Environmental Appeal Board

Citation: *Deep Water Recovery Ltd. v. Director, Environmental Management Act*, 2025 BCEAB 30

Decision No.: EAB-EMA-23-A025(a)

Decision Date: 2025-07-28

Method of Hearing: Conducted by way of written submissions concluding on July 3, 2024.

Decision Type: Final Decision

Panel: Jeffrey Hand, Panel Chair

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

Between:

Deep Water Recovery Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Graham Walker, Counsel

For the Respondent: Dennis Doyle, Counsel

FINAL DECISION

INTRODUCTION

[1] Deepwater Recovery ltd. (the "Appellant") brings this appeal in respect of a Determination of Administrative Penalty dated October 11, 2023 ("the "Determination"). The Determination was issued by Stephanie Little, Director, Ministry of the Environment and Climate Change Strategy (as it then was) (the "Ministry"), Compliance and Environmental Enforcement Branch (the "Respondent"). The Appellant was found to have failed to comply with an order of the Ministry (the "Order") that required the Appellant to submit monthly analysis of effluent sampling. The Determination imposes an administrative monetary penalty ("AMP") on the Appellant. The Appellant does not dispute that it delivered the required analysis outside the time limits set out in the Order.

[2] The Appellant says that compliance with the Order was impossible. Further, the Appellant says the AMP should be set aside because the Respondent did not follow its own policies and guidelines before issuing the AMP. It says those guidelines required that an AMP not be issued unless other enforcement efforts, such as a warning letter, had failed to achieve compliance. The Appellant also submits that it ought not to have received an AMP because this was the first instance of failing to deliver the analysis results.

[3] Further, the Appellant says that the Order ought to have provided that the Appellant could ask for a time extension if it could not comply with the timeline for submitting the analysis, and in the absence of this term in the Order, imposing an AMP was unfair. Lastly it submits that issuing an AMP in the circumstances of this appeal was not consistent with other decisions of the Environmental Appeal Board (the "Board") or the Courts.

[4] The Appellant asks that the Determination be set aside (reversed).

[5] The Respondent says that it was not impossible to deliver the samples by the required deadline in the Order. She submits that an AMP is properly authorized under the *Environmental Management Act*, SBC 2003, c 53 (the "*Act*") and it was necessary to ensure compliance in the future given that the Appellant had not responded to previous requests made by the Ministry that the Appellant obtain a permit to authorize the discharge of effluent. She submits that she followed Ministry guidelines for issuing the AMP. The Respondent asks that the appeal be dismissed, and that the Determination be upheld (confirmed).

BACKGROUND

[6] The Appellant operates a marine vessel maintenance and vessel resource recovery facility (the "Facility") located in Union Bay, British Columbia. The resource recovery work

done at the Facility involves dismantling vessels at the end of their operational life such that the materials used to construct the vessel are separated, salvaged, and reused in other forms.

[7] The Facility includes an area of open gravel, an area of the leased foreshore, and an upland asphalt pad. Vessel dismantling is conducted on the asphalt pad, which was constructed to direct surface water from the Facility to three water collection sumps. These sumps drain directly to the adjacent marine environment. There was no water treatment system connected to any of these sumps.

[8] In response to public complaints, Environmental Protection Officers employed by the Ministry conducted an inspection at the Facility on April 5, 2022. They collected samples of effluent from the sumps. The samples were analyzed and were found to exceed the BC Water Quality Guidelines for total copper, lead and zinc content.

[9] According to an affidavit from the Respondent, the BC Water Quality Guidelines are a tool to support regulatory decision making. Exceeding the guidelines does not necessarily mean that unacceptable risks to the environment exist, but rather that there is a potential for adverse effects that require further investigation. The Respondent says that effluent discharged from the Facility enters a shellfish reserve recognized by Fisheries and Oceans Canada as an ecological and biologically significant area. The Ministry determined that monitoring and sampling was needed to decide whether a pollution prevention order should be made.

[10] Following the April 5, 2022, inspection, the Ministry issued a warning letter to the Appellant dated April 29, 2022, which said the Appellant was discharging effluent without authorization in contravention of section 6(2) of the *Act*. The warning letter required the Appellant to correct this non-compliance within 30 days.

[11] On July 27, 2022, the Appellant began the process to apply for a permit to authorize the discharge of effluent into the environment. However, there is no evidence before me that a permit was ever issued.

[12] On August 17, 2022, Environmental Protection Officers conducted a follow-up inspection at the Facility and observed a barge being dismantled. They observed waste and surface water effluent being discharged to the marine environment.

[13] On September 6, 2022, a second warning letter was issued to the Appellant noting that there was continued contravention of section 6(2) of the *Act* and directing the non-compliance be corrected in 30 days.

[14] On October 27, 2022, Ministry staff conducted a further inspection, this time during a heavy rainstorm event. Samples were collected from discharge from the sumps. Analysis found that the water quality guidelines for copper, lead, zinc and cadmium, were being exceeded.

[15] A third warning letter was issued to the Appellant dated Dec 8, 2022, which provided the analysis from the April 5, 2022, and October 27, 2022, inspections and

repeated the requirement that the Appellant secure authorization to discharge waste into the environment.

[16] On January 23rd, 2023, the Ministry issued Information Order 111550 (the 'Order").

[17] The Order required the Appellant to:

1) retain a qualified professional by January 31, 2023, to develop and implement a sampling and monitoring plan;
2) submit the sampling and monitoring plan to the Director by February 28, 2023, with directions:

   Sampling must be conducted at a minimum of once per calendar month and samples must be collected during, or within 72 hours, of a rainfall event. If no rainfall occurs during the month, sampling may be conducted within the last three days of the sampling period[;]

3) collect the first samples prior to March 15, 2023;
4) submit to the Director, by April 15, 2023, and the 15th day of each month thereafter, a written report detailing the results of field and lab testing of samples taken the preceding month.

[18] The Appellant retained Envirochem Services Inc. ("Envirochem") to prepare the required sampling and monitoring plan. On February 28, 2023, the Appellant submitted Envirochem's plan to the Ministry. The plan confirmed, amongst other things, that samples would be obtained each month and that a report setting out the analysis of the samples would be submitted by the 15th day of the following month.

[19] There was a total of 46.7 mm of precipitation during the month of March 2023 according to Environment and Climate Change Canada records. Envirochem took samples from within the sumps between March 29 and March 31. These were sent for analysis on March 31, 2023, to a third-party laboratory. An analysis of the samples was received by the Appellant on April 21, 2023. The analysis was submitted to the Ministry on April 27, 2023.

[20] On May 1, 2023, the Respondent issued a Notice Prior to Determination of Administrative Penalty to the Appellant, indicating the Ministry was considering an AMP because the testing results were not submitted to the Director by April 15 as required by the Order. She was considering imposing an AMP of $900.

[21] On May 19, 2023, the Appellant requested an Opportunity to be Heard. Written submissions were submitted by June 24, 2023.

[22] On October 11, 2023, the Ministry issued the Determination. The Respondent found that the failure to submit the analysis on time was a significant administrative non-compliance which warranted an AMP according to a Non-Compliance Decision Matrix used by the Ministry. She established the amount of the AMP by using the "Administrative

Penalties Handbook - Environmental Management Act and Integrated Pest Management Act" (the "Handbook").

[23] The lowest amount for a non-compliance of this type, using the Handbook was $1000. This amount was reduced by 10% to recognize that the Appellant had acknowledged that they were submitting the analysis late. A further reduction of $400 was made in recognition that the Appellant had subsequently submitted the testing results on time in each of the subsequent months. Applying the deductions to the base penalty amount of $1000, resulted in an AMP of $500.

[24] On November 3, 2023, the Appellant filed a Notice of Appeal from the Determination.

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

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

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

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

ISSUES

1. Should the AMP be confirmed, varied or set aside?
2. If an AMP is warranted, what is the appropriate amount for the AMP?

ANALYSIS

Overview of the statutory scheme

[26] Under section 115(1) of the *Act*, a director may issue an administrative penalty to a person who fails to comply with an Order:

> Subject to the regulations, if a director is satisfied on a balance of probabilities that a person has
>
> ...
>
> (b) failed to comply with an order under this Act,
>
> ...
>
> the director may serve the person with a determination requiring the person to pay an administrative penalty in the amount specified in the determination.

[27] The *Administrative Penalties* (*Environmental Management Act*) *Regulation*, B.C. Reg. 133/2014 (the "*Regulation*") governs the determination of administrative penalties under section 115(1) of the *Act*.

[28] Section 6 of the *Regulation* states that a requirement that a person pay an administrative penalty applies even if the person exercised due diligence to prevent the contravention or failure in relation to which the administrative penalty is imposed.

[29] Section 7(1) of the *Regulation* lists the following factors that the Director must consider, if applicable, in 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.

[30] The Ministry uses the Handbook, updated June 1, 2020, as guidance for setting the amount of an AMP. The Handbook recommends determining a "base penalty" that reflects the seriousness of the contravention considering the nature of the contravention and any real or potential adverse effects (factors 7(1)(a) and (b) of the *Regulation*). The Handbook offers non-binding suggestions for assessing how to categorize the nature or type of contravention (major, moderate, or minor) and how serious its real or potential impacts are (high, medium, low, or none) and for how these two factors can be combined to establish a reasonable starting point for the base penalty. The Handbook also contains non-binding suggested base penalty tables which combine the nature of the contravention or failure with the seriousness of the real or potential adverse effects for each of the contraventions.

[31] The base penalty is added to, or deducted from, by considering each of the factors 7(1)(c) through (j) of the *Regulation*. The Handbook states that considering these mitigating and aggravating factors provides the statutory decision maker flexibility to consider more than simply what happened, and this flexibility encompasses why the contravention happened, whether it has happened before, and the person's past and current actions and attitude. However, use of this discretion requires the consideration of all the relevant factors and requires the provision of reasons for any adjustments (or lack of adjustments) to the base penalty.

[32] The Ministry also relies on an its Compliance & Enforcement Policy and Procedure (the "C&E Policy") in determining whether to impose an AMP. The C&E Policy is a tool to guide consistent decision making in choosing from various enforcement methods to address non-compliance. Within C&E is a Non-Compliance Decision Matrix intended to assist in the assessment of when an AMP is the appropriate enforcement tool to be used.

[33] According to the Board in G.T. Farms v Director, Environmental Management Act, 2024 BCEAB 43 (CanLII):

> [12] The use of the Handbook in setting administrative penalties has been accepted by the Board as "a reasonable guide for determining the appropriate quantum of an administrative penalty under the [EMA]," and it has been determined that the Handbook "fosters consistency and predictability in decision-making" (see *United Concrete & Gravel Ltd. v. Director, Environmental Management Act*, 2021 BCEAB 21 (CanLII), ("*United Concrete*") at para 72). Similarly in *93 Land Company v. Director, Environmental Management Act*, 2022 BCEAB 37, at para 107, the panel determined that "an important principle of administrative fairness is that administrative penalties should be assessed on a consistent and transparent basis," and I find use of the Handbook in assessing administrative penalties fosters that important principle.

[34] Like the Board in that decision, I find the Handbook and the C&E Policy to be a useful guide in assessing administrative penalties, bearing in mind that the Board is not bound to follow this non-binding guidance. Similarly, the Handbook is guidance only for the Director who retains discretion to decide whether to impose an AMP and to determine its amount.

1) Should the AMP be confirmed, varied, or set aside?

Position of the Parties

Appellant's Submissions

[35] The Appellant submits that its activities associated with the Facility are not prescribed under the *Act*. While the appellant's written submissions do not say so, the

implication of this assertion is that the Director lacked authority to issue the Order and the subsequent Determination.

[36] The Appellant submits that issuing an AMP in the circumstances of this appeal is contrary to the Ministry's own policies set out in the Handbook and the C&E Policy. The Appellant submits that those policies require that an AMP only be issued after other enforcement measures have failed to achieve compliance. The Appellant submits that there ought to have been a warning letter issued to the Appellant before an AMP. It says that the warning letters the Appellant received for discharging effluent without a permit are not relevant because those warnings did not concern a previous failure to submit sampling analysis on time.

[37] The Appellant says this contravention was trivial and caused no harm to the environment and as such the Handbook and C&E Policy did not require an AMP.

[38] Further, the Appellant says an AMP was not an appropriate penalty because compliance with the Order was impossible.

[39] The Appellant says that the Order was imprecise and ought not to be enforced because the Order did not specify that the Appellant was required to seek an extension from the Ministry if it felt it was prevented from carrying out the testing due to a lack of rainfall.

[40] The Appellant says it demonstrated its cooperation with the Ministry by subsequently adhering to the reporting requirements of the Order, thereby making the AMP unnecessary.

[41] Lastly, the Appellant submits that issuance of the AMP is not consistent with previous Board and Court decisions.

Respondent's Submissions

[42] The Respondent says the Appellant does not deny it contravened the reporting requirements of the Order and in these circumstances the Director had the discretion to issue an AMP. The Respondent says the Handbook and C&E Policy are guidelines only and cannot supplant the Director's discretion to levy an AMP. Nonetheless, it says the AMP was consistent with the Handbook and C&E Policy.

[43] The Respondent submits that it was not impossible to comply with the Order. Further, it says that impossibility is not a defense to the issuance of an AMP in any event.

[44] The Respondent submits that the Appellant's failure to comply with the warning letters requiring it to obtain a permit are relevant to the issuance of the AMP because they are evidence of previous non-compliance. The failure to comply with those warnings demonstrated that a further warning letter was not the best tool for achieving compliance and instead an AMP was the appropriate enforcement tool.

[45] Lastly, the Respondent says the authorities the Appellant relies upon are not relevant to this appeal. The Respondent relies on *1782 Holdings ltd. v Director*

Environmental Management Act 2024 BCEAB 2 (CanLII), which held that failure to submit testing data to the Director can be the basis for a $1,000 AMP.

Panel Findings

[46] Before determining the ultimate issues in this appeal, of whether the AMP should be confirmed, varied or set aside and the appropriate amount of any AMP levied, I will consider the specific arguments raised by the Appellant in their submissions.

Is the Appellant conducting prescribed activities under the Act?

[47] The Order was made pursuant to s. 77 of the *Act*, which empowers the director to require any person conducting any business to provide information about substances being released into the environment:

> **77** (1) For the purpose of determining whether there are reasonable grounds for making a pollution prevention order under section 81 *[pollution prevention orders]* or a pollution abatement order under section 83 *[pollution abatement orders]*, a director may order a person who is conducting an industry, trade or business to provide to the director the information described in subsection (2) that the director requests, whether or not
>
> (a) the industry, trade or business is prescribed for the purposes of section 6 (2) *[waste disposal]*, or
>
> (b) an activity or operation of the industry, trade or business is prescribed for the purposes of section 6 (3) *[waste disposal]*.
>
> 2) An order under subsection (1) must be served on the person to whom it applies and may require the person to provide, at the person's own expense, information relating to
>
> (a) the operations or activities of the industry, trade or business, or
>
> (b) substances used, stored, treated or introduced or caused or allowed to be introduced into the environment in the course of the industry, trade or business.

[48] The Appellant says its activities do not constitute those of a “regulated industry,” and that it only voluntarily agreed to provided monthly analysis of its effluent discharge.

[49] I firstly observe that regulated industry is not a term found in the *Act*. Rather, s. 77 of the *Act* refers to “prescribed activities.” I interpret the Appellant’s arguments to mean that they do not consider themselves to be regulated under the *Act*, and for the purposes of this analysis, I consider their argument as meaning that they are not carrying out “prescribed activities” as described in s. 77.

[50] Section 77 of the *Act* expressly states that the power to require the Appellant to provide testing results exists, whether or not the Appellant’s activities are a prescribed

activity. This section imposes broad discretionary authority for a director to require requested information to determine whether there are reasonable grounds to make a pollution prevention order or pollution abatement order. As such, it is not necessary for me to determine whether the Appellant was engaged in a prescribed activity.

[51] I find that the Director had the authority to issue the Order under s. 77 of the *Act* and require the Appellant to submit the required analysis. I reject the Appellant's submission that the sampling was merely voluntary. The Appellant was required to sample the effluent by the express terms of the Order, which was issued pursuant to the Respondent's statutory authority.

Was issuing the AMP contrary to the Ministry's policies?

[52] Section 115 of the *Act* permits an AMP where, on a balance of probabilities, there has been a contravention of an Order. This is a broadly worded discretionary power. The Act does not restrict or otherwise prescribe the criteria to be considered before issuing an AMP.

[53] The Appellant does not deny that it contravened the Order's requirements that it submit monthly testing analysis, but it nonetheless says that an AMP ought not to have been levied.

[54] The Appellant submits that an AMP is contrary to the Handbook but has not referred me to any specific provision that says an AMP cannot be levied in the circumstances of this case.

[55] While the Handbook is largely concerned with the process of issuing an AMP and how the amount is determined, I note the Handbook does say that an AMP can be a first response to non-compliance:

> The recommendation to impose an AMP may be part of a progressive enforcement response, following the unsuccessful use of other enforcement tools, or it may be the first response to non-compliance when the circumstances warrant it. Staff should continue to be guided by the Non-compliance Decision Matrix.
>
> As one of a number of enforcement tools available to EP [Environmental Protection Officer]to respond to non-compliance, an AMP may be imposed as part of an escalating enforcement response, preceded by unsuccessful efforts by staff to compel compliance using other tools such as advisories, warnings or violation tickets. Or an AMP may be an appropriate first response to non-compliance such as where a person has clearly fallen below the expected standard of care and demonstrates questionable willingness or capacity to comply.
>
> (emphasis added)

[56] The Handbook expressly contemplates an AMP being issued as a first response to non-compliance. The Appellant has failed to establish that there is any provision in the Handbook, other Ministry policy, regulation, or the *Act*, that says an AMP must be preceded by a warning letter or that an AMP cannot be issued for the first instance of a contravention.

[57] The C&E Policy says, about the circumstances which might justify an AMP:

> An AMP may be an appropriate response to non-compliance where, on a balance of probabilities, a decision maker determines that a regulated party has contravened a requirement of their authorization and an advisory, warning or ticket does not adequately reflect the severity of the contravention and therefore would not be an effective deterrent.

[58] The C&E Policy also says:

> When considering how to respond to non-compliance, ministry staff consider the severity of actual or potential impact to the environment, human health or safety, the factual circumstances of the alleged offence or the compliance history of the offender, as well as how to achieve the best environmental outcome and reduce the likelihood of recidivism. In some cases the ministry uses progressive sanctions when previous enforcement actions have been ineffective.

[59] The Director says that receiving the required analysis in a timely way was necessary to allow the Director to properly assess whether there is harm or potential harm to the environment. I do not accept the Appellant's characterization of their failure to provide the analysis as trivial. I accept that this is important information for the Director to have and that it must be received in a timely way in order to be useful and to avoid potential harm to the environment.

[60] I accept the Respondent's submission that the circumstances of this case make the failure to submit the analysis on time a significant administrative non-compliance. Based on the information in the Handbook ad C&E Policy I have set out above, I find that it is not contrary to Ministry policy to issue the AMP in this circumstance. To the contrary, the Handbook and C&E Policy expressly contemplate issuing an AMP as a first step to address non-compliance. As the Appellant has not pointed me to any specific part of the Ministry's policies that it thinks was not followed, I reject their argument that issuing an AMP in this circumstance was contrary to Ministry policy.

Was a warning letter required before an AMP?

[61] The AMP followed the three warning letters issued by the Ministry to the Appellant regarding the discharge of effluent without permit. The Order that has been breached was intended to obtain timely analysis of the very discharge that was the subject of the three warning letters in 2022. I find that there was sufficient nexus between the warning letters

and the subsequent failure to provide the analysis to be concerned that a further warning would not result in compliance.

[62] There is no provision in the Handbook or the C&E Policy which says that a previous warning letter must be concerned with the specific contravention in issue. Even if the previous warnings were not relevant, there is nothing in those policies that requires warning letter prior to issuing an AMP.

[63] The guidance provided by Non-Compliance Decision Matrix for where there is a low to medium expectation of compliance and a low risk of harm to the environment, indicates either an AMP or a warning letter can be used as an enforcement tool. There is discretion to choose the enforcement tool most likely to achieve compliance.

[64] The Appellant refers me *to Mount Polley Mining Corporation v Environmental Appeal Board* 2022 BCSC 1483 (CanLII) [*Mount Polley*] and submits that this decision supports the issuance of warning letters before an AMP.

[65] *Mount Polley* was a judicial review of a Board decision that upheld a monetary penalty. The AMP was issued for failure to comply with the terms of a permit that required the implementation of a water treatment system. The Court upheld the characterization of the contravention as "major" and the risk to the environment as "low." An AMP of $9,000 was upheld.

[66] The Appellant places some reliance on the fact that the reasons for judgment mention three warning letters having been issued before the AMP was imposed. However, the issue on judicial review concerned only whether the Appellant's assertion that it was impossible to comply with the timelines of the permit was a defense at law. Secondly, the Court was considering whether the Board's characterization of the contravention as "major" was reasonable. The decision offers no guidance on whether, or in what circumstances, an AMP can be levied or whether warning letters are required before an AMP is levied.

[67] I find that the Appellant has not demonstrated that the AMP was contrary to the Ministry's policies or that a warning letter was required before issuing the AMP. Even if a warning letter was required, I found the Ministry **did** issue three warning letters to the Appellant as a precursor to the Order so their argument would fail in this regard in any event.

Was it impossible for the Appellant to comply with the Order?

[68] The Appellant says it could not comply with the requirement in the Order to submit testing analysis by April 15 because low rainfall in March made it impossible to obtain samples. This assertion is at odds with the unrefuted fact that samples were in fact obtained during the last days of March and sent for analysis.

[69] While the Appellant submits it would be best practice to obtain the samples from overflow from sumps rather than from within the sumps, there is no evidence before me of these alleged best practices. Moreover, the samples from within the sumps were

collected and sent for analysis by Envirochem. If this was not the correct procedure, I would expect to see some evidence from Envirochem to that effect. There is none before me offering that opinion.

[70] I also note that the samples collected by the Ministry in April 2022, are described as being taken *from the sumps*. The last of these sampling events taken by the Ministry in October 2022, is said to have occurred following a rainstorm event. The Appellant asks me to infer that this must mean that the required sampling stipulated in the Order could only occur following a rain event. The Order expressly says that sampling can still occur even when there is no rainfall and it must occur in the last 3 days of the sampling period where there has not been prior rainfall in the month. I do not read the Order as saying that sampling can only occur during a rainfall event, or that the Appellant is somehow relieved of performing the testing of samples when there is low or no precipitation. The express terms of the Order say otherwise.

[71] The evidence also confirms that not only was the sampling performed by the end of March, but the samples were also submitted for analysis on March 31, a full two weeks before the analysis was to go to the Director. No explanation is provided for why the Appellant did not submit the results until April 27.

[72] I find that it was the responsibility of the Appellant to comply with the Order, and this necessarily requires the Appellant to manage its consultants and third-party testing agencies to ensure they receive the results in a timely way so as to comply with the timelines set out in the Order.

[73] I find that the Appellant has not demonstrated that compliance with the Order was impossible.

Did the order contain imprecise measurements such that it was unfair to enforce?

[74] The Appellant says that the Order ought to have provided an opportunity for the Appellant to seek additional time if it could not deliver the testing results on time. In the absence of such an opportunity, the Appellant says it is unfair to impose an AMP.

[75] The Appellant relies on *West Coast Reduction Ltd. v Greater Vancouver (Regional District),* 2010 BCEAB 6 (CanLII [*West Coast Reduction*]). *West Coast Reduction* concerned certain amendments to an air permit allowing the release of air contaminants. The appeal concerned the imposition of limits on odors emitted from a rendering plant. The director amended the permit to use "odour units' as a metric for measuring compliance with the permit's restriction on air contaminants. The appellant in that case took the position odour units is a flawed method of measurement because it lacked precision and accuracy since it depends on individual sensitivity or reaction to odour. The Board found this subjective measurement too imprecise to be useful in deterring compliance with the permit.

[76] I do not find the analysis in *West Coast Reduction* to be applicable to this appeal because I do not accept that the Order was imprecise. The Order set out the requirement

to test monthly, including in months when precipitation was low, and to submit the results by the15th day of the month.

[77] The Appellant has not demonstrated that the Order was imprecise and why, if it was, that would be a reason to reverse the Determination.

Did the Appellant demonstrate its cooperation with the Ministry by subsequently adhering to the reporting requirements of the Order, thereby making the AMP unnecessary?

[78] The Appellant says that its subsequent compliance with the reporting requirement in the months following the Notice Prior to Determination demonstrates its willingness to cooperate. It says that this should excuse the initial non-compliance or otherwise demonstrate that the AMP was not needed.

[79] Factors 7(h) and (i) of the *Regulation* say that a person's efforts to correct a contravention or to prevent a recurrence of a contravention are factors to be considered in establishing **the amount** of an AMP. These are not prescribed factors to be considered in whether an AMP should be issued. The Appellant has not referred me to any authority to says these are factors that should be considered when determining whether an AMP should be issued. As noted above, the C&E Policy provides some guidance to decision-makers deciding whether to exercise their discretion to impose an AMP. The critical excerpt is quoted above and does not specifically reference efforts to correct a contravention or prevent a recurrence. That may be, but is not necessarily, part of "…the factual circumstances of the alleged offence … as well as how to achieve the best environmental outcome and reduce the likelihood of recidivism," which are factors to be considered in whether to impose an AMP.

[80] The Appellant has not demonstrated that subsequent compliance is a reason why the AMP was unnecessary and that it should be reversed. This may be part of the overall circumstances, but I consider the compliance history of the Appellant with respect to related warning letters, as described above, to be more persuasive. I also note that the Appellant did not explain how the subsequent compliance would go to factors 7(h) and (i) in determining the penalty amount.

Was the AMP inconsistent with other Ministry enforcement decisions in similar situations?

[81] The Appellant refers me to three decisions in support of its argument that the AMP in this instance is inconsistent with previous decisions. I find that none of the decisions referred to support this assertion for the reasons set out below.

Li Zhu Liu v Deputy Director, Fish and Wildlife Branch, 2018 BCEAB 19 (CanLII)

[82] This decision concerns the cancellation of a hunting license under the *Wildlife Act*, RSBC 1996, c 488. This cancellation followed the appellant's conviction for various offenses in Provincial Court. This decision concerns an entirely different statute and there are no convincing similarities to the case before me.

[83] This decision does not provide me with any guidance on the issuance of AMPs, nor does it provide any assistance in assessing the significance of the non-compliance in issue before me.

R. v Zellstoff Celgar Ltd. Partnership, 2012 BCPC 295 (CanLII)

[84] This decision involved fines issued for offenses rather than AMPs. The appellant had repeatedly discharged effluent into the Columbia River in excess of permit levels. The appellant was ordered to pay $30,000 in fines and to contribute $120,000 to a conservation society.

[85] This decision is so dissimilar to the appeal before me that I find it is of no assistance in determining if an AMP was appropriate.

Wet'suwet'en Treaty Office Society v British Columbia (Environmental Assessment Office), 2021 BCSC 717 (CanLII)

[86] This was a judicial review of a decision to issue a 5-year extension of an environmental certificate to a pipeline operator. One of the issues, of many, raised by the applicant for judicial review was whether the decision maker had given due consideration to the compliance history of the certificate holder. It did not concern AMPs.

[87] I find this decision does not assist me in assessing the AMP in this instance.

Conclusion on whether the AMP should be confirmed, varied, or set aside

[88] According to the Board's Practice and Procedure Manual, which has been consistently upheld by the Board (e.g. *Norman Tapp v. Director, Environmental Management Act, 2022* BCEAB 20 (CanLII)) the general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities." In this case, the Appellant has the burden of proof to demonstrate that the Determination should be set aside.

[89] Considering all of the foregoing arguments, I find that the Appellant has not met their burden of proof to demonstrate that the Determination should be set aside. I therefore confirm the Respondent's Determination that an AMP was warranted for the contravention.

2) If an AMP is warranted, what is the appropriate amount for the AMP?

[90] Section 7(1) of the Regulation sets out the factors to be considered in establishing the amount of the AMP:

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, or administrative penalties;

d) whether the contravention or failure was repeated or continuous;

e) whether the contravention or failure was deliberate;

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

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

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

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

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

[91] The Director relied on the Handbook for guidance in setting the base penalty, based on factors (a) and (b) from the Regulation. The Handbook set a minimum penalty of $1,000 for failing to submit analysis in circumstances where there is a low to no risk to the environment. There is no lower category of penalty in the Handbook.

[92] The Appellant made no submissions in this appeal on the calculation of the base penalty. The Respondent has referred me to *1782 Holdings Ltd. v Director Environmental Management Act*, 2024 BCEAB 2 (CanLII) [*1782 Holdings*].

[93] *1782 Holdings* concerned five AMPs issued against the appellant in that case for failing to comply with the terms of a permit that allowed wastewater discharge into Lake Okanagan. One of the non-compliances concerned the failure to report annual groundwater and effluent analysis to the Ministry within 60 days of year end. The director issued a $2,000 AMP. The Board found the AMP was warranted for the late reporting but reduced the AMP to $1,000:

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

[94] The circumstances in *1782 Holdings* are similar to those in this appeal since both concern the late submittal of analysis where there has been no adverse environmental impact. I agree with the observation that submitting effluent analysis results in a timely way is important for the assessment of compliance and one for which a base penalty of $1,000 is appropriate. I find that analysis is applicable in this appeal. I therefore confirm the base penalty of $1,000.

[95] As described in the Handbook, the remaining factors in s. 7 of the *Regulation* are to be used to adjust the base penalty. I will address those factors now.

Any previous contraventions or failures, or administrative penalties

[96] The Respondent does not rely on any evidence of previous administrative penalties or contraventions. As such I make no adjustments based on this factor.

Whether the contravention or failure was repeated or continuous

[97] This was a single instance of failing to meet the timeline in the Order. There is no need to adjust the base penalty for this factor.

Whether the contravention or failure was deliberate

[98] The Respondent does not assert that the contravention was deliberate and there is insufficient evidence for me to conclude it was deliberate. I make no adjustments based on this factor.

Any economic benefit derived by the person from the contravention or failure

[99] The Respondent does not assert that the Appellant derived an economic benefit and there is insufficient evidence for me to conclude there was a benefit. I make no adjustments based on this factor.

Whether the person exercised due diligence to prevent the contravention or failure

[100] This is a factor that could decrease the penalty if there was evidence of due diligence. The Appellant has not provided sufficient evidence to demonstrate that it took steps to ensure the testing results were submitted on time. I find there is no need to adjust the base penalty for this factor.

The person's efforts to correct the contravention or failure

[101] The Director acknowledged in her determination that the Appellant recognized it was late in filing the effluent analysis and it spoke to the Ministry, which she considered to be some effort to correct the late delivery. The Director applied a 10% reduction in the base penalty amount of $1,000 to account for these efforts.

[102] The Appellant did not make any submissions in regard to this deduction. While they submitted evidence of later compliance, they did not explain how that would apply to this factor. I see no reason to vary this adjustment and confirm the Director's finding on this factor.

The person's efforts to prevent recurrence of the contravention or failure

[103] The Appellant complied with the Order in the months following the contravention. I accept this is some evidence of the Appellant's efforts to prevent recurrence. The Director applied a 40% reduction to the base penalty to account for these efforts. I see no reason to vary this adjustment and confirm the Director's finding on this factor.

DECISION

[104] For the reasons given, I confirm the AMP of $500.

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

[106] The appeal is dismissed.

"Jeffrey Hand"

Jeffrey Hand, Panel Chair
Environmental Appeal Board