



Environmental Appeal Board

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DECISION NO. EAB-EMA-21-A001(a)

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

BETWEEN:	Mount Polley Mining Corporation	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board: Teresa B. Salamone, Panel Chair	
DATE:	Conducted by way of written submissions concluding on June 30, 2021	
APPEARING:	For the Appellant:	Robert M. Lonergan and Christopher Erick, Counsel
	For the Respondent:	Stephen E. King and Cory Bargen, Counsel

APPEAL

[1] This appeal involves an administrative penalty determination (the "Determination") issued to Mount Polley Mining Corporation ("MPMC") for contravening section 2.10 of permit 11678 (the "Permit"). The Permit authorizes MPMC to discharge effluent from a mine it operates, the Mount Polley Mine. The Determination was issued on December 8, 2020, by Leslie Payette, acting as a Director under the *Environmental Management Act* (the "Director") in the Ministry of Environment and Climate Change Strategy (the "Ministry"). In the Determination, the Director imposed a penalty of \$9,000 for the contravention.

[2] The Environmental Appeal Board has the authority to hear this appeal under section 100 of the *Environmental Management Act* (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 disputes the Director's finding of non-compliance with the Permit and asks that the penalty be set aside, or in the alternative, that the penalty amount be reduced.

BACKGROUND

[4] MPMC is a subsidiary of Imperial Metals Inc. and is the operator of Mount Polley Mine, an open pit copper/gold mine near Likely, British Columbia. MPMC has been operating the Mount Polley Mine since 1997.

[5] MPMC has held the Permit since May 30, 1997. The Permit is issued under section 14 of the *Act* and authorizes MPMC's discharge of effluent from the Mount Polley Mine to Hazeltine Creek until December 31, 2017, and to Quesnel Lake until December 31, 2022. The Permit has been amended at various times, including amendments issued April 7, 2017, which included the section of the Permit that is the subject of this appeal.

Overview of the Permitting Legislation

[6] Section 6(2) of the *Act* states that, subject to subsection (5), a person must not cause or allow waste to be introduced into the environment while conducting a prescribed industry, trade or business. The Appellant's operation is a prescribed industry for the purposes of section 6(2), because it is a mining and coal mining industry under Schedule 1 of the *Waste Discharge Regulation*. Section 6(5)(a)(i) of the *Act* provides that the discharge of waste is not contrary to the *Act* if the waste discharge complies with a valid permit that is in effect at the time of the discharge.

[7] The Permit was issued under section 14 of the *Act*. Sections 14(1)(a), (d) and (e) are relevant to this appeal, and state:

14 (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

(a) require the permittee to repair, alter, remove, improve or add to works or to construct new works *and to submit plans and specifications for works specified in the permit;*

...

(d) require the permittee to *conduct studies and to report information specified by the director in the manner specified by the director;*

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;

[Emphasis added]

[8] The Director may amend a permit under section 16 of the *Act* under her own initiative if she feels the amendment is necessary, or at the request of the permit holder. A director's powers to amend a permit under section 16 of the *Act* include

changing or imposing any procedure or requirement that was imposed or could have been imposed under section 14. Specifically, under section 16(4)(h), the Director's powers to amend include:

- (h) altering the time specified for the construction of works or the time in which to meet other requirements imposed on the holder of the permit or approval;

History

[9] In 2014, the Mount Polley Mine was the site of a tailings dam failure. In response, mine operations were suspended until 2015. On November 29, 2015, the Permit was amended to include a Short-Term Water Management Plan, and a two-year temporary authorization to discharge to Quesnel Lake.

[10] In 2016, MPMC completed a Long-Term Water Management Plan and Technical Assessment Report (the "TAR") in which MPMC identified a range of water treatment technologies that would be investigated and evaluated for adoption, and included the timeline for that program.

[11] On April 7, 2017, Douglas J. Hill, acting as the Director under the *Act* for Mining Operations, issued amendments to the Permit, including section 2.10, which is the provision that is the subject of this appeal. MPMC and others appealed the April 7, 2017 amendments.

[12] Section 2.10 of the Permit imposed certain requirements for designing and testing systems to treat "mine influenced water", such as seepage from a mine pit. As of April 7, 2017, section 2.10 provided:

2.10 Bio-Chemical Reactors (BCR) Bench Scale Testing and Piloting:

The Permittee must submit:

- a) The Bench scale testing plan(s) within 60 days of the issuance of this permit amendment for review by the Director; and,
- b) A detailed design for the Pilot Passive Water Treatment system(s) by August 15, 2017 for review by the Director.

Both the above items must include documentation that the testing and piloting programs are relevant for all the different types of mine influenced water on site that the final water management plan needs to address and potential applications of BCR based treatment systems on site. For clarity, this includes the potential in-situ treatment of Springer-Cariboo Pit seepage waters containing submerged potentially acid generating waste rock.

The Pilot Scale BCR system(s) and, if necessary a Bench scale system specific to in situ treatment of Springer-Cariboo Pit water, and or other mine water generated on site must be commissioned and operational on or before December 1, 2017. The Permittee must submit "As built" drawing of the Pilot(s) and or further Bench Scale BCR system(s) on or before December 1, 2017.

[13] The deadline for submitting the Bench scale¹ testing plan under section 2.10 of the Permit was June 6, 2017. The deadline for submitting the design for a Pilot Passive Water Treatment system was August 15, 2017. The deadline for submitting "As built" drawings of the Pilot(s) or further Bench Scale BCR system(s) was December 1, 2017. The deadline for commissioning and operating a Bench scale system was December 1, 2017.

[14] MPMC appealed provisions of the April 2017 Permit. On October 2, 2018 the April 2017 Permit was amended based on that appeal. On October 11, 2018, MPMC withdrew their appeal of the April 2017 Permit. The 2018 amendments did not include changes to section 2.10 of the Permit.

Inspections and Compliance

[15] On May 9, 2018, the Ministry inspected the Mount Polley Mine. On July 12, 2018, the Ministry issued Warning Letter No. IR085587, which notified MPMC that it was out of compliance with Permit section 2.10. The Warning Letter stated:

MPMC submitted the Bench Scale Testing Plan on June 30, 2017, (which was submitted 84 days after the permit amendment, not within the specified 60 days).

MPMC did not report on conducting Pilot Scale BCR systems, and did not submit "As built" drawing of the Pilot(s) and/or further Bench Scale BCR system(s) on or before December 1, 2017. ...

[16] On October 9, 2018, the Ministry inspected the Mount Polley Mine. On December 6, 2018, the Ministry issued Warning Letter No. IR109119, which again notified MPMC that it was out of compliance with Permit section 2.10. The Warning Letter stated:

... MPMC has not submitted a detailed design for the Pilot Passive Water Treatment System, the Pilot Scale BCR system and Bench scale system specific to in-situ treatment mine water have not been commissioned, and no "as built" drawings of the Pilot(s) and further Bench Scale BCR system(s) have been submitted to date.

As reported by Alan Gibson (Ministry Authorizations Officer), MPMC are currently in discussions with Ministry Authorizations staff regarding the commissioning and operation of the Pilot Scale BCR system(s) and Bench Scale system. Until such time as these discussions have been completed, and this section is amended, the permittee remains out of compliance with these requirements.

[17] On January 7, 2019, MPMC, in response to Warning Letter IR109119, notified the Ministry that:

The Pilot Passive Water Treatment has been completed as of October 2018. Construction was delayed due to the strikes in Q2 and 3; operations will begin in spring 2019. As built drawings are currently being completed and will be submitted as soon as they are available. ... Detailed designs were

¹ "Bench scale" refers to the testing on a small scale, such as in a laboratory.

submitted to the Ministry of Energy, Mines, and Petroleum Resources September 13, 2018. MPMC will forward those designs to ENV.

[18] As explained in more detail below, on February 24, 2020, the Ministry issued a Notice Prior to Determination of Penalty (the "Notice Prior to Penalty"). The Notice Prior to Penalty informed MPMC that an administrative penalty could be levied as a result of MPMC's noncompliance with various parts of the Permit. The Notice Prior to Penalty gave MPMC the opportunity to make submissions before any penalty would be issued.

[19] In the Administrative Penalty Assessment Form attached to the Notice Prior to Penalty, the Director stated that on February 14, 2019, in response to discussions about permit amendments, the Ministry sent an Application Instruction Document to MPMC that explained what information should be included in an application to amend section 2.10 of the Permit. According to the Notice Prior to Penalty, this document stated:

Although you are requesting revision of permit conditions that MPMC has not met in full or in part, you are aware that you remain out of compliance with the current effluent discharge permit 11678. It is expected that your complete permit amendment application package will be submitted before May 14, 2019. If the final permit amendment application is not received by this date or is deemed substantially incomplete, your file may be referred to Compliance staff for consideration of further action.

[20] On April 23, 2019, the Ministry inspected the Mount Polley Mine.

[21] On May 14, 2019, MPMC submitted a final application for an amendment (the "Application for Amendment") of sections 2.8, 2.9, and 2.10 of the Permit, which was accompanied by several technical memoranda prepared by MPCA's technical consultants, Golder Associates ("Golder"). On June 6, 2019, the Application for Amendment was declared administratively complete by the Ministry.

[22] On July 26, 2019, the Ministry issued Administrative Penalty Referral No. 124119, which notified MPMC that based on the history of noncompliance and continued noncompliance with section 2.10, MPMC was being referred for an administrative penalty. Referral No. 124119 stated:

MPMC has not submitted a detailed design for the Pilot Passive Water Treatment System, the Pilot Scale BCR system and Bench scale system specific to in-situ treatment of mine water have not been commissioned, and no "as built" drawings of the Pilot(s) and further Bench Scale BCR system(s) have been submitted to date. ...

...MPMC submitted a final application package to amend Section 2.10 of the Permit. The final application is currently under review; however, MPMC remains out of compliance with this requirement.

Because MPMC has failed to return to compliance with this requirement and following the Ministry Non-Compliance Decision Matrix levels of escalating enforcement, this matter is being referred for an Administrative Monetary Penalty.

[23] On November 26, 2019, MPMC submitted documentation in response to the requirements of section 2.10 of the Permit.

Overview of the Administrative Penalty Scheme

[24] Under section 115(1)(c) of the *Act*, if a director “is satisfied on a balance of probabilities” that a person has “failed to comply with a requirement of a permit or approval issued or given under this Act,” the director may require the person to pay an administrative penalty.

[25] The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the “*Penalties Regulation*”), governs the determination of administrative penalties under section 115(1) of the *Act*.

[26] Part 2 of the *Penalties Regulation* specifies which sections of the *Act* and its regulations are prescribed for the purposes of section 115(1) of the *Act*, and the maximum penalties for contraventions. Section 12(5) of the *Penalties Regulation* states that the maximum penalty for failure to comply with a requirement of a permit or approval issued or given under the *Act* is \$40,000.

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

- a) the nature of the contravention;
- b) the real or potential adverse effect of the contravention;
- c) any previous contraventions, administrative penalties imposed on, or orders issued to the person who is the subject of the determination;
- d) whether the contravention was repeated or continuous;
- e) whether the contravention was deliberate;
- f) any economic benefit derived by the person from the contravention;
- g) whether the person exercised due diligence to prevent the contravention;
- h) the person’s efforts to correct the contravention;
- i) the person’s efforts to prevent recurrence of the contravention; and
- j) any other factors that, in the opinion of the director, are relevant.

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

[29] To assist decision-makers in determining an appropriate penalty using these factors, the Ministry has developed the *Administrative Penalties Handbook – Environmental Management Act and Integrated Pest Management Act*, dated June 2020 (the “*Handbook*”). The *Handbook* recommends first assessing a “base penalty” for the contravention. The base penalty is intended to reflect the seriousness of the contravention based on factors a) and b) above (i.e., the nature of the contravention, and any real or potential adverse effects). Additional amounts

are then added to, or deducted from, the base penalty after considering the "penalty adjustment factors" in subsections c) to j).

The Notice Prior to Penalty

[30] On February 24, 2020, the Director issued the Notice Prior to Penalty recommending a penalty of \$9,000 for contravening the Permit. The Notice Prior to Penalty includes information from the 2018 and 2019 inspections and details about the calculation of the proposed penalty.

[31] The Notice Prior to Penalty offered MPMC an opportunity to be heard, which involved providing written submissions to the Director before she made a final determination regarding the penalty.

[32] On August 14, 2020, MPMC provided its written submission and supporting information in response to the Notice Prior to Penalty. MPMC challenged both the contravention and the penalty. MPMC submitted that a penalty should not be imposed because:

... there has been no contravention. It was not possible to meet the requirements of Section 2.10 of Permit 11678. ...

In any event, if there was a non-compliance, it cannot be classified as "major" The proposed penalty is not proportionate with the circumstance and does not accord with the principles of the [Act].

The Determination

[33] On December 8, 2020, the Ministry issued the Determination, which described the scope of and penalty for MPMC's failure to comply with section 2.10 of the Permit.

[34] The Determination states that the penalty periods for failure to comply with section 2.10 of the Permit were as follows:

1. August 16, 2017 through November 26, 2019, for failure to submit detailed design of Pilot Passive Water Treatment System;
2. December 2, 2017 through November 26, 2019, for failure to commission and operate the Pilot Scale BCR system and, if necessary, a bench scale system specific to in situ treatment of Spring-Cariboo Pit water, and or other mine water generated on site; and
3. December 2, 2017 through November 26, 2019, for failure to submit "As built" drawing of Pilot(s) and or further bench scale BCR system.

[35] The Determination adopts the Penalty Assessment Form in the Notice Prior to Penalty, which explains how the Director calculated the penalty. It states that the Director chose a "base penalty" of \$10,000 to reflect the seriousness of the contravention. In that regard, the nature of the contravention (as per subsection 7(1)(a) of the *Penalties Regulation*) was "major", and the actual or potential adverse effect of the contravention (as per subsection 7(1)(b) of the *Penalties Regulation*) was "low". The Penalty Assessment Form states that the nature of the contravention was "major" because:

The failures to submit plans, to commission a pilot scale system and to submit drawings, and the resulting data are required by Ministry Authorizations staff to ensure that regulatory objectives will be achieved once the authorized period of discharge to Quesnel Lake expires on December 31, 2022. The prolonged failure to submit plans, and commission the pilot scale system and return to compliance undermines the basic integrity of the overarching regulatory regime and interferes with the Ministry's capacity to regulate.

[36] The Penalty Assessment Form states that the actual or potential adverse effect of the contravention was "low" because:

MPMC is authorized to discharge effluent to Quesnel Lake only until December 31, 2022. The testing required under Section 2.10 of the Permit was to ensure [sic] Ministry staff that MPMC would be capable of treating mine site effluent once treatment through discharge to Quesnel Lake expires on December 31, 2022.

[37] The Director then considered whether to increase or decrease the base penalty according to the "penalty adjustment" factors in subsections 7(1)(c) through (j) of the *Penalties Regulation*. The Director made no adjustments for factors c) (previous contraventions, penalties, or orders issued), e) (whether contravention or failure was deliberate), f) (economic benefit derived from the contravention), g) (due diligence to prevent the contravention), and j) (any additional factors that are relevant).

[38] For factor d) (whether contravention was repeated or continuous), the Director increased the penalty by \$1,000. The Director found that the failure to submit the required documents and take the required actions was continuous since the due date set out in section 2.10 of the Permit.

[39] For factor h) (efforts to correct the contravention), the Director decreased the penalty by \$1,000. The Director found that a \$1,000 reduction was appropriate because MPMC submitted required reports and plans in response to IR 124119 (the Administrative Penalty Referral).

[40] The Director also made a \$1,000 reduction under factor i) (efforts to prevent reoccurrence of the contravention or failure) based on MPMC's submission of a final application package to amend section 2.10 of the Permit and other documents intended to comply with section 2.10. Based on these evaluations, the Determination levied a penalty of \$9,000.

Appeal of the Determination

[41] On January 6, 2021, MPMC appealed the Determination and requested that it be set aside in its entirety. Alternatively, MPMC asked that the penalty be set aside in its entirety, that the Board conclude that no amount is payable, or that, if any penalty is to be imposed, it should be \$900 instead of \$9,000.

[42] MPMC also submitted that this hearing should be conducted based solely on the record available to the Director at the time of the Determination.

[43] The Board directed that the appeal be conducted by way of written submissions. The appeal was conducted as a new hearing of the matter, and not based solely on the record available to the Director at the time of the Determination. The Board considered the matter afresh, and has evidence that was new as well as evidence that was before the Director at the time of the Determination. A discussion of the decision to conduct the matter as a new hearing is provided below.

Subsequent amendments to section 2.10 of the Permit

[44] After the periods in 2017 to 2019 when the Director found MPMC to be out of compliance with section 2.10 of the Permit, further amendments were made to section 2.10.

[45] On February 1, 2020, based on the Application for Amendments, the Ministry issued revisions to the Permit (the "Revised Permit") that amended section 2.10 by replacing all existing obligations and deadlines with a requirement to submit a revised water management plan and an implementation schedule prior to December 1, 2020. MPMC appealed those amendments, specifically requesting the deletion of section 2.10 as amended.

[46] On September 18, 2020, the Board issued a Consent Order agreed to by the Director and MPMC, which resolved some of the issues in MPMC's appeal of the February 1, 2020 amendment. Among other things, the Consent Order included revisions to section 2.10 of the Revised Permit, as noted in a subsequent decision of the Board: *Christine McLean v. Director, Environmental Management Act*, Decision No. EAB-EMA-21-A002(a), May 6, 2021 [*Christine McLean*], at para. 18.

[47] On December 31, 2020, the Director issued an amended Permit (the "December 2020 Amendment") that included the amendments ordered in the Consent Order, as well as updates to some names in the Permit.

ISSUES

[48] In deciding this appeal, I considered the following issues:

1. What is the nature of this appeal to the Board under the *Act*?
2. Based on the submissions and evidence before the Board, did MPMC fail to comply with section 2.10 of the Permit?
3. If a contravention is found, should the penalty be reduced, based on the parties' submissions and evidence, and the relevant factors in section 7 of the *Penalties Regulation*?

DISCUSSION AND ANALYSIS

1. What is the nature of this appeal to the Board under the Act?

Summary of the Parties' submissions

[49] MPMC submits that while the Board has the discretion to “hear an appeal as a hearing on the records as a ‘true appeal’ or as a hearing *de novo*, or something along the spectrum of the two”, in this case, “it would be neither fair nor effective if the Board reopened the record.” MPMC argues that allowing new information in support of the opinions in the Determination would “create unfairness flowing from the Director getting another chance to rehabilitate her flawed reasons.” MPMC argues that the “Board has the complete record before the Director and there is no impediment to the Board hearing this appeal as a ‘true appeal.’”

[50] The Director submits that there is no reason to limit this appeal to the record, and she argues that new evidence such as the Director’s affidavit “provides relevant evidence that will assist the Board in its assessment of the merits of this appeal.”

The Panel’s findings

[51] Although I am not bound by the Board’s previous decisions, I note that the Board has considered the present issue in several previous decisions, and I find it helpful to consider the reasoning in those decisions.

[52] In *Emily Toews, et. al. v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(g) and 2013-EMA-010(g), December 23, 2015 [Toews], at paras. 99 and 100, the Board found that:

Pursuant to its authority under section 102(2) of the *EMA*, the Panel conducted these appeal as a “new hearing”....

The Board has broad remedial powers under section 103 of the *EMA*. Under section 103(c), the Panel may make any decision that the Director could have made and that the Panel considers appropriate in the circumstances. ...

[53] In addition, I note that section 40 of the *Administrative Tribunals Act* provides the Board with the discretion to “receive and accept information that it considers relevant, necessary and appropriate”.

[54] In *GFL, et. al. v. District Director*, Decision Nos. 2018-EMA-021(i), 020(b), 022(b)-028(b), 031(b)-034(b) and 036(b)-040(b) [Group File: 2018-EMA-G02], March 12, 2021 [GFL], at para. 303, the Board cited *Imperial Oil Ltd. v. Regional Waste Manager*, Appeal Nos. 2003-WAS-007(b); 2003-WAS-016(a), February 6, 2004 [Imperial Oil], at page 6:

In practice most hearings before the Board are a hybrid, of a hearing *de novo* and a true appeal. A full hearing of the evidence occurs, including new evidence, but the government official’s decision and the “record” before that decision-maker are also considered by the Board. In the Panel’s view, there is some indication that the Legislature intended this to be the case. It has specifically authorized the hearing of evidence under the *Environment Management Act* and has given the Board broad remedial powers. Further, neither the *Environment Management Act* nor the *Waste Management Act* refers to the decision below. However, the Board can summons witnesses and the original decision maker is made a full party. Clearly this allows the

Board to hear both the evidence from the record below and additional evidence that was not part of that record.

For the vast majority of appeals, this hybrid procedure facilitates full evidence and argument to be presented to the Board. Defects or deficiencies in the process below may then be cured rather than sent back to the original decision-maker, only to have the administrative decision-making and appeal processes begin again. It therefore results in some administrative efficiencies and cost savings to all involved.

To summarize, the Panel finds that the legislation provides the Board with the discretion to hear an appeal as a true appeal, an appeal *de novo*, or a hybrid of the two.

[55] In *GFL*, the Board continued at paras. 304 to 307:

Since *Imperial Oil*, the Board has confirmed this characterization of the hearing process: *City of Cranbrook v. Assistant Regional Waste Manager* (Decision No. 1999-WAS-023(c), April 9, 2009); and, *5997889 Manitoba Ltd. v. Acting Regional Executive Director* (Decision No. 2015-WAT-007(a), November 17, 2016). We adopt the Board's reasoning in *Imperial Oil*.

The hybrid nature of some administrative tribunal processes has been recognized by the courts: *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080 (CanLII)).

Furthermore, the courts have recognized that the Board is an "expert tribunal": *Burnaby (City) v. Environmental Appeal Board*, 2017 BCSC 2267, at paragraph 64. Similarly, in *Lindelaufer v. British Columbia*, 2017 BCSC 626, at paragraphs 34 and 35, the Supreme Court of British Columbia recognized the Board as a "specialized tribunal" that owes no deference to the original decision-maker when conducting an appeal as a new hearing:

The EAB is a specialized tribunal. The Legislature's decision to establish such a tribunal reflects "the complex and technical nature of the questions that might be raised" and that the tribunal "plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para. 57.

... In hearing these appeals, the EAB holds a new hearing. The EAB receives new evidence and arguments that were not before the Water Manager and owes no deference to the decision of the Water Manager under appeal.

The Court recently confirmed that the Board owes no deference to the original decision-maker when the Board is hearing a matter *de novo*: *British Columbia (Assistant Water Manager) v. Chisholm*, 2020 BCSC 545, at paragraph 25. The Panel accepts and applies the Court's reasoning in *Chisholm* to these appeals.

[56] I agree with the analysis in GFL and adopt the findings that a hybrid appeal process is appropriate for the vast majority of cases heard by the Board.

[57] I find that the evidence in this case included a combination of new information and existing information, and therefore, it is most appropriate to conduct the hearing as a “hybrid” process rather than either a purely *de novo* hearing or a true review.

[58] MPMC quoted extensively from *Imperial Oil* and agrees that “the Board has acknowledged that, in practice, appeals are heard as a combination of a true appeal and a new hearing considering fresh evidence.” MPMC argues, however, that notwithstanding the authority of the Board to conduct a *de novo* or even hybrid hearing, the decision under review in this case “relates to a draconian administrative monetary penalty system, which calls for careful scrutiny”, citing *Williams v. Canada (Public Safety and Emergency Preparedness)*, 1017 FCA 252, at para. 44 [*Williams*]. MPMC also relies on *Doyon v. Canada (Attorney General)*, 2009 FCA 152 [*Doyon*], and *Harelkin v. University of Regina*, 1979 Can LII 18 (SCC). [*Harelkin*].

[59] In *Williams* at para. 44, in interpreting a statute relating to the seizure of currency, the court found that the absolute liability provisions in that and similar laws deserve “careful scrutiny”. In *Doyon* at para. 28, the court also stressed the weight of absolute liability provisions and the need for the decision maker to “rely on evidence based on fact and not mere conjecture, let alone speculation, hunches, impressions, or hearsay.” In *Harelkin*, the court was concerned with the potential negative impacts of an appeal process and cited with approval the need for the “speedy and inexpensive as well as efficacious administration of justice”: *The King ex rel. Lee v. Workmen’s Compensation Board* [1942] 2 D.L.R. 665.

[60] MPMC appears to argue that the nature of the *Act’s* penalty provisions is such that the Determination requires the special scrutiny as outlined in these cases. I find that conducting a hybrid hearing in this case allows for careful scrutiny of the Determination, allows for the reliance on all admissible evidence and not mere conjecture or speculation, and allows for a speedy, inexpensive, and efficacious administration of justice.

[61] MPMC also argues that the careful scrutiny should be limited to the information that was available to the Director at the time of the Determination because to do otherwise would give the Director the opportunity to add new information that would bolster her Determination. According to MPMC, a *de novo* review allows the Director “another bite at the cherry” having “carefully grappled with the evidence and failed.”

[62] In *Imperial Oil* at page 18, the Board found that:

In the Panel’s view, an appeal under Part 4 of the *Waste Management Act* is not merely an opportunity to determine whether a decision is correct or incorrect based on the information available at a particular point in time. It is generally an opportunity to correct mistakes and determine the most effective and fair method of addressing the public interest concerns of health and the environment based on the most relevant evidence available.

[63] I agree with the description of the goals of an appeal expressed by the Board in *Imperial Oil* as those goals relate to benefits of evaluating the “most relevant evidence available.” As a result, I have considered the evidence that was before the Director, plus the new evidence that was presented by way of documentary submissions, and have considered whether to exercise any of my powers under section 103 of the *Act*, including the power to make any decision that the Director could have made under section 115 of the *Act*.

[64] Moreover, I find that it is not unfair to determine whether, based on all the relevant and admissible evidence and submissions provided by the parties in this appeal, MPMC violated the Permit’s terms and conditions, and if so, what penalty is appropriate.

2. Based on the submissions and evidence before the Board, did MPMC fail to comply with section 2.10 of the Permit?

Summary of Appellant’s Submissions

[65] MPMC submits generally that it should not be found in contravention of section 2.10 of the Permit, because the actions required by section 2.10 could not be met. Specifically, MPMC argues:

1. The policy of the Ministry of Environment and Climate Change Strategy, titled *Best Achievable Technology*, dated March 2015 (the “*BAT Policy*”), calls for an evaluation and ranking of different available technologies in a deliberate, logical manner before determining which technology is the best achievable. The steps envisioned in section 2.10 of the Permit for bench scale testing, commissioning and construction of a biochemical reactor were inconsistent with the evaluation and ranking steps set out in the *BAT Policy*.
2. The timelines established in section 2.10 of the Permit were not attainable. According to MPMC’s expert engineering and environmental consultant, the process contemplated by section 2.10 would have required at least 34 months to complete, and not the 7.9 months allowed in the Permit. There were no steps that MPMC could have taken to avoid missing a deadline that could not be met.
3. Given that the requirements in section 2.10 of the Permit were not consistent with the *BAT Policy* and were not practically achievable, MPMC could not be found to be in contravention.
4. MPMC was under no legal obligation to appeal or request an amendment to section 2.10, and cannot be found in contravention for failure to do so.

Summary of Respondent’s Submissions

[66] The Director submits that MPMC failed to comply with section 2.10 of the Permit. In support, the Director argues:

1. The requirements of section 2.10 of the Permit were clear and remained in effect for almost three years. There was nothing in the Permit that would relieve MPMC from complying with section 2.10.

2. The *BAT Policy* is not a legally enforceable document, and the language of that policy does not supersede the specific enforceable requirements of the Permit.
3. The intent of the Ministry to enforce section 2.10 as written was clearly expressed in two written inspection reports issued to MPMC, each of which were issued prior to the referral for potential administrative penalty.
4. MPMC could have appealed section 2.10 at the time of the issuance of the Permit and could have applied for modification of that provision at any time.

The Panel's Findings

Reliance on BAT Policy

[67] MPMC argues that it should not have had to comply with the terms of section 2.10 because compliance would be inconsistent with the proper evaluation of a treatment technology as set out in policy guidance provided by the Ministry for identifying BAT. According to MPMC, section 2.10 "presumes the outcome of the studies" is that BCR would be identified as the appropriate technology.

[68] The Director submits that the Permit is the only document that should be considered for purposes of determining permit compliance obligations.

[69] According to the *BAT Policy*, the "BAT evaluation provides Ministry staff with information to support the setting of waste discharge standards, *but is not used to prescribe specific technologies or equipment for use.*" [Emphasis added]

[70] The steps for identifying BAT as set out in the *BAT Policy* may be summarized as:

1. Identify all technologies and options;
2. Eliminate technically infeasible options.
3. Evaluate the reliability of each option in terms of the probability that at the technology will operate according to its specifications.
4. Rank options by control effectiveness in terms of relative discharge intensity.
5. Rank cost effectiveness of each option in terms of dollars per unit of emission reduction.
6. Recommend which option is the BAT.

[71] In reviewing the Permit, I find that section 2.8 of the Permit contemplates the development and implementation of a draft and final water management plan "that includes BAT technology to address contaminants not removed by the current Actiflo system and/or extend duration passive settling of the mine wastewaters." Section 2.8 contemplates the evaluation of a range of "works" to manage site-wide wastewater.

[72] In comparison, section 2.10 describes the procedures for the design and testing of one specific treatment technology, described as Bio-Chemical Reactors or BCR. There is no reference to "BAT" in section 2.10, and there is no requirement in section 2.10 that BCR be evaluated as an appropriate technology from among a

range of technologies. Section 2.10 only requires that the testing and piloting of the BCR must document that “the testing and piloting programs are relevant for all the different types of mine influenced water on site that the final water management plan needs to address and potential application of BCR based treatment systems on site.”

[73] MPMC argues that the requirements of section 2.10 amount to a choice of BCR technology without the evaluation of other options, and I find that this may be true. There is no specific information in the record to explain the language of section 2.10 as it relates to BCR technology. However, I find that the apparent choice of BCR technology, and the permit provisions relating to BCR testing and design, should be enforced as written and that the *BAT Policy* does not supercede the specific requirements of the Permit.

[74] I agree with the Director’s submission that notwithstanding Ministry guidance relating to the evaluation of BAT, the terms of the Permit are the only requirements relevant for evaluating permit compliance. Moreover, while the *BAT Policy* might provide some structure for the evaluation of a variety of technology options that might be adopted in the final water management plan as envisioned by section 2.8, there is no need for a wide-ranging evaluation of many technologies in order to comply with the more specific language of section 2.10 of the Permit.

[75] I find that MPMC cannot rely on the *BAT Policy* as a basis for avoiding a finding of contravention of section 2.10 of the Permit.

Impossible to Comply with Permit Terms

[76] MPMC also argues that the deadlines imposed by section 2.10 were unattainable, and therefore, MPMC cannot be penalized for failure to meet those deadlines.

[77] In the Determination, the Director stated:

MPMC submits that there was no step they could have taken to avoid missing a deadline that cannot be met. I reject this argument as MPMC was involved in setting the requirements, had the ability to appeal the requirements when the Permit was issued and had the ability to request an amendment to the requirements. ...

... I do not believe they took all reasonable efforts to comply with the requirement or to have it amended in a timely manner.

[78] The Director submits that “MPMC’s submissions regarding the challenges in complying are undermined by MPMC’s eventual partial compliance and do not address the fundamental principle that compliance with all permit conditions is necessary.”

[79] As a threshold matter, I considered the source of the deadlines included in section 2.10 of the Permit and the authority of the Director to include such deadlines.

[80] In her affidavit accompanying her submissions, the Director provided some background on the goals for the deadlines included in section 2.10 of the Permit:

... following the breach of the tailings dam and the issuance of the Pollution Abatement Order, the discharge authorized in the Permit was temporary in nature in that the authorization to discharge expires on December 31, 2022. *There are key milestones in the Permit to ensure that MPMC develops the details of a final water management plan* and there were key submissions and testing required related to compliance with Section 2.10 of the April 2017 Permit.

[Emphasis added]

[81] There is also evidence in the record that MPMC had a role in identifying the deadlines in section 2.10 of the Permit.

[82] In its submissions, MPMC stated that in 2016, it completed the TAR.

[83] The documents provided with MPMC's submissions also include an exchange of email messages between Alan Gibson, P.Eng. (Senior Environmental Protection Officer), Colin Meldrum (Senior Environmental Protection Officer), and the Director, who are all employees of the Ministry. In a November 30, 2020 email exchange in response to a question from the Director, Mr. Gibson provides the following comment:

The dates in the 2017 permit were taken from the Long Term Water Management Plan Technical Assessment Report 2016 (LTWMP) that accompanied Mount Polley's permit amendment application. Section 9 Implementation Schedule of the LTWMP (below) lists all the dates. Mount Polley still refers to this document, so it must be still relevant. If the time lines were not realistically attainable, then Mount Polley should not have included the time lines in the LTWMP and included the treatments and dates when they appealed the 2017 permit.

[84] Attached to this email was the section 9.0 Implementation Schedule from the TAR, which identifies dates for milestones associated with the Pilot Passive Water Treatment Research, Testing and Construction to occur between January 2017 and fourth quarter 2017.

[85] On November 30, 2020, Mr. Meldrum stated via email to the Director:

My understanding is that MPMC was heavily involved in setting those originally [sic] requirements and the deadlines. It is therefore somewhat unfair to call them unachievable. If they were unachievable, then MPMC knew this from the moment the Permit was amended and did nothing to correct things until Authorizations began working with them. Even more accurately, MPMC did little until Compliance issue and [sic] IR.

[86] I also note that a January 23, 2020 Ministry Assessment Report on MPMC's May 14, 2019 application to amend the Permit states on page 3 that:

... The effluent treatment options discussed in the [TAR] *were included in the 2017 effluent permit along with the implementation schedule and piloting schedule of the passive treatment section* (Section 9.0 Implementation Schedule, October 17, 2016).

[Emphasis added]

[87] Section 16(4)(h) of the *Act* gives the Director the authority to amend a permit by “altering the time specified for the construction of works or the time in which to meet other requirements imposed on the holder of the permit or approval.” There is no requirement for the Director to consult with or reach a consensus with the permit holder when specifying timeframes.

[88] In this case, it appears from the record that the deadlines in section 2.10 were based, at least in part, on timeframes suggested by MPMC in the TAR as part of the long term water management plan. Although consultation was not required under section 16(4)(h) of the *Act*, the Director included MPMC’s suggested dates into the Permit. It weakens MPMC’s argument in this case that the deadlines were unattainable, when MPMC was in part responsible for, or at least had knowledge of, those dates prior to their inclusion in the Permit.

[89] I find that the Director had the authority under section 16(4)(h) of the *Act* to include deadlines in the Permit for completion of various activities associated with the BCR technology, with or without consultation or approval of MPMC. As noted, if MPMC felt that the deadlines were unattainable, MPMC’s options were to appeal the Permit or seek a permit amendment.

[90] Notwithstanding the source of the deadlines, MPMC argues that the deadlines were unattainable, and therefore, it cannot be held responsible for complying with those deadlines.

[91] First, MPMC argues that there was insufficient time to conduct the required testing in the time allotted if the *BAT Policy* was followed. As noted above, I find that MPMC was not constrained or limited by the *BAT Policy* on its path to achieve compliance with the terms of section 2.10 of the Permit.

[92] Second, MPMC argues that even without the broad evaluation scheme anticipated by the *BAT Policy*, it would have been impossible to comply with the deadlines set out in section 2.10, citing an August 7, 2020 Technical Memorandum prepared by Golder, its environmental consultants. In that Memorandum, Golder stated that section 2.10 of the Permit provides approximately 8 months to complete the action items required by section 2.10, but that the actual time necessary to complete all those activities was 34 months.

[93] I interpret MPMC’s argument to be, essentially, that compliance with the tasks required by section 2.10 was possible, but compliance by the deadlines established in the Permit was impossible, and therefore, MPMC cannot be held in contravention of the Permit for failure to complete the required tasks.

[94] I find this argument to be without merit. On July 26, 2018, MPMC notified the Ministry that “The test designs for the BCR Bench-Scale testing has been completed with testing to continue for the rest of the year. A testing report will be completed and forwarded to ENV during the 1st Quarter or early in the 2nd Quarter.” This is an indication that MPMC was carrying out the substantive requirements of section 2.10, but had not yet provided the documentation to demonstrate compliance.

[95] On January 7, 2019, in response to Warning Letter IR109119, MPMC notified the Ministry that:

The Pilot Passive Water Treatment has been completed as of *October 2018*. Construction was delayed due to the strikes in Q2 and 3; operations will begin in spring 2019. *As built drawings are currently being completed and will be submitted as soon as they are available. Detailed designs were submitted to the Ministry of Energy, Mines, and Petroleum Resources September 13, 2018. MPC will forward those designs to ENV.*

[Emphasis added]

[96] According to another Golder Technical Memorandum provided by MPMC dated May 13, 2019 and submitted with the Application for Amendments, Golder also carried out BCR bench-scale testing from November 2018 through February 2019.

[97] The ultimate obligation in section 2.10 of the Permit was to complete the evaluation of the BCR technology, and MPMC has demonstrated that at least some aspects of the evaluation was possible and was completed at least eleven months prior to final submission of the relevant documents. Clearly, therefore, it was not “impossible” for MPMC to conduct the actions required by section 2.10. Furthermore, since MPMC had already submitted detailed designs to the Ministry of Energy, Mines and Petroleum Resources on September 13, 2018, it was possible for MPMC to submit those designs in response to the requirements of section 2.10 of the Permit.

[98] MPMC cites *R. v. Cobalt Construction Inc.*, 2018 YKSC 36 [*Cobalt Construction*] in support of the argument that a defence of impossibility is available in this case. However, I find that *Cobalt Construction* can be distinguished as it relates to a strict liability offence and consideration of the common law defences of due diligence and impossibility. At paras. 55 and 56 of *Cobalt Construction*, the court noted that the defence of impossibility applies in a strict liability context as part of the due diligence defence. In contrast, the legislation in the present case imposes absolute liability when an administrative penalty is being levied for a contravention. Section 6 of the *Penalties Regulation* provides:

6. 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.

[99] Consequently, I will not consider due diligence or the defence of impossibility as an element of determining compliance with section 2.10 of the Permit. Due diligence is considered, however, under section 7(1)(g) of the *Penalties Regulation* when determining the amount of the penalty.

[100] I further find that if MPMC was unable to complete the requirements of section 2.10, MPMC had the opportunity and experience to either appeal or apply to amend the Permit as a way to respond to the potential for contravention.

[101] In a related case, *Christine McLean*, the Board noted at paras. 12 and 13 that MPMC “appealed the April 2017 Amendment to the Board”, and that on October 11, 2018 “MPMC advised the Board that the October 2018 Amendment addressed the issues in its appeal of the April 2017 Amendment. MPMC withdrew that appeal.” Section 2.10 was not included in the October 2018 Amendment. The timely appeal

of the Permit in 2017 was MPMC's first opportunity to revise the deadlines in section 2.10 that it felt were unattainable.

[102] Even after the 30-day period for appealing the April 7, 2017 amended Permit had passed, MPMC still had the option of requesting an amendment to the Permit. It did so, but not until more than two years had passed since the April 7, 2017 amended Permit was issued. MPMC's Application for Amendment of sections 2.8, 2.9, and 2.10 of the Permit was not submitted until May 14, 2019.

[103] In a February 9, 2018 email to the Ministry, MPMC expressed its understanding of this option: "MPMC understands now that it is required that a formal amendment application relative to Section 2.8, 2.9 and 2.10 of EMA Permit 11678 be submitted."

[104] On February 14, 2018, the Ministry replied to MPMC and stated that if MPMC was unable to meet the dates set out in the Permit, it should request an extension to the deadlines or an amendment to the Permit. This was MPMC's next pre-enforcement invitation and opportunity to address concerns about compliance with section 2.10. The Ministry provided two options: request an extension, or seek a permit amendment.

[105] On May 9, 2018, the Ministry conducted an inspection of the Mount Polley Mine. On July 12, 2018, the Ministry notified MPMC that, based on the inspection, MPMC was out of compliance with section 2.10 of the Permit. Although MPMC had identified its concerns with the deadlines, it had taken no steps to address the risk of noncompliance by the May 9, 2018 inspection.

[106] After additional discussions with the Ministry, and two subsequent inspections that identified noncompliance with section 2.10, MPMC submitted its complete permit amendment application on May 14, 2019, which included a request to revise section 2.10.

[107] On July 26, 2019, the Ministry again notified MPMC that it was out of compliance with section 2.10 and iterated that MPMC would remain out of compliance until MPMC either submitted proof of compliance with section 2.10 or the requested permit amendments had been approved. On the same date, MPMC submitted another progress report in which it identified two documents associated with the requirements of section 2.10 but did not submit either report to the Ministry.

[108] I find that MPMC was able to conduct the tests and evaluations required by section 2.10 and that it was not "impossible" to do so. Although it might not have been possible within the deadlines established by the Permit, MPMC could have avoided contravention of the Permit by appealing the Permit, documenting and submitting proof of its efforts to comply, or requesting a timely permit amendment. It did none of those things. I also find that whether section 2.10 of the Permit was ultimately amended has no bearing on compliance during the effective dates of that provision.

Permit Amendment to Avoid Noncompliance

[109] MPMC argues that the true nature of this action is to penalize them for failing to appeal or amend the Permit, and that "MPMC has no legal authority to 'have it amended' and cannot be found in contravention for failure to do so."

[110] The Director submits that the finding of contravention is for failure to comply with the terms of section 2.10 of the Permit, and not for failure to appeal or request an amendment to the Permit.

[111] The Director identified the duration of the penalty as beginning on the first date of failure to comply with the obligations of section 2.10 of the Permit, and ending on the date that documents were submitted to demonstrate compliance with that section. The period of contravention as set out by the Director was not framed by either the date of submission of the permit amendment application or the date that the Permit was finally amended. I find that the dates for the contravention as described by the Director are appropriate and accurately reflect the period of noncompliance with section 2.10 of the Permit. I agree with this timeframe because, as I have found, the language of the Permit defines the meaningful compliance obligation. In addition, I found that MPMC's efforts to comply with section 2.10 were possible without an amendment to the Permit. Therefore, I find that MPMC contravened the Permit by failing to comply with the terms of section 2.10 of the Permit, and not by failing to appeal or request an amendment to the Permit in a timely way. They are separate questions, even if a permit amendment request addresses matters that might affect compliance with an existing provision, and even if the Permit amendment sets the standard for what constitutes compliance after the amendment is done.

[112] I find that MPMC failed to comply with the terms of section 2.10 of the Permit. The Director's Determination with regard to the contravention is, therefore, confirmed.

3. If a contravention is found, should the penalty be set aside or reduced, based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*?

Summary of MPMC's submissions

[113] MPMC submits that the Director's rationale for assessing the penalty was incorrect because strict compliance with section 2.10 was not necessary to "maintain the integrity of the overarching regulatory regime." Although MPMC did not submit the specific plans required by section 2.10, it did provide the Ministry with information "to demonstrate that the regulatory objectives will be achieved once the authorized period discharge to Quesnel Lake expires." In addition, the requirements of section 2.10 were not necessary as they were removed from the Permit entirely by the February 1, 2020 amendments to the Permit.

[114] Moreover, MPMC submits that the Director's position that compliance with section 2.10 was necessary to prove that MPMC would be "capable" of managing wastewater after the December 31, 2022 expiration date was incorrect. This is because the Ministry is aware that MPMC has the ability to continue to discharge using existing infrastructure, and although the deadline is set out in the Permit, the Permit could be renewed and that deadline extended.

[115] MPMC also argues that no penalty should be assessed, but if one is to be assessed, the contravention should be considered “minor” with an appropriate base penalty of \$1,000. This \$1,000 penalty should be further reduced by ten percent to reflect efforts to prevent reoccurrence of the contravention.

Summary of the Director’s submissions

[116] The Director submits that the detailed designs and testing anticipated by section 2.10 were necessary to demonstrate to the Ministry that MPMC would be capable of “treating mine effluent once treatment through the discharge to Quesnel Lake expires on December 31, 2022.” The contravention was appropriately classified as “major” because the failure to demonstrate compliance with section 2.10 “undermines the basic integrity of the arching regulatory regime and interfered with the Ministry’ capacity to regulate.”

[117] The Director states that the penalty imposed was appropriate and was less than the maximum allowable, did not include findings of a daily penalty, and did not include an addition to recognize the economic benefit gained from noncompliance that might also have been imposed. Moreover, MPMC had the opportunity to either appeal the Permit provision or apply for an amendment in a timely manner, either of which would have reduced or eliminated the period of noncompliance.

[118] The Director reviewed considerations with respect to each of the factors in section 7 of the *Penalties Regulation*. The Director submits that, given the repeated or continuous nature of the contravention, and the efforts by MPMC to correct the contraventions and to prevent recurrence of the contravention, a penalty of \$9,000 is appropriate in the circumstances.

The Panel’s findings

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

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

[120] The Director found that the nature of the contravention was “major” as categorized by the Handbook. Although I am not bound by the guidance in the Handbook, I will review the categories of penalties as raised by the parties. Under the guidance in the Handbook, a major contravention can include “administrative requirements that form the basis of a regulatory regime and government’s only way to ensure that the regulatory objectives will be met. Examples include failure of a person to provide information....”

[121] MPMC argues that the Director incorrectly assessed the contravention as “major” based on the relationship between the development of technology under section 2.10 and the impending expiration of the “authorized discharge period”.

[122] Section 1.2.2 of the Permit provides:

The authorized discharge period(s) is subject to the following conditions:

...

- iii. Use of the Quesnel Lake outfall is authorized until December 31, 2022.

[123] MPMC argues that although the discharge authorization expires in 2022, the authorization to discharge could be renewed, and therefore, the finding of a major contravention based on this potentially variable deadline was “unlawful”.

[124] I find that it is appropriate to assess the penalty based on the Permit as it existed at the time of the contravention. Even if MPMC might, in the future, apply to renew the Permit and/or extend the December 31, 2022 deadline, it is unknown whether the Ministry would approve such an extension. Speculation about whether a permit would be amended in the future is not relevant to the current need for information to demonstrate that the goals of an existing permit are being met. This is particularly true of the Permit, which was amended in response to the tailings dam breach in 2014 and which reflects the environmental goal of developing a long-term water management plan for the site that does not include a discharge to Quesnel Lake.

[125] Moreover, it is also not clear whether or how the Permit would be revised. Under section 16(1) of the *Act*, a director may amend a permit either on the director’s own initiative, or on application by a permit holder. In this case, although the Permit was amended in February 2020 based on an amendment application submitted by MPMC, the December 31, 2022 deadline related to using the Quesnel Lake outfall in section 1.2.2.iii. of the Permit was not included in the amendment application, and according to the Ministry, remained unchanged. According to the Board in *Christine McClean* at para. 20, the provision prohibiting the discharge into Quesnel Lake after December 31, 2022 was also unchanged in the December 2020 Amendments, which were the result of a Consent Order issued by the Board following an agreement between the Ministry and MPMC to resolve some of the issues in MPMC’s appeal of the February 2020 permit amendment.

[126] MPMC also argues that it has “not left the Ministry in the dark as to its plans regarding water treatment” and although the specific plans required by the Permit were not submitted, “this did not leave the Ministry Authorizations staff unable to ensure that the regulatory objectives will be achieved once the authorized period of discharge to Quesnel Lake expires.” However, MPMC did not point to specific reports or documents received by the Ministry to support this claim. To the contrary, in the Ministry Assessment Report of the February 14, 2019 permit amendment application, the Ministry stated: “Based on the latest MPMC progress reports, I do not believe that Mount Polley will be able to have the required treatments in place before the end of 2022.”

[127] MPMC argues that if a contravention is found, it should be considered “minor” with a base penalty of \$1,000 and a 10 percent discount because the “asserted non-compliance is, at most, an administrative failure to provide reports within specified timeframes. The non-compliance did not impede the Ministry’s ability to protect the environment and regulate and the alleged contravention did not have any environmental impact.” I disagree with MPMC’s characterization of the failure to comply with the requirements of section 2.10 as an administrative failure. As noted above, the contravention is for failure to carry out the specific and substantive requirements of section 2.10 relating to BCR technology, including design, testing,

and construction of an associated water treatment system, and to document that compliance.

[128] I find that MPMC's failure to comply with a term of its Permit for more than two years undermined the integrity of the legislative scheme, and interfered with the Ministry's ability to protect the environment from the potential impacts of waste discharge. Section 2.10 was very specific in its identification of a treatment technology and was deliberate in its expectations for assessing the effectiveness of that technology. Although I am not bound by the guidance in the Handbook, I find its descriptions helpful in fostering consistency and quality in decision-making. Neither party has provided sufficient reason why I should not rely on the Handbook, and as a result, I have used it to guide my analysis of the appropriate amount of the administrative penalty. In that regard, the Handbook explains that a major contravention can include the "failure of a person to provide information that forms the basis of the regulatory regime and government's only way to ensure that regulatory objectives are being achieved." Considering the nature of the information required by section 2.10 and its regulatory goals, I find that the failure to provide information in this case was "major" in nature.

[129] With regard to actual or potential adverse effects of the noncompliance, I agree with the Director that the contravention had "low" actual or potential adverse effects since the obligations in section 2.10 were designed to assess future discharge options, MPMC did conduct some of the technical assessment, and the information was ultimately provided to the Ministry.

[130] Finally, I have considered the maximum penalty under section 12(5) of the *Regulation* that could be imposed for the failure to comply with the requirement of a permit, which is \$40,000. Although the assessed \$10,000 base penalty is at the low end of the scale relative to the maximum penalty, it is still a significant amount. Overall, I find that this is an appropriate amount given the major nature, and low actual or potential impact, of the contravention.

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

[131] I find that the Determination appropriately characterizes MPMC's contravention as a single continuous contravention, and that there is no evidence of any prior contraventions.

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

Factor d): whether the contravention was repeated or continuous

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

Factor e): whether the contravention was deliberate

[134] According to the Handbook, "knowledge, willfulness and intent are indicators of deliberateness." MPMC began attempts at compliance with section 2.10 on June

30, 2017, with the submission of the BCR Bench Testing Plan. On January 9, 2018, MPMC notified the Ministry of its concerns about the remaining deadlines set out in section 2.10 in Progress Report #1. MPMC and the Ministry continued to discuss options for addressing the obligations of section 2.10, and although MPMC failed to meet the terms of the Permit, I find that the contravention was not deliberate as MPMC did begin design and construction of the BCR. I agree with the Director that no amount should be added to the based penalty for deliberateness.

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

[135] Although the Director notes that MPMC benefited economically from the contravention by not paying costs associated with retaining professionals to undertake the work required by section 2.10 of the Permit, the Director did not add an amount to the base penalty for this factor. I find that MPMC did incur expense by conducting some of the required activities, and therefore, I agree with the Director that no amount should be added to the base penalty for economic benefit.

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

[136] The Director found that MPMC did not exercise due diligence to prevent the contravention, and she did not adjust the base penalty to account for due diligence. I find that MPMC did not take sufficient steps to avoid noncompliance, which could have included a request to the Ministry to adjust the deadlines as well as a timely application for a permit amendment. MPMC could also have included section 2.10 in its appeal of the April 7, 2017 amendments to the Permit. In addition, MPMC had actually begun to take steps to comply, and could have submitted proof of compliance, earlier than it did. As such, I find that no reduction in the base penalty is warranted for due diligence.

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

[137] MPMC initiated compliance with section 2.10 by submitting the Bench Scale Testing Plan to the Ministry on June 30, 2017. MPMC also submitted two additional reports intended to address the terms of section 2.10 on November 26, 2019. The Director deducted ten percent from the base penalty to reflect efforts made to correct the contravention.

[138] I agree that MPMC did make efforts to discuss permit amendments over the course of the period of noncompliance, and did begin design and construction. I agree with the Director's deduction of ten percent for efforts made to correct the contravention.

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

[139] MPMC submitted an application to amend the Permit, which included a request to revise section 2.10, on May 14, 2019. In response to this application, the Director notes that the Ministry issued a revised permit on February 1, 2020 "to remove references to the specific Pilot Scale BCR system(s) and Bench Scale system and the December 1, 2017 due date." I agree with the Director's deduction of ten percent for efforts made to prevent recurrence of the contravention.

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

[140] The Director did not identify any other factors that were considered relevant in the adjustment of the penalty, and I agree with this assessment.

[141] Finally, I note that section 7(2) of the *Penalties Regulation* provides that if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues. Given that the contravention in this case continued for hundreds of days between September 2017 and September 2019 (and appeared to still be ongoing when the Determination was issued in 2020), the Director could have imposed more than one penalty, but chose not to. This is another potential ground to increase the base penalty, but neither party argued this ground, and I find no reason to assess an increase.

Conclusion

[142] Based on these considerations, I confirm the finding of contravention, and I conclude that the penalty should be not reduced, based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*. Accordingly, I conclude that a penalty of \$9,000 is appropriate for MPMC's contravention of section 2.10 of the Permit.

DECISION

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

[144] For the reasons set out above, I confirm the finding of contravention and the penalty in the Determination. I order MPMC to pay a penalty of \$9,000 for the contravention of section 2.10 of the Permit. The appeal is dismissed.

"Teresa B. Salamone"

Teresa B. Salamone,
Panel Chair

September 3, 2021