Environmental Appeal Board

Citation:	*1782 Holdings Ltd. v. Director, Environmental Management Act*, 2024 BCEAB 2
Decision No.:	EAB-EMA-22-A011(a) to A015(a)
Decision Date:	2024-01-16
Method of Hearing:	Conducted by way of written submissions concluding on April 17, 2023
Decision Type:	Final Decision
Panel:	Diana Valiela, Panel Chair
Appealed Under:	*Environmental Management Act*, S.B.C. 2003, C.53

Between:

1782 Holdings Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant(s):	Peter A. Gall, K.C., Counsel
For the Respondent:	Micah Weintraub, Counsel

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INTRODUCTION

[1] This appeal concerns five administrative penalty determinations (the "Penalties"), issued to 1782 Holdings Ltd. (the “Appellant”) on July 12, 2022, for failing to comply with Permit 6113 (the "Permit"). The Penalties were issued by Bryan Vroom, Section Head, Compliance and Environmental Enforcement, Ministry of Environment and Climate Change Strategy (the "Ministry"), acting as a director (the "Director"), under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). The Penalties total $47,870.

[2] 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 Director, with directions,

b) confirm, reverse or vary the Determination, or

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

[3] The Appellant appealed the Penalties on February 28, 2023. It does not dispute the Director’s finding of non-compliance with the Permit but does dispute the amount, or quantum, of the Penalties. The Appellant argues that the Penalties ought to be reduced because of its consistent efforts to remediate the contraventions which led to the Penalties and to prevent future contraventions.

BACKGROUND

General facts

[4] The Appellant is a company registered in B.C. that operates Lake Okanagan Resort (the “Resort”) and a condominium complex (the "Complex") located in Wilson's Landing, B.C. The Permit was first issued in 1981 and was amended in 2012. Under the Permit, the Appellant can discharge wastewater from the Resort and the Complex to the ground, subject to certain terms and conditions. The Permit authorizes the Appellant to operate two wastewater treatment facilities and ground disposal areas (the "Facilities") for the Resort (the “Valleyview facility”) and for the Complex (the “Lakeview facility”). The daily operations of the Facilities are managed by Corix Utilities Inc. ("Corix").

[5] The foreshore adjacent to the disposal areas, which is the receiving environment for the discharged wastewater, is listed in the Ministry's "Okanagan Large Lakes Foreshore Protocol" as a red zone area of concern, which indicates that this area has a high habitat value for shore spawning Kokanee.

[6] Section 2.1 of the Permit requires the Appellant to regularly inspect the authorised works and maintain them in good working order.

[7] Permit section 2.3 requires the Appellant to give notice prior to implementing changes to any process that may adversely affect the quality and/or quantity of the discharge.

[8] Section 2.6 of the Permit required the Appellant to post a $109,000 security prior to commencing discharge.

[9] Section 2.8 of the Permit required the Appellant to develop and maintain operational and maintenance manuals for the sewage collection, sewage treatment, and effluent disposal by December 30, 2012. Further, section 2.8 requires the Appellant to operate and maintain a system of preventative maintenance for the wastewater collection, wastewater treatment, and effluent disposal.

[10] Section 4 of the Permit requires the Appellant to submit data reports of effluent and groundwater analyses, flow measurements, and groundwater elevations within sixty days of the end of the calendar year for that year's monitoring.

[11] On May 7, 2013, the Ministry amended the Permit by letter (the "Amendment Letter") under section 2.19 of the Permit and section 16 of the *Act*, requiring the Appellant to upgrade the authorized works in order to decrease the concentration of total nitrogen and phosphorus in the discharge wastewater. This upgrade was to have been completed by June 30, 2014. This upgrade was not made and the concentration limits set by the Permit have been repeatedly exceeded by significant amounts.

[12] In June 2016, the Appellant proposed the use of a temporary wastewater treatment plant for a period of two months to address what the Appellant’s qualified professional described as “an imminent failure” of wastewater treatment at the Lakeview facility and the Appellant proposed the design and construction of permanent replacement works, which were to be operational before the end of 2016. The Ministry approved this proposal and timeline; however, the Appellant has continued to use the temporary treatment plant beyond the approved period without providing the Ministry notice of this, in violation of section 2.3 of the Permit. As stated above, the Appellant does not dispute this or the Director’s other findings of non-compliance with the Permit.

[13] On March 19, 2019, the Ministry inspected the Facilities and, on February 13, 2020, issued a notice of administrative penalty referral to the Appellant. On October 16, 2020, the Appellant responded to an Opportunity to be Heard. On December 8, 2020, the Ministry issued a determination of administrative penalty of $23,500 for failing to comply with sections 2.1, 2.3, 2.6, and 4 of the Permit (the "Previous Penalties"). These penalties are not the subject of the appeals presently before the Board.

[14] On April 19, 2021, the Ministry issued an inspection report which outlined a number of non-compliances with the Permit, including unauthorized bypasses of the authorized works observed on September 7, 2016, February 12, 2018, August 16, 2018,

and March 12, 2019. On January 13, 2021, a broken force main (pressurized sewer pipe) resulted in a spill of effluent to the ground.

[15] Environmental Protection Officers from the Ministry inspected the Resort and the Complex on July 20, 2021, and referred the record of their inspection to the Director on October 8, 2021. On February 16, 2022, the Director provided the Appellant notice of each of the Penalties prior to determination. The Appellant was given an opportunity to be heard and provided submissions on April 18, 2022 (the "OTBH").

[16] For each of the five Penalties, the Director issued a Determination of Administrative Penalty and an Administrative Penalty Assessment Form.

[17] The Penalties were as follows:

1. Penalty of $12,500 for ongoing failure to comply with Permit section 2.1 (Maintenance of works and emergency procedures) from March 20, 2019, to July 20, 2021, and Permit section 2.3 (Process Modification) from April 12, 2019, to July 20, 2021;
2. Penalty of $8,870 for ongoing failure to comply with Permit section 2.6 (Posting of security) from March 19, 2019, to present;
3. Penalty of $2,000 for failure to comply with Permit section 4 (Reporting) from March 2, 2020, to March 2, 2021;
4. Penalty of $20,000 for failure to comply with the Amendment Letter (nutrient parameter limits) between February 17, 2019, and December 20, 2020; and,
5. Penalty of $4,500 for ongoing failure to comply with Permit section 2.8 (Operation and maintenance manuals) from April 12, 2019, to July 20, 2021.

Overview of the statutory scheme

[18] Under section 115(1) 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*. The *Administrative Penalties* (*Environmental Management Act*) *Regulation*, B.C. Reg. 133/2014, (the "*Regulation*") governs the determination of administrative penalties under section 115(1) of the *Act*. Section 6 of the *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.

[19] Section 7(1) of the *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 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.

[20] Under section 7(2) of the *Regulation*, 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.

[21] Section 12(5) of the *Regulation* states that a person who fails to comply with a requirement of a permit or approval issued or given under the *Act* is liable to an administrative penalty not exceeding $40,000, unless the requirement the person failed to comply with is also a prescribed provision of the *Act* or the *Regulation* that is subject to a different maximum administrative penalty.

[22] The Ministry uses the "Administrative Penalties Handbook - Environmental Management Act and Integrated Pest Management Act" (the "Handbook"), updated June 1, 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 *Regulation*). The Handbook offers non-binding suggestions for assessing how to categorize the nature or type of contravention (major, moderate, or minor) and how serious its real or potential impacts are (high, medium, low, or none) and for how these two factors can be combined to establish a reasonable starting point for the base penalty. The Handbook also contains non-binding suggested base penalty tables which combine the nature of the contravention or failure with the

seriousness of the real or potential adverse effects for each of the contraventions subject to maximum penalties of $10,000, $40,000, or $75,000.

[23] The base penalty is added to, or deducted from, by considering each of the factors 7(1)(c) through (j) of the *Regulation*. The Handbook states that considering these mitigating and aggravating factors provides the statutory decision maker flexibility to consider more than simply what happened, and this flexibility encompasses why the contravention happened, whether it has happened before, and the person's past and current actions and attitude. However, use of this discretion requires the consideration of all of the relevant factors and requires the provision of reasons for any adjustments (or lack of adjustments) to the base penalty.

ISSUE

[24] The only issue in this appeal is whether the Penalties should be reduced, taking into account the evidence and the factors in section 7 of the *Regulation*. In deciding this issue, I have considered what the appropriate penalty is for each of the five Penalties.

DISCUSSION AND ANALYSIS

General Submissions

Appellant's submissions

[25] The Appellant does not dispute the contraventions but disputes the amount of the administrative penalty. The Appellant argues that the amount of the penalties ought to be reduced as it has consistently made efforts to remediate the contraventions and to prevent future ones. It adds that both of these elements have the potential to lower the quantum of monetary penalties in accordance with section 7(1) of the *Regulation*.

[26] The Appellant submits that the current ownership group purchased the company in 2014 and that many of the contraventions began before the current ownership managed the Resort and the Complex, including the breach of Permit section 2.6 which required the posting of security. Mr. Zheng, Director of Finance and Administration of DHI Holdings Inc., the parent company of the Appellant, provided an affidavit (the "Zheng Affidavit") in support of the appeal. The Zheng Affidavit states that during the purchase of the Appellant he was never notified of the breach and did not become aware of it until 2022. Mr. Zheng states that he still does not know whether the previous ownership group ever paid a security deposit and, if so, in what amount. The Zheng Affidavit does not state the role Mr. Zheng played in the purchase or how or when he should have been made aware of the breach of the requirement for the security deposit.

[27] The Appellant submits that it has taken steps to remediate the contraventions, including spending roughly $100,000 in 2016 to upgrade the wastewater facilities and to

plan facility updates, which were delayed because of Covid-19. The Appellant states that it has begun the lengthy, expensive process of permanently repairing or replacing the wastewater treatment facilities, including assigning responsibility to the company's vice president to resolve these outstanding matters in March 2020.

[28] The Appellant states that Covid-19 caused delays in moving the project forward but that it entered into a memorandum of understanding with Corix to transfer the wastewater facilities to Corix, which has the expertise to update and operate the Facilities in compliance with the Permit. The Appellant submits that the due diligence period for this transfer was to conclude in July 2022, but since then Corix advised that the capital costs were approximately double the original estimate[1], that an inspection of the underground pipe network was necessary, and that the timeline would be significantly longer than the original estimate. The Appellant submits that because of the delay it has found another buyer of the wastewater facilities to bring the facilities into compliance and that negotiations are in progress. The Appellant states it has submitted the reports and plans developed with Corix that are intended to address the contraventions. The Appellant adds that, while the upgrade to the wastewater facilities is a lengthy process, it has taken the necessary steps to begin this process.

[29] The Appellant argues that section 7(1) of the *Regulation* states that the person's efforts to correct and to prevent recurrence of the contravention or failure may both be taken into account in establishing the amount of the administrative penalty.

[30] The Appellant cites past decisions of the Board where deductions in administrative penalties were made following the submission of reports and plans intended to address the contraventions (*Mount Polley Mining Corporation v. Director, Environmental Management Act*, 2022 BCEAB 26 (CanLII)), making repairs and upgrades to a sewage system and encouraging tenants to report any issues (*Woodland Heights Investments, Ltd. v. Director, Environmental Management Act*, 2020 BCEAB 15 (CanLII)) and payments made in an effort to achieve compliance (*MTY Tiki Ming Enterprises Inc. v. Director, Environmental Management Act*, 2016 BCEAB 13 (CanLII)).

Director's submissions

[31] The Director states that the outstanding obligation to post the $109,000 security prior to starting discharge was communicated in previous penalties and inspection records in 2015 and 2016. According to the Director, those penalties were provided to the Appellant. The Director submitted a copy of the July 30, 2017, inspection record addressed

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[1] The Appellant submitted an August 3, 2022, e-mail from Ron Zink of Corix communicating these facts; in that e-mail Corix stated that the original estimate proposed was $2 million; in addition, given the condition of the storage tanks and that there was root infiltration in one part of the collection system, an underground pipe network could have a significant impact on the capital cost.

specifically to Mr. Zheng, and states that Mr. Zheng confirmed receipt of this inspection record by e-mail.

[32] The Director submits that, despite longstanding knowledge of the obligation under section 2.8 of the Permit, the Appellant has persistently failed to develop the required manuals or to provide any explanation for this failure.

[33] Regarding the Amendment Letter requirements, the Director states that in October 2013, the Appellant proposed to relocate one of their disposal locations as a means of managing their wastewater's nutrient discharge, and that the Ministry approved this proposal. However, the Director argues that the Appellant never made the required upgrades and, from 2014 to present, has repeatedly exceeded the nutrient limits in the Permit by significant amounts.

[34] The Director submits that Permit section 2.3 requires the Appellant to give notice prior to implementing changes to any process that may adversely affect the quality and/or quantity of the discharge. The Director reports that the Appellant has continued to rely on a temporary water treatment plant beyond the period for which it was approved. The Director takes the position that the continued use of this temporary facility beyond its approved life constitutes a process change that required notice of a process modification under section 2.3 of the Permit.

[35] Permit section 4 requires annual reports of data of effluent and groundwater analyses, flow measurements, and groundwater elevations. The Director submits that the Appellant failed to provide this annual reporting for the years 2012, 2013, 2014, 2016, 2017, 2018, 2019, 2020, and 2021.

[36] The Director submits that Permit section 2.1 requires the authorized works to be regularly inspected and maintained in good working order but that, as reported by the Appellant's qualified professionals and observed by Ministry staff, the authorized works are, and have been for some time, in a state of disrepair. The Director adds that despite repeatedly stating an intention to do so, the Appellant has not taken tangible steps to maintain, repair, or replace the authorized works to an acceptable standard.

[37] The Director states that the July 20, 2021, on-site inspection noted several instances of non-compliance with Permit conditions and adds that the maximum penalty for each failure to comply with a condition of a permit is $40,000 as prescribed by s. 12(5) of the *Regulation*. The Director submits that, in response to an OTBH prior to the Director's final determination, the Appellant provided a single written response acknowledging the non-compliance with the Permit going back to 2012.

[38] The Director submits that he did not consider or refer to the Ministry's Economic Benefit Guidance document, a supplement of the Handbook dated May 25, 2022, (the "Supplement") because that document was published after the OTBH process in this case. However, the Director submits his consideration of the issue of economic benefits was consistent with the guidance set out within the Supplement. The Director states the

Supplement describes the true value, estimated value, and applied value methods to determine an economic benefit. For most of the Penalties, the Director submits the record did not provide him enough information to determine true value or estimated value of the benefits derived by the contraventions, so he used the applied value method. He applied a 10 to 100 percent increase to the base penalty amounts depending on whether he considered the economic benefit derived from the avoided or delayed cost of compliance to be low, medium, or high. For the economic benefit of the Appellant's failure to post security, the Director used the estimated value of the annual fee a bank would charge for appropriate security. He adds that if the Appellant believed his economic adjustment methods were too high, he would have expected it to provide evidence and submissions on these calculations as part of its OTBH response, but it did not.

[39] The Director states that the Appellant asks the Board to consider steps it took both prior to the time-period to which the Penalties relate and subsequent to the Director's decisions. The Director submits that if it is open to the Board to consider this pre- and post-decision information, then the Board should also take note of the Appellant's compliance history, including the Previous Penalties which were assessed on December 8, 2020, based on a site inspection on March 19, 2019. The Director adds that the Previous Penalties are for contraventions of many of the same Permit conditions as the Penalties now being appealed and that the debt for the Previous Penalties remains unpaid. With accrued interest the amount the Appellant must pay as a result of the Previous Penalties approaches $27,000.

[40] The Director submits that the Appellant's non-compliance with many of the Permit conditions, which were the subject of both the Penalties and the Previous Penalties, appear to be ongoing. The Director cites an Inspection Record and Investigation Referral issued January 11, 2023, which covered compliance for the period from July 21, 2021, to November 23, 2022. The Director argues that these records show that the Appellant continues to be out of compliance with Permit sections 2.1, 2.3, 2.6, and 2.8, with nutrient control parameters set out in the Amendment Letter, and with other Permit conditions. The Director submits that the deterrence objective of the administrative penalty scheme has not been effective in addressing the Appellant's behavior, and that it is within the Board's jurisdiction to increase the amounts of the Penalties in the circumstances. The Director requests that the Board confirm the global amount of the Penalties and dismiss the appeal.

Appellant's reply

[41] The Appellant did not file a reply submission.

The Panel's findings

[42] The Appellant submits that it has taken steps to remedy the contraventions, including spending $100,000 in 2016 to upgrade the wastewater facilities. I did not receive details of the nature of this expense. Based on the fact that the temporary water treatment plant began operating that year and no other significant changes to the

wastewater treatment system were described as occurring in that year, I assume the expense was related to the installation of the temporary treatment plant. That facility is the subject of one of the current determinations. This remediation activity did not occur during the relevant penalty assessment period. However, the specific details of the outlay of this money are not material to the matters which I must decide, as set out below in these reasons.

[43] The Appellant submits it planned updates to the Facilities with Corix; however, these were delayed because of Covid-19. The Zheng Affidavit states the delays were due to staffing issues both with the Appellant company and within the government agencies it was working with. However, the Appellant did not provide evidence demonstrating how its specific activities with Corix or with government agencies were delayed because of Covid-19. In *Norman Tapp v. Director*, *Environmental Management Act,* 2022 BCEAB 20 (CanLII), and in *Nordstrom Enterprises Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 8 (CanLII), the Board found that claims of Covid-induced delays or financial difficulties require evidence to substantiate how and when Covid hampered addressing contraventions and an explanation of why this should lead to a reduction in the penalty assessed. I agree with the reasoning set out in these decisions and adopt it here.

[44] The Appellant states it has submitted the reports and plans it developed with Corix that are intended to address the contraventions into evidence in this appeal. The Appellant argues that such reports have previously been found by the Board to support reductions of administrative penalties. I find that the memorandum of understanding between the Appellant and Corix (the “MOU”), submitted by the Appellant, is dated February 15, 2022. This postdates the relevant penalty period. The MOU provides for the Appellant and Corix to explore the option of Corix acquiring both wastewater systems from the Appellant and that the parties "...acknowledge that there are significant upgrade requirements associated with the Wastewater Utility, and that the capital requirements associated with such upgrades will be the responsibilities of Corix...". The MOU does not include reports and plans showing the Appellant's commitment to physical improvements to correct the failures and prevent their recurrence, nor does it include details of how these improvements are to be completed nor any commitment that they be completed by a certain date. I find the MOU is indicative of the Appellant's effort to divest itself of the Facilities rather than to address the contraventions of the Permit. Therefore, I do not consider the MOU to be a document which demonstrates substantive efforts by the Appellant to correct the contravention or efforts to prevent recurrence of the contravention.

[45] The Appellant submitted a copy of a November 2019 report entitled "Lake Okanagan Resort Wastewater Treatment Assessment", completed by Associated Engineering (the "Report"). The Appellant did not refer to the Report in its submissions in this appeal, but it is included in the Zheng Affidavit as one of the "steps to remedy the breaches". The Report states its purpose is to assess the Valleyview facility following the April 11, 2019, administrative penalty referral. The Report recommended replacement of

both the influent tank and the treatment system as possibly the best option for achieving the effluent quality required by the Ministry. The Report also identified a number of electrical improvements and other maintenance items that could improve compliance with the contraventions listed in the administrative penalty referral letter. However, neither the Appellant's submissions nor the Report give indications of whether the Appellant intends to undertake actions to implement those recommendations. Nevertheless, I find the Report represents an attempt to investigate options for addressing the contraventions, though not steps taken to address the contraventions themselves, and can be considered as an effort to correct the contraventions or failures and to prevent their recurrence.

[46] In its October 16, 2020, OTBH response, the Appellant submitted that on September 24, 2020, it approved the preparation of an engineering report by True Consulting which would set out its specific recommendations for the repair or replacement of the two wastewater facilities and the connector between the two. The Appellant added that "[it] is expected that True Consulting will prepare this report as soon as possible". However, since the Appellant did not submit the referred-to True Consulting report in this appeal, I will not consider it as a mitigating factor for the Appellant's efforts to correct the contravention or failure or the Appellant's efforts to prevent recurrence of the contravention.

[47] As noted above, the Appellant does not dispute the contraventions which led to the Penalties. I find that the Director's submissions properly characterized the nature and the timing of the contraventions under appeal.

[48] To arrive at the Appellant's likely economic benefit resulting from most of the contraventions, the Director estimated whether the cost of compliance would be low, medium, or high and assigned a 10 to 100 percent increase of the base penalty. For the economic benefit of the Appellant's failure to post security, the Director used the estimated value of the annual fee a bank would charge for appropriate security. The Appellant did not make submissions, in the OTBH or in this appeal, on these methods or on the Director's resulting additions to the base penalties. I will not consider or refer to the Supplement because that document was published after the decision under appeal was made. However, I will consider the Handbook's guidance for estimating economic benefit from non-compliance along with the evidence and the parties' submissions.

Penalty-specific submissions

[49] The Appellant did not make specific submissions on many of the Director's findings on each of the factors in section 7(1) of the *Regulation,* or on the penalty amounts which were assessed for each of the contraventions. However, as summarized above, the Appellant presented general arguments and evidence regarding its efforts to correct the contraventions and to prevent their recurrence. I consider these general submissions and evidence in the reasons below when they are relevant to each of the factors in section 7(1) of the *Regulation* or the resulting penalty amounts.

[50] In this appeal, the Director made alterations to the base penalty under factors 7(1)(c) through (j) of the *Regulation* as monetary amounts as well as percentages of the base penalty. I find that assessing these modifications as percentages, rather than only as monetary amounts, is helpful in more directly representing them as mitigating and aggravating factors of the base penalties. As such, I adopt this approach in the reasons below.

1. Penalty for ongoing failure to comply with Permit sections 2.1 (Maintenance of works and emergency procedures) and 2.3 (Process Modification).

The Parties' submissions

[51] The Director calculated a combined single penalty for the contraventions of sections 2.1 and 2.3 of the Permit.

[52] The Director considered the nature of the contraventions to be moderate due to the deviation from an expected standard of care for maintenance of the authorized works, for the Appellant's failure to notify the Ministry of the intent to use the temporary wastewater treatment works after the authorized time, and for the failure to install a new wastewater treatment system for the Resort and the Complex. The Director stated these infractions interfered with the Ministry's ability to regulate the discharge to the environment.

[53] The Director found that the potential adverse effects from the failure to maintain works include small spills to the environment and catastrophic failure of works such as holding tanks resulting in larger spills to ground and overland surface flow to the shore of Okanagan Lake, which is a Kokanee spawning area. He concluded there is a medium potential for adverse effects to the environment. The Director calculated a base penalty of $5,000 for these contraventions and stated that this was more generous to the Appellant than the base penalty tables in the Handbook. The Director submits that had he followed the advice in the Handbook, this could have resulted in a base penalty of $10,000 for these two contraventions. Additionally, these two contraventions could also have been assessed separately, resulting in a higher aggregate penalty amount.

[54] The Director stated that he then considered and applied the penalty adjustment factors to this base penalty. Concerning 7(1)(c), he added $1,000, representing a 20 percent increase, to account for previous contraventions, failures, and penalties going back to 2012, including the Previous Penalties. The Appellant did not make submissions regarding this adjustment factor, although it did submit that the current ownership group purchased the company in 2014 and that many of the contraventions began before the current ownership was managing the Resort and the Complex. However, the Director cited the presence of previous penalties that had been issued since the Appellant's ownership group purchased the company. These penalties included violation tickets issued in 2015 and 2016 as well as the unpaid Previous Penalties.

[55] The Director submits that the Appellant informed the Ministry in June of 2016 that their authorized works were at risk of failure. However, as of the July 20, 2021, inspection, the Appellant had not repaired or replaced these at-risk works and had also failed to notify the Ministry of their ongoing reliance on a temporary treatment plant. The Director argues that these contraventions occurred on a continuing basis since the contravention dates found in the Previous Penalties. The Director increased the penalty amount by $1,000, 20 percent of the base penalty, to account for the aggravating factor that the contraventions were continuous.

[56] The Director stated that the Appellant was aware of the limited time-period during which the temporary wastewater plant was authorized to operate, which the Appellant had itself proposed. From this, the Director inferred the Appellant had been deliberate in its failure to notify the Ministry of the continued operation of the temporary plant as it was required to do under Permit section 2.3. The Director increased the penalty amount by $500, 10 percent of the base penalty, to account for the aggravating factor of the deliberate nature of the contravention.

[57] The Director considered the Appellant's failure to construct and maintain required works to be a high-cost contravention, and that this warranted a high percentage adjustment under the economic benefit factor. He increased the penalty amount by $5,000, 100 percent of the base penalty, to account for the Appellant's economic benefit by avoiding the cost of maintaining the authorized works in good working order and delaying the cost of constructing a new facility.

[58] The Director made no adjustment to the penalty based on the exercise of due diligence. The Director cited the Handbook's definition of "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation" when assessing the Appellant's actions under this mitigating factor. He submits there is no evidence to suggest that the Appellant has exercised a reasonable standard of care to prevent the current state of the authorized works or to contact the Ministry regarding the continued use of the temporary wastewater facility.

[59] The Director asserts that he considered the argument that many of the contraventions began before the Appellant became the Permit holder in 2014 to not be relevant since the Penalties occurred between 2019 and 2021, several years after this transfer of ownership. The Director submits that although the Appellant argues that it has been working to rectify its non-compliance since 2014, the Director is not aware of any physical steps taken towards this goal since 2014, or at all. When considering the Appellant's submission that it made significant upgrades to the Facilities in or around 2016, the Director states that the Appellant does not provide details of these upgrades or explain how they relate to the Penalties. Further, the Director submits that he does not consider this general reference to 2016 upgrades to be evidence of due diligence for specific Permit contraventions between 2019 and 2021.

[60] The Director made no adjustment in the assessed penalty based on the mitigating factor of efforts taken to correct the contraventions. In assessing the Penalties, the Director found that "[t]here is no evidence to suggest that 1782 Holdings Ltd. put any effort into correcting the maintenance of the authorized works or contacting the Ministry regarding the continued use of the temporary wastewater system."

[61] The Director states that he turned his mind to the Appellant's efforts to prevent recurrence of the contravention or failure. He considered the Appellant's appointment of an individual to resolve the contraventions and the efforts to transfer responsibility for the Permit and authorized works to Corix, but noted that no evidence was presented to him of any substantive steps taken to improve compliance with the Permit, through repair of the authorized works or otherwise. The Director ultimately concluded that "There is no evidence to suggest that 1782 Holdings Ltd. has put any effort into correcting the maintenance of the authorized works or contacting the Ministry regarding the continued use of the temporary wastewater facility." The Director made no adjustment to the assessed penalty as a result of his consideration of this factor. He states that the authorized works were in the same condition as they were at the time of the previous inspection in March 2019.

[62] The Director considered there were no additional relevant factors that would result in an adjustment to the assessed penalty.

[63] When accounting for all of the above adjustments to the base penalty, the Director concluded that the total penalty amount for the Appellant's failure to comply with Permit sections 2.1 and 2.3 should be $12,500.

The Panel's findings

[64] I find that since the contraventions of sections 2.1 and 2.3 of the Permit both relate to the works used to treat the Facilities' wastewater, it is appropriate to combine these two contraventions into a single penalty.

[65] The Handbook gives examples of situations that could be considered to be moderate contraventions. These examples include a failure to comply with operational requirements that, at a minimum, create a risk to the environment or human health and safety, properly installing or maintaining equipment, or obtaining approval prior to conducting a bypass. I find these examples are similar to the Appellant's contraventions of sections 2.1 and 2.3 of the Permit. These failures interfered with the Ministry's ability to regulate the discharge to the environment. I find that that the nature of these combined contraventions is in the moderate category.

[66] I find that the potential for adverse effects on the environment is in the medium category since the lack of proper maintenance of the authorized works gave rise to actual adverse effects, such as the four unauthorized bypasses which occurred between 2016 and March 12, 2019, and the January 13, 2021, broken force main that resulted in a spill of effluent to the ground. The possibility of potential adverse effects existed throughout this

entire time period. These possibilities included potential failure of works that could result in larger spills to the ground and overland surface flow to the shore of Okanagan Lake, a sensitive receiving environment due to the presence of a Kokanee spawning area. Further, the failure to notify the Ministry of the continued use of the temporary wastewater treatment works and the failure to install a new wastewater treatment system for the Resort and the Complex interfered with the Ministry's ability to regulate the discharge to the environment and therefore increased the potential for adverse effects.

[67] Having found that the nature of the combined contravention of sections 2.1 and 2.3 of the Permit is in the moderate category and that it represents contravention of a permit with medium real or potential environmental effects, I now consider the resultant base penalty.

[68] The base penalty tables in the Handbook can assist statutory decision makers in establishing a reasonable base penalty. These tables are not prescriptive, but serve to encourage consistency and transparency in assessing penalty amounts as between different factual scenarios across the province. The base penalty tables suggest reasonable base penalty starting points for the nature of the contravention or penalty (major, moderate, or minor) and the real or potential adverse effects (high, medium, or low to none) for contraventions subject to different the different maximum penalties prescribed under the *Act* and its *Regulations* ($10,000, $40,000, or $75,000). As stated above, a person who fails to comply with a requirement of a permit or approval issued or given under the *Act* is liable to an administrative penalty not exceeding $40,000. For the moderate nature of contravention category with medium real or potential environmental effects, as I have found in this case, the base penalty tables suggest a base penalty of $10,000 as a reasonable starting point.

[69] I find that the Director's assigned base penalty of $5,000 is a low base penalty in these circumstances, considering the importance of compliance with the requirements of sections 2.1 and 2.3 of the Permit. Non-compliance hinders the Ministry's ability to regulate the discharge to the environment and there are moderate real and potential adverse effects of the contraventions.

[70] Regarding the effect of previous contraventions required to be considered under factor 7(1)(c) of the *Regulation*, in *Randy Carrell, doing business as Iron Mask Trailer Park v. Director, Environmental Management Act,* 2019 BCEAB 24 (CanLII), at para. 62, and in *Woodland Heights Investments, Ltd. v. Director, Environmental Management Act,* 2020 BCEAB 15 (CanLII), at para. 133, the Board found that warning letters or other similar communications do not constitute "any previous contraventions, administrative penalties imposed on, or orders issued to the person who is the subject of the determination." There must be orders or formal findings of a contravention for them to properly be taken into consideration under this factor. In this case, previous contraventions included violation tickets from 2015 and 2016 and the Previous Penalties. I find that a violation ticket, including the 2016 violation ticket submitted as evidence by the Director, is a formal finding of a contravention or administrative penalty imposed, as it was issued to the

Appellant for failing to comply with specific terms of the Permit under section 120(7) of the *Act* and imposed a $575 fine.

[71] I find a high degree of similarity between the cited violation tickets and the Previous Contraventions on one hand to the current infractions of sections 2.1 and 2.3 on the other. Further, the previous enforcement actions should have had, but did not seem to have had, a deterrent effect on the Appellant's continued contraventions. I find that a 20 percent addition is appropriate as an adjustment factor for previous contraventions in these circumstances.

[72] Regarding the continuity of the contravention, both the Appellant's and the Director's evidence show that the contraventions of Permit sections 2.1 and 2.3 continued during the penalty period between 2019 and 2021, as well as before and after this period. I find that this continuity justifies the application of a 20 percent addition as an adjustment factor for the continuous nature of the contraventions.

[73] Regarding the deliberateness of the contravention, the Appellant acknowledges it knew of the contravention of section 2.1 as early as 2014 and submits that it is attempting to repair and replace the Facilities, citing its assignment of a vice president to resolve the non-compliance, and its attempts to transfer ownership of the Facilities. However, I have not received evidence that these actions resulted in, or could be reasonably expected to result in, repair or replacement of the Facilities. I find that in view of the Appellant's long awareness of the contravention, the Appellant's failure to address it in a direct manner indicates deliberateness.

[74] I find that the Appellant knew of its failure to comply with section 2.3 of the Permit since it had applied for the use of the temporary plant pending its replacement by a permanent facility. Further, the Appellant had full control of the ability to comply with this reporting obligation but did not, indicating lack of commitment to comply with the Permit requirements. I find that the Appellant deliberately did not comply with section 2.3 of the Permit.

[75] In summary, I find the contraventions of both sections 2.1 and 2.3 of the Permit were deliberate and note that, if the penalties were assessed separately, it is likely that a greater penalty would have resulted. However, the evidence does not support a conclusion that the Appellant took deliberate actions that caused the contraventions, which would lead to a more significant addition to the base penalty due to this factor. I find that an increase of 10 percent of the base penalty is appropriate as an adjustment factor for the deliberate nature of the contraventions.

[76] The Appellant did not specifically address the Director's penalty adjustment for the economic benefit that was received, although it stated in its submissions that it had spent roughly $100,000 on the Facilities. This expenditure could have been argued to offset the economic benefit of compliance, but I have not received sufficient detail of that expenditure nor an explanation of how it assisted in achieving compliance with the Permit. Further, the Appellant submitted that the capital costs to replace the Facilities were

approximately double the original estimate, which Corix stated to be about $2,000,000. Even accepting the $100,000 expenditure as an offset to the economic benefit of non-compliance, which I do not, I find that the latter would be significantly larger.

[77] The Handbook emphasizes that the economic benefit factor could significantly increase the penalty and that removing economic benefit is one of the most important objectives of administrative monetary penalties. I conclude that the Appellant has received a considerable economic benefit as a result of its noncompliance. I find that it was appropriate for the Director to increase the penalty amount by $5,000, 100 percent of the base penalty, if not more, to account for the Appellant’s economic benefit by avoiding the cost of maintaining the Facilities in good working order and replacing or sufficiently upgrading them.

[78] The Handbook defines due diligence as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." I find it would be reasonable to expect that the Appellant would have made specific attempts to comply with section 2.1 of the Permit by repairing or replacing the authorized works when it became aware, or should have become aware, of its noncompliance with the Permit conditions. As the Appellant's qualified professional's 2016 report, as well as the Ministry's 2019 and 2021 inspection reports, showed the Facilities were malfunctioning, I find that the Appellant should have known of the contraventions during all relevant times. The Appellant submits it spent $100,000 on the wastewater system in 2016 but does not specify what changes were made or how they improved the performance of the system. Similarly, it would be reasonable to expect the Appellant to comply with s. 2.3 by contacting the Ministry regarding the continued use of the temporary wastewater facility, since complying with this obligation would have required minimal effort and probably no expenditures. I find that the Appellant has not exercised reasonable diligence in response to what constituted continued and serious contraventions of Permit sections 2.1 and 2.3. I make no adjustment to the base penalty for the Appellant’s exercise of due diligence, or lack thereof.

[79] As previously discussed, I considered the Report submitted by the Appellant as demonstrating an attempt to identify possible solutions during the relevant penalty period. However, I have not received evidence of resulting decisions or actions taken by the Appellant as a result of the Report. Accordingly, I find there is insufficient evidence of substantive efforts undertaken by the Appellant to correct or prevent recurrence of the contraventions of Permit sections 2.1 or 2.3. As reviewed above, the Appellant cites the expenditure of $100,000 on the wastewater system in 2016 but I received insufficient evidence of the nature of these expenditures or how they corrected or prevented recurrence of the lack of compliance with these sections in the penalty period of 2019 to 2021. I make no adjustment to the base penalty for efforts to prevent recurrence of the contraventions of sections 2.1 and 2.3 of the Permit.

[80] Based on the evidence and submissions before me in this matter, I find there are no additional factors relevant for penalty adjustments and I do not apply any additional factors.

[81] Based on the above findings, I have not found compelling reasons for reducing the total penalty of $12,500 as determined by the Director for the failure to comply with Permit sections 2.1 (Maintenance of works and emergency procedures) and 2.3 (Process Modification). While I would have issued larger penalty amounts as described above, the only issue in this appeal is whether there should be a reduction from the Penalties. Having found no reduction is justified, I confirm the Director's decision as is.

2. Penalty for ongoing failure to comply with Permit section 2.6 (Posting of security)

The Parties' submissions

[82] The Appellant argues they did not know of this outstanding obligation to post security until 2022 and that they had previously understood that the previous owners would have needed to provide it when they were granted the Permit. The Appellant adds that it still does not know whether the previous owner ever paid it and if so, in what amount.

[83] The Director submits that Permit section 2.6 required the Appellant to post $109,000 in security prior to commencing any discharge to the environment, and that the security is intended to protect the public should the authorized works fail or if the Ministry needs to take action to protect the environment or human health. The Director found that the Appellant has failed to post the required security since 2012. The Director assessed a penalty for this ongoing failure from March 2019 to the present.

[84] The Director submits that he considered the nature of the contraventions to be moderate in that it would limit the Ministry's ability to take action to protect the environment, human health, and safety if the permittee abandons the site. The Director submits that the Board may also take notice that there are third parties who rely on the authorized works (such as residents of the Complex and visitors to the Resort) such that it may be infeasible to shut down the operation. The Director considered the potential for adverse effects on the environment to be low to medium because the failure to post security does not directly affect the environment. Based on these first two factors, the Director set a base penalty of $4,000 for the Appellant's failure to post security.

[85] Under *Regulation* section 7(1)(c), the Director added $800 to the penalty, 20 percent of the base penalty, to account for previous contraventions, failures, and penalties going back to 2012, including the Previous Penalties for the very same failure to comply with Permit section 2.6 prior to March 20, 2019.

[86] The Director added $400 to the penalty, 10 percent of the base penalty, to account for the fact that the failure was continuous. The Director and added a further $400 to the

penalty, 10 percent of the base penalty, to account for the deliberate nature of the Appellant's failure to post security.

[87] The Director added $3,270 to the penalty to account for the estimated economic benefit that the Appellant received by not posting the required security. The Director arrived at this amount by calculating the cost to the Appellant of three years of annual fees required to post $109,000 in security at a rate of one percent per year. The Ministry estimated that this amount would have to have been payable to a financial institution for financial security in the form of an irrevocable letter of credit ("ILOC") in order to satisfy this condition of the Permit. He states this is consistent with the estimated cost approach as set out in the Handbook and the Supplement. The Director calculated the accrued estimated economic benefit from avoided annual ILOC fees since January 2013 to present (9 years) would be $9,810, but he assessed this penalty for the period March 19, 2019, to present, a period of three years.

[88] The Director made no adjustment to the penalty on account of the Appellant's due diligence, effort to correct the failure, or effort to prevent reoccurrence. He stated that there is no evidence to support such mitigating adjustments to the base penalty.

[89] Based on these adjustments to the determined base penalty, the Director concluded the total penalty amount for the Appellant's failure to comply with Permit section 2.6 should be $8,870.

The Panel's findings

[90] I find that the Ministry included the ongoing contravention of the Appellant's failure to post security in its July 20, 2012, warning letter and in its December 10, 2014, inspection report. Both of these documents were provided to the Appellant. The Director presented evidence that the Appellant was notified of this contravention through the use of previous penalties and inspection records in 2015 and 2016. Further, the evidence demonstrates that the Appellant's representative acknowledged receipt of these records. The Associated Engineering Report that was submitted to the Appellant in November of 2019 states that the administrative penalty referral letter requests that a security of $109,000 be posted, as per section 2.6 of the Permit. In addition, I find the April 18, 2022, submissions the Appellant made in response to the OTBH acknowledges that when it became the Permit holder in 2014 there were several environmental compliance issues, including the failure to post security. I prefer this wealth of consistent evidence to the Appellant's submission to the Board, that it did not know of the obligation to provide the security deposit until approximately 2022.

[91] I agree with the Director's characterization of the nature of the contravention as moderate, since it limits the ability of the Ministry to take remedial action to protect the environment and human health. There are numerous scenarios where the Ministry would need to make use of the posted security, such as to correct an inadequacy of the construction or to conduct the operation and maintenance of the works if the Appellant

abandons the site and it is not possible to shut down the operation due to its use by residents of the Complex and Resort.

[92] I find that the potential for adverse effects to the environment as a result of this contravention of the Permit is most accurately characterized as low to medium, since the Appellant's failure to post the security does not directly cause adverse effects. However, this contravention has the potential to indirectly cause significant adverse effects should issues with the Facilities need to be urgently addressed and the Appellant has abandoned, or is otherwise unable to manage, the permitted works. The Handbook's base penalty tables suggest a base penalty of $5,000 for a moderate contravention with low to no real or potential adverse effects. I find that the Director's assessment of the base penalty is appropriate in the circumstances of this contravention.

[93] The documented history of previous contraventions, which included failure to provide the required security, should have deterred the Appellant from continuing this failure but did not. I find that the Director's decision to add 20 percent of the base penalty to account for previous contraventions is appropriate in the circumstances.

[94] I find that the continuity of this noncompliance, from 2012 through to a 2021 inspection or later, justifies a penalty increase of 10 percent of the base penalty. Further, I find the failure to post security was deliberate since the Ministry formally notified the Appellant of this failure in a 2012 warning letter, in investigations and violation tickets in 2014 and 2015, and subsequently confirmed the security was still not posted in inspections in 2019 and 2021. I would assess an increase of 10 percent of the base penalty amount for both of the factors in section 7(1)(d) and (c) of the *Regulation*.

[95] I agree with the Director's methodology of estimating the economic benefit the Appellant derived from contravening the requirement to post security, as it is based on the best information available and is reasonable in the circumstances. I find the assessed penalty should be increased by $3,270 as a result. The Appellant did not provide sufficient persuasive evidence to justify adjustment to the penalty on account of the Appellant's due diligence, effort to correct the failure, or effort to prevent reoccurrence. I find there are no other factors relevant to this penalty adjustment assessment.

[96] Based on the base penalty and adjustments I have found should be made as set out above, I have not found compelling reasons for reducing the total penalty of $8,870 as determined by the Director for the Appellant's failure to comply with section 2.6.

3. Penalty for failure to comply with Permit section 4 (Reporting) for the years 2020 and 2021

The Parties' submissions

[97] The Appellant did not make specific submissions relating to this penalty. It admitted having notice of this contravention prior to 2011 in its April 18, 2022, OTBH submissions.

[98] The Director submits that Permit section 4 requires the Appellant to collect and maintain effluent and groundwater data and to annually report these data to the Ministry. The purpose of this Permit requirement is to inform the Ministry of the quality and quantity of the effluent discharged to the environment. The Director found that the Appellant failed to provide reports to the Ministry in March 2020 and in March 2021. In assessing the penalty amount for the failure to report monitoring data to the Ministry, the Director considered the nature of the contraventions to be minor in that it interferes with the Ministry's ability to monitor the environmental impact of the discharge from the authorized works. The Director states he considered the potential for adverse effect to the environment to be low because the contravention does not have direct adverse effects. From these factors, the Director calculated a base penalty of $1,000.

[99] The Director states he added $200 to the penalty amount, 20 percent of the base penalty, to account for previous contraventions, failures, and penalties going back to 2012, including the Previous Penalties for the very same failure to comply with Permit section 4 in years prior to 2020.

[100] The Director added $500 to the penalty amount, 50 percent of the base penalty, to account for the fact that the failure was repeated in 2020 and in 2021. The Director noted under this factor that the failure to comply with Permit section 4 was, in fact, repeated in 2012, 2013, 2014, 2016, 2017, 2018, 2019, 2020, and 2021, though the penalty was assessed only for the latter two years.

[101] The Director added $200 to the penalty amount, 20 percent of the base penalty, to account for the deliberate nature of the Appellant's failure to meet the reporting requirements, despite the Appellant receiving formal notification of this failure in Ministry inspection reports in 2012, 2014, 2015, 2019, and 2021. The Director also added $100 to the penalty amount, 10 percent of the base penalty, to account for the economic benefit derived by the Appellant in avoiding costs associated with the preparation and timely submission of monitoring data.

[102] The Director made no adjustment to the penalty amount for due diligence, for the effort to correct the failures, or for efforts made to prevent recurrence, finding that there was no evidence to support such adjustments.

[103] Based on these adjustments to the determined base penalty, the Director concluded the total penalty amount for the Appellant's failure to comply with Permit section 4 should be $2,000.

The Panel's findings

[104] Section 4 of the Permit requires the Appellant to maintain and submit data reports within sixty days of the end of the calendar year for that year's monitoring. According to the October 8, 2021, Administrative Penalty Report, the required reports were submitted for 2020 and for 2021, but not within sixty days of the end of the calendar year. The 2019

report was due on March 2, 2020, but was submitted on April 1, 2020. The 2020 report was due on March 2, 2021, but was submitted on March 31, 2021.

[105] The failure to maintain and report data affects the Ministry's ability to assess compliance with the Permit's effluent limits. The reports for the 2020-2021 penalty assessment period were submitted, however, they were submitted late. The potential for adverse effects to the environment is low because this failure in itself does not physically affect the environment. Therefore, I find the nature of the contraventions to be minor. I find a base penalty of $1,000 is appropriate for this contravention.

[106] The similarity and number of previous contraventions, including violation tickets from 2015 and 2016 and the Previous Penalties, should have had a deterrent effect but did not. Those penalties remain unpaid, and with accrued interest, approach $27,000. I find it is appropriate to add 20 percent of the base penalty, $200, to the penalty amount.

[107] This contravention in 2020 and 2021 was a repetition of the failure to submit the reports within sixty days from the end of the calendar year on seven years between 2012 and 2019. This repetition, demonstrating a significant and concerning pattern of events, supports a significant aggravating factor under the *Regulation*. I find that it is appropriate to add 50 percent of the base penalty, $500, to the penalty amount.

[108] Although the Appellant was notified of its failure to meet the reporting requirements in the Ministry's inspection reports in 2012, 2014, 2015, 2019, and 2021, the contravention was not rectified. I find that the Appellant ignored the obligation to comply with this Permit requirement. I find that it is appropriate to add 20 percent of the base penalty, $200, to the penalty amount as a result to the deliberate nature of these contraventions.

[109] The economic benefit of avoiding costs associated with the preparation and timely submission of monitoring data is difficult to assess because the 2019 and 2020 annual reports were submitted, but were late by about a month. However, as the Appellant would have incurred some cost to submit the reports on time, I find it is reasonable to add 10 percent of the base penalty, $100, to the penalty amount to account for this.

[110] I find that although the monitoring reports were submitted for the years 2019 and 2020, these were not submitted when the Permit conditions required them to be. These efforts do not demonstrate the diligence expected of the Appellant, given its knowledge of the factually similar previous and current infractions. I make no adjustment to the penalty amount for this factor. Similarly, I consider that the Appellant's efforts to correct the failures or prevent their recurrence were minimal and do not justify a downward adjustment to the penalty amount. Additionally, I find there are no additional factors set out in the *Regulation* that are relevant for to the determination of this penalty.

[111] Calculating the base penalty and the adjustments set out above, I confirm the total penalty of $2,000 for the Appellant's failure to comply with section 4 of the Permit.

4. Penalty of $20,000 for failure to comply with the Amendment Letter between February 2019 and December 2020

The Parties' submissions

[112] The Appellant did not make specific submissions relating to this penalty.

[113] The Director states that the Amendment Letter, dated May 7, 2013, required the Appellant to upgrade wastewater treatment works at the Resort and Complex such that the concentration of total nitrogen and total phosphorus in the treated effluent, measured before it is discharged to the disposal field, is equivalent to or less than 10 mg/L and 1.0 mg/L, respectively. The Director submits that the Amendment Letter was sent in response to a 2012 groundwater monitoring program conducted by Golder Associates Ltd., qualified professionals retained by the Appellants, which identified that almost all of the samples collected exceeded BC Water Quality Guideline levels for total nitrogen and phosphorus levels. The Director submits that groundwater sampling in subsequent years confirms that the elevated nutrient levels in the Appellant's discharge has persisted.

[114] The Director submits that in 2014, the Ministry approved the Appellant's proposal to construct a new effluent disposal field as an alternative means of managing nutrient discharges. However, the approved work was never completed. He states that on July 20, 2021, the Ministry conducted an on-site inspection, which identified that the Appellant was out of compliance with the Amendment Letter requirement to reconstruct the authorized works to limit nutrient levels in their discharge by June 30, 2014. The Director found that the Appellant had failed to comply with the nutrient discharge limits prescribed by the Amendment Letter a total of 87 times between 2014 and 2020, with nitrogen and phosphorus concentrations ranging from 13 to 1520 percent above Permit limits, with 81 of those being 50 percent or more above the BC Water Quality Guideline level. The Director noted, however, that he limited his consideration of an administrative penalty for this failure to the period spanning February 17, 2019, to December 20, 2020. This resulted in a total of 46 relevant exceedances. The Director presented data on the measurement of nutrient limits in the effluent permitted to be discharged under the Permit and stated that the exceedances for total nitrogen ranged from 3% to 366% over the Permit limit and for total phosphorus they ranged from 22% to 583% over the Permit limit during the relevant period.

[115] The Director considered the nature of the contraventions to be major, as the failure to comply with the Amendment Letter resulted in significant exceedances of the authorized discharge limits.

[116] The Director states that excessive nitrogen and phosphorus discharged into freshwater can cause increased growth of aquatic plants and algae, which deplete dissolved oxygen concentrations and can block light reaching deeper waters, causing eutrophication.

[117] The Director submits that the receiving environment for the authorized discharge, the foreshore adjacent to the Appellant's waste disposal area, is classified as a red zone area of concern for shore spawning Kokanee on Okanagan Lake. He cites the Ministry's 2018 Okanagan Large Lakes Foreshore Protocol, which defines a red zone as an area where aggregations of over 50 spawning fish were observed between 2001 to 2014 and where over 1000 spawning fish were observed pre-2001.

[118] Further, the Director cites a Health Canada document, "Guidelines for Canadian Drinking Water Quality: Guideline Technical Document – Nitrate and Nitrite," to support his conclusion that elevated nitrogen concentrations also pose a risk to human health. He determined that the potential for adverse effects to the environment is medium to high, given the deleterious effects of excess nutrients on the environment, including the nearby fish spawning area, and the potential risk to human health.

[119] The Director concluded that the combined effects of the nature of the contravention as major and the potential for adverse effect as medium to high led to establishing a base penalty of $10,000.

[120] The Director added $2,000 to the penalty amount, 20 percent of the base penalty, to account for previous contraventions, failures and penalties back to 2015, including the Previous Penalties.

[121] The Director added $1,500 to the penalty amount, 15 percent of the base penalty, to account for the fact that the failures were repeated 46 times during the assessment period. The Director also increased the penalty amount by $500, 5 percent of the base penalty, to account for the deliberate nature of the failure. The Director states he considered it significant that "... despite repeated commitments to upgrade their treatment works, and repeated groundwater reports prepared by qualified professionals on behalf of 1782 Holdings Ltd. highlighting increasing downgradient concentrations of total nitrogen and phosphorous, 1782 Holdings Ltd. has made no efforts to achieve compliance."

[122] The Director added $6,000 to the assessed penalty, 60 percent of the base penalty, in response to the economic benefit the Appellant derived through avoiding the cost associated with construction and maintenance of new treatment works that would allow treatment to meet the nutrient limits in the Amendment Letter. The Director states that the high cost of compliance translated into a high percentage adjustment of the penalty to account for the Appellant's economic benefit in avoiding this cost. The Director asserted that the Appellant had an opportunity to counter this adjustment with evidence in its OTBH Response and on appeal, but has not done so.

[123] The Director made no downward adjustment for the Appellant's due diligence, finding that "there is no evidence that the 1782 Holdings Ltd. has exercised a reasonable standard of care to prevent further exceedances..." of the nutrient limits. Similarly, he made no downward adjustment for the Appellant's effort to correct the failures, finding that "There is no evidence to suggest that 1782 Holdings Ltd. put any effort into

correcting" the nutrient exceedances. The Director also made no downward adjustment for the Appellant's effort to prevent reoccurrence, finding that "There is no evidence to suggest that the Appellant made any effort to prevent recurrence of the Total Phosphorous and Total Nitrogen exceedances." The Director considered there were no additional factors relevant for penalty adjustment.

[124] Based on his adjustments to the determined base penalty, the Director concluded the total penalty amount for the Appellant's failure to comply with the Amendment Letter should be $20,000. The Director submits that he specifically considered the statements and arguments advanced by the Appellant in its OTBH Response, but found they were not persuasive. In his decision, the Director stated that "... 1782 Holdings has provided no substantive detail of actions taken to improve performance related to the Permit Amendment Letter other than to outline assignment of staff briefly and generally to an undefined project, and to mention a process for a transfer of ownership for the wastewater treatment works initiated in February 2022."

The Panel's findings

[125] The Handbook states that major contraventions include non-compliance events which "...can result in an actual significant impact or very serious threats to the environment or to human health or where non-compliance undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to regulate the discharge to the environment. Examples include an unauthorized discharge, exceeding a discharge limit by a significant magnitude (50-100%+)...". Given the evidence in this case of exceedances which ranged from 22% to 583% over the Amendment Letter's effluent nutrient limits, I find that this failure is a major contravention.

[126] There was insufficient evidence presented to establish that the failure to comply with the Amendment Letter resulted in actual adverse effects on the environment or human health. However, there is evidence before me as to the potential impact of the introduction of this quantity of effluent on the receiving environment. I find that this contravention has a medium to high potential adverse effect, including for shore-spawning kokanee through eutrophication and resulting oxygen depletion. Further, there is a medium to high potential adverse effect through the contamination of drinking water, posing a risk to human health. I find that the potential adverse effects of this contravention are medium to high. Considering that I have not received evidence of actual effects, and that potential effects should be given less weight than actual effects, I find that the failure to comply with the Amendment Letter resulted in medium real or potential adverse effects.

[127] For contraventions subject to a $40,000 maximum penalty, the Handbook suggests a base penalty of $20,000 for a major contravention with medium real or potential adverse effects. The Director's base penalty of $10,000 is relatively low, especially given the high

exceedances of the Amendment Letter's limits and the seriousness of the potential adverse effects.

[128] In a manner similar to the other contraventions reviewed above, previous contraventions include violation tickets in 2015 and 2016 for failure to comply with the terms of the Permit and the $23,500 Previous Penalty. Since this is a significant history of previous contraventions, I find that an addition of 20 percent of the base penalty for previous contraventions is appropriate in these circumstances.

[129] The Handbook suggests that a contravention could be considered repeated if the same incident or behaviour occurs at two or more separate times. In this case, evidence shows that the contravention of the Permit's nutrient limits was repeated 46 times during the assessment period. I find an addition of 20 percent of the base penalty is appropriate given the repeated nature of this contravention.

[130] Turning to the deliberateness of this contravention, the Appellant was notified of the exceedances of the Amendment Letter limits for total nitrogen and total phosphorous by, among other things, the 2014 and the 2015 groundwater sampling programs by Golder Associates and by way of a violation ticket issued in 2016 following an investigation by the Ministry. During the penalty period of February 17, 2019, to December 20, 2020, further notification of these infractions came from reports by the Appellant's consultants, Watterson Geoscience Inc. and Ecoscape Environmental Consultants Ltd. The Appellant's contravention of the Permit's nutrient limits continued despite its knowledge of the contraventions without any direct attempts to repair, upgrade, or replace the Facilities, indicating deliberateness. However, I am not aware of evidence that the Appellant took deliberate actions that caused the contraventions, which would lead to a more significant addition to the base penalty due to this factor. Therefore I agree with the Director's addition of 10 percent of the base penalty for the deliberateness of the contravention.

[131] As previously reviewed, the Handbook emphasizes that the economic benefit factor could potentially increase the penalty by a significant amount, and that removing economic benefit is one of the most important objectives of administrative monetary penalties. While actual dollar amounts are the best evidence, the Handbook recommends using the best evidence that is available, and assigning a value based on a description of the most likely economic benefit.

[132] The Appellant submitted an August 3, 2022, e-mail from Ron Zink of Corix to Mr. Zheng which stated that the original estimate for the proposed upgrade to the Facilities was $2 million but that, given the condition of the storage tanks and that there was root infiltration in one part of the collection system, the installation or repair of an underground pipe network could have a significant impact on the capital cost. Consequently, the capital costs to replace the Facilities were estimated to be approximately double those of the original estimate.

[133] I find that in this case, evidence shows that complying with the Amendment Letter would likely have required repair or replacement of large fixed assets as well as highly

specialized contracted services. This contravention is therefore best classified as a high-cost contravention.

[134] I agree with the Director's characterization of the Appellant's avoided costs as a high-cost contravention effected by avoiding the cost associated with construction and maintenance of new treatment works that would allow treatment to meet the nutrient limits in the Amendment Letter. However, I find his addition of $6,000 to the assessed penalty, 60 percent of the base penalty, for the economic benefit of avoiding the cost to substantially repair or replace the wastewater system is relatively low considering that both Corix and the Associated Engineering Report stated that system replacement would be required to comply with the Amendment Letter requirements and the high cost estimated by Corix.

[135] I find the Appellant did not meet a reasonable standard of care to comply with the Amendment Letter's nutrient limits. Such a standard would have included an attempt to upgrade, repair and/or replace the wastewater treatment equipment to attempt to comply with required nutrient limits, beyond installing a temporary water treatment facility (which was not replaced by a permanent one when required) and reorganizing responsibility for the Facilities, without any other significant physical improvements during the relevant penalty period. I have not received evidence that such physical changes were attempted. I make no deductions from the base penalty for the Appellant's due diligence.

[136] Regarding efforts to correct the contraventions of the Amendment Letter or efforts to prevent their recurrence, during the penalty period the Appellant assigned the then vice president of the Appellant's parent company to resolve outstanding matters, including making permanent updates to the wastewater treatment facilities. On February 15, 2022, after the penalty period, the Appellant entered into an MOU with Corix. It intended to transfer the Facilities to Corix, but the evidence does not show that this transfer took place. Similarly, the Associated Engineering Report examined options for upgrading or replacing the Facilities but no such options were implemented. I make no subtractions from the base penalty for efforts the Appellant made to correct the contraventions or prevent their recurrence, as I consider more than investigative and organizational efforts were required to warrant such an adjustment. I find there are no other relevant factors for a penalty adjustment.

[137] Based on the factors discussed above, while I would have issued larger penalty amounts, whether the Penalty amounts should be increased from those assessed by the Director is not an issue in this appeal. The only request in this appeal is for a reduction from the Penalties. As I have not found reasons to reduce the penalty amounts for the contravention of the Amendment Letter, I confirm the Director's $20,000 penalty decision as is.

5. Penalty for ongoing failure to comply with Permit section 2.8 (Operation and maintenance)

The Parties' submissions

[138] The Appellant did not make specific submissions relating to this penalty.

[139] The Director submits that Permit section 2.8 required the Appellant to develop and maintain both an Operational and a Maintenance manual for the sewage collection, sewage treatment, and effluent disposal works on or before December 30, 2012, and to retain copies of these manuals on site for inspection. The purpose of this requirement is to ensure the discharge of effluent to the ground does not cause harm to the environment or to human health.

[140] The Director states that the Appellant failed to maintain the required manuals between April 12, 2019, and July 20, 2021. The Director further asserts that the record shows that the required manuals have never been developed since their due date of December 30, 2012, and that the Appellant has not explained this failure.

[141] In assessing the penalty amount for the failure to develop and maintain the required manuals, the Director states he considered the nature of the contraventions to be moderate because it relates to a failure to comply with an operational requirement that, at minimum, creates a risk of harm to the environment and to human health and safety.

[142] The Director considered the actual or potential for adverse effect to the environment to be low to medium because it interferes with the Ministry's capacity to protect the environment and human health. The Director adds that the Ministry had repeatedly found that the wastewater treatment system was not being maintained in good working order and there was the potential for impacts to the receiving environment. He concluded that the actual or potential for adverse effects was considered to be low to medium. From these first two factors, the Director calculated a base penalty of $3,000.

[143] The Director added $600 to the assessed penalty, 20 percent of the base penalty, to account for the presence of previous contraventions, failures, and penalties going back to 2015, including violation tickets in 2015 and 2016 and the Previous Penalties.

[144] The Director stated that no records have been provided to show that a manual was ever developed by the due date of December 30, 2012, or after. The Director further stated that the Appellant had been informed, in inspection reports in 2015, 2019, and 2021, of the failure to comply with section 2.8. He added $300 to the assessed penalty, 10 percent of the base penalty, to account for the fact that the failure was continuous for at least three years.

[145] The Director added $300 to the assessed penalty, 10 percent of the base penalty, to account for the deliberate nature of the failure to develop the required manuals. The Director adds that the December 30, 2012, deadline was known the Appellant and it was given formal notice of this failure in inspection reports in 2015, 2019 and 2021.

[146] The Director added $300 to the assessed penalty, 10 percent of the base penalty, to account for the economic benefit to the Appellant of avoiding costs associated with the development and maintenance of the required manuals for at least three years.

[147] The Director made no downward adjustment of the penalty for any due diligence on the part of the Appellant, finding that there was no evidence the Appellant exercised reasonable care to prevent the failure to comply with Permit section 2.8. the Director made no downward adjustment for any efforts to correct the failures, finding that there was no evidence of any such effort. The Director similarly made no downward adjustment for the Appellant's efforts to prevent reoccurrence, finding that there was no evidence that the Appellant had made any effort to prevent recurrence of the failures. The Director considered that there were no additional factors relevant for penalty adjustment.

[148] Based on these adjustments, the Director concluded the total penalty amount for the ongoing failure to comply with Permit section 2.8 should be $4,500. The Director states he specifically considered the statements and arguments advanced by the Appellants in their OTBH Response, which acknowledged, but did not address, the failure to develop and maintain the required manuals since 2012.

The Panel's findings

[149] Section 2.8 of the Permit requires the Appellant to develop and maintain both an operational manual and a maintenance manual for the sewage collection, sewage treatment, and effluent disposal works on or before December 30, 2012, and to retain those manuals for inspection by the Ministry. Further, section 2.8 requires the Appellant to operate and maintain a system of preventative maintenance for the wastewater collection, wastewater treatment, and effluent disposal. The Permit does not specify particulars of the system of preventative maintenance.

[150] The Ministry inspection reports of 2015, 2019, and 2021 are evidence of the failure to develop and maintain the manuals. I have not received evidence of the presence of a system of preventative maintenance for the Facilities. These failures could hamper the operator's knowledge and ability to prevent, detect, and remedy malfunctions or failures, potentially causing a risk to the environment and human health and safety. I find that the nature of the contravention is in the moderate category, since it relates to a failure to comply with required tasks, actions, or operational requirements that, at a minimum, create a risk of harm to the environment and human health and safety.

[151] Regarding the contravention's real or adverse effects to the environment, I have not received evidence that the lack of the manuals or of a preventative maintenance system directly caused the spills that occurred and could be considered real adverse effects. However, without the manuals and a preventative maintenance system, the Facilities' operators may lack the information and preparedness required to lessen the potential risks identified for the nearby Kokanee population and for human health. As discussed previously, the potential risk without evidence of an actual impact is a

moderating consideration. Considering all of the above, I find that the actual or potential for adverse effects to the environment or human health to be low to medium.

[152] For a moderate contravention with low to medium real or potential adverse effects, the Handbook's base penalty tables suggest a base penalty between $5,000 and $10,000. The Director arrived at a base penalty of $3,000, which I consider to be low given that the failure to comply with section 2.8, at a minimum, created a risk of harm to the environment or to human health and safety.

[153] When assessing the appropriateness of modifications to the base penalty applicable for previous penalties, I have considered the violation tickets from 2015 and 2016 and the Previous Penalties, all of which included contraventions of section 2.8. I agree with the Director's conclusion that these previous contraventions are a basis for an increase of the assessed penalty of 20 percent of the base penalty.

[154] Regarding the continuity of the contravention, the evidence does not support a conclusion that the Appellant developed or maintained the required manuals or of the existence of a system of preventative maintenance since 2012 to the present. I note that the Ministry inspection reports of 2015, 2019, and 2021 confirm the continued infraction of section 2.8. Further, the November 2019 Associated Engineering report stated that an Operations and Maintenance Manual should be prepared and specifically refers to Permit section 2.8 when doing so. I therefore find the contravention was continuous during the penalty period from April 12, 2019, to July 20, 2021. While not relevant to my determination, I further find that this contravention was continuous from 2012 to July 20, 2021. I find the Director's addition to the assessed penalty of 10 percent of the base penalty for the continuity of the contravention is appropriate in the circumstances.

[155] The Ministry inspection reports of 2015, 2019, and 2021 and the November 2019 Associated Engineering report notified the Appellant of its failure to comply with section 2.8 of the Permit. In spite of these notifications, the contravention was not remedied. The Appellant did not provide sufficient persuasive evidence to establish that complying with this requirement was influenced by factors beyond the Appellant's control. I find that the Appellant was deliberate in this contravention, and agree with the Director's addition of 10 percent of the base penalty for the deliberate nature of the contravention.

[156] There was insufficient evidence to allow me to calculate either what the true value or an estimated value of the economic benefit received by the Appellant for this contravention. I find preventing the contravention would likely require contracting a qualified professional to develop and maintain an operational and a maintenance manual. I also find that it is likely that a technician would need to be contracted to oversee the ongoing operation and maintenance of a system of preventative maintenance for the sewage collection, sewage treatment, and effluent disposal works. The Director added $300 to the assessed penalty, 10 percent of the base penalty, to account for the economic benefit to the Appellant of avoiding costs associated with the development and maintenance of the required manuals for at least three years. I consider this addition to

be on the low side of the expenditures probably needed to comply with section 2.8 of the Permit, and I find there is insufficient basis to reduce the penalty assessed for the economic benefit factor.

[157] I find a reasonable standard of care to comply with section 2.8 of the Permit, as per s. 7(1)(g) of the *Regulation*, would have been some attempt to respond to the notifications, such as attempting to hire personnel or contract with an outside party to develop and maintain the manuals and to establish a system of preventative maintenance of the equipment. As I have not received evidence of such actions, I make no deductions from the base penalty for the Appellant's due diligence.

[158] The Appellant did not provide sufficient persuasive evidence to establish its efforts to correct or prevent the recurrence of the contraventions of s. 2.8 of the Permit. I make no alterations of the assessed penalty for efforts to correct the contraventions or to prevent their recurrence under s.7(1)(h) and 7(1)(i) of the *Regulation*. I find there are no other factors relevant to this penalty adjustment assessment.

[159] Based on the base penalty and penalty adjustment factors described above, while I found the total penalty of $4,500 assessed by the Director for the contravention of Section 2.8 of the Permit was on the low side of what I might have calculated, the only issue in this appeal is whether the Penalties should be reduced from those assessed by the Director. In the result, I find no reductions should be made and I confirm the Director's decision as is.

DECISION

[160] I considered the applicable factors in section 7 of the *Regulation* for each of the Appellant's non-compliances with the Permit and the Amendment Letter requirements. When doing so, I considered the relevant evidence presented to me and the parties' submissions. As determined above, the penalties will be confirmed as follows:

1. Penalty of $12,500 for ongoing failure to comply with Permit sections 2.1 (Maintenance of works and emergency procedures) and 2.3 (Process Modification);
2. Penalty of $8,870 for ongoing failure to comply with Permit section 2.6 (Posting of security);
3. Penalty of $2,000 for failure to comply with Permit section 4 (Reporting);
4. Penalty of $20,000 for failure to comply with the Permit Amendment Letter; and
5. Penalty of $4,500 for ongoing failure to comply with Permit section 2.8 (Operation and maintenance manuals, System of preventative maintenance).

[161] Based on the factors described above, the total penalty for all the contraventions in this appeal is $47,870. I find that this administrative penalty is appropriate in these circumstances, where the contraventions are varied and sustained and where previous administrative penalties issued to the Appellant were not effective in deterring further contraventions. It is intended that this administrative penalty will serve as a deterrent to the Appellant and to other holders of permits in similar circumstances.

[162] In making this decision, I considered all the relevant evidence and the submission of the parties, whether or not specifically stated in this decision. For the reasons set out above, I deny the appeal and confirm the total of the Penalties is $47,870.

"Diana Valiela"

Diana Valiela, Panel Chair
Environmental Appeal Board