

**IN THE DISTRICT COURT  
AT TAURANGA**

**I TE KŌTI-Ā-ROHE  
KI TAURANGA MOANA**

**CRI-2019-063-001434  
[2020] NZDC 22146**

**BAY OF PLENTY REGIONAL COUNCIL**  
Prosecutor

v

**RERE LAKE FARM LIMITED**  
and  
**CODI JOSLIN**  
Defendant

Judgment: 3 November 2020

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**FINAL SENTENCING DECISION OF JUDGE MJL DICKEY**

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[1] In a decision dated 7 September 2020 I gave a sentence indication that, for the reasons set out in full in that decision, I would:

- (a) Convict and fine Rere Lake Farm Limited \$42,350 with 90 per cent of that fine to be paid to the Council; and
- (b) Convict and discharge Mr Joslin under s 108 of the Sentencing Act 2002.

[2] On 9 September 2020 Mr Hardie filed a memorandum advising that Rere Lake Farm Limited had considered the sentence indication given and elected to change its

plea from not guilty to guilty on the basis it will be sentenced in accordance with the sentence indication given.

[3] On 17 September 2020 Ms Gwaze-Musesengwa filed a memorandum advising that Mr Joslin accepted the sentence indication and wished to enter a guilty plea.

[4] On 13 October 2020 the charges were called and the defendants confirmed their pleas.

[5] Accordingly, I convict and fine Rere Lake Farm Limited \$42,350, with 90 per cent of that fine to be paid to the Council, and convict and discharge Mr Joslin.

[6] A copy of my decision dated 7 September 2020 is attached to these notes on sentencing. There is nothing to be added to the reasons for the decision.

[7] The embargo prohibiting publication of the sentencing indication is lifted.

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Judge MJL Dickey  
District Court Judge

Date of authentication: 04/11/2020  
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

**NOTE: PUBLICATION OF THE JUDGMENT AND OF THE REQUEST FOR  
A SENTENCING INDICATION IN ANY NEWS MEDIA OR ON THE  
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UNTIL THE DEFENDANT HAS BEEN SENTENCED OR THE CHARGE  
DISMISSED. SEE**

**<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3865734.html>**

**IN THE DISTRICT COURT  
AT TAURANGA**

**I TE KŌTI-Ā-ROHE  
KI TAURANGA MOANA**

**CRI-2019-063-001434  
[2020] NZDC 15295**

**BAY OF PLENTY REGIONAL COUNCIL  
Prosecutor**

v

**RERE LAKE FARM LIMITED**

**CODI JOSLIN  
Defendants**

Hearing: 12 June and 27 July 2020 via AVL

Appearances: A Hopkinson for the prosecutor  
P Hardie for Rere Lake Farm Limited  
T Gwaze-Musesengwa for Codi Joslin

Judgment: 7 September 2020

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**SENTENCE INDICATION OF JUDGE MJL DICKEY**

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## **Introduction**

[1] The defendants have each pleaded guilty to a representative charge of discharging a contaminant, namely dairy effluent, onto or into land in circumstances where it may enter water, in breach of s 15(1)(b) of the Resource Management Act 1991 (**Act**).

[2] The maximum penalty for the charge against Rere Lake Farm Limited (**Rere Lake Farm**) is a fine of \$600,000 and against Mr Joslin a fine of \$300,000 and a two-year term of imprisonment. Counsel agreed that a fine is the appropriate sentencing response. The differences between counsel were in respect of the starting point I should adopt. For the prosecution it was submitted that starting points for Rere Lake Farm of \$70,000 and for Mr Joslin \$25,000 are appropriate. For Rere Lake Farm, it was submitted that a starting point of \$50,000 is appropriate and for Mr Joslin, a starting point of \$1,000 is appropriate.

## **Background<sup>1</sup>**

[3] The prosecution relates to a discharge of effluent from a travelling irrigator at a dairy farm at 466 Rerewhakaaitu Road, Rerewhakaaitu (**Farm**) on 9 November 2018.

[4] The Farm is owned by Rere Lake Farm and is approximately 198ha in size. Rere Lake Farm milks approximately 580 cows at the Farm.

[5] Rere Lake Farm was incorporated in 2008 and its directors are Trevor and Harriet Hamilton. The Hamiltons are also the sole directors of eight other companies that own eight other dairy farms in the North and South Island. As managing director of Rere Lake Farm, Trevor Hamilton does not have direct involvement in the day-to-day running of the Farm but periodically attends the Farm for staff meetings. At the time of the offending Codi Joslin was employed by Rere Lake Farm as Farm Manager. Rere Lake Farm also employed two other farm workers at the Farm.

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<sup>1</sup> Summary of Facts, paragraphs 1-8.

[6] The Mangakino Stream and its tributary streams flow through the Farm. The Stream flows out of the Farm at the Rerewhakaaitu Road Bridge. Approximately 1,200m north of the Farm, the Mangakino Stream flows into Lake Rerewhakaaitu.

*Farm's effluent system and resource consent<sup>2</sup>*

[7] The discharge of dairy effluent to pasture irrigation is authorised by resource consent 61620 (**Resource Consent**) granted by Bay of Plenty Regional Council (**Council**) in 2002. Condition 6.3 of the Resource Consent requires that the Consent Holder shall ensure that any effluent discharged does not enter any drain or natural watercourse either directly or by overland flow. The Resource Consent was originally issued to “Trevor and Harriet Hamilton on behalf of TH Enterprises Limited” but was transferred to Rere Lake Farm in October 2008.

[8] Effluent from the Farm's cowshed is captured and stored in an effluent pond, which has 30 days holding capacity and a submersible stirrer. Effluent from the pond is irrigated to pasture using a travelling irrigator. The travelling irrigator has a timer that automatically switches the Farm's travelling irrigator off. However, at the time of the offence the timer was not working and Farm staff were manually turning the irrigator off.

[9] The Farm also has a stationary rain gun irrigator that can be used if the travelling irrigator is not working.

*Events leading to the offending on 9 November 2018<sup>3</sup>*

[10] On 14 August 2018 the Council wrote to Rere Lake Farm advising of forthcoming annual effluent compliance visits across the region, and that it was therefore timely for Rere Lake Farm and its staff to check its effluent system and re-familiarise themselves with the Resource Consent conditions. The letter identified the main compliance issues the Council finds during inspections and encouraged Rere Lake Farm to undertake its own audit prior to the Council's inspection.

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<sup>2</sup> Summary of Facts, paragraphs 9-14.

<sup>3</sup> Summary of Facts, paragraphs 18-29, 32-35, 37-39.

[11] On 23 October 2018 at 4.28pm, the Council received a complaint from a member of the public that earlier that day dairy effluent had been seen in the Mangakino Stream at the Rerewhakaaitu Bridge, which is where that stream flows out of the Farm. The complainant said the discharge had lasted for about 30 minutes and then ceased.

[12] On 7 November 2018, two members of the public saw effluent in the Mangakino Stream at the Rerewhakaaitu Bridge, where that stream flows out of the Farm. They each took photographs of the stream at that location. In an email to Fish and Game about the issue on 8 November 2018 one of the members of the public who had seen the effluent stated that “the normally clear stream suddenly started flowing green and stunk of cow manure” and included photographs of the stream at the time. Fish & Game forwarded the complainant’s email and photographs to the Council on 8 November.

[13] In response to the email from Fish & Game, a Council enforcement officer went to the Rerewhakaaitu Road bridge at 3.15pm on 8 November 2018 to inspect the Mangakino Stream where that stream flows out of the Farm. He found that the stream was running clear.

[14] On 9 November 2018 at about 2:10pm, a member of the public employed by a roading contracting company who was working on the Mangakino Stream bridge made a complaint to the Council’s pollution hotline that the stream was “discoloured green again as it was yesterday”.

[15] In response to the complaint, a Council enforcement officer went to the Rerewhakaaitu Road bridge at 2:51pm on 9 November and saw that the stream was running green. The officer then drove to the Farm to determine where the contamination was originating from. He arrived at the Farm at approximately 3pm and spoke with Kaytlin Beattie (a Farm worker). The officer began his inspection by checking the pond and stone trap near the cowshed.

[16] As the officer finished inspecting the pond, Mr Joslin, the Farm Manager, arrived at the cowshed on a quad bike. Mr Joslin told the officer that he had just shifted

the travelling irrigator to a new paddock as he had discovered it in a paddock where it had not moved for several days. He said that he thought that effluent from the irrigator had not got to the Stream but he had not checked to confirm that.

[17] Mr Joslin then took the officer to the paddock from which he had just removed the travelling irrigator (paddock 54). Although the irrigator was no longer in the paddock, the officer could see where it had been. The ground was wet with small puddles in the grass around a ring of soaked ground. The paddock sloped towards the stream and formed a gully where effluent had flowed, and continued to flow, down from the irrigator and into the Mangakino Stream (an overland flow distance of approximately 275 metres).

[18] The officer directed Mr Joslin to use a tractor to dam the gully in the paddock to stop the flow of effluent into the stream. Mr Joslin complied with that direction.

[19] During his inspection of the property, the officer took samples from various locations in the Mangakino Stream. I address the results of that sampling later in this decision.

### ***Explanations<sup>4</sup>***

[20] Three of the farm workers, Codi Joslin, Bobby Potae and Kaytlin Beattie were interviewed about the discharge of effluent. Mr and Mrs Hamilton were also interviewed.

#### *Codi Joslin*

[21] When the Council officer was investigating the discharge, Mr Joslin told the officer that he had only been on the Farm as manager since the first week in September 2018, had been given no induction, and he did not know about an effluent plan for the Farm. He also said he had been off the Farm on annual leave on Tuesday and Wednesday (6 and 7 November) and had also had Thursday (8 November) off as a sick day. Prior to going on leave he had given instructions to another staff member to shift the irrigator to paddock 35.

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<sup>4</sup> Summary of Facts, paragraphs 40-44.

[22] In his interview, Mr Joslin confirmed what he had told the Council officer on 9 November. He also stated that, as Farm Manager, he was responsible for the Farm's effluent system. He would direct staff to shift the irrigator and it was his responsibility to monitor it.

[23] He indicated that, at the time of the 9 November discharge he had not seen the Resource Consent, but had since seen it. Further, that at the time of the offending the timer on the irrigator was malfunctioning, but since the incident it had been replaced. He acknowledged that he was at the Farm on 9 November 2018, but had been away from 6-8 November. The only other person at the Farm on 9 November was Kaitlyn Beattie.

[24] He advised that when he went away on leave on 6 November the irrigator was in Paddock 54, and that prior to going on leave he had given instructions to his 2IC (Mr Potae) to move the irrigator to another paddock. When he was doing his rounds on 9 November 2018, he saw the irrigator in the same paddock as it had been before he went on leave; he found a big puddle; he then moved the irrigator to the paddock he had asked for it to be shifted to before he went on leave.

[25] He later discovered that the brake system on the irrigator had failed and broken. Since the incident the irrigator has been overhauled and the Farm has implemented an Effluent Management Plan.

Bobby Potae

[26] The Farm's 2IC Bobby Potae said in his interview that he was not aware of the requirements of the Resource Consent at the time of the incident. He said that before going on leave on 6 November 2018, Mr Joslin had told him that if it was not raining he should turn the irrigator on and check it. On 8 November 2018 he told Kaitlyn Beattie to go and shift the irrigator and then go back to the shed and turn it on. He did not have time to move the irrigator out of Paddock 54 while Mr Joslin was away because he had too much other work on. He was away on leave on 9 November 2018.



Kaitlyn Beattie

[27] In her interview, Kaitlyn Beattie said that on 8 November 2018 she was asked by Mr Potae to go and turn the irrigator on. She had no previous experience operating an effluent irrigator and that day was the first time she had operated one. On 8 November she went to Paddock 54 and saw the irrigator was half way down the paddock. She then returned to the cow shed and turned the irrigator on. She did not return to the paddock to check the irrigator at any stage. She understood that Mr Potae would later check it but he didn't.

[28] She said that the irrigator was not on a timer, so staff at the Farm would use timers on their phones to remind them when to turn the irrigator off.

[29] She did not turn the irrigator on, on 9 November 2018. She said that she was not aware of the Farm's Resource Consent, but that they had a big meeting after the incident where the Resource Consent was discussed.

Mr and Mrs Hamilton

[30] Mr and Mrs Hamilton stated that the incident was reported to them the day after the discharge (on 10 November). After the incident Mr Hamilton became aware that there was a fault with the Farm's travelling irrigator. He acknowledged "if there's fault probably on my side that, we'll accept maybe we just need to have a more regular servicing programme on these irrigators, rather than wait until they had a fault".<sup>5</sup>

[31] Mr and Mrs Hamilton stated that since the incident the irrigator had had a "major service overhaul".<sup>6</sup> They believed that the cause of the discharge was mechanical, but also that there was too much complacency around the irrigator and its maintenance.

[32] Following the interview Trevor Hamilton provided a further written statement to the Council. He stated that the breach on 9 November was caused by lack of due care by the staff member who had set up the irrigator, that more care should have been

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<sup>5</sup> Summary of Facts, paragraph 41(b).

<sup>6</sup> Summary of Facts, paragraph 41(c).

taken by Codi Joslin around irrigator service maintenance, and that the irrigator had a fault that was never brought to his attention as the owner. He also said that it was Codi Joslin's responsibility to correct effluent issues and that he had the phone number of an external effluent irrigation consultant.

[33] Mr Hamilton claimed that the issue was not an infrastructure problem as the Farm has sound infrastructure, with a 30-day lined holding pond built in 2005 and two rain-guns available as back-up if needed. He stated that, since the incident, they have carried out a training day run by the owners and an external irrigation consultant that was attended by all staff. The Farm's irrigator was fully serviced after the incident and will be regularly checked and serviced in the future. He said that, since the incident, a new timer has been installed on the irrigator so that it can only run for an hour before being checked and restarted. He stated that Rere Lake Farm's parent company takes its environmental responsibilities seriously and "has spent \$1.2 million on upgrading effluent and on environmental mitigation in the last five years".

#### ***Compliance history at the Farm<sup>7</sup>***

[34] The Summary of Facts outlined the Farm's compliance history:

- (a) In 2005 TH Enterprises Limited was issued an abatement notice requiring it to repair or replace the pond liner of the Farm's effluent pond following an inspection that found that effluent from the pond was seeping into a neighbouring paddock where the effluent could reach water. That abatement notice was cancelled later in 2005 when the pond's liner had been replaced;
- (b) On 2 October 2009 the Council received a complaint that effluent was discharging from the Farm's effluent pond. Twice the number of cows were being milked than was normally the case. Due to the extra number of cows being milked, wet weather, and problems with power at the shed, the Farm's effluent pond had overflowed and travelled overland. There was no evidence it had entered any watercourses. The Council also found that the farm's effluent irrigator and sprinkler system had been malfunctioning. As

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<sup>7</sup> Summary of Facts, paragraphs 15-17

a result, the Council issued an infringement notice to Rere Lake Farm and also issued it an abatement notice requiring it to comply with conditions 2, 6.1, 6.3, 6.4, 7 and 8 of the Resource Consent.

- (c) During routine compliance inspections of the Farm in 2004 and 2007, the Council also found there were issues with excess effluent in the Farm's effluent pond and evidence that the pond had over-flowed. These issues were highlighted in compliance field sheets the Council issued to TH Enterprises, but no separate enforcement action was taken.

### **Sentencing Principles**

[35] The purpose and principles of sentencing under the Sentencing Act 2002 are relevant insofar as they are engaged by a particular case. My attention was drawn to *Thurston v Manawatu-Wanganui Regional Council*.<sup>8</sup> The principles outlined in that case are relevant to sentencing. The factors that are frequently considered in RMA sentencing cases include an assessment of the offender's culpability for the offending, any infrastructural or other precautions taken to prevent the discharges, the vulnerability or ecological importance of the affected environment, the extent of the environmental damage, deterrence, the offender's capacity to pay a fine, disregard for abatement notices or Council requirements, remedial steps taken to mitigate the offending or prevent future offending, and the offender's cooperation with enforcement authorities.

[36] Counsel for the prosecutor submitted that the most important of the sentencing purposes is deterrence.<sup>9</sup> In addition to purposes of deterrence, denunciation, accountability and responsibility the prosecutor referred to the purposes of sentencing under the RMA including to impose financial costs or penalties which cause the polluter to internalise the environmental cost; and to foster the principle of environmentally responsible corporate citizenship.<sup>10</sup>

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<sup>8</sup> *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North, CRI-2009-454-24, 25, 27 August 2010 at [40].

<sup>9</sup> Referring to *Glenholme Farms Ltd v Bay of Plenty Regional Council* [2012] NZHC 2971 at [41]; *Southland Regional Council v Baird* [2018] NZDC 11941 at [41]; *Burrows v Otago Regional Council* [2015] NZHC 861 at [34].

<sup>10</sup> See above n 8 at [44] and [45].

[37] The following principles of sentencing were also drawn to my attention as being relevant: the gravity of the offending, including the degree of culpability of the offender; the seriousness of the type of offence in comparison with other types of offences; and the general desirability of consistency.

[38] Defence counsel raised no objection to the matters highlighted as being relevant to sentencing, save that Mr Hardie indicated that deterrence is but one of a number of factors to take into account in each particular case.

*Environmental effects of the offending*<sup>11</sup>

[39] The effluent discharge at the Farm affected the Mangakino Stream, which flows into Lake Rerewhakaaitu approximately 1,200m north of the Farm.

[40] Lake Rerewhakaaitu is listed in Schedule 1 of the Bay of Plenty Regional Natural Resources Plan as:

- (a) a habitat and migratory pathway of indigenous fish species, namely common smelt;
- (b) a habitat of threatened indigenous flora and fauna, namely a range of water birds including NZ Dabchick, NZ Scaup, Australasian Bittern and Little Shag;
- (c) an important habitat of trout.

[41] Lake Rerewhakaaitu is one of the lakes that is subject to the ongoing Rotorua Te Arawa Lakes Programme which is run by a partnership involving the Regional Council, Rotorua Lakes Council, Ministry for the Environment and the Te Arawa Lakes Trust and is focussed on protecting and preserving the water quality of Lake Rerewhakaaitu. Lake Rerewhakaaitu is also the subject of Project Rerewhakaaitu which is an initiative that local farmers began in 2003 to improve the Lake's water quality and surrounding environment.

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<sup>11</sup> Summary of Facts, paragraphs 46-48 and 51.

Samples and photographs

[42] The Summary of Facts set out the following details:<sup>12</sup>

34. During his inspection the officer took samples in the Mangakino Stream. Those samples, and their subsequent analysis results were as follows:

No.	Sample location	Faecal coliforms cfu/100mL	E.coli cfu/100mL	Suspended solids g/m3
1	In Mangakino Stream, upstream of discharge point	90	50	6.4
2	In the Mangakino Stream, 10 metres downstream of discharge point	17,000	25,000	22
3	Where effluent was still discharging to Mangakino Stream	260,000	120,000	110
4	Approximately 20 metres below paddock 54, in channel leading to Mangakino Stream	700,000	440,000	980
5	In Mangakino Stream, at Rerewhakaaitu Road bridge approximately 500 metres downstream of discharge point	34,000	23,000	30

35. The officer left the farm at approximately 4pm and took a further sample (sample 5) from the Mangakino Stream at the Rerewhakaaitu Road bridge. At this time the stream at the bridge was still discoloured with effluent, but far less than it had been when the officer first inspected this location at 2.51pm.

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37. It had not rained on 9 November at the time of the officer's inspection and there had been little rainfall in the preceding week.

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39. On 14 March 2019 Trevor Hamilton emailed the Council photographs he had taken in paddock 54 on the morning of 10 November 2018 (the day after the Council had found the discharge in that paddock). Those photographs showed effluent remained ponded in the paddock on 10 November.

[43] The Summary of Facts records:

51. On 9 November 2018, the E.coli level in the Mangakino Stream upstream of the discharge point was 50 cfu/100mL. In contrast, the E.coli level where effluent was flowing into the stream was 120,000 cfu/100mL and the water flowing in the stream 10 metres downstream of the discharge point had E.coli levels of 25,000 cfu/100mL. These samples were taken after the irrigator had been removed from the paddock.

[44] Faecal coliforms and E.coli are the most commonly used indicator of microbial contamination. High levels of those indicate a high risk of other harmful microbial

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<sup>12</sup> Summary of Facts, footnotes excluded.

organisms (pathogens) being present. Examples of pathogens present include Campylobacter, Cryptosporidium and Giardia. Elevated levels of faecal coliforms indicate that water is unsafe for use and/or consumption. Under the National Objectives Framework E.coli levels exceeding 1,200 cfu/100 ml are associated with a heightened risk to recreational users of Campylobacter infection. The maximum allowable level of faecal coliforms present before stock drinking water becomes unsafe is 100 cfu/100ml (ANZECC, 2000).

[45] Finally, the Summary of Facts described the effects on waterways that can occur from dairy effluent as follows:

48. Dairy effluent is extremely high in organic matter and has high nutrient and bacterial loading. This can have various effects on waterways including the following:
  - (a) Oxygen levels can be depleted resulting in fish kills.
  - (b) The high solids loading can cause smothering of the stream channel, which can result in increased fish and invertebrate mortality. Invertebrates are often the food source for other larger creatures such as native fish and trout.
  - (c) High nutrient loadings can result, causing excessive weed growth. This can block the flow of water in the channel causing drainage and flooding issues.
  - (d) High nutrient loadings contribute to algal blooms, which can sometimes be toxic and can render water unsuitable for contact recreation.
  - (e) The discharge of high levels of bacteria can result in water being unsuitable for consumption by both humans and stock.
  - (f) As sediment is disturbed and waters are flushed down the catchment, exposure of pathogens to the whole downstream catchment community is increased.

[46] Mr Hopkinson submitted that the evidence indicated that the irrigator was operating in the same paddock near the Mangakino Stream from 6-9 November 2018, and that members of the public saw effluent in that stream immediately downstream of the Farm on 7, 8 and 9 November. On 9 November a Council officer found that the effluent had flowed 270m overland and into the Stream. He submitted that the fact that the effluent had travelled 275m into the Stream and caused conspicuous

discolouration 500m downstream “indicates that a significant volume of effluent was discharged while the irrigator was stationary in Paddock 54”.<sup>13</sup>

[47] He highlighted the water samples taken, noting faecal coliform levels of 260,000 cfu/100ml in the Mangakino Stream where effluent was flowing into the Stream contrasted with the upstream reading of 90 cfu/100ml. He pointed to the reading of faecal coliforms of 34,000 cfu/100ml in the Mangakino Stream at the Rerewhakaaitu Road Bridge, the sample having been taken two hours after the member of the public complained to the Council. He submitted that the discharge resulted in faecal coliform levels in the Stream increasing by a factor of 2,888 (that is from 90 cfu/100ml to 260,000 cfu/100ml).

[48] Mr Hopkinson noted that Lake Rerewhakaaitu is listed in Schedule 1 of the Bay of Plenty Regional Natural Resources Plan as a habitat for various indigenous fish species, flora and fauna, and an important habitat of trout, and referred to the fact that Lake Rerewhakaaitu is the subject of an ongoing project to protect and improve water quality in Rotorua Lakes.

[49] Counsel for Rere Lake Farm, Mr Hardie, acknowledged the environmental effects of the discharge. Ms Gwaze-Musesengwa, for Mr Joslin, acknowledged that the discharge caused damage to the environment, however submitted that it was not ongoing.

[50] I accept that it was likely that the irrigator was operating in the same paddock from 6-9 November 2018. I also accept that it is likely that a significant volume of effluent was discharged while the irrigator was stationary in Paddock 54, given that it travelled approximately 275m to the Mangakino Stream and caused conspicuous discolouration of the Stream 500m downstream from the discharge point. The faecal coliform and E.coli levels were considerably greater than those measured upstream of the discharge point, and would likely have impacted the health of the Mangakino Stream. Beyond that it is difficult to quantify the extent of the damage of the discharge save to note the effects of dairy effluent on waterways as outlined in the Summary of

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<sup>13</sup> Prosecution submissions, paragraph 32.

Facts. In this case I determine that the discharge would have had moderate adverse effects on the environment.

## **Culpability**

### ***Rere Lake Farm***

[51] Mr Hopkinson submitted that the culpability of Rere Lake Farm is higher than that of its Farm Manager, Mr Joslin, because it is the Consent Holder and owner of the Farm. In support of his submission that Rere Lake Farm's offending involved a high degree of carelessness, Mr Hopkinson pointed to what he described as a number of "systemic failures":

#### *No process for monitoring*

- (a) There was no process or system in place for staff to monitor and check the irrigator while in operation. The irrigator had operated in the same paddock for four days without being moved and without being checked;

#### *No proper training*

- (b) There was a failure to ensure proper training in the use of the irrigator, awareness of the Farm's effluent policy and Resource Consent conditions. All three staff members said that prior to the offending they had received no induction about effluent irrigation, not been shown any effluent management plan, and not been shown the Resource Consent. Furthermore, Mr Joslin had only been working at the Farm for approximately nine weeks and one of the farm workers (Ms Beattie) had never previously operated an irrigator;

#### *Poor maintenance of irrigator*

- (c) The irrigator was poorly maintained. At the time of the offence the timer on the irrigator had been broken for an unknown period of time. Further, its brake system had failed;

#### *No self-audit prior to inspection*

- (d) The company took no steps to self-audit before the Council's inspection,



foreshadowed on 14 August 2018;

*No checking of effluent irrigation system and infrastructure*

- (e) It took no steps to check its effluent irrigation management system and infrastructure.

[52] As a further point, Mr Hopkinson submitted that the Farm is a relatively large operation involving 580 cows, and is one of 10 dairy farms owned by Rere Lake Farm's directors, Mr and Mrs Hamilton. He submitted that as part of a large corporate dairy farming enterprise, Rere Lake Farm should have had an effluent management system/policy in place, should have been training its employees to operate the effluent system in a way that minimised environmental harm, should have ensured its employees were all aware of the Farm's Resource Consent conditions, and should have ensured that its irrigator was mechanically sound. He pointed out that it was not until after the offending was discovered by the Council that Rere Lake Farm took these steps. Finally, he submitted that the company's offending is at the upper end of Level 2 in *Chick*, being of a moderately serious nature.<sup>14</sup>

[53] For Rere Lake Farm, Mr Hardie submitted that the causes of the offence were, on the part of the Farm's staff, a failure to follow instructions and established practice and secondly, a mechanical breakdown affecting the travelling irrigator. He submitted that it was that combination which caused the offending.

[54] Mr Hardie submitted that Mr Joslin was an experienced farm manager and that this was his seventh season managing dairy farms and his second season managing a farm which employed travelling irrigators. I note that that information did not appear in the Summary of Facts, but was confirmed by Mr Joslin's counsel in her submissions to me.

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<sup>14</sup> *Waikato Regional Council v GA & BG Chick Ltd* (2007) 14 ELRNZ 291 (DC) paragraphs [24] to [26]. Level 1 offending (least serious) – unintentional, one-off incidents occurring as a result of system failure, with little or no effect on the environment; Level 2 offending (moderately serious) – unintentional but careless discharges, usually of a recurring nature over a period of time, or of incidents arising from the malfunction of different parts of the system. The offending is often manifested by a reluctance to address the need for a safe system of effluent disposal, resulting in delays in taking restorative action. It also reflects little or, at the most a moderate, effect on the environment. Level 3 offending (more than moderately serious) – deliberate, or if not deliberate, is occasioned by real want of care. It is often associated with large plural discharges over time, or one large one-off event. It often exposes a disregard for the effects on the environment.

[55] Mr Hardie pointed to the directions that had been given to one of the other Farm employees (described as Mr Joslin's 2IC), Mr Potae, to move the irrigator to another paddock. Mr Joslin stated that those instructions were given prior to his going away on leave. For his part, Mr Potae acknowledged that he had been instructed by Mr Joslin to move the irrigator on the basis that "if it was not raining he should turn the irrigator on and check it".<sup>15</sup> However, Mr Potae said that he did not move the irrigator while Mr Joslin was away because he had too much other work on. He instructed Ms Beattie on 8 November to go and shift the irrigator, go back to the shed, and turn it on.

[56] Mr Hardie submitted that the failure to follow instructions and check the irrigator was compounded by the fact that it suffered a mechanical fault, which fault had not been apprehended by either Mr Potae or Mr Joslin. He said that might have been because the fault had only recently manifested itself. It meant that the irrigator did not move as it should, meaning that the spread of wastewater was concentrated in one area. He noted that the irrigator was subsequently serviced and faulty parts replaced, and that there have been no further incidents of concern on the Farm.

[57] Mr Hardie submitted that the offence was plainly not intended. He submitted that the company's culpability can be no higher than that of Mr Joslin or indeed Mr Potae, who, he noted, avoided prosecution. He submitted that this is not a case where:

- (a) the infrastructure was not in place to properly manage effluent;
- (b) the Farm owner and Consent Holder had ignored shortcomings that had been previously brought to its attention;
- (c) the manager did not have autonomy to attend to repairs as they became necessary;
- (d) the owner refused to spend money on infrastructure; and
- (e) recklessly continued to operate despite obvious shortcomings.

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<sup>15</sup> Refer Summary of Facts, paragraph 43(b).

[58] Mr Hardie submitted that the company's staff were aware of their obligations in respect to the operation of the irrigator, and both Mr Joslin and Mr Potae acknowledged that they were required to regularly check the irrigator. He further submitted that any failure of the company's staff to understand the precise terms in the conditions of the Resource Consent was not a causative factor that contributed to the offence.

[59] Further, he submitted there was no evidence to suggest that the company or its staff were aware that the irrigator was not operating correctly at the time of the offence, or that they were aware of an appreciable risk of the irrigator malfunctioning, and being aware of that risk operated the irrigator in any event. He submitted that accidents, breakdowns and mechanical malfunctions are a fact of life in almost every industry.

[60] Finally, he submitted that although the company acknowledged that more frequent servicing of the irrigator may have avoided the malfunction, he submitted that its culpability can properly be assessed as falling into the lower end of category 2 of the *Chick* classifications.

[61] In determining culpability, I take particular notice of the fact that:

- (a) The timer on the irrigator was not working, which meant that there was no automatic shut-off after a period of time. Turning off the irrigator relied on farm staff keying in the requisite time to their phones and responding when the alarm went off. I understand that the company was not made aware of the timer issue with the irrigator until after the offending.
- (b) Mr Joslin was the Farm Manager and responsible for the Farm's effluent system. He would direct staff to shift the irrigator, and it was his responsibility to monitor it. Having said that, he was away from the Farm on 6-8 November, only returning on 9 November. Prior to leaving he instructed his 2IC, Mr Potae, to move the irrigator to another paddock.
- (c) Mr Potae acknowledged that Mr Joslin had asked him to turn the irrigator on if it was not raining and check it. Mr Potae said that he did not move the

irrigator because he had too much other work on. He instructed Ms Beattie, another member of the Farm staff, to shift the irrigator and turn it on. Ms Beattie turned the irrigator on but did not check it at any stage, as she had thought Mr Potae would check it. Ms Beattie did not turn the irrigator on on 9 November 2018.

- (d) The irrigator suffered a mechanical breakdown sometime between 6-9 November 2018;
- (e) The Farm had no formal process for monitoring and checking the irrigator while in operation, there was no proper/formal training in the use of the irrigator, staff had no awareness of the Farm's effluent policy and had not seen or been made aware of the Resource Consent, the irrigator was poorly maintained, there had been no regular checking of the Farm's effluent irrigation management system and infrastructure.

[62] After the incident, the Farm implemented an effluent management plan, the irrigator was given a "major service overhaul", a training day was run by the owners for all Farm staff, and the requirements of the Resource Consent were discussed with staff.

[63] At the further hearing of this matter, Mr Hardie submitted that the company's culpability "must be assessed at or below that of Mr Joslin's".<sup>16</sup> He submitted that there "was little if anything it could have done to prevent the offending in circumstances where Mr Potae failed to comply with instructions given to him by the Farm manager."<sup>17</sup>

[64] It seems to me that a combination of events led to and exacerbated the unlawful discharge of dairy farm effluent. First, if the irrigator's timer had been working that may have limited the volume of the discharge. However, that is not clear from the Summary of Facts. Secondly, if Mr Joslin's instructions to Mr Potae had been

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<sup>16</sup> Submissions in support of an application for a discharge without conviction for Rere Lake Farm dated 21 July 2020 (**Rere Lake Farm's Further Submissions**), paragraph 5.

<sup>17</sup> Rere Lake Farm's Further Submissions, paragraph 5.2.

followed, it is unlikely that an issue would have arisen because the irrigator would have been moved to another paddock.

[65] By the same token, it is of fundamental importance that the Farm owners should have an effluent management plan, inform those working on the Farm of the Resource Consent and the conditions that must be complied with, and that all equipment be regularly serviced and maintained. I do not consider that Rere Lake Farm had in place sufficient processes or plans to ensure compliance with the Resource Consent. Had those plans been in place and the staff properly educated about them, it may be that a more rigorous approach to effluent management would have been undertaken. I therefore characterise its culpability in this case as moderately careless, and place the offending at the lower end of Level 2 in *Chick*.

### ***Codi Joslin***

[66] Mr Hopkinson submitted that Mr Joslin's culpability was lower than that of Rere Lake Farm because, as Consent Holder and owner of the Farm it was primarily responsible for the Farm's effluent infrastructure and for ensuring that proper systems were in place for effluent management. He submitted that Mr Joslin's culpability was also reduced because he had only been working at the Farm for a short time (nine weeks) and had been away from the Farm for three days prior to the offence, had not received any training from Rere Lake Farm relating to the Farm's effluent system or the requirements of its resource consent, and had instructed staff to move the irrigator out of the paddock prior to going on leave.

[67] That said, Mr Hopkinson submitted that Mr Joslin's culpability can be characterised as careless. He pointed to Mr Joslin's role as Farm Manager, and his responsibility for the Farm's effluent system. He noted that it was Mr Joslin's responsibility to monitor the irrigator. He submitted that he failed to instruct the staff to check the irrigator when they operated it in his absence; he was aware at the time of the incident that the timer on the irrigator was malfunctioning but did not advise the Farm's owner of that; on his return to the Farm on 9 November, he did not check the irrigator until doing his rounds.

[68] Ms Gwaze-Musesengwa acknowledged that Mr Joslin was aware of his responsibilities as the Farm manager, and that he cannot be considered to be inexperienced or lacking knowledge of Rere Lake Farm's effluent system. She submitted that he took reasonable steps prior to going on annual leave to ensure that there would be no issue with the effluent system. Even though the timer on the irrigator was not working properly, he gave directions to the staff to ensure that the issue with the timer would not increase the likelihood of effluent discharging, as the staff were aware that the irrigator was to be moved.<sup>18</sup> She referred me to Mr Potae's acknowledgement that he knew it was necessary to check on the irrigator at least twice. That said, I note that the Summary of Facts makes no mention of Mr Potae acknowledging that he had to check the irrigator twice.

[69] Counsel submitted that none of Mr Joslin's actions amount to deliberate or reckless conduct. She submitted that he took the necessary precautions by giving directions to his staff to move the travelling irrigator whilst he was away.

[70] For the purposes of culpability, I accept that Mr Joslin asked Mr Potae to move the travelling irrigator while he was away. Further, I note that he had only been on the Farm for some nine weeks and had not been informed of the requirements of the Resource Consent. Also, that there were no processes or systems in place for staff to regularly monitor and check the travelling irrigator while it was in operation. Having said that, Mr Joslin has worked on farms for some nine years, and has also worked before with travelling irrigators, so he would be aware of the need for them to be monitored. It is also clear, however, that Mr Potae knew of the need to check the irrigator because he confirmed as much in his interview with Council officers.

[71] The question then is the extent to which Mr Joslin should bear responsibility for the discharge of effluent from the irrigator. I note that the timer on the irrigator was broken, and that Mr Joslin should have advised Rere Lake Farm that it was broken and had it repaired, given that it fell within his area of responsibility. As I noted earlier, however, the broken timer may have contributed to the amount of effluent discharged but the Summary of Facts does not make that clear. As I understand it, the real

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<sup>18</sup> Submission for second defendant for sentence indication hearing dated 8 June 2020 (**Ms Gwaze-Musesengwa submissions**), paragraph 22.

difficulty arose from the irrigator having stayed in the same paddock for four days. It seems that the failure of the brake system on the irrigator occurred some time between 6-9 November. That does not appear to be an event that was foreseen, although I note the Hamiltons admit that they could have had a more regular servicing programme on the irrigators rather than wait until they had a fault.

[72] In summary, I do not consider that Mr Joslin was careless in undertaking his duties. Not only was he away from the Farm during the duration of the offending, but it is clear that he asked his 2IC to move the irrigator prior to going on leave. Mr Potae was aware that the irrigator needed to be moved and checked and did neither. There is no doubt that Mr Joslin should have advised Rere Lake Farm that the timer on the irrigator was broken, but I do not know if that factor contributed to the offending. The final question is whether or not Mr Joslin should have checked the irrigator on the morning of the day of his return to the Farm from leave, being 9 November. Mr Hopkinson submitted that that should have been the first thing that he did that day. I disagree. I note that Mr Joslin observed the irrigator while doing his rounds on 9 November and noticed that there was an issue. He had no cause to specifically inspect the irrigator first thing on his return because he had received no advice of there being a problem. I consider that Mr Joslin's culpability in this offending is low, and at the lower level of Level 1 in *Chick*.

### **Starting point**

[73] Section 8(e) of the Sentencing Act 2002 requires me to take into account the general desirability of consistency with appropriate sentencing levels in respect of similar offending. I note that the consistency principle does not mean that the sentence in one case should dictate the sentence in another. Counsel for the prosecutor submitted that a starting point of \$70,000 would be appropriate for Rere Lake Farm and \$25,000 for Mr Joslin. Mr Hopkinson referred me to four cases, *Waikato Regional Council v Graze Limited (Graze)*,<sup>19</sup> *Otago Regional Council v Greg Cowley Limited (Greg Cowley Limited)*,<sup>20</sup> *Taranaki Regional Council v Vernon (Vernon)*,<sup>21</sup> and

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<sup>19</sup> *Waikato Regional Council v Graze Limited* [2019] NZDC 15963.

<sup>20</sup> *Otago Regional Council v Greg Cowley Limited* [2019] NZDC 13639.

<sup>21</sup> *Taranaki Regional Council v Vernon* [2018] NZDC 14037.

*Taranaki Regional Council v Langford (Langford)*.<sup>22</sup> Defence counsel addressed the prosecutor's submissions on those cases.

[74] In *Graze*, Graze Limited was employed as the contract milker at a farm and was charged with two offences arising from the breakdown of a travelling irrigator and a decision made by the company's director to proceed with milking, resulting in an overflow from the sump. A starting point of \$70,000 was set in that case and the offending was characterised as highly careless, but viewed as a one-off case in light of steps to improve the Farm's effluent infrastructure that were underway at the time of the offending. Mr Hopkinson submitted that the present case involves one discharge offence as opposed to two, and submitted that Rere Lake Farm's offending is more serious given that it was the owner and Consent Holder of the Farm.

[75] In *Greg Cowley Limited*, the defendant company was the contract milker and responsible for the day-to-day running of the Farm. Regional council officers found that a travelling irrigator was not working and was siphoning effluent, resulting in ponding in a paddock. The Court held that although there was a one-off element to the offending, the failure to check the operation of the irrigator for a period of about six hours introduced an element of carelessness that meant the offending was moderately serious. A starting point of \$55,000 was adopted to reflect a certain degree of carelessness but no more than moderate proven environmental effect. Mr Hopkinson submitted that the defendants' culpability in the present case is higher, and the adverse effects are more serious than in the *Greg Cowley Limited* case.

[76] In *Vernon*, a husband and wife pleaded guilty to a charge of discharging effluent to land where it may enter water. On a compliance inspection Council officers found that the travelling irrigator was not connected and that untreated effluent had discharged directly to the paddock. The irrigator had not been moved for some time. There was effluent ponding in the paddock, and that effluent flowed into a watercourse. The Court found that there were obvious issues in managing effluent, there was inadequate storage capacity and the system was reliant on effluent irrigation notwithstanding the difficulties in such a wet area. The Court accepted that the

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<sup>22</sup> *Taranaki Regional Council v Langford* [2018] NZDC 10793.



defendants had acted recklessly in carrying out farming without an adequate effluent storage and irrigation system in place, and that the offending fell within the moderately-serious category of *Chick*.<sup>23</sup> A global starting point of \$60,000 was adopted.

[77] In *Langford*, the Council responded to a complaint about effluent flowing from the farm into a culvert and then into a watercourse. On inspection it found a significant amount of effluent ponded in the farm's paddocks and a visible flow path of effluent from the paddock to the culvert and watercourse. Following an upgrade of the farm's effluent system some four years prior to the offending, some redundant pipes were left exposed and not properly capped by the defendant. The discharge occurred when one of the pipes was broken and resulted in effluent flowing from the cistern into the paddocks. The Court held that the effects of the discharge were almost certainly minor, however it was the cumulative effect of the individual minor discharge which was of concern. The offending was characterised as moderately serious and a starting point of \$50,000 was adopted. Mr Hopkinson submitted that this case isn't relevant to Rere Lake Farm's offending, but is an example of a penalty being imposed on a farm manager. He acknowledged that Mr Joslin's culpability in offending in the present case is less serious than Mr Langford's in the *Langford* case.

[78] For Rere Lake Farm, Mr Hardie focussed on the cases cited to me by Mr Hopkinson. With regard to *Graze*, he pointed to the emphasis placed by the Court on the decision of the director of the defendant company to continue milking knowing the irrigator was inoperable. He noted the offending was classified as being moderately serious, and falling within Level 2 of *Chick*. As to *Greg Cowley Limited* he noted the offending was caused by an irrigator siphoning effluent which in turn caused a discharge of effluent onto a paddock. The offending was classed as moderately serious, falling within Level 2 of *Chick*. For *Vernon*, he submitted that the decision dealt with a serious situation in which dairy shed effluent had been allowed to be pumped from a sump directly to a paddock, and that the irrigator had not been connected to the hose and had not been used. The offending had occurred over some time. He submitted the circumstances of the case were far more serious than Rere

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<sup>23</sup> See above n 14.

Lake Farm. As to *Langford*, he submitted that the offending was more serious than the present case because it involved a serious and ongoing failure to take steps. He submitted that the offence was unintended and is similar to that described in the *Cowley* case and accordingly a starting point of \$50,000 is appropriate and just.

[79] I do not regard any of the cases cited to me as providing particular assistance in setting the starting point in this case as it was a combination of events that contributed to the offending. However, Rere Lake Farm, as I have already found, must bear responsibility as Consent Holder and for its failure to put in place a process of staff education of the requirements of the Resource Consent and systems for guiding the operation of the effluent management system.

[80] I have already determined that the effects of the offending were moderate. I have determined that Rere Lake Farm was moderately careless and that Mr Joslin's culpability was low. In those circumstances, I determine that an appropriate starting point for Rere Lake Farm is \$55,000 and for Mr Joslin a starting point in the range of \$5,000-15,000.

### **Applications for discharge**

[81] Following the first hearing of this matter, I allowed time for Mr Joslin to make an application for discharge if he wanted to pursue that course. Rere Lake Farm Limited sought and was granted leave to file an application. Applications were received from both defendants, and further submissions filed by all counsel. Mr Joslin's application was supported by an affidavit from him. There was no affidavit in support of Rere Lake Farm's application. I heard submissions on 27 July 2020.

[82] Sections 106 and 107 of the Sentencing Act 2002 are relevant. Section 106 gives the Court a discretion to discharge an offender without conviction, but the discretion is subject to the tests in s 107 being satisfied. Section 107 states that the Court must not discharge an offender without conviction unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[83] The s 107 test was set out by the Court of Appeal in *Z v R*:<sup>24</sup>

- (a) consider the gravity of the offence – consider all the aggravating and mitigating factors relating to the offending and the offender;
- (b) identify the direct and indirect consequences of the conviction and consider whether those consequences are out of all proportion to the gravity of the offence;
- (c) if it is determined that they are all out of proportion, still consider whether the Court should exercise its residual discretion to grant a discharge.

[84] On consequences, the Court of Appeal has stated:<sup>25</sup>

... The sentencing judge must decide, not to any legal standard of proof, what the consequences of the offending will be. The Judge does not have to be satisfied that the direct and indirect consequences will inevitably or probably occur, it is sufficient if he or she is satisfied there is a real and appreciable risk of such consequences.

***Rere Lake Farm Limited***

[85] With reference to the evidence filed by Mr Joslin in support of his application for discharge, Mr Hardie for Rere Lake Farm submitted that should the Court accept the affidavit evidence and submissions of Mr Joslin as to his level of culpability, it follows that Rere Lake Farm’s level of culpability must be assessed at or below that of Mr Joslin’s. Counsel submitted that there was little, if anything, the company could have done to prevent the offending in circumstances where Mr Potae failed to comply with the instructions given to him by the Farm Manager. He submitted the company cannot be faulted because “an employee chose not to fulfil his legal duty and follow proper and lawful instructions given to him by the duly appointed Farm Manager”.<sup>26</sup>

[86] As to the gravity of the offending, Mr Hardie submitted there are no aggravating factors personal to Rere Lake Farm; it has no previous convictions, it has a demonstrated history of farming at Rerewhakaaitu in an environmentally responsible way, it had systems in place that the staff were aware of, in particular that the irrigator

<sup>24</sup> *Z v R* [2013] NZAR 142 (CA) at [27].

<sup>25</sup> *DC v R* [2013] NZCA 255 at [43] (footnotes omitted).

<sup>26</sup> Rere Lake Farm’s Further Submissions dated 21 July 2020 at 5.2.

was to be operated only for short periods of time and checked at least twice while it was operating.<sup>27</sup>

[87] Finally, he submitted that given Mr Joslin's evidence, the offending was plainly not the result of staff not understanding their responsibilities, or insufficient infrastructure, but principally caused by Mr Potae ignoring lawful instructions.

[88] For the prosecutor, Mr Hopkinson submitted that, as consent holder and owner of the Farm, Rere Lake Farm has primary responsibility for ensuring compliance with the Act and the conditions of consent. He submitted that the 'buck stops with' Rere Lake Farm as the Farm owner and the consent holder. Owners of dairy farms cannot escape their responsibilities under the RMA and their consent by a contract of employment or agency".<sup>28</sup>

[89] Mr Hopkinson submitted that the company's offending was the result of systemic failures, including a failure to ensure there was a process or system in place for its staff to regularly monitor and check the travelling irrigator while it was being operated, a failure to ensure its employees were properly trained in the use of the irrigator and were aware of the Farm's effluent policy and the Farm's Resource Consent conditions, and a failure to ensure the irrigator was properly maintained. He submitted the fact that Rere Lake Farm was part of a large corporate dairy farming enterprise involving a number of dairy farms exacerbated those systemic failures. Finally, Mr Hopkinson submitted that the offending involved the contravention of condition 6.3 of the company's Resource Consent, which is an inherently serious matter of itself.

[90] Mr Hardie submitted that, given Mr Joslin's evidence, the company's culpability must be assessed as being extremely low. The offence was caused by Mr Potae failing to follow the instructions of his manager. In that regard I note that Mr Hardie submitted at the first hearing that the company's culpability can be characterised as being at the lower end of Level 2 of *Chick*.

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<sup>27</sup> Relying on paragraphs 4.10 and 4.11 of his Submissions dated 7 June 2020.

<sup>28</sup> From prosecutor's Further Submissions dated 24 July 2020 at paragraph 20, referring to *Southland Regional Council v McPherson* [2017] NZDC 27751 at [15]; *Northland Regional Council v Pinney* DC Whangarei, CRN-09027500764, 18 March 2011 at [59].

[91] Further, Mr Hardie submitted that staff were aware that the irrigator was to operate for only short periods of time and had to be checked at least twice while operating. I observe that that submission is not supported by the Summary of Facts. While both Mr Joslin and Mr Potae acknowledged the need to check the irrigator,<sup>29</sup> there is no reference to the length of time the irrigator should run or how often it should be checked. For the purposes of this hearing I am limited to the facts agreed in the Summary of Facts.<sup>30</sup> Mr Joslin has essentially confirmed in his affidavit the statements in the Summary of Facts and his evidence does not change my view.

[92] I have already found the company to have been moderately careless and have no cause to depart from that view and the reasons for it.

### Consequences

[93] Mr Hardie submitted that a conviction in the circumstances of the company's culpability being extremely low "does little but to vilify the company and by association its directors, who are decent, hard-working people".<sup>31</sup> He further submitted that there will be consequences to the company of a conviction, submitting that "it is commonly known that a conviction will have to be disclosed to any insurer, to bankers, in respect of future milk supply contracts, and of course will be held against it in any future applications for resource consents. A conviction will obviously damage the hitherto good reputation of Rere Lake Farms Limited and by association, its directors and other companies associated with the directors".<sup>32</sup>

[94] Mr Hopkinson submitted that the consequences relied on by Rere Lake Farm are ultimately reputational. He observed there is no affidavit evidence to support the claims made in relation to the potential consequences of the conviction. He submitted that reputational impact is a natural consequence of conviction; that it is difficult to see how the directors would be adversely affected, given they do not personally face the stigma associated with a conviction and that the company's name bears no obvious connection to the Hamilton family. Finally, he submitted that any suggestion that

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<sup>29</sup> Summary of Facts, paragraphs 40(b) and 43(b).

<sup>30</sup> Section 24(a) Sentencing Act 2002.

<sup>31</sup> Rere Lake Farm Further Submissions paragraph 6.4

<sup>32</sup> Rere Lake Farm Further Submissions, paragraph 6.6.

disclosing a conviction to insurers, banks or others might impact the company is too vague and speculative to constitute a consequence.

[95] On proportionality, Mr Hopkinson submitted that there are no direct or indirect consequences that would be out of all proportion to the gravity of Rere Lake Farm's offending. He characterises the gravity of its offending as moderately serious, and the consequences of conviction being at the lower end of the scale (if they exist at all). He submitted that a discharge without conviction for either defendant would fail to achieve the Sentencing Act purposes of denunciation, accountability and, most importantly, deterrence.

[96] I have carefully considered the matters raised with me and the consequences of conviction outlined by Mr Hardie, and note there is no evidence that the requirement to disclose the conviction to the bodies he outlined would be held against the company in any future applications. As to the risk of reputational damage, I consider that consequence to be an inevitable result of environmental offending.

[97] I do not, therefore, consider that the consequences of a conviction would be out of all proportion to the gravity of the offending.

[98] I was also asked to consider exercising my discretion under s 108 to convict the company without further penalty. In all the circumstances I do not consider it appropriate to exercise my discretion under that provision.

### ***Codi Joslin***

[99] Ms Gwaze-Musesengwa submitted that Mr Joslin acted responsibly by giving instructions to Mr Potae, his 2IC, to move the irrigator in his absence. She submitted that Mr Potae was an experienced farm worker and there was no concern about his experience or ability to move the irrigator; that Mr Potae did not follow Mr Joslin's instruction to move the irrigator in his absence, stating that his reason for not moving it is not before the Court. However, the Summary of Facts records an interview with Mr Potae where he explained that he did not move the irrigator due to pressure of work.

[100] Ms Gwaze-Musesengwa submitted that Mr Joslin only learned that the irrigator had not been moved when he returned to work on 9 November 2018, and

when he realised it had not been moved he moved it. She stated that, at the time the irrigator was moved, he did not realise that effluent had flowed from the paddock into the nearby lake.

[101] She noted that Mr Joslin, at the direction of a Council officer, built a dam to catch the flow of effluent, and that he fully complied with the Council investigation as well as with the Farm owners following the offence.

[102] She submitted that the offending arose from an unfortunate situation where Mr Joslin's instructions had not been followed. She submitted the length of time that Mr Joslin was away prior to the offence occurring is crucial; there is no evidence before the Court that supports that effluent may have begun to flow into the nearby stream three days before 9 November 2018. However, I observe that is not correct. The Summary of Facts records two complaints from members of the public prior to 9 November, where the Mangakino Stream (where it flowed out of the Farm) was observed to have dairy effluent in it.

[103] As to the Council's criticism of Mr Joslin for not checking whether the irrigator had been moved at the start of his shift on 9 November, meaning that the offence could have been discovered earlier, Ms Gwaze-Musesengwa submitted that his offending should still be characterised as "truly very minor". She submitted that this is because "he was not required to particularly check on the irrigator at the commencement of his shift and he had no reason to, given that clear instruction had been given to Mr Potae by Mr Joslin to move the irrigator in his absence".<sup>33</sup>

[104] Counsel acknowledged that the offence caused damage to the environment however that damage was brief and not ongoing.

[105] For the prosecutor, Mr Hopkinson submitted that Mr Joslin, as Farm Manager, was responsible for ensuring that the day-to-day operation of the Farm's effluent system was carried out in a way that avoided environmental harm. In reference to the point made that Mr Joslin was absent from the Farm until the day of the offending, Mr Hopkinson submitted that, even if I accept his instructions to his staff prior to going on leave were adequate, on the date of the alleged offending Mr Joslin was back at

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<sup>33</sup> Counsel for Joslin submissions dated 17 July 2020 at paragraph 18.

work yet failed to take any steps to ensure the irrigator was operating safely. He noted that Mr Potae was not working at the Farm on the date of the offence, and the only other person on the Farm that day was Kaytlin Beattie, who said she had no involvement with the effluent irrigator on that date.

### Consequences

[106] Ms Gwaze-Musesengwa stated that Mr Joslin is not working as a farm manager in his current role, however he does have aspirations to do so in the future. She accepted that it would be speculative as to whether a conviction would impact on his ability to fulfil the role of farm manager, however submitted that it cannot be dismissed that a conviction would impact on his ability to acquire such a role in the future.

[107] She noted Mr Joslin's previous appearances before the Court, however said that they were unrelated to any offence under the Act. She submitted that, as the last conviction entered against him was in 2007, he is currently entitled to conceal his convictions under the Criminal Records (Clean Slate) Act 2004; however, if convicted of a subsequent offence loses that eligibility.

[108] Mr Joslin deposed that a conviction could lead to a fine that would impact on his financial position and that he would have difficulty completing a community based sentence as that would result in him not being able to work the hours that he is presently required to work in his current employment. Counsel observed that his present home in Cheviot would require him to travel long distances to undertake a community-based sentence. She submitted that because of the truly minor offending that could be found against Mr Joslin, it is appropriate he be discharged without conviction because the consequences of conviction would be out of all proportion with the gravity of the offending.

[109] Mr Hopkinson submitted there was no evidence that Mr Joslin's current employment would be at risk if he were convicted and that it is speculative to suggest that a conviction would hinder his ability to secure a job as a farm manager in the future. Counsel noted that, despite previous convictions, Mr Joslin has successfully obtained farm manager roles.



[110] Mr Hopkinson did not agree that Mr Joslin is eligible at the present time under the Criminal Records (Clean Slate) Act 2004 to conceal his convictions because it appears he does not satisfy the eligibility criteria under s 7(1)(b) of that Act. That provision states that an individual is eligible under the clean slate scheme if “no custodial sentence has ever been imposed on him or her”. I agree with that submission.

[111] Mr Hopkinson submitted that the consequences of conviction are no more than what are to be expected for a defendant in Mr Joslin’s position, and cannot be said to be out of all proportion to the gravity of the offending. Further, that it is difficult to see what additional impact a conviction in this case could have on Mr Joslin given his previous criminal convictions.

[112] I have carefully considered Mr Joslin’s circumstances, my finding of culpability, and the environmental effects of the offending, as against his personal circumstances. I am unable to conclude that the consequences of conviction are out of all proportion to the gravity of the offending, given that I am not satisfied there will be any particular consequences, save of a financial nature, which can be addressed at the time of determining a fine.

#### **Aggravating and mitigating factors**

[113] I was not advised of any aggravating factors. In terms of mitigating factors, Mr Hardie submitted that Rere Lake Farm has endeavoured to farm its property responsibly and to be a good neighbour. Mr Hamilton is a member of and supports Project Rerewhakaaitu, which works towards enhancing and protecting the environment around the Lake. He has been involved in this project for a number of years. I was also provided with a letter from owners of a farm near to the farm owned by Rere Lake Farm, Mr Sutton. Mr Sutton attested that there has been significant work undertaken on the farms operated by the Hamiltons’ companies in respect to effluent management, retirement of land to protect various waterbodies. Mr Sutton advised that he is the Chairman of Project Rerewhakaaitu Incorporated and has been involved in the organisation since 2002. He noted that Mr Hamilton has been on the committee of the group for several years prior to 2015 and is still a valued member. He noted that over and above Mr Hamilton’s involvement with the Society, the Hamiltons are staunch supporters of the wider Rerewhakaaitu community, they

sponsor events such as the Dairy Industry Awards, support community and school activities, and run seminars and other projects for the benefit of the farming community.

[114] The company has no previous convictions, and has a demonstrated history of compliance.

[115] The prosecutor accepted that a five percent discount for previous good character for Rere Lake Farm would be appropriate. I agree. In recognition of the work that the company has generally undertaken, including retiring land to protect water bodies, I would allow a further discount of three percent.

[116] Mr Joslin has no previous convictions for RMA offences and in those circumstances the prosecutor submitted that he is also entitled to a five percent discount for previous good character. I agree.

### ***Guilty plea***

[117] Mr Hopkinson submitted that the defendants would be entitled to a 10 percent discount if they were to plead guilty, pointing to the fact that charging documents were filed on 3 May 2019 and served on 29 May and 4 June 2019 respectively. It was noted that on 3 September 2019 Rere Lake Farm pleaded not guilty and elected trial by jury and on 22 November 2019 Mr Joslin entered a not guilty plea. Mr Hopkinson submitted that it had incurred the costs of preparing evidence for the jury trial, which was filed and served on 16 December 2019. I received no particular submissions on this point from counsel for the defendants.

[118] I note that 25 percent is the maximum discount that can be allowed for a guilty plea, but that the discount can be affected by delay in making that plea. The Court in *Hessell v R*<sup>34</sup> observed:

[75] The reduction for a guilty plea component should not exceed 25 percent. That upper limit reflects the fact that remorse is dealt with separately. Whether the accused pleads guilty at the first reasonable opportunity is always relevant. But when that opportunity arose as a matter for particular inquiry

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<sup>34</sup> *Hessell v R*, [2011] 1NZLR 607 (SC) at [75].

rather than formalistic quantification. A plea can be reasonably be seen as early when an accused pleads as soon as he or she has had the opportunity to be informed of all implications of the plea.

[76] At the other end of the range, there may be cases in which there are significant benefits from a plea, warranting a sentence reduction, even though the plea comes very late. After a trial has commenced some real justification should be required before any allowance is made but there are from time to time instances where an allowance is justified.

[77] All these considerations call for a valuation by the sentencing Judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.

[119] I note that it was not until 3 March 2020 that both defendants requested that the matter proceed by way of a hearing requesting a sentence indication. I note that the prosecutor did have to prepare evidence for the jury trial, which was filed and served in December 2019. In those circumstances I consider it appropriate to allow a discount of 15 percent in the event the defendants were to enter guilty pleas.

### *Ability to pay a fine*

[120] Mr Joslin has limited means to pay a fine. While in regular employment, Mr Joslin has a number of expenses which leave little left over at the end of each fortnight. Together with his wife, he looks after five young children. His wife is currently not working. Mr Joslin also stated that he would have difficulty completing a community based sentence as that would limit the hours he is currently able to spend in his current employment. Further, counsel submitted he would have to travel long distances to undertake any community-based work.

[121] The prosecutor noted there was no evidence to support Mr Joslin's claim about his ability to carry out community work. However, counsel accepted that Mr Joslin has limited financial capacity to pay a fine and submitted that a fine which might otherwise be imposed on him could be reduced to a fine of \$4,000, noting that a fine could be paid by way of instalment.<sup>35</sup>

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<sup>35</sup> Section 86(b) of the Summary Proceedings Act, 1957.

**Outcome**

[122] For Rere Lake Farm, if this sentence indication is accepted, the outcome is that it should pay a fine of \$42,350, with 90% being paid to the Council pursuant to s 342 of the Act.<sup>36</sup>

[123] For Mr Joslin I have carefully weighed the purpose and principles of sentencing and Mr Joslin's role in the offending. Because of the matters referred to above I consider that it would be appropriate to exercise my discretion under s 108 to convict and discharge him.

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Judge MJL Dickey  
District Court Judge and Environment Judge

Date of authentication: 07/09/2020  
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

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<sup>36</sup> Applying the two step approach to sentencing outlined in *Moses v R* [2020] NZCA 296.