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DECISION NO. EAB-EMA-20-A023(a)

In the matter of an appeal under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53.

BETWEEN:	Pacesetter Mills Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on April 12, 2021	
APPEARING:	For the Appellant: Rick Lindstrom For the Respondent: Robyn Gifford, Counsel	

APPEAL

[1] This appeal concerns an administrative penalty determination (the "Determination") issued to Pacesetter Mills Ltd. (the "Appellant") for discharging waste into the environment without authorization, contrary to section 6(2) the *Environmental Management Act* (the "*Act*"). The Determination was issued on November 16, 2020, by Andreas Wins-Purdy, acting as a Director under the *Act* (the "Director") in the Ministry of Environment and Climate Change Strategy (the "Ministry"). In the Determination, the Director imposed a penalty of $5,500 for the contravention.

[2] The Environmental Appeal Board has the authority to hear this appeal under section 100 of the *Act*. Under section 103 of the *Act*, the Board has the power to:

a) send the matter back to the Director, with directions,

b) confirm, reverse or vary the Determination, or

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

[3] The Appellant does not dispute the Director's finding of non-compliance with the *Act*. The Appellant asks that the penalty be reduced.

BACKGROUND

[4] The Appellant operates a sawmill in Quesnel, BC. The sawmill produces packing material such as dunnage, lath, and pallets.

[5] Section 6(2) of the *Act* states that, subject to subsection (5), a person must not cause or allow waste to be introduced into the environment while conducting a prescribed industry, trade or business. The Appellant's sawmill is a prescribed industry for the purposes of section 6(2), because it is a secondary wood processing industry under Schedule 2 of the *Waste Discharge Regulation*. Consequently, the Appellant requires an authorization under the *Act*, such as a permit, to discharge waste into the environment. Section 6(5)(a)(i) of the *Act* provides that the discharge of waste is not contrary to the *Act* if the waste discharge complies with a valid permit that is in effect at the time of the discharge.

2017 Inspection and Warning Letter

[6] On August 24, 2017, staff from the Ministry inspected the Appellant's sawmill and observed the following discharges to the environment:

a. a groove mill discharging air contaminants to a fabric filter inside a large metal container;

b. a table saw discharging air contaminants to a small cyclone; and

c. a deck saw discharging air contaminants to a fabric filter inside a large metal container.

[7] On September 7, 2017, an Environmental Protection Officer with the Ministry issued an inspection report and warning letter (the "Warning Letter") to the Appellant, stating that the Appellant was discharging waste into the environment without authorization contrary to section 6(2) of the *Act*. The Warning Letter advised the Appellant that it needed to apply for authorization to discharge waste to the environment, and failure to do so may lead to escalating enforcement action. The Warning Letter requested that the Appellant immediately take steps to correct the non-compliance, and notify the Ministry within 30 days regarding what corrective measures had been taken.

[8] On October 30, 2017, the Ministry received a preliminary application from the Appellant, signed by Rick Lindstrom, company president, for an authorization to discharge waste into the environment.

[9] On November 8, 2017, Ministry staff reviewed the application, and sent a letter to the Appellant explaining the additional information that was needed to assess the application. The Ministry received no response from the Appellant.

2019 Inspection and Referral for Penalty

[10] On July 11, 2019, while inspecting a nearby authorization holder, an Environmental Protection Officer with the Ministry observed discharges from the Appellant's sawmill and conducted an inspection.

[11] On September 12, 2019, Ministry staff spoke with Mr. Lindstrom by telephone regarding the inspection and the status of the 2017 application.

[12] On September 16, 2019, the Ministry issued inspection report 139404 (the "Inspection Report") to the Appellant. The Inspection Report states that, based on the July 11, 2019 inspection, the Appellant continued to contravene section 6(2) of the *Act*, and the matter was being referred for an administrative penalty.

[13] Shortly thereafter, Mr. Lindstrom contacted the Ministry and stated he had retained the services of a qualified professional to provide the additional information requested in the Ministry's November 8, 2017 letter.

Overview of the Administrative Penalty Scheme

[14] Under section 115 of the *Act*, a director may issue an administrative penalty to a person who fails to comply with a prescribed provision of the *Act* or its regulations. The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Penalties Regulation*"), governs the determination of administrative penalties under section 115(1) of the *Act*.

[15] Part 2 of the *Penalties Regulation* specifies which sections of the *Act* and its regulations are prescribed for the purposes of section 115(1) of the *Act*, and the maximum penalties for contraventions. Section 12(1) of the *Penalties Regulation* states that the maximum penalty for contravening section 6(2) of the *Act* is $75,000.

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

a) the nature of the contravention;

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

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

d) whether the contravention was repeated or continuous;

e) whether the contravention was deliberate;

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

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

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

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

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

[17] Under section 7(2) of the *Penalties Regulation*, if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues.

[18] To assist decision-makers in determining an appropriate penalty using these factors, the Ministry has developed the *Administrative Penalties Handbook – Environmental Management Act and Integrated Pest Management Act*, dated January 2020 (the "Handbook"). The Handbook recommends first assessing a "base penalty" for the contravention. The base penalty is intended to reflect the

seriousness of the contravention based on factors a) and b) above (i.e., the nature of the contravention, and any real or potential adverse effects). Additional amounts are then added to, or deducted from, the base penalty after considering the "penalty adjustment factors" in subsections c) to j).

The Notice Prior to Penalty

[19] On September 3, 2020, the Director issued a Notice Prior to Determination of Administrative Penalty (the "Notice Prior to Penalty") to the Appellant, recommending a penalty of $11,000 for the contravention of section 6(2) of the *Act*. The Notice Prior to Penalty included information from the 2017 and 2019 inspections, and details about how the Director calculated the proposed penalty.

[20] The Notice Prior to Penalty offered the Appellant an opportunity to provide written submissions before the Director made a final determination regarding the penalty.

[21] In response, the Appellant provided submissions which were considered by the Director. The Appellant did not dispute the contravention, and outlined the steps it took to re-engage in the permit application process after receiving the Notice Prior to Penalty.

The Determination

[22] On November 16, 2020, the Director issued the Determination. The Determination advises that the proposed penalty of $11,000 was reduced to $5,500 in response to the Appellant's submissions.

[23] The Determination explains how the Director calculated the penalty, and why the penalty was reduced. It states that the Director chose a "base penalty" of $10,000 to reflect the seriousness of the contravention. In that regard, the nature of the contravention (as per subsection 7(1)(a) of the *Penalties Regulation*) was "major", and the actual or potential adverse effect of the contravention (as per subsection 7(1)(b) of the *Penalties Regulation*) was "minor". The Determination states that the nature of the contravention was "major" because the unauthorized waste discharge undermined the integrity of the regulatory regime, significantly interfered with the Ministry's capacity to regulate, and undermined government's ability to ensure that regulatory objectives are met. The actual or potential adverse effect of the contravention was "minor" because the unauthorized waste discharge was localized and did not result in a significant adverse effect, and the potential to do so was low.

[24] The Director then considered whether to increase or decrease the base penalty according to the "penalty adjustment" factors in subsections 7(1)(c) through (j) of the *Penalties Regulation*. The Director made no adjustments for factors c) (previous contraventions, penalties, or orders issued), f) (economic benefit derived from the contravention), g) (due diligence to prevent the contravention), and i) (efforts to prevent reoccurrence of the contravention).

[25] For factor d) (whether contravention was repeated or continuous), the Director increased the penalty by $1,000. The Director found that the Appellant continuously discharged air contaminants without authorization from September 7,

2017 to September 16, 2019, despite being notified in September 2017 of the non-compliance.

[26] For factor e) (whether contravention was deliberate), the Director also increased the penalty by $1,000. The Director noted that the Appellant's continuous unauthorized discharge of air contaminants, despite notification of the non-compliance, indicated that the Appellant was aware of the contravention but continued to discharge, which showed a deliberate contravention.

[27] For factor h) (efforts to correct the contravention), the Director decreased the penalty by $4,000. The Notice Prior to Penalty had proposed a reduction of $1,000 for this factor. In the Determination, the Director found that a further $3,000 reduction was appropriate because the Appellant had, since receiving the Notice Prior to Penalty, fully re-engaged in the permit application process including submitting the required additional information and engaging in public consultation.

[28] The Director also made a $2,500 reduction under factor j) (any other relevant factors) based on the Appellant being a small operator, and the Appellant's cooperativeness and strong willingness to come into compliance since receiving the Notice Prior to Penalty.

Appeal of the Determination

[29] On December 17, 2020, the Appellant appealed the Determination, and requested that the penalty be reduced.

[30] The Board directed that the appeal be conducted by way of written submissions. The appeal was conducted as a new hearing of the matter. Consequently, the Board considered the matter afresh, and has evidence that was, and new evidence that was not, considered by the Director.

[31] The Director provided written submissions and documentary evidence. The Appellant's submissions consist of a one-page letter that was attached to the Notice of Appeal. The Appellant provided no submissions in response to the Director's submissions, despite the Board providing the Appellant an opportunity to do so.

ISSUE

[32] In deciding this appeal, the only issue is whether the penalty should be reduced, based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*.

RELEVANT LEGISLATION

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

DISCUSSION AND ANALYSIS

Whether the penalty should be reduced

Summary of the Appellant's submissions

[34] On behalf of the Appellant, Mr. Lindstrom says he is very appreciative for the Director's reduction in the penalty from the original amount, but he would like to see the penalty reduced even further. He suggests that the penalty could be "back charges for the annual [permit] fees".

[35] Mr. Lindstrom states that over the last several years, the Appellant's business has been reduced significantly due to mill closures, and the Appellant had to lay off almost half of its employees. He states that the Appellant is "now recovering somewhat", but the Appellant experienced an almost three-week long shutdown by its largest customer due to the COVID-19 pandemic.

Summary of the Director's submissions

[36] The Director submits that the Appellant has provided no evidence or submissions to support a further reduced penalty. The Appellant has not asserted that the Director erred in his assessment of the facts or the relevant factors in section 7 of the *Penalties Regulation*. Further, the Director says that the Appellant presented no evidence to substantiate its assertion that it has experienced financial difficulties. The Appellant has not met the burden of proof, and the appeal should be dismissed on this basis.

[37] Moreover, the Director maintains that even if the Appellant had provided such evidence, the penalty already reflects the nature of the contravention and the Appellant's operation. A penalty of $5,500 is appropriate given the nature of the contravention, the size of the Appellant's operation, and the objectives of promoting deterrence and future compliance. Any further reductions to the penalty are not warranted on the facts and would defeat the purpose of the administrative penalty regime. The penalty is appropriate in the circumstances and serves as a deterrent to the Appellant specifically, and to similar operators who might discharge waste into the environment without authorization.

[38] The Director reviewed his considerations with respect to each of the factors in section 7 of the *Penalties Regulation*. The Director submits that, given the applicable factors under section 7 and the lack of evidence from the Appellant about its financial difficulties, a penalty of $5,500 is appropriate in the circumstances.

The Panel's findings

[39] I have considered the parties' submissions and evidence in light of the relevant factors in section 7 of the *Penalties Regulation*, as discussed below.

Factors a) and b): nature of the contravention, and real or potential adverse effect of the contravention

[40] I agree with the Director that the nature of this contravention is "major", given the requirements and objectives of the *Act*. Section 6 of the *Act* requires businesses in certain industries to obtain authorization, such as a permit, before discharging waste into the environment. Failure to obtain such authorization poses a threat to the integrity of the legislative scheme and, potentially, the environment. For example, section 14 of the *Act* authorizes a director to issue a permit

authorizing the introduction of waste into the environment "subject to requirements for the protection of the environment". Permits typically regulate the amount and type of waste that the permit holder may discharge, and include requirements for monitoring and reporting waste discharges. I find that this indicates that controlling the discharge of waste, and mitigating the potential impacts of waste discharge, are purposes of the *Act*, and these purposes are achieved by requiring authorization before discharging waste.

[41] My understanding of the *Act*'s purposes and requirements is consistent with past decisions of the Board and the courts. For example, at para. 89 in *Cobble Hill Holdings Ltd. v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-017(a), 019(b), 020(a) and 021(a), February 5, 2014), the Board stated:

> The Courts and this Board have had the opportunity to consider the objects and purposes of the *Act* -- or its predecessor *Waste Management Act* -- on a number of occasions. Of note, in *Swamy v. Tham Demolition Ltd.*, [2000] B.C.J. No. 1734 (QL), the Court states:
>
> > 36. Applying these factors to the case at bar, the purpose of the *Waste Management Act* is to prevent, and remedy, environmental problems caused by waste. This is evident in the broad powers which the Act confers on those persons designated as directors and managers under the Act. Examples of the powers conferred under the Act include the power to issue permits for storage and treatment of waste, to identify a site as contaminated and to require remediation. The fact that the Act gives the directors and managers these powers, as was stated in *Consolidated Maybrun* by L'Heureux-Dube J. at para.54:
> >
> > > ... is a clear indication that the purpose of the Act is not just to remedy environmental contamination, but also to prevent it. This purpose must, therefore, be borne in mind in interpreting the scheme and procedures established by the Act ...
>
> [Emphasis added]

[42] I find that the Appellant's failure to obtain a permit while continuing to discharge waste into the environment over a period of at least two years undermined the integrity of the legislative scheme, and interfered with the Ministry's ability to regulate waste discharges and to protect the environment from the potential impacts of waste. In this sense, the contravention was "major" in nature.

[43] I also agree with the Director that the contravention had "minor" actual or potential adverse effects. There is no evidence that the unauthorized discharge resulted in, or could have resulted in, a significant adverse effect. Any effects were localized.

[44] Finally, I have considered the maximum penalty that could be imposed for the most serious noncompliance with section 6(2) of the *Act*, which is $75,000. Although the $10,000 base penalty is at the low end of the scale relative to the maximum penalty, it is still a significant amount. Overall, I find that this is an

appropriate amount given the major nature, and minor actual or potential impact, of the contravention.

Factor c): any previous contraventions, administrative penalties imposed on, or orders issued to the Appellant

[45] I find that the Determination appropriately characterizes the Appellant's contravention of section 6(2) of the *Act* as a single continuous contravention. There is no evidence of previous contraventions by the Appellant.

[46] For these reasons, I agree with the Director that no amount should be added to the base penalty for previous contraventions by the Appellant.

Factor d): whether the contravention was repeated or continuous

[47] I find that there is clear evidence that this contravention was repeated or continuous for a period of at least two years. The Appellant has not asserted otherwise. The Director added $1,000 to the base penalty for this factor, and I find that this is appropriate in the circumstances.

Factor e): whether the contravention was deliberate

[48] I find that once the Appellant received the September 7, 2017 Warning Letter, the Appellant was, or should have been, aware that it was contravening section 6(2) of the *Act*. Shortly after receiving the Warning Letter, the Appellant began, but failed to complete, the steps to obtain the necessary authorization. The Appellant submitted an initial application to the Ministry, it did not respond to the Ministry's request for further information, and it took no further steps to obtain authorization. I find that the Appellant's failure to obtain the necessary authorization was the result of deliberate actions (i.e., continued unauthorized waste discharge) and inactions (i.e., not completing the process to obtain authorization) by the Appellant.

[49] The Director added $1,000 to the base penalty for this factor. I find that this is appropriate in the circumstances.

Factor f): any economic benefit derived by the Appellant from the contravention

[50] Although the Director notes that the Appellant benefited economically from the contravention by not paying annual permit fees, the Director did not add an amount to the base penalty for this factor. The Appellant suggests that the overall penalty could be reduced to the amount of the annual fees that would have been paid if the Appellant had obtained a permit for the duration of the contravention.

[51] The parties provided no information regarding how much the annual fees for a permit would have been, if the Appellant had obtained one. I note that section 3 of the *Permit and Approval Fees and Charges Regulation*, B.C. Reg. 299/92, specifies how annual fees are calculated for permits. In general, the annual fee consists of a base amount plus an additional amount for the quantity of each contaminant authorized by the permit over 12 months. Schedules attached to that regulation specify fees, in dollars per tonne, for various types of contaminants that may be discharged. However, the parties' submissions do not indicate what contaminants, or how much of those contaminants, would be regulated in a permit for the Appellant's sawmill.

[52] Without more information, I am unable to determine how much the Appellant's annual permit fee would have been if the Appellant had obtained a permit. Therefore, I am unable to determine how much the Appellant benefitted from not having a permit for the duration of the contravention. Consequently, although the Appellant may have benefited economically from not having to pay the annual fees associated with the required authorization, there is insufficient reason to add to the base penalty because of non-payment of permit fees.

[53] I also note that the Appellant's contravention of the *Act* allowed it to continue operating its sawmill, using existing infrastructure and methods, for commercial purposes. By doing so after receiving the Warning Letter, the Appellant maintained its commercial operations and avoided the risk of reduced or eliminated operations while an authorization to emit potential contaminants was pending. As such, this might support the view that the Appellant's contravention resulted in economic benefit that should attract an increased penalty. As neither party has argued for this, however, or presented further evidence on this point, I will add no amount to the base penalty for this factor.

Factor g): whether the Appellant exercised due diligence to prevent the contravention

[54] The Director found that the Appellant did not exercise due diligence to prevent the contravention, and he did not adjust the base penalty to account for due diligence. I find that there is no evidence that the Appellant was duly diligent in preventing this contravention. As such, no reduction in the base penalty is warranted for this factor.

Factor h): the Appellant's efforts to correct the contravention

[55] In October 2017, after receiving the Warning Letter, the Appellant began the steps to correct the contravention by submitting a preliminary application for an authorization. However, the Appellant did not respond to the Ministry's subsequent request for additional information needed to assess the application, and the contravention continued. Approximately two years later, after receiving the Notice Prior to Penalty, the Appellant resumed the application process. The Appellant hired a qualified professional who had conducted air emissions tests to support the application, and the Appellant engaged in public consultation as part of the application process.

[56] The Director found that the Appellant's recent efforts to complete the permit application process warranted a 40% or $4,000 reduction in the base penalty. I have some concern about this level of reduction, given that the Appellant was not sufficiently motivated to comply with the Warning Letter until after receiving the Notice Prior to Penalty. As neither party argued for a smaller reduction of the base penalty under this factor, however, and given that one of the objectives of enforcement action is to encourage compliance, I agree that the Appellant's recent efforts to obtain a permit and achieve compliance warrant a $4,000 reduction in the base penalty.

Factor i): the Appellant's efforts to prevent recurrence of the contravention

[57] I find that the Appellant has not taken any additional efforts beyond the permitting process to prevent recurrence of the contravention. Given that a significant reduction was already given for factor (h), I find that no further reduction is appropriate when considering this factor.

Factor j): any other factors that, in the opinion of the Director (and now the Board), are relevant

[58] The Director considered the Appellant's cooperativeness with the Ministry, efforts to re-engage in the permitting process to correct the contravention, and status as a small operator, were relevant factors that warranted a further $2,500 reduction in the penalty. I agree that those considerations are relevant and are mitigating factors.

[59] The Appellant seeks a further reduction of the penalty based on the Appellant's alleged financial difficulties. However, the Appellant has provided insufficient evidence to support its assertion that it is experiencing financial difficulties. Further, even if the Appellant had provided such evidence, I find that a further reduction is not warranted, because the penalty has already been reduced to reflect the fact that the Appellant is a small operator.

[60] Regarding the Appellant's suggestion that the penalty should be reduced to equate to the annual fees that it would have paid if it had obtained a permit in 2017, I have already stated above that there is insufficient information for me to determine how much the Appellant's annual permit fee would have been. More importantly, I find that the purpose of an administrative penalty is not simply to allow the government to recoup fees that would have been paid if the Appellant was in compliance during the period of non-compliance. Administrative penalties are intended to act as a deterrent to prevent future non-compliance by both the Appellant and similar businesses. An administrative penalty that only amounted to the cost of unpaid fees would be ineffective as a deterrent, and insufficient for a contravention that was major in nature. This is particularly so in this case, where the Appellant seems to have only been motivated to enduringly attempt to become compliant with the *Act* after receiving the Notice Prior to Penalty.

[61] Finally, I note that section 7(2) of the *Penalties Regulation* provides that if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues. Given that the contravention in this case continued for hundreds of days between September 2017 and September 2019 (and appeared to still be ongoing when the Determination was issued in 2020), the Director could have imposed more than one penalty but chose not to. This is another potential ground to increase the base penalty, but as neither party argued this ground, I consider it inappropriate to do so.

Conclusion

[62] Based on all of these considerations, I find there is insufficient reason to conclude that the penalty should be reduced, based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*.

Accordingly, I conclude that a penalty of at least $5,500 is appropriate for the Appellant's contravention of section 6(2) of the *Act.*

DECISION

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

[64] For the reasons set out above, I confirm the penalty in the Determination, and order the Appellant to pay a penalty of $5,500 for the contravention of section 6(2) of the *Act.* The appeal is dismissed.

"Darrell Le Houillier"

Darrell Le Houillier
Chair

April 21, 2021