



Environmental Appeal Board

Citation: *Shuswap Lake Estates Ltd. v. Director, Environmental Management Act*, 2026 BCEAB 34

Decision No.: EAB-EMA-24-A012 and EAB-EMA-24-A013 [collectively, EAB-EMA-24-G001]

Decision Date: 2026-08-20

Method of Hearing: Conducted by way of oral hearing and final written submissions concluding on May 15, 2026

Decision Type: Final Decision

Panel: Diana Valiela, Panel Chair

Appealed Under: *Environmental Management Act*, S.B.C. 2003, c. 53

Between:

Shuswap Lake Estates Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Cory Barker and Terry Barker

For the Respondent: Matthew Fingas and Dario Balca

TABLE OF CONTENTS

Introduction

Issues

Background

Failure to Comply with Section 1.1.3 of the Permit

Appellant's Submissions

Respondent's Submissions

Appellant's Final Reply Submissions

Discussion and Analysis

Failure to Comply with Section 5.2 of the Permit

Appellant's Submissions

Respondent's Submissions

Discussion and Analysis

Request for the Board to Amend the Permit

Appellant's Submissions

Respondent's Submissions

Discussion and Analysis

Conclusions

Decisions

FINAL DECISION

INTRODUCTION

[1] Shuswap Lake Estates Ltd. (the "Appellant", or "SLE") appeals two Determinations of Administrative Penalty made on March 4, 2024 (the "Determinations"), by a delegate of the director (the "Respondent") under Section 115 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act").

[2] The Appellant holds waste discharge permit 11905, originally issued under the *Act* on January 13, 1994, and amended on May 15, 2014 (the "Permit"). The Permit authorizes the Appellant to discharge effluent to ground from a sewage treatment facility located near Blind Bay, British Columbia. The Respondent found the Appellant failed to comply with Section 1.1.3 of the Permit and imposed a penalty of \$17,000 for that non-compliance. In a separate Determination of Administrative Penalty issued on the same day, the Respondent found the Appellant failed to comply with Section 5.2 of the Permit and correspondingly imposed a \$1,700 penalty. The two appeals were grouped by the Environmental Appeal Board (the "Board") and were heard together.

[3] The Appellant requests the Board rescind or considerably reduce the penalties imposed and that the Board amend the Permit to include an existing lagoon that is not authorized in the Permit. The Respondent requests the Board confirm the Determinations and argues that the Board cannot make the permit amendment requested by the Appellant.

[4] The Board is given the authority to hear this appeal under Section 100 of the *Act*. Section 103 of the *Act* specifies the Board's powers in deciding an appeal:

103 On an appeal under this Division, the appeal board may

- (a) send the matter back to the person who made the decision, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

ISSUES

[5] The issues to be decided in this appeal are whether the administrative penalty amounts imposed in the Determinations should be varied and whether the Board should grant the Permit amendment requested by the Appellant.

BACKGROUND

[6] The Permit authorizes the discharge of effluent from the Shuswap Lake Estates Spray Irrigation facility (the "Facility") owned and operated by the Appellant. The maximum rate of discharge is 426 cubic meters per day and requires the discharge to be equivalent or better than a maximum of 20 mg/L Biochemical Oxygen Demand ("BOD") and a maximum of 30 mg/L Total Suspended Solids ("TSS").

[7] The works authorized under the Permit are two aerated lagoons, blowers, air diffusers, chlorine contact chamber(s), irrigation equipment, storage pond, and related appurtenances. The source of the discharge is from a specified commercial/residential complex, and the point of discharge is Shuswap Estates Golf Course.

[8] Section 2.1 of the Permit states that, when the monthly averaged daily flow reaches 75% of the authorized daily flow, a strategy must be developed by the permittee to comply with the *Municipal Sewage Regulation* (now the *Municipal Wastewater Regulation*, B.C. Reg. 87/2012, the "MWR") or other authority under the *Waste Management Act* (now the *Act*). The strategy shall be prepared by a professional engineer, licensed to practice in the Province of British Columbia, for review by the director. The Permit contains monitoring and data reporting requirements, including a biennial operations/inspection report required to be submitted by January 31 of every second year.

[9] Section 12(5) of the *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "Regulation") states that a person who fails to comply with a requirement of a permit or approval issued under the Act is liable to an administrative penalty not exceeding \$40,000. Section 2 of the *Regulation* requires the director to provide notice of the intent to make a determination in respect of an alleged contravention or failure, and Section 3 requires the director to provide the person with an opportunity to make representations before making a determination. Prior to making a determination of administrative penalty, the director must consider the factors listed in Section 7(1)(a) to (j) of the *Regulation*. Before issuing the Determinations, the Respondent issued a notice prior to determination and provided the Appellant with an opportunity to be heard.

[10] The Respondent found the Appellant failed to comply with Section 1.1.3 of the Permit from February 15, 2021, to August 4, 2023, by discharging effluent to the environment from a third, unauthorized, aerated lagoon.

[11] In a separate Determination of Administrative Penalty, the Respondent found the Appellant failed to comply with Section 5.2 of the Permit, which requires the Appellant to submit to the director a biennial operations/inspection report prepared by an engineer licensed to practice in the Province of British Columbia and knowledgeable in such matters. Section 5.2 requires the report to review the operational performance and maintenance of the authorized works and make any recommendations for the maintenance or upgrade of the works so that they function as originally intended. Reports

must be submitted by January 31, every second year, the first report to be submitted by March 31, 2003.

FAILURE TO COMPLY WITH SECTION 1.1.3 OF THE PERMIT

Appellant's Submissions

[12] The Appellant submits the third lagoon was added to the authorized works by a previous owner and that it is much smaller than the two main lagoons as it represents only 9% of the effluent volume of the Facility. He states the third lagoon is located upstream of the two primary lagoons and its function is to provide coarse bubblers to improve the operation and effectiveness of the two primary lagoons and prolong their service lives. The Appellant argues that the third lagoon assists in breaking down solid matter, reducing sludge buildup, and reducing TSS and BOD, thus improving the quality of the treated effluent discharged from the system.

[13] The Appellant states that Section 1.1.3 of the Permit authorizes "two aerated lagoons ... and related appurtenances" and submits that the third lagoon should be considered a related appurtenance to the two primary lagoons rather than an unauthorized work. The Appellant adds the third lagoon does not represent any further risk to the Ministry of Environment and Parks (the "Ministry") or to the environment, it was constructed with no cost to users of the sewer system, and the Appellant does not receive any economic benefit from having the third lagoon. The Appellant states that the third lagoon was taken offline in December 2024 to bring the Permit back into compliance, but doing so actually reduced the level of treatment of the system. The Appellant further submits the third lagoon is an accessory component that enhances treatment but is not essential to system operation.

[14] The Appellant states that they have been advised that it is very likely that the Ministry will force them into the *MWR* permit system upon application to amend the Permit, but that Section 2.1 of the Permit states that a strategy must be developed to comply with the *MWR* when the monthly averaged daily flow reaches 75% of the authorized daily flow. This trigger point is far greater than the recorded monthly averaged daily flows of 19%, over the last three years, and greater than the highest monthly average daily flow of 30% of the Permit allowance over the same period. The Appellant states that as new owners, they commit to applying for an amendment to the Permit for the third lagoon, if necessary, on the condition they will not be forced into the *MWR*.

[15] The Appellant submits the Facility does not discharge to a receiving water body, which means that no effluent enters Shuswap Lake, no nutrient loading occurs, no aquatic habitat is affected, no downstream drinking water intakes are impacted, and there is no environmental harm-either actual or potential. He adds that since there is no direct connection between their system and any receiving water body, the Facility presents an

extremely low risk to the environment for the overall system. The Appellant states that according to Ministry of Environment reporting, two other nearby sewage systems discharged raw or poorly treated sewage directly into Shuswap Lake, or in close proximity to the lake, for many years.

[16] The Appellant submits an email from the Ministry to Blind Bay Resort (the "Archibald Email") and states it contains misleading, incorrect, or incomplete statements about SLE's system, including mischaracterization of effluent exceedances, misrepresentation of monitoring and reporting non-compliance, an incorrect statement about the number of residential/commercial units, and a misleading statement that SLE will be "very likely" to be required to register under the *MWR*. The Appellant states that they previously attempted a permit amendment application but did not make further attempts to amend the Permit because they relied on this email and subsequent conversations with Ministry staff to the effect that they would likely be forced into the *MWR*. However, the Appellant notes that the monthly average daily flow for the last three years was only 19% of their permitted flow, while the only trigger to comply with the *MWR* is the 75% flow threshold in the Permit.

[17] The Appellant challenges the Ministry's penalty factors, stating there is no environmental impact resultant from the Facility's operation that has occurred over more than the last 12 years. The Appellant provided data showing that 97% of the BOD and TSS samples taken from the Facility met the Permit's limits. The Appellant states that the 3% of test results that were elevated simply evaporate with the rest of the treated effluent without risk to the Ministry or the public. The Appellant submits that the third lagoon operated for approximately 13 years without a single environmental issue and that they do not receive any economic benefit from operating the third lagoon. The Appellant states the last time the Ministry visited their site was in 2020, and that the three inspections in 2021, 2022, and 2023 have all been desktop inspections. The Appellant submits that if the Ministry believed SLE posed a "moderate risk," as stated in the penalty calculation, it would not have gone six years without a physical site visit nor relied exclusively on desktop reviews.

[18] The Appellant submits the Penalty relies heavily on penalty factors (a), (b), (d), (e), and (f), despite the available evidence contradicting the conclusions made under each factor. Regarding factor (a), the nature of the contravention, the Appellant states that the third lagoon risk should be considered a minor risk since there is no basis for calling it a moderate risk. Further, the Appellant submits the evidence shows the third lagoon was built to the same standard as the authorized lagoons, improves effluent quality and prolongs the lives of the two primary lagoons, and has operated for 13 years without a single environmental issue. Relatedly, the Appellant asserts the Facility does not discharge effluent into a receiving water body as the primary disposal method for the effluent is evaporation.

[19] Regarding factor (b), actual or potential adverse effects, the Appellant submits that while the Ministry claims the third lagoon interfered with its capacity to protect the

environment, the data gathered over the past 12 years show that approximately 97% of BOD and TSS samples met the limits in the Permit. The Appellant argues the actual or potential effects should be categorized as Low to None as there is no discernable environmental or human health impact.

[20] Under factor (d), whether the contravention or failure was repeated or continuous, the Appellant objects to the Ministry's adding a 20% surcharge because the lagoon operated for 901 days, while those 901 days are already the basis for the base penalty and adding a surcharge double-counts the same period.

[21] Regarding factor (e), whether the contravention was deliberate, the Appellant states attempts were clearly made by the previous owner to amend the Permit, but they were discouraged by Ministry staff who strongly implied the Appellant would be forced into the *MWR* if they proceeded with the amendment applications. They further state that subsequent actions to take the third lagoon offline represent a commitment to complying with the Permit, despite this reducing the quality of the effluent, all of which is the opposite of deliberate non-compliance.

[22] Regarding factor (f), whether any economic benefit was derived from the contravention or failure, the Appellant states that it does not receive any economic benefit from having the third lagoon, since it was built at no cost to users and it has never sought cost recovery related to the third lagoon.

[23] The Appellant submits that both the previous management and the new ownership of SLE have acted responsibly throughout by:

- removing the third lagoon from service to comply with the Permit;
- increasing sampling frequency beyond Permit requirements;
- initiating studies into rapid infiltration, additional storage, and reuse of treated effluent for irrigation to enhance the system and potentially comply with the *MWR* at a future time when warranted by flow rates, and have already secured the land where many of these potential future works can be constructed; and
- engaging with the Columbia Shuswap Regional District about regional sewer solutions.

[24] The Appellant states the Ministry should be assisting with engaging with the Columbia Shuswap Regional District regarding regional sewer solutions rather than resisting the idea of expanding the Appellant's system to be a regional facility, which would be the best overall solution for the area and the environment. The Appellant argues that there are a lot of failing sewer systems and numerous homes on failing septic systems that contribute pollution and nutrient loading into Shuswap Lake that could be eliminated with a regional facility, such as the Appellant's, that doesn't discharge to a receiving water body.

[25] The Appellant submits that if the Board does not amend the Permit directly, their new ownership commits to having further discussions with the Ministry and potentially applying for a permit amendment if they want to pursue bringing the third lagoon back online.

Respondent's Submissions

[26] The Respondent presented evidence through three witnesses, all of whom are employees of the Environmental Protection Division within the Ministry: Liz Archibald, Section Head, South Authorizations; Keith Connolly, Senior Environmental Protection Officer; and Yihting Lim, Environmental Protection Officer.

[27] The Respondent submits the evidentiary record demonstrates the Appellant contravened Section 1.1.3 of the Permit by discharging sewage effluent from a third, unauthorized aerated sewage lagoon for 901 continuous days. The Respondent further submits the Appellant was advised of this non-compliance back in 2018 and was also advised of the process to amend the Permit to include the third lagoon. However, the Appellant did not diligently pursue the amendment process.

[28] The Respondent states the Appellant does not dispute that it operated the third lagoon in the relevant timeframe but argues the third lagoon is an appurtenance of the two permitted lagoons. The Respondent adds that the term “appurtenance” is not defined in the *Act*, nor has the term been interpreted in the Board's past decisions, and cites two examples of Canadian court decisions that considered the meaning of the term, though this consideration was in different contextual scenarios. The Respondent submits the Appellant did not advance the appurtenance argument until one month before the hearing of this appeal. The Respondent submits the appurtenance argument is not based in any supporting evidence from qualified professionals that could provide an opinion that the third aerated lagoon is a necessary appurtenance to the two permitted lagoons. The Respondent further submits that since the Appellant states the third lagoon was taken offline in December of 2024 and has remained offline, this confirms the third aerated lagoon is not a necessary appurtenance to the other two lagoons as its function is not a necessary component to their function. The Respondent states that if the Appellant's unsupported argument were accepted, it would create the illogical and problematic consequence that any number of sewage lagoons or other structures could simply be added as “appurtenances” without the need for appropriate technical documentation and assessments, and the Ministry would have no oversight over such system modifications.

[29] The Respondent states the Appellant describes the operation of the third aerated lagoon as being to improve the effectiveness of the other two lagoons as well as the overall quality of the treated effluent discharged from the Appellant's sewage treatment system. However, the Respondent argues the Appellant has submitted no technical assessments or other evidence to support these assertions.

[30] The Respondent submits the Appellant's assertions about being forced under the *MWR*, if there were an amendment to the Permit to include the third lagoon, are mistaken and unsupported. The Respondent adds that Section 2.1 of the Permit states that the requirement for a permit amendment to occur under the *MWR* rather than the *Act* is based on the daily flow rates reaching 75% of the authorized daily flow rate and the technical assessments required by the Ministry.

[31] The Respondent states that this appeal is not about environmental contamination, and penalty amounts levied on other permit holders is of very little relevance to the penalties at issue. The Respondent submits liability is made out on the evidence and the penalty amounts imposed are reasonable, proportionate, and reflect the potential environmental risks created by the Appellant's actions. The Respondent submits the penalty amounts should not be disturbed, and that any reduction would undermine the important regulatory scheme at play and would also condone demonstrated years of noncompliance.

[32] The Respondent submits the Appellant's narrative that it was being improperly forced to operate under the *MWR* is shown incorrect by Ms. Archibald's testimony: she testified that if the Appellant wished to continue operating the permitted works and met its flow parameters, there was no question it could remain operating under the *Act*, depending on the nature and impacts of the amendments sought. The Respondent submits Ms. Archibald testified that the issue of whether authorization of the third lagoon would require registration under the *MWR* remained hypothetical or speculative because the Appellant abandoned its amendment application without supplying much of the requested technical documentation. The Respondent argues the Appellant did not fully pursue the Permit amendment that could have allowed the third lagoon and did not cease to operate the third lagoon, choosing to remain out of compliance with the Permit despite years of warnings and advisories from the Ministry.

[33] The Respondent states that classifying the nature of the contravention as moderate is appropriate because it was a failure to comply with operational requirements which, at a minimum, create a risk of harm to the environment or human health and safety. The Respondent further argues this is consistent with the evidence presented at the appeal hearing, where both Ms. Archibald and Mr. Connolly spoke about the serious operational risks posed by a permittee operating unauthorized works that have not been properly reviewed or approved by the Ministry.

[34] The Respondent characterized the potential adverse effects of the Section 1.1.3 contravention as medium because it "interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so, but does not result in a significant adverse effect or the potential to do so is moderate." The Respondent states Ms. Archibald testified that the third aerated sewage lagoon had never been approved and the Appellant had never provided the necessary certified documents that would allow the Ministry to make an informed assessment on the possible environmental risks involved in its operation. The Respondent states the Appellant deliberately chose to

operate this lagoon without authorization for years, and this created the potential for adverse consequences. The Respondent submits that the Determination appropriately characterized Section 7(1)(b) of the *Regulation* and set the base penalty at \$10,000.

[35] The Respondent states that:

- the 20% increase under Section 7(1)(d) of the *Regulation* is warranted because the contravention was repeated and continuous;
- the 20% increase under 7(1)(e) is warranted because the contravention was deliberate since the Appellant was repeatedly warned but deliberately chose to contravene the terms of the Permit; and
- the increase of \$1,000 corresponds with the economic benefit the Appellant gained from choosing not to comply with the Permit or proceed through the amendment process.

[36] The Respondent submits the final penalty amount of \$17,000 is consistent with the facts and evidence before the Board and the Appellant has provided no evidence or argument that should cause the Board to disturb the penalty amount.

Appellant's Final Reply Submissions

[37] The Appellant argues against the Respondent's statement that SLE has not led admissible evidence that its treatment facility outperforms other sewage treatment facilities in the area by stating it provided evidence of their test results that show that 97% of the time it meets their Permit discharge parameters. The Appellant further argues it provided evidence based on the Ministry documentation of two other facilities in the area, Carmel Beach and Blind Bay Resort, that both show numerous exceedances. The Appellant adds that some of these exceedances of other facilities for fecal coliform were so high that they required notification to Interior Health.

[38] The Appellant states it was not a simple exercise to disconnect the third lagoon as the distribution piping upstream of the sewer treatment system had to be modified. The Appellant states that after that work was completed in December 2024 it is now simple to keep the third lagoon disconnected or bring it back online if permission is provided by the Ministry. In addition, the Appellant submits the reason the third lagoon was not taken offline sooner was because it knows disconnecting it reduces the level of treatment being provided.

[39] The Appellant submits that it did provide supporting evidence from a qualified professional during the oral portion of the hearing, in which Cory Barker was a witness and is a professional engineer, thus the information provided should be admissible.

[40] The Appellant submits that when the application to amend the Permit was made, the previous owner felt he did provide most of the information requested by the Ministry, but was confused about the process and had provided the as-built drawings that were

received from the company which produced them in 2012. The Appellant states all the information that was provided to its office was, in turn, provided to the Ministry in its amendment application, which did not include sealed drawings.

[41] The Appellant submits the Ministry knew what amendments were being sought as it previously applied to amend the Permit to include the third lagoon and this was clearly documented by the Ministry. The Appellant argues, however, that despite the Ministry knowing what amendments were being sought, the Archibald Email stated it is very likely SLE will be required to register under the *MWR* and, further, it will be very difficult for SLE to register under the *MWR*. The Appellant states it relied on the Archibald Email and subsequent conversations with Ministry staff that suggested SLE would have to register under the *MWR* and affected whether SLE continued its permit application.

[42] The Appellant states Ms. Archibald's comment within the Archibald Email that it would likely be required to register under the *MWR* was based on the circumstances of the email: Blind Bay Resort was seeking to connect to the Appellants' sewage treatment facility and this would be a significant change in circumstances which would necessitate a significant permit amendment and registration under the *MWR*. The Appellant argues that even adding the maximum authorized flow from Blind Bay Resort this should not be the case since the Permit clearly states that a strategy to comply with the *MWR* is not required until their flow hits 75% of the authorized daily flow and this hearing process has clarified this is the only applicable criterion in the Permit. The Appellant submits that because it operates at such a small fraction of their authorized flow rate, even adding the maximum authorized flow from Blind Bay Resort would still only put them at 30-35% of their authorized flow capacity. The Appellant states this is far from their flow threshold so it should only have triggered a minor amendment and the need to amend the source of discharge as noted in Section 1.1.4 of the Permit. The Appellant submits this is simply a minor text amendment to update the legal description to include the Blind Bay Resort property and updating the source of discharge and, therefore, should not be considered a major amendment.

Discussion and Analysis

[43] The Appellant submits that it did provide supporting evidence from a qualified professional during the oral portion of the hearing, in which Cory Barker was a witness and is a professional engineer, thus the technical information he provided should be admissible. However, Mr. Cory Barker only advanced this information in reply and did not give the required notice of expert witness prior to the hearings. Such notice would have provided the Respondent the opportunity to respond with an expert witness. Therefore, Cory Barker was not qualified as an expert witness in the hearing but made submissions, along with Mr. Terry Barker, as owners and operators of the Facility.

[44] The Appellant argues that the third lagoon is a related appurtenance rather than an unauthorized work. However, I find that, other than qualitative statements of how the

third lagoon operates, there is insufficient technical evidence before me to make a finding as to what would constitute an appurtenance as opposed to a separate third lagoon.

[45] Prior to making a determination of administrative penalty, the director must consider the factors listed in Section 7(1)(a) to (j) of the *Regulation*:

7 (1) In establishing the amount of an administrative penalty in a particular case, a director must consider the following matters, if applicable:

- (a) the nature of the contravention or failure;
- (b) the real or potential adverse effect of the contravention or failure;
- (c) any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the following:
 - (i) the person who is the subject of the determination;
 - (ii) if the person is an individual, a corporation for which the individual is or was a director, officer or agent;
 - (iii) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;
- (d) whether the contravention or failure was repeated or continuous;
- (e) whether the contravention or failure was deliberate;
- (f) any economic benefit derived by the person from the contravention or failure;
- (g) whether the person exercised due diligence to prevent the contravention or failure;
- (h) the person's efforts to correct the contravention or failure;
- (i) the person's efforts to prevent recurrence of the contravention or failure;
- (j) any other factors that, in the opinion of the director, are relevant.

(2) If a contravention or failure continues for more than one day, separate administrative penalties, each not exceeding the applicable maximum administrative penalty, may be imposed for each day the contravention or failure continues.

[46] In making the Determinations, the Respondent used the "Administrative Penalties Handbook - Environmental Management Act and Integrated Pest Management Act" updated January 2020 (the "Handbook"), as guidance for the issuance of the penalties. The

Handbook recommends determining a "base penalty" that reflects the seriousness of the contravention, considering the nature of the contravention (factor 7(1)(a)) and any real or potential adverse effects (factor 7(1)(b)) of the *Regulation*. The base penalty is added to, or deducted from, by considering each of the factors (c) through (j) of the *Regulation*.

Previous decisions of the Board¹ have considered the use of the Handbook as an appropriate guide in determining administrative penalty amounts and the parties have not suggested any other method of calculating the appropriate penalty. Although it is not binding on me, I find the Handbook is an appropriate guide, subject to my findings in the circumstances of this appeal.

[47] Regarding factor (a), the nature of the contravention or failure, the Determination found that the failure to obtain authorization for an additional treatment work has the potential to create a risk of harm to the environment and human health and, therefore, the contravention is considered to be moderate. I agree with the Respondent that factor 7(1)(a), the nature of the contravention, is moderate, since there was failure to obtain approval for the third lagoon and this impaired the Ministry's ability to regulate the Facility.

[48] Regarding factor (b), assessing whether the real or potential adverse effects are very high, high, medium, or low, the Determination stated that since the new treatment works were put in place without authorization by the Ministry, the contravention interferes with the Ministry's capacity to protect the environment and human health and it is considered to have medium potential for adverse effect. In my view, interference with the Ministry's capacity to protect the environment has already been assessed in factor (a). According to the Handbook, factor (b) relates to "...how serious is the actual or potential harm or "adverse effect" to the environment or human health"².

[49] The Appellant provided evidence that the third lagoon is upstream of the two main lagoons and that the Facility does not discharge to a receiving water body, which was not disputed by the Respondent. The Appellant submits data that over the last 12 or more years, while the third lagoon operated, about 97% of BOD and TSS samples met the Permit's limits of 20 mg/L and 30 mg/L respectively. The Appellant states its function is to provide coarse bubblers to improve the operation and effectiveness of the two primary lagoons and prolong their service lives. The Appellant argues that the third lagoon assists in breaking down solid matter, reducing sludge buildup, and reducing TSS and BOD, thus improving the quality of the treated effluent discharged from the system.

[50] The Respondent submits that the Appellant alleges, largely without support, that there is no environmental impact related to the contraventions at issue and that they make comparisons to other sewage treatment facilities dealing with separate issues and

¹ Examples include *Harbourside Lodge Bamfield Ltd. v. Director, Environmental Management Act*, 2026 BCEAB 1, and *Nordstrom Enterprises Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 8.

² The Handbook, p. 42.

circumstances. The Respondent states that this appeal is not about environmental contamination, but it is about whether the amount of the AMPs imposed by the director are reasonable in the totality of the circumstances.

[51] The Handbook states that factor (b) relates to the real or potential harm the contravention has on the environment, human health or safety, and that the focus should be on how serious the actual or potential harm is. The Handbook states the Medium category of potential harm interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so, but does not result in an adverse effect or the potential to do so is moderate. It characterizes a Low to None category of real or potential adverse effects as a contravention that 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. The Handbook therefore states that both the Medium and Low to None categories of factor (b) relate to the real or potential effects of the contravention on (1) interfering with the Ministry's capacity to protect the environment and or human health and (2) resulting in the real or potential harm to the environment, human health, or safety. In the circumstances of this appeal, I find the Decision assessed both factors 7(1)(a) and 7(1)(b) only on the contravention's potential interference with the Ministry's capacity to protect the environment or human health. The Respondent's witnesses testified they lacked the certified documents to make an informed assessment of the possible environmental risks involved.

[52] During the hearing, the Appellant presented evidence that the third lagoon is upstream of the two main lagoons, it is much smaller than the two main lagoons as it represents only 9% of the effluent volume of the Facility, and that its effluent is evaporated along with that of the two permitted lagoons. The Appellant submits data that over the last 12 or more years, about 97% of BOD and TSS samples met the Permit's limits of 20 mg/L and 30 mg/L respectively. In addition, there is uncontested evidence that the Facility does not discharge to a receiving water body, which can be generally considered an indication of lower expectation of adverse effects on aquatic biota and human water uses. I find that there is evidence that there is low rather than medium potential for operation of the third lagoon to result in real or potential harm on the environment, human health or safety.

[53] The Handbook's base penalties tables³ combine the nature of the contravention or failure with the real or potential adverse effects and suggest a base penalty of \$10,000 where the nature of the contravention is moderate and the real or potential adverse effects are medium, and of \$5,000 where the nature of the contravention is moderate and the real or potential adverse effects are low to none. I find a base penalty of \$5,000 is appropriate in the circumstances of this appeal.

³ for contraventions subject to \$40,000 maximum penalties under the *Regulation*, as is applicable in this case.

[54] Under the *Regulation's* subsection 7(1)(c), a director must consider any previous contraventions, administrative penalties imposed on, or orders issued to, the person who is the subject of the determination. The Handbook suggests⁴ "this can include 'determined contraventions' such as tickets, previous administrative penalties, administrative sanctions and prosecutions as well as advisories and warnings (although there are conflicting appeal decisions on including the latter)." The Handbook further suggests that evidence to support this factor does not include prior enforcement responses to the current contravention, such as an advisory or warning that preceded the AMP, since those provide evidence in support of factor (d) or (e). In addition, the Handbook states that contraventions under appeal should not be considered.

[55] The Determination states "SLE has received previous AMPs for failure to comply with other sections of the Permit."⁵ The Respondent's evidence showed a June 22, 2020, AMP and a December 14, 2021, AMP, both for contravention of Section 5.2 of the Permit. The Determination assessed twenty percent of the base penalty for the previous failures to comply with other sections of the Permit. The Appellant did not challenge the Respondent's assessment of factor (c), and I find a 20% increase to the base penalty appropriate in the circumstances.

[56] Under factor (d), whether the contravention or failure was repeated or continuous, the Determination states the failures to comply were continuous for 901 days between February 15, 2021, and August 4, 2023, and added twenty percent increase to the base penalty as a result of this factor. The Appellant submits those 901 days are already the basis for the base penalty and adding this surcharge double-counts the same period. However, the Appellant does not specify how the 901 days are the basis of the base penalty, which primarily relates to the lack of compliance with Section 1.1.3 of the Permit. It is clear Section 7(d) of the *Regulation* requires a director to consider whether the contravention or failure was repeated or continuous separately, and in addition to, the nature of the contravention and the real or potential adverse effects of the contravention. I find that the Determination's addition of twenty percent of the base penalty is appropriate given the long duration of the contravention.

[57] Factor (e) requires assessment of whether the contravention or failure was deliberate. The Determination states the Appellant was warned of non-compliance with Section 1.1.3 of the Permit related to the unauthorized third aerated lagoon in 2018, 2020, and 2021. In addition, the Respondent presented evidence the Ministry reminded the Appellant of the need to apply for a permit amendment but that while the Appellant submitted a preliminary application it failed to diligently pursue the final permit application. The Determination assessed an increase of twenty percent of the base penalty to reflect the deliberate nature of the contravention.

⁴ at p. 62.

⁵ at para. 34 of the Determination.

[58] The Appellant submits that it attempted to amend the Permit but was discouraged by Ministry staff who strongly implied SLE would be forced into the *MWR*. The Appellant ultimately took the third lagoon offline in December 2024 to comply with the Permit, even though doing so reduced treatment quality, and that attempting to amend the Permit and taking the lagoon offline represent a commitment to comply with the Permit.

[59] I find that during the 901 days relevant to the Determination, the Appellant continued operation of the unauthorized third lagoon. The Handbook suggests that if the facts indicate that the repeated or continuing nature of the contravention should have alerted the person to the contravention and the need to stop, but the person continued nevertheless, this would justify a higher penalty. I agree and find that a twenty percent increase of the base penalty is appropriate for the deliberateness factor.

[60] The *Regulation's* subsection 7(1)(f) requires consideration of the economic benefit derived by the person from the contravention or failure. The Determination assessed an increase in the AMP of \$1,000 for the avoided costs of the Permit amendment or registration under the *MWR*, which would have needed to be done in order to lawfully operate the third lagoon. The Appellant submits it does not receive any economic benefit from having the third lagoon, this lagoon was built at no cost to users, and it has never sought cost recovery in relation to this lagoon. The Handbook describes delayed costs as costs that the person delayed incurring, allowing them the use of the money that should have been spent on achieving compliance. The Handbook gives an applicable example⁶ of delayed costs of "failure to obtain necessary authorization (savings include conducting studies, preparing an application, application fee)." I find that the assessment of \$1,000 for the economic benefit factor is appropriate in the circumstances.

[61] Subsection 7(1)(g) of the *Regulation* requires consideration of whether due diligence was exercised to prevent the contravention. The Handbook states this factor can only decrease the penalty, which is consistent with a modern interpretation of the *Regulation*. The Respondent found the Appellant failed to take all measures reasonably necessary to prevent the occurrence of the contravention and therefore did not exercise due diligence to prevent the failures. As a result, the Determination did not apply an adjustment for this factor.

[62] I find the Appellant did not take all reasonable steps to fulfill their obligation despite a clear record demonstrating it was informed of the need to operate in compliance with the Permit. I agree that due diligence was not applied during the time of the contravention and confirm there is no reduction in the penalty due to this factor.

[63] Under factor (h), efforts to correct the contravention or failure, the Determination found the Appellant has demonstrated minimal effort to correct the failure in that it submitted a preliminary permit amendment application but failed to diligently pursue it

⁶ at page 65.

while continuing to use the unauthorized works. The Determination did not make an adjustment for this factor. The Appellant submits it corrected the contravention by shutting down the function of the third lagoon, which it says was not an easy procedure. However, it admits this was not done until December of 2024, which was considerably after the period of the Determination. Further, the Appellant did not complete its permit amendment application and states it commits to applying for an amendment to the Permit for the third lagoon, if necessary. I agree this represents minimal, if any, effort to correct the contravention and do not make any positive adjustment to the base penalty for this factor.

[64] Section 7(i) of the *Regulation* relates to efforts to prevent reoccurrence of the contravention or failure. The Determination found SLE has continued to use the unauthorized works, has made no effort to prevent reoccurrence of the failure, and did not apply an adjustment for this factor. Although the third lagoon was shut down, it was during and after a long period of non-compliance. I do not find an adjustment to the base penalty for this factor is justified.

[65] Section 7(j) of the *Regulation*: any other factors that, in the opinion of the director, are relevant.

[66] The Determination states the Appellant's submissions demonstrated an awareness and understanding of the authorization requirements and a blatant disregard for compliance and made no adjustment for this factor. I find no other factors are relevant in these circumstances.

[67] In summary, I find the penalty for the contravention of Section 1.1.3 of the Permit for factor (a), the Nature of the Contravention, is Moderate. I find the potential for adverse effects, factor (b), is Low to None. The Handbook recommends a base penalty of \$5,000 where the nature of the contravention is moderate and the real or potential adverse effects are low to none. I find this base penalty is appropriate in the circumstances of this appeal.

[68] The Determination added twenty percent of the base penalty for the previous failures to comply with the Permit, an additional twenty percent of the base penalty for the continuous nature of the contravention, twenty percent of the base penalty for the deliberate nature of the contravention, and an increase of \$1,000 for economic benefit derived from the infraction. There were no adjustments made to the base penalty in the Determination for factors (g) through (j). I agree with these assessments of factors (c) through (j) but apply them to the \$5,000 base penalty. In the result, I find a penalty of \$9,000 is appropriate for failing to comply with Section 1.1.3 of the Permit. Although I have varied the penalty assessed by the Determination, I find the penalty of \$9,000 is nevertheless likely to have a deterrent effect on any further unauthorized operation of the third lagoon and there is now a commitment by the Appellant not to do so in the future.

FAILURE TO COMPLY WITH SECTION 5.2 OF THE PERMIT

Appellant's Submissions

[69] The Appellant states the penalty is unreasonable and no considerations were made for: its submission of its 2020 biennial report, although three months late; the annual report on July 28, 2023, completed seven days before Inspection Report 204248 was issued⁷; and, the fact that SLE has been transparent and has improved reporting practices, with its most recent 2024 biennial report submitted on time.

Respondent's Submissions

[70] The Respondent states that in the Section 5.2 Determination, they considered the previous AMPs issued against the Appellant as a result of its past non-compliance with Section 5.2 and the Appellant's awareness of its reporting requirements. The Respondent submits the Appellant does not appear to contest that this contravention occurred and has failed to raise any valid basis for the Board to interfere with the director's application of these factors and the final AMP amounts.

[71] The Respondent submits that the penalty of \$1,700 is proportionate to the nature of the contravention in light of previous penalties in 2020 and 2021 for \$1,000 and \$1,400, respectively. The Respondent states this amount recognizes the prolonged history of noncompliance and argues increasing penalties amounts deter future noncompliance.

[72] The date of this contravention was February 1, 2023. The Respondent found the nature of the contravention to be minor and the actual or potential adverse effect to be low to none, assessing a base penalty of \$1,000 for combined factors (a) and (b), and given the maximum penalty allowed under the *Regulation*. The Respondent added \$500 to the penalty for factor (c), based on two previous penalties for failure to comply with Section 5.2 of the Permit. The Respondent added an additional \$200 to the penalty for factor (e), stating the contravention was deliberate since the Appellant was aware of the requirement for biennial report submission.

Discussion and Analysis

[73] I find the penalty for the contravention of Section 5.2 of the Permit for factor (a), the nature of the contravention, is Minor, since it is non-compliance with an administrative requirement and the report is not the only insight into the performance of the Facility. The

⁷ Determination of administrative penalty 2023-54 states this inspection report was issued August 4, 2023; however, the inspection occurred on July 20, 2023, prior to the Appellant's annual report which was submitted on July 28, 2023.

Ministry has the ability to conduct inspections and take regulatory actions, such that it is not solely dependent on the reports required by the Permit to evaluate the effect the Facility has on the environment. Therefore, I find that the actual or potential for adverse effects is Low to None.

[74] The Handbook recommends a base penalty of \$1,000 where the nature of the contravention is Minor and the real or potential adverse effects are Low to None. I find this base penalty is appropriate in the circumstances of this appeal.

[75] I find the Appellant's submission of the 2023 report on July 28, 2023, although late, and the on-time submission of the report due on February 1, 2025, are positive steps regarding compliance but do not constitute compliance with submitting a biennial report by January 31, 2023. I find that these are efforts after the contravention, rather than specific efforts during the contravention period, to correct the contravention or prevent reoccurrence of the contravention.

[76] I find the addition of \$500 for factor (c) to the base penalty for previous contraventions is appropriate, since there were two previous instances of the same contravention. I agree with the addition of \$200 for factor (e) since the failure to comply with the reporting requirement in spite of knowledge of the requirement demonstrates deliberateness. I do not find any additional factors to be relevant.

[77] In summary, I confirm the final penalty assessment of \$1,700 for the failure to comply with Section 5.2 of the Permit.

REQUEST FOR THE BOARD TO AMEND THE PERMIT

Appellant's Submissions

[78] The Appellant requests the Board amend Section 1.1.3 of the Permit to recognize the three existing lagoons and avoid any future confusion around the matter. The Appellant states they are not requesting additional treatment capacity, just recognition that three lagoons were built by a previous owner instead of two.

[79] If the Board chooses not to amend the Permit directly, the Appellant requests the Board acknowledge SLE's commitment to apply for an amendment under the current permit system if the Appellant wants to pursue bringing the third lagoon back online.

Respondent's Submissions

[80] The Respondent submits that the Board should not amend the Permit. The Respondent states that pursuant to Section 103 of the *Act*, the Board has the authority on appeal to:

- a) send the matter back to the person who made the decision with directions,
- b) confirm, reverse, or vary the decision being appealed, or
- c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[81] The Respondent argues that in the present case the decision maker who imposed the penalties could not have unilaterally amended the Permit since his role was to consider the referral for a possible administrative penalty and to determine whether, and in what amount, the penalty should be imposed. The Respondent submits the decision maker's role was not to consider any possible permit amendments, nor was there any application before him to that effect. The Respondent states he could not have made a permit amendment in the circumstances, and therefore, pursuant to Section 103 of the *Act*, the Board's jurisdiction cannot be exercised in this manner on appeal.

[82] The Respondent further submits the decision maker could not have made the decision to amend the Permit since the Appellant has not provided the required technical and impact assessment of the full permit amendment process and, as a result, the Board cannot make the requested permit amendment. The Respondent submits, in the alternative, if the Board deems it does have jurisdiction to amend the Permit, it should refrain from doing so as the Appellant has not provided the necessary evidence and technical materials that would allow the Board to responsibly authorize the use of a third aerated sewage lagoon.

Discussion and Analysis

[83] Subsection 103(c) of the *Act* authorizes the Board to make any decision that the person whose decision is appealed could have made, and that the Board considers appropriate in the circumstances. To determine the Board's authority to amend a permit it is necessary to establish if a decision to amend the Permit could have been made by the Respondent in the circumstances of this appeal.

[84] Subsection 16(1) of the *Act* gives the power to amend a permit to a director, who may do so on his own initiative if the director considers it necessary, or on application by a holder of the permit.

[85] Subsection 16(4) sets out some of the director's broad powers to amend a permit, including authorizing or requiring the construction of new works in addition to or instead of works previously authorized or required (subsection 16(4)(a)). Further, if a director amends a permit, the director may require that the holder of the permit supply the director with plans, specifications and other information the director requests (subsection 16(7)(a)).

[86] The Respondent submits that the decision maker's role was not to consider any possible permit amendments, nor was there any application to that effect. I find that although the director's role in these circumstances was to determine whether to impose a penalty and in what amounts, there was an initial application and other evidence that the Appellant sought the amendment. Further, the Appellant's Notice of Appeal lists, as a remedy sought, "...an order that clause 1.1.3 of the Permit be amended from two to three aerated lagoons."

[87] Further, I find that the director had the authority under subsections 16(4)(a) and 16(7)(a) to amend the Permit and, if deemed necessary, require the Appellant to provide the technical information the Respondent requests. In the result, I find the Respondent had the authority to amend the Permit and require submission of technical and other information. In turn, as a result of subsection 103(c) of the *Act*, the Board has the power to make any decision that the Respondent could have made, and that the Board considers appropriate in the circumstances.

[88] Although I find the Board has the authority to amend the Permit, I agree with the Respondent's statement that in this circumstance the more appropriate permit amendment process is by the Appellant's application to the director as established under section 16 of the *Act*. In my view, regulation of the Permit, including potential amendments that may be required in the future, will be more consistent and efficient if done by the Respondent rather than the Board. I have considered, in making this decision, the requirements of section 16(3) of the *Act*.⁸ Appeals to the Board can be brought if necessary.

[89] Although the Appellant initially limited its commitment to apply for a permit amendment by seeking assurance they would not be forced into being regulated under the *MWR*, all parties agreed during the hearing that regulation under the *MWR* would only be required under the Permit at some time in the future when the monthly averaged daily flow reaches 75% of the authorized daily flow. In its closing arguments, the Appellant committed to applying for an amendment under the current permit system if they decide to bring the third lagoon back online. I find that although there may be legal authority under the *Act* for the Board to amend the Permit, under these circumstances it is appropriate for the Appellant to proceed with the established Ministry process for permit amendment rather than for the Board to amend the Permit as part of this appeal. I therefore deny the Appellant's request to amend the Permit.

⁸ 16(3) If a permit or an approval is subject to conditions imposed pursuant to a decision made in an appeal to the appeal board under Division 2 [*Appeals under this Act*] of Part 8, those conditions must not be amended except (a) by the appeal board, and (b) after the appeal board has given the parties an opportunity to be heard on the question of whether the conditions should be amended.

CONCLUSIONS

[90] Regarding the appeals of the Determinations, I have considered the parties' submissions and evidence in conjunction with the factors set out in Section 7 of the *Regulation* and the maximum penalty for contravening a permit: \$40,000. Although the penalty determinations of \$9,000 and \$1,700 I assessed above are relatively low in this range, in the circumstances of this case I find these are the appropriate penalties for failing to comply with Sections 1.1.3 and 5.2 of the Permit. I find these penalties will still act as a deterrent and promote future compliance by the Appellant and other permit holders.

[91] Regarding the Appellant's request that the Board amend Section 1.1.3 of the Permit to recognize the three existing lagoons rather than the two permitted lagoons, I have considered the relevant legislative provisions defining the director's and the Board's power to amend the Permit, as well as the parties' submissions. I find that under these circumstances it is appropriate for me to deny the Appellant's request to amend the Permit.

DECISIONS

[92] I have considered the parties' submissions and the available evidence, whether or not they have been specifically referenced above.

[93] For the reasons provided above, I vary the administrative penalty for contravention of Section 1.1.3 of the Permit to \$9,000 and grant that appeal, in part. I confirm the administrative penalty of \$1,700 for contravention of Section 5.2 of the Permit and deny that appeal. I deny the Appellant's request to amend the Permit.

"Diana Valiela"

Diana Valiela, Panel Chair
Environmental Appeal Board