



Environmental Appeal Board

Citation: *Pacific Coast Renewables Corp. v. Director, Environmental Management Act*, 2026 BCEAB 32

Decision No.: EAB-EMA-25-A001

Decision Date: 2026-08-04

Method of Hearing: Conducted by way of written submissions concluding on April 13, 2026

Decision Type: Final Decision

Panel: Cynthia Lu, Panel Chair

Appealed Under: *Environmental Management Act*, S.B.C. 2003, c. 53

Between:

Pacific Coast Renewables Corp.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Scott Kerr

For the Respondent: June Ling

FINAL DECISION

INTRODUCTION

[1] Pacific Coast Renewables Corp. (the “Appellant”) owns and operates a composting facility in Abbotsford, BC, where it receives and processes organic waste into compost and soil blends. The Appellant’s operations are subject to the conditions in Permit No. 109112 (the “Permit”), issued by the Ministry of Environment and Parks (the “Ministry”) on November 6, 2020. The Appellant appeals a Determination of Administrative Penalty made on December 2, 2024 (the “Determination”), by the Director, *Environmental Management Act* (the “Respondent”). In the Determination, the Respondent imposed four administrative monetary penalties pursuant to section 115 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the “Act”) for failures to comply with Permit requirements.

[2] Section 103 of the Act specifies the powers of the Environmental Appeal Board (the “Board”) in deciding an appeal:

- 103** On an appeal under this Division, the appeal board may
- (a) send the matter back to the person who made the decision, with directions,
 - (b) confirm, reverse or vary the decision being appealed, or
 - (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[3] The four administrative monetary penalties (“AMP”) in the Determination are outlined in the table below.

Determination Penalty	Relevant Permit Requirements	Total AMP Amount
2022-09a (“Penalty A”)	Sections 1.2.3 and 1.2.4	\$94,689
2022-09b (“Penalty B”)	Section 1.2.6	\$6,200
2022-09c (“Penalty C”)	Sections 4.3.1 and 4.3.2	\$17,006
2022-09d (“Penalty D”)	Sections 6.1 and 6.2	\$1,800

[4] Regarding Penalties A, C, and D, the Appellant does not appeal the findings of non-compliance but asks the Board to rescind or reduce the penalty amounts. Regarding Penalty B, the Appellant appeals the finding of non-compliance with Permit Section 1.2.6.

[5] The Respondent submits the four penalties are reasonable and appropriate and ought to be confirmed by the Board.

BACKGROUND

[6] The Appellant's composting facility began operations in 2012, initially under the ownership of Net Zero Waste Abbotsford Inc. On December 31, 2020, EverGen Infrastructure Corp. acquired Net Zero Waste Abbotsford Inc. As of March 16, 2023, Net Zero Waste Abbotsford Inc. continued operations under its new name, Pacific Coast Renewables Corp.

[7] The Ministry issued the Permit on November 6, 2020. Prior to November 2020, the Appellant operated the facility under the *Organic Matter Recycling Regulation*, B.C. Reg. 18/2002. The Permit authorizes the Appellant to discharge effluent from the composting facility, subject to several requirements. The receiving environment for the Appellant's discharge is Gladwin Ditch, which flows to Matsqui Slough and eventually the Fraser River. The Appellant applied for a permit amendment in February 2021 and for updated permit amendments in August and October 2024. As of December 2025, the Ministry indicated it had not yet reviewed the amendment applications and the amendments remain outstanding.

[8] In March 2021, the Appellant was issued an AMP for contravention of the *Organic Matter Recycling Regulation* which occurred between September 13, 2018, and March 26, 2020. On June 2, 2022, the Appellant was issued an AMP for failing to comply with sections of the Permit between November 15, 2020, and November 27, 2021. The Appellant appealed the administrative penalty amounts for two portions of the June 2, 2022, determination to the Board. The Board allowed the appeal, in part, by varying two AMP amounts (*Pacific Coast Renewables Corp. (formerly Net Zero Waste Abbotsford Inc.) v. Director, Environmental Management Act*, 2024 BCEAB 6).

[9] The non-compliances at issue in this appeal arise from Ministry facility inspections conducted on November 9, 2021, and January 20, 2022. The Ministry notified the Appellant in early February 2022 that the inspection findings would be referred for administrative penalties. The Ministry provided the Appellant with a Notice Prior to Determination on December 21, 2023. An Opportunity to be Heard ("OTBH") occurred on March 20, 2024, where the Appellant provided written submissions.

ISSUES

[10] The issues to be addressed in this appeal are:

- Whether the administrative penalty amounts for Penalties A, C, and D should be varied.

- Whether the Appellant failed to comply with Section 1.2.6 of the Permit.

ADMINISTRATIVE PENALTY FRAMEWORK

[11] Under section 115 of the *Act*, if a director is satisfied a person has failed to comply with a requirement of a permit issued under the *Act*, they may require the person to pay an administrative penalty. The maximum penalty for failure to comply with a permit requirement is \$40,000, as per section 12(5) of the *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Regulation*").

[12] Section 7(1) of the *Regulation* lists the factors (the "Factors") that must be considered when establishing an AMP amount:

7 (1) In establishing the amount of an administrative penalty in a particular case, a director must consider the following matters, if applicable:

- (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 following:
 - (i) the person who is the subject of the determination;
 - (ii) if the person is an individual, a corporation for which the individual is or was a director, officer or agent;
 - (iii) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;
- (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;
- (j) any other factors that, in the opinion of the director, are relevant.

[13] Section 7(2) of the *Regulation* states:

(2) If a contravention or failure continues for more than one day, separate administrative penalties, each not exceeding the applicable maximum administrative penalty, may be imposed for each day the contravention or failure continues.

[14] When considering the Factors, the Respondent relied on guidance found in the Ministry's Administrative Penalty Handbook, June 2020, (the "Handbook"), and Administrative Penalties Economic Benefit Guidance, May 2022, (the "Guidance"). The Handbook provides decision makers non-binding assistance on how to apply the Factors.

[15] The Respondent submits the Board has previously upheld the use of the Handbook as an appropriate guide to assist decision makers. The Respondent submits both the Handbook and the Guidance were provided to the Appellant as part of the OTBH process. The Appellant does not submit an alternative framework for penalty assessment and its submissions generally adopt the same language and approach as the framework in the Handbook.

[16] In *United Concrete & Gravel Ltd. v. Director, Environmental Management Act*, 2021 BCEAB 21 (CanLII) ("*United Concrete*"), the Board found the Handbook to be a reasonable guide in determining administrative penalty amounts and stated in paragraph 72 that "it fosters consistency and predictability in decision-making." Several subsequent Board decisions have taken the approach set out in *United Concrete*, relying on the guidance provided in the Handbook in determining administrative penalty amounts.

[17] The framework recommended in the Handbook for considering the Factors under section 7(1) of the *Regulation* is to take Factor (a), the nature of the contravention or failure, and Factor (b), the real or potential adverse effect of the contravention or failure, together to establish a base penalty. The Handbook recommends a range of base penalty amounts relative to the maximum penalty amount prescribed in Part 2 of the *Regulation* for a given failure or contravention. The Handbook considers the remaining Factors (c) to (j) as penalty adjustments which could increase or decrease the base penalty amount.

[18] The Guidance, a supplementary document to the Handbook, is intended to support calculations related to Factor (f), economic benefits derived by the person from the contravention or failure. If found to apply, Factor (f) is generally an aggravating Factor that increases the penalty amount.

[19] Although previous Board decisions are not binding on me, I agree that use of the Handbook fosters consistency and predictability. Further, in this appeal both parties' submissions reference the base penalties and penalty adjustment framework found in the Handbook. I consider the Guidance, a supplementary document to the Handbook, in a similar way. In the absence of other resources or authorities provided to me, I find the Handbook, supplemented by the Guidance, to be a reasonable guide in determining the appropriate administrative penalty amounts in this appeal in addition to the applicable

legislative requirements. In line with the submissions of the parties, I have chosen to apply these materials in my assessment of penalty amounts in this case.

SUBMISSIONS AND ANALYSIS

Penalty A

Summary of the Non-Compliance and the Administrative Penalty

[20] This penalty was imposed for failure to comply with Sections 1.2.3 and 1.2.4 of the Permit. Section 1.2.3 of the Permit specifies discharge criteria for several effluent parameters, including biological oxygen demand (“BOD”), chloride, *Escherichia coli*, nitrogen, phosphorus, total suspended solids, and pH. Section 1.2.4 of the Permit states the Appellant is only permitted to discharge effluent that meets the criteria in Section 1.2.3. Samples of the effluent discharge are to be collected from the outlet of the facility’s supplemental pond, where effluent is stored before being discharged into the environment. Section 1.2.4 of the Permit further states that if the criteria are exceeded, the Appellant must stop the discharge, notify the director, re-sample the effluent after additional treatment, and only discharge when the Section 1.2.3 criteria are met.

[21] The Respondent found the Appellant’s effluent discharge failed to meet criteria in Section 1.2.3 on nine occasions between January 5, 2021, and January 22, 2022. The Respondent also found the Appellant failed to comply with some or all requirements under Section 1.2.4 on eight occasions between January 5, 2021, and December 15, 2021. Additionally, the Respondent found the Appellant failed to follow the measures recommended by qualified professionals in its Operating and Closure Plan Including Odour and Leachate Management Plans, dated June 24, 2021, (“Operating and Closure Plan”).

[22] In determining the penalty amount, the Respondent found Factor (a), the nature of the failure to be Major, and Factor (b), the actual or potential adverse effects to be Medium to High. These findings resulted in a base penalty of \$25,000. The base penalty was adjusted upwards due to aggravating Factors (c), previous contraventions or failures, and (f), economic benefit derived. The base penalty was adjusted downwards due to the mitigating Factor (i), efforts to prevent reoccurrence of the failure. No penalty adjustments were made in consideration of the remaining Factors (d), (e), (g), (h), and (j). The penalty amount after adjustments was determined to be \$31,563. Instead of applying a penalty adjustment under Factor (d), the Respondent accounted for the repeated nature of the contraventions by applying a three times daily multiplier to the penalty amount, in accordance with Section 7(2) of the *Regulation*. The resulting total administrative penalty for these contraventions was \$94,689.

Appellant's Submissions

[23] The Appellant argues the base penalty should be reduced because the actual or potential adverse effects are best characterized as Low. The Appellant submits it is permitted to discharge up to 400 cubic meters of effluent per day, every day, but its total actual annual discharge is much lower than the permitted amount. The Appellant submits it only discharges effluent when necessary to maintain freeboard in the supplemental pond. As a result, the Appellant argues its environmental risk based on actual discharge should be considered Low. Further, the Appellant submits background water sampling data for Gladwin Ditch from September 2023 to August 2024. Based on this sampling, the Appellant argues the background data shows the levels of several permit parameters in the receiving environment often exceed the Permit criteria and limits suggested in the BC Water Quality Guidelines, even when the Appellant is not discharging effluent. The Appellant argues this sampling data supports their claim that their facility, and effluent discharge, does not have a negative impact on the receiving environment.

[24] The Appellant argues that since it implemented several site changes, there has been a significant improvement in effluent characteristics for permit parameters *E. coli*, BOD, and chloride. The Appellant submits graphs showing steady reductions in concentrations of each of the above listed parameters over the period of August 2022 to December 2025. The Appellant argues, despite its high exceedances of the fecal coliform criteria, fecal coliform is not an environmental risk. The Appellant submits fecal coliform bacteria may pose a risk to humans, but Gladwin Ditch is not used for human recreation.

[25] The Appellant explains that, given the physical site design, it is not practical to stop discharging from the supplemental pond during heavy rainfall events. Even though the discharge may exceed Permit criteria, the Appellant argues the alternative, to allow uncontrolled surface runoff during heavy rainfall events, would be more harmful to the environment.

[26] The Appellant submits the economic benefits the Respondent says it gained from the non-compliances are overstated, and that it didn't receive any economic benefit at all. The Respondent's calculation of economic benefits relied on the delayed costs associated with failing to install three items recommended by a qualified professional in June 2020: Quonset huts, GORE covers used to prevent clean stormwater from reaching compost, and a silt curtain. The Appellant submits while these three items have potential to benefit stormwater quality, the qualified professional made those recommendations prior to other site upgrades. The Appellant argues the three items (huts, covers, and silt curtain) alone would not have resulted in achieving Permit compliance. The Appellant states it received qualified professional advice which indicated that the Permit could not be complied with as written. The Appellant argues the Respondent inappropriately considered these three items in isolation of all the other site upgrades and investments the Appellant has made with the goal of regulatory compliance.

[27] The Appellant describes several projects undertaken in 2021 aimed at achieving Permit compliance. The Appellant describes commissioning, designing and installing stormwater management infrastructure—including a drainage channel, catchment basin, and pumping chamber—at a combined approximate cost of \$293,000. The Appellant submits a new aeration pond was installed to meet Permit requirements, at an approximate cost of \$136,000. The Appellant notes there is a silt curtain dividing the primary aeration and supplementary ponds. The Appellant submits a concrete floor was installed under its feedstock receiving tent, at an approximate cost of \$69,000. The Appellant submits winter construction resulted in higher costs and any alleged savings derived from delaying construction were negated by the higher seasonal costs. The Appellant argues that these site upgrades serve the same functional purposes as were intended by the qualified professional's recommendations.

[28] The Appellant describes additional project spending of over \$3 million on site upgrades completed over the course of 2022 and through to April 2023, with the goal of achieving Permit compliance. These projects included the installation of new GORE covers to replace older GORE covers, construction of new concrete composting bunkers, and the installation of a leachate capture system. The Appellant submits a further \$2 million was spent on various projects from April 2023 to the end of 2025. The Appellant submits its financial statements from 2021 to 2025 to show it has not been profitable since 2021. The Appellant submits it should be given credit for its due diligence and efforts to correct and prevent future failures.

Respondent's Submissions

[29] The Respondent submits the base penalty was appropriately established using the guidance from the Handbook and ought to be confirmed. The Respondent submits the Permit is not structured to consider the total loading of discharge over an annual rate. Compliance with the Permit limits is assessed through analysis of grab samples, and the sampling procedures are specified in the Permit. The Respondent submits the Permit criteria for six Permit parameters were substantially exceeded by amounts ranging between 38% to 129,000% during the contravention period. The Respondent found the discharge to be acutely toxic to aquatic life based on test samples collected from the discharge point. Based on these test results, the Respondent found there to be a Medium to High likelihood the discharge could impact downstream environments. The Respondent argues the substantial exceedances and acute toxicity to aquatic life support a Medium to High potential impact, even in the absence of demonstrated actual impacts. The Respondent argues the Appellant has not met its burden of proof to show that the potential adverse effect should be considered Low.

[30] The Respondent submits the economic benefit factor was calculated in accordance with the Guidance. The Respondent argues it was not incorrect to use items recommended by the Appellant's qualified professionals, found in the Appellant's Operating and Closure Plan.

[31] The Respondent determined the Appellant benefited from delayed costs associated with the delayed installation of Quonset huts, GORE covers, and a silt curtain. The Respondent calculated the economic benefit associated with delayed costs using methods found in the Guidance. The Respondent found the delayed costs were no less than \$42,189 between January 2021 and January 2022. The Respondent divided the total economic benefit by three, the daily multiplier, resulting in a penalty adjustment of \$14,063. The Respondent argues if the true value of the actual infrastructure installed on site between 2022 to 2023 were used to calculate economic benefits, the economic benefits considered under this factor would have been even higher. Further, the Respondent argues the value of the actual upgrades should not be considered under Factor (f), economic benefit, but are more appropriately considered under Factor (i), efforts to prevent recurrence of the failure. The Respondent argues the Appellant has not met its burden of proof to show how it was unreasonable for the Respondent to have calculated the economic benefit as they did.

Panel's Analysis and Findings

[32] The Appellant does not make substantive submissions on how to otherwise characterize Factor (a), the nature of the contravention. In the absence of substantive submissions or arguments on the nature of the contravention, I do not depart from the Respondent's assessment of Factor (a) and likewise characterize the nature of the failure to be Major given the magnitude of the exceedances over the Permit criteria.

[33] The Appellant's argument regarding Factor (b), the real or potential adverse effects of the non-compliance, appears to be that the receiving environment has poor water quality, therefore its exceedances have little to no impact on water that is already of poor quality. Without expert evidence to this effect, I place little weight on this argument. This sentiment, if shared and acted upon by all regulated dischargers to the receiving environment would undermine the regulatory framework as well as environmental and human health. This argument, if accepted, would grant licence to further contaminate the receiving environments that require the protection most urgently. Further, the Appellant's receiving environment sample data is from September 2023 to August 2024 and does not cover the contravention period addressed in the Determination and under this appeal.

[34] The Appellant submits there have been significant improvements in effluent quality following the infrastructure improvements from 2021-2025, especially related to chloride, BOD, and *E. coli*. While there may be significant improvements to discharge characteristics since the Determination, the fact remains that the Appellant significantly exceeded the Permit criteria during the period of contravention. While the Appellant demonstrates improvements in the nature of the discharged effluent such that the Permit exceedances are lesser than those within the contravention period, there is no compelling argument that the characteristics of its current discharge should mitigate the real or potential adverse effects of its previous, non-compliant, discharge. Given the above, I find the

Appellant has not met its burden of proof to demonstrate that the real or potential adverse effects of its discharge are Low.

[35] I confirm the Respondent's findings that the nature of the contravention was Major, and the real or potential adverse effects were Medium to High. As a result, I confirm the base penalty of \$25,000.

[36] The Appellant does not make substantial submissions on the Respondent's penalty adjustments with respect to Factors (c), and (d), or the Respondent's application of a three times daily multiplier in accordance with Section 7(2) of the *Regulation*. My understanding is that the Appellant contravened Section 1.2.3 of the Permit on nine occasions and Section 1.2.4 on eight occasions. Without substantive submissions on the repeated contraventions or the application of a daily multiplier, I do not depart from the Respondent's assessment of Factor (d) or the application of a three times daily multiplier.

[37] The Respondent did not adjust the penalty for Factor (e), whether the contravention was deliberate, and this Factor is not disputed by the parties. As a result, I do not make any penalty adjustments in consideration of Factor (e).

[38] Next, I consider Factor (f), economic benefits derived from the contravention. The Respondent found the Appellant derived economic benefit from its non-compliance because it did not make changes to its facility which were recommended by its qualified professionals. This was characterized as an economic benefit derived from delaying costs. The Appellant submits it installed other infrastructure to improve discharge quality at the relevant time and did not derive any economic benefits at all, given the overall cost of these infrastructure upgrades. The Respondent argues even though the Appellant installed different infrastructure items, it was not incorrect to use the recommendations of the qualified professional to determine economic benefit. The Respondent submits that if the actual costs spent by the Appellant were used for the calculations the economic benefit it derived from delaying this spending would be even higher.

[39] As part of rationale for determining economic benefit provided in the Determination, the Respondent stated:

...Any efforts or admission of the failures does not negate the fact that an economic benefit was obtained during the period of non-compliance. The intent of this factor is to eliminate any economic advantage gained, and it should not be diminished by considering evidence that is already accounted for in other factors.

The assessment of economic benefit focuses not on how much was later spent on expenditures potentially linked to achieving compliance, but rather **on the financial savings realized during the period of non-compliance**. (emphasis added, paragraph 81-82, Determination).

[40] Section 7(1) of the *Regulation* states “In establishing the amount of an administrative penalty in a particular case, a director must consider the following matters... any economic benefit derived by the person from the contravention or failure.”

[41] The Handbook and Guidance provide decision makers with guidance on how to consider Factor (f). While the Guidance provides workflows for calculating economic benefits, the decision maker must first consider whether economic benefit was gained. I have reviewed the Handbook and Guidance and highlight several excerpts from both documents that provide guidance on considering when and why Factor (f) could apply:

- Removing economic benefit is one of the most important objectives of an AMP. It sends the message to operators as well as the public that **it is not ok to profit from breaking the law; the intent is to deter** individuals and companies from ‘taking their chances’ of getting caught by **ensuring the consequence (penalty) is equal or greater than the benefit of not complying**. (Handbook, page 41)
- Delayed costs are costs that the person delayed incurring, allowing them the use of the money that should have been spent on achieving compliance. Although they eventually comply, there is **an economic advantage associated with delaying the expenditures until the Ministry takes enforcement action**. (Handbook, page 41)
- Any benefit, such as an economic benefit, can **create a competitive advantage for the contravening entity** and disrupt a level playing field within the industry. If economic benefit is not removed, the regulated entity has a **business incentive to continue the contravention**. (Guidance, page 1)
- Economic benefit is 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**. (Guidance, page 2)
- ‘Was there a **material** economic benefit?’ Materiality is considered the quality of being relevant or significant. (Guidance, page 3)

[emphasis added for all quotes]

[42] The Handbook and Guidance, taken together with the wording in the *Regulation*, make it clear that the application of Factor (f) is discretionary, based on the decision maker’s assessment of whether there was a material economic benefit realized by the non-compliant party. According to the Guidance, materiality considers relevancy or significance. In my view, materiality is a contextual assessment that will vary based on the factual circumstances of each permit and regulated entity.

[43] The Respondent calculated the Appellant derived \$42,189 in economic benefits by delaying the installation of recommended items for a period of one year. The Respondent relied on the following recommendations found in the Appellant’s Operating and Closure Plan to determine economic benefit:

- “Permanent buildings and GORE covers are utilized in all areas of the composting process to minimize clean stormwater from contacting compost stored at the Facility,” and
- “If additional [effluent] treatment is recommended additional measures may include the construction of silt curtains in the pond, aeration or the covering of additional areas on Site.”

[44] I have reviewed the Appellant’s Operating and Closure Plan. The plan and the above recommendations do not indicate that taking these measures would definitively achieve Permit compliance in relation to discharge quality criteria. The evidence submitted in this appeal indicates the Appellant, despite significant investments, including and in addition to implementing the above-recommended measures, may still not reliably meet the Permit’s discharge quality criteria. In practice, it appears a combination of several upgrades, actions, technologies, processes, and approaches recommended by various qualified professionals over time are required to further improve the quality of the discharge and achieve consistent Permit compliance. I consider this important because this penalty is being assessed for failure to meet the Permit’s discharge quality criteria, not for failure to implement specific recommendations made by qualified professionals.

[45] The period of non-compliance addressed in the Determination is January 2021 to January 2022. The Notice Prior to Determination and preliminary penalty assessments were provided to the Appellant on December 21, 2023. The Appellant acknowledges it did not install the specific items recommended by the qualified professionals during the non-compliance period. However, the Appellant submits in 2021 it undertook other projects aimed at improving discharge quality including the installation of a stormwater catchment system and a concrete floor. The Appellant’s submissions show it was actively spending money to achieve Permit compliance with respect to discharge criteria during the non-compliance period and before it was notified of the preliminary penalty assessments in the Notice Prior to Determination. Given the evidence before me, I find the Appellant was not waiting for the Ministry to take enforcement action prior to taking steps towards compliance.

[46] The Appellant submits it has been operating at a financial loss since 2022. The Respondent argues the Appellant’s financial statements are not relevant to what, if any, economic benefit was derived by delaying the installation of items or equipment. The Handbook conveys the intent of Factor (f) is to deter non-compliance by ensuring that the consequence (that is, the penalty) is equal to or greater than the benefit gained from not complying. The Guidance defines economic benefit to be a benefit that, when removed, the regulated entity is “[placed] in the same financial position as if they had complied.” I find the Appellant’s financial statements to be of assistance when considering whether it benefited from its non-compliance and are therefore relevant in the consideration of this Factor.

[47] The Appellant submits, in addition to the investments made in 2021, it invested over \$3 million in site infrastructure upgrades from 2022 to 2023, aimed at improving discharge quality. The Respondent argues the Appellant's upgrades should not be considered under Factor (f) but instead considered under Factor (i) efforts to prevent reoccurrence. What I find relevant to Factor (f) is not specifically the dollar value of the Appellant's upgrades, but the consideration of this spending in the overall context of whether the Appellant:

- requires additional deterrence with an increase to the monetary penalty,
- gained competitive advantage from failure to comply,
- has business incentive to continue to not comply,
- gained economic advantage by delaying expenditures,
- delayed expenditures until the Ministry took enforcement action, or
- gained material economic benefit.

[48] The overall context is important to consider in whether I exercise my discretion to increase the penalty under Factor (f). More is required than identifying the cost associated with some improvements that were not done and applying that cost regardless of the context. I am not persuaded by the evidence before me to find that any of the above considerations apply to the Appellant in this scenario.

[49] In summary, informed by the *Regulation*, Handbook, and Guidance, I find any economic benefit derived by the Appellant not to be materially significant in the circumstances of this appeal. Consequently, I find the Appellant did not derive material economic benefits that justify an increased penalty adjustment under Factor (f).

[50] In its Notice of Appeal ("NOA") the Appellant asserted it ought to receive credit for its due diligence. Due diligence refers to taking all reasonable steps to avoid the failures. The Appellant's submissions fail to outline what due diligence steps were taken prior to or during the period of non-compliance. I confirm the Respondent's finding that there is insufficient evidence to show due diligence was demonstrated and do not apply a mitigating penalty adjustment under Factor (g).

[51] The Appellant also asserted in the NOA that it ought to receive credit for its efforts to correct and prevent reoccurrences of the contraventions or failures. It is not disputed that the Appellant has invested significantly in site upgrades between 2021 to 2025. In the Determination, the Respondent applied a sixty percent mitigating base penalty reduction to account for the Appellant's efforts with respect to Factor (i). The Appellant has not further articulated what it means by asserting it ought to "receive credit," or how the Respondent's application of a sixty percent base penalty reduction is unreasonable. I find insufficient evidence to depart from the Respondent's penalty adjustment under Factor (i).

[52] Finally, the Respondent did not make penalty adjustments for Factors (h) and (j), and the Appellant did not make substantial submissions related to these factors. As a result, I do not make any penalty adjustments in consideration of Factors (h) and (j).

[53] For the reasons above, I remove the economic benefit factor and vary Penalty A to \$52,500.

Section 7(1) of the <i>Regulation</i> Factors	Assessment	Penalty Amount
(a) Nature of contravention	Major (no change)	Base penalty \$25,000
(b) Actual or potential adverse effect	Medium to High (no change)	
(c) Previous contraventions or failures	Previous contraventions of the same Permit sections (no change)	+\$7,500
(f) economic benefit derived	No material benefit (reduced to \$0)	\$0
(i) Efforts to prevent reoccurrence of the contravention or failure	Efforts recognized in Determination (no change)	-\$15,000
Penalty sub-total		\$17,500
Section 7(2) of the <i>Regulation</i>	X 3 daily multiplier (no change)	
Final Penalty on Appeal		\$52,500

Penalty B

Summary of the Non-Compliance and the Administrative Penalty

[54] This penalty was imposed for failure to comply with Section 1.2.6 of the Permit which states the Appellant “must not discharge under this Authorization unless the Authorized Works are complete, fully operational and in operation at the time of discharge.” Section 1.2.5 of the Permit identifies the Authorized Works to be “all asphalt and concrete surfaces, leachate collection channels, two (2) concrete weirs, one (1) primary aeration lagoon, one (1) supplemental pond, related pumps, pipes and related appurtenances approximately located as shown on the Site Plan.” To determine the

Appellant was not compliant with Section 1.2.6, the Respondent relied on the undisputed fact that the “blowers” in the primary aeration lagoon were not in operation on nine dates in January 2022 when the Appellant discharged effluent from the site.

[55] The Respondent found the nature of the contravention to be Moderate and the actual or potential adverse effects to be Low to None. The base penalty was assessed at \$5,000. The base penalty was adjusted upwards due to aggravating Factors (c), previous contraventions, (e), deliberateness, and (f), economic benefit. The base penalty was adjusted downwards due to the mitigating Factor (i), efforts to prevent reoccurrence of the failure. No adjustments were made in consideration of the remaining Factors (d), (g), (h), and (j).

Appellant's Submissions

[56] The Appellant submits the Authorized Works were operational during the periods of alleged non-compliance and there was consequently no failure to comply with Section 1.2.6 of the Permit. The Appellant submits Section 1.2.5 describes the “primary aeration lagoon” as the Authorized Works and argues this section does not refer to “blowers” or how aerobic conditions are to be maintained in the primary aeration lagoon.

[57] The Appellant submits the purpose of the “blowers” is to agitate the water in the lagoon, to ensure mixing and to reduce dead or anaerobic spots. The Appellant submits the blowers were shut off due to freezing concerns but were otherwise operational and available to be turned on if required to maintain aerobic conditions in the aeration lagoon. The Appellant submitted in the OTBH that dissolved oxygen in the primary aeration lagoon was measured to be 5mg/l on January 28, 2022. It is not contested by the parties that dissolved oxygen levels of 2mg/l or higher are generally accepted to indicate aerobic conditions in the water. The Appellant submits the dissolved oxygen data indicates the liquid contents of the primary aeration lagoon were aerobic at the time, implying that the lagoon was operational.

Respondent's Submissions

[58] The Respondent submits the Appellant admitted on several occasions that the blowers in the primary aeration lagoon were not operational on dates of discharge events in January 2022. The Respondent submits, since the Appellant discharged effluent when the blowers were shut down, the Appellant contravened the requirements of Section 1.2.6 of the Permit. The Respondent submits the Appellant has not met its burden of proof that the contravention should be set aside.

Panel's Analysis and Findings

[59] I have reviewed the Permit and do not find language specifically referring to “blowers” as Authorized Works under Section 1.2.5, or language specifying how the primary aeration lagoon must operate to maintain aerobic conditions. Sections 1.2.5 and

1.2.6 of the Permit do not specify what would be determinative of whether the primary aeration lagoon is fully operational and in operation. As implied by its name and in the Operating and Closure Plan, I understand the purpose of the primary aeration lagoon is to maintain aerobic conditions of its contents, which are released into the supplemental pond before being discharged from the site. I find it to be logical that if stormwater was being directed into and out of the primary aeration lagoon as intended, and its contents were measured to be in aerobic condition, the lagoon was operational. The Appellant submits the level of dissolved oxygen in the lagoon measured in January 2022 indicated the conditions in the lagoon were aerobic. The Respondent does not submit alternate dissolved oxygen measurements or make compelling submissions to otherwise characterize the aerobic conditions in the primary aeration lagoon. The evidence before me indicates the conditions in the primary aeration lagoon at the time of the discharges were aerobic. Further, there is insufficient evidence before me to conclude that the Authorized Works, specifically the primary aeration lagoon, required the “blowers” to be active in order for the Authorized Works to be fully operational and in operation.

[60] Given the above, I find the primary aeration lagoon was fully operational and in operation despite the “blowers” being shut off on the dates of discharge in January 2022. As a result, I find the Appellant did not fail to comply with Section 1.2.6 of the Permit and should not be subject to an administrative monetary penalty under this provision.

Penalty C

Summary of the Non-Compliance and the Administrative Penalty

[61] This penalty was imposed for failure to comply with Sections 4.3.1 and 4.3.2 of the Permit. Section 4.3.1 requires the Appellant to complete grab sampling on a weekly basis between November 15, 2020, and May 30, 2021, and monthly after June 1, 2021. Section 4.3.2 lists the parameters that the samples must be analysed for. The Respondent found the Appellant failed to collect the required weekly samples between January 10 to February 28, 2021.

[62] The Respondent found the nature of the contravention to be Moderate and the real or potential adverse effects to be Medium. As a result, a base penalty of \$10,000 was established for this contravention. The base penalty was adjusted upwards due to aggravating Factors (c), previous contraventions, (d), the failures repeatedly occurred on 10 separate dates, and (f), economic benefit. The base penalty was adjusted downwards due to the mitigating Factor (i), efforts to prevent reoccurrence. The Respondent’s consideration of the remaining Factors (e), (g), (h), and (j) did not result in adjustments to the penalty.

Appellant's Submissions

[63] In its NOA, the Appellant argued it did not derive any economic benefits from the contravention, and that it ought to receive credit for its due diligence and efforts to correct and prevent future failures. In the NOA, the Appellant also argued that the water quality of the receiving environment has elevated levels of contaminants and that its discharge likely does not have a measurable impact.

[64] The Appellant submits there is a minimum one-week lag time between collecting samples and receiving lab results. The Appellant submits that discharge from the site is dependent on precipitation and it is not practical to stop discharging during heavy rainfall. Together, according to the Appellant, this means the sampling results are not practically useful for determining whether to cease discharges even if the Appellant were able to do so. Instead, the Appellant argues, sampling results that show exceedances to the Permit criteria would result in non-compliance reporting, an administrative action. As a result, the Appellant argues the failure to comply with the sampling requirement has no direct impact on the environment and the real or potential adverse effects are Low to None.

Respondent's Submissions

[65] The Respondent refers to *United Concrete*, where the Board found that the nature of the contravention and potential adverse effects of failing to comply with permit sampling and analysis requirements is "moderate" and "medium." The Respondent argues the same risk of harm and adverse effects apply in this appeal. The Respondent submits that characterization of effluent is critical in both knowing when discharge should stop and for determining the impact of the discharge on environmental and human health.

[66] The Respondent submits the base penalty of \$10,000 is consistent with the Handbook and the findings in *United Concrete* and should be confirmed. The Respondent submits the Appellant does not dispute the application of penalty adjustment Factors and the total penalty of \$17,006 ought to be confirmed.

Panel's Analysis and Findings

[67] The Appellant argues the sampling results would only lead to an administrative action of reporting a non-compliance, therefore failing to conduct sampling has Low to No real or potential adverse effect. While in the Appellant's view, administrative reporting may be its only subsequent action, the same is not true for the regulator. The Ministry may rely on this data to inform actions it determines necessary to protect environmental and human health. The absence of required sampling data hinders the Ministry's ability to take informed actions to protect environment and human health. The fact that the Appellant's discharge has not reliably met Permit criteria and that the site design cannot practically prevent discharge from entering the environment further underscores the need for sampling instead of diminishing the importance of it. The Appellant's arguments

do not meet the standard of proof to demonstrate how Factor (a) or (b) should be other than as were considered by the Respondent in the Determination.

[68] The Respondent's findings in relation to Factors (c), (d), (e), (h), and (j) are not disputed by the Appellant. Therefore, without persuasive arguments or sufficient evidence to the contrary, I confirm the Respondent's findings related to these factors.

[69] In its NOA, the Appellant asserted it did not derive economic benefits from the failures to comply with sampling requirements. However, the Appellant's submissions do not provide sufficient additional explanation or evidence to support this assertion. The Appellant's submissions on economic benefit mainly relate to Penalty A. It is unclear how those submissions ought to be relevant or considered under economic benefits derived from the sampling contraventions at issue in Penalty C. As a result, I find there to be insufficient evidence to vary the Respondent's finding and penalty adjustment of \$556 under Factor (f), economic benefits.

[70] The Appellant also asserted in the NOA it ought to be given credit for due diligence and its efforts to correct and prevent reoccurrence with major investments in the site. Similar to Penalty A, the Appellant's submissions fail to outline what due diligence steps were taken prior to the failures occurring. I find there is insufficient evidence to show due diligence was demonstrated. Consequently, I do not apply a mitigating penalty adjustment under Factor (g).

[71] In its OTBH submission, the Appellant provided a summary of actions taken since March 2022 to address testing and reporting requirements. The Respondent considered these actions under Factor (i), efforts to prevent reoccurrences, and applied a twenty percent mitigating factor to the base penalty. In this appeal the Appellant does not make substantive submissions on why the twenty percent adjustment is unreasonable or how it should be varied. I find insufficient evidence to vary the Respondent's finding and penalty adjustment under Factor (i).

[72] In conclusion on this issue, I find there is insufficient evidence to vary the Determination with respect to Penalty C, and I confirm the penalty amount of \$17,006.

Penalty D

Summary of the Non-Compliance and the Administrative Penalty

[73] Section 6.1 of the Permit requires the Appellant to immediately notify the director of any non-compliance with the Permit requirements. Section 6.2 requires the Appellant to submit a written report within 30 days of any non-compliance event, and that this report must include relevant test results, explanations of probable causes, and a description of remedial or preventative measures taken to prevent this non-compliance from recurring in the future.

[74] The Respondent found the Appellant had failed to immediately notify the Ministry of discharge criteria exceedances on four occasions between January 5 and March 8, 2021, and also failed to submit a non-compliance report within 30 days on four occasions between February 4 to April 8, 2021. The Respondent found the nature of these failures to be Minor and the real or potential adverse effects to be Low to None. As a result, the base penalty was assessed at \$1,000. The base penalty was adjusted upwards due to aggravating Factors (c), previous contraventions, (d), the failures were repeated, and (f), economic benefit. The base penalty was adjusted downwards due to the mitigating Factor (i), efforts to prevent reoccurrence. The Respondent's consideration of the remaining Factors (e), (g), (h), and (j) did not result in adjustments to the penalty.

Appellant's Submissions

[75] In its NOA, the Appellant asserted it did not derive any economic benefits from the contravention, and that it ought to receive credit for its due diligence and efforts to correct and prevent future failures. The Appellant submits the failures to comply occurred soon after its ownership transfer and it has since greatly improved its reporting record. The Appellant submits the Permit requirement is entirely administrative and therefore the real or potential adverse effect is None and the base penalty ought to be reduced to reflect this.

Respondent's Submissions

[76] The Respondent submits the Appellant has not met its burden of proof to show that the base penalty or penalty adjustment Factors should be varied.

Panel's Analysis and Findings

[77] The Appellant argues the base penalty should be reduced because the failure to comply is entirely administrative, and therefore there is no real or potential adverse effect to human or environmental health. The Respondent relied on the guidance in the Handbook to determine the base penalty amount. The guidance in the Handbook includes an assessment of a base penalty for minor contraventions with Low or No real or potential adverse effects. The Appellant's submissions are not persuasive as to why these contraventions, which are enforceable Permit requirements regardless of their real or potential adverse effects, warrant a lower base penalty. Nor does the Appellant argue what quantum it considers to be a more appropriate amount for these types of contraventions. I find there is not convincing evidence to deviate from the Respondent's assessment of Factors (a) and (b), and, therefore, from the base penalty.

[78] Similar to Penalty C above, the Appellant does not provide substantive submissions to warrant reconsideration of penalty adjustment Factors (f) economic benefits, (g) exercise of due diligence, or (i) efforts to prevent reoccurrence. The Respondent's findings in relation to Factors (c), (d), (e), (h), and (j) are not contested by the Appellant. Therefore,

without arguments or persuasive evidence to the contrary, I confirm the Respondent's findings related to Factors (c) to (j).

[79] I find there is insufficient evidence before me to vary the Determination with respect to Penalty D and confirm the penalty amount of \$1,800.

DECISION

[80] I have considered the parties' submissions and the available evidence, whether or not they have been specifically referenced above. For the reasons above, I allow the appeal in part. Penalty A, issued for failure to comply with Sections 1.2.3 and 1.2.4 of the Permit, is varied to \$52,500. Penalty B is rescinded as I have found the Appellant did not fail to comply with Section 1.2.6 of the Permit. Penalty C, issued for failure to comply with Sections 4.3.1 and 4.3.2 of the Permit, is confirmed. Penalty D, issued for failure to comply with Sections 6.1 and 6.2 of the Permit, is confirmed.

"Cynthia Lu"

Cynthia Lu, Panel Chair
Environmental Appeal Board