response to the current contraventions that the Handbook makes clear would be inappropriate to consider under Factor (c). I find the Delegate was not referring to that correspondence in his reasons under Factor (c).

[174] The question then is whether it was appropriate for the Delegate to rely on the previous Advisory Letter or Warning Letters unrelated to the current contravention under this Factor.

[175] Coeur relies on the Board's decisions in *Carrell* and *1782 Holdings,* and the Director relies on *Western Aerial.* I will now address each of these referenced decisions in turn.

[176] In *Carrell* the permit contraventions in question occurred between 2017 and 2019. At the time relevant to the appeal in *Carrell,* Factor (c) in the *Regulation* read:

> (c) any previous contraventions, administrative penalties imposed on, or orders issued to the person who is the subject of the determination.

Accordingly, the phrase "contraventions or failures" was not considered by the panel in *Carrell.* I note that the phrase "contravention or failure" was defined in the *Regulation* at the time as the same definition as the current version of the *Regulation*. However, while the phrase was used in other Factors listed in section 7(1), it was not used in Factor (c).

[177] In *Carrell,* when considering Factor (c), the Panel noted the Director had considered whether prior warning and investigation letters could be considered previous contraventions but did not increase the penalty in respect of that factor. In agreeing with that finding the Panel held at para. 62:

> The letters document the Ministry's investigations and conclusions that contraventions had occurred. However, no formal determination of contravention (or administrative penalty) was issued as a result of the events documented in those letters. Therefore, I find that no amount should be added to the base penalty for previous contraventions.

[178] I read the forgoing finding in *Carrell* as an interpretation of prior "contraventions" as used in Factor (c) pre-dating the above-described changes in the *Regulation* as having to be more than allegations from the Ministry that a contravention had occurred.

[179] In *Western Aerial* referred to by the Director, the Panel was also considering the Factors at a time when, like in *Carrell*, the description of Factor (c) did not yet include the phrase "contraventions or failures". It was in the context of the absence of that language, that the Panel considered the possibility of adding an amount to the base penalty for previous contraventions by the appellant by reason of a historical advisory letter from the Ministry regarding another contravention. The Panel found that the advisory letter provides evidence of the Ministry's view that there had been a contravention by the appellant but did not lead to an opportunity for the appellant to make submissions to the decision maker below in response to the Ministry's allegations. Based on the evidence before him, the Panel decided not to add an amount to the base penalty based on the historical advisory letter. This statement implies that the panel might have considered the advisory letter under Factor (c) if it had led to an opportunity for the appellant to make submissions to the decision maker below in response to the Ministry's allegations.

[180] In *1782 Holdings*, the permit contraventions in question occurred between 2019 and 2021. At the time relevant to the appeal in *1782 Holdings*, the language in Factor (c) in section 7 of the *Regulation* had been amended and read:

> (c) any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the person who is the subject of the determination (emphasis added).

The definition of "contravention or failure" in the *Regulation* at this time was the same as its current wording.

[181] In *1782 Holdings*, the Director had added a 20% increase under Factor (c) for previous contraventions, failures, and penalties going back to 2012. When addressing Factor (c), the Panel referred to the finding in *Carrell* that warning letters or other similar communications do not constitute previous contraventions and held at para. 70:

> There must be orders or formal findings of a contravention for them to properly be taken into consideration under this factor.

[182] However, I note that on the facts in *1782 Holdings*, the Panel was considering whether previous violation tickets could be considered as prior contraventions under Factor (c) and held that they could. The Panel was not considering previous advisory or warning letters as I am in this case. Accordingly, the Panel in *1782 Holdings* did not address whether historical advisory or warning letters or other similar communications could be seen as contraventions or failures in the context of Factor (c), although it may be implied from the above quoted finding.

[183] I find that while the decisions in *Carrell* and *1782 Holdings* provide some guidance in my analysis, they are both distinguishable from the facts in this appeal and do not answer the question of whether the Advisory Letter and the First and Second Warning Letters were appropriately considered as prior contraventions or failures as aggravating factors by the Delegate under Factor (c).

[184] While *Western Aerial* was decided before the use of "contravention or failure" in Factor (c) in the *Regulation*, I have found it relevant to my consideration of the Warning Letters generally, and the 2018 Advisory Letter in particular, which I will address in due course in this decision.

[185] In addition to *Western Aerial*, the Director relies upon the language of Factor (c), including the phrase "contraventions or failures", as well as the definition of that phrase in the *Regulation*, in support of the proposition that an advisory or warning letter, in conjunction with other evidence, might support an increase to the penalty under Factor (c).

[186] The Director reads the language of Factor (c) together with the "broad" definition of "contravention or failure" to make it clear that Cabinet intended for the Director to consider both contraventions for which penalties or orders had been issued and failures for which no penalties or order had been issued.

[187] I agree with the Director's submission. I find that the current language of Factor (c) and the definition of "contravention or failure" contemplate previous acts of persons including "a failure to comply with a requirement of a permit or approval issued or given

under the Act" in respect of which enforcement steps were taken by the Ministry short of "administrative penalties imposed on, or orders issued to the person who is the subject of the determination" as potentially being relevant considerations under Factor (c).

[188] However, as with all potential administrative penalties that can be imposed upon regulated persons, those persons are entitled to procedural fairness in the process before imposing an administrative penalty. Procedural fairness dictates that the person against whom allegations of contravention or failure have been advanced by the Ministry should at least have been afforded an opportunity to respond and take issue with the allegations before such allegations can fairly be taken into account under Factor (c).

[189] I also find that such an alleged "contravention or failure", if considered, should be given less weight than a previous administrative penalty imposed on, or order issued to the person that would have followed a formal determination after a hearing before a decision maker in which the person was afforded appropriate participation rights.

[190] The Director submits that Coeur did not dispute that it had contravened section 4.1 of the Permit when it received the First and Second Warning Letters, but rather said it would work to improve its performance. In its OTBH submissions, as well as in its submissions in this appeal, while Coeur had the opportunity to dispute that it had contravened section 4.1 of the Permit in 2019 and 2020, it did not do so. The evidence on this appeal supports this characterization by the Director.

[191] In reply, Coeur submits that given the lack of legal remedy associated with letters giving information or guidance, it is to be expected that parties would not expressly deny every alleged non-compliance in an advisory or warning letter. If the Advisory or Warning Letters were to be part of the basis for the Penalty, they should have been included as alleged contraventions subject to penalty affording Coeur an opportunity to defend itself against such allegations. They were not. Instead, Coeur argues the Delegate unfairly (and contrary to the Handbook guidance) treated the Advisory and Warning Letters as prior contraventions to the prejudice of Coeur.

[192] I will first consider the 2018 Advisory Letter that indicated that, based on a review of Coeur's 2017 Annual Monitoring Report, certain Wells were not monitored in accordance with the Permit.

[193] The 2018 Advisory Letter includes a statement that:

> This Advisory, the alleged violations and the circumstances to which it refers will form part of the compliance history of Coeur Silvertip Holdings Ltd. and will be taken into account in the event of future non-compliance.

[194] The Advisory Letter references alleged violations but did not invite or require a response from Coeur. I find this significant. Like the advisory letter considered by the Panel in *Western Aerial,* the Advisory Letter provides evidence of the Ministry's view that there had been "alleged" contraventions by the appellant but did not offer an opportunity for Coeur to make submissions to the Ministry in response to these allegations.

[195] As also addressed in the Handbook guidance quoted above, where a person may not have had an opportunity to respond to the alleged non-compliance, they may challenge its use as an aggravating factor.

[196] Accordingly, I find that the Advisory Letter did not afford Coeur an opportunity to respond to the alleged non-compliance contrary to procedural fairness and the referenced guidance in the Handbook. I find the Advisory Letter was not evidence of a "contravention or failure" within the definition set out in the *Regulation* for purposes of Factor (c) and it should not have been relied upon by the Delegate as an aggravating factor.

[197] I will now consider the 2020 and 2021 Warning Letters.

[198] The First Warning Letter advised Coeur that it had failed to monitor Wells including those in question on this appeal in 2018. The Second Warning Letter addressed non-compliance with section 4.1 of the Permit during 2019 and 2020.

[199] Both the 2020 First Warning Letter and 2021 Second Warning Letter advised Coeur an inspection had determined that it was out of compliance with the Permit, subjecting Coeur to possible prosecution or administrative penalties.

[200] Both Warning Letters required that Coeur, within 30 days, provide a response in writing, advising what corrective measures have been taken, and what else is being done, to prevent similar non-compliances in the future.

[201] Both Warning Letters also include a statement that:

> Finally, if you fail to take the necessary actions to restore compliance, you may be subject to escalating enforcement action. This Warning Letter and the alleged violations and circumstances to which it refers, will form part of the compliance history of Coeur Silvertip Holdings Ltd. and will be taken into account in the event of future violations.

[202] I find that the call for a response from Coeur in both Warning Letters adequately addressed Coeur's procedural fairness right to be given an opportunity to dispute or otherwise address the alleged non-compliances for purposes of Factor (c). A full hearing as suggested by Coeur is not required as a pre-requisite to the Warning Letters being considered contraventions or failures for purposes of Factor (c).

[203] Coeur's written response to the First Warning Letter includes a statement that:

> This document is intended to meet the request of submitting a response in writing, advising what corrective measures have been or will be put in place to prevent similar non-compliances in the future.

[204] Coeur's written response to the Second Warning Letter includes a statement that:

> The Report identified some non-compliances and requested that Coeur Silvertip respond within thirty days to explain what corrective measures it has taken, and what else is being done, to prevent similar non-

> compliances in the future. Accordingly, this letter provides a response to each non-compliance in the order in which they appear in the Report.

[205] Coeur's written responses did not dispute that the alleged non-compliances had occurred.

[206] In the above circumstances, I find that it was appropriate for the Delegate to take the 2020 and 2021 Warning Letters into account as previous contraventions or failures as an aggravating factor under Factor (c).

[207] However, since the Delegate inappropriately considered the Advisory Letter as an aggravating factor and since the alleged contraventions covered by the Warning Letters were not subject to a formal determination following a hearing, I find the Delegate should have attached less weight to those Warning Letters than he did. In result, I vary the increase in the base penalty under Factor (c) downward from 20% to 10% of the base penalty (+$500 from base penalty).

Factor (d) Contraventions or failures were repeated or continuous

[208] The Delegate held a 20% increase in the base penalty was appropriate for 12 contraventions. Coeur does not dispute this finding. I find the Delegate's assessment that a 20% increase in the base penalty was appropriate for 12 contraventions to be reasonable and confirm it (+$1,000).

Factor (e) Contraventions or failures were deliberate

[209] Under this Factor, the Delegate accepted that, for a majority of the samples missed, Coeur had attempted to report in their monthly reports that specific Well sites were either damaged, destroyed, or dry. While this did not amount to an answer to the Permit breach, there appeared to be some effort by Coeur to report their missed samples, but a 10% increase in penalty was appropriate in the circumstances. Coeur does not dispute this finding. I find the Delegate's assessment that a 10% increase in the base penalty was appropriate for 12 repeated contraventions in these circumstances was reasonable and confirm it (+$500).

Factor (f) Any economic benefit derived from the contravention or failure

[210] When considering Factor (f), the Delegate determined that Coeur had derived economic benefit from the contraventions and increased the base penalty by $10,000. The Delegate's calculation methodology is summarized under Factor (f) in the *Determination* section of the Background facts section of this decision.

[211] Coeur submits that the bulk of the Delegate's findings in calculating Coeur's economic benefit were unreasonable. In response, the Director submits they were all reasonable.

[212] A component of the estimated economic benefit that the Delegate calculated was $4,857.13 related to Coeur delaying paying, for at least four years, the estimated costs of retaining a QP to prepare an alternate monitoring program and of applying for a Permit

amendment. In doing so, he estimated that the QP would have taken 80 hours to do so at a rate of $240 per hour ($19,200). Using an imputed interest rate of 5.8% and an estimated delay of four years, he calculated the benefit of delaying payment of that amount for this work at $4,857.13.

[213] Coeur questions the reasonableness of both the estimated four-year delay period and the interest rate used by the Delegate in this aspect of his penalty calculation. Likewise, Coeur puts these same assumptions in issue in relation to the economic benefit calculated by the Delegate for the four-year estimated delay in incurring Permit amendment fees of $101.19.

[214] Coeur has not put in issue the economic benefit estimated by the Delegate for avoiding sampling analysis and shipping fees for the missed samples. This amount was estimated by the Delegate as $1,062.91.

[215] The remaining component of the Delegate's penalty calculation was the economic benefit from avoiding personnel time to undertake the missed groundwater measurements determined by the Delegate using the "applied value" method as 41% of the base penalty amount. This amount is also challenged by Coeur as unreasonable.

[216] Regarding the economic benefit from avoiding personnel time to undertake the missed groundwater measurements, Coeur does not dispute that some economic benefit would have been derived by it from not taking the required samples. However, Coeur suggests the amount derived using the "applied value" of $4,100 (being 41% of the $10,000 base penalty assessed by the Delegate) would result in a "grossly inflated" hourly rate of approximately $455 per hour. Coeur's submissions do not specify the factual basis for this hourly rate calculation, nor has Coeur presented evidence as to what its actual cost savings were.

[217] As stated in the Guidance, the method of calculating economic benefit is chosen depending on the available information. While "true value" is the most accurate determination of an economic benefit, it is dependent on actual records being provided by the regulated entity. I agree with the Director's submission that Coeur could have provided such evidence concerning its actual or estimated cost savings on this appeal but has not done so. Accordingly, "true value" is not an appropriate method of calculating economic benefit in this case.

[218] The "applied value" method used by the Delegate acknowledges that an economic benefit was gained and attempts to account for these gains in the absence of true or estimated values.

[219] I find the Delegate's use of the "applied value" method to estimate the economic benefit from personnel not having spent time taking the missed groundwater measurements was reasonable in the circumstances. Consistent with the Guidelines and the evidence on this appeal, the Delegate reasonably categorized Coeur as a class 2 entity and the contravention class as low cost deriving the 41% increase in base penalty.

[220] I therefore confirm the Delegate's finding that Coeur derived an economic benefit from avoiding personnel time to undertake the missed groundwater measurements to be calculated as 41% of the base penalty. I have held above that the base penalty is $5,000 and not $10,000 as found by the Delegate. 41% of $5,000 is $2,050 which is the amount of economic benefit I find Coeur obtained by avoiding personnel time to undertake the missed groundwater measurements, rather than the $4,100 calculated by the Delegate.

[221] Regarding the Delegate's estimated four-year delay by Coeur in retaining a QP to prepare an alternate monitoring program and applying for a Permit amendment, Coeur submits that, based on the facts it summarizes in its submissions, it submitted its Permit amendment application on a timely basis in May 2022 after assessment by its QP. The time taken to submit this application should not be interpreted as a delay, but rather as a reasonable amount of time to develop a thorough permit amendment application.

[222] In response, the Director submits there was at least a four-year delay between the time when Coeur knew that the Permit needed to be amended and when it submitted its application for an amendment in May 2022. The Delegate's calculation of delayed costs using a four-year period was reasonable in the circumstances.

[223] From a review of the background facts, a chronology of events relevant to the issue of "delay" by Coeur in retaining a QP to prepare an alternate monitoring program and applying for a Permit amendment can be summarized as follows:

- In December 2018, Coeur received the Advisory Letter indicating that certain of its Wells had not been monitored as required by the Permit. The Advisory Letter stated some of the missed samples were due to Wells that had been destroyed during mining operations or covered by a drill pad or crusher. The evidence on this appeal does not include any response from Coeur to the Advisory Letter.
- In January 2020, the First Warning Letter was sent to Coeur. As part of its response, Coeur retained a QP to help improve its groundwater monitoring program at Silvertip. In July 2020, this QP developed an updated version of a Water Monitoring and Adaptive Management Plan for Silvertip (the "WMAMP").
- In January 2021, the final version of the Second Warning Letter was sent to Coeur. Coeur, in response, explained that some of the Wells had been destroyed since at least 2016 stating it would work with its QP to replace Wells as needed and that it would adjust its routine reporting to address the non-compliance item regarding documentation of sample collection compliance.
- In the summer of 2021, Coeur's QP assisted with field surveys to identify Wells which were permanently or seasonally dry, not locatable, damaged, or destroyed. The QP prepared a technical report dated August 25, 2021, summarizing the condition of each surveyed Well, proposing priorities for Well

re-conditioning, and providing recommendations on actions to be taken and pathways for regulatory notification or approval.

- In May 2022, Coeur applied to the Ministry to amend the Permit. Coeur says it did not submit the Permit amendment application until May 2022 because it required time to assess which Wells were viable through the 2021 field program and have its QP review the application. The amended Permit was issued to Coeur by the Ministry in December 2022.

[224] From this chronology, I find that the Advisory Letter received by Coeur in December 2018 should have put Coeur on notice that something needed to be done to address the state of its Wells and groundwater monitoring program. It was not until July 2020 or thereabouts, after receipt of the First Warning Letter in January 2020, that Coeur retained the QP to address the problems in question. This delay approaching two years has not been adequately explained by Coeur.

[225] Once the QP was retained by Coeur, the evidence indicates that substantive steps were taken to revise the WMAMP in the summer of 2020 and to do the requisite investigative fieldwork in the summer of 2021 resulting in an August 25, 2021, technical report before finally submitting an application for an amended Permit in May 2022. While the evidence does not tell us why it took from August 2021 until May 2022 to submit the application, I find the evidence does not reasonably support the Delegate's characterization that the approximately two-year period after the Qualified Profession was retained as being the result of an unreasonable "delay" by Coeur.

[226] Accordingly, I find that Coeur can reasonably be held to account for what I would approximate as a two-year delay in retaining a QP to prepare an alternate monitoring program and applying for a Permit amendment in May 2022, rather than the four years estimated by the Delegate.

[227] This leaves for consideration for the 5.8% interest rate used by the Delegate in his calculations. Coeur submits this rate is much higher than the actual average rate during the period covered by the Penalty, which they submit was 0.25%. Again, Coeur could have, but has not, put forward evidence of its actual cost of borrowing or documentary evidence supporting what it submits would be a more reasonable rates of interest to assume for purposes of calculating the economic benefit resulting from any delay.

[228] In the circumstances, absent persuasive evidence on the actual interest rates accessible to Coeur or interest rates that better represent the timeframe at issue, I do not find it was unreasonable for the Delegate to use the 5.8% interest rate suggested as an example in the Guidance.

[229] With respect to the $350,000 Coeur spent on improving its groundwater monitoring program since 2021, I agree with the Director that such expenses are not relevant to the question of economic benefit resulting from non-compliance. As also noted

by the Director, these expenditures were acknowledged by the Delegate in significantly reducing the base penalty by 60% under Factors (h) and (i) as discussed below.

[230] I have held above that the delay for which Coeur can reasonably be held accountable relating to its retaining a QP to prepare an alternate monitoring program and applying for a Permit amendment is two years and not four years as held by the Delegate. Accordingly, I vary the Delegate's estimated economic benefit, ($4857.13 for Qualified Professional and $101.19 for Permit application fees, totaling $4958.32) downward by half to $2,479.16 to reflect this shorter delay using the same QP cost estimate and interest rate used by the Delegate.

[231] In result, I find the economic benefit derived by Coeur under Factor (f) to be:

- $2,479.16 associated with unreasonably delayed expenses,
- $1,062.91 for the estimated avoided sampling analysis and shipping fees of the missed samples, and
- $2,050 associated with avoiding personnel time to undertake the missed groundwater measurements.

This totals $5,592.07, which I round off to $5,600 (+$5,600).

Factor (g) Exercise of due diligence to prevent the contravention or failure

[232] No upward or downward adjustment was applied by the Delegate for this Factor. This finding was not disputed by Coeur and I find the Delegate's determination that there was no evidence of due diligence in this instance to be appropriate in the circumstances and confirm it ($0).

Factor (h) The person's efforts to correct the contravention or failure

[233] Under Factor (h) the Delegate held that a 30% decrease in base penalty was appropriate in the circumstances. In addition to having a QP review their monitoring program, Coeur provided the Delegate with a summary of their efforts to ensure they complied with the sampling requirements of the Permit. Coeur does not dispute this assessment.

[234] I find the Delegate's assessment and determination of a 30% reduction under this Factor to be appropriate in the circumstances and confirm it (-$1,500).

Factor (i) The person's efforts to prevent recurrence of the contravention or failure

[235] Under Factor (i) the Delegate held that a 30% decrease in base penalty was appropriate in the circumstances. Coeur explained that they have received a Permit amendment and progress was underway to improve their program. Coeur had shown an effort to improve their monitoring program and the Permit amendment addresses the stated non-compliances and changes in the groundwater monitoring program. Coeur does not dispute this assessment.

[236] I find the Delegate's assessment and determination of a 30% reduction under this Factor to be appropriate in the circumstances (-$1,500).

Factor (j) Any other factors that, in the opinion of the director, are relevant.

[237] I find the Delegate's determination that there were no additional relevant factors to be considered was appropriate in the circumstances and confirm it. Coeur also does not dispute this assessment ($0).

Summary on Penalty

[238] Having considered the evidence, submissions of the parties and all of the relevant Factors, I find that an administrative penalty of $9,600 is appropriate in the circumstances and will serve as an adequate deterrent specifically to Coeur, and generally to other permit holders subject to the *EMA* and the *Regulation.*

[239] My Penalty calculations reflecting the above findings are summarized in the following table:

Factors considered		Decision
(a) nature of contravention		moderate
(b) potential adverse effects		low
Base Penalty:		$5,000
Adjustment Factors (+/-)		
(c) previous contraventions	(+10%)	+$500
(d) repeated contraventions	(+20%)	+$1,000
(e) deliberate contraventions	(+10%)	+$500
(f) economic benefit derived		+$5,600
(g) due diligence		$0
(h) efforts to correct	(-30%)	-$1,500
(i) efforts to prevent	(-30%)	-$1,500
(j) other		$0
Penalty after considering all factors		$9,600

DECISION

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

[241] For the reasons set out above, I confirm the Delegate's finding in the Determination of 12 contraventions of section 4.1 of the Permit by Coeur and vary the Penalty imposed in the Determination from $19,000 to $9,600.

"Michael Tourigny"

Michael Tourigny, Panel Chair

Environmental Appeal Board