



MINISTRY OF ENVIRONMENT AND CLIMATE CHANGE STRATEGY  
COMPLIANCE AND ENVIRONMENTAL ENFORCEMENT BRANCH

**DETERMINATION OF ADMINISTRATIVE PENALTY**

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January 31, 2023

File: 2019-22  
107517

Email: [Robin.Sheremeta@teck.com](mailto:Robin.Sheremeta@teck.com); [Christine.Deynaka@teck.com](mailto:Christine.Deynaka@teck.com)

Teck Coal Limited  
Suite 3300, 550 Burrard Street  
Vancouver, BC V6C 0B3

Attention: Teck Coal Limited

**RE: Determination of Administrative Penalty**

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Further to the Notice Prior to Determination of Administrative Penalty issued to you on March 15, 2021, and your opportunity to be heard respecting the alleged contraventions, I have now made a Determination in this matter.

After reviewing the information available to me, I have concluded Teck Coal Limited has failed to comply with Section 7.1.1 of Permit 107517 in respect of which an administrative penalty is being imposed pursuant to Section 115 of the *Environmental Management Act* (EMA) and the Administrative Penalties Regulation. The amount of the penalty, reasons for my decision, payment, and appeal information are provided in the attached decision document.

If you have any questions with regards to this determination, please contact me at [Dan.Bings@gov.bc.ca](mailto:Dan.Bings@gov.bc.ca) or [EnvironmentalEnforcement@gov.bc.ca](mailto:EnvironmentalEnforcement@gov.bc.ca).

Sincerely,

A handwritten signature in black ink, appearing to be "D. Bings".

Daniel P. Bings  
for Director, *Environmental Management Act*

cc: Kelly Mills, Environmental Protection Specialist  
[Kelly.Mills@gov.bc.ca](mailto:Kelly.Mills@gov.bc.ca)

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**DETERMINATION OF ADMINISTRATIVE PENALTY**

**File: 2019-22**

**THE CONTRAVENTION**

**Name of Party:**

Teck Coal Limited – Fording River Operations

**AMOUNT OF ADMINISTRATIVE  
PENALTY:**

**\$15,480,000**

**Contravention or Failure:**

**Failure to comply with Permit PE-107517 Section 7.1.1 (Active Water Treatment Facilities):**

7.1.1 The permittee must design, construct and operate the following active water treatment facilities (AWTF) or alternative water treatment technology as approved by the director, by the date shown. The permittee must employ best achievable technology in the development of these treatment facilities. Phosphorus treatment must be included if necessary, to ensure BC Water Quality Guidelines for chlorophyll -a for freshwater aquatic life in streams is met.

TREATMENT FACILITY	TREATMENT SCOPE	APPROXIMATE CAPACITY OF AWTF	OPERATIONAL DATE
Fording River South	Cataract, Swift, Kilmarnock Creeks	20,000 m <sup>3</sup> /day	December 31, 2018
Elkview Phase I*	Bodie, Gate, Erickson Creeks	30,000 m <sup>3</sup> /day	December 31, 2020
Fording River North	Clode Creek, North Spoil, Swift Pit	15,000 m <sup>3</sup> /day	December 31, 2022
Elkview Phase II	Erickson	20,000 m <sup>3</sup> /day	December 31, 2024
Greenhills	GHO West Spoil (Thompson, Leask, Wolfram), Greenhills Creek	7,500 m <sup>3</sup> /day	December 31, 2026
Fording River North Phase II	Swift Pit Discharge	15,000 m <sup>3</sup> /day	December 31, 2030

\*Elkview Operations SRF Phase 2 replaces Elkview Phase I

Notwithstanding the above requirements to construct and operate active water treatment facilities, **the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.**

## **Date of Contravention or Failure:**

Daily from January 1, 2019 until March 15, 2021 (Date of Notice), for a total of 805 days

## **Director's Summary:**

On March 15, 2021, the Ministry of Environment and Climate Change Strategy (Ministry) issued a Notice Prior to Determination of Administrative Penalty (Notice) to Teck Coal Limited (Teck). In the Notice, Teck was offered an Opportunity to be Heard (OTBH). Teck provided their OTBH on June 7, 2021. On June 8, 2021, the Ministry shared Teck's OTBH with the Ktunaxa Nation Council (KNC). On October 12, 2021, the KNC provided comment on Teck's OTBH. On October 21, 2021, the Ministry forwarded KNC's comments to Teck for review. On November 30, 2021, Teck provided a rebuttal to the KNC comments.

## **Reasons for Decision:**

I have considered all of the information submitted to me, including the written submissions provided by Teck and the associated KNC comments. My evaluation has included a consideration of the matters listed in Section 7(1) of the Administrative Penalties (EMA) Regulation (APR), as applicable. Based on this assessment, I offer the following comments:

## **Territorial Acknowledgement:**

As part of this process, I have involved the KNC by sharing the Teck OTBH submission with them and considered their comments in the process of making this determination.

The Ktunaxa people have occupied the lands along the Kootenay and Columbia Rivers and the Arrow Lakes of what is now known as British Columbia (BC), for thousands of years. The territory of the Ktunaxa Nation covers approximately 70,000 km<sup>2</sup> in the Kootenay region of south-eastern BC and traditionally included parts of Alberta, Montana, Washington, and Idaho. The Ktunaxa people traditionally migrated throughout the land following seasonal harvesting cycles. The name for their territory is ʔamakʔis Ktunaxa. The Ktunaxa language is a cultural isolate spoken only by the Ktunaxa and is unrelated to the neighbouring Salishan languages. Colonialization in the 1800s resulted in the endangered status of the Ktunaxa language and the establishment of the present Indian Bands.

Ktunaxa citizenship is comprised of Nation members from six Bands. Four Bands are located in BC and two are in Idaho and Montana, respectively. The Bands in BC include the ʔakisq̓nuk First Nation (Columbia Lake Band), Yaq̓it ʔa·knuq̓i'it (Tobacco Plains Band), ʔaq̓am (St. Mary's Band), and Yaq̓an Nuʔkiy (Lower Kootenay Band); the bands in the United States include the k̓upawiq̓nuk (Ksanka Band) in Elmo, Montana and the ʔaq̓anq̓mi (Kootenai Tribe of Idaho) in Bonner's Ferry, Idaho.

I respectfully acknowledge that this statutory decision relates to mining activities and associated impacts in the Ktunaxa territory and as part of the Province's commitment to reconciliation, the KNC will continue to be consulted on issues that impact their Rights and Title.

I would like to express my sincere gratitude to the KNC for their active engagement in this administrative penalty proposal and my appreciation of the time commitment this involved for their staff. The perspective provided in their submissions has been of great assistance in my deliberations on this matter.

## **Preliminary Matters:**

### **Format of decision:**

1. Teck raised concerns with some of the history outlined in the Penalty Assessment Form (PAF) shared at Notice in addition to certain turns of phrase in that document and reference to five operating mines when only four are in operation. While I routinely issue a revised PAF with a Final Determination with strikethrough edits to indicate revisions, due to Teck's concerns, I will address my reasons for decision solely in this document. The format of this decision will be to address the factors required by Section 7 of the APR sequentially by first summarizing the proposals for these factors at Notice, then providing a high-level summary of the Teck and KNC comments prior to providing my rationale and conclusions.

### **Consideration of Fording River Operations South Active Water Treatment Facility (FRO-S AWTF), Selenium exceedances, and Line Creek Operations (LCO) Nitrate exceedances submissions together:**

2. Teck and the KNC have both requested that I collectively address this penalty (2019-22 FRO-S AWTF) and the proposed submission from the parties on the penalties for Selenium (2021-25 Selenium) and Nitrate (2019-21 LCO CP Nitrate) exceedances. Based on the submissions I have reviewed from the parties for these three penalty proposals, I will grant this request. This decision will consider the comments from Teck and the KNC regarding the interconnectivities between the three penalties where they are raised in the submissions.
3. The following discussion cross references the Final Determinations for the Selenium exceedances (2021-25 Final Determination) and the Nitrate exceedances (2019-21 Final Determination) and they should be read together.

### **The Requirement:**

4. Teck has raised an issue that warrants discussion and clarification prior to addressing the factors required by the APR. That issue being the specific requirement of the alleged contravention and the amendment of Section 7.1.1 of the Permit. The PAF addresses Section 7.1.1 which remains unvaried today, but Teck submits that the Permit was amended from Section 8.1.1 to Section 7.1.1 in October 2020. Teck also asserts that the language in the requirement of the renumbered Permit section changed substantially. Because the compliance period being contemplated by this penalty proposal spans the period from January 1, 2019, until March 15, 2021 (the date of Notice), I will address this argument directly.
5. Teck's primary argument respecting the subject requirement is as follows:

*“Notably, the Permit did not include any reference to “alternative water treatment technology as approved by the director” relied on heavily in the Penalty Form as an aggravating factor.”*

6. I note that the PAF references *“or alternative water treatment technology as approved by the director”* in the first sentence of the requirement. As discussed below, this reference was added October 22, 2020, and is the requirement in force at the time the Notice was issued.
7. Section 8.1.1 of the Permit, dated November 19, 2014, is the applicable requirement from the beginning of the compliance assessment period on January 1, 2019, until April 4, 2019:

*“8.1.1. ACTIVE WATER TREATMENT FACILITIES*

*The Permittee must design, construct and operate the following active water treatment facilities (AWTF), by the date shown. The Permittee must employ best achievable technology in the development of these treatment facilities. Phosphorus treatment must be included if necessary to ensure BC Water Quality Guidelines for chlorophyll-a for freshwater aquatic life in streams is met.*

<i>TREATMENT FACILITY</i>	<i>TREATMENT SCOPE</i>	<i>APPROXIMATE CAPACITY OF AWTF</i>	<i>OPERATIONAL DATE</i>
<i>Fording River South</i>	<i>Cataract, Swift, Kilmarnock Creeks</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2018</i>
<i>Elkview Phase I</i>	<i>Bodie, Gate, Erickson Creeks</i>	<i>30,000 m<sup>3</sup>/day</i>	<i>December 31, 2020</i>
<i>Fording River North</i>	<i>Clode Creek, North Spoil, SwiftPit</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2022</i>
<i>Elkview Phase II</i>	<i>Erickson</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2024</i>

*Notwithstanding the above requirements to construct and operate active water treatment facilities, the Permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.”*

8. Subsequently, on April 4, 2019, the Permit was amended:

*“8.1.1 ACTIVE WATER TREATMENT FACILITIES*

*The Permittee must design, construct and operate the following active water treatment facilities (AWTF), by the date shown. The Permittee must employ best achievable technology in the development of these treatment facilities. Phosphorus treatment must be included if necessary, to ensure BC Water Quality Guidelines for chlorophyll -a for freshwater aquatic life in streams is met.*

<i>TREATMENT FACILITY</i>	<i>TREATMENT SCOPE</i>	<i>APPROXIMATE CAPACITY OF AWTF</i>	<i>OPERATIONAL DATE</i>
<i>Fording RiverSouth</i>	<i>Cataract, Swift, Kilmarnock Creeks</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2018</i>
<i>Elkview Phase I</i>	<i>Bodie, Gate, Erickson Creeks</i>	<i>30,000 m<sup>3</sup>/day</i>	<i>December 31, 2020</i>
<i>Fording RiverNorth</i>	<i>Clode Creek, North Spoil, SwiftPit</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2022</i>
<i>Elkview Phase II</i>	<i>Erickson</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2024</i>
<i>Greenhills</i>	<i>GHO West Spoil (Thompson, Leask, Wolfram), Greenhills Creek</i>	<i>7,500 m<sup>3</sup>/day</i>	<i>December 31, 2026</i>
<i>Fording RiverNorth Phase II</i>	<i>Swift Pit Discharge</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2030</i>

*Notwithstanding the above requirements to construct and operate active water treatment facilities, the Permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.”*

9. On September 25, 2020, the Permit was amended again:

*“7.1.1 ACTIVE WATER TREATMENT FACILITIES*

*The permittee must design, construct and operate the following active water treatment facilities (AWTF), by the date shown. The permittee must employ best achievable technology in the development of these treatment facilities. Phosphorus treatment must be included if necessary, to ensure BC Water Quality Guidelines for chlorophyll -a for freshwater aquatic life in streams is met.*

<i>TREATMENT FACILITY</i>	<i>TREATMENTSCOPE</i>	<i>APPROXIMATE CAPACITY OF AWTF</i>	<i>OPERATIONALDATE</i>
<i>Fording River South</i>	<i>Cataract, Swift, Kilmarnock Creeks</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2018</i>
<i>Elkview Phase I</i>	<i>Bodie, Gate, Erickson Creeks</i>	<i>30,000 m<sup>3</sup>/day</i>	<i>December 31, 2020</i>
<i>Fording River North</i>	<i>Clode Creek, North Spoil, SwiftPit</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2022</i>
<i>Elkview Phase II</i>	<i>Erickson</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2024</i>
<i>Greenhills</i>	<i>GHO West Spoil (Thompson, Leask, Wolfram), Greenhills Creek</i>	<i>7,500 m<sup>3</sup>/day</i>	<i>December 31, 2026</i>

<i>Fording River North Phase II</i>	<i>Swift Pit Discharge</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2030</i>
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*Notwithstanding the above requirements to construct and operate active water treatment facilities, the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.”*

10. On October 22, 2020, the Permit was amended for the final time during this compliance assessment period and was modified slightly as indicated in **bold underline** below:

*“7.1.1 ACTIVE WATER TREATMENT FACILITIES*

*The permittee must design, construct and operate the following active water treatment facilities (AWTF) **or alternative water treatment technology as approved by the director**, by the date shown. The permittee must employ best achievable technology in the development of these treatment facilities. Phosphorus treatment must be included if necessary, to ensure BC Water Quality Guidelines for chlorophyll -a for freshwater aquatic life in streams is met.*

<i>TREATMENT FACILITY</i>	<i>TREATMENT SCOPE</i>	<i>APPROXIMATE CAPACITY OF AWTF</i>	<i>OPERATIONAL DATE</i>
<i>Fording River South</i>	<i>Cataract, Swift, Kilmarnock Creeks</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2018</i>
<i>Elkview Phase I*</i>	<i>Bodie, Gate, Erickson Creeks</i>	<i>30,000 m<sup>3</sup>/day</i>	<i>December 31, 2020</i>
<i>Fording River North</i>	<i>Clode Creek, North Spoil, Swift Pit</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2022</i>
<i>Elkview Phase II</i>	<i>Erickson</i>	<i>20,000 m<sup>3</sup>/day</i>	<i>December 31, 2024</i>
<i>Greenhills</i>	<i>GHO West Spoil (Thompson, Leask, Wolfram), Greenhills Creek</i>	<i>7,500 m<sup>3</sup>/day</i>	<i>December 31, 2026</i>
<i>Fording River North Phase II</i>	<i>Swift Pit Discharge</i>	<i>15,000 m<sup>3</sup>/day</i>	<i>December 31, 2030</i>

*\*Elkview Operations Phase 2 replaces Elkview Phase 1*

*Notwithstanding the above requirements to construct and operate active water treatment facilities, the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.”*

11. Having carefully reviewed these four versions, and despite Teck’s repeated assertions to the contrary, I have confirmed that the subject requirement has not materially changed as asserted by Teck.

12. Until the October 22, 2020 amendment, the requirement was identical with the minor exceptions of the Permit section re-numbering in 2020, minor formatting differences and the word permittee being capitalized in 2014 and 2019 versions.

13. In the October 22, 2020, amendment the first sentence of Section 7.1.1 was modified by adding the wording emphasized above and addressed below:

*“The permittee must design, construct and operate the following active water treatment facilities (AWTF) **or alternative water treatment technology as approved by the director**, by the date shown.”*

14. I am informed that this change was made to accommodate Teck’s transition toward Saturated Rock Fill (SRF) technology over the more expensive active water treatment facilities pursued initially. The only other change to the requirement was the notations respecting “\*Elkview Operations Phase 2 replaces Elkview Phase I”.

15. I note that the PAF emphasizes the following language that existed in all four versions of the Permit from issuance in 2014 until the date of Notice:

*“the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.”*

16. Teck asserts there existed no requirement for “...*alternative water quality mitigation works prior to October 2020*”. I disagree. The preceding bolded paragraph has existed unmodified since the Permit was first issued November 19, 2014.

17. Furthermore, the disputed requirement respecting alternate water quality mitigations suggests that this Permit requirement requires not only implementation and continuing operation of the FRO-S AWTF, but also full compliance with the Area Based Management Plan (ABMP). However, I will not attempt to perform a compliance assessment of the ABMP as part of this decision, but will address the late AWTF implementation and alternative mitigative options or lack thereof as contemplated in the paragraph noted above.

18. It is noteworthy that the subject requirement consists of two distinct components. The first paragraph requires installation and operation of the listed treatment facilities (“...*or alternative water treatment technology as approved by the director*” added October 22, 2020) by the indicated dates.

19. The second component of the requirement which follows the table, has existed since issuance to the date of Notice and requires Teck to ensure “*all necessary alternative water quality mitigative works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP.*”

20. I have considered Teck’s argument that there was no requirement for “*alternative water treatment technology as approved by the director*” prior to October 2022. This argument appears to hinge upon the addition of the above noted language to the first component of the requirement made to accommodate the transition to SRF’s on October 22, 2020.

21. While Teck's comment respecting the addition of the above noted language to the first component of the requirement is correct in part, their argument that no alternative mitigations or treatment options were required as dictated by the second component of the requirement is incorrect.
22. My assessment of this contravention will therefore consider both the requirement to complete and operate the FRO-S AWTF by January 1, 2019, and the requirement that *"the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP."*

**Parties Positions on application of the daily multiplier:**

23. The Notice contemplated application of the maximum \$40,000 penalty allowed by the APR and application of the daily multiplier under three potential scenarios: monthly, weekly, and daily.
24. Teck submits that it would not be fair, reasonable, or proportionate to impose any administrative penalty. Alternatively, that should a penalty be applied, commissioning of the FRO-S AWTF was a point in time requirement and only a single penalty calculation may be considered. Teck submits that the maximum penalty in consideration of all factors should be substantially less than the maximum allowable penalty for a single contravention of \$40,000. Teck's submission suggests a single base penalty of \$1,000 to \$5,000 if any penalty is assigned.
25. The KNC advocate strongly in support of the approach of the application of the daily multiplier for a variety of reasons addressed in the factors below. Notably, the KNC close their submission with the following which I have quoted directly from their submission:  
  
*"The purpose of EMA is to protect the environment by, among other things, requiring polluters to control, reduce and mitigate waste introduced into the environment. Waste discharge permits are the lynchpin of the system of pollution control established under the scheme of EMA, as they establish the thresholds and standards required to protect the environment. Contrary to Teck's submission, regulatory action to enforce compliance with permit conditions is therefore not only consistent with the purposes of EMA, it is integral to ensuring that those purposes are fulfilled. Conversely, a failure by ENV to levy an administrative penalty after nearly three years of non-compliance and hundreds of thousands of kilograms of untreated contaminant release would not only be inconsistent with the purposes of EMA, it would also undermine the integrity of the scheme by signalling to polluters that there is no consequence to consistent non-compliance."*
26. Discussion respecting the application of the daily multiplier is contained in Factor d) below.
27. My considerations under Section 7 of the APR are as follows:

### **Factor a): Nature of the contravention**

28. The PAF shared at Notice proposed that the subject contravention is major in nature since failure to have the FRO-S AWTF in operation, and to develop alternative water quality mitigations to meet water quality targets, undermines the regulatory regime, and significantly interferes with the Ministry's capacity to protect and conserve the natural environment.
29. Teck proposed the FRO-S AWTF in response to Ministerial Order M113 (Minister's Order), dated April 15, 2013, and the Permit was issued based on the understanding that water treatment technology, including the FRO-S AWTF, would be operational by the required date. The Permit requirement that applied throughout the compliance assessment period of the Notice is addressed above.
30. Teck submits that when it "*realized it would not be able to meet the deadline, it has been upfront and transparent, informing EMPR and ENV, seeking an adjustment to the deadline in August 2018, before it expired.*" However, I find no record of an EMA Permit application granted that would vary this requirement. Teck advances arguments supporting their assertion that the contravention was not major. These include a compliance rate with Permit benchmarks without the FRO-S AWTF operating between 93% to 98% from 2015 to 2020, an overambitious target date for operation and their best efforts to commence operation as soon as possible.
31. The KNC rebuts Teck's assertion that the contravention was not major by arguing that the Permit specifies that "*the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP*" (Section 7.1.1). Further, neither of the mitigations planned for 2018 (FRO-S AWTF and the 45,000 m<sup>3</sup>/day Kilmarnock Clean Water Diversion) were implemented which is a significant deviation from the ABMP and must be considered a major contravention.
32. The Ministry of Environment and Climate Change Strategy, Administrative Penalties Handbook – *Environmental Management Act* and *Integrated Pest Management Act* (AMP Handbook) provides high level guidance to Ministry staff considering the assignment of administrative penalties. Statutory decision makers consider and decisions are informed by this document. Under this guidance, I can consider the options of minor, moderate, or major classification for this factor.
33. After considering the relevant submissions, I conclude that the nature of the contravention is major. The contravention results in a threat to the integrity of the environment and undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to protect and conserve the natural environment.

### **Factor b): Real or potential adverse effects**

34. The PAF shared at Notice proposed that the subject contraventions had a high effect classification, concluding the contravention has had real adverse effects.

35. Teck refutes this conclusion and asserts that the Ministry has failed to establish that the actual effects of the contravention warrant a high classification. Teck points to PAF referenced exceedances prior to December 31, 2018, the FRO Compliance Point issue, Teck's overall compliance rate with Permit limits, and average tissue sample concentrations which are "*generally below toxicity thresholds*" as primary arguments against a high classification. Teck acknowledges the potential for harm as a result of selenium and nitrate in the watershed but asserts that the base penalty should not exceed a range of \$1,000 to \$5,000 if in fact any penalty is appropriate. Teck's primary position is that no penalty is appropriate.
36. The KNC response identifies the multiple exceedances of daily and monthly Permit limits, exceedance of Level 1, 2, and 3 benchmarks, cumulative impacts to downstream exceedances, and the direct role resulting from the lack of treatment in these conditions as their primary rationale for a determination of high risk of adverse effects. Furthermore, I find the following excerpts from the introductory discussion in the KNC submission to be noteworthy:
- "Ktunaxa people are not confident that the water and fish are uncontaminated."*
- "The Ktunaxa perspective is a holistic one that looks at the web of life as an interconnected whole, and recognizes water as a sacred and life-giving entity that we must nurture and protect so that it can continue to support Ktunaxa people and culture now and into the future."*
37. Teck refers to language in the PAF as discussed above and asserts there existed no requirement to consider other mitigative alternatives to the FRO-S AWTF prior to October 2020. As discussed above, I cannot agree with this assertion. Teck's submissions rely heavily on the \$1 billion of capital investments in treatment technology to date and the projected \$2.65 billion it plans to invest by 2030.
38. Upon review of the information available to me, I find the contravention has the potential to cause an adverse effect that is cumulative and persistent in nature, threatening to the health of aquatic organisms, and highly impactful on KNC harvesting rights and cultural practices. The fact that Teck continues to project Permit exceedances well into the future after commissioning the FRO-S AWTF is also concerning.
39. Teck's efforts to address the substantial cumulative effects of its operations in ?amak?is Ktunaxa are significant and will be addressed elsewhere in this decision. However, I find a high risk of adverse environmental effect caused by the subject contravention. My findings are only reinforced by considering the unique KNC perspective of impact or risk thereof provided in their submissions. I have placed significant weight on this perspective.
40. The base penalty is therefore confirmed at \$40,000 as was proposed at Notice. Having arrived at the base penalty, I will now address the application of the following penalty adjustment factors and the submissions from the parties respecting them.

**Factor c): Previous contraventions or failures, administrative penalties imposed, or orders issued:**

41. The PAF shared at Notice proposed that Teck had a compliance history with the Permit that involved the Minister's Order and the issuance of one previous administrative penalty under the Permit. The PAF only addressed compliance history directly related to the Permit and did not consider Teck's compliance history with other *Environmental Management Act* authorizations in Kamak's Ktunaxa. The Notice proposed the application of an aggravating factor of twenty percent of the base penalty for the history of previous contraventions, penalties imposed, and orders issued.

42. Teck asserts that there are no relevant contraventions or failures and that no aggravating factor should be assigned. Teck further points to the AMP Handbook discussion on considering previous advisories and warnings as evidence of previous contraventions. Teck requests that I strictly follow the guidance in the AMP Handbook. This suggestion warrants a fulsome discussion. For reference, the contradictory references of note are quoted from page 62 of the AMP Handbook below:

*This factor considers the person's compliance history. This can include 'determined contraventions' - tickets, previous administrative penalties, administrative sanctions and prosecutions - as well as advisories and warnings (although there are conflicting appeal decisions on including the latter). Where a person may not have had an opportunity to respond to the alleged non-compliance, they may challenge its use as an aggravating factor. Orders issued for reasons similar or related to the contravention should also be considered.*

*Evidence to support this factor does not include prior enforcement responses to the current contravention. (e.g. an advisory or warning that preceded the AMP). Those provide evidence in support of factor (d) or (e).*

43. Ministry staff administering the conflicting guidance underlined above are aware of this issue and it is being revised accordingly. Specific issues may include the suggestion that decisions of an administrative tribunal establish precedent and the fact that the first paragraph concludes that advisories and warnings may be considered as evidence of previous contraventions in certain circumstances, whereas the second paragraph explicitly prohibits consideration of advisories and warnings.

44. My view is that the current AMP Handbook language on this issue cannot bind statutory decision makers, rather it ought to guide or inform them.

45. The AMP Handbook is a helpful guidance document and assists Ministry staff in preparing penalty proposals and statutory decision makers in making consistent decisions.

46. Recent decisions of the Environmental Appeal Board, the administrative tribunal responsible for reviewing EMA AMP decisions, rely heavily upon the guidance in the AMP Handbook. The prohibitive language related to advisories and warnings noted above has also been directly referenced in recent appeal decisions. Some of these decisions have highlighted the need for the Ministry to comprehensively review this guidance to ensure that Ministry statutory decision makers and the tribunals or courts reviewing our decisions are supported

by this important guidance document. This review is currently underway and a revised AMP Handbook which addresses the concerns noted above will be included.

47. In the calcite toxicity Final Determination (2018-17 FRO Daphnia Toxicity) issued to Teck March 8, 2021, I addressed my thoughts on the use of previous advisories and warnings under Factor c). That discussion is quoted below:

*“Section 7(1)(c) of the Administrative Penalties Regulation (APR) requires me to consider “any previous contraventions or failures by, administrative penalties imposed on, or orders issued to...” Teck in this instance. Administrative penalties and orders are statutory decisions. Those issued under a director’s authority, pursuant to the Environmental Management Act, provide for recourse to appeal via the Environmental Appeal Board (EAB). However, the reference to “previous contraventions of failures” is a category I view as distinct from administrative penalties and orders. The APR defines this category as follows:*

*“contravention or failure” means*

- (a) a contravention of a prescribed provision of the Act or the regulations,*
- (b) a failure to comply with an order under the Act, or*
- (c) a failure to comply with a requirement of a permit or approval issued or given under the Act;*

*The Ministry evaluates compliance with these defined requirements by conducting inspections under the established authorities in the Environmental Management Act. The inspections are conducted in accordance with Ministry guidance, which include the Ministry’s Compliance Management Framework and the Compliance and Enforcement Policy and Procedure (C&E Policy). These policy instruments direct an escalating approach to compliance activities and ensure consistency and transparency in the Ministry’s compliance evaluations. When the Ministry identifies a contravention or failure to comply with a requirement, the possible outcomes include the escalating options of an advisory of non-compliance, a warning, an administrative penalty referral or a referral to legal investigation. These outcomes are guided by the Non-Compliance Decision Matrix in the C&E Policy. The determination of the appropriate outcome is a factor of the regulated party’s willingness or ability to comply and the actual or potential environmental, human health or safety impacts.*

*Advisories, warnings, referrals to administrative penalty and investigation referrals are all records of a contravention or failure. The evaluation of these contraventions or failures is fact based and the evidentiary standard is the balance of probability. While advisories and warnings do not include the recourse to appeal, the leadership of the Ministry’s Compliance and Environmental Enforcement Branch routinely entertains arguments from regulated parties respecting consistency of the outcome with established policy and procedure. When inconsistencies or errors are identified, they are corrected, and the subject inspection report is re-issued. Additionally, individuals who are aggrieved by the ultimate outcome of these reviews have recourse to the Office of the Ombudsperson.*

*There is a high degree of oversight and quality control of advisories and warnings issued by the Ministry in addition to the availability of options for administrative recourse for regulated parties. Furthermore, the evidence of these contraventions was collected and*

*submitted by Teck. Teck has acknowledged that they have contravened this requirement in correspondence and in their OTBH submission. For the preceding reasons, I am confident on a balance of probabilities basis, that these compliance outcomes are accurate and represent the documentation of a contravention or failure as defined by the APR.*”

48. An additional consideration respecting what have been considered “determined contraventions” being defined generally as only violation tickets, court issued fines, and administrative penalties is how the Ministry and other administrative law forums treat less significant compliance outcomes such as advisories and warnings. In considering an administrative penalty, if a person has been issued a warning for an event, they cannot be subsequently assigned a penalty for that event. This discussion is offered in the specific context of the conflicting AMP Handbook references that advisories and warnings both can and cannot be considered a “contravention or failure”. They are in fact contraventions or failures as defined by the APR as discussed above.
49. It is also noteworthy that Teck has routinely engaged in responding to adverse compliance findings against the Permit. Teck’s responses to previous warnings illustrate that Teck has “*had an opportunity to respond to the alleged non-compliance*” as indicated in the AMP Handbook.
50. The KNC concur with the assignment of a twenty percent increase and offer the perspective that Teck’s management actions to environmental issues and Permit requirements have been deficient and in conflict with the ABMP.
51. I find there exists a substantial history of previous contraventions of the Permit, if not this specific requirement. However, in accordance with the current AMP Handbook, the recent calcite toxicity administrative penalty warrants the application of a ten percent aggravating factor.
52. The Notice suggested that the existence of the Ministers Order requiring the submission of the ABMP and the ultimate issuance of the Permit warrants the application of an additional ten percent factor to the base penalty. The use of the Minister’s Order is significant, and it is a rarely used legal instrument. It should be noted that it was necessary to exercise this level of regulatory authority to mitigate the dramatically escalating cumulative effects of Teck’s operations in ?amak?is Ktunaxa.
53. The AMP Handbook indicates that “*Orders issued for reasons similar or related to the contravention should also be considered*” in indicating that previous related orders may warrant the application of an aggravating penalty. The legal advice I received respecting this decision suggests that it could be successfully argued that the Minister’s Order was not issued for a reason similar to or related to the contravention. Rather that it was issued in order to address the increasing cumulative impacts and cross boundary pollution occurring as a result of Teck mining activities in ?amak?is Ktunaxa via a continuous improvement approach. I can understand this potential perspective and have elected not to apply a ten percent aggravating factor for the Minister’s Order as proposed at Notice.
54. Accordingly, a total of ten percent of the base penalty is assigned for this factor due to the existence of the previous administrative monetary penalty referenced above.

**Factor d): Whether contravention or failure was repeated or continuous**

55. The PAF shared at Notice proposed no additional increase for this factor and instead proposed that the daily multiplier be applied to account for the continuous nature of the contravention. The daily multiplier was contemplated at monthly, weekly, and daily application and submission on these approaches was sought from the parties.
56. Teck submits that the requirement to commission the FRO-S AWTF is a single event that occurred only once on January 1, 2019, and as such, cannot be determined to be repeated or continuous in nature and that only a single penalty calculation not exceeding the \$40,000 maximum prescribed by the APR can be considered as a result. Furthermore, Teck submits that assigning the daily multiplier at any level would be disproportionate and directs my attention to the AMP Handbook.
57. The KNC submits that the application of the daily multiplier is appropriate given the daily loading to the receiving environment, the costs avoided in excess of \$33 million, and the cost to mitigate the contaminants deposited in the aquatic environment as a result of lack of treatment as required by the Permit. The KNC argue that the AMP Handbook guidance supports the imposition of the daily multiplier in an instance such as this.
58. Teck's rebuttal of the KNC comments argues that application of the daily multiplier in any form would be unreasonable and cites a recent AMP appeal decision issued by the EAB (EAB-EMA-21-A005 Mount Polley Mining Corporation v. Director, *Environmental Management Act*) as an example of a preferred approach should any penalty be considered.
59. Upon reviewing the circumstances and the submissions of the parties, I have elected to take a purposive approach to conclude a continuous nature of the contravention. I conclude Teck's failure to commission the FRO-S AWTF on January 1, 2019, was not a passive event occurring at a discrete point in time, but rather the commencement of a state of affairs wherein Teck continued to contravene the subject requirement from January 1, 2019, until the date of Notice on March 15, 2021.
60. I find that the language in the subject requirement requiring ongoing operation of the FRO-S AWTF and implementation of alternative mitigative measures further supports a purposive approach to the conclusion that the contravention was continuous from January 1, 2019, until March 15, 2021. The result of Teck's failure to comply with the subject requirement has resulted in nearly three years of increased impacts to ?amak?is Ktunaxa.
61. I have reviewed the determination issued to Mount Polley and the subsequent EAB decision referenced in Teck's rebuttal comments. That decision pertained to a required plan submission on a specified date. I concur that it was a point in time contravention and not continuous. I also note that the determination was for a nature of contravention classification of major and an effect classification of low. Other than the nature of contravention classification, the circumstances references are substantially different that those before me and can be easily distinguished. The EAB dismissed the Mount Polley appeal and upheld the Director's decision. This EAB decision was subsequently upheld by the Supreme Court of BC.

62. Given the specific circumstances and the history of this contravention, I find that assigning the daily multiplier is appropriate and in fact, the only way to address the economic benefit as discussed further in Factor f). I also recognize Teck's substantial and ongoing efforts to address water quality impacts in Kamak's Ktunaxa but will address them in subsequent factor considerations. I will assign the daily multiplier on a daily basis to account for the substantial AWTF operational costs avoided and make adjustments as warranted by the parties' submissions to establish a penalty quantum appropriate to the specific circumstances of this continuing contravention. The penalty period for daily multiplier application is confirmed at 805 days (from January 1, 2019, to and including March 15, 2021 (date of Notice).

**Factor e): Whether contravention or failure was deliberate**

63. The PAF shared at Notice concluded that Teck was aware of the contravention, that it was therefore deliberate, and proposed the assignment of ten percent of the base penalty. The PAF addresses Teck's failure to consider options outside of the AWTF as contemplated in the Permit which is summarised and emphasized as follows:

*"The permittee must design, construct and operate the following active water treatment facilities (AWTF), by the date shown. The permittee must employ best achievable technology in the development of these treatment facilities... Notwithstanding the above requirements to construct and operate active water treatment facilities, the permittee must ensure that all necessary active water treatment works or alternative water quality mitigation works are designed, constructed and operated in sufficient time and at sufficient capacity to meet targets and timeframes for water quality consistent with the ABMP."*

64. Teck repeatedly disputes any suggestion that mitigations other than the AWTF facility are required by the Permit.

65. The KNC point to Teck's failure to apply any other mitigations and highlights Teck's decision not to re-implement the Kilmarnock Clean Water Diversion until 2019 after it's initial failure in 2013. The KNC also point out that clean water diversion is an ABMP contemplated mitigation making the failure to implement this mitigation until recently a conspicuous and clear contravention of the Permit requirement.

66. Part of the reason for Teck's deferral of the FRO-S AWTF commissioning was that they needed to address the selenium speciation issue. That delay was not the result of a decision not to proceed or willful blindness to the need to proceed, nor was there a complete lack of effort or gross negligence. Instead, Teck decided to delay while problems with the design were addressed.

67. I find that the information available to me does not support a conclusion of deliberateness and therefore no application of an aggravating factor is applied.

**Factor f): Economic benefit derived by the party from the contravention or failure**

68. The PAF shared at Notice concluded that Teck had derived an economic benefit from continuing to operate and expand mining operations while delaying the costs associated with construction and avoiding costs associated with operation of the FRS AWTF and proposed

the addition of a one hundred percent aggravating factor. Furthermore, an unquantified deferred economic benefit was also derived through Teck's failure to develop alternative water quality mitigation works to meet water quality targets. The clean water diversion at Kilmarnock was destroyed in 2013 and Teck chose not to conduct any repairs or additional work until 2019. The PAF proposed avoided operational costs based on a \$5 million/year operational cost for FRS AWTF operation.

69. Teck refutes a conclusion of economic benefit in any form pointing to the increase in the FRO-S AWTF project cost from \$160 million to over \$450 million with estimated Covid-19 impacts of \$40 million. Teck's submissions rely almost entirely on capital costs and with one limited exception, is silent on the issue of avoided operational costs. That reference is contained in Teck's rebuttal to the KNC comments on Teck's OTBH submission. Paragraph 2 of page 4 states:

*"Moreover, Teck Coal intends to operate the facility for the same length of time as originally planned (which is tied to the life of the technology), so will not realize any savings from operational costs."*

70. The KNC strongly support a conclusion that Teck derived an economic benefit resulting from the contravention by continuing to operate and expand mining operations while delaying the costs associated with construction and avoiding costs associated with operation of the FRO-S AWTF. The KNC point to Teck's June 28, 2021, OTBH submission on the Line Creek Operations nitrate exceedances and Teck's submission that annual operation and maintenance costs of West Line Creek AWTF are \$11 million annually.
71. This 7,500 m<sup>3</sup>/day facility is compared to the 20,000 m<sup>3</sup>/day FRO-S AWTF and the implication is that the operational costs of the FRO-S AWTF would be substantially greater than \$11 million annually. The KNC further submit that as much as \$300 million in costs were avoided over two years as a result of the contravention.
72. The KNC also suggest that economic benefit was derived through Teck's failure to develop alternative water quality mitigation works to meet water quality targets including the clean water diversion at Kilmarnock which was destroyed in 2013. This activity falls under the second component of the requirement discussed above. Teck elected not to conduct any repairs or additional work to restore this clean water diversion until 2019.
73. While the AMP Handbook contains guidance to inform statutory decision makers on the calculation of economic benefit, it relies heavily upon the Determination And Application Of Administrative Fines For Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries (2009). This document was authored by the Organization For Economic Co-Operation and Development (OECD). In my discussion respecting economic benefit, I have also considered this guidance to augment the AMP Handbook guidance.
74. Of all the foundational principles in any administrative penalty system, economic benefit is one of the most important considerations, while simultaneously being a challenge to quantify.
75. While the PAF and KNC have proposed vastly divergent degrees of economic benefit, Teck's submissions have consistently avoided engaging in the discussion of avoided costs of

operating the FRO-S AWTF or the deferred economic benefit achieved because of the project implementation deferral. Instead, Teck points to capital costs associated with the project and unpredicted cost overruns associated with project design changes, construction delays, and Covid outbreaks. I am prepared to accept Teck's assertion of \$1 billion capital expenditure in treatment technology expended thus far with a projected \$2.65 billion in projected capital expenditures by 2030. However, Teck's ultimate capital investments for the purpose of ensuring their ability to continue to extract coal from Kamaxis Ktunaxa as part of their plans for future development does not offset costs avoided as result of the contravention which is the subject of this penalty proposal.

76. While Teck may operate the facility for the same temporal duration based on its operational lifespan, the salient point in this discussion respecting avoided operation costs of the FRO-S AWTF is that Teck failed to operate the facility from January 1, 2019, until the date of the Notice on March 15, 2021. There is no discussion outside of that compliance assessment period when it comes to avoided operational costs.

77. I am convinced that Teck avoided operational costs resulting from this contravention well in excess of \$32.2 million for the subject assessment period of the Notice. This estimate is based on Teck's provided operational cost of operation and maintenance of the West Line Creek AWTF of \$11 million/annum provided in their OTBH submission for the nitrate penalty proposal (2019-21 LCO CP Nitrate) as follows from page 20, para 2:

*"The ongoing operational and maintenance costs of the WLC AWTF are approximately \$11 million per year."*

78. The West Line Creek AWTF is approximately one third the size of the FRO-S AWTF and its operation and maintenance costs can reasonably be presumed to be significantly under representative of the actual operating costs of the FRO-S AWTF once it is fully commissioned.

79. In addition to the avoided operational costs addressed above, by using the US Environmental Protection Agency discount rate approach to Teck's estimated \$450 million project cost over 2.25 years, I calculate a potential deferred economic benefit of \$50.6 million ( $\$450 \text{ million project cost} \times 5\%/\text{annum} \times 2.25 \text{ yr}$ ). This simple approach to calculating the deferred economic benefit is intended to be illustrative in nature, as it is apparent that the economic benefits associated with this contravention cannot be captured even with the application of the daily multiplier. Accordingly, my primary reliance on the calculation of economic benefit shall be the avoided operational costs based on Teck's provided \$11 million/annum operating cost of the West Line Creek AWTF.

80. In the OECD guidance referenced above, conditions for imposing a fine lower than the economic benefit is contemplated. The first scenario presented is that the benefit of non-compliance is insignificant, which is clearly not the case in this instance based on the preceding discussion. The second scenario contemplated pertains to public interest concerns against a high penalty as follows:

*"If the removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business, the enforcement agency may impose a smaller fine."*

81. It is clearly not in the public interest for a regulated party to be assigned a penalty that could result in mill closures, substantial employment curtailments, and the subsequent potential impact on the regulated party's financial viability.
82. Teck's publicly posted financial statements for steelmaking coal in 2018, 2019, and 2020 after depreciation and amortization indicates gross profit in 2018 of \$3.04 billion, 2019 gross profit of \$2.1 billion, and a 2020 gross profit of 277 million. Review of Teck's fourth quarter report for 2021 concludes highest ever \$3.1 billion earnings before interest, taxes, depreciation, and amortization. The 2021 Q4 financial report stated:
- "Teck's record-setting performance was driven by the ongoing positive commodity price environment and made possible by the tremendous resilience of our people, who persevered through heatwaves, wildfires, floods, freezing temperatures and the global pandemic to continue safely and sustainably producing the essential resources the world needs."*
83. Teck is a federally incorporated company with vast holdings throughout Canada with substantial and sustainable earnings and projected operations in Kamaxis Ktunaxa for decades to come. There is no information available to me to suggest that the preceding discussion of economic benefit would represent a challenge in Teck's ability to pay or for that matter, present a public interest argument supporting deliberately assigning a penalty substantially below the preceding economic benefit discussion.
84. Since commencing my deliberations on this matter, the "Ministry of Environment & Climate Change Strategy – Economic Benefit Guidance for Administrative Monetary Penalty (AMP) Program under the *Environmental Management Act* (EMA) and *Integrated Pest Management Act* (IPMA)" (Supplementary to the AMP Handbook), Version 1.0, May 25, 2022 was released. This document augments the Ministry guidance respecting determining economic benefit. This guidance suggests determination of true value where possible, then secondarily, estimated value calculations in determining an appropriate penalty addition for economic benefit as a result of a contravention when information respecting economic benefit is available. In lieu of information required for true value or estimated value calculations, this guidance suggests the use of an applied value where there is evidence of economic benefit.
85. In lieu of information provided by Teck or the KNC respecting true value, I will use this supplemental guidance to estimate economic benefit derived as a result of the contravention.
86. This guidance leads me to conclude that the avoided operational costs of operating the FRO-S AWTF would have been well in excess of \$32.2 million as discussed above. This guidance does not enable a regulated party to utilize accounting methods to arrive at a net economic benefit after costs incurred as Teck appears to argue in its submission pertaining to larger than projected capital costs for the facility construction or asserted costs related to a problematic contractor or Covid-19 impacts. This guidance takes a gross economic benefit approach as opposed to net benefit in attempting to account for costs either avoided or delayed and to remove economic benefit to the maximum degree practicable.
87. In concluding the discussion regarding this factor, I have elected that I will not apply an aggravating factor for economic benefit as proposed at Notice as economic benefit cannot be appropriately addressed via the application of an aggravating factor against a penalty

maximum of \$40,000. I will therefore address economic benefit in concert with the application of the daily multiplier upon completion of my consideration of all the required factors under Section 7 of the APR.

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

88. The PAF shared at Notice concluded that there was “*no evidence of the exercise of due diligence in this instance.*” Teck asserts that they have in fact exercised due diligence. The KNC refute Teck’s assertion of due diligence.

89. A finding of due diligence can only be applied as a mitigating factor in an administrative penalty. A finding of the lack of due diligence cannot result in the assignment of an aggravating factor. To find the exercise of due diligence in this instance, I would need to be persuaded that Teck had taken all measures reasonably necessary to avoid these contraventions.

90. As sated in the AMP Handbook, the test for the two alternative branches of due diligence is as follows:

*“Did the accused have an honest and reasonable belief in a mistaken set of facts, which, if true, would render the act or omission innocent, or*

*Did the accused person take all reasonable steps to avoid the particular event, based on what a prudent person would have known or done?”*

91. Factors in assessing the reasonableness of a measure include: the nature and gravity of adverse effects caused by non-compliance, the foreseeability of those effects, the alternative solutions available, industry standards, what efforts have been made to address the problem, over what period of time, promptness of response, and matters beyond the control of the regulated party, including technological limitations, economic considerations, and the actions of officials.

92. As the subject requirement is comprised of two components as discussed above, I will address due diligence with both components of the requirement separately. Firstly, I will address due diligence with the requirement to construct and operate the FRO-S AWTF by January 1, 2019.

93. Teck has referred to my previous statements in the calcite AMP in their OTBH response respecting the significance, scope, and scale of Teck’s undertaking in ?amak?is Ktunaxa toward mitigating impacts from their mining operations. While I remain of this general view, the test for due diligence being “all reasonable steps” is a high legal bar to meet.

94. It appears that some of Teck’s efforts earlier in the compliance assessment period could reasonably be viewed as comprising due diligence. However, the following are some examples of where I believe Teck failed to exercise due diligence with respect to the first component of the requirement to construct and operate the FRO-S AWTF, by December 31, 2018.

95. I find a lack of communication with the Ministry, a lack of reporting on the anticipated contravention, and the failure to pursue a Permit amendment to the compliance date in the Permit. It appears that Teck waited until February 8, 2018 (11 months before the facility was to be completed) to report a likely three year delay in FRO-S AWTF being completed.
96. I am aware of no information indicating that Teck documented its efforts to comply, nor did it apply for a Permit amendment. Teck also raises delays due to permitting, but provides no evidence regarding when permits were applied for, and whether late permit issuance was the result of foreseeable permitting lags or something beyond Teck's control.
97. Teck ascribes the remainder of the delay in construction completion to the fact that after January 7, 2021, only 6 of an expected 145 persons employed by its contractor, Tradesmen, returning to the site by January 8, and Teck had to terminate the contractor due to insolvency, delaying completion of the Project to Q3, 2021.
98. I find no indication that Teck took reasonable steps during procurement to ensure a contractor that was financially sound, or that Teck relied on commercial practices such as surety performance bonds to ensure expeditious completion of work where their contractor ran into financial difficulties. I find there is a reasonable basis for finding that Teck has not adequately shown due diligence respecting this issue.
99. One issue that pertains to this factor in relation to the second component of the requirements of Section 7.1.1 (pertaining to "alternative water quality mitigation works" vs. "treatment works" in component one) is Teck's approximately 6 year deferral of the implementation of the Kilmarnock clean water diversion until 2019 after its 2013 failed attempt. Given the importance of source control mitigations in managing impacts from Teck's operations, I view this decision by Teck as critical in my consideration of Teck's assertion of due diligence with respect to this component of the requirement. Added to this is Teck's apparent unwillingness to cover their waste piles by arguing it is not feasible.
100. While covering waste rock and clean water diversion are the two most fundamental elements of source reduction in mining operations and the starting point in any considerations related to mitigation of impacts prior to treatment options, Teck appears unwilling to consider mitigative options outside of AWTF or Saturated Rock Fill (SRF) implementation. While the clean water diversion is now in operation, I have seen no information that Teck is prepared to consider covering of waste rock other than the cover trial project mandated by 2030 by the current *Fisheries Act* inspector's directive issued by Environment and Climate Change Canada.
101. The information available to me in the submissions from the parties respecting cover is limited, but I can conclude that Teck is not actively covering their waste piles to mitigate contact water generation. However, I cannot conclude why cover is not being applied given its reference in the ABMP and the limited information available to me in the submissions. I note that paragraph 48 of the PAF contains the following reference from the March 31, 2019, Research and Development Report for 2018:

*"It has been hypothesized based on recent research of mine-impacted watersheds in the Elk Valley that diversions of this type will reduce the volume of spoil-influenced water in the rock drain but will not appreciably reduce the total chemical load reporting downstream.*

*Load is not expected to be reduced because weathering products are generated by the spoils above the buried creeks rather than along the flow path in the rock drain.”*

102. This appears to downplay the role of clean water diversion while emphasizing the importance of covering waste rock and is directly relevant to this factor.
103. The AMP Handbook contains guidance addressing reasonable foreseeability. Given that Teck foresaw implementation delays, one must ask why no alternative mitigative responses were seriously considered.
104. While both Teck and the KNC have spoken to Teck’s efforts to improve water quality in ʔamakʔis Ktunaxa, I cannot conclude due diligence was exercised with regard to the two components of the subject requirement. While Teck has expended significant effort and expense to date and projects \$2.65 billion in capital investments in treatment by 2030, they did not take all measures reasonably necessary to avoid the contravention. Accordingly, I have not assigned a mitigating factor for due diligence.

**Factor h): Efforts to correct the contravention or failure**

105. The PAF shared at Notice concluded that there was no evidence to support that Teck undertook efforts to correct the subject contravention and that Teck took measures to reduce its discharges or alter its operation in any way as to limit the effects of the failure to have the FRS AWTF operational.
106. Teck’s OTBH submission points to the AMP Handbook language which states *“this factor considers what the person did after the contravention or failure to restore compliance or reverse or mitigate the impacts.”* Additionally, *[i]f the person has taken some action to correct the contravention it should be recognized. This does not have to include an expenditure of funds, but a sincere effort should be demonstrated.”*
107. Teck further points to their efforts *“to bring the facility into operation as soon as safely possible, expending more than triple the cost as originally estimated. Teck Coal has also undertaken substantial efforts to develop other treatment technologies, but not as short term concurrent alternatives to the AWTF in the Fording River, but as part of the long-term regional approach contemplated by the Permit.”*
108. The KNC comments on Teck’s OTBH submission express concern at Teck’s failure to undertake efforts to reduce discharges to the receiving environment and proposes that no reduction for this factor is appropriate as suggested at Notice.
109. As noted by Teck, efforts to correct is factor that focuses on what the regulated party did after the contravention or failure to restore compliance or reverse or mitigate the impacts. This places the commencement of assessment of this factor at the beginning of the compliance assessment period on January 1, 2019.
110. In the March 8, 2021, calcite toxicity determination referenced earlier in this document, I have addressed the significance of Teck’s efforts toward mitigating impacts and the scope and scale of Teck’s efforts in implementing AWTF facilities in ʔamakʔis Ktunaxa. However, large, complex problems warrant large, complex solutions and the cumulative impacts from

Teck's mining operations in ?amak?is Ktunaxa represent a significant cross boundary contamination issue. It is my understanding that our neighbours in the United States are concerned with the status quo of water quality entering their jurisdiction from Teck's four remaining active mines and are concerned about Teck's progress respecting mitigations.

111. The AMP Handbook provides clear guidance in determining the appropriateness of assigning a mitigating factor in this instance. I cannot conclude that Teck has "done everything practical to prevent, eliminate and ameliorate the adverse effects and to repair any damage." My preceding comments respecting clean water diversion and covering of waste piles alone are sufficient evidence to support this. However, it must be noted that Teck did address the Kilmarnock clean water diversion in 2019 is evidence of efforts to correct the contravention.
112. Teck's substantial efforts to address the design challenges in the FRO-S AWTF is also evidence of efforts to correct the contravention.
113. The information available to me does not support a conclusion that Teck has not taken "*any effective steps to prevent, eliminate or ameliorate the adverse effects or to restore the environment.*" My earlier comments respecting Teck's efforts to develop and implement AWTF's and SRF's are abundant evidence of this conclusion.
114. Having reviewed all the information submitted in respect of this factor by Teck and the KNC, I have concluded that after January 1, 2019, Teck had taken "*some steps that had some effect in preventing, eliminating and ameliorating the adverse effects or in restoring the environment*". Accordingly, I am assigning a mitigating factor of twenty-five percent of the base penalty for this factor.

**Factor i): Efforts to prevent reoccurrence of the contravention or failure**

115. The PAF shared at Notice indicated that there was no evidence that Teck had implemented measures to prevent reoccurrence of the contravention referencing Teck's acknowledgement that they will continue to operate in non-compliance with their Permit limits at the FRO Compliance Point until the end of 2022.
116. Teck's OTBH submissions assert that "*Bringing FRO AWTF-S online is a single event, and the delays experienced have been outside of Teck's control. Teck Coal has clearly acted to minimize delay and also continues to advance other technology to deploy throughout the watershed. There is no basis to conclude Teck Coal has not acted to address the delays.*"
117. The KNC express significant concerns with the fact that "*...the next mitigation for the Upper Fording River is not projected to be operational at design capacity and by the permit deadline and that design criteria for the effluent (as outlined in the EVWQP) may not be achieved. This is of significant concern for load reduction and for the recovery of WCT.*"
118. Teck's submissions speak to demonstrable and substantial effort and expense incurred by Teck to prevent recurrence of the contravention since it commenced on January 1, 2019. This despite Teck's current projections of continuing exceedances of the EVWQP and established Permit limits into the future.

119. In consideration of these efforts and Teck’s substantive investment in AWTF and SRF technologies for treating contact water from Teck’s operations in ʔamakʔis Ktunaxa, I have elected to assign a reduction of twenty-five percent of the base penalty for this factor.

**Factor j): Other**

120. This factor allows the application of increases or decreases to the penalty for what is generally intended to be unique circumstances which are not reflected in the preceding factors. Teck has submitted that a mitigating reduction of the penalty should be applied for their transparency by notifying the Ministry that the FRO-S AWTF would not be operational as required by the Permit. This suggestion is in response to the following PAF reference:

*“Teck failed to provide any formal notification of the non-compliance from January 1, 2019, despite notification requirements in sections 10.2.1, 10.2.2, and 10.2.4 and 10.2.5 of the Permit.”*

121. Review of the facts confirms that Teck failed to comply with the non-compliance notification and reporting requirements in the Permit. Teck did not appear to view the failure to comply with the requirement that is the subject of this discussion as a reportable contravention. While authorizations staff from the Ministry, and Energy, Mines and Low Carbon Innovation authorizations staff, were notified that Teck would not meet the requirement, the noted notification and reporting requirements were not fulfilled.

122. The AMP Handbook provides some limited guidance on circumstances that might warrant the application of other consideration under this factor. This guidance includes self reporting, cost to government, cooperation, remorse, and ability to pay/financial impact. Self reporting is addressed above, but I do not find any information that would support application of a mitigating factor under this factor.

123. I have addressed Teck’s ability to pay and financial impact under Factor e) above. No variations from the base penalty are assigned for this factor.

**Total Penalty after base penalty determination and factors C to J considered:**

124. After determining a base penalty of \$40,000 for this continuing contravention and applying the mitigating and aggravating factors (-\$16,000) discussed above, the penalty is established at \$24,000, prior to determining the application of the daily multiplier.

**Daily Multiplier Application:**

125. The PAF shared at Notice proposed the application of the daily multiplier on either a daily, weekly, or monthly basis. Teck argues that application of the daily multiplier would result in result in an unreasonable penalty that is disproportionate to the circumstances and points to an underperforming contractor and the Covid-19 pandemic as reasons for the delay. Teck suggests that should the daily multiplier be applied, that the period of application should be for no longer than nine months. The KNC dispute Teck’s assertion that delays due to an underperforming contractor are beyond Teck’s control and supports the application of the daily multiplier.

126. As discussed above, the daily multiplier is being applied to this contravention in lieu of an aggravating factor for the continuous nature of the contravention and to account for the economic benefit. It is also apparent that the penalty quantum needs to focus on specific deterrence to encourage Teck toward voluntary compliance in the future. I have concerns about Teck's ability or intent to comply with the Permit requirements and the ongoing projections of exceedances of the established Permit limits.
127. This contravention has been continuous from January 1, 2019, until the date of Notice on March 15, 2021, for a total of 805 days. The following discussion will address the submissions from the parties respecting daily multiplier application and rationale for application.
128. Upon reviewing all the information provided to me and following my discussion above pertaining to economic benefit, I have ascertained that the ultimate penalty quantum cannot account for the economic benefit derived. Determination of the appropriate application of the daily multiplier will commence at the initial 805 days of the compliance period, from January 1, 2019, to and including the date of the Notice, March 15, 2021.
129. I concur with the KNC assertion that hiring, vetting, and oversight of a contractor is entirely within Teck's control and responsibility and addressed this matter in the due diligence discussion above, so will not strike delays because of that issue from the calculation. This period extends from January 7, 2021, to and including the date of Notice on March 15, 2021.
130. However, I conclude that it is reasonable to account for delays that were the direct result of the Covid-19 pandemic. The Covid-19 pandemic and the associated provincial state of emergency which resulted commenced on March 18, 2020, was nearly 15 months after the commencement of the subject contravention. The submissions do not provide sufficient detail to quantify impacts resulting from Covid-19 throughout the entire compliance assessment period. To assist in establishing the commencement of direct Covid-19 related delays, I have consulted Teck's December 15, 2020, "Update on Covid-19 Cases at Teck Steelmaking Coal Operations" document publicly posted at.
131. This document identifies 14 active cases at the FRO-S AWTF construction project related to testing which occurred between November 30 and December 12, 2020. Fall of 2020 also coincides with the implementation of the public health orders requiring indoor mask wearing and related public health mitigations. It is clear that Teck was experiencing direct effects to the project as a result of the pandemic at this time.
132. Similarly, Teck's August 27, 2020 web posting entitled "Covid-19 Cases at Water Treatment Construction Site" at <https://www.teck.com/news/news-releases/2020/covid-19-cases-at-water-treatment-construction-site> confirms the earliest identified Covid cases that could have impacted the project completion. The positive cases were members of a night shift that worked between August 4 and 18, 2020.
133. In consideration of the foregoing, I will exclude the entirety of the 159 days in the period from August 1, 2020, to and including January 6, 2021, from consideration for application of the daily multiplier. This reduces the total number of days that could be considered for daily multiplier application from 805 to 646 days.

134. With the application of the daily multiplier from January 1, 2019, to and including July 31, 2020 (578 days), and from January 7, 2021, to and including March 15, 2021 (68 days), the penalty quantum is \$15,504,000 (578 days + 68 days = 646 days x \$24,000).
135. Teck has presented the argument that assigning a penalty for failing to operate the FRO-S AWTF on the same day as assigning a penalty for exceeding selenium or nitrate exceedances would constitute double punishment for the same behaviour. While I am not entirely convinced that this is correct, I will deduct one day (\$24,000) from the penalty quantum in the paragraph above for the following daily selenium Permit exceedances during the subject penalty assessment period which is referenced in the accompanying Selenium Determination of Administrative Penalty:
- December 3, 2019, 63 ug/L or exceedance of 9%.
136. No reductions have been made for penalties assigned in the accompanying Nitrate Determination of Administrative Penalty since as discussed in that decision, I have concluded that daily exceedances at the Line Creek Compliance Point are not directly related to this decision.
137. Accordingly, the penalty quantum is set at \$15,480,000. The final penalty calculations are summarized in the table below:

<b>Factors to be considered in penalty calculation</b>	<b>Notice</b>	<b>Final Determination</b>
a) Nature of contravention of failure	Major	Major
b) Actual or potential adverse effect	High	High
Base Penalty:	\$40,000	\$40,000
c) Previous contraventions, penalties imposed, or orders issued	+ \$8,000	<b>+ \$4,000</b>
d) Whether contravention or failure was repeated or continuous	\$0	\$0
e) Whether contravention or failure was deliberate	+ \$4,000	<b>\$0</b>
f) Economic benefit derived by the party from the contravention or failure	+ \$40,000	<b>\$0</b>
g) Exercise of due diligence to prevent the contravention or failure	\$0	\$0
h) Efforts to correct the contravention or failure	\$0	<b>- \$10,000</b>
i) Efforts to prevent reoccurrence of the contravention or failure	\$0	<b>- \$10,000</b>
j) Additional relevant factors	\$0	\$0

<i>(add factors (c) to (j))</i> Total Penalty Adjustments:	+ \$52,000	- <b>\$16,000</b>
Penalty after considering all factors: <i>(base penalty plus penalty adjustments)</i>	\$40,000 <i>The APR prescribes \$40,000 as the maximum daily penalty for this contravention. Accordingly, the calculated penalty has been adjusted from \$92,000 to \$40,000.</i>	<b>\$24,000</b>
Application of daily multiplier: YES	27 months x \$40,000 =	<i>646 days less a day for Selenium exceedance on Dec 3, 2019</i> 645 days x \$24,000 =
<b>Final Penalty:</b>	\$1,080,000 to ~\$32.5M	<b>\$15,480,000</b>

## **DUE DATE AND PAYMENT**

Payment of this administrative penalty is due within thirty (30) calendar days after the date of service of this Determination of Administrative Penalty (Determination). You will be sent an invoice, to be paid via cheque or money order made **payable to the Minister of Finance**. Payment can be mailed to Business Services at:

Attn: Fees Analyst  
 Ministry of Environment and Climate Change Strategy  
 PO Box 9377 Stn Prov Govt  
 Victoria BC V8W 9M6

Please do not mail cash. A \$30 service fee will be charged for dishonoured payments.

If payment has not been received in the thirty (30) calendar day period, interest will be charged on overdue payments at a rate of 3% + the prime lending rate of the principal banker to the Province per month and the amount payable is recoverable as a debt due to the government. In the event of non-payment you will be ineligible for a permit or approval, or to amend a permit or approval, until the penalty is paid in full. Further, I am authorized by Section 18 of EMA to cancel or suspend your current authorization in the event of non-payment and if I decide to do so, you will be notified accordingly.

## **RIGHT TO APPEAL**

If you disagree with this Determination, Division 2 of Part 8 of EMA provides information for how to appeal my decision to the Environmental Appeal Board (EAB). In accordance with EMA and with the EAB Procedures Regulation, the EAB must receive notice of the appeal no later than 30 calendar days after the date you receive this Determination of Administrative Penalty. The notice must include:

- a. Your name and address and the name of the person, if any, making the request on your behalf;
- b. The address for serving a document to you or the person acting on your behalf;
- c. The grounds for appeal;
- d. A statement of the nature of the order requested; and

- e. The notice of appeal shall be signed by you, or your counsel or agent if any, and be accompanied by a fee of \$25, payable to the Minister for Finance by cheque, money order or bank draft.

The Notice of Appeal form is available online at <https://www.bceab.ca/resources/forms-and-templates>. It should be completed and filed by registered mail or by leaving a copy at the EAB office during normal business hours. The street address is 4th Floor, 747 Fort Street, Victoria, BC, and the office is open from 8:30 am – 4:30 pm Monday through Friday, excluding public holidays.

Notice may also be sent by email or fax, provided the original Notice of Appeal and the appeal fee follows by mail. The mailing address of the EAB is:

Environmental Appeal Board  
PO Box 9425 Stn Prov Govt  
Victoria BC V8W 9M6

For further information, please consult the EAB website at <https://www.bceab.ca>. If the administrative penalty is appealed to the EAB and the penalty is upheld, payment is due within 30 calendar days after receiving a copy of the order or decision of the appeal board, or, if the EAB has sent the matter back to the decision maker, within 30 calendar days after a new Determination of Administrative Penalty is served.

### **PUBLICATION:**

Seven days after the date of service, this Determination will be published on the Natural Resource Compliance and Enforcement Database (NRCED) Website: <https://nrcead.gov.bc.ca/>

Dated this 31<sup>st</sup> day of January, 2023.