



Environmental Appeal Board

Citation: *Pacific Coast Renewables Corp. (formerly Net Zero Waste Abbotsford Inc.) v. Director, Environmental Management Act, 2024 BCEAB 6*

Decision No.: EAB-EMA-22-A009(a)

Decision Date: 2024-02-16

Method of Hearing: Conducted by way of written submissions concluding on September 1, 2023

Decision Type: Final Decision

Panel: Cynthia Lu, Panel Chair

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

Between:

Pacific Coast Renewables Corp. (formerly Net Zero Waste Abbotsford Inc.)

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant(s): Jana McLean, Counsel
Sebastian Ennis, Counsel

For the Respondent: Robyn Gifford, Counsel

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INTRODUCTION

[1] This appeal concerns the June 2, 2022, Determination of Administrative Penalty (the "Determination") issued by the Director, *Environmental Management Act* SBC 2003, c. 53, (the "Act") of the Ministry of Environment and Climate Change Strategy (the "Ministry") to New Zero Waste Abbotsford Inc. ("Net Zero"). Net Zero has since been renamed Pacific Coast Renewables Corp. ("PC Renewables") and is the Appellant.

[2] In the Determination, the Director issued four administrative penalties for failing to comply with several sections of Net Zero's Permit 109112 (the "Permit") issued on November 6, 2020, under the Act. The Appellant appeals two of the four administrative penalties: penalties relating to its failure to install a flowmeter (the "Flowmeter Contravention") and its unauthorized discharge of waste into the environment (the "Discharge Contraventions"). The Appellant does not appeal the remaining two penalties, which related to monitoring, sampling, and reporting. The Flowmeter Contravention and the Discharge Contraventions are collectively referred to as the "Contraventions."

[3] The Appellant does not dispute the findings of non-compliance in the Determination. The Appellant asks for the administrative penalty associated with the Discharge Contraventions to be cancelled or, alternatively, reduced to no more than \$5,000. The Appellant asks for the penalty associated with the Flowmeter Contravention to be reduced to no more than \$5,750. The Appellant argues the penalties are premature and unnecessary given the specific circumstances of the Contraventions.

BACKGROUND

[4] The Appellant operates a composting facility in Abbotsford, BC. The facility receives food and yard waste which it processes into compost and soil blends. Effluent generated at the composting facility, consists of both leachate and contact water. Leachate is produced during the composting process. Contact water is stormwater that comes into contact with composting materials on site.

[5] The facility has been in operation since 2012. Before November 2020, Net Zero operated the site according to the *Organic Matter Recycling Regulation* (the "Regulation"). In October 2020, the Ministry sent Net Zero a draft permit, providing two weeks for review, with comments to be received no later than October 30, 2020. On November 6, 2020, the Ministry issued the Permit to Net Zero via registered mail. The Permit sets out parameters for authorized discharges, operational conditions, the need for certain management plans, and requirements for monitoring, sampling, and reporting within Net Zero's facility. Certain clauses of the Permit, such as the location and installation of a flowmeter, are time

sensitive. The Appellant is required to have management plans in place for both leachate and stormwater (in that it includes contact water) in order to control and limit their introduction into the environment.

[6] On November 9 and 12, 2020, the Ministry reached out to Net Zero via email to arrange a meeting to discuss the permit clauses. On November 13, 2020, Net Zero responded and requested an opportunity to provide further comments on what it referred to as the draft permit. On November 17, 2020, the Ministry informed Net Zero that the comment period was closed and that the Permit conditions were in force.

[7] The Ministry conducted an on-site inspection of PC Renewables' facility on February 24, 2021. The inspection found the Appellant was out of compliance with a number of clauses of the Permit.

[8] On December 31, 2020, Net Zero was acquired by EverGen Infrastructure Corp. In 2023, the Appellant changed its name from Net Zero to PC Renewables.

[9] An Administrative Penalty Referral letter was sent to PC Renewables on March 26, 2021.

[10] According to the Appellant's Operating and Closure Plan dated June 24, 2021 (the "Operating Plan"), during the wettest months of the year leachate is collected in a below-ground system for removal and off-site disposal. The Operating Plan estimates 12-20 truckloads of leachate are required to be removed per year. According to the Operating Plan, stormwater (including contact water) is collected in a separate system and flows into an aerated primary pond. After settling in the primary pond, the stormwater then flows into a supplemental pond where it is subsequently discharged into nearby municipal irrigation ditches.

[11] The volume of discharge from the supplemental pond outlet is restricted by the Permit's maximum discharge rate of 400 cubic meters per day. The characteristics of the discharge are restricted by the Permit parameters for maximum thresholds in several areas including, but not limited to, biological dissolved oxygen demands and chloride.

[12] The current leachate and stormwater management systems were installed in 2021, after the Contraventions occurred. At the time of the Contraventions, the supplemental pond was unlined and discharged automatically once the water in the pond reached a certain level.

[13] On September 1, 2021, the Ministry sent PC Renewables a Notice Prior to Determination of Administrative Penalty. PC Renewables subsequently made a written submission, on December 3, 2021, during its formal opportunity to be heard.

[14] The Determination of Administrative Penalty was issued on June 2, 2022. The date of the Discharge Contraventions was November 27, 2020, and the date for the Flowmeter Contravention was reported as spanning November 15, 2020, to April 9, 2021. The

Appellant does not dispute the findings of non-compliance in the Determination, nor the period of non-compliance.

ISSUES

[15] The issues to be decided in this appeal are:

1. Should the administrative penalty of \$40,000 assessed for the Discharge Contraventions be cancelled or reduced?
2. Should the administrative penalty of \$19,000 assessed for the Flowmeter Contravention be reduced?

[16] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under Section 100 of the *Act*. Under Section 103 of the *Act*, the Board has the powers to:

- (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.

ADMINISTRATIVE PENALTY FRAMEWORK

[17] Section 7(1) of the *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Penalties Regulation*"), sets out the factors decision makers must consider when establishing the amount of an administrative penalty.

- (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

[18] Under section 12(5) of the *Penalties Regulation*, the maximum penalty for failing to comply with a requirement of a permit is \$40,000.

[19] The Ministry's Administrative Penalty Handbook, dated June 2020 (the "Handbook"), provides statutory decision makers guidance on determining the amount of an administrative penalty. The Handbook addresses the same list of factors outlined in the *Penalties Regulation* while providing decision makers additional description, commentary, and context for each factor.

[20] The Handbook recommends first assessing a "base penalty" given the nature of the contravention (factor (a)) and any real or potential adverse effects (factor (b)), and further provides penalty tables to assist in determining the base penalty amount. According to the Handbook, factors (c) to (j) are adjustment factors that may increase or decrease the final penalty from the previously established base penalty. Both parties refer to the guidance provided in the Handbook. The Board has held in previous decisions that the Handbook provides a good starting point: *93 Land Company Inc. v. Director, EMA*, 2022 BCEAB 37 (CanLII) ("*93 Land Company*"), *Nordstrom Enterprises Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 8 (CanLII) ("*Nordstrom*"), and *Pacesetter Mills Ltd. v. Director, Environmental Management Act*, 2021 BCEAB 9 (CanLII). I likewise find the Handbook to be a useful basis to determine the appropriate level of penalties in this case.

DISCUSSION AND ANALYSIS

1. Should the administrative penalty of \$40,000 assessed for the Discharge Contraventions be cancelled or reduced?

Factor (a): What was the nature of the contraventions? And factor (b): What were the real or potential adverse effects?

Appellant's Submissions

[21] The Appellant submits that according to the Handbook, a "major" contravention includes the "most serious compliance issues... an actual significant impact or very serious threat to environmental or to human health." Although a discharge above 100% of the

permit limits may cause this kind of impact, it cannot be demonstrated in this case. While the Appellant admits that the discharge was greater than 100% of its permitted limit, it argues that there is no specific evidence of impacts to environmental or human health as a result of the Discharge Contraventions.

[22] Additionally, the Appellant submits that the Director recharacterized the nature of the contravention from “Moderate” to “Major” from the time of the Notice Prior to Determination to the final Determination without providing the Appellant opportunity to comment on this change. Therefore, the “Moderate” nature of the contravention as suggested in the Penalty Assessment Form provided at time of Notice should be confirmed.

Respondent’s Submissions

[23] The Respondent asserts these were “major” contraventions because the Permit discharge limits were exceeded by a significant magnitude. The discharge limits were exceeded by over 300% for biological oxygen demands and over 1000% for chloride. The Respondent argues the Appellant further contravened the Permit when it did not stop the excess discharge and did not re-sample and treat this discharge. The discharge from Net Zero’s facility is only permitted once the permit parameters are met.

[24] The Respondent submits that the Appellant had been repeatedly warned of unauthorized leachate discharge from its operations since in 2017, and that it was previously issued an administrative penalty as a result of unauthorized leachate discharge. Despite a history of leachate discharge issues at this site, the Appellant did not appeal the Permit conditions. The Respondent submits that the persistent non-compliance with discharge requirements supports the characterization of these current Discharge Contraventions as “major” in nature.

Panel’s Findings

[25] The Handbook describes that establishing the nature of the contravention includes an assessment of how the Ministry’s ability to protect the environment is impacted by compliance with the permit conditions. A “major” contravention is the most serious of compliance issues that, by their nature, result in a threat to the environment or human health or that otherwise interfere with the Ministry’s capacity to protect and conserve the environment. The Handbook provides examples of “major” contraventions, including unauthorized discharges, discharges exceeding 75-100% of the permit criteria, and actions that result in significant pollution.

[26] A “moderate” contravention, according to the classification in the Handbook, refers to situations involving failures to perform required tasks or actions and minor to moderate exceedance of a discharge limit with no sustained impact to environment or human health. The Handbook provides examples of “moderate” contraventions, including failures to develop or follow plans, unauthorized discharges that are 50% or less than permit criteria, and failures to properly install or maintain equipment.

[27] The examples in the Handbook provide guidance but are not rules. The Handbook suggests decision makers consider the question “what is the regulatory importance of compliance with this...authorization?” when evaluating this factor (page 59).

[28] The Respondent submits the Appellant’s persistent non-compliance with discharge requirements supports the characterization of a “major” contravention. I find that where there may be a concern of persistent non-compliance with permit requirements, the Handbook addresses this through the penalty adjustment factors (c), previous contraventions, and (d), whether the contravention was repeated or continuous. The Handbook does not recommend that persistent non-compliance with permit requirements be considered in determining whether the non-compliance was of a minor, moderate, or major nature.

[29] My interpretation of the Handbook is that the key metric for categorizing the nature of contraventions is the real or potential threat to environmental or human health. While the permit discharge parameters were exceeded by a large amount, there is insufficient evidence submitted before me to establish, on a balance of probabilities, that the Discharge Contraventions resulted in a sustained impact or threat to the integrity of the of the environment or human health.

[30] Additionally, there is insufficient evidence before me to establish, on a balance of probabilities, that the Discharge Contraventions undermine the basic integrity of the regulatory regime. When considering “what is the regulatory importance of compliance with this authorization?” I find it is more appropriate to characterize the nature of the contravention as Moderate.

[31] The parties agree that the categorization of “medium” for real or potential adverse effects is appropriate. Given a “moderate” contravention with “medium” potential for adverse effects, the base penalty suggested by the Handbook is \$10,000. I see no compelling reason to depart from this suggestion, and I set the base penalty for the Discharge Contraventions at \$10,000.

Factor (c) Any previous contraventions?

Appellant's Submissions

[32] The Appellant submits that an aggravating factor of no more than 25% should be applied for its previous contraventions. The Appellant submits that the previous administrative penalty issued by the Ministry dealt with contraventions of *Regulation* sections 26(2)(c) and 26(3) related to its leachate management system, whereas the current Discharge Contraventions related to Permit discharge criteria. The Appellant argues that the previous *Regulation* contravention was of a different nature and under a different regulatory regime than the current Permit issued under the *Act*.

Respondent's Submissions

[33] The Respondent submits the Appellant's history of non-compliance started in 2017 when the Ministry issued it a warning letter as a result of unauthorized discharge of leachate under the *Regulation*. Another warning letter for the same non-compliance was issued in 2018. A Ministry inspection in January 2020 led to the eventual issuance of a \$13,000 Administrative Penalty in March 2021 for continuous failure to ensure that leachate was not discharged to the environment. The Appellant initially appealed the 2021 administrative penalty but withdrew its appeal later that year.

[34] The Respondent submits that the Ministry has repeatedly directed the Appellant to take actions to prevent further unauthorized leachate discharges to the environment. The Respondent submits that while legal obligations between the *Regulation* and the Permit may be slightly different, the facts leading to the contraventions are identical. Given the Appellant's history of non-compliance with respect to leachate discharge, the Respondent submits that a 50% aggravating factor is appropriate.

Panel's Findings

[35] I am not persuaded by the Appellant's submissions that operations under the *Regulation* compared to operations under a Permit are a different regulatory regime. The *Regulation* is subordinate to the *Act*, and part of the same overall regulatory regime that enables the Ministry to protect the environment and human health from unauthorized or excessive waste discharges, amongst other things. Further, it is clear to me from the parties' submissions that both the Permit and the *Regulation* were the means by which the Ministry regulated the Appellant's emissions into the environment. The Permit was issued in November 2020, and on its issuance the *Regulation* ceased to govern the actions of the Appellant. Both of these methods of regulation are aimed at the protection of the environment and are part of the same regulatory regime.

[36] I am not persuaded by the Appellant's submission that the current contravention is of a different nature to those that came before. I agree with the Respondent's characterization that both previous and current contraventions are substantially similar to warrant the use of this adjustment factor. Specifically, the Discharge Contravention cites Permit sections 1.2.3 (effluent from the supplemental pond), 1.2.4 (effluent), and 3.2.3 (leachate). The Appellant has not appealed the fact that they are out of compliance with these sections. Both the previous and current contraventions relate in some part to leachate discharge. I find a 50% aggravating factor is appropriate.

Factor (d) Was the contravention repeated or continuous?

[37] This factor may increase the penalty. The Respondent did not increase the penalty for this factor in the Determination and makes no additional arguments that an aggravating factor should be applied here.

[38] The Appellant did not make any arguments in its submissions regarding this factor. There is no additional information to justify imposing a penalty adjustment for this factor. Consequently, I do not adjust the base penalty as a result of this factor.

Factor (e) Was the contravention deliberate?

Appellant's Submission

[39] The Appellant submits the contravention was not deliberate, it takes regulatory compliance very seriously, and its conduct since being issued the Permit does not warrant a strong and specific deterrent as suggested by the Respondent in the Determination. The Appellant submits the Discharge Contraventions occurred due to elevated stormwater levels and could not have been stopped or prevented given the site design at the time. The Appellant submits the contraventions were involuntary.

[40] The Appellant cites *93 Land Company* (paragraph 143) where the word "deliberate" requires consideration of if the party was intentionally in contravention, or at least willfully blind to the contravention. The Appellant cites *Parke-Davis Division v. Canada (Minister of Health) (C.A.)*, 2002 FCA 454 (CanLII), where the *Oxford English Dictionary* definition of the word "deliberate" was considered, in part, as: "with careful consideration and full intention" (paragraph 92) The Appellant submits that none of these definitions of deliberate action apply to them.

[41] The Appellant submits that the Permit's discharge requirements came into effect immediately and did not account for the time needed to implement infrastructure changes to the site which were required to maintain compliance with the Permit. The Appellant submits it was not possible to make the site modifications required to meet permit discharge thresholds in the three-week time period between the permit being issued (November 6) and the Discharge Contraventions occurring (November 27).

[42] Since 2021, the Appellant has invested significant resources in redesigning and constructing new effluent collection and treatment systems and implementing new preventative measures surrounding the composting process. In addition to financial resources, the investment in time and human resources needed to plan, coordinate, and implement these modifications is significant.

[43] The Appellant submits it was not possible at the time to truck its effluent off-site as suggested by the Respondent. The failure to truck effluent off-site was characterised in the Determination as willful contravention of the Permit. The Appellant argues the Respondent had no evidence that trucking effluent was a possible alternative at the time. Since 2021, the Appellant has searched for off-site disposal options but has not found a processing facility that would consistently accept its waste.

[44] The Appellant responds to statements made in the Respondent's Determination regarding covering of compost piles. In the Determination, the Respondent states that covering the piles would reduce the amount of leachate produced, but that the Appellant's

piles were not all covered. In response, the Appellant replies that the active compost piles have always been covered. In addition, since EverGen acquired the stockpiles, pre-screening piles and unfinished piles are now also covered. Furthermore, the Appellant argues that covering piles does not significantly impact the site's ability to comply with the Permit's discharge criteria.

Respondent's Submission

[45] In the Determination, the Respondent assigned a 50% aggravating factor to the base penalty for the deliberate nature of the contravention. The Respondent submits that the Appellant has been aware of compliance issues related to the leachate management system and leachate discharge on site since at least 2017. The Respondent submits that, despite repeated warnings and letters issued between December 2017 and March 2020, the Appellant has continuously failed to comply with waste discharge requirements under the *Act* and *Regulation*.

[46] The warning letters issued to the Appellant addressed actions that the Appellant was required to undertake. The Respondent submits these actions included halting leachate discharge to the stormwater lagoon, ensuring all product remains covered, addressing the issue of the unlined stormwater pond, and updating the leachate management plan. In each inspection performed during the 2017–2020 period, Ministry inspectors observed leachate flowing from the composting operation to the unlined supplemental pond, where it was then discharged to the environment.

[47] The Respondent argues that the Appellant's failure to comply with discharge requirements is the result of deliberate actions and inactions over a period of years. Additionally, the Respondent argues that upon receiving the Permit the Appellant made the choice not to appeal the Permit conditions. Instead, the Respondent argues, the Appellant carried on with its same actions, knowing these would likely be in breach of the Permit's terms.

Panel Findings

[48] According to the Handbook, "knowledge, willfulness and intent are indicators of deliberateness" (page 64). The parties agree that the Appellant knew about the contraventions while they were occurring. In addition to knowledge, the Handbook guides decision makers to also consider the indicators of willfulness and intent. In acknowledging that "intent" may be hard to prove, the Handbook suggests decision makers ask the question "how much control did the did the person have over the events that constituted the violation?" (page 64). I find this guidance to be useful to my assessment of the deliberateness of the Appellant's actions.

[49] The Appellant submits there was not enough time to implement the site design changes in the weeks between the Permit being issued and when the contraventions occurred. While that may be so, the Appellant had years to ensure compliance with its discharge requirements, first under the *Regulation* and then under the Permit. I am not persuaded by the Appellant's argument that this contravention falls under a different

regulatory regime than that which was in place before the Permit was issued. The broader framework of the *Act*, enforced by the Ministry through inspections is still the same. The Appellant also argues its past contraventions are unrelated to this new Permit requirement. The Handbook clearly states that this factor considers a person's compliance history and does not limit decision makers to only consider compliance history related to the same contravention type.

[50] Given the history of warnings and the previous administrative penalty, should the infrastructure improvements carried out by the Appellant in 2021 and 2022 have started in 2020 or before? Was there inaction in making site improvements for a period of time? In *Nordstrom*, the Board found that an "Appellant's inaction over a long period, knowing about the contravention, can be considered deliberate" (paragraph 49). In *Nordstrom*, the Appellant's inaction continued over a period of three years.

[51] In this appeal, I find that the Appellant was, or ought to have been, aware of the issue of unauthorized discharge from the unlined supplemental pond from the outcome of the November 2017, January 2018, and January 2020 Ministry inspections. This issue was the subject of a Notice Prior to the Determination of Administrative Penalty issued in August 2020. All of these events occurred prior to the issuance of the Permit on November 6, 2020.

[52] Both the Respondent, in the Determination, and the Appellant, in its submissions, raised the issue of covering the compost piles on site and the impact this may have on the leachate generated from said piles. However, as I was not presented with sufficient evidence, expert or otherwise, to determine what the impact, if any, the covering of these compost piles had on the generation of leachate on the site, I cannot consider this factor as either an aggravating or a mitigating factor when assessing the Appellant's compliance.

[53] I find that the Appellant had roughly three years, from November 2017 to November 2020, not three weeks, to address at least one key aspect of its site design in order to comply with the *Act* and *Regulation*, and then Permit, requirements. The Appellant submits that site work for a new lined aeration pond began in January 2021 and was completed May 2021. While I agree with the Appellant that the contravention of the Penalty's requirements was an involuntary reality given the site design at the time the Permit was issued, the Appellant had been aware of issues with the site design for a period of years, leading to non-compliance with the applicable regulatory regime under the *Act* (whether it was the *Regulation* or the Permit). As in *Nordstrom*, I find the Appellant's inaction from November 2017 to November 2020 while knowing about the discharge from the unlined supplemental pond to be deliberate. I find an aggravating factor of 50% (\$5,000 in this case) for deliberateness to be appropriate.

Factor (f) Were there economic benefits derived?

Appellant's Submissions

[54] The Appellant submits that it did not gain any economic benefits from the contraventions. The Appellant submits that off-site trucking of the effluent was not a realistic option because no off-site facilities were available to accept such high volumes of effluent. The Appellant argues that the Respondent provided no evidence of where off-site disposal would have been possible at the time of the contravention. During this appeal, the Appellant introduced into evidence a copy of its application to Metro Vancouver for an out of region discharge authorization for approximately 7 loads of effluent per day, or approximately 1500 loads during the period of November 2022 to May 2023, which had been denied.

[55] The Appellant submits that, since 2022, they have been in discussions with a wastewater treatment plant in Abbotsford to have effluent from its facility accepted there. This plant accepted, on a temporary basis, certain test loads of effluent from the Appellant's facility from December 2022 to April 2023. The Appellant submits that prior to this recent agreement, this treatment plant was at capacity and unable to accept any of the Appellant's effluent.

[56] In October 2022, the Appellant sought, and received, permission to apply the effluent to farmers' fields as a type of liquid manure. The Appellant submits it incurred costs of about \$20,000 in 2022 and \$31,000 in 2023 by carrying out this land application program.

Respondent's Submissions

[57] The Respondent assigned a 100% aggravating factor for economic benefits the Appellant derived from the contraventions. In the Determination, the Respondent stated that a 100% penalty increase represents an underestimation of the economic costs avoided by not trucking the discharged effluent.

[58] The Respondent cites sections of the Appellant's Operating Plan, which states that leachate would be collected and hauled off-site for disposal during the wettest months of the year. The Operating Plan estimates approximately 12 to 20 truckloads of leachate per year will be collected and hauled for off-site disposal.

[59] The Respondent submits that in January 2020, a Ministry inspector observed a third-party disposal company removing leachate from the collection tanks to be hauled off-site. The Respondent argues this is evidence that trucking of effluent off-site was possible at the time of the contravention. The Respondent submits that the Appellant has failed to establish that trucking of effluent was not possible.

[60] The Respondent submits that the Appellant also benefitted from continuing its operations during a period of non-compliance. Both avoided costs and the benefit of continuing operations should be considered under this factor.

Panel's Findings

[61] The Operating Plan requires that leachate be transported off-site from the Appellant's facility, but not contaminated stormwater. The Operating Plan describes how stormwater is collected and stored in the primary aeration and supplemental ponds and discharged to irrigation ditches from the supplemental pond.

[62] I am not convinced by the Respondent's argument that the ability to haul leachate means there was, or is, a similar opportunity for the Appellant to haul stormwater away for off-site disposal. The volumes of effluent discharge from the supplemental pond are much greater than the 12 to 20 truckloads per year of leachate contemplated in the Operating Plan. The Appellant's application to Metro Vancouver was for up to 7 loads per day during the November 2022 to May 2023 period.

[63] The Appellant's submissions show that they have not found a consistent destination for their effluent since increasing their efforts to do so in 2021. The Respondent did not submit any evidence to show that off-site trucking of the effluent was possible at the time of contravention, or since then. Given the Appellant's inability to find a consistent off-site facility for waste from 2021 to 2023, and the lack of evidence to the contrary from the Respondent, I find, on the balance of probabilities, the removal of stormwater from the facility by way of off-site trucking in late 2020 and early 2021 was not intentionally avoided.

[64] The Handbook states that consideration of this factor "sends a message to operators as well as the public that it is not ok the 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 to the benefit of not complying" (page 41).

[65] Given that both parties agree that the Appellant had knowledge of the contravention, that Ministry inspectors were on site multiple times, and that the Appellant is not appealing the fact that they were in non-compliance, I do not view the Appellant's behaviour as "taking their chances of getting caught." The efforts made by the Appellant to improve the site and to find alternative destinations for the effluent persuade me that an increased deterrent is not necessary in this case to account for any economic benefits the Appellant experienced as a result of the Discharge Contraventions. I do not find an aggravating factor for economic benefits to be appropriate in this instance. Consequently, I do not adjust the base penalty as a result of this factor.

Factor (g) Was due diligence exercised?

[66] The Appellant did not make any submissions to assert they were duly diligent. In the Determination, the Respondent stated there was no evidence of due diligence so no mitigating factor was assigned. I do not assign any mitigating factor for due diligence. Consequently, I do not adjust the base penalty as a result of this factor.

Factor (h) What efforts have been made to correct the contravention? And Factor (i) What efforts have been made to prevent reoccurrence of the contravention?

Appellant's Submissions

[67] The Appellant submitted a list of recent investments that it made, aimed at bringing the facility into compliance with the Permit requirements. The Appellant submits that it invested approximately \$259,000 at the time of the Determination in order to prevent future contraventions on the site. The Appellant argues that these investments resulted in the Respondent reducing the penalty by \$10,000.

[68] The Appellant submits that, by the end of December 2023, it will have spent \$8 million on permit compliance. The Appellant consequently argues that a proportionate penalty reduction of at least \$300,000 (30 times \$10,000) should be applied. The Appellant submits that a nominal \$5,000 administrative penalty may also be appropriate in this circumstance.

Respondent's Submissions

[69] The Respondent acknowledges that the Appellant has made significant efforts to prevent a reoccurrence of the contravention and therefore implemented a 50% mitigating factor to the base penalty for these efforts. The Respondent argues that further reduction of the penalty would undermine the administrative penalty regime, and significant reductions would encourage permit holders to only comply when they are caught.

[70] The Respondent argues that despite the Appellant's recent investments and site modifications, Ministry inspections in 2021 and 2022 showed the Appellant was still exceeding the Permit discharge requirements. The Respondent submits that a further reduction to the penalty is not appropriate as the discharge parameters were still being exceeded in 2022 and there is not enough evidence to show that discharge parameters have been consistently achieved in 2023.

Panel's Findings

[71] According to the Handbook, mitigating factors (h) and (i) may be assessed for actions taken to correct the contravention or to prevent future reoccurrences which occurred after the contravention; actions "[do] not have to include an expenditure of funds" (page 67). These factors consider the efforts made, not specifically the dollars spent.

[72] I acknowledge the efforts made by the Appellant that include, but are not limited, to retaining advice of qualified professionals, applying to amend the Permit conditions, re-design and construction of improved leachate and stormwater management systems, improved site operations processes, boosting internal staff resources, and finding alternative uses for the effluent. However, there is no justification for reducing the penalty in proportion to the amount invested by the Appellant to bring the site into compliance. It is not a question of simply tallying the money spent to correct a contravention and to seek to prevent its reoccurrence.

[73] The intent of an administrative penalty is to encourage compliance and deter future non-compliances. I am not persuaded by the Appellant's arguments that the penalty should be reduced proportionate to the funds invested in Permit compliance after a non-compliance has been found. I find that a 50% mitigating factor is appropriate. Consequently, I find that a decrease of the penalty amount in the order of 50% of the base penalty, or \$5,000, is appropriate.

Factor (j) What additional factors may be relevant?

[74] Neither party made submissions on any additional factors that should be considered in the penalty adjustment. I do not consider any other factors in this decision. Consequently, I do not adjust the base penalty as a result of any additional factors.

Panel's Findings on Administrative Penalty for the Discharge Contraventions

[75] I find the base penalty for the Discharge Contraventions to be \$10,000. The following adjustments are made to this base penalty:

- a. a 50% aggravating factor (+\$5,000) is applied for previous contraventions;
- b. a 50% aggravating factor (+\$5,000) is applied for the deliberateness of the contraventions; and,
- c. a 50% mitigating factor (-\$5,000) is applied for efforts made by the Appellant to prevent future contraventions.

[76] All other penalty adjustments are applied at 0% for the reasons above. The administrative penalty for the Discharge Contraventions is varied to \$15,000.

2. Should the administrative penalty of \$19,000 assessed for the Flowmeter Contravention be reduced?

Factor (a) What was the nature of the contraventions? and (b) What were the real or potential adverse effects?

[77] The parties agree that the nature of this contravention is "moderate."

Appellant's Submissions

[78] The Appellant submits the real or potential adverse effects of the Flowmeter Contravention is "low," not "medium" as categorized in the Determination. The Appellant submits that the contravention is the failure to monitor the discharge rates, and there is no evidence to show this failure to monitor the rates has had any impact or risk to environmental or human health. According to the Handbook penalty tables, the appropriate base penalty for a "moderate" contravention with "low" adverse effects should be \$5,000.

Respondent's Submissions

[79] The Respondent submits that due to the failure to install a flowmeter at the required location, there were no flow records that could be gathered and therefore it is challenging to quantify the impacts and risk to the environment. The Respondent cites *United Concrete* where it was held that:

... without the required sampling and analysis, no one has an accurate understanding of what the Appellant is discharging into the environment. There is no way to promptly or effectively respond if any discharges of process water or runoff from an establishment exceed the limits...or if pollution takes place, for example.

[80] The Respondent submits that without the flowmeter at the required location there is no accurate understanding of what is being discharged to the environment. Therefore, the risk is "medium" because there is not enough information to confirm that the risk is "low." The lack of a flowmeter to monitor discharges interferes with the Ministry's capacity to protect the environment or human health.

Panel's Findings

[81] The *United Concrete* decision cited by the Respondent addresses the requirement for sampling and analysis. I do not find that case to be of assistance in the matter before me, as the Flowmeter Contravention involved only the failure to install a flowmeter at the required location at PC Renewables' facility. This is a separate factual situation from that presented in *United Concrete*. In particular, in *United Concrete* the Board considered circumstances where there had been an unappealed administrative penalty for failing to generate and retain sampling and analysis data for effluent. This went beyond the circumstances of the Flowmeter Contravention. The analysis of the administrative penalty for the Flowmeter Contravention must be narrowly focused on the consequences that can reasonably flow from this particular contravention.

[82] There is insufficient evidence before me to suggest that actual harm to, or adverse effects on, the environment or human health have occurred as a result of the failure to install a flowmeter in the proper location, or failure to monitor the rate of discharges during the contravening period. The Respondent has not made submissions on what potential harms may come to the environment or human health as a result of the lack of a flowmeter installed in the correct location.

[83] I find that the real or potential adverse effects of the Flowmeter Contravention are best characterized as "low." The base penalty as suggested by the Handbook for a "moderate" contravention with "low" adverse effects is \$5,000. I see no compelling reason to depart from this suggestion, and I set the base penalty for the Flowmeter Contravention at \$5,000.

Factor (c) Any previous contraventions?

Appellant's Submissions

[84] The Appellant submits an aggravating factor of no more than 25% is appropriate here, as previous contraventions under the *Regulation* and *Act* are unrelated to the Flowmeter Contravention. The Appellant submits that the flowmeter is a new Permit requirement under a different legal regime.

Respondent's Submissions

[85] The Respondent submits that, given the Appellant's history of previous contraventions under the *Act* at this location, a 50% aggravating factor is appropriate. The Respondent's submission of PC Renewables' history of non-compliance is described above.

Panel's Findings

[86] In the same manner as I previously described when assessing this factor when applied to the Discharge Contraventions, I am not persuaded by the Appellant's argument that this contravention falls under a different regulatory regime than that which was in place before the Permit was issued. The broader framework of the *Act*, enforced by the Ministry through inspections is still the same. The Appellant also argues its past contraventions are unrelated to this new Permit requirement. As I have already indicated, the Handbook clearly states that this factor considers a person's compliance history and does not limit decision makers to only consider compliance history related to the same contravention type. I find a 50% aggravating factor for previous contraventions is appropriate. Consequently, I find that an increase of the penalty amount in the order of 50% of the base penalty, or \$2,500, is appropriate.

Factor (d) Was the contravention repeated or continuous?

[87] The Appellant does not dispute the Respondent's application of a 10% aggravating factor for continuous contravention. Consequently, I find that an increase of the penalty amount in the order of 10% of the base penalty, or \$500, is appropriate.

Factor (e) Was the contravention deliberate?

Appellant's Submissions

[88] The Appellant submits the delay in properly installing a flowmeter was not deliberate. The Appellant argues it was not physically possible to install the flowmeter at the required location in the 9 days between when the permit was issued (November 6) and when the permit required the flowmeter to be installed (November 15). A temporary flowmeter was installed in February 2021. Site modifications were made to accommodate a flowmeter in the required location after this time, and the new flowmeter was installed April 15, 2021. The Appellant accepts that while a flowmeter may have been installed earlier in 2021, it was not physically possible in the time required by the Permit.

Respondent's Submissions

[89] The Respondent makes similar arguments regarding deliberateness for the Flowmeter Contravention as were made regarding the Discharge Contraventions, as described above. The Respondent submits that the Appellant knew it was likely to be in contravention of the Permit requirements given the repeated warnings it was given by Ministry inspectors over the period of several years. The Respondent submits that, despite this knowledge, the Appellant chose not to appeal the Permit requirements and continued with its operations in the same manner it had been doing so before being issued the warnings. The Respondent submits that a 50% aggravating factor is appropriate to account for the Appellant's deliberate contravention of the *Act* and Permit requirements.

Panel's Findings

[90] I do not interpret the Appellant's choice to not appeal the Permit conditions as deliberate non-compliance with the Permit, or as deliberate inaction. None of the authorities referred to me by the Respondent support the notion that a failure to appeal a permit's conditions can be considered as evidence that any contraventions of that permit were deliberate.

[91] While inaction, like knowledge, might signify not taking steps towards complying with regulatory or Permit requirements, these are not indicators of deliberateness in all cases. As described in the paragraphs above, there is also a time element to knowledge of a contravention which must be considered.

[92] Neither party submits evidence to suggest the Appellant would have known about the flowmeter location and installation requirement prior to the Permit being issued. As such, any inaction on installing a flowmeter can only be said to have begun in October 2020, when the Ministry sent Net Zero a draft of the Permit. I find the Appellant's argument reasonable: it was not possible to install the flowmeter in the required location in the short time window between when the permit was issued and when a flowmeter was required. I find no aggravating factor for deliberateness is appropriate for the Flowmeter Contravention. Consequently, I do not adjust the base penalty as a result of this factor.

Factor (f) Were there economic benefits derived?

[93] The parties agree no aggravating factor is applied for economic benefits derived from the contravention. Consequently, I do not adjust the base penalty as a result of this factor.

Factor (g) Was due diligence exercised?

[94] The Respondent did not apply a mitigating factor here. The Appellant did not make any submissions arguing that it was duly diligent. No mitigating factor is assessed for due diligence. Consequently, I do not adjust the base penalty as a result of this factor.

Factor (h) What efforts have been made to correct the contravention?

[95] The Appellant installed the flowmeter in the required location in April 2021. In the Determination, the Respondent applied a 10% mitigating factor for efforts to correct the contravention, the Appellant agrees with this. Consequently, I find that a decrease of the penalty amount in the order of 10% of the base penalty, or \$500, is appropriate.

Factor (i) What efforts have been made to prevent reoccurrence of the contravention?

[96] In the Determination, the Respondent applied a 10% mitigating factor for efforts to correct the contravention, the Appellant agrees with this. Consequently, I find that a decrease of the penalty amount in the order of 10% of the base penalty, or \$500, is appropriate.

Factor (j) what additional factors may be relevant?

[97] The parties did not make submissions on any additional factors to be considered. Consequently, I do not adjust the base penalty as a result of any additional factors.

Panel's Findings on Administrative Penalty for Flowmeter Contravention

[98] I find the base penalty to be \$5,000. The following adjustments are made to the base penalty:

- a. a 50% aggravating factor (+\$2,500) is assessed for previous contraventions,
- b. a 10% aggravating factor (+\$500) for continuous contravention,
- c. a 10% mitigating factor (-\$500) for efforts to correct the contravention, and
- d. a 10% mitigating factor (-\$500) for efforts to prevent reoccurrence.

[99] All other penalty adjustments are applied at 0% for the reasons above. The administrative penalty for the Flowmeter Contravention is varied to \$7,000.

DECISION

[100] In making my decision, I have carefully considered all the relevant documents and the parties' submissions and evidence, whether or not they are specifically referenced in the reasons above.

[101] For the reasons provided in this decision, I vary the administrative penalties and grant the Appeal, in part. The administrative penalty for the Discharge Contraventions is varied to \$15,000, and the administrative penalty for the Flowmeter Contravention is varied to \$7,000.

"Cynthia Lu"

Cynthia Lu, Panel Chair
Environmental Appeal Board