

**IN THE DISTRICT COURT  
AT WHAKATANE**

**I TE KŌTI-Ā-ROHE  
KI WHAKATĀNE**

**CRI-2021-087-000785  
via AVL  
[2022] NZDC 1375**

**BAY OF PLENTY REGIONAL COUNCIL**  
Prosecutor

v

**LANGFORD TRANSPORT LIMITED  
WAIŪ DAIRY LIMITED PARTNERSHIP**  
Defendants

Hearing: 15 November 2021

Appearances: A Hopkinson and S Revell for the prosecutor  
SV Curlett for Langford Transport Limited  
K Barry-Piceno for Waiū Dairy Limited Partnership

Judgment: 10 March 2022

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**SENTENCING DECISION OF JUDGE MJL DICKEY**

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**Introduction**

[1] The defendants have pleaded guilty to five representative charges each of contravening ss 338(1)(a) and 15(1)(d) of the Resource Management Act 1991 (**RMA**) by discharging a contaminant (namely wastewater) onto or into land. The offending occurred at five farms between 29 September 2020 and 16 December 2020.

[2] The maximum penalty for each charge is a fine not exceeding \$600,000. Mr Hopkinson for the prosecutor proposes a global starting point of \$70,000 to

\$80,000 for Waiū Dairy and \$35,000 to \$40,000 for Langford Transport. Ms Barry-Piceno for Waiū Dairy proposes a starting point of \$50,000. Ms Curlett for Langford Transport proposes a starting point of \$15,000.

[3] A summary of facts was agreed for the purposes of sentencing.

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

[4] Waiū Dairy Limited Partnership (**Waiū Dairy**) is a limited partnership<sup>2</sup> that owns the leasehold estate of the factory site and operates Waiū Dairy factory. The factory commenced operation in June 2019.

[5] Milk is processed at Waiū Dairy factory to produce milk protein concentrate powder, milk powder and butter. It generates approximately 320,000 litres of wastewater per day arising from both the processing of milk and from the cleaning of the plant. The main contaminants in the factory's wastewater include suspended solids, nutrients (nitrogen and phosphorus), and sodium.

[6] Langford Transport is a trucking company that was contracted by Waiū Dairy to dispose of wastewater from Waiū Dairy factory at nearby farms.

### ***Resource consents<sup>3</sup>***

[7] On 21 September 2018 Bay of Plenty Regional Council issued a resource consent RM18-0158 (**resource consent**) for the Waiū Dairy factory. The resource consent does not authorise any discharges of wastewater from the factory.

[8] There was no application for a resource consent to discharge wastewater because wastewater was to be discharged to Kawerau District Council's (**KDC**) municipal wastewater treatment plant via a sewer line that runs through the factory site. The wastewater treatment plant is 1km from the factory site.

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<sup>1</sup> Summary of Facts at [2]-[5].

<sup>2</sup> A limited partnership is a legal entity that is registered under the Limited Partnerships Act 2008. The Limited Partnerships Act 2008 provides that limited partnerships are separate legal persons but are to be managed by a general partner.

<sup>3</sup> Summary of Facts at [7]-[10].

[9] The application for resource consent included certain statements. Waiū Dairy<sup>4</sup> advised that “industrial process and cleaning wastewater will be managed separately” to the matters for which consent was sought. Further, “The wastewater generated will be up to 320,000 litres per day. [KDC] has advised that it has capacity to provide treatment of wastewater at this level.” Finally, that the wastewater from the processing plant will be piped directly to KDC’s wastewater treatment plant and there would be no storage or treatment of wastewater at the factory site.

[10] KDC’s wastewater treatment plant (**WWTP**) at Kawerau is authorised to operate under resource consent 65081. That consent is subject to conditions that include daily effluent quality limits and maximum contaminant loading limits.

### *Issues*<sup>5</sup>

[11] Two months after Waiū Dairy factory commenced operating in June 2019, its wastewater discharges to the KDC WWTP began to cause contraventions of KDC’s resource consent. From 21 August 2019 KDC raised concerns with Waiū Dairy about these issues. The issues continued until July 2020 when KDC ended the informal arrangement for receiving Waiū Dairy factory’s wastewater at its WWTP. From that point, KDC required all discharges from Waiū Dairy factory to the KDC wastewater system to meet discharge quality limits KDC set out in a trade waste consent it issued to Waiū Dairy. That consent is dated 13 July 2020.

[12] After KDC issued the trade waste consent, Waiū Dairy made changes to its processing plant in an attempt to comply with the conditions of that consent. However, it was unsuccessful and by August 2020 it was apparent that the discharges from the factory could not meet the limits in KDC’s trade waste consent.

[13] On 21 August 2020 Mr O’Reilly (Waiū Dairy’s General Manager) sent an email to a Regional Council consents officer asking for “*advice and potential support regarding 200m<sup>3</sup> of waste water that needs to be displaced*”.

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<sup>4</sup> Waiū Dairy was named “Kawerau Dairy Limited Partnership” at that time.

<sup>5</sup> Summary of Facts at [11]-[19], [32]-[35], [37]-[41], [43], [47]-[58], [60]-[68].

[14] On 9 September 2020 KDC sent an email to the Regional Council attaching August 2020 test results from KDC's WWTP and advising that the laboratory results showed that Waiū Dairy "*exceeded its trade waste conditions significantly.*"

Meeting with Regional Council – 16 September 2020

[15] As a result of these two emails a meeting took place on 16 September 2020 involving the Regional Council and representatives of Waiū Dairy and KDC. Langford Transport was not in attendance. At the meeting it was agreed that:

- Waiū Dairy, KDC and the Regional Council would continue to work together on the issue of the Waiū Dairy factory's wastewater.
- By 30 September 2020 Waiū Dairy would apply for resource consent to discharge wastewater to land on Putauaki's property (which is owned by one of the shareholders of Waiū Dairy General Partner Limited (**Waiū Dairy GP**)).
- Waiū Dairy would purchase or lease a vehicle to move wastewater off site.
- If there were further breaches of the KDC resource consent after 30 September 2020 the Regional Council would take further enforcement action.
- Waiū Dairy would work on a longer term solution for disposing its trade waste.

Meeting with Regional Council – 30 September 2020

[16] On 30 September 2020 a further meeting about the wastewater issues occurred at Waiū Dairy factory. It involved the Regional Council, Waiū Dairy representatives and an independent planning consultant who the Regional Council had recommended that Waiū Dairy engage to prepare a resource consent application for its wastewater discharges. Langford Transport did not attend this meeting.

[17] There was no mention at the 30 September 2020 meeting that Waiū Dairy had plans to discharge its wastewater to land at farms prior to obtaining a resource consent.

[18] An internal Waiū Dairy email dated 5 October 2020 indicated the company was planning to discharge wastewater to a farm (Steiner) in reliance on that farm's dairy effluent discharge consent. The email was copied to the Regional Council.

Meeting with Regional Council – 9 October 2020

[19] On 9 October 2020 a Zoom meeting was held involving the Regional Council, KDC, Waiū Dairy and an engineering consultant engaged by Waiū Dairy. The Regional Council told Waiū Dairy that wastewater from the factory could not be discharged in reliance on a dairy effluent discharge consent, and that a separate resource consent was required. At the time of the meeting, 16 truck-loads of wastewater had already been disposed of to a local farm (Pikowai). However, the Regional Council was not aware that any discharges to the farms had occurred at this stage.

Meeting with Regional Council – 20 October 2020

[20] On 20 October 2020 there was a meeting between the Regional Council and Waiū Dairy at its factory. Langford Transport was not present at that meeting. Regional Council officers were shown the processing plant, including the wastewater diversion system. The officers were advised by Waiū Dairy that it was investigating irrigating wastewater at two farms (Pikowai and Steiner); that Langford Transport had told them those farms had consents enabling irrigation; that Langford Transport spreads the effluent; and that wastewater was being irrigated at the Steiner farm that day.

[21] Regional Council officers collected a sample of wastewater from Waiū Dairy's wastewater diversion system. The sample was of Waiū Dairy's high solids wastewater that was to be taken to the Steiner farm later that day for disposal. When that sample was analysed, it had faecal coliform levels of 580 million cfu/100ml and E.coli levels of 420 million cfu/100ml. A further sample was taken from a Langford Transport tanker that arrived while the Regional Council officers were at the factory and while it was being filled with wastewater. When this sample was later analysed, it had faecal coliform levels of 650 million cfu/100ml and E.coli levels of 500 million cfu/100ml.

[22] Regional Council officers also spoke to Clyde Langford of Langford Transport during the visit. Mr Langford said that Langford Transport would be discharging the factory's wastewater to land at the Steiner farm that day. He advised that the only control on the discharge rate is the speed of the truck, and that it takes approximately 20 minutes to discharge the contents of the tank at the farm.

*Email from Regional Council to Waiū Dairy – 5 November 2020*

[23] On 5 November 2020 the Regional Council emailed Waiū Dairy stating that there are no resource consents authorising the spread of wastewater at the two farms (Pikowai and Steiner) and that the discharges contravene s 15 of the RMA. The email indicated the Regional Council would await the results of the samples taken before considering whether an abatement notice should be issued. Waiū Dairy was urged to progress its plans and resource consent application to discharge to land as quickly as possible.

*Meeting at Steiner Farm – Waiū Dairy General Manager, Mr Langford and Regional Council officer – 19 November 2020*

[24] On 19 November 2020 a Regional Council enforcement officer met with Mr O'Reilly outside the Steiner farm. Mr O'Reilly was cautioned about statements he might make being used in evidence, advised that the officer did not condone the discharge of wastewater from Waiū Dairy, and that these discharges were illegal. Mr O'Reilly confirmed that he understood these points. He said that he had warned Clyde Langford about liability, that Waiū Dairy takes full responsibility, and that all persons involved knew that the wastewater discharging activity is illegal.

[25] Mr Langford arrived at the farm and discharged wastewater from his truck onto a paddock. Mr O'Reilly confirmed to the officer that the material discharging from the truck was Waiū Dairy factory's wastewater. During the inspection, the only control to manage the discharge rate of wastewater from the open valve beneath the tank was the speed of the truck. There were no controls in place to manage the buffer zone between the discharge and farm drains other than the distance of the truck from the drains; the wastewater was discharged to land more than 20 metres from the nearest waterway; the wastewater was applied to a level less than 30mm and soaked away

within 10 minutes of application; and there was no offensive or objectionable odour present during or immediately after application.

[26] After Mr Langford had finished disposing of the wastewater, he spoke to the Regional Council officer. The officer cautioned Mr Langford, who confirmed that he owned the truck company that was irrigating the wastewater for Waiū Dairy. He told the officer that he already understood “the legalities” because Mr O’Reilly had explained it to him and his workers, and from his previous meeting with Regional Council officers; he and his workers were undertaking the discharge work; they only have the one truck; they irrigate in paddocks after cows have grazed in that paddock; they had not irrigated the same paddock twice yet.

[27] Mr O’Reilly advised the Regional Council officer that he had worked for Fonterra Limited (**Fonterra**) previously and is aware of its consent conditions relating to monitoring requirements, wastewater quality, irrigation buffer zones, and not irrigating the same paddock within 14 days. He told the officer that this knowledge had helped Waiū Dairy determine good practices for disposal of the wastewater at these farms. He also said that, even though the disposal of Waiū Dairy factory’s wastewater at these farms is illegal, he did not believe they were affecting the environment.

[28] Later that day, Mr O’Reilly sent the Regional Council an email explaining the wastewater disposal practices. His email included maps of the five farms where Waiū Dairy’s wastewater was being disposed, and disposal records. On reviewing this material, the Regional Council learned of the full scale of the disposal.

[29] On 27 November 2020, Waiū Dairy advised the Regional Council that the resource consent application for Waiū Dairy factory’s wastewater discharges would be lodged by 20 December 2020.

*Abatement Notice – 10 December 2020*

[30] On 10 December 2020 the Regional Council issued an abatement notice to Waiū Dairy GP requiring it to immediately cease discharging dairy factory wastewater from Waiū Dairy factory to land at the five farm properties Mr O’Reilly had identified

in his email of 19 November 2020. The abatement notice has not been appealed. The Regional Council did not issue or serve an abatement notice for these issues to or on Langford Transport.

[31] From 11 to 16 December 2020 wastewater from Waiū Dairy factory continued to be discharged after the abatement notice was issued, contravening the abatement notice. There were 45 loads of Waiū Dairy wastewater taken to Gow Farm for disposal.

*Meeting With Regional Council – 16 December 2020*

[32] On 16 December 2020 a meeting was held between the Regional Council and Waiū Dairy to discuss the abatement notice and Waiū Dairy GP's options to comply with the notice. Waiū Dairy stated all discharges had ceased, but admitted that it did take a few days for them to cease, that Waiū Dairy GP's board had made a decision to stop receiving all dairy products to reduce the volume of processing and wastewater, but they continued to receive organic product. It also said that it was preparing an application for resource consent to discharge wastewater to land with the balance to be discharged to the KDC WWTP under the trade waste consent. It advised that it had approved funding to make in-site infrastructure upgrades that would commence in February 2021, and it was looking at the option of partnering with Fonterra to discharge its excess wastewater in the meantime. The Regional Council confirmed that the abatement notice would remain in force.

***Steps to address issues – 17-24 December 2020<sup>6</sup>***

[33] On 17 December 2020 the Regional Council received an email from Waiū Dairy setting out the actions taken since receiving the abatement notice on 10 December 2020. Those actions included reducing its non-organic milk processing from 80,000 litres per day to zero, asking other dairy plants in the area to take Waiū Dairy's shareholders' milk, notifying the Waiū Dairy GP board of the abatement notice, notifying Langford Transport of its intent to end any further disposal of effluent, only processing organic milk every third day and utilising its trade waste

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<sup>6</sup> Summary of Facts at [74], [76]-[81].



consent with KDC WWTP to dispose of any effluent from the smaller organic runs every third day.

[34] On 21 December 2020 Waiū Dairy arranged for Fonterra to seek a variation of Fonterra's wastewater consent to enable Waiū Dairy to spread high strength wastewater to land under that resource consent. Fonterra's consent includes conditions that limit the volume and rate of wastewater application and its level of nitrogen and phosphorous, address buffer zones, odour management, wastewater monitoring, discharge monitoring, groundwater monitoring, surface water quality monitoring and soil monitoring.

[35] On 24 December 2020 the Regional Council granted Fonterra's application to vary its wastewater discharge consent to authorise the discharge of wastewater from Waiū Dairy factory to land via truck spreading. The variation to Fonterra's consent allowed discharges of wastewater from Waiū Dairy factory until 30 June 2021. That variation has not been extended.

### **The discharges<sup>7</sup>**

[36] In August 2020 Waiū Dairy engaged Langford Transport to transport wastewater from Waiū Dairy factory to farms where it would be discharged onto paddocks. Clyde Langford (Langford Transport's director) obtained permission from the farm owners/lessees for the discharges of wastewater. Those five farms were: Pikowai Farm, 1207 State Highway 2, West, Matata; Knights Farm, 28 Otamarakau Valley Road, Pukehina; Gow Farm, 109 Military Road, Edgecumbe; Steiner Farm Block 1, Awaiti Road North Edgecumbe; Steiner Farm Block 2, Sutherland Road, Edgecumbe.

[37] Between 29 September 2020 and 16 December 2020 Langford Transport removed at least 7.3 million litres<sup>8</sup> of wastewater from Waiū Dairy factory and transported it in tankers so it could be discharged onto paddocks at the farms. Some

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<sup>7</sup> Summary of Facts at [20]-[31].

<sup>8</sup> 7,300 cubic metres.

of the wastewater was discharged from Langford Transport tankers and some from tanks on the farms which had been filled by Langford Transport.

[38] There were no resource consents that authorised the discharge of wastewater from an industrial or trade premises to land at any of these five farms.

***Pikowai Farm (CRNs 21087500409, 21087500404)***

[39] Waiū Dairy factory's wastewater was discharged to land at Pikowai Farm on 148 occasions from 29 September 2020 to 19 November 2020 (i.e. 148 full loads of 25m<sup>3</sup>/25,000 litres, being 3.7 million litres in total).

[40] Mr Langford advised the lessee that the wastewater discharges were "above board and through Waiū Dairy" and that the wastewater had low solids and was tested at the factory.

***Gow Farm (CRNs 21087500412, 21087500407)***

[41] Waiū Dairy factory's wastewater was discharged to land at Gow Farm on 198 occasions from 11 November 2020 to 16 December 2020, being 46 full loads of wastewater and 152 half loads (2.97 million litres in total).

***Knights Farm (CRNs 21087500413, 21087500408)***

[42] Waiū Dairy factory's wastewater was discharged to land at Knights Farm on four occasions on 23 and 24 October 2020 (being 100,000 litres in total).

***Steiner Farm Block 1 (CRNs 21087500410, 21087500405)***

[43] Waiū Dairy's wastewater was discharged to land at Steiner Farm Block 1 on 18 occasions from 19 November 2020 to 9 December 2020, being 18 half loads (216,000 litres in total).

***Steiner Farm Block 2 (CRNs 21087500411, 21087500406)***

[44] Waiū Dairy's wastewater was discharged to land at Steiner Farm Block 2 on 18 occasions from 17 November 2020 to 24 November 2020, being 9 full loads and 9 half loads (333,000 litres in total).

**Explanations<sup>9</sup>**

[45] During its investigation of the offending the Regional Council conducted formal interviews with representatives of Waiū Dairy. Key points from those interviews are as follows:

- (a) initially, Waiū Dairy thought it was complying with the trade waste consent. It had consultants involved and systems in place, but once issues arose it sought other options for disposal of wastewater including talking to other parties with wastewater treatment plants to try and find alternative disposal options;
- (b) arrangements were then made with Langford Transport. Waiū Dairy thought Langford Transport had taken the lead on disposal. Langford Transport provided Waiū Dairy with a resource consent that indicated the receiving land at one of the Farms could take the dairy effluent;
- (c) it was through discussions with the Regional Council in September 2020 that Waiū Dairy became aware the consent it was relying on for disposing of wastewater was the wrong consent – that it was for a dairy shed not a dairy factory;
- (d) Waiū Dairy put in place practices to ensure that it safely disposed of the wastewater to areas of land as if it had consents for those spaces;
- (e) Waiū Dairy admitted that the discharges continued after it was aware they were illegal. However, because it had not been expressly told by the Regional Council to stop (e.g. through an abatement notice) and it was

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<sup>9</sup> Summary of Facts at [82]-[88].

actively managing the process and working towards getting a consent, it thought it was allowed to continue;

- (f) Waiū Dairy accepts that what it did was a non-permissible activity carried out without a resource consent;
- (g) after receiving the abatement notice Waiū Dairy wound things down as soon as it could;
- (h) the Board was unaware of any plant or discharge issues until a Board meeting in October 2019. The Board became aware of the trade waste issues some time in 2020 and immediately signed off for the necessary upgrades/infrastructure. Nothing further was brought to the Board's attention until an abatement notice was served in December 2020;
- (i) the Board was told that wastewater would be discharged to land, but was told by the Chief Executive Officer of Waiū Dairy that this was legal because there were resource consents for the identified properties;
- (j) Waiū Dairy will submit a consent application for discharge to land, and in the interim Fonterra has stepped in to help them dispose of waste in a permissible way.

[46] Clyde Langford, the director of Langford Transport, stated:

- Langford Transport's relationship with Waiū Dairy started when Waiū Dairy factory began operating in June 2019.
- He was later asked by Merrill Fleming, Operations Manager of Waiū Dairy, if he could cart wastewater. He (Mr Langford) was told that Waiū Dairy needed somewhere to put its wastewater, so Mr Langford arranged to introduce Waiū Dairy to the recipients. There were no formalised agreements relating to each of the farms.
- He was aware a resource consent was required for the discharge of wastewater to land, but he was told by Waiū Dairy that the Regional Council

recognised the desperate situation and would waive the need for consent as long as they followed all the rules.

- He believed the wastewater to be “washings from the dairy plant”. The farmers were happy to get it because they were in the middle of a very dry season. He had no idea about the Regional Council’s rules about discharging wastewater to the properties. He relied on instructions from Waiū Dairy.
- The process for discharging wastewater at the properties was developed with Philip O’Reilly, General Manager of Waiū Dairy. They ended up with a system that had a spreading bar at the back, but initially they just used a nozzle to break the flow of water so it was not at “full blast”. They amended the process to include a spreader bar at the back of the truck after the Regional Council officer told Mr O’Reilly the existing method was not ‘good enough’. He personally drove the truck at times.
- All the farmers had accepted the wastewater and often requested the wastewater be spread on their properties due to the drought-like conditions.
- He recorded all of the wastewater discharges at the various properties. This information was provided to the Regional Council upon request.

### **Sentencing principles**

[47] The purposes and principles of the Sentencing Act 2002 are relevant. The High Court in *Thurston v Manawatu Wanganui Regional Council*<sup>10</sup> provides a useful summary of the approach to be taken to sentencing, which includes consideration of culpability, precautions taken to prevent discharges; the vulnerability or importance of the affected environment; extent of damage; deterrence; capacity to pay a fine; disregard for abatement notices; co-operation and guilty pleas.

[48] When considering the extent of environmental damage, the Court looks at whether it was of a continuing nature or occurred over an extended period of time. Where no specific lasting harm can be identified, an allowance for harm may be made

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<sup>10</sup> *Thurston v Manawatu Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, -25, -27, 27 August 2010.

on the assumption that any given offence contributes to the cumulative effects of pollution generally. The definition of *effect* in s 3 of the RMA refers to potential and cumulative effects.

[49] Mr Hopkinson submitted deterrence is important for those involved in industries that generate significant quantities of wastewater or other contaminants. Mr Hopkinson referred to *Hawke's Bay Regional Council v Stockade Pastoral Farms Ltd*, in which the Court said:<sup>11</sup>

[A] fine has to be a penalty with enough sting in it to be really felt on the offender's financial bottom line, and thus be a deterrent to the offender, and more importantly still, I think, to be a general deterrent to others who follow the same occupation.

[50] In addition to the purposes identified in the Sentencing Act, the purpose of the RMA is an important consideration when the Court is sentencing for offences under the RMA. The purpose of the RMA is to promote the sustainable management of natural and physical resources.<sup>12</sup> A further purpose of sentencing under the RMA is to impose financial costs or penalties that cause the polluter to internalise the environmental cost and foster environmentally responsible corporate citizenship.<sup>13</sup>

### **Environmental effects**

[51] The Summary of Facts records:<sup>14</sup>

89. The discharges involved large volumes of trade waste from a dairy processing plant. At least 7,323m<sup>3</sup> (or 7,323,000 litres) of wastewater was discharged from Waiū Dairy's factory to the five farms over 49 days between 29 September 2020 and 16 December 2020.

90. There is no evidence of any actual discharge to water. There was no evidence of actual adverse effects on soil quality (as confirmed in a report by Natural Knowledge, who were engaged by Waiū Dairy).

91. However, there were potential adverse effects to soil and water quality at the farms arising from the discharges of the 7.3 million litres of wastewater during the offending period.

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<sup>11</sup> *Hawke's Bay Regional Council v Stockade Pastoral Farms Ltd* DC Napier CRI-2008-081-096, 20 March 2009 at [16].

<sup>12</sup> RMA, s 5(1); *Thurston* at [40].

<sup>13</sup> *Thurston* at [44], [45] and [47].

<sup>14</sup> Summary of Facts [89]-[91].

[52] Mr Hopkinson submitted that potential adverse effects arise due to the contaminants in Waiū Dairy factory's wastewater, which include:

- (a) extremely high levels of faecal coliforms and E/coli bacteria. High levels of faecal coliforms indicate a high risk of other harmful microbial organisms (pathogens) being present;
- (b) nitrogen and phosphorus, which are a risk to waterways. Although these nutrients are generally beneficial to agricultural production, high levels can lead to soil/crop damage and leaching into groundwater and other waterways;
- (c) sodium, which is a risk to soil health;
- (d) elevated Biochemical Oxygen Demand (**BOD**), which is a risk to waterways due to the ability to reduce oxygen levels, which can impact on aquatic life (particularly macroinvertebrates and fish). Very high levels can also impact on soil health.

[53] Mr Hopkinson submitted these potential adverse effects are relevant because potential effects are effects for the purpose of the RMA;<sup>15</sup> the "harm" in a discharge offence relates not just to any injury to the immediate environment but the risk created of wider damage to it; where no specific lasting harm can be identified, an allowance for harm may be made on the assumption that any given offence contributes to the cumulative effects of pollution generally.<sup>16</sup>

[54] Mr Hopkinson submitted that, although there were some controls put in place by the defendants (such as inductions and procedural guidelines for all truck drivers), because the discharges were carried out without a resource consent they were not subject to formal environmental controls and monitoring, meaning they posed a greater potential risk to human and environmental health.

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<sup>15</sup> Section 3 of the RMA; *Taranaki Regional Council v Silver Fern Farms Limited* [2021] NZDC 3430 at [12].

<sup>16</sup> Potential and cumulative effects are referred to in the definition of *effect* in s 3 of the RMA.

[55] For Waiū Dairy, Ms Barry-Piceno submitted there is no evidence that there was any environmental harm caused by the wastewater disposal; there is no evidence of any actual discharge to water or adverse effects on soil quality;<sup>17</sup> all the farms accepted the wastewater and often requested it, due to the drought like conditions.

[56] Ms Barry-Piceno rejected the implication that the offending falls within the broad category of “dirty dairying”. She noted that the Regional Plan encourages the practice of effluent disposal via irrigation or truck spraying, albeit that a controlled activity consent is required. She submitted that land application of effluent wastewater via irrigation is a common method of dairy effluent disposal, as such discharges to land utilise natural processes, and natural soil treatment and nutrient uptake processes assimilate the contaminants into the environment, acting as a soil conditioner.

[57] Ms Barry-Piceno submitted there is no evidence that the physical and chemical characteristics of soil and groundwater were adversely affected, and that the discharge of contaminants were not managed correctly.<sup>18</sup> All watercourse and wetlands at the five farms were deliberately and conservatively avoided by distancing during application.

[58] Ms Barry-Piceno submitted that no scientific conclusions, either actual or potential, can be drawn about the impact of the discharges on the receiving environment purely by the levels of contamination recorded in the samples taken by the Regional Council. The samples taken of the wastewater discharge were before it entered the receiving environment and are not a basis for determining effects on the environment. She suggested that the Regional Council’s submissions only convey the characteristics of dairy factory wastewater, they do not identify or characterise the volume of diluted dairy waste mixed into the receiving environment soils.

[59] Ms Barry-Piceno submitted there is no evidence that the environment was impacted or degraded at all in the summary of facts, or any issues relating to environmental effects on waterways or crops, flora, or fauna. She submitted it would

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<sup>17</sup> Summary of Facts at [90], Natural Knowledge Ltd, Wastewater Soil Monitoring Results, Dr Peter Singleton, March 2021.

<sup>18</sup> Summary of Facts at [90].



be unfair to impose “an allowance for harm” when no harm has been caused, nor has legal counsel cited any case law to support this approach.

[60] Ms Barry-Piceno noted that the Regional Council’s legal submissions relied on “potential” adverse effects as one of the key grounds for the prosecution and extent of fine sought. She submitted, however, that this approach is inconsistent with the Regional Council’s advice to the defendants on 5 November 2020, when the Regional Council advised Waiū Dairy that its decision whether to bring enforcement proceedings or not related to actual adverse effects.<sup>19</sup>

[61] Ms Barry-Piceno argued that the prosecution’s submission, that the discharges posed a greater potential risk to human and environmental health as they were undertaken without a formal consent, is inconsistent with the Regional Council’s variety of activities classified as permitted activities in its Regional Plan that relate to normal farming practises with similar contaminants and potential risks. These activities include self-management to meet standards as a permitted activity.

[62] Ms Barry-Piceno submitted the factual evidence includes two critical findings. First, the defendants were careful to ensure there was no risk to surrounding waterways or effects on water quality. Second, the discharges to land were associated with common farming practises and contained the same or similar contaminant discharges that are permitted or controlled activities, such as dairy effluent sprayed onto land.<sup>20</sup>

[63] Ms Curlett highlighted that, in the Natural Knowledge report attached to the summary of facts, Dr Peter Singleton concluded after conducting various soil tests that there has been no environmental damage caused to the environment. There is also no evidence which suggests that there were any discharges to water.<sup>21</sup>

[64] Langford Transport accepts that high levels of faecal coliforms, E.coli bacteria, nitrogen, phosphorus, sodium and BOD could be problematic if they were to enter a

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<sup>19</sup> Summary of Facts at [43], email Regional Council to Waiū Dairy.

<sup>20</sup> Rule 32 Regional Plan.

<sup>21</sup> Summary of Facts, Natural Knowledge Ltd, Wastewater Soil Monitoring Results, Dr Peter Singleton, March 2021, at [90].

waterway or sensitive area. Ms Curlett submitted there is no evidence of this and that systematic precautions were taken to ensure that they did not.

[65] Ms Curlett highlighted that Waiū Dairy drafted a protocol to spread the wastewater, which meant that there was a buffer zone between the spreading of wastewater and waterbodies. She understood these precautions to be similar to those of the Fonterra wastewater spreading protocol under its resource consent.

[66] Ms Curlett also referred to the various interviews in which the farmers who received the wastewater from the Waiū Dairy factory were thankful for the wastewater on their properties, given that the Bay of Plenty was in drought. This is reflected in the fact that the majority of farmers did not seek compensation for the wastewater being spread at their properties. In fact, some of the farmers interviewed commented that the wastewater helped improve pasture growth and led to better than usual results in terms of calf growth.

[67] Ms Curlett submitted that, as the spreading of the wastewater did not lead to any environmental damage, this should be an important consideration when the Court is reviewing the offending.

### ***Conclusion on environmental effects***

[68] Ms Barry-Piceno submitted that it would be unfair to impose an ‘allowance for harm’ when there is no proof of actual adverse effects. She argued that the potential for adverse effects relied on by the prosecutor is inconsistent when one considers that the Regional Plan allows discharges of effluent as a permitted activity, and that the defendants were careful to ensure no risk to surrounding waterways and that the discharges were associated with common farming practices. I do not accept her submission. The fact remains that Waiū Dairy needed, but did not have, a resource consent to authorise the discharge of its wastewater to land as it is not a permitted activity.

[69] Further, there is no evidence that the discharges complied with all of the conditions applying to permitted activities for the discharge of dairy shed effluent. I

cannot, therefore, infer that there is a similarity of effects from these discharges and those occurring from permitted activities.

[70] Potential effects are effects for the purpose of the RMA, and are relevant to any assessment of effects in this case. I find that there was a potential for adverse effects on the environment from this offending, in particular on water and soil quality. I note, however, that the summary of facts records that there is no evidence that the wastewater entered water or that there were any actual adverse effects on soil quality. In all the circumstances I determine that the effects on the environment of this offending were low.

### **Culpability**

[71] Mr Hopkinson submitted that Waiū Dairy's culpability can be characterised as deliberate, continuous and commercially expedient. That is because:

- (a) it spent more than \$30 million constructing its dairy processing factory in Kawerau to process up to 30 million litres of milk but failed to give proper consideration to how it would deal with the large quantities of wastewater the factory would inevitably produce;
- (b) two months after Waiū Dairy factory began operating, KDC advised Waiū Dairy that the quantity and nature of wastewater from the factory significantly exceeded the agreed levels and was causing major problems at KDC's wastewater plant;
- (c) the issue persisted for the next 12 months. Waiū Dairy then decided to dispose of large quantities of wastewater on nearby farms. The discharges were not accidental. They were deliberate and involved Waiū Dairy engaging Langford Transport to dispose of the wastewater in this manner on a number of occasions;
- (d) from as early as 16 September 2020, Waiū Dairy knew that it was not permitted to discharge its wastewater onto land without a resource consent. However, without having applied for nor obtained any such consent, it discharged significant quantities of wastewater at five different farms;

- (e) Waiū Dairy continued to discharge its wastewater in this way for a two and a half month period, knowing the discharges to be unlawful, and, in the latter stages of the offending, after the Regional Council had served it with an abatement notice;
- (f) throughout the offending period Waiū Dairy told the Regional Council that it was going to apply for a resource consent to authorise wastewater discharges to land. However, that did not occur. The consent application was not lodged until 17 August 2021.

[72] Ms Barry-Pacino submitted this is not a case where there has been any deliberate reckless conduct; the discharge was not accidental but was an intentional interim emergency arrangement. She submitted there is no evidence that Waiū Dairy deliberately sought to conceal or undertake wastewater discharges without first seeking approval or at least disclosure and/or advice from the Regional Council.

[73] Ms Barry-Piceno highlighted that when Waiū Dairy started discharging wastewater to local farms, it understood that it was able to do so legally under consents held by those farms. It was not until later that it was advised by the Regional Council that the consents held by the farms only enabled disposal of dairy shed wastewater, not dairy factory wastewater. She submitted that, although Waiū Dairy continued to use Langford Transport to discharge its wastewater onto the farms after notice it was not consented, it did so under the genuine, if mistaken, belief that the Regional Council was aware of this temporary non-compliance situation and, based on the circumstances, would not take enforcement action.

[74] Ms Barry-Piceno submitted Waiū Dairy actively tried to manage the dairy factory activities in relation to all of its potential and actual environmental effects and to comply with the relevant Regional Plan rules.

[75] Ms Barry-Piceno noted that, to the extent that Waiū Dairy did not have the appropriate consents to enable the dairy factory wastewater to be applied to the five identified farms, it entered a guilty plea to take full responsibility for the non-compliance.

[76] In relation to the culpability of Langford Transport, Mr Hopkinson submitted that its role in the offending involved an element of deliberateness and was motivated by commercial gain. It had a subsidiary role in the offending and a lower level of culpability for the following reasons:

- (a) the offending had a commercial element as the company was paid by Waiū Dairy to take the wastewater away and discharge it at the various farms. Clyde Langford, the Director, made arrangements with the five farms to accept Waiū Dairy's wastewater;
- (b) Mr Langford also provided Waiū Dairy with a resource consent which purportedly allowed such discharges at one of the farms when in fact it did not;
- (c) by 19 November 2020, Mr Langford and Langford Transport's staff were aware that the discharges of Waiū Dairy's wastewater at the farms were unlawful;
- (d) during the offending period, Langford Transport transported and discharged 207 full truckloads, and 179 half truckloads of wastewater at the respective farms. However, its culpability is lower than Waiū Dairy given it did not generate the wastewater and was contracted by Waiū Dairy to dispose the wastewater.

[77] While Langford Transport accepted that it discharged the wastewater and was paid for that work, in respect of culpability Ms Curlett submitted:

- (a) Langford Transport was not acting deliberately, and even on the Regional Council's own case was not acting deliberately in the same way as the Regional Council alleges Waiū Dairy was acting deliberately;
- (b) Langford Transport undertook the engagement for Waiū Dairy on the basis and understanding that there had been a "waiver" in respect of the resource consent until Waiū Dairy and the Regional Council could work together to ensure that a relevant resource consent had been approved. Langford Transport had no reason to believe that this was not the case, given it had

no involvement in the discussions or correspondence between Waiū Dairy and the Regional Council relating to the resource consenting process;

- (c) Langford Transport was requested by Waiū Dairy to provide resource consents for the various farms. Accordingly, it obtained resource consent information for the farms and provided this to Waiū Dairy. It did not review the consents and was not providing advice on the consents to Waiū Dairy. It was simply an intermediary; and
- (d) All documentation relating to the spread of wastewater was documented and this information was provided to the Regional Council immediately when it was requested.

[78] Ms Curlett submitted that, after the above factors are taken into consideration, the offending should be viewed as lower in comparison with Waiū Dairy, and also lower in comparison with other cases of offending.

[79] Ms Curlett submitted that it was reasonable for Langford Transport to believe that Waiū Dairy had been given a waiver given what Langford Transport had been told by Waiū Dairy and given the behaviour of the Regional Council in the following months. Langford Transport was not advised that assisting Waiū Dairy with the dispersal could lead to Langford Transport being charged by the Regional Council. It was not compensated by Waiū Dairy to an extent that would support a contention that Langford Transport would willingly risk being charged simply for the cost of this job. Ms Curlett noted that Waiū Dairy had prepared documented procedures for the disposal of its wastewater at the five farms. These procedures were complied with as if they were conditions of consent. Ms Curlett noted that Regional Council officers had observed the dispersal and provided recommendations to Langford Transport and Mr O'Reilly as to changes that should be made to the methodology. This was, for Mr Langford, consistent with what he understood the Regional Council's role to be in respect of the activity that was being carried out – the regulator who had granted the waiver provided certain conditions were complied with.

[80] Langford Transport disputed that it understood that the discharges of Waiū Dairy's wastewater at the farms 'were illegal' on 19 November 2020 in the sense that

at this time, Langford Transport still understood that a waiver or grace period was in force until the resource consent had been granted. Ms Curlett submitted that the Court should not treat comments in the summary of facts that Mr Langford “understood the legalities” of what was taking place as an admission that Mr Langford understood that the disposal was illegal (or that there was no waiver). Ms Curlett submitted that, based on the actual wording recorded in Regulatory Compliance Officer Brown’s notes, Mr Langford was saying that he ‘understands’ the Officer needed to caution him that anything could be used as evidence. Ms Curlett noted that at the site walkover Regulatory Compliance Officer Richards does not record discussing any “legalities” such as the fact that the discharges were not permitted. Mr Langford’s comments to the Regional Council Officer on 19 November 2020 that he “understood the legalities” are consistent with his statement in his interview that he considered there was a ‘waiver’ in place and that the Regional Council was looking to help Waiū Dairy with its wastewater issues, given the urgency of the situation.

[81] Ms Curlett confirmed that Langford Transport did not receive an abatement notice directly, and was not informed by Waiū Dairy that an abatement notice had been served. It was not until after 16 December 2020 when Mr Langford received a call from Mr O’Reilly stating that dispersal should cease as the Regional Council took issue with the spreading of wastewater at the various farms. Once advised of the abatement notice Langford Transport did not cart or spread any further wastewater. It was not involved in the subsequent spreading under the Fonterra Consent.

### ***Conclusion on culpability***

[82] I was not provided with any detail of the consent for wastewater disposal that Waiū Dairy obtained from KDC before it started operations. The only information I have about the steps it took to secure wastewater disposal is that taken from the company’s application for resource consent to the Regional Council and relating to air discharge and stormwater, among others. The company stated that it was going to discharge to KDC’s wastewater plant. I have no information about the form of KDC’s authorisation. The summary of facts described it as an “informal arrangement”.<sup>22</sup> I

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<sup>22</sup> Summary of Facts at [12].

would have expected that the company would have taken further and more formal steps to secure its means of wastewater disposal before it began operations.

[83] When it became clear, two months after starting operations in June 2019, that there were issues with disposal to the KDC plant, the company continued with normal production. In July 2020 KDC ended the informal arrangement and required that a trade waste consent be obtained. It then issued that consent in July. However, despite making alterations to its plant, it became clear over the next month that Waiū Dairy could not comply with the terms of that consent. It was at that point that the company involved the Regional Council. It is not clear to me when the company first engaged consultants to assist with its wastewater disposal issues. The Summary of Facts records the company's advice that when the trade waste agreement was formulated it had consultants involved.<sup>23</sup> I would have expected that, as soon as it became aware of issues with disposing of wastewater to KDC's plant it should have engaged consultants and explored all of its options for managing wastewater. It may have done so – it is not clear to me from the information I have that it did.

[84] On 5 October 2020 the Regional Council was copied into an internal Waiū Dairy email in which it said it was planning to discharge wastewater to the Steiner farm.<sup>24</sup> On 9 October 2020 there was a meeting at which Waiū Dairy was told by the Regional Council that it could not rely on a dairy effluent discharge consent.<sup>25</sup> Mr O'Reilly in his interview admitted that it came to Waiū Dairy's attention in September 2020, in discussions with the Regional Council, that the consent it was relying on was the wrong consent.<sup>26</sup>

[85] The company could have reduced the amount of product it took into the plant to comply with its trade waste consent and/or while upgrading its plant. It chose not to do so until December 2020.

[86] The consequence of the decisions it made was that over 7 million litres of wastewater was disposed to land over the period from the end of September to

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<sup>23</sup> Summary of Facts a [84.1].

<sup>24</sup> Summary of Facts at [32].

<sup>25</sup> Summary of Facts at [34].

<sup>26</sup> Summary of Facts at [85.3].



16 December 2020 in full knowledge that it was unlawful. While the situation in which the company found itself was unfortunate, the steps it could have but did not take when it realised there was a problem demonstrate a high level of carelessness. While both Waiū Dairy and Langford Transport argued that they followed the conditions applying to the discharge of dairy farm effluent and Fonterra's consent, it is by no means clear that all conditions were followed. Further, it is of note that the company did not lodge an application for resource consent until 17 August 2021. I find that Waiū Dairy was highly careless.

[87] Langford Transport is an experienced trucking operator; it has been in the business since 2012, and operates effluent disposal from one of its trucks. While it was assisting Waiū Dairy with its issues it still had a responsibility to ensure it acted lawfully. Mr Langford has said he thought that Waiū Dairy was operating under 'a waiver or grace period'. Waiū Dairy stated that it made it clear to Mr Langford that the discharges were unlawful. It is clear that Mr Langford was spoken to by a Regional Council officer on 19 November 2020, but Ms Curlett submitted that Mr Langford's reference to understanding "the legalities" simply referred to his understanding that a waiver was in place. The fact remains that Mr Langford should have taken care to make enquiries of the Regional Council as to whether the discharges were lawful before it started work. It is not enough to rely on an understanding as to lawfulness. The discharges were sizable. While it is clear that the company was trying to assist with the wastewater disposal issue it also benefited as it was paid for that work. I find that Langford Transport was highly careless, but not to the same level as Waiū Dairy.

[88] The issues associated with effluent disposal and consent requirements are well known to all those working in the farming industry and should have been known to the company and Langford Transport.

### **Starting Point**

[89] Mr Hopkinson submitted Waiū Dairy is responsible for a significant dairy operation that generates large quantities of wastewater. Any fine needs to satisfy the sentencing purposes of deterrence and denunciation, particularly where offending is motivated by commercial expediency. Accounting for these factors, the deliberate

nature of the offending, and the starting points in similar cases, Mr Hopkinson submitted the starting point for Waiū Dairy should be \$70,000 to \$80,000. He noted that the maximum penalty for each of the five offences is a fine of \$600,000 (or \$3 million in total) so the suggested starting point is approximately 3% of the maximum available penalty, or 13% of the maximum (on a global basis). Had the offending involved evidence of actual environmental harm or contamination of a watercourse, Mr Hopkinson submitted that a significantly higher starting point would have been justified.

[90] Mr Hopkinson accepted that, while Langford Transport's offending involved an element of deliberateness and was motivated by commercial gain, its subsidiary role in the offending and lower level of culpability justifies a lower starting point. He submitted that a global starting point of \$35,000 to \$40,000 would be appropriate for Langford Transport. This would be approximately 1.3% of the maximum available or 7% of the maximum (when considered on a global basis).

[91] Ms Barry-Piceno noted that Waiū Dairy is not a large company, where a fine could be an "easily absorbable item on the bottom line".<sup>27</sup> A fine on Waiū Dairy of even a small scale will have a very different deterrent effect than on a large organisation such as Fonterra. Ms Barry-Piceno submitted deterrence has effectively been borne by the defendant already, in the form of financial losses for the seven months when the factory could not process milk supplies (as it could not handle the wastewater), then Council fees, consultancy fees, and legal fees.

[92] Ms Barry-Piceno also noted that there is the cultural whakamā that the company has had to face in disclosure of this environmental prosecution to its Hapu and Iwi shareholders.

[93] Ms Barry-Piceno submitted that Waiū Dairy relied on independent expert advice from its consultants engaged to obtain all the necessary consents for the proposed factory. Waiū Dairy also relied on early advice from KDC that it could

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<sup>27</sup> *Hawke's Bay Regional Council v Stockade Pastoral Farms Limited* DC Napier CRI-2008-081-96, 20 March 2009 at [16].

manage its planned dairy factory's wastewater at the district wastewater plant and within its comprehensive consent.

[94] When Waiū Dairy was advised by the Regional Council its farm discharges were outside the legal scope of the farm's wastewater discharge consents, it commenced arrangements for interim solutions with Fonterra. This led to Fonterra varying its wastewater discharge consent to authorise wastewater from the Waiū Dairy factory by 20 December 2020 and taking its milk supplies. Ms Barry-Piceno noted that the consents granted for truck spraying disposal of wastewater followed the same or similar methods as Langford Transport was using informally when it disposed of the same wastewater products via truck spreading.

[95] Ms Barry-Piceno submitted Waiū Dairy made significant efforts to ensure Langford Transport staff followed best practice methods for wastewater discharges and informally applied standard consent conditions related to buffer distances from waterways and other mitigation measures. Waiū Dairy put in place interim solutions such as cutting back on its processing operations at a significant loss.

[96] Ms Barry-Piceno submitted this sentence is unlikely to act as a relevant deterrent to others but would be viewed historically as a series of events in timing, an unfortunate failure of the District Council to understand the limitations of its wastewater plant infrastructure and some poor expert advice relied on by Waiū Dairy in relation to consent compliance matters.

[97] Ms Barry-Piceno submitted that, bearing in mind the totality principle, a starting point in the region of \$50,000 would appropriately reflect the defendant's culpability, the lack of any adverse environmental effects of this offending and the unique set of circumstances that led to the non-compliance situation and involvement of both the KDC and Regional Council in the evolving consent noncompliance situation. This could be broken down to be based on \$10,000 for each of the five charges.

[98] Ms Curlett submitted the appropriate starting point for Langford Transport is \$15,000. She pointed out that Langford Transport was carrying out orders from Waiū

Diary and there was no environmental damage. Various protocols and precautions were used by the parties to avoid wastewater entering a waterway. Ms Curlett also submitted that Mr Langford relied on advice from Waiū Dairy that the activity was permitted.

### ***Conclusion on starting points***

[99] I have considered the various starting points in comparable cases to which I was referred.<sup>28</sup> They range from \$10,000 to \$100,000. The number of charges differed across the cases.

[100] None of the cases were on all fours with this case. I am, however, assisted by *Fonterra* involving six offences relating to discharges from a dairy processing factory insofar as the Court found a continuing and systematic failure to address environmental and RMA obligations. The starting point was \$100,000 for the four wastewater discharges and \$36,000 for two discharges from the factory.

[101] Ms Curlett noted that there do not appear to be any decisions that are completely analogous to Langford Transport's offending. She referred to a number of cases where the discharge of contaminants had not resulted in adverse impacts on the environment. I have had regard to *AJ Cowley* for its finding that the defendant should have turned its mind to checking whether the clean-fill site had an appropriate resource consent. The offending was characterised as careless and a starting point adopted of \$20,000.

[102] The defendants argued that they ensured that certain protocols were observed for the spreading of wastewater to stop or minimise environmental effects. Ms Barry-

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<sup>28</sup> Mr Hopkinson referred to: *Bay of Plenty Regional Council v Fonterra Ltd* DC Tauranga CRI-2015-087-385, 27 July 2015 (***Fonterra***), *Waikato Regional Council v Open Country Dairy Ltd* [2019] NZDC 19755, *Cando Fishing Ltd v Southland Regional Council* [2013] NZHC 3444 and *Bay of Plenty Regional Council v Ziwi Limited* [2021] NZDC 946. Ms Barry-Piceno referred to: *Otago Regional Council v Thom* DC Dunedin CRI-2012-012-2259, 19 July 2012, *Wellington City Council v Naginbhai Patel & Ganesh Superannuation Fund Limited* [2017] NZDC 6771, *Auckland Council v Liu* [2017] NZDC 22882 and *Ma & Lu v Auckland Council* [2017] NZHC 1274. Ms Curlett referred to: *Taranaki Regional Council v AJ Cowley Limited* DC New Plymouth CRI-2011-043-2428 (***AJ Cowley***), 15 December 2011, *Canterbury Regional Council v Lindsay Builders Limited* DC Christchurch CRI-009-7440, 19 October 2013, *Marlborough District Council v GrowCo* [2018] NZDC 16539, *R v Yealands* [2018] NZDC 4115, *Auckland Council v Frogley* [2018] NZDC 19942.

Piceno asserted that the Fonterra consent required the same or similar methods as Langford Transport used. I have no evidence of that. In any event, the Fonterra consent limits the volume and rate of wastewater application and requires extensive monitoring. Further, I do not accept that undertaking this activity in an informal way, without a resource consent, in any way relieves the defendants of responsibility in this matter.

[103] I have found that both defendants were highly careless in their approach to disposal of wastewater. I placed Waiū Dairy's culpability as higher than Langford Transport, because it had the primary meetings and correspondence with the Regional Council and it was able to control production at the plant so as to minimise wastewater. Despite being made aware early on in its operations that there were problems with its wastewater discharges, Waiū Dairy chose to continue processing. Having been made aware of problems with disposing to the KDC WWTP, it turned to land disposal. It did not check with the Regional Council if that was lawful, and when it found it was unlawful determined that it would continue with the disposal. As I have observed, Langford Transport should have checked with the Regional Council prior to undertaking the disposal and not relied on an understanding as to lawfulness. While there are no actual adverse environmental effects, the culpability of each defendant elevates the seriousness of the offending. For Waiū Dairy I impose a global starting point of \$70,000, and for Langford Transport a global starting point of \$45,000.

#### **Aggravating or mitigating features**

[104] The parties agreed that there were no personal aggravating factors relevant to either defendant.

[105] Mr Hopkinson submitted the Court should be mindful of the Court's concerns in *Stumpmaster v Worksafe New Zealand*<sup>29</sup> that discounts of 25 to 30 per cent that have been routinely allowed for mitigating factors in the District Court can distort the sentencing process and result in outcomes that are too low.

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<sup>29</sup> *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 at [64] to [67].

***Good character***

[106] Waiū Dairy and Langford Transport do not have any previous convictions.<sup>30</sup> However, one of Mr Langford's other companies (Langford Holdings Limited) has previously been the subject of an RMA prosecution relating to the discharge of dairy effluent at a dairy farm at Waihi in 2009.<sup>31</sup>

[107] Mr Hopkinson submitted Waiū Dairy is entitled to a discount of 5 per cent for previous good character. Waiū Dairy supports the prosecutor's position. I agree, and allow a five per cent discount.

[108] Mr Hopkinson submitted Langford Transport is not entitled to any discount for previous good character given the previous offending of its related entity.<sup>32</sup>

[109] Ms Curlett submitted the offending of Langford Holdings related to a different entity which is not related to Langford Transport in any way aside from the shared directorship. Langford Holdings is not the holding company for Langford Transport, and Langford Holdings was not involved in the transport business which Langford Transport now operates. Langford Holdings is a corporate entity that was set up by Mr Langford and his brother to operate a Waihi Dairy farm over 15 years ago. Langford Holdings was fined for breaches relating to effluent accidentally entering into a drain from a broken effluent sump. Ms Curlett submitted that, as in *PF Olsen v Bay of Plenty Regional Council*,<sup>33</sup> there is insufficient commonality between the offending to not warrant a discount for good character. Accordingly, it cannot be viewed in the same light as the current offending. Ms Curlett submitted a 5 per cent discount for good character should be awarded to Langford Transport. I agree that there is insufficient commonality in the offending, and also note that it occurred nearly ten years ago. I allow a five per cent discount for good character.

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<sup>30</sup> Summary of Facts at [92].

<sup>31</sup> Summary of Facts at [93]; *Bay of Plenty Regional Council v Langford Holdings Limited* DC Tauranga CRI-2010-070-3644, 8 September 2010.

<sup>32</sup> Counsel referred to *Waikato Regional Council v Hillside Farms Ltd* DC Hamilton CRI-2008-019-2997, 28 August 2009 at [29] in which the Court held that it could take into account the previous convictions of other companies and individuals in a group of companies as an aggravating factor in relation to offenders who were part of that same group of companies.

<sup>33</sup> *PF Olsen Ltd v Bay of Plenty Regional Council* [2012] NZHC 2392 at [71]; counsel also referred to *Bay of Plenty Regional Council v Vercoe* [2020] NZDC 17531.

***Remorse***

[110] Mr Hopkinson submitted there is no evidence of exceptional remorse by either defendant that would justify a discount. He accepted that Waiū Dairy has been cooperative throughout the investigation, but submitted that it should not result in an additional discount. Responsible corporate entities should cooperate with local authorities during an investigation of RMA offending, and the absence of belligerence, hostility and aggression during the investigation should not give rise to an additional discount from the penalty that is imposed.

[111] Ms Curlett submitted Langford Transport should be entitled to a discount of five per cent for assisting the Regional Council in its investigation. She submitted that after Langford Transport was made aware that the Regional Council had requested Waiū Dairy to stop disposing of the wastewater it immediately stopped collecting and disposing wastewater from the Waiū Dairy factory. It also cooperated with the Regional Council throughout the investigation.

[112] While helpful and commendable, I do not consider that cooperation with authorities should necessarily lead to a discount.

***Early guilty pleas***

[113] It was accepted that both defendants are entitled to a full discount for early guilty pleas. I agree and allow a 25 per cent discount for each.

**Outcome**

[114] I have adopted the two-step sentencing methodology outlined by the Court in *Moses v R*.<sup>34</sup>

[115] Accordingly, Waiū Dairy Limited Partnership is convicted and ordered to pay a fine of \$49,000. In terms of s342(2) of the RMA, I order that 90 per cent of the fine be paid to the Bay of Plenty Regional Council.

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<sup>34</sup> *Moses v R* [2020] NZCA 296 at [45] to [47].

[116] Accordingly, Langford Transport Limited is convicted and ordered to pay a fine of \$31,500. In terms of s342(2) of the RMA, I order that 90 per cent of the fine be paid to the Bay of Plenty Regional Council.

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Judge MJL Dickey

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 10/03/2022