IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2019-070-004691
[2021] NZDC 14140

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

CPB CONTRACTORS PTY LIMITED
Defendant

Judgment: 16 July 2021

FINAL SENTENCING DECISION OF JUDGE B P DWYER

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[1] Following the sentencing indication I gave on 5 July 2021[1] CPB Contractors Pty Limited entered a guilty plea to the charge contained in charging document ending 1700 and I recorded a conviction accordingly.

[2] The Prosecutor has now advised that the Defendant has paid $40,000 (plus GST) to CGC Limited as a contribution to the costs of implementing the landscape restoration agreed with iwi which I required to be either paid or appropriately secured before I would give the indicated 10% further sentencing credit.

[3] The embargo on publication of the sentencing indication is lifted. Sentence is to be imposed as indicated.

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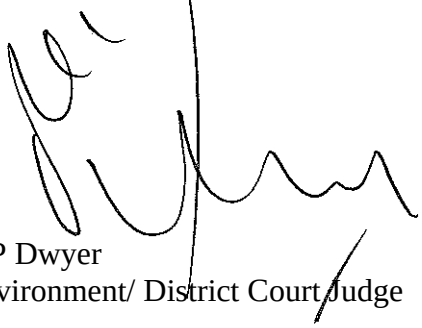
[1] Proof reading of sentence indication not yet completed due to delay in transcription. To follow next week.

[4] Accordingly, I determine as follows:

- On charge CRN19070501700, CPB Contractors Pty Limited is fined the sum of $63,000;[2]

- It will pay $113 solicitor costs and Court costs of $130;

- Finally, pursuant to s 342 of the Resource Management Act I direct that the fine (less 10 per cent Crown deduction) is to be paid to the Bay of Plenty Regional Council.



B P Dwyer
Environment/ District Court Judge

[2] Corrected from the $73,000 stated in the oral sentencing indication under Rule 11.10 of the District Court Rules 2014. The $73,000 may have been an oral misstatement on my part or a mishearing by the transcriber. $63,000 was the correct figure using the sentence indication methodology and my handwritten notes show $63,000.

IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2019-070-004691
JUDGE VIA AVL
(BLENHEIM)

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

CPB CONTRACTORS PTY LIMITED
Defendant

Date: 5 July 2021

Appearances: A Hopkinson for the Prosecutor
J Eaton QC for the Defendant Company (via VMR)

NOTES OF JUDGE B P DWYER ON SENTENCING INDICATION

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[1] CPB Contractors Pty Limited (CPB) seeks a sentence indication on one charge brought against it by the Bay of Plenty Regional Council (the Regional Council) alleging breach of s 15(1)(b) of the Resource Management Act 1991 by discharging a contaminant onto or into land in circumstances where it entered water. The charge is contained in charging document ending 1700.

[2] The offending is alleged to have occurred on 29 April 2019 extending into 30 April (a period I am told of some 16 hours) during the course of upgrading works on the road between Baypark and Bayfair, Mount Maunganui. The works are known as the B2B project. New Zealand Transport Agency (NZTA) was the authority responsible for the project and had obtained various resource consents allowing the project to be undertaken.

[3] NZTA contracted CPB to carry out the work on the project. The summary of facts records that CPB had responsibility to ensure environmental compliance on site and identification of all underground services which might be affected by project work including the position of sewerage and stormwater pipelines.

[4] CPB in turn sub-contracted March Construction Limited (March) to carry out ground strengthening works known as dry bottom feed vibro compaction or stone column ground improvements as part of the project. These works involved the insertion of stone columns into the ground at a number of specified points identified by CPB engineers in the B2B route. The column installation process works by a vibration probe known as a Vibroprobe being inserted in the earth at a depth of up to 16 metres. Stones are tipped into the Vibroprobe by a hopper and gravitate to the bottom of the probe when they are released through the nose cone at the tip of the Vibroprobe forming columns in the ground.

[5] The potential for works such as these to damage inground services is well recognised. CPB had a suite of procedures in place to manage the risks of encountering underground services, including various plans and procedures. The stone column installation work was controlled by a Safe Work Method Statement (SWMS) which identified hazards, how they were to be controlled and who was responsible for managing the hazards.

[6] As part of the sub-contracting process CPB issued March with a Permit to Excavate (PTE) for works which March was to undertake. Separate PTEs were issued for various components of the sub-contract works. Each PTE was prepared by CPB personnel and was valid for a specified timeframe but could be revalidated for a

limited period. The PTE form specified a number of items which had to be confirmed before the PTE was issued described in these terms in the Summary of Facts:

17. Each PTE was prepared and issued by authorised CPB personnel and was valid for a limited timeframe – although it could be reviewed and revalidated up to three times prior to its expiry.

18. The PTE form specified a number of items that had to be confirmed before the PTE was issued, including:

    (a) All known concealed and buried assets/services within 3 metres of planned works had to be identified and marked;

    (b) Design drawings had to be attached and had to confirm that the planned works would not damage an underground service; and

    (c) A review of the Dial Before You Dig, relocated service and project asset drawings had to be completed.

[7] The stone column work which gives rise to this charge was undertaken by March in an area identified as Stage 2C of the B2B project. The PTE issued by CPB for this Stage had a start date in 1 April 2019 and a potential final expiry date of 28 April 2019. Paragraphs 19 and 20 of the summary of facts sets out the PTE timeline for Stage 2C and the term:

19. The relevant PTE for Stage 2C of the B2B project had a start date of 1 April 2019 and – subject to revalidation – a finish date of 28 April 2019. The relevant timeline recorded in this PTE was as follows:

19.1	29 March 2019	Site inspection signed off by Andrej Belna (CPB's Site Engineer) confirming, among other things, that a number of underground services were identified on plans (including sewage and stormwater pipes within the excavation zone), buried services had been marked, and current Dial Before You Dig and Service Drawings were attached to the PTE.
19.2	2 April 2019	Permit issued by Nick Denyer (CPB's Senior Project Engineer) confirming, among other things, that he had inspected the site and reviewed the Dial Before You Dig, relocated service and project asset drawings, as well as the current construction and design documentation.
9.3	5 April	Permit accepted by Mark Derksen (March's Project

	2019	Manager) confirming that he accepted the conditions of the PTE and associated Work Pack and SWMS and will ensure strict adherence to the conditions and all persons under his control will be advised accordingly.
9.4	9 April 2019	Permit revalidated by Nick Denyer (CPB), certifying that he had assessed the ground conditions associated with the PTE and was satisfied that the ground remains competent and works could continue.
19.5	16 April 2019	Expiry date of permit (unless revalidated).
19.6	28 April 2019	Permit finish date, meaning the permit could not be revalidated beyond this date.

20. The PTE was not revalidated after 9 April and expired on 16 April 2019.

(footnotes omitted)

[8] Prior to the alleged offending March had been undertaking stone column work under a different PTE in an area of the project known as Zone 1E. On 16 April 2019 in the course of those works March had encountered unmarked stormwater and sewerage pipes, damaging both. An investigation was undertaken by CPB which identified a number of failings in its processes and made recommendations for improvements which had not been implemented by 29 April, being the date of the commencement of the alleged offending works in area 2C.

[9] CPB and March personnel had met for a site pre-start briefing on that day and work had duly commenced. Para 28 of the Summary of Facts sets out what happened in these terms:

> 28. The CPB Project Engineers and March personnel were relying on the Permit To Excavate (**PTE**) issued on behalf of CPB by CPB's Senior Project Engineer on 2 April 2019, despite the fact that:
>
> (a) Since the PTE had been issued, the incident had occurred on 16 April where stone column installation damaged underground pipes resulting in wastewater entering the stormwater system.
>
> (b) The PTE had been issued by Nick Denyer, CPB's Senior Project Engineer, to March's Project Manager who had not received training

about what was required of a permit acceptor and who was not an authorised acceptor.

(c) The PTE had expired on 16 April 2019.

(d) Andrej Belna, the CPB Site Engineer who prepared the PTE, relied on stone column design drawings that did not include services in Area 2C.

(e) None of CPB's personnel detected the clash between the planned location of the stone columns and the underground services.

(f) By 29 April 2019 the progress that had been made with stone column installation, meant that stone column installation was to move beyond the area covered by the PTE briefing on 5 April 2019, into an area where CPB's Site Engineer had not clearly marked or positively identified the underground services.

[10] It transpired that one of the stone column locations intended for construction by CPB's project engineer was above the main sewer pipeline on Maunganui Road. There is no evidence that CPB's engineer on site on 29 April had checked to make sure that there were no live services in the area where March was to undertake stone column installation. The sewer pipe had not been identified as required by CPB's Safe Work Method Statement.

[11] At about 4 pm that day (29 April) March's Vibroprobe passed through the sewer pipe. Sewage eventually bubbled to the surface and overflowed into the surrounding area. Tauranga City Council (TCC) staff and advisors arrived to check what was happening. They determined that the overflowing sewage was entering the nearby reticulated stormwater system. It was not possible to stop the overflow that day so the discharge continued into the following day when temporary repairs were effected. The summary of facts records that the estimated rate of flow from the pipe was 3-4 litres per second. The total flow over the period that the discharge continued is estimated to be 373 cubic metres or 373,000 litres.

[12] The discharged sewage entered a pipe in TCC's stormwater system which flowed to an open drain at a golf course about 460 m away from the point of discharge. This drain in turn flows to Waipu Bay in Tauranga Harbour, about two kilometres away from the point of discharge.

[13] The environment affected by the discharge and the extent of effects on that environment are described in these terms of the summary of facts:

> 62. The affected watercourse flows through Omanu golf course and into Waipu Bay in Tauranga Harbour, approximately 2 kilometres away. Waipu Bay is vulnerable to incremental loss and degradation of natural character, natural features and landscapes, and indigenous biodiversity through inappropriate subdivision, use, and development in and around the coastal environment.
>
> 63. Tauranga Harbour covers an area of 210 square kilometres and is one of New Zealand's largest estuaries. The harbour waters are mostly shallow, and more than 60% of the harbour bed is exposed at low tide.
>
> 64. The harbour is highly valued by the community for its recreational, cultural, and natural heritage values. The harbour is of significant value to Maori as a physical and spiritual symbol of identity for all Tauranga Moana whanau, hapu and iwi. It provides a source of kaimoana, such as flounder, kahawai, mussels and cockles.
>
> 65. Tauranga Harbour contains many important productive ecosystems, including freshwater wetlands, saltmarsh, mangroves, seagrass, sand and mud flats, rocky reefs and subtidal channels. These ecosystems are home to many types of wildlife, including breeding and feeding grounds.
>
> 66. The entire harbour is recognised in the Regional Coastal Environment Plan as an outstanding natural feature and landscape, and nearly the entire harbour (except the port area) is identified as an area of significant conservation value.
>
> 67. One of the key challenges facing Tauranga Harbour is the impact of land based activities and land use on water quality and the cumulative effects of these activities.
>
> 68. Tangata whenua have strong links with the coastal environment, and value its mauri and mana particularly for mahinga mataitai (a place to gather seafood). Of particular concern to tangata whenua is the loss of mauri that can occur with discharges of human and other wastes.
>
> 69. The sampling results taken from within the Omanu golfcourse watercourse exceeded the freshwater contact recreational water quality guidelines. However, that watercourse would not typically be considered of recreational use value.
>
> 70. No samples were taken of water within the estuary.
>
> 71. There is no evidence or observations of effects on aquatic organisms, of any changes to ecosystems, displacement of species or excess growth of nuisance species resulting from the alleged discharge. However, the contamination had the potential to have toxicological and physiological impacts on aquatic organisms.

72. There is a potential that the discharge of sewage will have had cumulative effects (longer exposure) on the ecological health of the watercourse and the harbour depending on the volume of organic loading. Cultural values of the watercourse and potentially the harbour were also likely to have been impacted by the discharge of sewage.

[14] There is some dispute between counsel for the Regional Council and the Defendant as to the status of the golf course drain, namely whether it is an artificial or modified watercourse. I do not have to determine that as part of this sentence indication.

[15] Although no water samples were taken in Waipu Bay, the summary of facts records that samples taken in the golf course drain exceeded freshwater contact recreational water quality guidelines. The Defendant acknowledges in its submissions that E.Coli levels in the samples were consistent with the presence of raw sewage.

[16] Whatever the status of the golf course drain might be there is no dispute that water (either as defined in the Resource Management Act or in its colloquial sense) contained within the drain ultimately flowed into Waipu Bay, conveying contaminants contained in that water.

[17] The Defendant's submissions refer to an affidavit provided by its ecology advisor (Dr I Boothroyd) which concludes that:

- The drain outfall in Waipu Bay appears to discharge via a saltmarsh which would dissipate flow and slow down the passage of discharge into the estuary;
- The tidal intrusion of salt water into the estuary would assist in breaking-down bacterial content in the discharge;
- What Dr Boothroyd described as the "low volume of discharge" meant that it was unlikely that cumulative effects would be measurable above background levels.

[18] I do not understand the first two of these matters to be in dispute. Insofar as the contention of a low-level of discharge is concerned I make two observations:

- Firstly, the proposition that the volume of effluent was relatively low must be looked at in context. If by relatively low Dr Boothroyd meant in comparison to the volume of water in the harbour so that the discharge would accordingly be speedily diluted, he is undoubtedly correct. However, that is not the point. As Mr Hopkinson submits, 373,000 litres of human sewage should not be characterised as a relatively small amount. Section 6(a) of the Resource Management Act seeks to protect the coastal environment from inappropriate use as a matter of national importance. The discharge of 373,000 litres of sewage certainly failed to achieve that;
- Secondly, the observation about background levels fails to acknowledge that the background levels of contaminants in our waterways (in this case, the harbour) will have been brought about by a myriad of sources and discharges many of which considered in isolation make an indefinable contribution to the level of pollution but whose cumulative effect has a real adverse outcome in terms of the quality of our waters. This Court has been commenting about that cumulative effect for many years now. That is the issue of concern in cases such as this.

[19] Finally, on the issue of effects I record that in addition to the matter of ecological effect there are three other matters to be taken into account:

- First is the amenity effect arising from discharge of raw sewage to land in Area 2C, where it visibly flowed into the stormwater system and its visible presence in the golf course drain;
- Second is the well-recognised cultural offence to Māori arising from the discharge of raw sewage into our waterways. Such discharges are commonly offensive to the wider community also;
- Third, is the potential for harm to members of the community who might come in contact with sewage either on the ground or in water bodies which it entered. Although there is no suggestion that had happened in this case, there was potential for that to happen.

[20] To fix starting point for sentence indication in this case I have particular regard to the following matters:

- Maximum penalty;
- Adverse effects;
- Culpability;
- Deterrence and denunciation;
- Comparable cases;
- Credits for engaging in restorative justice, remorse, good character, co-operation and (potentially) guilty plea.

[21] The maximum fine for this offending is $600,000. The Prosecutor submits that the appropriate starting point for consideration is a figure in a range of $90,000 to $100,000. Counsel for the Defendant submits that the appropriate figure is in the $60,000 to $70,000 range.

[22] I have dealt with the issue of adverse effects in my earlier comments. I acknowledge that they fall into the unascertainable/cumulative category. There were no identified effects on fish or other aquatic life although there was potential for that to happen. Had more significant adverse effects been identified that would have increased the seriousness of the offending and the level of a starting point I would adopt.

[23] The Defendant's culpability for the offending revolves around assessment of the failure of its employees which are apparent on consideration of the summary of facts. Mr Hopkinson described the offending as involving a relatively high level of carelessness but not being deliberate or reckless. Mr Eaton QC contends that the conduct involved a low-level of carelessness.

[24] On its face, the difference between the Prosecutor and Defendant involves a certain degree of hair-splitting. However, I have a very clear view on this matter. While it is correct that the Defendant had procedures in place to address the risk of encountering underground services, in my view the procedures were obviously not as robust as CPB contends. They failed to prevent breach of a stormwater pipe only a few days before this incident. Paragraph 54 of the summary of facts sets out five

deficiencies in the procedure identified by CPB's own internal investigation into the earlier incident.

[25] Significantly for sentencing purposes both the 16 April and 29 April incidents involved a common failure at the most fundamental level. Namely, that in each case CPB staff had failed to identify and mark out the position of underground services, before March commenced stone column construction works. The need for this to be done prior to commencement of work seems overwhelmingly obvious, even to a lay person in civil construction.

[26] The key findings of CPB's own incident report into the 16 April breach concluded ... "CPB critical safety essentials not followed-no mark out on the ground when permit was issued". (my emphasis)

[27] I note that this requirement (and I put emphasis on the word *critical*) applies to all PTEs at the time of issue, not when work commences. This indicates that a check of the position of underground services should have been undertaken before issuing the PTE. The fact that there had been a breach of a stormwater drain only a fortnight before the breach which caused this discharge should have highlighted the obvious need for underground services to have been marked before allowing March to commence work.

[28] The summary of facts records that the employee responsible for marking underground services in Area 2C was unavailable on 25 April through to 3 May 2019. CPB's supposedly robust procedures failed to ensure that someone had undertaken this critical and essential step before work had commenced and before the PTE was issued. CPB's incident report on the 29 April incident described the sewer line as a ... "known service". In my view, these facts establish not only a staff failure but a systemic failure on CPB's part.

[29] When these factors are taken into account I consider that Mr Hopkinson's assessment of a high level of carelessness is accurate. That leads to an inevitable conclusion that CPB has a comparably high level of culpability arising out of the failures of both its employees and its own procedures which failed to ensure that a

critical safety essential was not followed before work commenced in Area 2C on 29 April.

[30] I make that observation notwithstanding that CPB's Project Manager intervened in this matter prior to work commencing on 29 April in an endeavour to ensure that compliance had been achieved. Failure for that to happen raises issues as to the extent to which the company had ensured that its employees adequately understood their obligations in that regard.

[31] As always in these matters the issue of deterrence and denunciation is an important factor when sentencing participants in industries or occupations who might reasonably be expected to know the regulations, processes and standards under which they must operate but fail to do so. The need to ascertain the position of underground services and to take care when excavating in their known vicinity is something that CPB and its employees should have been well aware of. The risk of damaging a known sewer pipeline with a consequent discharge of sewage is something that they should have also been aware of particularly in light of the earlier discharge incident.

[32] I consider that ensuring regulatory compliance with RMA obligations is an important factor in its own right irrespective of environmental effects. Deterrence and denunciation are important matters in that regard. Penalties should be set at a level which deters civil construction operators from taking risks which might lead to outcomes such as those which happened in this case.

[33] I have considered the substantial list of cases referred to by counsel for the purposes of s 8(e) of the Sentencing Act 2002. Section 8(e) records the general desirability of consistency with appropriate sentencing levels in respect of similar offenders committing similar offences in similar circumstances.

[34] Setting aside the cases of broader principle referred to me by counsel, the Council identified five cases for comparative purposes in paras 29-58 of its sentencing submissions. Starting points for the cases identified were in the $70,000 to $80,000 range.

[35] Mr Eaton QC for the Defendant identified ten comparable cases in paras 38 - 75 in his submissions. Starting points in those cases range from $35,000 in the *Clutha District* decision up to $150,000 in the more recent *New Plymouth District* decision.[1]

[36] The range of circumstances in some of the cases referred to by both counsel have very limited (if any) similarity to the offending in this case, making comparisons difficult.

[37] The *Clutha* case at the lowest end of the scale involved a discharge between 18 and 90 cubic metres of effluent over a five hour period into a large, fast flowing river with no identified adverse effects and what was described as an element of shortcoming in the District Council's management of its effluent system. I consider that offending had little similarity to what we are talking about in this case.

[38] At the other end of the scale the *New Plymouth District Council* case involved a discharge in the order of 1500 cubic metres, adverse odour effects, discolouration of water extending up to one kilometre out to sea and a kill estimated as between 1000-1500 fish. These factors make that offending substantially more serious than this. Where there is some similarity is that I identified substantial failures on the part of the contractor in that case (as I consider is the case here) and found that the defendant had a high degree of culpability, a similar finding to that which I have made in this case.

[39] In terms of sentencing levels the appropriate starting point in this case lies somewhere between *Clutha* and *New Plymouth* which is obviously a very wide range indeed. I consider that an appropriate degree of comparison can be made with the *Wellington Water* case where I identified there to be a high and significant degree of carelessness involving what I described in that case as "a cascade of failures" on the part of that defendant's staff.[2] In this case I consider there was a similar but not identical group of failures. There were moderate adverse effects, potential for harm

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1 *Otago Regional Council v Clutha District Council* [2018] NZDC 16724, *Taranaki Regional Council v New Plymouth District Council* [2021] NZDC 3372.

2 *Wellington Regional Council v Wellington Water Limited* [2019] NZDC 18588.

and amenity and cultural effects in *Wellington Water* similar to this case. A start point of $90,000 was adopted in that case.

[40] Taking all those matters into account I would adopt a starting point of $90,000 in this case. I think that appropriately reflects the high level of carelessness involved whilst acknowledging the limited extent of proven adverse effects which would give rise to a higher starting point such as in the *New Plymouth* case. I was not advised of any aggravating factors warranting any uplift from that point.

[41] The Defendant had no convictions for environmental offending in New Zealand prior to this incident. I was not advised that it has been subject to any other processes or procedures such as enforcement orders, abatement notices, inspection notices or infringement notices, all of which in my view might be taken into account when looking at past good character. There are no such procedures involving this company previously. I would make an allowance of five per cent to recognise past good character accordingly.

[42] These proceedings were filed over 18 months ago. Not all the delay up to the present time should be attributed to the Defendant as matters were delayed because of COVID-19. The Defendant pursued an unsuccessful application under s 147 CPA which has contributed to the delay although I acknowledge it was entitled to do so. The possibility of a guilty plea was raised when trial was pending. Obviously, no guilty plea has been entered as at the date of this sentence indication, although the possibility has been raised.

[43] The Prosecutor has submitted that a guilty plea credit should be set at 10 per cent. I disagree with that. I refer to the *Te Kinga* case where the High Court allowed a 10 per cent discount for a guilty plea entered on the morning trial was to commence.[3] That was more proximate to trial commencing than in this instance and I note Mr Eaton QC's advice that 10 per cent is a discount commonly allowed for a last-minute guilty plea.

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3 *Te Kinga Farms Ltd v West Coast Regional Council* [2015] NZHC 293.

[44] Taking all those matters into account I would allow a 15 per cent reduction to reflect any guilty plea which might be made.

[45] I note the Defendant has made formal apologies to iwi for cultural offence and participated in a restorative justice process where it agreed to contribute $44,000 for the cost of implementing a package of environment works comprising fencing, weed control, riparian planting and habitat enhancement in conjunction with Iwi. This work is detailed in a document appended to Mr B Mikaere's affidavit. Provided I was satisfied that payment had either been made or appropriately secured prior to sentencing I would make a further reduction of 10 per cent from the starting point to reflect that, giving an all-up reduction from starting point of 30 per cent and, by my calculation, an end penalty of $63,000.[4]

B P Dwyer
Environment/ District Court Judge

[4] Corrected from the $73,000 stated in the oral sentencing indication under Rule 11.10 of the District Court Rules 2014. The $73,000 may have been an oral misstatement on my part or a mishearing by the transcriber. $63,000 was the correct figure using the sentence indication methodology and my handwritten notes show $63,000.