



**Agricultural Land Commission Appeal Decision, ALC File 87334 & 126599**

In the matter of an appeal under section 55 of the *Agricultural Land Commission Act*

**BETWEEN:**

**Nancy Kinney**

**Appellant**

**AND:**

**Agricultural Land Commission**

**Respondent**

**BEFORE:**

An Appeal Panel of the ALC

Linda Michaluk, ALC Vice Chair

Janice Tapp, ALC Vice Chair

Ione Smith, ALC Vice Chair

**DATE:**

Conducted by way of written submissions concluding on January 4,  
2023

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**Appeal**

[1] This appeal concerns two compliance and enforcement (“**C&E**”) decisions:

- a) a varied stop work order issued by the Agricultural land Commission (“**ALC**”) C&E Officer Steven Laing to the Appellant dated December 14, 2021 (“**Varied 2021 SWO**”); and
- b) a penalty order issued by ALC Chief Executive Officer (“**CEO**”) Kim Grout to the Appellant dated January 25, 2022 (“**Penalty Order**”).



[2] On December 20, 2021 the ALC received an email from the Appellant advising that she would like to appeal the Varied 2021 SWO.

[3] On January 26, 2022 the ALC received an email from the Appellant advising that she would like to appeal the Penalty Order.

[4] The Panel has the authority to hear the appeal of the Varied SWO and Penalty Order under section 55 of the ALCA which provides:

*55 (1) A person who is the subject of a determination, a decision, an order or a penalty under section 50, 52 or 54 (1) may appeal the determination, decision, order or penalty to the commission by serving the commission with a notice of appeal.*

*(2) On an appeal under this section, the commission may*

*(a) confirm or reverse the determination, decision, order or penalty, or*

*(b) refer the matter, with or without directions, back to the person who made the initial determination, decision or order.*

[5] The Appellant is asking that the Penalty Order be reduced or cancelled.

[6] The Appellant argues she will comply with the Varied 2021 SWO pending the outcome of a Non-Farm Use Application that she intends to submit. She argues that she is not withdrawing her appeal of the Varied 2021 SWO because it is “inexorably linked” with the Penalty appeal.

### **The Appeal Process**

[7] As noted, the ALC received an e-mail advising of the Appellant’s intention to appeal the Varied 2021 SWO on December 20, 2021.

[8] On December 20, 21, 23 and 31, 2021, an ALC Official replied advising that the Appellant’s e-mail had been received and providing the ALC Rules of Practice and Procedure for Appeals.



[9] On January 26, 2022 the ALC received an email from the Appellant advising that she would like to appeal the Penalty Order.

[10] On February 16, 2022 the ALC Appeal Co-ordinator advised the Appellant and Respondent by electronic letter that the Appeal of the Varied SWO and Penalty Order would be heard by the Appeal Panel (“**Panel**”) in a combined hearing on April 25, 2022.

[11] On March 21, 2022 the ALC Appeal Co-Ordinator followed up with a second letter to the Appellant and Respondent with additional information and advising that the hearing would be a written hearing. The letter also advised that since the Appellant had not submitted a written submission, that submission should be provided within the appropriate timelines in Section 26 of the Appeal Rules.

[12] On April 1, 2022 the ALC received a letter of appointment dated March 31, 2022 from the Appellant appointing Vangenne & Company as representative (the “**Appellant’s Representative**”). In the April 1 letter, the Appellant sought an extension of time.

[13] On April 6, 2022 the Respondent responded to the April 1, 2022 letter from the Appellant’s Representative consenting to the request for an extension of time sought by the Appellant.

[14] On April 21, 2022 the ALC received an application for a stay or suspension of the Penalty Order (“**stay application**”) from the Appellant’s Representative.

[15] On May 3, 2022 the ALC Appeal Co-Ordinator sent an additional electronic letter to the Appellant’s Representative with the Appeal Hearing information previously provided and also providing a revised Appeal Hearing date of June 1, 2022.

[16] On May 5, 2022 the Appellant requested an extension of time for the written submission required for the Appeal Hearing.

[17] On May 12, 2022 the ALC Appeal Co-Ordinator advised that the Appeal Panel had no issue with the extension of time for written submissions.



[18] On May 13, 2022 the Appellant's Representative provided the ALC Appeal Co-Ordinator with the Appellant Written Appeal Package.

[19] On May 26, 2022 the ALC Appeal Co-Ordinator advised the Appellant's Representative and the Respondent that the Appeal Panel rescheduled the Written Appeal Hearing to June 27, 2022 to allow for adequate time to review all of the material.

[20] On May 30, 2022 the Respondent provided the ALC Appeal Co-Ordinator with the Respondent's Written Appeal Package.

[21] On June 14, 2022 the Appellant's Representative provided the ALC Appeal Co-Ordinator with a reply to the Respondent's Written Appeal Package.

[22] On June 23, 2022 the Respondent provided the ALC Appeal Co-Ordinator with sur-reply submissions.

[23] On June 24, 2022 the Appellant's Representative provided the ALC Appeal Co-Ordinator with sur-sur reply submissions.

[24] On July 4, 2022 the Appeal Panel granted the Appellant's unopposed request for an extension of time to bring the stay application. The Appeal Panel then considered the stay application in light of Rule 19(3) of the Appeal Rules and granted a stay of the Penalty Order but ordered that the stay will expire on the date the Appeal Panel issues its decision on the Penalty Order.

[25] A written hearing was held on June 27, 2022 and reconvened on January 4, 2023.

## **Background**

[26] The property located at PID: 003-193-110, 5895 Old East Road, Saanich BC ("**Property**") has been subject to previous Agricultural Land Commission ("**ALC**") compliance and enforcement actions that provide necessary background and context for the current appeal.



[27] On June 13, 2018 an ALC Stop Work Order under section 50(a) of the Agricultural Land Commission Act (“**ALCA**” or “**Act**”) was served to the Appellant. The 2018 Stop Work Order (“**2018 SWO**”) ordered the Appellant to immediately cease the importation and deposition of fill material on the Property for the purpose of land development work.

[28] On June 18, 2018, the Appellant appealed the 2018 SWO pursuant to section 55 of the *Act*. On July 26, 2018, the ALC Appeal Panel confirmed the 2018 SWO (“**2018 Appeal Decision**”) and it remains in effect. That earlier decision of the ALC Appeal Panel sets out much more detailed factual background leading up to the July 26, 2018 appeal decision and that will not be repeated here.

[29] On eight occasions between July 3, 2019 and December 8, 2021, ALC Officials conducted further investigations by viewing the Property. The ALC Officials observed that the Appellant had not ceased the activities prohibited by the 2018 SWO and was contravening the 2018 SWO.

[30] On December 11, 2019 an ALC Official served the Appellant with a Remediation Order and Notice of Consideration of Penalty both dated December 3, 2019.

[31] No appeal of the Remediation Order nor any further response to the Notice of Consideration of Penalty was received from the Appellant.

[32] The Remediation Order stated the Owner had 30 days from the date of service to submit a remediation proposal to the Commission. No remediation proposal was submitted to the ALC. The Remediation Order also directed the removal of all imported fill brought on the Property since June 13, 2018, and remediation of the area where that fill had been deposited, by April 30, 2020.

[33] Further complaints were received in 2019, 2020 and 2021 regarding fill placement on the Property. As noted above, during follow up inspections, ALC Officials observed that the Appellant continued the activities prohibited by the 2018 SWO and no effort to remediate had been made.



[34] A Notice of Failure to Remediate was sent November 3, 2020.

[35] Although the 2018 SWO remained in effect, a further Stop Work Order was served on the Appellant on December 8, 2021 ("**2021 SWO**"). On December 14, 2021, the Varied 2021 SWO was issued to the Appellant. The Varied 2021 SWO varied the 2021 SWO. The Varied 2021 SWO pertained to importation and deposition of fill material on the Property; and the use of prohibited fill including construction or demolition waste, synthetic polymers, treated wood and unchipped lumber on the Property.

[36] On January 25, 2022 Kim Grout, ALC CEO, issued the Penalty Order to the Appellant pertaining to placement of unauthorized fill on the Property. The Penalty Order outlines the dates that unauthorized fill was brought onto the Property subsequent to the 2018 SWO, and dates that observations of unauthorized fill were made by ALC Officials. The Penalty Order outlines the CEO's consideration of factors including the gravity and magnitude of the contravention; whether the contravention was deliberate, repeated or continuous; whether there was an economic benefit derived by the Appellant from the contravention; the Appellant's cooperativeness and efforts to correct the contravention; and the degree to which the contravention detrimentally affected or impaired the agricultural capability of the Property or its suitability for farm use.

[37] The CEO levied a penalty against the Appellant in the amount of \$100,000 pursuant to section 54(1) of the ALCA ("**Penalty**") and required that the Penalty be paid within 90 days of receiving the notice or deemed notice of the Penalty (i.e. paid on or before April 25, 2022). The CEO's letter provided a copy of the ALCA and its regulations, along with the ALC's Practice Directive relating to appeals, and advised that the commencement of an appeal does not operate to suspend the Penalty.

### **Appellant's Submissions**

[38] In her submissions, the Appellant states that she is now prepared and willing to do the following in relation to the fill project, as a result of obtaining advice from counsel:

- a) To submit a Non-Farm Use Application ("**NFU Application**");

- b) To comply with ALC direction and restrictions in respect of the fill project;
- c) To undertake remediation efforts to the extent that she will have removed from the Property any and all prohibited materials ("**Prohibited Materials**") as defined by section 36 of the Agricultural Land Reserve Use Regulation ("**Use Regulation**") contained in the fill, where practicable; and
- d) To provide an undertaking to cease all work and comply with the Varied SWO pending the outcome of the NFU Application

[39] The Appellant argues that the Penalty Order is no longer appropriate or necessary given that she is now willing to comply with the ALC as outlined above. In that circumstance, the Appellant says insisting on payment of the penalty would be punitive in both purpose and effect.

[40] The Appellant argues that even if she were not now willing to comply with the ALC, there are indicia that the purpose and effect of the Penalty Order is punitive. The Appellant argues the size and magnitude of the Penalty are unreasonable and disproportionate to the contravention. The Appellant argues the Penalty Order is penal in nature. The Appellant argues the Penalty Order reflects not only her own alleged non-compliance with the orders and instructions of the ALC but is also meant to reflect alleged harm done to society at large and goes beyond mere regulatory compliance into the realm of redressing harm to the public or society at large. The Appellant argues that payment of the Penalty would likely render the Appellant insolvent or require that she sell the Property which is unjust and unreasonable. The Appellant further argues the immediate escalation to the highest possible penalty under the *Act* undermines reasonableness and gives the appearance of a punitive effect. The Appellant argues the fine is paid to the ALC and is within the complete discretion of the CEO meaning there is no predictability regarding penalty sizes. The Appellant also argues the Penalty Order carries stigma.

[41] Additionally, the Appellant argues there are mitigating factors which weigh in favour of eliminating or, in the alternative, reducing the Penalty Order including:

- a) the lack of clarity around the initial regulatory and legislative framework in respect of fill projects like the Appellant's, and subsequent amendments thereto;
- b) the Appellant's reasonableness in her initial interpretation of the ALCA and regulation in effect in 2014;
- c) the Appellant's inadvertent inclusion of any Prohibited Materials on the Property;
- d) the Appellant has not benefitted economically from the contravention;
- e) the magnitude of the Penalty Order and its effect on the appellant; and
- f) the Appellant's commitment to remediate and make useful the Property for the purposes of agriculture.

[42] In respect of the Varied 2021 SWO, the Appellant submits only that she will comply with the Varied SWO pending the outcome of the Non-Farm Use Application.

### **Respondent's Submissions**

[43] The Respondent notes that the Appellant has not advanced any grounds to challenge the Varied 2021 SWO.

[44] In respect of the Penalty Order, the Respondent argues it was properly made, and the amount is appropriate in the circumstances, for the reasons stated in the Penalty Order. The Respondent argues that the Appellant's conduct demonstrates that the Penalty Order is necessary to ensure her compliance with the *Act* and orders made under the *Act*. The Respondent further argues that there are significant gaps in the evidence that pertain to whether the Penalty Order will cause the Appellant financial hardship. As well, the Respondent argues that the Appellant profited from breaching the 2018 SWO and Varied 2021 SWO.

[45] The Respondent argues that administrative penalties are permitted to be punitive in nature and that when they are, they attract the protection of s. 11 of the *Charter*. The Respondent argues that the Appellant has not asserted any breach of her *Charter* rights.



[46] In any event, the Respondent argues the Penalty Order is not punitive in nature. The *Act* includes separate offence provisions which are not at issue here. The magnitude of the Penalty Order is directly tied to the objective of deterring non-compliance with the *Act*, the regulations and orders of the Commission. The Respondent argues the Penalty Order takes into account prescribed factors all of which are closely tied with the purpose of deterring non-compliance. The magnitude of the Penalty Order is determined by regulatory considerations expressly imposed by section 30 of the ALR General Regulation (the “*General Regulation*”), rather than by criminal sentencing considerations. The Respondent further argues that no stigma comparable to that attached to a criminal conviction flows from the imposition of the Penalty Order.

[47] The Respondent argues that the CEO properly exercised her discretion having regard to the criteria set out in the *General Regulation* for the exercise of such authority.

[48] The Respondent argues that the mitigating factors relied on by the Appellant do not assist her. The Respondent argues that the arguments about lack of clarity around the earlier legislative and regulatory framework for filling of the Property were addressed in the 2018 Appeal Decision confirming the 2018 SWO. In any event, the Respondent argues the Penalty Order is not based on the Appellant’s actions prior to the 2018 SWO so that the legislative and regulatory framework prior to that order are irrelevant. For the same reason, the Respondent says the Appellant’s claims about her interpretation of the *Act* and regulations in 2014 are not relevant. The Respondent argues there is no evidence to support that the deposition of fill was inadvertent and there was no finding that the deposition of *prohibited* fill was intentional. The Respondent argues the Appellant still refuses to comply with the 2019 Remediation Order.

### **Replies and Sur-Replies**

[49] In reply, the Appellant objects to reference made by the Respondent to an April 2022 Stop Work Order as being prejudicial, unfair, and unrelated to the fill project. The Appellant argues that although it is not the subject of this appeal, the 2019 Remediation Order is difficult to comply with. The Appellant also argues that the Respondent’s reliance

on her “long history of intentional and continued non-compliance” undermines the Respondent’s argument that the identified mitigating factors do not assist her. The Appellant argues the legislative framework was and remains unclear. The Appellant reiterates that the Penalty is punitive. In addition, the Appellant seeks to supplement the evidentiary record to address her financial circumstances in more detail.

[50] The Respondent objects that some of the arguments and evidence advanced in reply exceed the scope of proper reply and should not be admitted or, alternatively, should be given little weight. The Respondent argues that the 2022 Stop Work Order is relevant and has not been appealed. If the additional evidence is admitted, the Respondent says it expresses a much more limited commitment to future compliance than her earlier submissions and is, in some respects, contradicted by the Appellant’s prior statements.

[51] The Appellant says the Respondent’s objections to the scope of reply are not supported by administrative law principles, relevant jurisprudence or the ALC’s Rules. The Appellant argues that to exclude her evidence and arguments would be to breach procedural fairness. She further argues that any actual prejudice to the Respondent has been addressed by the Respondent’s sur-reply. The Appellant disputes the Respondent’s characterization of her affidavit evidence.

## **Discussion and Findings**

### **A. Scope of Reply and Evidence**

[52] This Panel is entitled to receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law: *Administrative Tribunals Act*, s. 40(1).

[53] The Panel accepts that the Appellant’s Reply, including the supplemental affidavit, is relevant, necessary and appropriate. We find that any potential prejudice to the Respondent arising from the Appellant’s reply has been addressed by the Respondent’s sur-reply.

[54] We have not admitted the April 2022 Stop Work Order as it does not pertain to the fill project and we have not found consideration of it to be necessary. We have not considered paragraphs 26-29, 35 of the Respondent's Appeal Package or the Affidavit of Steven Laing and Kim Grout addressing the April 2022 Stop Work Order.

[55] In determining the issues raised on this appeal, we have carefully considered all of the other arguments and evidence before us whether or not they have been specifically referenced in this decision.

### **B. Varied 2021 SWO**

[56] The Appellant has not advanced any grounds to challenge the Varied 2021 SWO. The appeal in respect of the Varied 2021 SWO is dismissed.

### **C. Penalty Order**

[57] The CEO has authority to levy a penalty against a person who contravenes the *Act*, the *General Regulation*, or an order of the ALC pursuant to s. 54(1) of the *Act*:

#### **Penalties levied by chief executive officer**

**54** (1)The chief executive officer, in accordance with the regulations, may levy a penalty up to the prescribed amount against a person who contravenes this Act, the regulations or the orders of the commission.

(2)The time limit for levying a penalty against a person under subsection (1) is 3 years after the facts on which the penalty is based first came to the knowledge of the chief executive officer.

[58] Section 30 of the *General Regulation* constrains the exercise of discretion under s. 54 of the *Act*:

#### **Penalties for contraventions**

**30** (1)The chief executive officer must consider all of the following before levying a penalty against a person for contravening the Act, the regulations or an order of the commission:

- (a) the gravity and magnitude of the contravention;
- (b) whether the contravention was deliberate, repeated or continuous;
- (c) whether there has been any contravention of a similar nature by the person;
- (d) whether the person derived an economic benefit from the contravention;
- (e) the person's cooperativeness and efforts to correct the contravention;
- (f) the degree to which the contravention detrimentally affected or impaired the agricultural capability of agricultural land or its suitability for farming.

(2) The maximum penalty which the chief executive officer may levy is as follows:

- (a) for any single contravention, \$100 000;
- (b) for a subsequent contravention, double the amount of the penalty levied for the first contravention.

[59] As noted above, the evidence establishes that the Appellant contravened the 2018 SWO on multiple occasions between 2019 and 2021 and also that she contravened the 2019 Remediation Order.

[60] The Penalty Order was issued within the time limit set out in section 54(2) of the *Act*.

[61] The CEO complied with the requirement set out in section 30(1) of the *General Regulation* by expressly considering each of the factors identified. The CEO concluded:

- a) The full extent of the fill deposited on the Property by the Owner is difficult to calculate, but it is clear that the volume of fill has been substantial. Admissions by two trucking companies confirm that approximately 45 truck loads of fill have been dumped on the Property. There is evidence that at least one other company also dumped unknown amounts of fill on the

Property (it is unclear whether the amounts dumped by Pitstar Trucking were included in the estimated total provided by Axel Trucking).

The fill deposited on the Property includes materials expressly prohibited by section 36 of the Agricultural Land Reserve Use Regulation. The inclusion of prohibited materials in the fill increases the gravity of the contravention.

- b) The Owner has been extensively educated by ALC staff numerous times on relevant fill deposition laws and regulations since January 2016. The Owner's arguments that the Act and regulations permit her to dump fill on her Property were rejected by the appeal panel on her appeal of the 2018 Stop Work Order, which resulted in the order being upheld.

Email communications from the Owner to ALC staff and legal counsel demonstrate that the Owner's contraventions of the Act, ALR Use Regulation, and the 2018 Stop Work Order are deliberate and she intends to continue dumping fill on the Property.

Despite the 2018 Stop Work Order and the Remediation Order, the Owner continues to deposit large amounts of fill on the Property, including prohibited materials. Her contraventions of the 2018 Stop Work Order have been repeated on at least three separate occasions since November 2020.

Stop work order placards placed on the Property have been repeatedly removed, likely by the Owner or at the Owner's direction.

- c) The Owner has collected fees from trucking companies for dumping fill on the Property.
- d) The Owner has repeatedly and clearly communicated that she refuses to cooperate with the ALC's directions or Orders. The Owner has failed to take steps to remediate the Property despite the Remediation Order and has continued to place fill on the Property.
- e) The fill site is continuously growing and spilling onto Class 3X agriculture land (agricultural capability per 2015 report prepared by agrologist John Paul for the Owner).

The fill deposited by the Owner includes prohibited materials (construction/demolition waste such as concrete, rebar and brick; plastic pipe; treated and painted lumber). These materials are buried in fill, which will make them difficult to remove and may complicate remediation of the Property. The deposition of fill, particularly fill contaminated by prohibited materials, impairs the Property's agricultural capability and suitability for farm use in a manner which is particularly difficult and expensive to remedy in future.

[62] In terms of the gravity and magnitude of the contravention, on this appeal, the Appellant concedes she has intentionally deposited large volumes of fill on the Property. She also argues that she is “now willing to submit an NFU Application with the desire to make permissible this volume of fill”. In other words, she concedes that the deposition of fill to date has been voluminous, intentional and impermissible.

[63] In her submissions, the Appellant argues (without evidentiary support) that any *prohibited* fill was not intentionally deposited. However, we find it unnecessary to resolve whether the deposit of prohibited fill was intentional because the Penalty Order was not premised on any finding by the CEO that the deposit of *prohibited* fill was intentional.

[64] The Panel Finds that the nature of the contravention at issue is grave and substantial.

[65] Turning to whether the contravention was deliberate, repeated or continuous, the Appellant argues her insistence on the rightness of her interpretation of the laws and regulations in effect in 2014 is what gave rise to the continuity of her actions and deposition of fill. However, the Appellant’s interpretation of the laws and regulations in effect in 2014 was conclusively addressed in the 2018 Appeal Decision. No judicial review of that decision was pursued.

[66] The Appellant argues that by 2018, “there was already a relationship breakdown between the ALC and the appellant; that the appellant had effectively lost her basis for believing that the ALC was acting impartially”. She further argues that when the ALC adopted Bylaw No. 2 in 2018, she “felt that she was now being asked to comply with a new process that was not in effect when she had first begun her fill project which she concluded was patently unfair”.

[67] The Panel finds that the fill project was not permitted under any version of the *Act* or regulations or Bylaws in force at the material times. The Appellant is obliged to comply with the laws, regulations and bylaws in force at all points in time. Therefore, any changes in the scheme are immaterial to the question of whether the contravention was repeated and/or continuous.

[68] The legislative changes may be more relevant to the question of whether the contravention was deliberate. However, in respect of the conduct that forms the basis for the Penalty Order, the 2018 SWO was in force at all material times. It was the subject of an unsuccessful appeal in 2018. The outcome of that appeal was not the subject of any judicial review. In those circumstances, the Appeal Panel finds the repeated and continued breaches of the 2018 SWO to have been deliberate.

[69] Further, the Remediation Order was served on December 11, 2019. No appeal of the Remediation Order was received from the Appellant. The Remediation Order stated the Owner had 30 days from the date of service to submit a remediation proposal to the Commission. No remediation proposal was submitted to the ALC. The Remediation Order also directed the removal of all imported fill brought on the Property since June 13, 2018, and remediation of the area where that fill had been deposited, by April 30, 2020. None of that has occurred. The Appeal Panel finds the breach of the Remediation Order to have been deliberate.

[70] In terms of whether the person derived an economic benefit from the contravention, the Appellant argues that she has not benefited economically because although she charged the trucking companies for the fill, the trucking companies charged her for their labour and services. She says the net result is that she “broke even”.

[71] The Appeal Panel does not find the fact that the Appellant “broke even” to negate the finding that there was an economic benefit in this case. An economic benefit may include an offset of labour and service costs, as it did in this case. The CEO appropriately considered this factor as the Regulations require. The Appeal Panel finds it to be somewhat of an aggravating factor that the Appellant received an economic benefit in this case, albeit this factor is of limited significance in the analysis. Much more significant to the Panel is the repeated nature of the contravention which has been described above.

[72] Turning to the Appellant's cooperativeness and efforts to correct the contravention, the Appellant argues that she was proceeding from an erroneous though not unreasonable interpretation of the laws and regulations in effect in 2014 and this is the

source of her lack of cooperation with the ALC. However, as noted above, the Appellant had the benefit of the 2018 Appeal Decision which should have clarified her erroneous misunderstanding of the laws and regulations and orders in effect. In the wake of that decision, she continued to deposit large volumes of unauthorized fill on the Property. She did not comply with the Remediation Order – an order from which she sought no appeal. The Panel finds the Appellant was not cooperative and did not make efforts to remediate.

[73] In terms of the degree to which the Appellant’s contraventions have detrimentally affected or impaired the agricultural capability of agricultural land or its suitability for farming, the Appellant argues that she agrees that the ultimate agricultural capability of the Property and its suitability for farm use should be preserved. She continues to maintain that she undertook the fill project for the purpose of rehabilitating the Property.

[74] This argument was considered in the 2018 Appeal Decision:

[24] The Panel finds that there is no compelling evidence submitted that gives comfort that the fill project outcome would benefit agriculture. This is because there is no way to ensure that the fill project will substantively improve the Property for agriculture. Though 0.9 ha of pasture would be created, 0.6 ha of existing pasture would be covered by fill, at a grade that might not be useful for cropping or pasture. In addition the Panel finds that it is impossible to be certain that the agricultural activities would be developed after the completion of the fill project. The Panel is not aware that any active agriculture is occurring on the presently usable areas.

[75] As well, and as the 2018 Appeal Decision noted, it is through submitting the appropriate application to the ALC that the project could be reviewed and, if convinced of its benefit to the ALR and farming in the province, permitted: 2018 Appeal Decision, para. 25.

[76] The Appellant has so far not submitted any relevant application.

[77] The Panel finds there is no basis to interfere with the CEO’s conclusion that: “The deposition of fill, particularly fill contaminated by prohibited materials, impairs the Property’s agricultural capability and suitability for farm use in a manner which is particularly difficult and expensive to remedy in future.”





[78] As noted above, the Appellant has argued that the Penalty Order is unreasonable and disproportionate to the contravention that gave rise to it.

[79] We do not find the Appellant's belated willingness to comply with orders of the ALC to be a mitigating factor in this case where the contraventions have been repeated over a number of years and despite repeated communications and orders of the ALC requiring that they cease.

[80] The Panel does not find the Penalty Order to be punitive in effect. The Penalty Order is directed at maintaining compliance within a limited sphere of activity. The fact that the Penalty Order contemplates the extent to which the repeated contravention of the Order impairs the Property's agricultural capability and suitability for farm use does not render it penal in nature.

[81] We accept that the Penalty Order may have a significant financial impact on the Appellant although the evidence before us does not enable us to find it would likely render her insolvent as she alleges.

[82] Although the CEO imposed the maximum penalty that may be imposed for any single contravention, we conclude the Penalty Order is reasonable and proportionate in this case, in light of the regulatory factors that must be considered, all of which are discussed above. We accept that no prior lesser penalties have been ordered; however it is also significant that there have been multiple contraventions of the 2018 SWO since 2018. We therefore do not agree with the Appellant's characterization of the Penalty Order as an "immediate escalation to the highest possible penalty amount". Rather, what the record reflects are multiple communications over a number of years, without financial penalty, made in an effort to bring the Appellant into compliance with the law none of which have been effective.

[83] The Panel does not consider that the imposition of the Penalty carries significant stigma.



[84] In light of the factors set out in the Regulations which guide the CEO's discretion, the Panel finds that the magnitude of the fine is reasonable and proportionate.

Appeal Panel:

A handwritten signature in black ink, appearing to read 'Linda Michaluk'.

Linda Michaluk

A handwritten signature in black ink, appearing to read 'Janice E. Tapp'.

Janice Tapp

A handwritten signature in black ink, appearing to read 'Lone Smith'.

Lone Smith

Appeal Decision Date: April 3, 2023