IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2018-070-004407
[2021] NZDC 7065

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

TBE 2 LIMITED
and
A & R EARTHMOVERS LIMITED
Defendants

Hearing:	7 September 2020
Last memorandum filed:	7 April 2021
Appearances:	A Hopkinson for the prosecutor M Beech for the defendants
Judgment:	20 April 2021

SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] The defendants have each pleaded guilty to three charges of discharging sediment-laden stormwater onto land in circumstances where it may enter water. The discharges occurred on 29 April, 13 May and 16 May 2018.

[2] The discharges are contrary to ss 15(1)(b) and 338(1)(a) of the Resource Management Act (**RMA**).

[3] The land onto which the stormwater was discharged is located on the south side of Gargan Road, near the corner of Wintrebre Lane and Belk Road (**the site**).

[4] The maximum penalty for each of these offences is a fine of $600,000. The difference between counsel was in respect of the appropriate starting point. The prosecutor proposes a global starting point of $120,000 is appropriate, with the fines apportioned equally between the two defendants. Counsel for the defendants submitted that an appropriate starting point for the offending is between $30,000 and $40,000.

Background[1]

[5] The site is approximately 9 hectares in size. It is largely flat and contains farm drains that drain to the west, where they form a tributary stream of the Wairoa River. That tributary flows into the Wairoa River approximately 1.4 kilometres from the site. Until 2018 the site was in pasture.

[6] The site is owned by TBE 3 Limited (**TBE 3**). The earthworks at the property were to be carried out by A & R Earthmovers Ltd (**A & R Earthmovers**). Bryce Donne is the sole director of A & R Earthmovers Limited, TBE 2 Limited and TBE 3 Limited.

[7] In October 2017 TBE 2 Limited (**TBE 2**) applied to the Regional Council for resource consents to enable the site to be converted to industrial use as part of the Tauriko Business Estate industrial development. Stage 3 is approximately 71 hectares in size and the site is the final 9 hectare part of that stage to be developed. It is referred to as "Stage 3C". TBE 2's consent application stated that the earthworks would involve an area of 9ha: 14,600m^3 of cut, and 246,700m^3 of fill. Sediment and stormwater were to be managed at the site by directing all sediment-contaminated stormwater to three sediment retention ponds. The primary sediment retention pond

[1] Summary of Facts, paragraphs 2-24.

would be Pond 1, which would receive stormwater from 7.49ha of the earthworks site. The other two ponds would receive water from the remaining 1.5ha of the site.

[8] During processing of the consent application the Council raised concerns about the large volume of stormwater TBE 2 was intending to direct to Pond 1, the greater potential for failure due to the period of earthworks, and the fact that Pond 1 was associated with a larger exposed area than recommended in the Council's Erosion and Sediment Control Guidelines. To address the Council's concerns, TBE 2 provided updated plans that referred to additional erosion protection (an outlet apron and riprap) for the primary discharge point from Pond 1.

Consents

[9] On 21 December 2017 the Council granted resource consent (RM17-0582-AP) to TBE 2 (**Resource Consent**). The Resource Consent comprised a discharge consent (RM17-0582-DC.01) that authorised the discharge of stormwater and flocculants from sediment retention ponds to farm drains at the site during two summer earthworks construction periods (i.e. in 2017/2018 and in 2018/2019) (**Discharge Consent**) and an earthworks consent (RM17-0582-LC01) (**Earthworks Consent**).

[10] Relevant conditions of the Discharge Consent are as follows:[2]

> (a) Condition 6.1 provides that all stormwater discharging from the site shall be treated in the sediment retention ponds before discharging to farm drains.
> …
>
> (e) Condition 8.3 provides that the consent holder shall ensure that no sediment contaminated stormwater leaves the site before treatment in a sediment treatment device.
>
> (f) Condition 8.5 provides that within 30 working days of installation of the sediment retention ponds the consent holder shall submit to the Regional Council the following:
>
> (i) A statement from an appropriately qualified professional verifying that the sediment pond has been installed as per best engineering practice; and
>
> (ii) Detailed as-built plans of the sediment storage pond and outlets.

[2] Summary of Facts, paragraph 12.

(g) Condition 8.6 provides that unless otherwise specified in this consent, the consent holder shall ensure that all erosion and sediment controls comply with the specifications set out in Environment Bay of Plenty Guideline No. 2010/01 – "Erosion and Sediment Control Guidelines for Land Disturbing Activities" or its successor.

(h) Condition 8.7 provides that during the period 16 September to 30 April (inclusive) of any year within this consent, the concentration of Total Suspended Solids in the stormwater discharge from any sediment retention pond shall not exceed 150 g/m3 except where a 12 hour duration 50% AEP storm event (2 year return period storm) is exceeded. The discharge shall cease immediately if this limit is exceeded.

[11] Condition 7.1 of the Earthworks Consent provides that all erosion and sediment controls were to be installed prior to the commencement of construction works and in accordance with the Plan titled Stage 3C3 Earthworks Sediment and Erosion Control Plan Drawing No. 142333-RC340 Rev 4, dated 13 October 2017 and identified as BOPRC Plan Number RM17-0582/2.

Construction of Pond and Earthworks – early January 2018

[12] Construction of erosion and sediment controls and the sediment retention pond (**Pond 1**) began in early January 2018. That work was carried out by A & R Earthmovers.

[13] On 7 January 2018 Mr Donne emailed his site managers copies of the discharge and earthworks consents and drew their attention to a number of the consent conditions.

[14] The Council carried out its first consent compliance inspection at the site on 8 January 2018 and recorded that Pond 1 was being installed and was due to be completed within a couple of days.

[15] During this first inspection, Mr Donne told the Council officer that it was intended to develop the 7.5ha part of the site in two stages, i.e. the northern part which would then be stabilised, and then the southern part which would then be stabilised.

[16] The Council carried out a further compliance inspection at the site on 23 January 2018 and found that, rather than doing the earthworks in two stages, the majority of the 7.5 hectare area was exposed.

[17] During the 23 January inspection the Council officer found that the site was "non-complying low risk" due to the following issues:

- Earthworks had begun involving an area of almost 7.5ha prior to Pond 1 having been completed (contravening condition 7.1 of the consent).
- Pond 1 had not been constructed in accordance with the plans submitted by TBE 2 with its application.
- A spillway/entrance point had been installed at the northern end of the Pond outside of the forebay area.
- There was no access point to the forebay to allow maintenance and removal of sediment build-up within the forebay.

[18] During the inspection the officer outlined his concerns to Mr Donne, and following this inspection emailed an audit report to TBE 2 summarising the issues.

[19] On 15 February 2018 Mr Donne emailed the as-built plans for the Pond 1 to the Council, as required by condition 8.5(ii) of the discharge consent. However:

- At no stage did TBE 2 provide the Council with a statement from an appropriately qualified professional verifying that Pond 1 had been installed as per best engineering practice. This was required by condition 8.5(i) of the discharge consent.
- The as-built plans Mr Donne provided did not show any forebay, but showed the sole spillway (entrance) to the Pond as being the spillway on the north-eastern side of it.

[20] A Council officer carried out a further compliance inspection of the site on 27 February 2018.

[21] Sediment retention Ponds 2 and 3 had not been constructed at this time because they were intended to receive stormwater from other parts of the site that would not be developed until the next construction period (16 September 2018 to 30 April 2019).

The offending[3]

Offence 1 - 29 April 2018 – (CRNs ending784 and 790)

[22] At 11.25am on Sunday, 29 April 2018 the Council received a complaint from a member of the public that "sediment was leaking" from the site. Two Council officers inspected the site at 2.10pm that day.

[23] When the officers arrived at the site they found that a section of Pond 1's western wall had blown out and a large amount of sediment laden water was flowing through the breached wall of the pond. The officers tracked the flow of sediment laden water from Pond 1 approximately five metres overland, through a culvert, and into the eastern drain, just before the eastern drain and western drain combine to form the tributary stream.

[24] The officers saw that the majority of the sediment contaminated stormwater from the exposed earthworks at the site was flowing into the Pond 1 through the north-eastern spillway/entrance point. There was a large volume of water ponding above Pond 1. There was insufficient bunding/diversion channels to direct the water from the exposed earthworks into Pond 1's forebay.

[25] The officers observed that the water in the eastern drain was clear upstream of the point where stormwater was discharging into it but was very discoloured downstream of the discharge point from Pond 1.

[26] The officers took samples of the contaminated stormwater flowing from Pond 1. Those samples had the following suspended solids levels:

(a) 4,900 g/m³ at the point where contaminated stormwater was entering the eastern drain approximately 5 metres from the broken pond wall;

[3] Summary of Facts, paragraphs 25-54.

(b) 7.5 g/m³ in the eastern drain 20 metres upstream of the discharge point;

(c) 2,000 g/m³ in the tributary stream 10 metres downstream of where the contaminated stormwater was entering that stream from the pond;

(d) 1,300 g/m³ in the tributary stream 600 metres downstream of the breached pond wall and approximately 600 metres upstream of the Wairoa River.

[27] The suspended solids levels in the water discharging from Pond 1 into the eastern drain on 29 April 2018 contravened condition 8.7 of the Discharge Consent, which provided that the concentration of suspended solids in the stormwater discharge from any sediment retention pond at the site would not exceed 150g/m³ unless a 12 hour duration 50% AEP storm event was exceeded. The rainfall on 29 April 2018 did not exceed a 12 hour duration 50% AEP storm event.

[28] A & R Earthmovers' Environmental Manager attended the site on 29 April and advised Council officers that the breach in Pond 1 had occurred at around 10.30am that day.

[29] Officers returned to the site the following day and found that repairs were underway on the breached wall of Pond 1. The Pond was virtually empty.

[30] When a Council officer spoke with Mr Donne at the site on 30 April 2018, Mr Donne said that on 29 April 2018 two of the decant arms were capped in the manhole riser, and that for a big rainfall event three decant arms should have been open, which Mr Donne had thought was the case based on the information relayed to him from the last staff inspection on that day.

[31] On 30 April 2018 A & R Earthmovers repaired the pond embankment and installed bunding on the eastern side of Pond 1 to divert stormwater from the earthworks area to the forebay and south-eastern spillway and away from the north-eastern spillway.

Offence 2 – 13 May 2018 (CRNs ending -785 and -791)

[32] On Sunday, 13 May 2018 a Council officer inspected several earthworks sites following heavy rainfall. One of those was the TBE 2 site.

[33] As the officer drove towards the site, he noticed that the tributary stream flowing alongside Belk Road (which receives stormwater from the TBE 2 site and flows into the Wairoa River) was very discoloured and appeared to be laden with sediment. In contrast, other streams feeding into that tributary were relatively clear.

[34] When he arrived at the site, the officer saw that the stormwater from Pond 1 that was discharging from its primary outlet pipe into the eastern drain appeared to have higher sediment levels than expected.

[35] The officer saw that a level spreader at Pond 1's forebay had failed, which meant that sediment laden water from the site was entering the pond at a higher velocity and with greater contamination than would have been the case if the level spreader had not failed.

[36] The officer took the following samples on 13 May 2018:

(a) a sample from the water discharging from Pond 1's outlet into the eastern drain which had suspended solid levels of 260 g/m^3;

(b) a sample from the water in the tributary stream approximately 10 metres downstream of the discharge point from Pond 1's outlet into the eastern drain which had suspended solids levels of 270 g/m^3;

(c) samples from the water in the tributary stream 100 and 200 metres downstream of the first sample which had suspended solids levels of 200 g/m^3 and 220 g/m^3.

[37] The suspended solids levels in the water discharging from Pond 1 into the eastern drain on 13 May 2018 contravened condition 8.7 of the Discharge Consent.

Offence 3 – 16 May 2018 (CRNs ending -796 and 792)

[38] On Wednesday 16 May 2018 a Council officer inspected the site. On his way to the site he inspected the confluence of the tributary stream (that flows from the site) with the Wairoa River and saw that it was discoloured at the point the stream flowed into the Wairoa River.

[39] On arrival at the property, the officer saw that the stormwater from Pond 1 that was discharging through the primary pipe into the drain was heavily discoloured and appeared to be sediment laden. Water was also discharging from under Pond 1's outlet pipe, which indicated another potential failure in the wall of the pond.

[40] The officer saw that sediment contaminated stormwater from the site was flowing into Pond 1 through the northern spillway rather than through the forebay and the southern spillway.

[41] An A & R Earthmovers staff member told the officer that they had been repairing the damaged level spreader when a rain event came through and washed the repair work away.

[42] Samples taken by the officer on 16 May 2018 were found to have the following suspended solids levels:

(a) 2,500 g/m³ in the water discharging from Pond 1's outlet into the eastern drain;

(b) 2,200g/m³ in the tributary stream approximately 10 metres downstream of Pond 1's outlet;

(c) 930 g/m³ in the tributary stream 200 metres downstream of Pond 1's outlet.

[43] As the officer was taking the sample where the water was discharging from the Pond 1 into the eastern drain, one of the A&R Earthmovers staff put caps on the manhole riser in the pond, which stopped the discharge from the pond's outlet pipe into the eastern drain.

[44] The suspended solids levels in the water discharging from Pond 1 into the eastern drain on 16 May 2018 contravened condition 8.7 of the Discharge Consent.

Abatement Notices

[45] On 16 May 2018 a Council officer issued an abatement notice to TBE 2 that required TBE 2 to cease contravening a number of the conditions of the Resource Consent RM17-0582.

[46] On 23 May 2018 the Council issued a further abatement notice to TBE 2 requiring it to cease contravening condition 7.1 of the Earthworks Consent.

Causes of pond failures[4]

[47] The Council obtained advice from independent engineers confirming that the discharge on 29 April 2018 was caused by a number of factors, including that Pond 1's wall was breached because the pond was not constructed in accordance with the consented plan, nor did it follow the requirements set out in the Council's Erosion and Sediment Control (**ESC**) Guidelines; the Pond's catchment exceeded the maximum size of 5 ha recommended in the ESC Guidelines; and there was no evidence from a suitably qualified professional that the Pond had been installed in accordance with best engineering practice, nor that a suitably qualified person had inspected it during or after construction to confirm its suitability. The report concluded that a sediment retention pond constructed in accordance with the ESC Guidelines would have operated without failure during a rain event of the intensity that occurred on 28- 30 April 2018. Further, Pond 1 had the incorrect number of decants (three rather than five), and the length to width ratio was incorrect (based on the location of the inlet in relation to the outlet decant).

[48] The defendants obtained expert advice that suggested the cause of the Pond 1's failure was saturation of the pond's embankment.

[4] Summary of Facts, paragraphs 55-57.

[49] The Council also obtained advice from independent engineers that confirmed the discharge on 13 May 2018 was due to the failure of the level spreader and that the spreader failed because:

(a) H4 timber and concrete haunching had not been installed in the level spreader as required in the ESC Guidelines;

(b) the level spreader was shorter than required, and at a steeper gradient than set out in the ESC Guidelines.

Environmental effects[5]

[50] An uncontrolled earthworks site can produce a sediment yield of approximately 17,000 tonnes/km² per annum or 1,400 tonnes/km² per month.

[51] Given the exposed earthworks area at the site in April/May 2018 was 6.6 hectares, the potential site sediment yield was approximately 55 tonnes while the site was open at the time of the relevant events (from 29 April 2018 to 16 May 2018). It is unknown how much of that sediment yield would have reached the sediment retention pond during this period, however based on generally accepted estimates, around 50% of this 55 tonnes (27.5 tonnes) would have been released from the site. However, given the large exposed area at the site in April 2018, and the high levels of suspended solids in the water that discharged from the sediment retention pond at the site on 29 April, 13 May and 16 May 2018, those discharges of sediment laden water from the sediment retention pond at the site on those dates are likely to have caused moderate effects on the downstream environment.

[52] These effects include:

(a) scour and erosion at the outlet point;

(b) scour and erosion downstream of the outlet point caused by larger than normal flows in the farm drain and unnamed waterway;

(c) sedimentation of the western and eastern drains and unnamed tributary of

[5] Summary of Facts, paragraphs 58-63.

the Wairoa River, leading to habitat changes for benthic and aquatic species in those watercourses (both immediate and long term);

(d) in the short term, entrained sediment in the water can cause toxicity to fish and other organisms;

(e) sedimentation of the Wairoa River, and increased sediment input into Tauranga Harbour.

[53] In this case, the discharges of sediment laden water were into a watercourse that flows approximately 1.4 kilometres from Pond 1's discharge point to the Wairoa River.

[54] It is likely that the discharge caused some reduction in stream habitat quality by smothering any stable areas on the stream bed. These would include rocks and cobbles, and aquatic macrophyte (plant) beds that support invertebrates. Invertebrates are an important food source for indigenous fish.

[55] Some or all of these effects are likely to have persisted for some weeks due to the continued re-suspension of suspended solids from the bed of the stream.

Defendants' explanations

[56] A detailed explanation was given by Bryce Donne by way of email to the Council on 2 May 2018. Also, he was interviewed by a Council officer under caution on 27 June 2018. Key points from his interview are set out in the Summary of Facts.[6] Mr Beech addressed these explanations in his submissions addressing the defendants' culpability.

Previous compliance history[7]

[57] The Council has taken enforcement action in relation to some or all of the defendants in relation to Stages 1 and 2 of the Tauriko Business Estate development.

[6] Summary of Facts, paragraph 65.
[7] Summary of Facts, paragraphs 66-69.

[58] In 2014 the Council prosecuted TBE 2 and Comanche Holdings Ltd for three contraventions each of s 15(1)(b) RMA on 5 December 2013. This prosecution related to three separate discharges of sediment contaminated stormwater to the Kopurererua Stream.

[59] The Council has issued several abatement notices and infringement notices to A & R Earthmovers Limited (two relating to dust control and a third relating to treatment of sediment-contaminated stormwater).

[60] TBE 2 was issued an abatement notice and an infringement notice on 19 February 2018 for breach of a condition of a resource consent relating to discharges of sediment-laden stormwater from a related earthworks site onto a nearby road.

Sentencing principles

[61] The purposes and principles in the Sentencing Act 2002 are relevant to the extent a particular case engages them. I was referred to *Thurston v Manawatu-Wanganui Regional Council*[8] which sets out considerations that frequently assume relevance in pollution sentencing, and include the offender's culpability; any infrastructural or other precautions taken to prevent discharges; the vulnerability or ecological importance of the affected environment; the extent of the environmental damage, including any lasting or irreversible harm, and whether it was of a continuing nature or occurred over an extended period of time; deterrence; the offender's capacity to pay a fine; disregard for abatement notices or Council requirements; cooperation with enforcement authorities and guilty pleas. Mr Hopkinson submitted that the most important sentencing purpose is deterrence, both specific deterrence and general deterrence.

Environmental effects

[62] On the dates of the offending, sediment contaminated stormwater flowed into a drain, and from there into a tributary stream of the Wairoa River. The stream flows into the Wairoa River approximately 1.4km downstream of the discharge point from

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

Pond 1. It was acknowledged that the drain and the tributary stream have moderate to low ecological values, however I was advised that the Wairoa River is listed in Schedule 1A of the Bay of Plenty Regional Natural Resources Plan as a habitat and migratory pathway of indigenous fish species (namely short jawed kokopu, giant bully, red finned bully, long finned eel, short finned eel, common smelt, common bully, inanga, banded and giant kokupu). The Wairoa River is listed in Schedule 1C of the Plan as a whitebait spawning site.

[63] Mr Hopkinson submitted that when a contaminant has actually entered water, as occurred here, that aggravates the offending above those cases where it only had the potential to enter surface water.[9] He submitted that the environmental effects in this case were moderate, and did not involve obvious adverse effects. However, he submitted this case is another example of cumulative death by a thousand cuts that occurs from uncontrolled discharge of sediment from development.

[64] I note the assessment in the Summary of Facts to the effect that it is likely that the discharge caused some reduction in stream habitat quality by smothering any stable areas on the stream bed, and that some or all of these effects are likely to have persisted for some weeks due to the continued re-suspension of suspended solids from the bed in the stream.

[65] Mr Beech submitted that a number of factors point to the discharges as being at the lower end of seriousness in terms of environmental effects. He referred to a report obtained by the prosecutor from Wildland, which he submitted confirmed moderate to low effects.

[66] He also submitted that the area affected by the discharge was localised; that effects have been observed only in the immediate surrounds of the discharge. He referred to measurements taken at the Wairoa River less than 2km from the site at which suspended solids levels were <100g/m^3 from all sources.

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[9] Relying on, by way of example, Judge Dwyer's comment in *Southland Regional Council v MacPherson* [2017] NZDC 27751 at [16].

[67] He also submitted that the Summary of Facts refers only to general effects of discharges of this kind, and that no specifics were provided. He submitted that the Court should assume that the consequences of the kind described are at the low end, and direct consequences are limited to only temporary degradation of the local environment and associated habitat changes.

[68] I consider that there would have been adverse effects on the environment from these three discharges. While it is fair to describe them as somewhat localised and somewhat transitory in effect, what cannot be ignored is that discharges such as this contribute to cumulative effects on the environment. This indeed is another example of a cumulative 'death by a thousand cuts' that occurs from uncontrolled discharges of sediment from development. Such effects are serious and are not to be diminished by reference to their limited range of effect or transitory nature.

Culpability

[69] Mr Hopkinson submitted that the defendants' culpability was at the high end of the scale. He submitted that their conduct could be categorised as reckless and, if not reckless, exhibiting a high degree of carelessness. In support of his submission, he pointed to a number of factors.

[70] He submitted that, as holder of the resource consent authorising earthworks at the site, TBE 2 was primarily responsible for ensuring compliance with conditions of the consent, and in a manner that avoided causing environmental harm. A & R Earthmovers carried out the relevant earthworks and was on express notice of the resource consent conditions that applied to those works. Bryce Donne was the sole director of both defendants and the director of TBE 3 Limited (which owned the site). He was directly involved in the management and supervision of the earthworks and also was on express notice of the consent conditions.

[71] It is not in doubt that Pond 1 had a number of construction flaws that culminated in the discharges on 29 April, 13 May and 16 May. Key conditions of the Discharge and Earthwork Consents were contravened. A & R Earthmovers' staff were aware of the consent requirements, having been reminded of them by Mr Donne at the commencement of earthworks in early January 2018. Despite being aware of the

consent requirements, TBE 2 and A & R Earthmovers breached key conditions of the Consents:

- Pond 1's construction was not completed prior to the commencement of earthworks as required by conditions of the Earthworks Consent. A Council officer recorded his concern about that when he found that extensive earthworks had been carried out between his visit on 8 January and his site visit on 23 January 2018;.

- Pond 1's construction was not completed in accordance with the plans referenced in conditions of both the Discharge and Earthwork Consents.

- Pond 1 was not signed off by a suitably qualified person as required by the Discharge Consent.

[72] Mr Hopkinson pointed to the fact that the offending involved the defendants undertaking their core business of developing land for commercial purposes. He submitted that, in those circumstances, it might reasonably be expected that they were aware of their obligations under the RMA and the importance of ensuring their activities did not cause environmental harm. He submitted that the commercial pressure that the defendants were under to progress the development led to them taking risks or shortcuts that resulted in environmental harm. He referred to the Court's comments in *PF Olsen Limited v Bay of Plenty Regional Council*:[10]

> Penalties should be set to ensure that it is unattractive to take the risk of offending on economic grounds. Consequently, if there is any profit to be derived from the risk-taking activity, then the penalty needs to be imposed to make that an unattractive course of conduct.

[73] Finally, he submitted that previous convictions of related entities for sediment discharges to streams during earthworks at earlier stages of the Tauriko Business Estate development in March 2009 and December 2014 put the defendants on express notice of their obligation to avoid sediment discharges during earthworks at the site in 2018.[11]

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[10] *PF Olsen Limited v Bay of Plenty Regional Council* [2012] NZHC 2392 at [62].
[11] Prosecutor's submissions, paragraph 25.

[74] Mr Beech submitted that the defendants' offending can be described as being careless to a moderate degree. He did not accept that it was reckless as submitted by Mr Hopkinson. He addressed culpability with reference to the first discharge and then to the further discharges.

29 April discharge

[75] The defendants acknowledged that Pond 1 did not conform to design specifications contained in the consents, so was not signed off as compliant. They further accepted that, to an extent, that contributed to the Pond's failure. The difference between the defence and the prosecution is that they argued the extent of the contribution was limited, and that there were extenuating circumstances leading to design non-compliance. In effect, Mr Beech maintained that there were issues with construction of Pond 1, as the site was found to lie upon an extensive underground peat deposit. He submitted that the defendants could not build the Pond as it was intended. He submitted that the need to remove peat resulted in large excavation areas, and that large flows of groundwater continuously entered the excavation and, until backfilled, filled up with water. He submitted that the areas were significantly lower than the entry level of the forebay to the Pond. Those peat gullies made the design level of Pond 1 (being the level at which the pond had been constructed) too high, and the pond could not operate as intended.

[76] Mr Beech submitted that, until the gullies were able to be backfilled, A & R Earthmovers needed to continually empty the excavation by pumping to a containment area outside Pond 1 and then pump from there into the pond. The water needed to be held there for extended periods in order to reach a requisite discharge standard.

[77] He submitted that, shortly after the first discharge, the defendants commissioned expert advice as to the cause of the failure and were advised that a major contributor to the failure was saturation of the walls of Pond 1 over a protracted period affecting the structural integrity of those walls.[12] Mr Beech submitted that the gradual compromise was unusual, and was unnoticed by the defendants or any of its geotechnical engineers, who were on site on a regular basis.

[12] Defence counsel's submissions, paragraph 20 and Summary of Facts, paragraph 56.

[78] Significantly, he submitted that non-compliance with the consented design specifications became a practical necessity. He submitted that the ESC Guidelines are directed not at structural integrity, but pond functionality; that is, the Pond's ability to separate suspended solids from water. He submitted that non-compliance with the ESC Guidelines does not necessarily speak to heightened risk of structural failure, and that in this case there is no basis to presume that it did. He submitted the Pond was designed by appropriately qualified persons and approved as appropriate for the unexpected conditions that the defendants confronted.

[79] Mr Beech submitted that A & R Earthmovers was required to adapt to an unfolding of unexpected ground conditions that it had to actively manage on the hoof. He acknowledged that the defendants should have communicated with Council officers with a view to agreeing necessary variations to the consent, but did not do so. TBE 2 accepts responsibility for failing to do that. However, he submitted that its responsibility is significantly mitigated by the Council's hands-off engagement with the development – despite the development's immense scale and significance. He submitted that the defendants had long been left to manage issues such as these for themselves.

[80] He finally submitted that this was not offending motivated by commercial gain. The steps taken by A & R Earthmovers to address the issues it confronted on opening the site were not cost-cutting measures. They were genuine efforts to respond to the unexpected.

Subsequent discharges

[81] Mr Beech submitted that the degree of culpability for the two further discharges needed to be distinctly assessed. He submitted that an assessment of culpability required the action/inactions of the defendants to be assessed from "the perspective of what was required to be done given that the Pond had already failed. In short, the defendants' efforts at remediation should be the focus."[13]

[13] Defence counsel's submissions, paragraph 28.

[82] Seventeen days elapsed between the first and last discharges, and he submitted that the work done in the interim was extensive, albeit not sufficient to prevent further discharges. He advised that, after the first discharge, the defendants commissioned an ecological survey by Boffa Miskell and sought geotechnical advice from CMW Geosciences. Based on advice received from CMW Geosciences, the defendants ensured that very extensive remediation works were undertaken at an approximate cost of $80,000.

[83] Mr Beech submitted that the further discharges did not result from a further breach of Pond 1. Rather, the forebay was undermined and greater concentrations of dirty water entered the pond. As a result, water leaving the pond exceeded discharge standards. Again, he submitted that these further discharges were not motivated by commercial gain or invited by cost-cutting measures. They arose despite extensive efforts to prevent them.

[84] I find that, at its heart, this offending arose from the defendants' failure to comply with the conditions of the Resource Consent. Earthworks were commenced involving an area of almost 7.5ha before Pond 1 was completed. This contravened condition 7.1 of the Earthworks Consent, which required all erosion and sediment controls to be installed prior to the commencement of construction works.

[85] Pond 1 was not constructed in accordance with the plans submitted by TBE 2 with its application, and with which the Resource Consent required compliance. In particular, the forebay was not in the location indicated on the plan, it was not well constructed, and was built in a location that meant stormwater from the site was not going to get to the forebay and its spillway. At the time of the hearing, I was advised by the prosecutor that Pond 1 was still not complete.

[86] Mr Beech explained that the reason the Pond 1 was not completed, and failed, was because ground conditions were significantly different to those which had been anticipated, that is the ground consisted of peat. Earthworks undertaken filled with water, that water needed to be pumped away and created difficulties with detention times in the constructed pond, which in turn resulted in a failure of the pond wall and the first discharge occurring. As I understand it, the prosecution does not argue with

the issue faced by the defendants, and that Pond 1 could not be built as intended. From its perspective, it is what happened next. The Council's criticism is that, rather than proposing an alternative, the defendants opened up 7.5ha of land. Its position is that that risk should have been better managed, and that the land should not have been opened up to the extent that it was until the defendants were sure that the Pond was going to work.

[87] The results of the first discharge were that contaminated stormwater was discharged from the site, samples taken at the eastern drain showed that the sediment levels were 32 times higher than the consent limit of 150g/m^3. Further, that suspended solid levels in the tributary stream remained high 600m downstream of the discharge point (1,300 grams/m^3), which was approximately 600m from where that stream flows into the Wairoa River. Photographs and samples taken at the point where the tributary flows into the Wairoa River on 30 April 2018 showed there was ongoing contamination from the sediment discharge. Council samples taken on the dates of the further offending also showed exceedances of the consent limits, but not to the same extent as occurred with the first offence. It is also clear that steps were taken by the defendants between the date of the first offence and the further offending.

[88] Mr Hopkinson described the defendants as reckless or highly careless. The defendants disputed that, but acknowledged that Pond 1 did not conform to the design specifications contained in the Resource Consent, and was not therefore signed off as compliant. They said there were reasons for that, which I have explained. I do not consider that the defendants were reckless, but I do consider they failed to exercise an appropriate level of care in their approach to the works; in particular it was highly careless to open up 7.5ha of land prior to completing Pond 1. This is a case where the job got away from them. A prudent approach dictated that, as soon as the unfavourable ground conditions became apparent, other earthworks should have ceased until the problem had been resolved. That did not occur. That is unacceptable. I view the breach of such fundamental conditions of the Resource Consent as serious. Further, the previous convictions of TBE 2 and related entities during earthworks at earlier stages of the Tauriko Business Estate development means that the defendants were on express notice as to the nature of their obligations when undertaking earthworks. I find both defendants to have been highly careless in this case.

Starting point

[89] I am required to take into account the general desirability of consistency with appropriate sentencing levels in respect of similar offending, among others. Counsel cited a number of cases in support of their respective submissions.[14]

[90] Mr Hopkinson described the *Bay of Plenty Regional Council v Waiotahi Contractors Limited* (**Waiotahi**) case as being quite similar to the present case as it involved four charges of permitting the discharge of sediment-contaminated stormwater from earthworks at a subdivision at Ohauiti onto land where it may enter water. *Waiotahi* was an earthworks contractor engaged to carry out large scale earthworks to convert a 20.8ha rural property into a residential subdivision. Discharges to a local stream occurred because the existing sediment retention pond and other sediment treatment measures were inadequate. 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 (there were also two charges relating to contravening an abatement notice).

[91] The Court found, among others, that there were very high levels of suspended solids entering the stream and also that there were breaches of abatement notices. It noted that the effect on the environment was unable to be quantified with specificity, but given the levels of suspended solids involved it was not difficult to infer that there would have been immediate and dramatic adverse environmental effects on the affected streams.

[92] At the sentencing hearing, Waiotahi argued that the problems at the site were due to flaws in the design of the erosion and sediment controls by the consultant

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[14] *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* [2018] NZDC 2397; *Bay of Plenty Regional Council v Comanche Holdings Ltd & TBE 2 Limited* DC Hamilton, CRN-14070500063, 64, 66, 69, 70, 72, 11 December 2014; *Bay of Plenty Regional Council v The Lakes (2012) Ltd* DC Hamilton, CRN-15070500520 and 22, 10 June 2015; *Bay of Plenty Regional Council v Baygold Holdings Ltd* [2020] NZDC 697; *Bay of Plenty Regional Council v IMF Backstop Ltd* DC Tauranga, CRN-9070501999 and 2000, 18 March 2011; *Otago Regional Council v Trustpower Ltd* [2019] NZDC 1990; *Otago Regional Council v Civil Construction Ltd* [2019] NZDC 869; *Otago Regional Council v Maruia Mining Ltd* [2019] NZDC 20752; *Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 2711.

engineers and due to the consent holder's decision to decommission the main sediment pond. However, Judge Harland held:[15]

> … even if there were design issues, the consent conditions were known to the defendant and, as it was responsible for managing the earthworks on the site, it was required to ensure that the site was managed in a way that complied with the consent conditions.

[93] Further, at the sentencing *Waiotahi* pointed to the absence of dead fish and eels as being evidence of limited environmental effects. Judge Harland rejected that argument, and held that:[16]

> Whilst evidence of actual harm in terms of dead fish or animals can be a factor indicating the seriousness of the environmental damage, it is not necessary for such evidence to be provided and often it cannot. Furthermore, this submission seems to miss the point that it is the damage to ecosystems by man-made activities that is the concern, and which the RMA seeks to prevent.

[94] Mr Hopkinson also referred me to the *Bay of Plenty Regional Council v Comanche Holdings Ltd & TBE 2 Ltd* (***Comanche***) case, involving one of the defendants here, TBE 2. It related to an earlier stage of this development, and comprised one day of offending. The offending occurred after a forecast heavy rain event. Large volumes of sediment-contaminated stormwater bypassed stormwater controls and flowed over exposed areas of earthworks into the local stream. Sampling showed suspended solids levels as high as 28,000 g/m^3 from one of the discharge points in the stream. The erosion and sediment controls had been designed and signed off by a 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 defendants' culpability was high having regard to a number of factors including the defendants' failure to undertake an inspection before the rainfall event, which the Court considered to be negligent given that most of the site was exposed and therefore vulnerable to potential failure; the site manager being aware that the site was a difficult one and very close to the stream; the director of the defendant companies having been aware of the need for active management of the site given his previous involvement in a prosecution relating to an earlier stage of the business estate development. The Court found that

[15] At [59].
[16] At [73].

it was serious offending and set a global starting point of $100,000 apportioned equally between the two defendants (who were related corporate entities).

[95] Other cases cited to me by Mr Hopkinson set a range of starting points for sediment discharges of between $42,000 and $70,000.

[96] Mr Hopkinson submitted that an appropriate starting point for this offending is $120,000.

[97] As to whether the starting point should be assessed globally or on an individual basis, Mr Hopkinson referred me to *Taranaki Regional Council v Farm Ventures Ltd*[17] where Judge Dwyer considered when global penalties would not be appropriate, and held as follows:

(a) It is not appropriate to identify one penalty and then divide it between multiple defendants. The exception to this principle is where individual and corporate defendants are so closely related that any fine imposed on one effectively comes out of the pocket of the other as well;

(b) There are two issues to be considered in this context:

(i) are the defendants so closely related that a fine imposed on one effectively comes out of the pocket of the other;

(ii) can the actions of one defendant effectively be the actions of the other?

[98] Mr Hopkinson submitted that the primary considerations in this context are that a starting point should be assessed on a global basis. That is primarily because the defendants are so closely related that the fine will effectively come out of the same pocket; further that Mr Donne is the sole director of both defendants, both defendants have the same owner, of which Mr Donne is one of two directors. Finally, the roles and culpability of each defendant are closely linked through Mr Donne, who is the sole director of both companies. In the circumstances I consider that a global starting

[17] *Taranaki Regional Council v Farm Ventures Ltd* [2019] NZDC 10803 at [35] – [40]

point is appropriate. Mr Hopkinson submitted that the starting point could be apportioned between the two defendants equally.

[99] Mr Beech cited a number of cases with starting points ranging between $30,000 and $60,000. He referred to *Otago Regional Council v Trustpower*,[18] submitting that the case involved a much more serious discharge (that ran over five days for more than 14km in a major river and caused measurable downstream effects). The Court described the failure as involving real carelessness and imposed a starting point of $60,000. He submitted that that case was more serious than the present case, and that the starting point here must be lower than in that decision.

[100] Mr Beech also cited *Otago Regional Council v Civil Construction Ltd*,[19] submitting that this case supplies the best factual comparison to the present case, noting that the decision appears to set a higher penalty level than earlier decisions he had cited. That case involved discharge of silts and sediments to land in circumstances where it did enter the Clutha River. The defendant was carrying out site works as part of a residential subdivision at Wanaka. The discharge discoloured the Clutha River for over 500m. The case involved one charge of breaching the RMA. In setting a starting point of $40,000 the Court had particular regard to certain factors: that it was a substantial discharge; the sediment was generated from development works undertaken on a large sloping site over the winter period; fines should be set at a level such that they are not simply a licencing fee. In determining culpability the Court had regard to the fact that sediment protection works had been designed by a registered engineer and approved by the Council, however the defendant conceded that it was obliged to monitor the effectiveness of those measures and that it was too passive in that regard.

[101] Mr Beech cited other cases involving discharge from a mine, discharges from a sediment retention pond, which involved failure to ensure that staff understood their responsibilities and a failure to properly supervise works.

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[18] [2019] NZDC 1990.
[19] [2019] NZDC 869.

[102] I have considered all the cases to which I was referred, but note that each case must be considered on its own merits. In this case there are three charges involving discharges to the environment. I accept that the first offence on 29 April 2018 was the more serious of the three. I have already found that the discharges in large part resulted from a fundamental failure to comply with the conditions of the Resource Consent. I have also found that when the defendants discovered that soil conditions were vastly different to those which they had anticipated when they made the application for consent, they chose to proceed with opening up 7.5ha of land whilst trying to resolve the issue. I found their approach to be highly careless in those circumstances. I determined that the effects on the environment, while relatively short-lived, would have contributed to a cumulative adverse effect from sediment discharges of this nature. I determine, therefore, that the appropriate starting point for this offending is $95,000, to be apportioned equally between the two defendants.

Personal aggravating and mitigating factors and guilty plea

Aggravating factors

[103] TBE 2 Limited was convicted for three s 15(1)(b) offences in 2014. Mr Hopkinson submitted that the previous conviction should be applied as a factor that elevates the defendant's culpability when setting the starting point. That was the approach taken by Judge Harland in *Comanche*. The alternative approach would be to adopt a lower starting point and then to apply an uplift for TBE 2's previous conviction. I have already determined that it is appropriate to take the previous conviction into account in determining culpability, and have done so.

Mitigating factors

Previous good character

[104] Mr Hopkinson submitted that TBE 2's previous conviction for similar offending means it is not entitled to a discount for good character. He also submitted that A & R Earthmovers is similarly not entitled to a discount given that Mr Donne is the sole director of that company and his companies (TBE 2 and IMF Backstop Limited) each have convictions for similar offending in 2011 and 2014. I accept those submissions.

Exceptional cooperation

[105] Mr Hopkinson acknowledged that the level of cooperation during the investigation was over and above what is to be expected of defendants. Mr Donne made frank admissions about the failures that led to the offending and consented to Council site visits relating to the investigation. Mr Hopkinson submitted that a discount of up to 5 percent for each defendant would be appropriate in that regard. I agree.

Remorse

[106] Mr Hopkinson submitted that the defendants are entitled to a further 5 percent discount for remorse given that they initiated and participated in a restorative justice process with the Council on 31 August 2020 and demonstrated genuine remorse regarding the offending. At the meeting, Mr Donne made a full and frank apology for the offending, and accepted responsibility for the offending on the defendants' behalf. I agree that a five percent discount is appropriate.

Offer to make amends

[107] The outcome of the restorative justice meeting was that Mr Donne, the defendants' director:

(a) offered to contribute to the Bay of Plenty ratepayers by refunding the Council's costs of the prosecution (confirmed by the Council to be $118,728 excluding GST);

(b) offered to contribute to the restoration of the Bay of Plenty environment by providing $50,000 towards an environmental project to be overseen by the Council;

(c) agreed with Council that he would participate as a speaker in education programmes provided by the Council designed to improve earthworks environmental management practice, and offered to make a site available for Council, trainers and other contractors to visit as a working example;

(d) undertook to monitor the silt effects of his operation and communicate with Council about these as a way of contributing to the overall understanding of silt effects and silt management practices.

[108] It is also for note that he requested and paid for the restorative justice process.

[109] Mr Hopkinson submitted that the defendants' offers to make amends mean a further discount is warranted. He proposed a discount of 10 percent to recognise the offer of $50,000 towards an environmental project. He referred me to s 8(j) of the Sentencing Act that requires the Court to take into account the outcomes of restorative justice processes, including anything referred to in s 10 of the Sentencing Act. Section 10(1) requires the Court to take into account any offer, agreement, response or measure to make amends. In deciding whether and to what extent any matter referred to in s 10(1) should be taken into account, s 10(2) states that the Court must take into account whether the measure is genuine and capable of fulfilment; whether or not it has been accepted by the victim as expiating or mitigating the wrong. I agree that a discount of 10 percent to recognise the defendants' offer to contribute to an environmental project is appropriate.

[110] At the hearing, Mr Hopkinson emphasised that this case is an example of when restorative justice works, and how it can work. That is particularly so because of the offers of amends – costs and a contribution to environmental projects.

[111] Mr Beech emphasised the defendants' genuine and heartfelt remorse. In addition to the restorative justice process, he outlined the nature and number of operational changes the defendants have made, and on that basis submitted that no further penalty should be imposed:

(a) they have engaged specialist advice to design all environmental controls and implementation methodologies and to audit these weekly;

(b) they have spent considerable resources on staff and contractor education;

(c) they have determined that all future ponds should be subject to specific design and construction oversight by independent geotechnical engineers and then signed off as fit for purpose.

[112] I do not consider that any of items (a) – (c) of themselves justify a further discount beyond what I have already discussed, primarily because they are directed at ensuring there will be no further breaches of the RMA.

Guilty pleas

[113] The defendants entered not guilty pleas to the charges on 4 February 2019. The case was scheduled for a three-day judge-alone trial on 3-6 August 2020 but, having received the prosecution's evidence for the trial, the defendants changed their pleas to guilty on 24 July 2020. Mr Hopkinson submitted that a discount of 10 percent for the guilty plea would be appropriate. I received no submissions on that point from Mr Beech. In the circumstances I consider it is appropriate to allow a discount of 10 percent for the guilty plea.

End point

[114] Mr Hopkinson acknowledged that, normally, offers of reparation do not result in a dollar for dollar discount,[20] however he noted that the offer of reparation includes an offer to pay the prosecutor's actual legal costs. I was referred to s 342 RMA, which requires the Court to order that the prosecuting council receives 90 percent of any fines imposed. He submitted that, given the offer of amends directly addresses the issue of costs, it would be appropriate to impose no fines on the defendants. Instead, he submitted that I could impose orders on the defendants to pay the prosecution costs ($118,728) and reparation ($50,000) pursuant to s 339(5)(a) and 314(1)(d) of the RMA and/or to pay the prosecution costs pursuant to the Costs in Criminal Cases Act 1967. He stated that this would not be a situation where the defendants "were buying their way out of a prosecution" because the entering of convictions would demarcate that they have been held criminally liable for the offending. However, I cannot rely on sections 339(5)(a) and 314(1)(d) of the RMA to impose an order that the defendants

[20] *PF Olsen Limited v Bay of Plenty Regional Council* [2012] NZHC 2392 at [85].

pay the Council's legal costs for the reasons set out in *Interclean Industrial Services Limited v Auckland Regional Council*.[21]

[115] As an alternative to that sentencing outcome, Mr Hopkinson suggested that the Court could impose a fine following the two-step process required by *Moses v R*[22] and then make a costs order for the defendants to pay any deficit between 90 percent of the fines imposed and the prosecutor's legal costs of $118,728. That would result in the same monetary end point for the penalty as the suggested approach.

[116] Finally, Mr Hopkinson addressed my powers under s 108 of the Sentencing Act to convict and discharge the defendants and make orders that they pay the prosecutor's costs in compensation. He submitted that is not an appropriate option because those powers are intended for cases involving minor offending or low gravity where the Court considers that a conviction alone is sufficient penalty.[23] Mr Beech sought that the defendants be convicted and discharged – being the most appropriate outcome in the circumstances.

[117] Following the conclusion of the hearing there was further discussion between counsel and the Court as to how the agreement to pay costs and make the contribution to the environmental project could be recognised by the Court. Uncertainty in the matter resulted in sentencing being adjourned until those amounts were paid. That has now occurred (on 7 April 2021) and sentencing can be concluded.[24]

Outcome

[118] I begin final sentencing by acknowledging the genuine expression of remorse from Mr Donne on his own and the companies' behalf. The remediation and restorative efforts made by the defendants are extensive and worthwhile and they are to be commended for them.

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[21] *Interclean Industrial Services Limited v Auckland Regional Council* HC Auckland A/198/99, 4 April 2000 at paragraph [29].
[22] [2020] NZCA 296.
[23] Section 108(1) of the Sentencing Act 2002; *Kahui v R* [2013] NZCA 124 at [23].
[24] $118,728 was paid towards the Bay of Plenty Regional Council's legal costs and $50,000 was paid towards an environmental project in the Bay of Plenty.

[119] I have considered the alternatives advanced by Mr Hopkinson as to how the defendants' payment of the prosecutor's costs and contribution to an environmental project can be appropriately addressed.

[120] The situation is unusual because the payments made exceed the starting point I have adopted. Leaving to one side the contribution to an environmental project, for which I have allowed a discount, there remains the payment of the prosecutor's costs and how that is recognised. It is not appropriate for me to set a starting point and essentially reduce it to zero by applying discounts that recognise the amount paid towards costs.[25] However, the costs paid exceed the amount I would have imposed as a fine, considering the starting point and the discounts I have applied. I am left, therefore, with determining an appropriate sentence, having regard to the purposes and principles of sentencing. In light of the cost payment made, I do not consider it appropriate to impose any other sentence save for that of convicting the defendants.

[121] In this case I consider the circumstances are highly unusual and such as to support my convicting and discharging the defendants under s 108 of the Sentencing Act. I acknowledge that this is not a case of minor offending, but I determine that, with the cost payment made by the defendants, nothing else is needed by way of penalty and the convictions will provide the necessary deterrence and denunciation. In saying that I emphasise that the situation is unusual, and not a case of the defendants' "buying their way out of a prosecution", because convictions are to be entered.

[122] Accordingly, the defendants are convicted on all charges and discharged under s 108 of the Sentencing Act.

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Judge MJL Dickey
District Court Judge

Date of authentication: 20/04/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[25] *Stumpmaster & Ors v Worksafe New Zealand Limited* [2018] 3 NZLR 881; [2018] NZHC 2020 at [64]-[66].