Environmental Appeal Board

Citation: *Klondike Silver Corp. v. Chief Inspector of Mines*, 2025 BCEAB 4

Decision No.: EAB-MA-23-A001(a)

Decision Date: 2025-01-23

Method of Hearing: Conducted by way of written submissions concluding on August 21, 2024

Decision Type: Final Decision

Panel: Cynthia Lu, Panel Chair

Appealed Under: *Mines Act,* R.S.B.C 1996, c.293

Between:

Klondike Silver Corp.

Appellant

And:

Chief Inspector of Mines, Ministry of Mining and Critical Minerals

Respondent

And:

Thomas Kennedy

Third Party

And:

Leonard Palmer

Third Party

Appearing on Behalf of the Parties:

For the Appellant and Third Parties:	Mark Youden
For the Respondent:	Micah Weintraub

FINAL DECISION

INTRODUCTION

[1] This appeal concerns a Determination of Administrative Penalty Decision (the "Determination") made on March 16, 2023, against Klondike Silver Corp. (the "Appellant"), by a delegate of the Chief Inspector of Mines (the "Respondent"). The Respondent was delegated authority under the *Mines Act,* RSBC 1996, c. 293 (the "*Act*") and works for the Ministry of Mining and Critical Minerals[1] (the "Ministry"). Mr. Leonard Palmer, the Appellant's Mine Manager, and Mr. Thomas Kennedy, an agent of the Appellant, are also named in the Determination. Mr. Palmer and Mr. Kennedy are Third Parties in this appeal.

[2] The Determination levied an administrative monetary penalty ("AMP") of $110,000 for failure to comply with two orders issued under section 35 of the *Act.*

[3] The Environmental Appeal Board (the "Board") is designated under section 9 of the *Administrative Penalties (Mines) Regulation* (the "*Regulation*") to hear appeals brought under the *Act.* Section 36.7 of the *Act* gives the Board the power to confirm, vary or rescind the Determination.

[4] Appellant asks the Board to reverse the Determination, or alternatively to reduce the penalty amount. The Respondent and Third Parties ask the Board to confirm the Determination. The appeal was heard by written submissions. The Appellant and Third Parties made joint submissions.

ISSUES

[5] The Appellant's grounds for appeal are that the administrative penalties were not determined based on proper consideration of *Regulation* sections 2(a) to 2(j) or the principles of sentencing in environmental offences. The Appellant does not appeal the findings of contraventions. The Appellant asks the Board to reverse the Determination, or as an alternative, reduce the penalty amount. I interpret the Appellant's request to reverse the Determination to mean the same as rescinding the decision under section 36.7(4)(a) of the *Act*.

[6] Since the Appellant has not appealed the findings of contraventions, the issues in this appeal can be narrowed as follows:

- Did the Respondent appropriately consider sections 2(a) to 2(j) of the *Regulation* when determining the administrative penalties?
    - Did the Respondent establish an appropriate base penalty?

[1] Known as the Ministry of Energy, Mines and Low Carbon Innovation at the time of the Determination.

- Did the Respondent appropriately apply penalty adjustment matters 2(c) to 2(j)?

- Do the principles of sentencing apply to administrative penalty determinations?

BACKGROUND

[7] The Appellant owns, and holds Permit M-65 to operate, Silvana Mine ("Silvana") near Sandon, BC. Silvana is an underground silver, lead, zinc mine. Silvana's mine site includes three tailings storage ponds, a tailings management facility, and related structures. The initial mine plan was approved by the Ministry in 1971, and the most recent amendment was approved in 2018.

[8] Silvana's tailings management facility is comprised of three adjacent, tiered tailings ponds, collectively storing about 400,000 tonnes of tailings. Golder Associates Ltd. ("Golder"), an engineering consultant, completed the 2018 Dam Safety Inspection Report for Silvana. The dam safety inspection was conducted as a requirement of the Health, Safety and Reclamation Code for Mines in British Columbia (the "Code"), established under the *Act.* The 2018 Golder report classifies the tailings management facility dam as having "high" consequence. Golder's report recommended a dam breach inundation assessment be completed to confirm the consequence classification and provide further information for emergency response planning. Golder's 2018 report also identified several other deficiencies and non-conformances.

[9] Section 15 of the *Act* gives an inspector authority to enter and inspect a mine for the purposes of administering or enforcing the *Act*, its regulations, or the Code. Following an inspection, section 15 of the *Act* requires the inspector to complete a report and provide the report to the mine manager. On June 24, 2019, the Ministry conducted an inspection of Silvana. A Geotechnical Inspection Report ("GIR") issued pursuant to section 15 was provided to the Appellant on July 2, 2019. The inspector issued five orders (the "GIR Orders") pursuant to section 15 of the *Act,* nine advisories, three information requests, and one warning. The GIR ordered the mine manager to establish an independent tailings review board ("ITRB") for the Mine's tailings management facility by March 31, 2020, and for the mine manager to submit a dam breach inundation study ("DBI Study") to the Chief Inspector of Mines by March 31, 2020. Silvana's Mine Manager responded to the GIR on July 17, 2019.

[10] On May 27, 2020, the Ministry sent notice to the Appellant and Third Parties issuing eighteen enforcement orders. Four of the eighteen enforcement orders were orders to comply with the original GIR Orders issued in 2019. Order 2, issued pursuant to section 35(1) of the *Act,* required the compliance with the GIR Order to establish an ITRB, setting a new date for completion by June 30, 2020. Order 3, issued pursuant to section 35(1) of the *Act,* required compliance with the GIR Order to submit a DBI Study, setting a new date for completion by June 30, 2020. Contraventions of Order 2 and Order 3 led to the issuance of the AMPs subject to this appeal.

[11] In June 2020, the Appellant retained an engineering consultant, Tetra Tech Canada Inc. ("Tetra Tech"), to assist in compliance with the outstanding orders. The Appellant and its previous engineering consultant, Golder, parted ways in April 2020. An ITRB was established on September 1, 2021. A DBI Study was completed by Tetra Tech on July 7, 2022.

[12] The Respondent provided a Notice Prior to Determination on May 4, 2022, indicating that the Respondent was contemplating imposing administrative penalties in respect of contraventions of Orders 2 and 3, described above. The Notice provided information on an Opportunity to Be Heard ("Notice of OTBH"). The Appellant and Third Parties submitted written submissions for the Opportunity to Be Heard on November 29, 2022.

[13] The Respondent issued the Determination on March 16, 2023. The Determination found the Appellant contravened *Act* by failing to comply with orders issued under section 35(1) of the *Act.* Specifically, the Appellant failed to establish an ITRB before June 30, 2020, and failed to submit a DBI Study before June 30, 2020. The Respondent imposed an AMP of $55,000 for each contravention.

RELEVANT LAW

[14] Section 35 of the *Act* establishes the government's authority to enforce the *Act,* regulations, and Code. The Determination under this appeal was issued as a result of failing to comply with orders issued under section 35(1) of the *Act.* Section 36.1 of the *Act* states that "after giving a person an opportunity to be heard, the chief inspector may find on a balance of probabilities that the person has contravened or failed to comply" with a provision of and order made under the *Act.* Section 36.2 of the *Act* provides for the chief inspector's authority to impose administrative penalties and the potential for prosecution under the *Act.* Section 36.3 of the *Act* establishes the procedures to be followed if the chief inspector finds a contravention has occurred or imposes an administrative penalty.

[15] Section 2 of the *Regulation* sets out the matters that must be considered by the chief inspector before imposing an administrative penalty. Each of these matters, sections 2(a) to 2(j), are discussed in the analysis below. Section 4 of the *Regulation* establishes a maximum penalty of $500,000 for contravention of section 35(1) of the *Act.*

RELEVANT POLICY

[16] The Respondent refers me to the Ministry's Administrative Monetary Penalty Handbook (the "Handbook"). The Handbook is a Ministry policy document that provides non-binding guidance to statutory decision makers on their roles and responsibilities around the issuance of AMPs.

[17] In practice, the Handbook's guidance considers sections 2(a) and 2(b) of the *Regulation* together to determine a preliminary or base penalty amount. The Handbook lays out multiple base penalty tables that vary based on classification of a regional or major mine and the maximum penalty amount of the contravention prescribed in section 4 of the *Regulation.* The Handbook suggests lower base penalty amounts for regional mines as compared to major mines for similar contraventions. The Handbook considers the remaining matters, sections 2(c) to 2(j) of the *Regulation,* as mitigating or aggravating adjustments that may be applied to the base penalty amount.

[18] All parties' submissions rely on the approach set out in the Handbook. This approach, to establish a base penalty then apply adjustments, is how the Respondent considers *Regulation* section 2 in practice. The Appellant and Third Parties' submissions on how *Regulation* matters 2(a) to 2(j) should be considered in this case are framed in a similar way as in the Handbook. The Appellant submits that matters 2(a) and 2(b) are used to determine a base penalty amount, although it disagrees with the base penalty amount determined by the Respondent. The Appellant then considers the remaining matters 2(c) to 2(j) as penalty adjustment factors. The parties have relied on the structure provided in the Handbook, and while not binding on me, I also find the Handbook to be a useful basis to determine the appropriate administrative penalties in this case.

DISCUSSION AND ANALYSIS

Did the Respondent appropriately consider sections 2(a) to 2(j) of the *Regulation* when determining the administrative penalties?

Appellant and Third Parties' Submissions

Did the Respondent establish an appropriate base penalty?

[19] The Respondent assessed the base penalty for contraventions as "major" gravity and magnitude (matter 2(a)), and "medium" real or potential adverse effects (matter 2(b)). The Appellant and Third Parties do not contest the classifications of "major" and "medium," but say that the Respondent did not properly assess the base penalty amount and did not explain the rationale for setting the base penalty at $50,000 for each contravention.

[20] The Appellant and Third Parties refer me to the decision rationales of three previous AMP determinations classified as "major" gravity and magnitude and "medium" real or potential adverse effects. The base penalties of these cited determinations were set at $10,000 or $25,000. They submit the difference between the base penalties of similar cases compared with this Determination is not warranted or explained.

Did the Respondent appropriately apply penalty adjustment matters 2(c) to 2(j)?

[21] The Appellant and Third Parties agree with the Respondent's decision to not apply adjustments for matters 2(c)—previous contraventions, 2(d)—whether the contravention

was repeated or continuous, 2(f)—economic benefits derived from the contravention, and 2(g)—efforts to prevent the contravention.

[22] The Appellant and Third Parties submit a penalty increase of 10% should not have been applied under *Regulation* matter 2(e): whether the contravention was deliberate. They submit that economic constraints impeded their ability to comply with the orders. However, they submit the non-compliances were not out of deliberate disregard for the Appellant's obligations. The Appellant argues it demonstrated a desire to come into compliance prior to the Determination being issued.

[23] The Appellant and Third Parties submit there should be a 10% penalty decrease applied for factor 2(h), efforts to correct the contravention. They refer me to a previous AMP determination where the decision maker applied a penalty decrease for this factor because the penalized party had come into compliance prior to the determination. They submit that the Appellant came into compliance with Order 2 by establishing an ITRB, prior to the Notice of OTBH. They argue for the same decrease to be applied in this Determination as was applied in their cited previous determination.

[24] The Appellant and Third Parties submit a 10% penalty decrease should be applied for 2(i), efforts to prevent reoccurrence of the contravention. They submit the decrease should be applied because the ITRB and DBI Study have been completed, and Tetra Tech has been engaged to assist the Appellant in maintaining compliance into the future.

[25] The Appellant and Third Parties submit the Appellant's transparency and desire to come into compliance since being notified of the contraventions should be recognized through an appropriate penalty decrease.

Respondent's Submissions

Did the Respondent establish an appropriate base penalty?

[26] The Respondent submits the penalty determination was appropriate and ought to be confirmed by the Board. The Respondent submits the penalty table in the Handbook was used to determine the base penalty amounts. The Respondent submits that the Handbook has two tables for determining base penalty amounts, one for major mines, such as Silvana Mine, and another for regional mines. The Respondent submits the three penalty determinations referred to in the Appellant's submissions as analogous decisions, are in fact not the same. The Respondent submits each of the three cases submitted by the Appellant were smaller regional mines. Therefore, the classifications of "major" and "medium" resulted in lower base penalties, as described in the Handbook's penalty tables for regional mines. The Respondent submits that the table for major mines was used to arrive at a base penalty of $50,000 for each contravention.

Did the Respondent appropriately apply penalty adjustment matters 2(c) to 2(j)?

[27] The Respondent submits that they considered the evidence appropriately, and made no adjustments for matters 2(c) to (d) and (f) to (j).

[28] The Respondent submits a penalty increase is warranted for matter 2(e), whether the contravention was deliberate. The Respondent argues the Appellant was fully aware of its obligations, but cited financial constraints impacted its ability to comply. The Respondent argues allowing permittees the choice not to comply for financial reasons is contrary to the principles of effective regulation.

[29] The Respondent submits, while the Appellant enjoyed economic benefit from its failure to comply, the penalty was not increased for matter 2(f) as the overall penalty amount was determined to be a sufficient deterrent.

[30] The Respondent submits a penalty decrease was not applied to matter 2(h), efforts to correct the contravention, due to the time elapsed between the Appellant becoming aware of the contravention and when remedial actions took place. The Respondent argues the desire to achieve consistency between penalties does not bind the Respondent, or the Board, to the analysis and rationales of previous AMP determinations.

[31] The Respondent submits a penalty decrease for 2(i), efforts to prevent reoccurrence of the contravention, does not apply. The Respondent submits merely undertaking the actions ordered does not prevent the failure to comply with orders from occurring again.

Panel's Findings

Did the Respondent establish an appropriate base penalty?

[32] The Appellant and Third Parties recognize that base penalties reflect the size and complexity of mining operations. The Appellant and Third Parties argue that the Respondent provided insufficient reasoning as to why the base penalty did not align with what they view as analogous cases. They do not dispute the Respondent's classifications for each contravention to be of "major" gravity and magnitude (2(a)) and "medium" real or potential adverse effects (2(b)).

[33] I accept the Respondent's argument that the determinations presented by the Appellant and Third Parties as analogous cases were not the same in context or factual scenarios as in this appeal. The Appellant has not argued that it should be considered a regional mine. I accept the Respondent's classification of Silvana to be a major mine. While the Handbook's guidance is non-binding, it provides a consistent and transparent approach to determining administrative monetary penalties. I find that the Handbook's major mines penalty tables were appropriately applied to determine the base penalty of $50,000 for each contravention.

Did the Respondent appropriately apply penalty adjustment matters 2(c) to 2(j)?

[34] Following the base penalty determination, penalty adjustments may be applied. The Respondent did not apply adjustments for matters 2(c)—previous contraventions or failures and 2(d)—whether contravention was repeated or continuous. The Appellant and

Third Parties agree that no adjustments should be made. Consequently, I do not adjust the base penalty because of these matters.

[35] The next penalty adjustment matter is 2(e), whether the contravention was deliberate. According to the Handbook, "knowledge, willfulness and intent are indicators of deliberateness" (page 30). Neither party made specific submissions on how the term or concept of deliberateness ought to be interpreted. I find the Handbook's guidance to be useful in my assessment of deliberateness of the Appellant's actions for the reasons provided above.

[36] The Appellant asserts that it did not act in deliberate disregard of their compliance obligations but faced difficulties (including financial ones) in meeting its obligations. The Appellant responded to the 2019 GIR Orders by stating that the ITRB was not established due to their "present financial constraints" and the Mine's "care and maintenance status." The Appellant also responded, in part, that "the mine is committed to completing this and all other deficiencies identified in [the dam safety inspections] once the Company's financial situation improves."

[37] The 2018 Dam Safety Inspection Report identified several deficiencies and non-conformances including these two non-conformances: "[a]n [ITRB] has not yet been appointed" and "a [DBI Study] has not been carried out for the [tailings management facility]." The 2018 report also states that these non-conformances were previously identified in the 2017 Dam Safety Inspection Report. The Ministry made its first orders related to these outstanding items in July 2019 (the GIR Orders) and made the subsequent section 35(1) enforcement orders in 2020.

[38] I find it is reasonable to conclude that the Appellant has been aware of the requirement to establish an ITRB and to complete DBI Study since its 2018 Dam Safety Inspection Report. The Appellant has had knowledge of their contraventions since at least July 2019 when the GIR Orders were issued. Although the Appellant claims that they faced economic and other hardships, their submissions do not include persuasive evidence to support these assertions. I agree with the Respondent that allowing permittees the choice not to comply for financial reasons undermines the effectiveness of the regulatory scheme. I find the Appellant deliberately decided not to comply with the orders for some time, and a penalty adjustment for this matter is appropriate. I confirm the 10% increase applied in the Determination for each contravention.

[39] The next penalty adjustment matter, 2(f), is whether any economic benefits were derived from the contravention. The Respondent did not apply a penalty adjustment, and the Appellant agrees that no adjustment should be made for this matter. The Respondent submits that the Appellant enjoyed an economic benefit by delaying the costs of compliance, but that the overall penalty amount was sufficient for future deterrence. Consequently, I do not adjust the base penalty for this matter.

[40] Matter 2(g) relates to efforts to prevent the contravention. The Respondent did not apply a penalty adjustment, and the Appellant and Third Parties do not argue an

adjustment should be made. Consequently, I do not adjust the base penalty for this matter.

[41] The Respondent did not apply a penalty adjustment for the next matter 2(h), efforts to correct the contravention. However, the Appellant and Third Parties argue a 10% decrease adjustment should be applied. They refer me to a previous AMP determination where efforts to correct the contravention prior to the Notice of OBTH resulted in a mitigating factor being applied. They argue a similar penalty decrease should be applied in this case because the Appellant established the ITRB prior to the Notice of OBTH. The Appellant submits it corrected the ITRB contravention in September 2021 and the Notice of OBTH occurred May 4, 2022.

[42] AMP determinations are not bound by the rationales of previous determinations, nor by the specific guidance presented in the Handbook. The unique facts and context of each contravention should be evaluated against the matters listed in section 2 of the *Regulation*. I am not convinced by the Appellant and Third Parties' argument that this penalty determination should be based on the rationales of previous determinations. I agree with the Respondent's rationale to not apply an adjustment due to the time elapsed between the Appellant becoming aware of the contravention and when the contraventions were corrected. While the Appellant did submit the ITRB and the DBI Study, they submitted them after the deadlines set in the GIR Orders; therefore, they were not in compliance with the orders.

[43] Matter 2(i) is a potential mitigating factor for the efforts to prevent reoccurrence of the contravention. The Appellant and Third Parties argue a 10% penalty decrease should be applied because the GIR Orders have been resolved, and the Appellant has engaged a consulting firm, Tetra Tech, to assist in maintaining compliance. I note that, at the time of the GIR Orders in July 2019, the Appellant was also engaged with an engineering consultant. Additionally, I note that the previous engineering consultant identified the outstanding issues of establishing a ITRB and completing a DBI Study in its 2018 Dam Safety Inspection Report. While the specific requirements of the orders have been satisfied (apart for the deadlines for compliance), I do not find the Appellant and Third Parties' submissions or arguments convincingly demonstrate or explain how these efforts contribute to preventing future failures to comply with orders. I find a penalty decrease is not appropriate in consideration of this matter.

[44] The final penalty adjustment matter is 2(j), any additional factors that may be considered relevant. The Respondent did not apply a penalty adjustment, and the Appellant and Third Parties did not argue that additional adjustments should be made. Consequently, I do not adjust the base penalty for this matter.

[45] In summary, I find the penalty adjustment matters 2(c) to 2(j) were appropriately considered and applied by the Respondent. I confirm the 10% increase to the base penalty amounts for matter 2(e) and make no other penalty adjustments.

Do the principles of sentencing apply to administrative penalty determinations?

Appellant and Third Parties' Submissions

[46] The Appellant and Third Parties submit the penalty must reflect the principles of sentencing in environmental offences. They submit these principles are: parity with other cases, history of non-compliance, responsibility and remorse, deterrence, severity of potential or actual harm, and economic advantage. The Appellant and Third Parties argue the Respondent did not properly consider each of these principles in determining the penalty amounts.

Respondent's Submissions

[47] The Respondent submits that principles of sentencing are part of the criminal sentencing process and do not apply to administrative processes such as this penalty determination. The Respondent refers me to *Hogan v. British Columbia (Securities Commission)*, 2005 BCCA 53 (CanLII), and *Guindon v. Canada*, 2015 SCC 41 (CanLII) ("*Guindon*"). The Respondent submits both cited cases confirm the distinction between criminal and administrative processes. The Respondent submits that the language in section 36.2 of the *Act* shows that legislature has turned its mind to the distinction and interplay between administrative penalties and offences under the *Act.* The Respondent submits this appeal does not arise from an offence proceeding, therefore sentencing principles do not apply.

Panel's Findings

[48] The Appellant and Third Parties submit the administrative penalties must reflect the principles of sentencing in environmental offences. However, they did not refer me to legal authorities to support their argument that the principles of sentencing must apply in this case. The Respondent submits this is not an offence proceeding; therefore, sentencing principles do not apply.

[49] The *Act* and *Regulation* set out the procedures that must be followed and matters that must be considered in determining a contravention or AMP. The Respondent provided, and the Appellant engaged in, an Opportunity to Be Heard prior to the Determination. The Respondent considered the matters set out in section 2 of the *Regulation.* The Respondent provided a notice of the administrative penalties, including information on the Appellant's right to appeal established under section 36.7 of the *Act.* Finally, the Respondent determined the contraventions and imposed the administrative penalties in accordance with the *Regulation,* and sections 36.1, 36.2, and 36.3 of the *Act*.

[50] The Respondent referred me to *Guindon,* where in paragraph 51 the court states:

> The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act. As Wilson J. stated in *Wigglesworth*, the test is whether a matter "fall[s] within s.

> 11 . . . because by its very nature it is a criminal proceeding": p. 559 (emphasis added). This was confirmed in *Shubley*, at pp. 18-19, where McLachlin J. (as she then was) stated explicitly: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but **the nature of the proceedings themselves**" (emphasis added).

[51] In *Guindon,* paragraph 75, the court went on to say "administrative monetary penalties are designed as sanctions to be imposed through an administrative process. They are not imposed in a criminal proceeding."

[52] I find that nature of the proceedings to issue the AMPs, starting from the Ministry's GIR Orders through to issuing the Determination has been administrative.

[53] An appeal of AMPs under the *Act* is heard by the Board, which is an administrative tribunal, and not a court. The Board does not have the same remedial powers as a court and cannot impose sentences for offences. As stated in *Guindon*, it is the nature of the proceeding itself that determines whether the proceedings are criminal in nature. Therefore, I find that the nature of the appeal proceedings before the Board are also administrative in nature. I find that principles of sentencing did not apply when the Respondent issued the AMPs and I do not need to apply them when coming to my decision in this appeal. The matters that must be considered in setting the amount of the AMP in this case are prescribed in the *Regulation*. While the *Regulation* leaves open the possibility of considering other, non-prescribed matters, the Appellant has not established which, if any, matters relevant to criminal sentencing should be considered in this context. They bear the burden of doing so and have not discharged that burden.

DECISION

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

[55] For the reasons provided in this decision, I confirm the Determination and the administrative monetary penalty of $110,000.

"Cynthia Lu"

Cynthia Lu, Panel Chair
Environmental Appeal Board