

**IN THE DISTRICT COURT
AT TAURANGA**

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

**CRI-2019-070-000599
[2020] NZDC 697**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

BAYGOLD HOLDINGS LIMITED
Defendant

Hearing: 4 September 2019
Appearances: A Hopkinson for the Prosecutor
L Burkhardt for the Defendant
Judgment: 22 January 2020

RESERVED SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] Baygold Holdings Limited (**Baygold**) has pleaded guilty to two charges of contravening the Resource Management Act 1991 (**RMA**) by contravening a regional Rule by carrying out earthworks that contravened the conditions of its resource consent and by discharging a contaminant (namely sediment-laden stormwater) onto land where it may enter water. The contraventions are of s 9(2) and 15(1)(b) of the RMA.

[2] Because the defendant is a company, the maximum penalty for each charge is a fine not exceeding \$600,000.

[3] The question for me is the starting point for the fine to be imposed on the defendant. The prosecutor, Mr Hopkinson, submitted that the appropriate starting point for the fine to be imposed (on a global basis) is \$80,000. Ms Burkhardt, for the defendant, submitted that a starting point of between \$50,000-\$60,000 would be appropriate.

Background¹

[4] The defendant company Baygold Holdings Limited (**Baygold**) was incorporated in 2009 and carries out large-scale conversions of pastoral land into kiwifruit orchards. It also carries out kiwifruit orchard management in the Bay of Plenty. Its directors are Graeme Neilson, Murray McBride and Martyn Robinson. Baygold is the sole partner in a limited partnership called “Baygold Orchards Limited Partnership” (**Baygold Partnership**). Baygold enters into any contracts that are necessary for Baygold Partnership’s activities.

[5] In January 2016, Baygold Partnership purchased the property at 1251A State Highway 2, Pikowai (**the site**). The site’s legal description is Lot 1 DP 490110. It is located at the northern end of the Matatā Straight and is approximately 100m from the sea. It is approximately 40ha in size and was in pastoral grazing land at the time Baygold Partnership purchased it. Baygold intended to convert the site into a large kiwifruit orchard in stages.

Resource consents

[6] In July 2016 Baygold obtained a resource consent (RM16-0006-AP) from Bay of Plenty Regional Council (**Regional Council**) to undertake earthworks to re-contour 13.3ha of the site and to carry out pumice quarrying. Baygold carried out earthworks at the site in 2016 and 2017 in reliance on that consent.

[7] In December 2017, Baygold applied to the Regional Council for another resource consent to carry out earthworks to convert a further 16.7ha of land at the site into a kiwifruit orchard. Resource consent was required because the size of the

¹ Agreed Summary of Facts, paragraphs 2-30.

proposed earthworks area (16.7ha) and the volume of the works (334,000m³) exceeded the permitted activity limits in the Regional Water and Land Plan (**Regional Plan**) and the activity was therefore discretionary under Rule 1C of the Regional Plan.²

[8] During processing of the application, the Regional Council raised several concerns with Baygold about engineering issues in relation to proposed sediment ponds, diversion drains and proposed slope angles in the earthworks area. Baygold responded to these concerns, stating that it would reduce the exposed earthworks area during winter periods to a maximum of 2ha, to correspond with the proposed pond storage capacity of 1,200m³. It also provided further copies of its earthworks plan that showed the two sediment ponds and various diversion drains that would be installed.

[9] On 21 March 2018 the Regional Council issued Baygold with resource consent RM 17-0749-AP (**Resource Consent or Consent**), which authorised earthworks and discharges of stormwater onto land which may result in contaminants entering water.

[10] The Resource Consent was subject to a number of conditions that included the following:

- Baygold was to ensure that no more than 2ha of earth was exposed on-site during the winter earthworking season (1 May – 15 September) (condition LC6.2);
- Baygold was to ensure that all earthworks and discharges were in accordance with the consent application, the plans annexed to the consent and further information that had been provided by way of email dated 26 January 2018. Baygold's earthworks plans were annexed to the consent as Plan RM17-0749/2 and RM17-0749/3. The former plan showed two sediment retention ponds at the earthworks site;
- Baygold was to ensure that there were no stormwater discharges off the site during the works and that all sediment-contaminated water generated on-site was contained within the site and discharged to ground soakage

² From September 2017 the Bay of Plenty Regional Water and Land Plan was renamed the "Bay of Plenty Natural Resources Plan" and Rule 1C was renamed "Rule LM R4".

(condition DC6.3);

- All erosion and sediment controls were to be installed prior to the commencement of construction works and were to be in accordance with the specified plans (condition LC7.1);
- All erosion and sediment controls for each stage of earthworks were to be installed prior to the commencement of bulk earthworks for each stage to ensure that sediment contaminated water does not discharge from the property (condition LC7.3);
- Baygold was to ensure that the construction of sediment retention ponds was undertaken as quickly as possible, and within a dry period of weather (condition LC7.6);
- Within 30 days of the installation of the sediment retention ponds, Baygold was to submit to the Regional Council a “statement from an appropriately qualified profession” (sic) verifying the sediment pond and spillway had been installed in accordance with best engineering practice, and was to provide as-built plans for the sediment ponds and spillways (condition LC7.7).

Commencement of work

[11] Baygold engaged G & J Vercoe Contracting Limited (**Vercoe Contracting**) to carry out the earthworks specified in the Resource Consent. There was no written contract between these parties for the earthworks. Baygold had engaged Vercoe Contracting for similar earthwork projects in the past. Gregory Vercoe is the managing director of Vercoe Contracting, and he has more than 20 years’ experience as an earthworks contractor.

[12] On 21 March 2018 Graeme Neilson (a director of Baygold) emailed Gregory Vercoe a full copy of the Resource Consent and the associated consent plans, which included the earthworks plan and sediment retention plan. In his covering email to Mr Vercoe, Mr Neilson said “We will need to consider putting correct ponds in place,

subject to Wiki's views". ("Wiki" is Wiki Mooney, a Regional Council enforcement officer).

[13] On 9 April 2018, a Regional Council Enforcement officer (Wiki Mooney) met with Baygold representatives (**Graeme Neilson and Peter Blakeley**) at the site for pre-earthworks discussions. Mr Mooney discussed with Mr Neilson the consent requirement for sediment retention ponds to be constructed. The construction of a bund and a number of soakholes, as compared with the consented pond, was discussed. Mr Mooney said that he thought that the ponds should be installed as specified by the Consent plans, but that he would discuss the issue with Mr Vercoe. When Mr Mooney met with Mr Vercoe, later that day, Mr Vercoe said he was happy to construct soak holes, but preferred that the pond be constructed, given there was a house and state highway near to the site.

[14] Mr Mooney issued a field sheet to Baygold summarising the above discussion and highlighting the relevant consent conditions, including the requirement to install ponds in accordance with the consented plans, the requirement that sediment retention ponds had to be installed as quickly as possible (condition 7.6) and the requirements of condition 7.7 that Baygold was to provide the Council with a statement from a professional verifying the construction of the pond and as-built pond plans for those ponds.

[15] On 22 May 2018 Mr Mooney inspected the site and noted that minor stormwater run-off had occurred onto an access road adjacent to the site, but there was no evidence of sediment contaminated water leaving the site. The two main sediment retention ponds had not yet been constructed. Mr Mooney discussed this issue with Mr Neilson, who said he thought that the soakage ponds that had been established in the immediate area of works to contain any sediment that could be mobilised during rain events would be sufficient. Mr Mooney accepted Mr Neilson's arguments that those soakage ponds were sufficient at that stage of the works.

[16] Rainfall occurred in the relevant area on 15 and 22 July 2018. On 22 July 2018 the owners of the property at the bottom of the access road sent an email to Graeme Neilson expressing their concerns about the large amounts of mud being washed onto

the access road from the site. Mr Neilson responded to the email indicating he would have Baygold's quarry manager look into the issue.

[17] On 23 July 2018 Mr Mooney inspected the site and found that:

- (a) A considerable amount of earthworks had been completed in the two months since his last inspection;
- (b) The two sediment ponds specified on the Resource Consent plans had not been constructed. Instead, several soakage ponds had been dug out. They were in low areas and were not as large as the sediment retention ponds specified in the consent plans. There were other deficiencies with those ponds;
- (c) A large amount of sediment had run off during recent rainfall onto the access track adjacent to the site;
- (d) Serious erosion had occurred at Baygold's earthworks site.

[18] During the inspection, Mr Mooney asked Mr Vercoe to ensure the sediment retention ponds had sufficient capacity so that they could contain all sediment-laden stormwater from the earthworks site. Mr Vercoe replied that he considered the soakholes he had constructed were sufficient for this and he would construct more if the need arose.

[19] The ground conditions immediately after the July rain events made it difficult for any further sediment controls to be installed at that time.

[20] On 6 August the owners of the property at the bottom of the access road sent another email to Graeme Neilson expressing their concerns about the effects of mud from the Baygold earthworks on the access road.

[21] In response, Mr Neilson said Baygold's quarry manager would assess the matter and address it. He also said that the catchment above this area is significant, and that water can flow from multiple zones, all feeding to the one outlet by their houses.

[22] On 7 August 2018 Mr Vercoe had a disagreement with Mr Neilson, following which Mr Vercoe removed all of Vercoe Contracting's earthworking equipment from the site. Vercoe Contracting has not returned to the site since. When later interviewed, Mr Vercoe told the Council that the reason he walked away from this job was that the grass at the earthworks site was not growing.

[23] After Mr Vercoe abandoned the site, Baygold put its quarry manager, Peter Blakeley, in charge of the site.

Offending³

Between 7 and 14 August 2018 (representative charge) – earthworks in contravention of a regional rule by carrying out works in contravention of a resource consent (CRN ending -304)

[24] On 6 August 2018 Mr Blakeley from Baygold notified Mr Mooney that he was concerned about the volume of stormwater flowing on the access track. He said there was some sediment in the stormwater.

[25] On 7 August 2018 Mr Mooney went to the site and found:

- (a) The grass alongside the access track for the Baygold earthworks site had been flattened;
- (b) The total amount of exposed earth was 7.24ha, which exceeded the 2ha limit in condition LC6.2 of the Consent;
- (c) The erosion and sediment controls were not in accordance with the plan specified in the Consent, in breach of condition LC6.1;
- (d) A number of the soakholes/ponds that had been constructed to retain sediment-contaminated stormwater had been filled in. There were only two soakholes remaining and they were both full. Neither of these soakholes met the requirements for sediment retention ponds in the consent (eg in terms of design, location and minimum capacity) – a breach of conditions DC6.1, LC7.1 and LC7.2 of the Consent;

³ Agreed Summary of Facts, paragraphs 31-51.

- (e) Where the north-eastern pond (Pond B) was supposed to be constructed there was a bund to retain sediment-laden stormwater. A part of that bund had been washed away by stormwater and then reinstated;
- (f) Clean stormwater had not been diverted away from the exposed earthworks as required by condition LC7.4 of the Consent;
- (g) Stormwater had discharged off-site in breach of condition DC6.3 of the Consent;
- (h) Deep channels had formed within the earthworks site during the recent rainfall. Sediment-contaminated stormwater had flowed from these channels, along the access road, down to and across SH2 into an adjacent wetland. Stormwater also flowed in a westerly direction along SH2 before flowing across the highway into the adjacent wetland;
- (i) A section of stormwater bund in the north-western part of the earthworks site had been washed away.

[26] During the 7 August inspection Mr Mooney determined that the majority of the sediment-laden stormwater that had flowed down the access road was from the Baygold earthworks site. Mr Mooney took photographs on 7 August showing a large area of exposed earthworks and deep channels that formed in that area during recent rainfall.

[27] At the end of his inspection Mr Mooney told Mr Blakeley of Baygold about the issues he had identified and said if the sediment retention pond had been constructed as specified in his April field sheet, then the off-site discharge may not have occurred.

Between 8 and 14 August 2018 (representative charge) – discharged sediment laden stormwater onto land where it may enter water (CRN ending -308)

[28] On 8 August Mr Mooney received a complaint from the property at the entrance of the access road to the Baygold site. The complainant said that sediment-laden stormwater was again flowing down the access road and onto State Highway 2

(SH2). Mr Mooney went to the property and found stormwater discharging from the Baygold earthworks site down the access road. He took samples on the access road and beside SH2.

[29] During his inspection on 8 August the Council officer also found a discharge of sediment-laden water from the site to SH2 from a separate flowpath, to another culvert on SH2 to the north of where sediment-laden water had been discharging from the access road to SH2. Some sediment had come from an adjacent maize paddock to the west of the Baygold site.

[30] As a result of Mr Mooney's discovery of discharges of sediment-contaminated water from the site on 7 August, the Regional Council issued an abatement notice to Baygold. It was issued on 9 August 2018 and required Baygold to cease contravening condition 6.3 of the Resource Consent (which required Baygold to ensure no stormwater discharged off site).

[31] On 10 August 2018 a Council officer returned to the site to check compliance. During that inspection he took photographs of the residual sediment that had discharged from the Baygold site along the access road on 8 August and other photographs of the earthworks. The photographs showed residual sediment on the access road and at the junction of the access road and SH2.

[32] On 13 August the Council took drone footage of the site and assessed the affected wetland.

[33] During the inspection on 13 August Mr Blakeley told Mr Mooney he would arrange for a machine to remove the sediment from SH2 that had flowed there from the Baygold site.

[34] Late on 13 August 2018 Mr Neilson left Mr Mooney a voicemail message saying he was incredibly frustrated and disappointed with what had happened at the Baygold site.

[35] At 6:54am on 14 August 2018 Mr Mooney received a phone call from the owners of the house near the access road leading to the Baygold site to say that water was flowing down the access road and that they were concerned it might flood their house. He went to the property soon after receiving the call and when he arrived he saw sediment-laden stormwater flowing down the access road. Because of the rate of flow, it was overtopping the culvert and flowing across the track to a channel next to the complainant's house. He found that the majority of the sediment-laden water flowing across the access track was from the Baygold site, and that the source of the sediment contamination in that water was the Baygold earthworks site.

[36] Mr Mooney took samples in two locations along the access track. One sample was taken at the point where sediment-laden water was discharging from the Baygold earthworks site onto the access track. The second sample was taken on the access track 400m downstream of the first sample.

[37] When he returned to the point where the access track joined SH2, Mr Mooney observed some water was flowing straight across SH2 and into a drain that flowed into a wetland on the eastern side of the highway.

[38] Mr Mooney took a sample from the manhole riser on the western side of SH2 and a sample where that water was flowing into the wetland on the eastern side of the highway. He also took photographs of sediment-laden water from the site flowing into and along the access track on 14 August 2018.

[39] While he was inspecting the site on 14 August, Mr Blakeley from Baygold arrived. He said that Baygold would be undertaking more works to reduce the discharges from their earthworks site.

Subsequent events⁴

[40] Mr Blakeley phoned Mr Mooney on 15 August to say that he had been unable to borrow any functioning machinery from Mr Vercoe to carry out the further works, and so had arranged for another contractor to undertake the remedial works.

⁴ Agreed Summary of Facts, paragraphs 52-54.

[41] On 10 September 2018, Mr Mooney carried out a further compliance inspection of the Baygold earthworks site and found that, since his previous inspection on 14 August 2018, the following works had been carried out:

- (a) A large sediment retention pond had been constructed adjacent to the access track, with two decanting pipes, a spillway and a geotextile overflow path. This pond is the north-eastern sediment retention pond (Pond B) shown on the Consent plan (17-0749/2);
- (b) A clean water diversion bund had been installed near to the pond;
- (c) At the southern end of the site a number of soakholes had been de-silted, and the bund of one soak hole had been raised;
- (d) At the site's north-western corner, sediment retention pond A had been installed, several soakholes had been de-silted and the final bund had been enlarged.

Rainfall

[42] During the periods 18-24 July 2018, 2-10 August and 13-14 August 2018, rainfall in the area where the site is located did not exceed a 1 in 2 year storm event, a 1 in 100 year 24 hour duration storm event, and a 1 in 10 year, 10 minute duration storm event.

The defendant's explanations⁵

[43] Graeme Neilson and Peter Blakeley, both from Baygold, were interviewed by the Council about the offending. I summarise relevant aspects of their explanation:

- Graeme Neilson was the only Baygold director involved in these earthworks. He has been involved in constructing orchards since 2000.
- He does not consider himself an expert in relation to earthworks. Baygold engages contractors who have appropriate expertise, eg Vercoe Contracting,

⁵ Agreed Summary of Facts, paragraph 56.

for earthworks and Stratum Consultants for consenting and subdivision applications.

- Peter Blakeley is Baygold's pumice quarry manager, but following the issues in August 2018 he has been given responsibility for managing Baygold's earthworks sites. He did not become involved in the present earthworks until after Mr Vercoe ceased work at the site.
- Graeme Neilson was the primary contact between Baygold and Greg Vercoe about the earthworks, and emailed a copy of the Resource Consent to Mr Vercoe as soon as it had been granted.
- Mr Neilson would normally attend the Baygold earthworks site once a week.
- Mr Neilson recalled the details of the Consent being discussed at the first site meeting with Mr Mooney and with Mr Vercoe. In particular, he recalled Mr Vercoe assuring Mr Mooney that he would put in the pond required by the Consent until the earthworks were stabilised.
- After the events on 7 August 2018 Mr Neilson became aware that there were major issues at Baygold's earthworks site and that Mr Vercoe had not put in the appropriate sediment retention structures to cater for the scale of earthworks. "This was devastating to Baygold as the company prides itself about what they do and how they do it. They want to be held in high esteem. While there was a measure of compliance at their site, there was 'then a fatal flaw'".⁶
- the two sediment ponds required under the Consent were constructed after the August 2018 rain events. Mr Vercoe put in soakage holes but not the required ponds.
- Mr Neilson had not raised any concerns with Mr Vercoe about this. He was not aware of anyone arranging for as-built plans to be completed as required

⁶ Agreed Summary of Facts, paragraph 56(i).

by the Consent. He accepted that it was Baygold's responsibility to provide as-built plans for the pond to the Regional Council.

- Mr Vercoe did not install the diversion bunds required by the Consent.
- Mr Neilson was very disappointed with what had happened.
- Mr Vercoe had approached this project too casually, and Baygold no longer had confidence in his ability to comply with the Consent.
- Mr Vercoe walked away from the site. Mr Vercoe then removed all his earthmoving equipment on the day of the first rain event (7 August 2018). He refused to return to the site or allow them to use his digger. Mr Blakeley had to arrange for other earthmoving equipment to be brought in.
- Mr Neilson accepted the earthworks were not carried out in accordance with the Consent plans. From its perspective, Baygold had transferred its responsibilities to Vercoe Contracting.
- Mr Vercoe did not install all the required silt fences, and he had filled in soakage holes with soil as he progressed with his earthworks.
- Baygold was not aware Mr Vercoe's company had been previously prosecuted for earthworks until after 7 August 2018.
- Baygold had been naïve as consent holder in relying on Mr Vercoe's expertise, and had learnt harsh lessons from the failures in this case.
- Baygold would take a more proactive role in the future.

Starting point

[44] The sentencing process and the purposes and principles of the Sentencing Act 2002 and the RMA were not in dispute. Reference was made to the High Court decision in *Thurston v Manawatu-Wanganui Regional Council (Thurston)*⁷ in which Miller J summarised the principles generally considered relevant in cases of this kind.

⁷ *Thurston v Manawatu Whanganui Regional Council (Thurston)* High Court, Palmerston North, CRI-2009-454-24, 27/8/2010, paragraph [40].

[45] The principle of deterrence is an important one for environmental offending. This was described by Miller J as one of the relevant factors.⁸ In reference to it he said:

Penalties should ensure that it is unattractive to take the risk of offending on economic grounds.

[46] Some factors that are commonly highlighted as relevant to the assessment of the starting point in RMA cases are the offender's culpability, any infrastructural or other precautions taken to prevent discharges, disregard for abatement notice or council requirements, the ecological importance of the affected environment and the extent of environmental damage, deterrence, the size and wealth of the defendant and its capacity to pay a fine.

*Effects on the environment*⁹

[47] Samples of the stormwater taken on 8 August on the access road and beside SH2 showed:

- (a) Stormwater flowing from the Baygold site onto the access road had suspended solids levels of 490g/m³;
- (b) Stormwater from the site that was flowing beside SH2 had suspended solids levels of 790g/m³.

[48] The samples taken at two locations on the access track on 14 August, one at the point where sediment-laden water was discharging from the site onto the access track found that it had suspended solids levels of 2,500g/m³. The second sample, taken downstream, was found to have suspended solids levels of 1,800g/m³.

[49] The samples taken from the Baygold site flowing near SH2 on 14 August had the following suspended solids levels:

- (a) 6,000g/m³ at the manhole riser on the western side of the highway;

⁸ Thurston, above n 7, paragraph [41](e).

⁹ Agreed Summary of Facts, paragraphs 37, 46, 49, 55.

- (b) 1,000g/m³ at the discharge point into the wetland on the eastern side of the highway.

[50] Regional Council scientists assessed the adverse effects of the August 2018 discharges. Their main conclusions are as follows:

- (a) The size of the exposed earthworks area (7.2ha) at the Baygold site and the lack of adequate sediment and stormwater controls, left the site vulnerable to erosion and stormwater discharges;
- (b) Discharges of sediment-contaminated stormwater from the earthworks site have flowed overland and entered the Ōtamarākau Wetland in two locations. The discharges have also deposited sediment from the site along the access track and alongside SH2. In future rain events this sediment will be mobilised and washed into the Wetland;
- (c) The discharges of sediment-contaminated stormwater in August 2018 would have contributed to the cumulative impact of sedimentation in the Ōtamarākau Wetland.

[51] The affected wetland is the Ōtamarākau Wetland, which is part of Significant Indigenous Biodiversity Site (SIBS) BS71 in the Whakatāne District Plan, and Indigenous Biological Diversity Area (IBDA) A42 in the proposed Regional Coastal Environment Plan.

[52] During Regional Council monitoring in 2015 the Ōtamarākau Wetland was assessed as being in reasonably good condition. Main vegetation types recorded were *phormium tenax* flaxland, *typha orientalis* reedland and *carex geminata* sedgeland. These vegetation types show that the site meets the definition of a wetland in the Regional Natural Resources Plan.

[53] Ōtamarākau Wetland is a dune-slack wetland. Dune-slack wetlands are a “Naturally Uncommon Ecosystem” and a national priority for protection of biodiversity. Dune-slack wetlands have been ranked as nationally endangered.

Though not recorded during monitoring, this wetland is likely to provide habitat for at-risk and threatened species such as North Island Fernbird and Spotless Crane.

[54] Water from Ōtamarākau Wetland flows into the Ōtamarākau Stream, which then flows to the sea nearby.

[55] I assess the environmental effects of this offending to be moderately serious in the context of the site's proximity to the Ōtamarākau Wetland and based on the assessment from the Regional Council's scientists that the sediment-contaminated stormwater would have contributed to the cumulative impact of sedimentation on that Wetland.

Culpability

[56] Mr Hopkinson submitted that the defendant's culpability for the offending was at the high end of the scale. He submitted the defendant was either reckless or careless to a high degree. In support of that submission, he pointed to a number of factors:

- (a) The defendant is the holder of the Resource Consent that authorised the earthworks;
- (b) The defendant's related entity, Baygold Partnership, is the owner of the property where the earthworks were being carried out;
- (c) The defendant engaged the earthworks contractor, G & J Vercoe Contracting Limited to carry out the earthworks at the site;
- (d) The defendant is in the business of carrying out large-scale conversions of pastoral land into kiwifruit orchards, and has been carrying out this work for approximately nine years.

[57] The defendant contravened the Resource Consent in a number of ways:

- It failed to ensure that the two sediment retention ponds were constructed as required by the Consent.
- It failed to ensure that the total area of exposed earthworks in August 2018

was less than 2ha, as required by the Consent. The total amount of exposed earth was more than three times that maximum limit (ie 7.24ha).

- It failed to provide the Regional Council with as-built plans for the two sediment ponds, and verification by a suitably qualified professional that the ponds had been installed in accordance with best engineering practice, as required by conditions of consent.
- It failed to ensure that no stormwater or sediment-contaminated water discharged from the site, as required by the Consent.

[58] The prosecutor submitted that these failures and breaches directly caused the discharges of sediment-laden stormwater from the site between 8 and 14 August 2018.

[59] Finally, the prosecutor submitted that the defendant will derive significant commercial benefits from converting the site to a kiwifruit orchard. He noted that the conversion couldn't be carried out without the Resource Consent, noting that the Consent was subject to important conditions that were intended to minimise the adverse effects of the defendant's earthworks.

[60] For the defendant, Ms Burkhardt advised that the defendant accepted that it was its responsibility to ensure that the Resource Consent was being fully complied with by the contractor engaged to undertake the work. She submitted that the defendant's failure was not deliberate, but rather careless or reckless, but not to the high degree as suggested by the prosecutor.

[61] Ms Burkhardt advised that the defendant engaged a contractor with whom it had worked before. Further, that it used appropriate consultants to obtain the necessary resource consent, which consent was provided to the contractor by the defendant's representative, Graeme Neilson.

[62] Ms Burkhardt provided some explanation for a number of the events described in the Summary of Facts. She submitted that it was clear from the first visit on site dated 9 April 2018 involving Council officer Wiki Mooney, Mr Neilson and

Mr Vercoe, that Mr Vercoe preferred that the stormwater pond be constructed (in preference to soak holes), given there was a house and state highway near to the site.

[63] She submitted that at the time of Mr Mooney's next inspection on 28 May 2018, while the consented ponds had not yet been constructed, soakage ponds had been placed in the immediate area of the works and that they were sufficient at that stage of the works. The failure to have the consented pond in place at that stage was not taken by Mr Neilson to be of serious concern, given the way in which the compliance officer dealt with the issue.

[64] It was acknowledged that it was a different story when Mr Mooney returned to the site two months later, on 23 July 2018, as the consented ponds had still not been constructed. Instead, soak holes had been dug out in their location. Mr Neilson was not present for that inspection, however other representatives of the defendant and Mr Vercoe were.

[65] Counsel advised that, during this period, Mr Neilson had been less able to attend the site to oversee the work due to the then very recent loss of his wife to cancer. Counsel submitted that Mr Neilson's email to the complainant on 22 July 2018 indicates a high degree of concern for the issue being raised, and confirmed that steps to resolve matters would be taken. However, it was agreed that the level of rain by that stage had made it difficult for any further sediment controls to be installed at that time. And finally, that the defendant's ability to take action was seriously constrained by Mr Vercoe leaving the site on 7 August 2018 and taking his equipment with him.

[66] While the defendant's quarry manager was put in charge at this time, it was due to ground conditions and lack of equipment to undertake necessary remedial works that the site was vulnerable to any heavy rain events. The 14 August event represents such an occurrence. Counsel submitted that, after that, it is agreed that the necessary works were completed by the time of Mr Mooney's subsequent inspection on 10 September.

[67] Finally, Ms Burkhardt drew my attention to the fact that, when issues arose at the site these were self-reported by the defendant. Further, that when neighbours

raised issues directly, the defendant took steps to rectify the situation as far as it was able to do so. Once it had taken complete control of the site, and despite some challenges, all remedial work was completed in a timely manner. I note that the defendant certainly reported concerns with the volume of stormwater flowing onto the access track on 6 August 2018, but that with regard to the offending commencing 8 August 2018 that was discovered as a result of a complaint from the property at the entrance of the access road to the Baygold site. Ms Burkhardt acknowledged that the defendant's culpability is somewhere between the moderate to high end of the scale. She advised that the defendant accepts its responsibility as consent holder to ensure that the Consent is complied with. It knew that the conditions were not being met. While a contractor had been relied on to undertake the works, the defendant acknowledged that its management was too passive during a critical period of the works.

[68] I consider that the defendant acted responsibly insofar as it sought advice and obtained a resource consent to authorise the works. It also acted responsibly when it engaged a contractor with whom it had previously worked (presumably without incident). However, as an experienced developer, Baygold should have known the importance of ensuring that the Resource Consent was complied with. It cannot claim inexperience in relation to this matter. While it was clear that the ponds hadn't been constructed on 22 May 2018 it was also clear that, as the works proceeded, it was important that those ponds be constructed. The Council inspection of 23 July 2018 made that clear.

[69] I understand that Mr Neilson wasn't as present as he could have been during this period of time because of his wife's death. He has the Court's sympathy. However, Mr Neilson could have put Mr Blakeley in charge of matters much earlier and his involvement may have resulted in a different outcome. The effects of the offending on the environment were moderately serious given the site's proximity to the Ōtamarākau Wetland. Further, the effects of the flooding on the neighbour's house at the end of the access road cannot be ignored.

[70] In all the circumstances, I assess the defendant's culpability as being highly careless. I do not go so far as to label it as reckless given the matters I have outlined.

Starting point

[71] Counsel cited a number of cases as being of assistance. However, I consider that all cases to an extent stand on their own facts. The cases I was cited were *Bay of Plenty Regional Council v Waiotahi Contractors Limited*,¹⁰ (**Waiotahi**); *Bay of Plenty Regional Council v Comanche Holdings Ltd & TBE 2 Limited*,¹¹ (**Comanche**); *Nelson City Council v KB Contracting and Quarries Limited and KB Quarries Limited*,¹² (**KB Contracting**); *Canterbury Regional Council v Sicon Ferguson Limited & Tresta Holdings Limited*,¹³ (**Sicon**); *Waikato Regional Council v Rex Holloway & Ors*,¹⁴ (**Holloway**); *Northland Regional Council v Verano Properties Limited*,¹⁵ (**Verano**).

[72] In *Waiotahi* there were four charges of permitting the discharge of sediment-contaminated stormwater from earthworks onto land where it may enter water. There were two further charges of contravening an abatement notice. *Waiotahi Contractors* was the earthworks contractor engaged by the developer and consent holder. The Court adopted a total starting point of \$120,000 but said that the starting point could also be treated as a starting point of \$40,000 for each of the three offence dates, or a starting point of \$20,000 for each of the six charges. The starting point took into account a number of factors, including that there were three separate incidents, two of which involved very high levels of suspended solids entering a stream and a tributary stream.

[73] Mr Hopkinson submitted that there are similarities between the offending in *Waiotahi* and this case, given that both involve discharges of sediment-laden water on more than one date, involved commercial earthworks and involved breaches of consent conditions. However, he acknowledged that the offending there involved higher levels of suspended solids contamination than the present case. Ms Burkhardt

¹⁰ *Bay of Plenty Regional Council v Waiotahi Contractors Limited (Waiotahi)* [2018] NZDC 2397.

¹¹ *Bay of Plenty Regional Council v Comanche Holdings Ltd & TBE2 Limited (Comanche)* DC Hamilton, CRN-1407050063, 64, 66, 69, 70, 72, 11 December 2014.

¹² *Nelson City Council v KB Contracting and Quarries Limited & Ors (KB Contracting)* [2018] NZDC 11153.

¹³ *Canterbury Regional Council v Sicon Ferguson Limited & Tresta Holdings Limited (Sicon)* DC Christchurch, CRI-2013-009-10493, 10495, 27 June 2014.

¹⁴ *Waikato Regional Council v Rex Holloway & Ors (Holloway)*, DC Hamilton, CRI-2013-019-3819, 6 May 2014.

¹⁵ *Northland Regional Council v Verano Properties Limited (Verano)*, DC Auckland, CRI-2009-084-344, 17 August 2014.

submitted that *Waiotahi* represented the high point for this type of offending, and pointed to the sentencing Judge's observation that "this case is one of the most serious that has come before me".

[74] Mr Hopkinson also referred to *Comanche*, which involved offending during earthworks where 30ha of pastoral land was being converted for industrial use. *Comanche* was the consent holder of the consent and TBE 2 was the landowner. There were three charges of discharging sediment-contaminated stormwater to a stream that fed into an estuary listed as containing important habitats or migratory pathways for a range of indigenous fish species. The Court accepted that the offending would have had an impact downstream on the stream and the estuary. At the time of the offending, the defendant company's director and site manager were involved in other projects away from the site. The Court noted that the erosion and sediment controls had been designed and signed off by the project engineer, and at the time of the incident the level of compliance at the site had been assessed as high. However, the Court accepted that the defendant's culpability was high given the failure to undertake an inspection before a forecast heavy rainfall event, awareness that the site was difficult, and an awareness of the need for active management. The Court set a global starting point of \$100,000. Mr Hopkinson said that the context of the offending and the nature of the failures in *Comanche* were similar to the present case, but the adverse effects and the quantity and level of contamination in *Comanche* were more serious than here. Ms Burkhardt drew my attention to the fact that the sampling results in *Comanche* showed a significant level of suspended solids.

[75] Finally, Mr Hopkinson referred to me to *KB Contracting*. The defendants had pleaded guilty to five charges of discharging sediment-laden water into a stream. The land was being developed for residential use. The Court referred to a number of factors as elevating the seriousness of the offending, including that it was a situation of appalling management of sediment discharges, there was gross pollution of a high value environment, and that there was a high degree of culpability. The Court adopted a starting point of \$120,000, dealing with the charges and the defendants on a global basis. Mr Hopkinson submitted that the present case is less serious than *KB Contracting*, but that the Court's comments about the offending involving developers

undertaking commercial activities are equally applicable in this case. He pointed to the Court's finding as follows:¹⁶

Finally, I record that these offences were committed by developers undertaking work as part of their commercial activities. It is to be assumed that such persons are aware of their responsibilities and the standards to which they have to work. The issue of deterrence is of particular importance in this situation. It is axiomatic that profit should not come at the expense of the environment.

[76] Ms Burkhardt pointed out that, in contrast with the present case, the KB Contracting case involved a situation where the management of the site was described as appalling, with issues arising within weeks of consent being granted and persisting for a year prior to the offending.

[77] Ms Burkhardt referred me to three cases. The first was *Sicon*. In that case the earthworks contractor and the land developer were charged with permitting the discharge of a contaminant into water from a subdivision. The defendants had been warned by the Council to improve the effectiveness of their sediment control measures, but repairs undertaken were inadequate. The effect on the environment was small and transient. A starting point of \$40,000 was adopted for the earthworks contractor and a starting point of \$30,000 for the developer.

[78] Ms Burkhardt also cited *Rex Holloway*. In that case the land owner, earthworks contractor, and farm manager were prosecuted for permitting the discharge of sediment onto land in circumstances where it may have entered water. No erosion or sediment controls were in place and no resource consent had been obtained. The Court found that each of the defendants should have been aware that the earthworks had the potential to create adverse environmental effects. The Court assessed Mr Holloway's culpability for the offending as high because he was an experienced contractor and should have been aware of the rules that apply to earthworks. The Court found that the farm manager's culpability was also high because he was negligent in not identifying there was a problem with the works and did not draw it to the attention of the owner. Starting points for the contractor and the farm manager of \$80,000 each were adopted. The land owner was found to be least culpable due to its reliance on

¹⁶ Above n 12, paragraph [27], final bullet point.

others for advice and lack of involvement in the activities. The starting point was \$20,000. The impact on the environment was determined to have been moderate.

[79] Finally, Ms Burkhardt cited *Verano Properties*. In that case the consent holder and developer and the contractors were sentenced after pleading guilty to charges of discharging soil onto land in circumstances where it may enter water. The contractors were responsible for design of the sediment controls and installation of the controls. The charges related to a five month period when the discharges occurred. Verano as consent holder and developer had a starting point of \$30,000 imposed and the contractors \$45,000 and \$36,000 respectively.

[80] The prosecutor submitted that an appropriate starting point would be \$80,000, based on the defendant's culpability being high, and on there having been major contraventions of the consent conditions that resulted in large amounts of sediment contaminated stormwater being discharged from the site, along the access track, and along SH 2 where it entered the Ōtomarākau Wetland. Further, the discharges occurred on more than one occasion. It was submitted that the suggested starting point is modest when considered against the maximum available penalties and when compared to the other cases such as *Waiotahi* and *KB Contracting*. He submitted that deterrence is important, and that a starting point at this level will reinforce to consent holders that consents are not open licences to carry out an activity, and that compliance with consent conditions is of fundamental importance.

[81] Ms Burkhardt submitted that the present case sits somewhere between the cases she cited (being *Rex Holloway*, *Sicon* and *Verano*). She submitted that a starting point should be between \$50,000-\$60,000. Ms Burkhardt also submitted that it is relevant to record that the defendant is being sentenced separately from the co-defendants, and that it would be unfair for the defendant to be additionally penalised for having been the first to take responsibility for the part it played in the offending. The defendant pleaded guilty to the charges based on the Agreed Summary of Facts. My assessment is based on that and the submissions I received. I have only considered the role of this defendant in the offending for the purposes of this decision.

[82] I consider the appropriate starting point sits between that which has been proposed by the prosecutor and defence counsel. While the cases cited to me were helpful, I consider that this case has its own particular circumstances that lead me to the starting point. As I have previously indicated, the company acted responsibly in obtaining a resource consent and engaging a contractor to undertake the works. Where it fell down was in ensuring that the contractor properly executed those works and complied with the Consent. It did not approach with sufficient urgency problems that had been identified with regard to the non-construction of the detention ponds, and was caught short when problems began to manifest themselves. The effects on the environment from the offending were moderate. I therefore adopt a starting point of \$70,000.

Aggravating and mitigating factors

[83] I was not advised of any relevant convictions that would warrant an uplift to the starting point.

Mitigating factors

[84] Counsel for the defence submitted that at least a five percent reduction for the defendant's previous good character is appropriate. The prosecution agreed. Counsel for the defence submitted that some credit is due to the defendant for the clean-up of sediment on the neighbours property, the shared access and beside the state highway. A five percent reduction was thought to be appropriate. I disagree. Clean-up would not have been required if the Resource Consent had been complied with. The defendant did nothing more than remedy an unsatisfactory situation.

Guilty plea

[85] The prosecutor submitted that the defendant would be entitled to a 25 percent discount given guilty pleas were entered at an early stage. I consider that is appropriate.¹⁷

¹⁷ *Hessell v R*, [2011] 1NZLR 607 (SC), paragraph [75].

Outcome

[86] The defendant is convicted on the charges and fined the sum of \$49,875.00. I make an order pursuant to s 342 of the RMA that 90 percent of the fine imposed be paid to the Bay of Plenty Regional Council.¹⁸

Judge MJL Dickey
District Court Judge and Environment Judge

Date of authentication: 22/01/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

¹⁸ Corrected from Waikato Regional Council in accordance with Rule 1.6 of the Criminal Procedure Rules 2012.

