IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2019-070-005645
[2021] NZDC 4071

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

CRS TAURANGA LIMITED
Defendant

Hearing:	2 November 2020
Appearances:	Ms V Brewer for the Prosecutor Mr S Ryan for the Defendant
Judgment:	9 March 2021

SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] CRS Tauranga Limited (**CRS**) has pleaded guilty to two representative charges of discharging a contaminant onto or into land in circumstances where it may enter water pursuant to ss 15(1)(b) and 338(1)(a) of the Resource Management Act 1991 (**RMA**). One charge relates to discharging a contaminant at Te Awanui Way between 4 July 2019 and 11 October 2019.[1] The other charge relates to discharging a contaminant at Taiaho Place between 16 July 2019 and 11 October 2019.[2] The maximum penalty for each offence is a fine not exceeding $600,000.

[1] CRN-19070502101.
[2] CRN-19070502106.

[2] Ms Brewer proposed a starting point in the range of $130,000 to $150,000. Mr Ryan proposed a starting point in the range of $50,000 to $100,000.

[3] A Summary of Facts was agreed between the parties.

Background[3]

[4] Section 15(1)(b) of the RMA states that no person may discharge any contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan or proposed regional plan, or a resource consent.

[5] The sediment contaminated stormwater that was discharged in this case is a contaminant within the meaning of that term under the RMA as, when discharged into water, it changes or is likely to change the physical, chemical or biological condition of the water.

[6] CRS operates a container repair and resale business from premises covering 2.35 hectares over four adjoining properties located near Tauranga Airport at the southern end of Totara Street, Mount Maunganui. The physical addresses of the four properties are 2 Te Awanui Way, 10 Te Awanui Way, 18 Te Awanui Way and 1 Taiaho Place (**the site**).

[7] CRS has leased the site since December 2015.

[8] In February 2016 CRS obtained a certificate of compliance (**CoC**) from the Tauranga City Council (**TCC**) that the operation of the container terminal was a permitted activity under the district plan. The CoC authorised the establishment and operation of a container storage and repair terminal from a compacted gravel yard.

[3] Summary of Facts, at [1] – [10].

[9] In February 2016 CRS applied to the Bay of Plenty Regional Council (**Council**) for a land use resource consent to carry out earthworks at the CRS site to prepare the "existing, unused industrial allotment for a port-related activity."

[10] The proposed earthworks included stripping back the vegetation (weed/grass and flaxes) and uneven fill on the site and spreading fill and gravel over the entire 2.4 hectare surface of the site to establish a compacted gravel yard.

[11] The application stated that the proposed earthworks would not cause any adverse effects relating to sediment, erosion and stability given the works were relatively minor and the imported gravel would be compacted to form a dust free surface.

[12] After considering the application, the Council issued a certificate of compliance on 9 March 2016 stating, "the application of metal aggregate to 200mm depth over an area of 2.4ha does not meet the definition of earthworks as outlined in the Bay of Plenty Regional Water and Land Plan, does not trigger any of the relevant rules, and can be lawfully carried out without resource consent."

[13] Between March and June 2016 CRS proceeded to develop the site as set out in its certificates of compliance. From late 2016 CRS began using the CRS site as its Tauranga storage terminal.

[14] The CRS site remains predominately unsealed as a compacted gravel yard except for a chip sealed vehicle access route around the site.

Stormwater system[4]

[15] The CRS site adjoins the Te Awanui Way and Taiaho Place stormwater systems.

[4] Summary of Facts, at [11] – [17].

Taiaho Place

[16] The stormwater system on Taiaho Place is part of the TCC stormwater network.

[17] Stormwater that enters the Taiaho Place stormwater network flows west along the length of Taiaho Place and discharges through a culvert into Tauranga Harbour at Whareroa Beach, approximately 390 metres from the CRS site.

[18] Discharges into the sea from the TCC stormwater system are authorised by TCC's comprehensive stormwater consent. This consent does not expressly allow discharges of contaminants or discharges that exceed the total suspended solids limit of 150 g/m³.

Te Awanui Way

[19] The stormwater system on Te Awanui Way is part of the adjacent site occupied by Seeka Kiwifruit Industries Limited (**Seeka**). Seeka is the holder of resource consent 63450 (**the Seeka consent**) which authorises the discharge of reticulated treated stormwater from the Te Awanui Way roadway and the Seeka and CRS sites to a modified watercourse to the south of Te Awanui Way that is part of the TCC stormwater network (**the airport drain**).

[20] Relevant conditions of the Seeka consent include requirements that:

(a) Stormwater from the consented site is reticulated and treated by an 'Ecosol RSF 4750' stormwater treatment device (the Ecosol unit) prior to being discharged to the airport drain;

(b) The concentration of suspended solids in the stormwater discharge shall not exceed 150 g/m3 at any time except where the design event of a 1:50 year, 10-minute storm is exceeded;

(c) The Ecosol unit is to be operated and maintained in good working order at all times to the satisfaction of the Council and in accordance with any manufacturers' recommendations; and

(d) Consent shall expire on 31 May 2021.

[21] Stormwater that enters the Te Awanui Way stormwater network flows south to the Ecosol unit located at the bottom of Te Awanui Way. From there, the treated stormwater is discharged to the airport drain. The airport drain discharges to Tauranga Harbour approximately 250 metres from the point where the treated stormwater from the Te Awanui Way system enters that drain.

The offending[5]

4 July 2019 – CRN 19070502101

[22] On 4 July 2019 the Council was notified by TCC of a large sediment discharge from the CRS site. In response, Council enforcement officers went to Te Awanui Way to inspect the CRS site and found dirty stormwater discharging from the CRS site at various locations, including:

(a) From the CRS driveway near Taiaho Place (**the site exit**);

(b) From the CRS driveway near the bottom of Te Awanui Way (**the site entrance**); and

(c) From a catchpit on the driveway within the CRS site which flows into the stormwater system on Te Awanui Way (**the CRS catchpit**).

[23] All three of these discharges flowed into the stormwater system on Te Awanui Way.

[24] The officers collected water samples. An upstream sample collected from the Te Awanui Way stormwater system recorded suspended solids of 82 g/m³. A sample taken at the point where the stormwater system discharges to the airport drain recorded suspended solids of 1,400 g/m³. From the CRS driveway near Taiaho Place, suspended solids of 2,600g/m³ were recorded.

[5] Summary of Facts, at [26] – [59].

[25] The discharges of sediment contaminated stormwater from the CRS site to Te Awanui Way on 4 July 2019 were not expressly allowed under Seeka's resource consent nor were they authorised by a regional rule.

16 July 2019 – CRN 19070502101 and 19070502106

[26] On 16 July 2019 Council enforcement officers went to Te Awanui Way to check compliance during a rain event and found dirty stormwater discharging from the CRS site at various locations, including the following discharges to Te Awanui Way:

(a) From under the boundary fence at the southern end of the CRS site, flowing overland into the curbside channel and entering a stormwater catchpit on Te Awanui Way;

(b) From a stormwater lateral pipe connected to two sumps that CRS had constructed to the north of the workshop area (the northern sumps) for collecting stormwater and allowing sediment to settle before discharging the "treated" water from the site to the Te Awanui Way stormwater system; and

(c) From the CRS catchpit to the Te Awanui Way stormwater system.

[27] The officers also located a discharge of sediment contaminated stormwater from under the northern boundary fence of the site, flowing overland into the curbside channel and entering the TCC stormwater network via a stormwater catchpit on Taiaho Place.

[28] During the 16 July 2019 inspection, Council officers collected water samples. An upstream sample collected from the Te Awanui Way stormwater system recorded suspended solids of 170 g/m³ (Sample 20). A downstream sample collected at the point the stormwater system discharges to the airport drain recorded suspended solids of 550 g/m³ (Sample 17).

[29] Downstream samples taken from the Taiaho Place stormwater system recorded elevated levels of suspended solids ranging from 1,300 g/m³ to 2,200 g/m³.

[30] The discharges of sediment contaminated stormwater from the CRS site to Te Awanui Way on 16 July 2019 were not expressly allowed under Seeka's resource consent nor were they authorised by a regional rule.

[31] The discharge of sediment contaminated stormwater from the CRS site to Taiaho Place on 16 July 2019 was not expressly allowed under TCC's stormwater consent nor was it authorised by a regional rule.

19 July 2019 – CRNs 19070502101

[32] On 19 July 2019 Council enforcement officers went to Te Awanui Way to check compliance during a rain event and found dirty stormwater discharging from the CRS site at various locations, including:

(a) From under the southern boundary fence of the site, flowing overland into the curbside channel and entering a stormwater catchpit on Te Awanui Way;

(b) From the stormwater lateral pipe connected to two sumps to the south of the CRS site's workshop area (the southern sumps) that discharge "treated" water from the CRS site into the Te Awanui Way stormwater system; and

(c) From a stormwater lateral pipe that flows from the CRS site and into the Te Awanui Way stormwater system outside the site entrance. This stormwater pipe conveys water from the CRS site, including from the two northern sumps.

[33] During the inspection on 19 July 2019 Council officers collected water samples. An upstream sample collected from the stormwater system on Te Awanui Way recorded suspended solids of 310 g/m3 (Sample 13). A downstream sample collected at the point the stormwater system discharges to the airport drain recorded suspended solids of 1,300 g/m3.

[34] The discharges of sediment contaminated stormwater from the CRS site to Te Awanui Way on 19 July 2019 were not expressly allowed under Seeka's resource consent nor were they authorised by a regional rule.

10 September 2019 – CRN 19070502106

[35] On 10 September 2019 a Council enforcement officer went to Te Awanui Way to check compliance during a rain event. The officer observed brown discoloured water flowing into the Te Awanui Way stormwater system from the CRS site. The officer took photographs and collected water samples.

[36] While the discharge from the CRS site to the Te Awanui Way stormwater system had elevated levels of suspended solids (1,100gm/3), the sample taken at the stormwater outlet to the airport drain was within the permissible limit prescribed by the Seeka consent conditions. Seeka confirmed that the Ecosol unit had been pumped out on 15 August 2019.

[37] The officer continued his inspection at the northern end of the CRS site and found discoloured water leaving the CRS site under the sand sausages located along the northern boundary and seeping under the retaining wall. The sediment-laden water discharging from the northern end of the CRS site was flowing to the curbside channel on Taiaho Place and into TCC's roadside stormwater catchpits.

[38] The officer took a sample of the dirty water emanating from the northern boundary of the CRS site and flowing into the TCC stormwater system on Taiaho Place (Sample 4 – Turbidity 1,600 NTU, Suspended Solids 620 g/m3). A downstream sample taken at the culvert outlet into Tauranga Harbour at Whareroa Beach also recorded elevated suspended solids.

[39] The discharge of sediment contaminated stormwater from the CRS site to Taiaho Place on 10 September 2019 was not expressly allowed under TCC's stormwater consent nor was it authorised by a regional rule.

11 October 2019 – CRNs 19070502101 and 19070502106

[40] On 11 October 2019 a member of the public complained to the Council that there was a dirty plume of water entering Tauranga Harbour near the Whareroa boat ramp. In response to this complaint, a Council officer went to the boat ramp and saw a large brown plume discharging to the harbour from the Taiaho Place stormwater outlet. A sample taken at the culvert outlet had suspended solids levels of 8,800 g/m³.

[41] The officer went to Taiaho Place and saw discoloured water leaving the CRS site under the northern boundary fence, flowing through the grass verge and into the curbside channel. This water then flowed into a stormwater catchpit on Taiaho Place. The officer took a sample of the dirty water as it flowed into the stormwater catchpit. That sample had suspended solids levels of 7,600 g/m³.

[42] The officer drove down Taiaho Place and confirmed that there were no other sources of dirty water entering the stormwater network.

[43] The officer then inspected the Te Awanui Way stormwater system and found brown discoloured water flowing into the system from the CRS site. The discharge appeared to be coming from the southern sumps, which CRS representatives had previously told Council had been plugged to prevent contaminated stormwater from the CRS site flowing into the Te Awanui Way stormwater system.

[44] The Council officer collected a sample of water discharging from the CRS site into a manhole on Te Awanui Way. That sample had suspended solids levels of 1,400 g/m³.

[45] The officer also inspected the Te Awanui Way stormwater culvert that discharges into the airport drain. Turbid water was exiting the stormwater culvert into the airport drain. A sample taken of this discharge had suspended solids levels of 580 g/m³.

[46] The discharges of sediment contaminated stormwater from the CRS site to Te Awanui Way on 11 October 2019 were not expressly allowed under Seeka's resource consent nor were they authorised by a regional rule.

[47] The discharge of sediment contaminated stormwater from the CRS site to Taiaho Place on 11 October 2019 was not expressly allowed under TCC's stormwater consent nor was it authorised by a regional rule.

Inspection of Ecosol unit by manufacturer – 15 May 2020[6]

[48] In response to the Council's investigation, Seeka provided an initial explanation to the Council that it arranged for regular cleanout and maintenance of the Ecosol unit by a contractor in accordance with the conditions of the Seeka consent.

[49] Seeka subsequently provided a further explanation to the Council that due to an oversight by its contractor, the contractor had not cleaned out the Ecosol unit during the 2018 year, and in 2019 not until August 2019.

[50] At the request of CRS a clean-out of the Ecosol unit was arranged on 15 May 2020 to occur in the presence of a representative from the manufacturer of the Ecosol unit. The manufacturer's representative found that the clean-out process of the Ecosol unit by the contractor had not previously removed a build-up of sediment against the filtration screens in the Ecosol unit to the point where the operating effectiveness of the unit was substantially reduced and the stormwater flowing through the Ecosol unit was not being treated.

[51] Mr Ryan submitted that the lack of maintenance of the Ecosol unit was a factor in the sampled levels measured at the outfall in the airport drain. All of the dates of the offending as they relate to Te Awanui Way correlate to a time period when the Ecosol unit at the end of Te Awanui Way was not being properly cleaned out by Seeka. Mr Ryan acknowledged that while CRS has been the primary contributor to sediment generation, the failure to clean out the Ecosol sediment unit (or properly clean it out)

[6] Summary of Facts at [56] – [59].

as envisaged by the condition of the Seeka consent is logically a contributor to the sediment sampled and observed at the airport drain.

The defendant's explanations[7]

[52] During the inspection on 19 July 2019 an office spoke with the CRS site operations manager who stated that CRS had not been able to finish stormwater retention works at the CRS site due to the weather.

[53] On 22 July 2019 another Council enforcement officer met with CRS representatives and their contractor to discuss what CRS was doing to address the sediment/stormwater issues at the CRS site. The CRS representative told the Council officer that CRS was carrying out the following works:

(a) Installation of downpipes to direct clean water from the workshop roof into a new manhole (sump) and then to the Te Awanui Way stormwater system;

(b) Installation of two manholes/stormwater sumps, one considered a "pre-chamber", on either side of the workshop area (northern side and southern side) along with open drainage channels to convey the water to the sumps, to collect and settle sediment prior to stormwater discharging to the Te Awanui Way stormwater system;

(c) Construction of a soakage chamber at the Taiaho Place northwest corner of the CRS site to keep dirty water on site and installation of a silt fence behind the fence line bund to stop run-off.

(d) Re-shaping of the yard.

[54] CRS also said it intended to seal the main roadway around the CRS site with chip seal and to seal the last 40 metres to the site exit with asphalt.

[7] Summary of Facts at [65] – [70].

[55] On 28 August 2019 the Council officer returned to inspect the completed sediment control works. The CRS representative advised that:

(a) Since the previous meeting with Council they had added two above-ground holding tanks for dirty stormwater pumped from the northern and southern sumps;

(b) These tanks have 60,000L capacity;

(c) The second sump on each side of the workshop have had plugs installed to block the pipes connected to the Te Awanui Way stormwater system to prevent contaminated stormwater from the CRS site flowing into the Te Awanui stormwater system; and

(d) Silt that settles in the holding tanks would be sucked out by hydrovac trucks and the water would be used for dust control on the yard.

[56] CRS declined to attend a formal interview during the Council investigation.

[57] In October 2019 CRS engaged a consultant to provide advice on what further remedial measures were necessary to resolve the stormwater issues at the CRS site. CRS' consultant confirmed that the primary source of sediment generation was the unsealed areas at the CRS site.

[58] Mr Ryan submitted that the sediment discharges occurring between July to October 2019 stemmed from the errors and omissions in the original design and set up of the CRS site. He submitted that the design and set up of the CRS site failed to adequately identify the potential for adverse stormwater effects and run-off from the compacted gravel yard.

[59] He acknowledged that, retrospectively, CRS has made attempts to identify and rectify the stormwater issues by a series of remedial actions. The remedial actions have been iterative, reflecting that the success or otherwise of remedial or mitigation measures have been assessed after a rainfall event occurs.

[60] The dates of the offending, 4, 16, and 19 July 2019, all coincide with rainfall events when further remedial works had been designed and commissioned but due to weather and/or lack of contractor availability, the works had not been completed.

[61] CRS accept that remedial steps undertaken to date do not avoid a continuing risk of sediment escape from the CRS site in heavy rainfall events.[8]

[62] Mr Ryan confirmed that CRS had engaged a consultant to provide advice on what further remedial measures were necessary to resolve the stormwater issues at the CRS site, and there have been discussions with the Council.[9] Further temporary works have been completed and CRS continues to investigate remedial options to the long-term solutions to the stormwater issues.[10] There are significant financial implications to long-term remedial options.[11]

History

[63] CRS has been the subject of enforcement action on three previous occasions.

[64] On 11 September 2018, an abatement notice (RA18-00074) was issued requiring the company to cease discharging a contaminant, namely sediment laden stormwater, from 18 Awanui Way, to the TCC stormwater network and subsequently to Tauranga Harbour.

[65] On 6 November 2018 the Council issued infringement notice RI18-00028 to CRS for contravening abatement notice RA18-00074 on 29 October 2018. CRS paid the infringement fine.

[66] On 27 March 2019 an officer issued abatement notice RA19-00034 to CRS requiring it to cease discharging a contaminant, namely sediment from the tracking of motor vehicles, onto land in circumstances where it may enter water.

---

[8] Defence submissions on sentence, dated 28 October 2020, at [9](g).
[9] Defence submissions on sentence, dated 28 October 2020, at [44]-[51].
[10] Defence submissions on sentence, dated 28 October 2020, at [52].
[11] Defence submissions on sentence, dated 28 October 2020, at [9](h).

Sentencing principles

[67] The purposes and principles of sentencing under the Sentencing Act 2002 are relevant insofar as they are engaged by a particular case. The principles outlined in *Thurston v Manawatu-Wanganui Regional Council* (***Thurston***) 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 cooperation with enforcement authorities.[12]

Environmental Effects[13]

[68] The Taiaho Place and Te Awanui Way stormwater drains both discharge directly into Waipu Bay in Tauranga Harbour. The Regional Coastal Environment Plan (**Coastal Plan**) identifies the affected environment as an Outstanding Natural Feature and Landscape and an Area of Significant Cultural Value. The margins of Waipu Bay are identified as an Indigenous Biodiversity Area, meeting the criteria in the New Zealand Coastal Policy Statement. The Maheka sandspit, on the Matapihi side of Waipu Bay, is also an important shore bird roosting site.

[69] Increased rates of sedimentation are a key issue for Tauranga Harbour, as identified in the Coastal Plan. Sedimentation can have a range of adverse effects on benthic communities and habitats and the cumulative impacts of sediment discharges will adversely affect the ecological health of the harbour.

[70] The persistent discharges of suspended sediment from the CRS site to the harbour will likely have significant localised effects on Waipu Bay, with adverse effects possible across a range of highly valued habitats that have been outlined in the

[12] *Thurston v Manawatu-Wanganui Regional Council* HC, Palmerston North, CRI-2009-454-24, 27 August 2010, at [41] and [42].
[13] Summary of Facts at [60] – [64].

Coastal Plan as key areas of concern. There is also concern that sediments could be transported to other areas of the harbour, creating effects further afield.

[71] The main adverse actual and potential impacts resulting from the CRS discharge events were:

(a) Localised sedimentation has occurred directly out from the stormwater outlet from Te Awanui Way to the airport drain, encouraging juvenile mangroves to grow on newly created sediment habitat adjacent to the drain. The growth of these mangroves will continue to have negative feedback, encouraging additional sediment deposition and mangrove recruitment due to changing hydrodynamics. The airport drain itself has minimal ecological value but over time will convey the contaminants discharged to it to the Tauranga Harbour;

(b) Depending on tides and prevailing winds, sediment discharged from the CRS site via the two outlets into Waipu Bay may be carried east into Waipu Bay onto threatened habitats (seagrass, shellfish beds, bird roosting sites, estuarine wetlands). Sediments may also be discharged out into the greater harbour, where it may be transported out of the harbour;

(c) Sediments discharged into slow, sheltered estuarine environments are likely to be retained, thus creating significant localised impacts. At the mouth of Waipu Bay adjacent to Whareroa marae, hydrodynamic modelling shows moderate current flow in the channel along the beach near the discharge points in certain tidal conditions and adjacent to Whareroa marae, as well as high transport rates for fine sediments sourced from the main drain input at the upper Northeast of Waipu Bay. The modelling does not consider large, cumulative point source discharges from industrial sites; and

(d) There may be localised impacts on shellfish in Waipu Bay, but no actual assessment has occurred.

[72] Ms Brewer submitted that the discharges on the five relevant dates involved relatively high levels of sediment flowing into the stormwater system a short distance from where that system flows into the Tauranga Harbour.

[73] Ms Brewer submitted that putting to one side the impact of the individual discharges on the five separate dates, the Court must also consider the cumulative effect that discharges of this nature have on our waterbodies which is often referred to as "death by a thousand cuts". Overall counsel submitted that the environmental effects of the offending were moderately serious.

[74] CRS acknowledged that protecting the Tauranga Harbour from the cumulative effects of increased sedimentation is an important policy imperative. Mr Ryan submitted that, apart from observed sedimentation at the outfall at the airport drain, here the predicted effects appear more as potential effects rather than actual effects. Mr Ryan submitted that CRS's sentence ought to recognise that the actual effects of the particular discharges from CRS's site have not been measured.

[75] Mr Ryan noted that in a wider context, sedimentation in the Tauranga Harbour involving an industrial site represents an overall small percentage of the total sediment load occurring to the Tauranga Harbour from all sources.

[76] The samples taken indicate suspended solids levels at the two discharge points from the CRS site were well above the permitted suspended solids limit. I accept that while the CRS site was a major contributor to the sediment escaping the CRS site, lack of maintenance of the Ecosol unit in Te Awanui Way has been a factor in the sampled levels measured at the outfall in the Airport Drain.

[77] There are also effects on the local community and iwi. Victim impact statements have been prepared on behalf of the nearby Whareroa Marae community and Ngai Te Rangi Iwi, who have been directly affected by the offending.

[78] The statement on behalf of the Whareroa Marae community identified that the sediment discharges have caused damage to Tangaroa and his children, and this is detrimental to the community's wairua – spiritual and mental wellbeing. The

community also said that they cannot practice kaitiakitanga, clean up and restoration when the discharges continue.

[79] The statement on behalf of Ngāi Te Rangi identified that the discharges have disrupted the foundations of Ngaiterangitanga because of the way they interfere with traditional and ancestral connections to place, cultural practices and intergenerational responsibilities.

[80] The Court has observed on many occasions that it is the cumulative effects of discharges of contaminants onto ground and into waterways that is of concern. It is not enough to point to a lack of information on actual adverse effects as they are well known. In the circumstances, I determine that the effects of the offending, particularly given the number of individual discharges (five), are likely to have caused adverse effects to the environment. The discharge would have made some contribution to any cumulative effects arising from other sedimentary discharges to the stormwater systems and Tauranga Harbour. I have noted the classification of the affected environment and the vulnerability of the environment. I am concerned with the effects on the local community and the matters raised by iwi. In all the circumstances I determine that the environmental and cultural effects of this offending are moderately serious.

Culpability

[81] Ms Brewer submitted that the defendant's culpability in this case can be characterised as careless to a high degree.[14] She submitted that:

(a) The offending demonstrates a real want of care by the defendant. CRS has been on express notice of the stormwater issues since at least 29 August 2018, when a Council enforcement officer inspected the CRS site in response to a public complaint and found discoloured stormwater discharging from the site. Despite being issued with abatement notices

[14] Prosecutor's submissions on sentence, dated 16 October 2020, at [20].

on 11 September 2018 and 26 March 2019, and an infringement notice on 6 November 2018, CRS has been slow to address the need for a long-term solution to sediment issues and stormwater management at the site.

(b) Interim remedial measures adopted by CRS have been ineffective at preventing discharges. One of the measures taken by CRS in response was to install sumps to collect dirty water and allow sediment to settle before the stormwater discharged to Te Awanui Way. However, these sumps were not appropriate sediment treatment devices and were found to be ineffective when inspected by Council officers on 16 and 19 July 2019. Other measures adopted by CRS proved similarly ineffective at controlling the volume of sediment-contaminated stormwater runoff from the CRS site during rain events (e.g. use of "sand sausages" and silt fences around the perimeter, and installation of two above-ground holding tanks for dirty stormwater). It was not until October 2019 that CRS engaged a consultant to provide advice on what remedial measures were necessary to resolve the issues at the CRS site.

(c) The number of discharges and duration of the offending is an aggravating feature. On five occasions over a three-month period Council officers found discharges of sediment-laden stormwater from the CRS site to the Taiaho Place and/ or Te Awanui Way stormwater systems.

(d) There is a commercial element to the offending in that CRS has opted to continue with its operations at its site and generate sediment from the unsealed areas, rather than sacrifice some of its container storage area for an appropriately sized sediment treatment device or invest in more expensive remedial steps for a long-term solution.

(e) The offending is characterised by an unwillingness to take responsibility for the environmental effects of the activity. There appears to be a suggestion that Seeka is partly to blame for failing to

> maintain its Ecosol stormwater treatment unit at the bottom of Te Awanui Way. However, the fact that the Ecosol unit did not cope with the very high loadings of sediment emanating from the CRS site does not mitigate the defendant's offending. CRS cannot shift responsibility from its own failures to control sediment generated on its site. This prosecution has not resulted in the defendant adequately addressing the sediment and stormwater management issues at its site. The CRS site remains largely unsealed and CRS continues to operate its container storage yard despite the ongoing risk of discharges of sediment laden stormwater during rain events.[15]

[82] Mr Ryan submitted that the offending has not been deliberate. He submitted that the offending is more readily characterised as "*unintentional but careless discharges of a recurring nature over a period of time, or of incidents arising from the malfunction of different parts of the system*".[16] This description adopts language from the *Chick*[17] case; level 2, moderately serious band.

[83] Mr Ryan submitted that there is a broader 'systemic' element to the offending, in that breaches in part arise from the failure of the process when establishing the CRS site to adequately identify the potential for adverse stormwater effects and run-off from the compacted gravel yard. The potential for significant adverse stormwater effects was not identified, predicted or assessed at the outset. He highlighted that the consequences of rectifying this retrospectively have serious financial implications for the company.[18]

[84] Mr Ryan submitted that the failure to clean out the Ecosol sediment unit (or properly clean it out) as envisaged by the condition of the Seeka consent is logically a contributor to the sediment sample results. Mr Ryan submitted that the maintenance obligation was not under the supervision or control of CRS.[19]

---

[15] Prosecutor's submissions on sentence, dated 16 October 2020, at [21].
[16] Defence submissions on sentence, dated 28 October 2020, at [58] and [60].
[17] *Waikato Regional Council v GA & BG Chick Ltd* (2007) 14 ELRNZ 291.
[18] Defence submissions on sentence, dated 28 October 2020, at [61] – [62].
[19] Defence submissions on sentence, dated 28 October 2020, at [39] and [43].

[85] I note that, while the potential for adverse stormwater effects may not have been identified when establishing the CRS site, adverse stormwater effects and run-off were initially identified by the Council in August 2018 and have continued through to (at least) October 2019. In fact, both the Council and the defendant acknowledge that the problems leading to the offending have still not been addressed. It is appropriate to acknowledge the steps the company has taken in an attempt to resolve the issues, but as at the date of this hearing those issues have still not been resolved. At best, they could be characterised as stop-gap remedial measures.

[86] Mr Ryan submitted that issues with the clean-out of the Ecosol unit contributed to the sediment sampled and observed at the airport drain. The Council does not accept that this mitigates the company's offending. I find that it is clear that sediment was discharged from the company's site and that those discharges were due to the company's failure to properly address its site management.

[87] This offending took place in the context of an active business which has continued operations despite the ongoing risk of sediment laden stormwater being discharged from the site. Efforts to resolve the issues aside, it is of note that, at least in heavy rainfall events, sediment continues to escape the site. The defendant acknowledges that. It was not until October 2019 that the defendant engaged a consultant to provide advice on necessary remedial measures.

[88] I find that the company has dragged its feet in appropriately addressing the problem, even though it was aware there was an issue from at least August 2018. There have been at least five occasions where discharges occurred over a three-month period. The charges are, however, representative and allege offending between July and October 2019.

[89] I conclude that the defendant did not respond with sufficient urgency or diligence to the ongoing sediment discharge problems at its site. It had a number of opportunities to do that, dating back to September 2018 when it first received an abatement notice. Accordingly, I determine that the defendant was highly careless in its approach to management of stormwater on its site.

Starting point

[90] Section 8(e) of the Sentencing Act requires the Court to take into account the general desirability of consistency with appropriate sentencing levels in respect of similar offending. However, the high degree of variation in the facts, individual culpability, and environmental effects in prosecutions under the RMA makes it difficult for direct comparisons between cases.

[91] Ms Brewer has drawn my attention to five cases offered by way of comparison to assist with identifying a starting point: *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* (**Waiotahi Contractors 19938**)[20], *Bay of Plenty Regional Council v Katikati Quarries (2001) Ltd* (**Katikati Quarries**)[21], *Bay of Plenty Regional Council v Baygold Holdings Ltd* (**Baygold**)[22], *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* (**Waiotahi 2397**)[23], and *Bay of Plenty Regional Council v The Lakes (2012) Ltd* (**The Lakes**)[24].

[92] In *Waiotahi Contractors 19938* the Court adopted a starting point of $55,000 in respect of a discharge of sediment-laden washwater from the defendant's aggregate washing and crushing facility. It was submitted that there are similarities between the offending in *Waiotahi Contractors 19938* and the offending in the present case, given that both cases involve discharges of sediment-laden water from industrial sites. Each case involves high levels of suspended solids and a history of previous compliance inspections identifying non-compliant discharges. However, *Waiotahi Contractors 19938* involved a one-off discharge whereas the present case involved discharges on at least five occasions over a period of three months. Ms Brewer submitted that the environmental effects are worse in the present case given the environmental impacts on Tauranga Harbour.

[93] In *Katikati Quarries* the Court adopted a starting point of $40,000 in respect of a discharge of sediment contaminated water from a quarry operated by the

[20] *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* [2018] NZDC 19938.
[21] *Bay of Plenty Regional Council v Katikati Quarries (2001) Ltd* [2018] NZDC 14867.
[22] *Bay of Plenty Regional Council v Baygold Holdings Ltd* [2020] NZDC 697.
[23] *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* [2018] NZDC 2397.
[24] *Bay of Plenty Regional Council v The Lakes (2012) Ltd* DC Hamilton CRN-15070500520 & 0522, 10 June 2015.

defendant. It involved a one-off discharge rather than repeated discharges and arose from the company's failure to properly manage its employee, rather than from problems with the site's sediment control systems. Ms Brewer submitted that the present offending is more serious.

[94] In *Baygold Holdings* the Court adopted a starting point of $70,000 in respect of offending arising from earthworks associated with the conversion of a rural property to a kiwifruit orchard. The offending involved discharging sediment laden stormwater to land where it may enter water. Baygold was found to be highly careless; it did not approach with sufficient urgency problems that had been identified regarding the non-construction of the retention ponds and was caught short when problems began to manifest themselves. The environmental effects of the offending were moderately serious given the site's proximity to the Otamarakau Wetland and the cumulative impact of sedimentation on that wetland.

[95] *Baygold Holdings* involved an area of exposed earth approximately three times larger than the CRS site and breaches of the defendant's consent. However, Baygold's offending involved discharges on only two dates, compared with the five dates in the present offending.

[96] In *Waiotahi 2397* the Court adopted a total starting point of $120,000 for the offences but said 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. There were four charges of permitting the discharge of sediment contaminated stormwater from earthworks, and two charges of contravening an abatement notice that required it to cease discharging sediment contaminated stormwater.

[97] Ms Brewer submitted that the individual discharges in the *Waiotahi 2397* case involved higher levels of suspended solids than the present case and were aggravated by the fact that they involved contraventions of an abatement notice. However, she noted that the *Waiotahi 2397* case involved discharges on three dates whereas the present case involves discharges on at least five occasions.

[98] In *The Lakes* case a starting point of $42,000 was adopted for the employer and $40,000 for the contractor. Counsel submitted the present case is more serious than *The Lakes* because it involved discharges on at least five separate occasions, a higher level of culpability, and higher levels of contamination to Tauranga Harbour resulting from the discharges.

[99] Ms Brewer submitted that a starting point in the range of $130,000 - $150,000 would be appropriate in this case. She submitted that the suggested starting point range is modest when considered against the maximum available penalties in this case, being 11% to 12.5% of the total available maximum penalties of $1,200,000. Ms Brewer submitted that a starting point at this level recognises the scale of the offending as well as the environmental harm caused by repeat discharges of sediment to the marine environment. She also submitted that it is important that the starting point is set at a level that will have a general deterrent effect and provide a strong message of individual deterrence.

[100] Mr Ryan drew my attention to six cases offered by way of comparison to assist with identifying a starting point: *Bay of Plenty Regional Council v Comanche Holdings Ltd* (**Comanche**)[25], *Waiotahi 2397, Northlake Investments Ltd v Otago Regional Council* (**Northlake**)[26], *Canterbury Regional Council v Bathurst Coal Limited* (**Bathurst Coal**)[27], *Nelson City Council v KB Contracting and Quarries Ltd* (**KB Contracting**)[28], and *Otago Regional Council v Maruia Mining Ltd* (**Maruia Mining**).[29]

[101] In *Comanche* the Court set a global starting point of $100,000 in respect of offending arising from three charges of discharging sediment-laden stormwater from an industrial subdivision 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 found that the effects of the offending on the environment were wide ranging and significant in the short term, and moderately serious thereafter. The Court

[25] *Bay of Plenty Regional Council v Comanche Holdings Ltd* DC Hamilton CRN1407050063, 64, 66, 69, 70, 72, 11 December 2014.
[26] *Northake Investments Ltd v Otago Regional Council* [2020] NZHC 1144.
[27] *Canterbury Regional Council v Bathurst Coal Limited* [2019] NZDC 23872.
[28] *Nelson City Council v KB Contracting and Quarries Ltd* [2018] NZDC 11153.
[29] *Otago Regional Council v Maruia Mining Ltd* [2019] NZDC 20752.

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.

[102] Mr Ryan submitted that the offending in *Waiotahi 2397* appears to be more serious than here; that the defendant was a specialist earthworks contractor, and responsible for day to day management. There were six charges, involving extremely high exceedances of resource consent levels. Mr Ryan also submitted that the defendant appeared to have done little to resolve the management issues on site, and the action taken appeared too late.

[103] *Northlake* involved discharging sediment from earthworks at the site along a natural flow path to the Clutha River. The High Court declined the appeal and affirmed the District Court's approach to sentencing, setting a starting point of $50,000. Mr Ryan submitted that the fine imposed was in line with authorities that involved environmental effects, which although significant in some cases, were largely transitory or short term and not extreme in any instance.

[104] In *Bathurst Coal* the Court set a starting point of $30,000 in a situation where the discharge was found to be occurring not from the discharge point authorized in the resource consent but from a different point with a high level of suspended solids. The Court found that there was a systemic element to the defendant's failings. The Court was unable to draw any conclusions about the actual effects of the offending and accepted that any potential effect would have been cumulative on effects from other land use activities. The Court noted that had there been proven effects that would have greatly increased the starting point.

[105] In *KB Contracting* the Court set a starting point of $120,000 for both defendants in relation to offences of discharging a contaminant, namely sediment-laden run-off from sediment treatment ponds utilised as part of the earthworks undertaken for a residential development, onto land and in circumstances which may have resulted in that run-off entering water. Mr Ryan submitted that the "death by a thousand cuts" analogy should be recognised in the context that urban land uses contribute a small percentage to the totality of the sediment load.

[106] In *Maruia Mining* the Court set a starting point of $60,000 relating to the discharge of sediment laden water from a mine on two separate instances. The defendant's failings were characterised as systemic and involving a high degree of carelessness. The defendants had been on notice from their previous offending as to the need for proper management of the site. The Court noted that the starting point could have been higher however, there were uncertainties as to the volume of sediment that was in fact discharged and the adverse effects which were brought about by the discharge, the defendants were given the benefit of the doubt in relation to both these matters.

[107] In considering the appropriate starting point the cases cited to me were of some assistance, but ultimately I am guided by the particular circumstances of this case.

[108] Mr Ryan submitted that a starting point of $50,000-$100,000 is appropriate in light of the cases he referred to and the willingness of the defendant to undertake remedial work, even if not wholly successful, and to entertain appropriate remedial orders at potentially significant cost. Mr Ryan also endeavoured to minimise the seriousness of the offending by pointing out that urban sites contribute a small percentage of sediment loads in the environment. That submission ignores the cumulative effects of such discharges and the effects suffered by local iwi and the nearby Whareroa Marae.

[109] While CRS implemented some remedial measures, they were not effective. CRS was on notice that there were issues before the offending occurred. I have found that CRS did not approach the sediment problems on its site with sufficient urgency or diligence. In all the circumstances, I determine that this offending should have a starting point of between $100,000 and $120,000. The company's culpability leads me to conclude that the starting point should be at the upper end of that range being $115,000.

Enforcement Orders

[110] At the sentencing hearing the Council sought enforcement orders against the defendant pursuant to sections 339(5) and 314 of the RMA. CRS indicated a willingness to entertain appropriate enforcement orders.

[111] The hearing was adjourned to enable the parties to discuss a possible enforcement order.

[112] The Court received a joint memorandum of counsel dated 27 November 2020 stating that the parties were unable to agree on the terms of an enforcement order to be imposed as part of the penalty of this prosecution. The parties asked that the Court proceed with sentencing based on imposing a financial penalty only.

[113] I note that I am empowered to make an order if I think it is appropriate, despite what the parties' positions might be. In the circumstances, I thought an enforcement order was desirable, however I have insufficient information on which to make an order. I therefore reluctantly put this matter to one side.

Aggravating and mitigating factors

[114] The Summary of Facts recorded previous compliance issues, namely two abatement notices and an infringement notice being issued. Ms Brewer submitted that an uplift of 5% is warranted in these circumstances.

[115] Ms Brewer submitted that there should be no entitlement to a discount for previous good character given the defendant's poor previous compliance history at the site.

[116] Both parties agreed that the defendant should be entitled to a 25 percent discount given guilty pleas were entered at an early stage.

[117] Mr Ryan submitted that some discount for previous good character is appropriate in the absence of previous convictions. He submitted that the prior compliance history is not an aggravating factor, but instead goes more to the

defendant's claims of good character, as the defendant cannot show a previous unblemished record.

[118] Mr Ryan submitted that the abatement notices and other directions were not disregarded, even if the remedial works undertaken by CRS have not been wholly effective. He highlighted that the process undertaken at the outset failed to identify the potential for adverse stormwater effects from the compacted gravel yard to the adjacent waterways.

[119] Mr Ryan submitted that the remedial steps undertaken by the defendant are a mitigating factor. The defendant has been undertaking remedial works since it became apparent in late 2018 that sediment-laden stormwater was leaving the CRS site. CRS has received a cost estimate for further remedial options, but CRS management have been unable to obtain support from the shareholders for this capital expenditure. CRS continue to investigate remedial options for long-term solutions to the stormwater issues.

[120] As CRS indicated its plea of guilty at an early stage, it is appropriate that a discount of 25 percent be allowed for the early guilty plea.

[121] Given the history of abatement notices (two) and an infringement notice relating to the same site, I do not consider that it is appropriate to allow a reduction for the absence of previous convictions, but neither do I consider it appropriate to uplift the starting point. I accept that CRS's compliance history goes to the defendant's claim of good character, and I agree that that there should be no entitlement to a discount for previous good character, given the defendant's poor previous compliance history at the site.

[122] I will not allow any discount for steps taken to remediate as they are the steps that are necessary to ensure compliance, there has been an awareness of the need to act since 2018, and I consider the approach taken to addressing the sediment run-off problems has not been sufficiently diligent. The defendant has done nothing more than take steps to attempt to remedy an unsatisfactory and unlawful situation.

Outcome

[123] I have adopted the two-step sentencing methodology outlined by the Court in *Moses v R*[30]. I convict CRS and impose a fine of $86,250.

[124] I direct that 90 percent of the fine be paid to the Regional Council in terms of section 342 of the RMA.

_____

Judge MJL Dickey
District Court Judge

Date of authentication: 09/03/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[30] *Moses v R* [2020] NZCA 296 at [45] to [47].