



Environmental Appeal Board

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DECISION NO. EAB-EMA-21-A009(a)

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

BETWEEN:	Nordstrom Enterprises Ltd.	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Diana Valiela, Panel Chair	
DATE:	Conducted by way of written submissions concluding on February 14, 2022	
APPEARING:	For the Appellant: Jon and Chris Kreke For the Respondent: Robyn Gifford, Counsel	

FINAL DECISION

APPEAL

[1] This appeal concerns the October 13, 2021 administrative penalty determination (the "Determination") issued by Andreas Wins-Purdy, acting as Director (the "Respondent") under the *Environmental Management Act* (the "Act"), in the Ministry of Environment and Climate Change Strategy (the "Ministry"). The Determination was issued to Nordstrom Enterprises Ltd. (the "Appellant") for failing to comply with Permit 10869 (the "Permit"). The Permit authorizes the Appellant to discharge effluent to the ground from the sewage treatment system at its recreational development in Clearwater. The Determination levied a penalty of \$6,500 for contravening Appendices B-2(B), B-2(C), and C-1(C) of the Permit.

[2] The Appellant does not dispute the Respondent's finding of non-compliance with the Permit but asks for a reduction in the penalty, stating that the penalty is very difficult for its small business to pay and that the Covid-19 pandemic has made it difficult to find a professional to assist them.

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

- (a) send the matter back to the Respondent, with directions,
- (b) confirm, reverse, or vary the Determination, or
- (c) make any decision that the Respondent could have made, and that the Board considers appropriate in the circumstances.

BACKGROUNDGeneral Facts

[4] The Appellant operates Dutch Lake Resort, a recreational development in Clearwater, BC. The resort has a sewage treatment system that includes a septic tank, disposal fields, pumps, pipes, and related equipment.

[5] On October 11, 1991, the Ministry issued the Permit under the *Waste Management Act* (predecessor to the *Act*) to the Appellant. The Permit allows the Appellant to discharge effluent from the resort's sewage treatment system to the ground. The Permit is subject to a number of terms and conditions.

[6] The terms and conditions are set out in Appendices attached to the Permit. Conditions affecting the maximum discharge rate appear in the Appendices. They recognize that the treatment system serves a first phase of the development, but may be expanded to serve the development's second phase. Appendix B-1(B) limits the maximum discharge of effluent during the first phase of the project to 10.8 cubic metres per day. Appendix No. 1(b) limits the rate at which effluent may be discharged if the treatment system is enlarged to treat the second phase of development, to 30 cubic metres per day. The second phase of development has not been constructed.

[7] Appendix B-2(B) requires one ventilation/observation port for every 152 metres of distribution pipe, with a minimum of four ports. Appendix B-2(C) requires installing monitoring wells in the disposal fields. Appendix C-1(A) requires obtaining quarterly grab samples from each monitoring well, and Appendix C-1(B) requires obtaining chemical analyses of the grab samples for certain substances.

[8] Appendix C-1(C) requires that a suitable flow measuring device be installed and maintained. Once per month, the average effluent volume discharged over a 24-hour period must be recorded. Appendix C-1(D) requires maintaining data of flow measurements and chemical analyses for inspection, and submitting the data, suitably tabulated, to the Ministry for the previous year.

[9] The Respondent notified the Appellant of non-compliance with Appendices B-2(B), B-2(C), and C-1(C) of the Permit (not having ventilation/observation ports, monitoring wells, and a flow measuring device, as specified in the Permit) in a warning letter dated June 8, 2018, and an Administrative Penalty Referral letter dated January 27, 2020. The January 27, 2020 letter also notified the Appellant of non-compliance with Appendix C-1(D) of the Permit, as flow measurements and chemical analyses were not maintained and submitted for 2019.

[10] On July 9, 2020, the Respondent issued an administrative penalty of \$1,000.00 to the Appellant for contravening Appendix C-1(D) of the Permit. This penalty is not the subject of this appeal.

[11] Ministry staff conducted a further inspection on March 24, 2021. They found continued non-compliance with Appendices B-2(B), B-2(C), and C-1(C), because the Appellant still had not installed observation ports, monitoring wells, or a flow measuring device. Due to the lack of a flow measuring device, the Ministry could not determine whether the Appellant was complying with the effluent discharge limit in the Permit, or whether the Appellant needed to install the second dual

septic field. The Appellant was also out of compliance with the requirement in Appendix C-1(D) to maintain data and analyses of flow measurements for inspection and submission to the Ministry. Due to the lack of observation wells, the Appellant was also out of compliance with the requirement in Appendix C-1(A) to obtain quarterly grab samples from each well, and the requirement in Appendix C-1(B) to obtain analyses of the grab samples for specified substances.

[12] On March 29, 2021, the Ministry issued an Administrative Penalty Referral letter to the Appellant.

[13] After issuing a Notice Prior to Determination on August 18, 2021, and obtaining submissions from the Appellant, the Respondent issued the Determination on October 13, 2021.

[14] The Appellant filed its appeal of the Determination on October 25, 2021. The Appellant does not dispute the finding of non-compliance with the Permit but asks for a reduction in the penalty, stating that the penalty "went from \$1000 to \$6500 which is very difficult for our small business to pay".

Overview of the statutory scheme

[15] Under section 115(1)(c) of the *Act*, a director may issue an administrative penalty to a person who fails to comply with a requirement of a permit issued under the *Act*.

[16] 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*.

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

[18] Section 7(1) of the *Penalties Regulation* lists the following factors that a director must consider, if applicable, in establishing the amount of an administrative penalty:

- (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.

[19] 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.

[20] Under section 12(5) of the *Penalties Regulation*, a person who fails to comply with a requirement of a permit issued under the *Act* is liable to an administrative penalty not exceeding \$40,000.

[21] The Ministry uses the "Administrative Penalties Handbook - Environmental Management Act and Integrated Pest Management Act" (the "Handbook"), updated January 2020, as guidance for the issuance of administrative penalties. The Handbook recommends determining a "base penalty" that reflects the seriousness of the contravention considering the nature of the contravention and any real or potential adverse effects (factors 7(1)(a) and (b) of the *Penalties Regulation*). The base penalty is added to, or deducted from, by considering each of the factors (c) through (j).

ISSUE

[22] The only issue in this appeal is whether the \$6,500 penalty should be reduced.

DISCUSSION AND ANALYSIS

Summary of the Appellant's submissions

[23] In the Notice of Appeal, the Appellant states that following the inspection on June 8, 2018, they purchased a flow meter for \$2,954.70 and received it in September of 2018 but did not install it. In the January 27, 2020, notification of non-compliance, they were told that they should probably be under the jurisdiction of the Interior Health Authority ("IHA") instead of the Ministry. On March 17, 2021, the Appellant contacted the IHA regarding changing the regulatory authority. The Appellant states that they were directed to someone else in the IHA, but that person was not interested in helping them.

[24] The Appellant submits that, following the March 29, 2021 notification of non-compliance, they asked for suggestions of professionals who could help them, as they didn't understand what they needed to do. In April of 2021, and again in August and in September of 2021, the Appellant contacted Stantec Engineering but there has been no further contact. The Appellant submits that they also contacted Clear Tech Consulting in April of 2021 but there was no reply. The Appellant states that on October 8, 2021, they installed the flow meter.

[25] Following the Determination, the Ministry informed the Appellant that it had reached out to IHA on the Appellant's behalf. The Appellant is hoping to hear from IHA about whether the Appellant is eligible to be registered under the IHA.

[26] The Appellant states that they want to comply with the Permit and are asking for more time to change their designation from the Ministry to IHA, and/or find a professional that can assist in getting into compliance with the Permit.

[27] The Appellant asks for a reduction in the penalty fee and states that the \$6,500 is very difficult for its small business to pay. The Appellant is trying to find professionals to assist them with compliance but states it is difficult during the Covid-19 pandemic.

Summary of the Respondent's submissions

[28] The Respondent submits that the Appellant has not proved its case on a balance of probabilities, since it has not provided any evidence to support its claims with respect to its efforts to comply with the Permit requirements or to register with IHA. Further, the Respondent submits that the Appellant has not provided any evidence to substantiate its assertion of financial difficulties. The Respondent submits that because no such evidence has been provided, the appeal should be dismissed.

[29] In the alternative, the Respondent submits that the penalty is appropriate in this case given the nature of the contravention and the Appellant's operations, the Appellant's history of non-compliance with the Permit, and the objectives of promoting deterrence and future compliance. Any further reductions to the penalty would defeat the purpose of the administrative penalty regime.

The Panel's Analysis and Findings

[30] I have no jurisdiction to grant the Appellant's request for more time to comply with the Permit. The Board can only provide remedies in relation to the decision under appeal, which in this case is the Determination. I cannot delay the time by when the penalty must be paid, because the *Penalties Regulation* sets out the time when an administrative penalty must be paid.¹

[31] Further, in this case, the Permit is not under appeal, and the Board can neither suspend the requirements in the Permit nor direct the Respondent not to enforce the Permit. The Board could reverse the Determination if the Board considered that to be an appropriate remedy in this case, but I find that the facts do not warrant reversing the Determination. The Appellant does not dispute the findings in the Determination that it failed to comply with several requirements of the Permit. The only issue is whether the penalty should be reduced.

[32] I have considered the parties' submissions and evidence as they relate to the relevant factors in section 7(1) of the *Penalties Regulation*. I have weighed these factors in the context of section 12(5) of the *Penalties Regulation*, which prescribes a maximum penalty of \$40,000 for failing to comply with a requirement of a permit or approval issued or given under the *Act*. I have also considered the Handbook as guidance to set the penalties. The parties have not suggested any other method of calculating the appropriate penalty, and use of the Handbook will foster consistency between this penalty and others that the Ministry has imposed.

(a) the nature of the contravention or failure

[33] The Respondent found that the non-compliance with the requirements to install observation ports, groundwater wells, and a flow meter at a minimum creates a risk of harm to the environment or human health and safety. The Appellant submits that it installed a flow meter on October 8, 2021. However, there is no evidence that effluent flow was measured, chemical analyses were carried out,

¹ Where a person appeals the imposition of the administrative penalty, section 8(c) of the *Penalties Regulation* requires that the administrative penalty must be paid within 30 days after the person receives the decision of the appeal board if the appeal board confirms or varies the administrative penalty, or 30 days from the date the new determination is served on the person if the appeal board sends the matter back, with directions, to the Director who made the determination.

or yearly data were reported to the Ministry. These failures could lead to potentially undetected flow rates exceeding the Permit's discharge restrictions or undetected effluent chemical characteristics of concern, which poses a risk of harm to the environment or human health. In addition, the flow meter was installed after the period of non-compliance relevant to this appeal (August 18, 2018 to March 17, 2021).

[34] I agree with the Respondent that the nature of the contravention is moderate, since there was a failure to comply with Permit requirements, causing a risk to the environment or human health and safety. The Appellant did not correct the non-compliances despite repeated notifications by the Ministry.

(b) the real or potential adverse effect of the contravention or failure

[35] The Respondent rated the actual or potential adverse effect of the contravention as low because the contravention does not result in an adverse effect or interfere with the Ministry's capacity to protect the environment or human health, or the potential to do so is low.

[36] I find that although there is a risk to the environment or human health and safety, there is no evidence that the contraventions actually resulted in an adverse effect.

[37] It is possible that the Permit limits were being exceeded but the exceedances were not detected because the Appellant did not provide data on effluent flow or chemical analyses. This lack of data hampers the Ministry's ability to enforce the Permit's maximum discharge limits or to assess the chemical characteristics of the effluent. However, I find that the potential to interfere with the Ministry's capacity to protect the environment or human health and safety is low because the Ministry has broad powers under the *Act* to manage adverse effects. These powers include issuing orders to provide information² for the purpose of determining whether there are reasonable grounds for making a pollution prevention order³ or a pollution abatement order⁴, or to issue pollution prevention or pollution abatement orders.

[38] I agree with the Respondent that it is likely that the contravention does not result in an adverse effect and that the potential for interference with the Ministry's capacity to protect the environment or human health is low.

Base Penalty

[39] Based on my findings regarding factors (a) and (b) above, I conclude that the nature of the contravention is moderate and the potential for adverse effect is low. The Handbook is not binding on me, but it suggests that for such contraventions, a base penalty of \$5,000 is appropriate if the nature of the contravention is moderate and the potential adverse effects are low. The parties have not suggested a different base penalty, and I find a base penalty of \$5,000 (the "Base Penalty") is appropriate in the circumstances.

² Section 77 of the *Act*

³ Section 81 of the *Act*

⁴ Section 83 of the *Act*

(c) Any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the Appellant

[40] The Respondent considered the previous Determination of Administrative Penalty of \$1,000 against the Appellant, stating that it was paid in full but had no effect on the Appellant's operations and that the Appellant did not take steps to correct any of the noted non-compliances. Therefore, the Respondent concluded that a 10% increase (+ \$500) should be added for this factor.

[41] The previous penalty was imposed for not complying with Appendix C-1(D) of the Permit, which requires maintaining data of flow measurements and chemical analyses for inspection and submitting the data, suitably tabulated, to the Ministry for the previous year. This is a similar contravention to the subject of this appeal, which includes not complying with Appendix C-1(C) of the Permit. The latter requires providing and maintaining a suitable flow measuring device and recording once per month the average effluent volume discharged over a 24-hour period. These actions would have been necessary to comply with Appendix C-1(D). I find that the previous contravention should have alerted the Appellant of the need to provide and maintain a suitable flow measuring device and to record, once per month, the average effluent volume discharged over a 24-hour period. As noted above, the Appellant did not install a flow meter until after the period of non-compliance that is relevant to this appeal.

[42] I find that no corrective action was taken in the relevant time frame in response to the previous penalty imposed for a related non-compliance, and that a 10% increase (+ \$500) should be added for this factor.

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

[43] The Respondent noted that the Appellant was notified of non-compliances on three separate inspection reports but failed to make the needed changes to come into compliance. The Respondent considered the non-compliances as continuous from August 18, 2018 to March 17, 2021. The Respondent assigned an increase of 10% of the base penalty (+ \$500) for continuous contravention. I note the non-compliance was determined and communicated to the Appellant even earlier, in the June 8, 2018 Inspection Report and Warning⁵.

[44] The evidence indicates that the Appellant knew of the continuing contravention and should have stopped the non-compliances but failed to do so. The contravention was continuous. I therefore agree with the Respondent that an increase of (at least) 10% (+\$500) of the proposed base penalty should be added for this factor.

(e) whether the contravention or failure was deliberate

[45] The Respondent considered the contravention to be deliberate because the Appellant was aware of the requirements of the Permit, since the Appellant was previously found to be out of compliance with it on two occasions leading up to the current inspection period. The Respondent added that the Appellant was also aware that by failing to install the observation ports, groundwater wells, and flow meter, they were not meeting the requirements of the Permit.

⁵ Administrative Penalty Assessment Form, Exhibit "B" referred to in the affidavit of Andreas Wins-Purdy, p. 3.

[46] The Appellant stated in its reasons for appeal that it wanted to comply with the Permit and it listed efforts it had made to do so between June 8, 2018, and October 14, 2021. The efforts cited to specifically stop the non-compliance included the following:

- purchasing a flow meter on June 20, 2018, receiving it in September 2018, but not installing it at that time;
- contacting engineering consultants several times between April 2021 and September 2021;
- contacting the IHA on March 17, 2021 to inquire about registering under the *Sewerage System Regulation* instead of holding the Permit under the *Act*; and
- installing the flow meter on October 8, 2021.

[47] None of these actions prevented the continuing non-compliance during the period cited in the Determination (August 18, 2018, to March 17, 2021). According to the March 29, 2021 Administrative Penalty Referral Report, the Appellant informed Ministry staff that it had not maintained data of flow measurement and analysis and it could not provide the annual report upon request. Ministry staff confirmed through the Ministry's electronic filing system that the Appellant did not submit the 2020 annual report.

[48] The Appellant submitted that installation of the flow meter occurred on October 8, 2021. This was after the period relevant to the Determination. Further, there is no evidence that any flow measurements resulted from the installation of the meter. Similarly, the efforts made in 2021 to retain a professional consultant or change its regulator did not begin until after the period relevant to the Determination and were unsuccessful. Although the Appellant submits that it was difficult to retain a consultant during the Covid pandemic, there is no evidence that any efforts to do so began until after the Ministry issued the March 29, 2021 Administrative Penalty Referral Letter to the Appellant. The Appellant knew it was not in compliance with Appendices B-2(B), B-2(C), and C-1(C) of the Permit throughout the period from June 8, 2018 to March 17, 2021, and it failed to take sufficient or timely action to comply.

[49] The Board previously found that one appellant's knowledge of a contravention and its continued failure to come into compliance was the result of deliberate actions and inactions of the appellant⁶. In the present case, the Appellant's inaction over a long period, knowing about the contravention, can be considered deliberate. This supports an increase in the Base Penalty.

[50] I find that an increase of 10% of the base penalty (+ \$500) is appropriate for this factor, since the contravention continued despite the Appellant's continued awareness of the non-compliance and the Appellant failed to take sufficient corrective actions.

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

[51] The Respondent considered there was no economic benefit for the non-compliance because the Appellant will be required to install observation ports,

⁶ *Pacesetter Mills Ltd. v. Director, Environmental Management Act* (Decision No. EAB-EMA-20- A023(a), April 21, 2021), at para. 48.

groundwater wells, and a flow meter in the future. Therefore, he did not increase the penalty for this factor.

[52] It could be argued that the Appellant has benefited from the non-compliance by continuing to operate its resort by avoiding compliance, or by delaying compliance. However, there is no evidence that the Appellant received an economic benefit from not complying with the Permit. Further, the Appellant incurred the cost of purchasing a flow meter. I find that the Appellant will be required to incur the deferred economic costs in the future, and I agree with the Respondent that there should be no increase in the penalty for this factor.

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

[53] Under section 6 of the *Penalties Regulation*, even if the Appellant had done everything reasonably possible to prevent the contravention, it would still be liable for the contravention. However, if the Appellant had acted with due diligence to try to achieve compliance, it would be appropriate to reduce the penalty under this factor.

[54] The Respondent stated that due diligence involves taking all measures reasonably necessary to avoid a contravention, and he did not consider a reduction in base penalty for this factor.

[55] I agree with the Respondent that no reduction is appropriate for this factor. I have already found that the Appellant was fully aware of its obligations under the Permit but failed to take the steps that would reasonably be required to prevent the contravention. Such steps might have included timely and serious attempts to install and operate the required parts of the sewage treatment system, and to implement the required monitoring and reporting. The Appellant's attempts in April of 2021 to contact a professional and the IHA, and to purchase a flow meter in 2018, but not installing it until October 8, 2021, fall short of doing everything reasonably required to prevent the continued contravention between August 18, 2018 and March 17, 2021. Therefore, I find that there should be no reduction in the penalty for this factor.

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

[56] The Respondent did not apply a reduction in the Base Penalty for this factor because he stated the Appellant has shown no efforts to correct the contraventions or failures with their Permit.

[57] I find that the Appellant did not take reasonable or timely steps to achieve compliance after learning of the contraventions in 2018 or during the period considered in the Determination. The Appellant's installation of the flow meter occurred approximately three years after the Appellant had received it in September 2018, and the Appellant has provided no reasonable explanation for this delay. I find that there should be no reduction in the penalty for this factor.

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

[58] The Respondent found there were no efforts to prevent the recurrence of the contravention or failure, and he did not apply a reduction in the base penalty for this factor. I agree that no reduction is justified for the reasons provided above.

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

[59] Although the Appellant submitted that the penalty of \$6,500 is very difficult for its small business to pay, there is no evidence to support this statement. The Board has previously found⁷, and I agree, that where financial difficulties are asserted, at least some records should be submitted in evidence. Therefore, I find that there is no basis to include this submission as a factor relevant to adjust the amount of administrative penalty in this case. I find no other factors are relevant.

Additional administrative penalties for each day the contravention continued (s. 7(2) of the Penalties Regulation)

[60] The Respondent did not add additional administrative penalties for each day the contravention continued since the continuity of the contravention was accounted for under factor (d), namely a 10% increase in the Base Penalty for continuous contravention.

[61] The contravention continued for hundreds of days, so the Respondent could have imposed a significantly higher penalty under section 7(2) of the *Penalties Regulation*. The Respondent chose not to. I find that the 10% increase in the Base Penalty assessed for the continuity of the non-compliance highlights the unacceptable length of the non-compliance to some extent. Therefore, in this case there is no need to assess additional administrative penalties for each day the contravention continued.

Conclusion

[62] I considered the factors set out in section 7 of the *Penalties Regulation* for the Appellant's failure to comply with the Permit requirements, and the parties' submissions and evidence. I have also considered the maximum penalty for contravening a permit.

[63] Under section 12(5) of the *Penalties Regulation*, a person who fails to comply with a requirement of a permit issued under the *Act* is liable to an administrative penalty not exceeding \$40,000. A penalty of \$6,500 is at the low end of potential penalties for this type of contravention. However, in the circumstances of this case, I find that \$6,500 is the appropriate penalty for failing to comply with Appendices B-2(B), B-2(C), and C-1(C) of the Permit.

[64] As submitted by the Respondent, the Board has previously emphasized considering whether an administrative penalty will serve as an adequate deterrent as well as to promote future compliance by both the non-compliant person specifically and other permit holders more generally⁸. In the case of this Appellant, a previous administrative penalty of \$1,000 did not result in compliance. In this case, I find that the administered penalty of \$6,500 should act as a deterrent and promote future compliance by the Appellant and other permit holders.

⁷ *Delfresh Mushroom Farm Ltd. v. Director, Environmental Management Act* (Decision No. 2019-EMA-009(a), Apr. 14, 2020) at para. 42.

⁸ *Randy Carrell v. Director, Environmental Management Act* (Decision No. 2019-EMA-010(a), Nov. 27, 2019) at para. 114; *Pacesetter Mills Ltd. v. Director, Environmental Management Act* (Decision No. EAB-EMA-20- A023(a), April 21, 2021) at para. 60.

DECISION

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

[66] For the reasons set out above, I confirm the penalty in the Determination. The Determination is confirmed, and the appeal is dismissed.

“Diana Valiela”

Diana Valiela
Panel Chair

March 31, 2022