IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2020-070-004889
via AVL
[2021] NZDC 1191

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

CRS TAURANGA LIMITED
Defendant

Hearing:	13 September 2021
Last case event:	Memorandum from defendant dated 17 December 2021
Appearances:	V Brewer for Bay of Plenty Regional Council S Ryan for CRS Tauranga Limited
Judgment:	4 February 2022

SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] The defendant has pleaded guilty to two charges of discharging a contaminant onto or into land in circumstances where it may enter water, contrary to ss 338(1)(a) and 15(1)(b) of the Resource Management Act 1991 (**RMA**). The charges relate to discharges of sediment contaminated stormwater from an unsealed industrial site used by the defendant for the storage, washing and repair of shipping containers on or about 20 June and 26 June 2020.

[2] The maximum penalty available to the Court for each charge is a fine not exceeding $600,000. Ms Brewer, for Bay of Plenty Regional Council, submitted that a starting point in the range of $80,000 to $90,000 would be appropriate. Mr Ryan, for CRS Tauranga Limited (**CRS**), submitted that a starting point of $60,000 would be appropriate.

[3] A Summary of Facts was agreed for the purpose of sentencing.

Background[1]

[4] The defendant leases four adjoining properties covering an area of 2.35 hectares with physical addresses at Te Awanui Way and Taiaho Place. The CRS site is bounded by Taiaho Place to the north, Te Awanui Way to the east, Te Runanga o Ngai Te Rangi Iwi land to the west and Tauranga Airport's main runway to the south east. Whareroa Marae is located at the end of Taiaho Place, approximately 250 metres west of the CRS site.

[5] CRS developed the site for use as a container facility. From late 2016, CRS began using the CRS site as its Tauranga storage terminal.

[6] Stormwater from the CRS site is authorised to be discharged via the stormwater system on Te Awanui Way, which extends to part of the adjacent site occupied by a coolstore. The coolstore is the holder of a resource consent that authorises the discharge of reticulated stormwater from the Te Awanui Way, which forms part of the Tauranga City Council (**TCC**) stormwater network.[2]

[7] The northern boundary of the site adjoins Taiaho Place. The stormwater system on Taiaho Place is part of the TCC stormwater network. Discharges into the sea from the TCC stormwater system are authorised by TCC's comprehensive stormwater consent. This consent does not expressly allow discharges of contaminants or discharges that exceed total suspended solids of $150 g/m^3$.

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[1] Summary of Facts at [2]-[3], [7], [10]-[31].

[2] It is a condition of the Te Awanui Way consent that the concentration of suspended solids in the stormwater discharge shall not exceed $150 g/m^3$.

[8] There have been previous compliance issues dating from August 2018 and relating to stormwater discharges from the site; an abatement notice in September 2018, an infringement notice in November 2018, a further abatement notice in March 2019 and a prosecution for discharges from the site between July and October 2019.[3]

[9] Between December 2019 and June 2020 CRS explored remedial options to address sediment issues on the site. CRS was in correspondence with the Council during this time. On 19 June 2020, CRS advised the Council that: it had received advice about sealing the yard for an estimated cost of $6.3 million, it had constructed an enlarged retention pond, it would monitor ponding during rain events and have a truck remove water as required and that it was looking at the feasibility of installing above-ground stormwater retention tanks.

[10] In June 2020 the CRS site was mainly unsealed as a compacted gravel yard, with the exception of a chip-sealed vehicle access route around the site.

The offending[4]

20 June 2020 – CRN 20070501505

[11] On 20 June 2020 the Council received a complaint from a member of the public about flooding from the site flowing onto Taiaho Place. A Regional Council enforcement officer inspected Taiaho Place and observed a large amount of sediment-laden water ponding on the northern boundary of the site. The sediment-laden stormwater was coming through the boundary's silt fence and flowing over the curb into the curbside channel on Taiaho Place.

[12] Photographs of the site and the discharge were taken by the officer, who noted that the small amount of stormwater flowing upstream of the discharge to Taiaho Place was clear.

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[3] *Bay of Plenty Regional Council v CRS Tauranga Ltd* [2021] NZDC 4071. The decision was dated 9 March 2021.

[4] Summary of Facts at [32]-[49].

[13] Samples of the discharge were taken, and the results were as follows:

(a) at the point where the discharge from the CRS site entered the curbside channel, suspended solids of 500 g/m^3;

(b) at the point where the discharge from the CRS site entered the stormwater sump on Taiaho Place, suspended solids of 440 g/m^3;

(c) at the culvert outlet to Whareroa beach, suspended solids of 220 g/m^3.

[14] At the stormwater outlet, the officer observed a sediment-laden plume of water in the harbour from the outlet.

26 June 2020 – CRN 20070501507

[15] On 26 June 2020 TCC received a complaint in relation to a discharge of dirty stormwater to Taiaho Place. Regional Council enforcement officers inspected Taiaho Place at approximately 9.13am. It was raining at the time. The officers observed a large area of sediment-laden water as it flowed to a stormwater grate in Taiaho Place. That grate had been bunded with silt socks. While most of the stormwater flow was being redirected by the silt socks away from the grate, some of the water was flowing underneath or around the edges of the bund and into the stormwater grate.

[16] The officers followed the redirected flow of the sediment-laden stormwater to the next catchpit along Taiaho Place. The second catchpit had no silt socks blocking it and stormwater from the curbside channel was flowing into this catchpit.

[17] Samples were collected and the results were as follows:

(a) from sediment-laden water flowing in the curbside channel before pooling in front of the silt socks at the first catchpit, suspended solids of 1,500 g/m^3;

(b) from ponded water on the northern boundary of the CRS site before it breached the CRS site's perimeter, suspended solids of 1,900 g/m^3;

(c) from the second stormwater catchpit on Taiaho Place, downstream from the stormwater catchpit that had silt socks, suspended solids of 750 g/m^3;

(d) from the stormwater outlet to the harbour, suspended solids of 400 g/m^3;

(e) 10 metres downstream of the discharge point into the harbour, suspended solids of 150 g/m^3;

(f) two samples in Tauranga Harbour 10 metres upstream of the discharge point into the harbour, each sample had suspended solids of 23 g/m^3.

[18] During the 26 June 2020 inspection the Council officers spoke to CRS's site manager and told him that he needed to take steps to stop the sediment laden water leaving the site. The manager said words to the effect of "*I will, if you can do something about all the rain*". The manager said it was "*a downpour*" and that he had trucks coming in to remove the water but could not get enough trucks to keep up with the amount of rain.

[19] Following the discharge events on 20 June 2020 and 26 June 2020, TCC wrote to the defendant formally notifying it that the discharges to TCC's stormwater network on Taiaho Place were in breach of the bylaw and must cease.[5]

[20] On 19 August 2020 a Regional Council enforcement officer emailed the defendant asking, "*with the rain today can you please make sure someone is monitoring the site and taking steps to prevent discharges?*". Mr Thompson responded that there was "*a team monitoring the site and taking necessary steps to mitigate*." The following morning a Council enforcement officer visited the site after the rainfall and took photographs showing signs of sediment laden stormwater pooled in the curbside channel outside the northern boundary of the site. The photographs were forwarded to the defendant.

Defendant's explanation and remedial steps taken[6]

[21] CRS was asked to provide written explanations in relation to the incidents of 20 and 26 June 2020, however no explanations were provided.

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[5] Letter Tauranga City Council to CRS Tauranga Limited dated 1 July 2020.
[6] Summary of Facts at [58]-[63].

[22] Between September and October 2020 CRS sought further expert advice in relation to possible remedial options, and obtained a new report dated 16 October 2020. This report set out a summary of the site's stormwater and sediment control issues and outlined options to address the concerns. Key points from the report include:

(a) the site's current compacted gravel yard has an excessively high proportion of sediments which due to their fine nature has become suspended in stormwater runoff during periods of rain, causing sediment laden flows to discharge from the CRS site;

(b) previous soakage assessments of the CRS site identified it has poor soakage properties. This, together with the relatively shallow groundwater depths present at the site, is unlikely to favour the option of soakage for purposes of stormwater disposal;

(c) a review of historical data and the report writer's site inspections suggest that the rip-rap channels and soakage basin are silted up to varying degrees, removing some of the ability for runoff to soak into the ground and resulting in sediment laden discharges seeping and/or overflowing from the basin and entering Taiaho Place;

(d) the report recommends a number of remedial options but favours Option D (stabilisation with swales) and Option G (chemically treated ponds) as having the potential to provide the most effective means to deal with the contamination issues;

(e) the report notes that option G – while being the most economical – does not address the sediment source and relied heavily on the correct functioning of chemically dosed sediment retention ponds.

[23] CRS carried out further temporary works in September 2020 to improve the rip-rap lined channel running within the north, west and south boundaries of the CRS site, as well as the northern soakage basin.

[24] The Summary of Facts records that CRS has yet to commence works to implement a long-term solution for addressing the site's sediment issues. I was advised at the hearing, however, that works to seal the site have commenced.

Sentencing principles

[25] The purposes and principles of the Sentencing Act 2002 are relevant. The High Court in *Thurston v Manawatu Wanganui Regional Council*,[7] 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.

Environmental effects

[26] The Summary of Facts set out the following:

> 50. The Taiaho Place stormwater network discharges directly into the Tauranga Harbour at the entrance to Waipu Bay. This area out to the port channel is identified as an Outstanding Natural Feature and Landscape (ONFL 3), and an Area of Significant Cultural Value (ASCV-4) in the Regional Coastal Environment Plan (Coastal Plan).
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> 51. The Coastal Plan also identifies Indigenous Biodiversity Areas (IBDA) in Tauranga Harbour that meet the criteria in the New Zealand Coastal Policy Statement (NZCPS (Policy 11(a)). This includes the margins of Waipu Bay which are identified in the Coastal Plan as an IBDA-B (B44), due to containing areas of predominantly indigenous vegetation, habitats important during vulnerable life stages and ecosystems and habitats vulnerable to modification.
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> 52. In particular, the margins of inner Waipu Bay have areas with predominantly indigenous vegetation (grey willow forest with indigenous understory, raupo reedland, mānuka scrub, mangrove scrub and shrubland, and other estuarine wetlands dominated by sea rush, oioi, saltmarsh ribbonwood, and *Schoenoplectus pungens*. Many of these habitats are vulnerable to modification. The Maheka sandspit, on the Matapihi side of Waipu Bay, is also an important shore bird roosting site.
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> 53. Increased rates of sedimentation are a key issue for Tauranga Harbour, as identified in the Coastal Plan. One of the primary adverse effects of suspended and deposited sediments is on benthic macrofauna biodiversity. Sedimentation can negatively impact a range of benthic communities and modify habitats, especially habitat forming species including seagrass beds,

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

green-lipped mussel and horse mussel beds, bryozoan and tubeworm forests, kelp forests, sponge gardens and mangrove habitats. Sediments from all sources across the harbour need to be controlled, as the cumulative impacts of all sources are having significant adverse effects on the ecological health of the harbour.

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

Effects

55. These further discharges of suspended sediment from the CRS site to Tauranga Harbour may have had localised effects on Waipu Bay, with potential adverse effects possible across a range of highly valued habitats that have been outlined in the Coastal Plan as key areas of concern. Sediments may have been transported to other areas of the harbour, creating effects further afield.

56. The main potential adverse effects resulting from the CRS discharge events were:

a) Depending on tides and prevailing winds, sediment discharged from the CRS site via the stormwater outlet into Waipu Bay may be carried east into Waipu Bay onto threatened habitats (seagrass, shellfish beds, bird roosting sites, estuarine wetlands). Sediments may also be discharged out into the greater harbour.

b) There may be localised impacts on shellfish in Waipu Bay.

57. There are also cumulative cultural effects caused by discharges of this kind to Te Awanui (Tauranga Harbour), including injury to the mana of those who exercise kaitiakitanga over the affected environment. Kaitiakitanga is a concept that extends beyond inherited stewardship of natural resources and encompasses spiritual responsibilities to the environment including protection of the sacred character (tapu) and life-force (mauri) of resource.

[27] Ms Brewer submitted the discharges on 20 and 26 June 2020 involved unknown volumes of sediment-laden water escaping from the CRS site and flowing through the stormwater system on Taiaho Place to Waipu Bay in Tauranga Harbour approximately 390 metres from the CRS site.

[28] The discharge detected on 20 June 2020 has suspended solids approximately 1.5 to 3 times the permitted 150 g/m^3 total suspended solids limit. The discharge

detected on 26 June 2020 had suspended solid levels approximately 12.5 times the permitted 150 g/m^3 total suspended solids limit.

[29] Ms Brewer highlighted that there was a visible plume of discoloured water at the Taiaho Place stormwater outlet to Waipu Bay on each offence date.

[30] Ms Brewer submitted that, putting to one side the impact of the individual discharges on the two separate dates, the Court must also take into account the cumulative effect that discharges of this nature have on our water bodies, which is often referred to as "death by a thousand cuts".[8]

[31] Ms Brewer submitted in the present case, while the sampling shows comparatively moderate levels of suspended solids contamination, the impacts from these discharges should be considered not only in combination with the cumulative impacts of discharges of sediment from unknown sources, but also within the context of CRS's sediment discharges that were the subject of previous prosecution.

[32] CRS acknowledged the well-traversed impacts that discharges of sediment may potentially have on waterways, including the Tauranga Harbour and the indigenous flora and fauna it houses, and the importance of the harbour in the statutory planning documents.

[33] CRS also acknowledged the sensitivity and vulnerability of the receiving environment, including to the people of the adjacent Whareroa Marae, and to the identified ecological features noted in the Regional Coastal Environment Plan. This sensitivity coexists with the CRS site being in an industrial zone adjacent to New Zealand's largest port.

[34] Mr Ryan highlighted the prosecution's acknowledgement that the scale of offending is less in the present case than in the first prosecution; fewer discharges and lower levels of contamination.

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[8] Counsel referred to *Nelson City Council v KB Contracting and Quarries Ltd* [2018] NZDC 11153 at [19], as well as the recent discussion of cumulative effects of sediment discharges in *Greater Wellington Regional Council v CPB HEB Joint Venture* [2021] NZDC 12513 at [19].

[35] Mr Ryan submitted that the 20 June discharge event could properly be described as minor, and that both offences are at the lower level in terms of physical effects to the environment, while acknowledging that there are other factors here of concern including the repeat offending, the policy context, and the sensitivity of the receiving environment.

[36] Mr Ryan submitted, in terms of seriousness of these offences, the Summary of Facts indicates:

(a) the effects occurred for a limited duration on the identified dates, coinciding with (heavy) rainfall events;

(b) the collected sample results from the sampling on 20 June and 26 June indicate dilution of the sediment laden water following escape from the CRS site, followed by dispersal of a sediment plume following entry to the harbour via the Tauranga City Council stormwater network;

(c) sample three of 20 June 2020 (at the culvert at the beach) recorded sediment solids of 220gms per cubic metre (compared to the permitted discharge level of 150gms per cubic metre). The photograph appears to show rapid dispersal and localised discolouration at the end of the pipe on 20 June;

(d) whereas for the 26 June 2020 event, the discolouration appears to have been observed 10 metres downstream of the discharge point.

[37] Mr Ryan submitted that, apart from the observed discolouration at the stormwater outfall, the described effects to the natural environment in the Summary of Facts are *potential* effects rather than actual effects. This is reflected in the Summary of Facts with the reference to "*potential adverse effects*".[9]

[38] Mr Ryan submitted that, as a matter of law, potential effects are "effects" as defined (in section 3) but are not cumulative effects. The distinction is explained by the Court of Appeal in *Dye v Auckland Regional Council*[10] which held that "A

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[9] Summary of Facts at [55]-[56].

[10] *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209, [2002] 1 NZLR 337, [2001] NZRMA 513 at [38]-[39]

cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect".

[39] Mr Ryan submitted that while effects from sedimentation in the Tauranga Harbour from all sources are an important resource management issue, CRS's sentence ought to recognise that the actual effects of the particular discharges from CRS's site have not been measured. This is consistent with the sentencing decisions in *Otago Regional Council v Northlake Investments Ltd*[11] (***Northlake Investments***) and *Otago Regional Council v Maruia Mining Ltd*.[12] Mr Ryan submitted the same approach as taken in *Northlake Investments* should be taken here.

[40] Mr Ryan submitted that, in describing effects to the environment and their seriousness, there is room for the prosecution to recognise the wider context in which sedimentation occurs to the Tauranga Harbour. He noted that research identifies the significant influence of non-point sources. Sedimentation involving an industrial site represents an overall small percentage of the total sediment load occurring to the Tauranga Harbour from all sources. Mr Ryan observed that context is relevant when assessing the seriousness and gravity of sediment discharges. Existing nonpoint sources all form part of the existing environment to Tauranga Moana.

Victim impact statements

[41] There are also effects on the local community and iwi.

[42] A victim impact statement was prepared by Pia Bennett on behalf of Ngāi Te Rangi Iwi, who have been directly affected by the offending. Ngāi Te Rangi Iwi expressed a sense of helplessness and powerlessness to act. The discharges have impacted traditional and ancestral connections to place, cultural practices and intergenerational responsibilities. They feel unable to exercise kaitiakitanga effectively, because they cannot protect their taonga and their whanau. Ngāi Te Rangi feel the site management plan is failing and there is a lack of proactive management. They highlighted that CRS has been prosecuted before. Ngāi Te Rangi asked the Court

[11] *Otago Regional Council v Northlake Investments Ltd* [2019] NZDC 17582.
[12] *Otago Regional Council v Maruia Mining Ltd* [2019] NZDC 20752.

to consider imposing an enforcement order for site improvements, with strict timeframes and conditions.

[43] Mr Joel Ngātuere prepared a victim impact statement on behalf of Ngāti Kuku, Whareroa marae, the descendants of Taiaho Hōri Ngātai, and all residents of Whareroa community. The statement highlighted concerns with air pollution, pollutants that attach to the sediments CRS discharged to waterways, visual intrusion from the containers stacks and truck movements. The statement describes that the sediment discharges have caused damage to Tangaroa and his children. Their ancestor has been poisoned and this is detrimental to their wairua – spiritual, cultural and mental wellbeing. They ask the Court to use every level of the RMA to charge CRS with the maximum fine possible, and to terminate their consent to operate.

[44] Ms Brewer submitted that the anger and frustration of the neighbouring Whareroa Marae community is understandable. As set out in Mr Ngātuere's victim impact statement, there is a feeling of helplessness that discharges of sediment from the CRS site continue at the expense of the well-being of the receiving environment and those connected with this environment.

[45] CRS acknowledged the cultural importance of Tauranga Moana to iwi and hapu, including Ngāi Te Rangi Iwi and to Whareroa Marae, as referenced in the victim impact statements.

Conclusion on effects

[46] I have noted the classification of the affected environment and the vulnerability of that environment. Increased rates of sedimentation are a key issue for Tauranga Harbour. Sampling identified that the discharges had suspended solids above the permitted limit. A sediment plume was observed in the harbour. I do not have evidence of effects on benthic communities but note that sedimentation can negatively impact a range of those communities and modify habitats. It is impossible to quantify the volume of sediment discharge or detail the level of actual effects. It has been acknowledged that there were potential adverse effects.

[47] While actual effects of these discharges have not been demonstrated I accept that suspended sediment would accumulate with sediment generated by other discharges to the Tauranga Harbour, a harbour sensitive to the effects of sedimentation. In other words, the discharge would have contributed to any cumulative effects arising from other sedimentary discharges to the river. The Court has, on many occasions, observed that the cumulative effects of discharges of contaminants is of concern.

[48] Mr Ryan argued that, in determining the seriousness of the offending, I can recognise the context in which sedimentation occurs and that sedimentation from industrial sites represents an overall small percentage of the total sediment load. I have no evidence to support that submission, but note that the context in which these discharges occurred is indeed relevant – the site is in close proximity to the harbour and to the local Whareroa marae and community, meaning that there is an immediate and obvious visual impact of sediment laden discharges of stormwater.

[49] The effects on the local marae and iwi have been well articulated in their two victim impact statements. They have expressed concerns about industry generally in terms of proximity and effects on them, but also about the impacts of repeated discharges on them and their waterways.

[50] In all the circumstances I determine that the environmental effects of this offending are moderately serious.

Culpability

[51] Ms Brewer submitted that the defendant's culpability in this case can be characterised as careless to a high degree. This is because:

(a) the offending demonstrates a real want of care. CRS has been on express notice of the stormwater issues since at least 29 August 2018. Despite the site's vulnerability to discharges of sediment-laden stormwater during rain events, it appears that CRS failed to closely monitor the site during the June 2020 rain events and / or failed to intervene to remove ponded stormwater from the site's northern boundary;

(b) the offending occurred while CRS was being prosecuted for discharges of sediment contaminated stormwater between 4 July 2019 and 11 October 2019. Despite the enforcement steps that have been taken to date, including abatement notices, an infringement notice, and now two prosecutions, the CRS site remains largely unsealed and CRS continues to operate its container storage yard despite the ongoing risk of discharges of sediment-laden stormwater during rain events;

(c) interim remedial measures adopted by CRS after the 2019 discharges have proven to be ineffective at preventing further discharges. After the June 2020 discharges CRS sought further expert advice in relation to possible remedial options and obtained a new report dated 16 October 2020. That report set out a summary of the site's stormwater and sediment control issues and outlined options to address the concerns. However, as at the date of filing submissions CRS had still not adequately addressed the sediment and stormwater management issues at its site;[13]

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

[52] Mr Ryan submitted that culpability is substantially the same as in the previous prosecution, as the factual matrix is not substantially different from that which existed before the Court on 2 November 2020.

[53] Mr Ryan noted that the prosecution elected to lay the present charges after the sentencing hearing on 2 November 2020. It is not a situation where the present offences (June 2020) were unknown to the prosecution at the time of sentencing on 2 November 2020. Further, the Regional Council knew that CRS was actively seeking long-term remedial solutions, was seeking further engineering advice and that it

[13] The prosecutor understands that remedial works to seal the site commenced prior to the recent Covid 19 level 4 lockdown.

acknowledged that the (then) existing remedial steps were not adequate to avoid the risk of further discharge.

[54] Mr Ryan submitted that that it would have been an easy matter for the prosecution to add these June 2020 charges to the matters previously before the Court, for which CRS had already pleaded guilty for sentencing on 2 November 2020. Had this occurred, the present charges could have been dealt with efficiently without the time and attendant cost of fresh proceedings.

[55] Mr Ryan observed that a factor that may have weighed with the Regional Council was the unresolved remedial works. At the earlier sentencing, CRS was willing to agree to an enforcement order but could not reach agreement with the prosecution over the timeframe. The draft enforcement order proposed by CRS included a 'walkaway' option, but if sealing was to be mandated the works required consent and approval of third parties (landlords) and other internal stakeholders (other shareholders). Earlier, CRS was not willing to commit to a timeframe that it could not (then) perform. Fortunately, those remedial works are now in progress because CRS can now finance them.

[56] Mr Ryan submitted that the offending in this case is more readily described as unintentional but careless discharges of a recurring nature over a period of time, or of incidents arising from the malfunction of different parts of the system.[14] Mr Ryan was unable to locate any equivalent enforcement decision involving a 'modern' consented industrial activity where stormwater was, from the outset, dealt with so inadequately.[15]

Conclusion on culpability

[57] This offending occurred before the issue of the sentencing decision for the earlier offending. It cannot, therefore, be said that CRS flouted the Court's decision. However, the circumstances leading to the offending are the same. I find that the company did not respond with sufficient urgency or diligence to the ongoing sediment

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[14] Counsel adopted language from *Waikato Regional Council v GA & GB Chick Ltd* (2007) 14 ELRNZ 291.

[15] In older plans, it was not uncommon for rules to require resource consent for unsealed industrial sites. However no equivalent provision applied in either the district (city) plan or relevant regional plan.

discharge problems at its site. I determine that the defendant was highly careless in its approach to management of stormwater on its site.

Starting point

[58] In support of her proposed starting point Ms Brewer referred to four cases:

- *Bay of Plenty Regional Council v CRS Tauranga Ltd* (***CRS Tauranga***);[16]
- *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* (***Waiotahi Contractors***);[17]
- *Bay of Plenty Regional Council v Baygold Holdings Ltd* (***Baygold***);[18]
- *Otago Regional Council v Maruia Mining* (***Maruia Mining***).[19]

[59] Ms Brewer submitted that, although the scale of the offending is less in the present case than in the first prosecution of CRS[20] (given there were fewer discharges

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[16] *Bay of Plenty Regional Council v CRS Tauranga Ltd* [2021] NZDC 4071 – two representative charges of discharging a contaminant (namely sediment contaminated stormwater) onto or into land in circumstances where it may enter water. The environmental and cultural effects of this offending were moderately serious. The defendant was highly careless in its approach to management of stormwater on its site. Starting point of $115,000.

[17] *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* [2018] NZDC 19938 – two charges relating to the discharge of sediment-laden washwater from the defendant's aggregate washing and crushing facility. The Court said it was likely that some short-term reduction in stream habitat had been caused by the discharges which would have contributed to the cumulative impact of sediment in the rivers. The Court held the defendant's culpability was towards the higher end of the comparable cases referred to at sentencing. The defendant was an experienced operator, it knew or should have known that the risks of its operation required care in the maintenance and regular monitoring of the site and waterways around it. Starting point of $55,000.

[18] *Bay of Plenty Regional Council v Baygold Holdings Ltd* [2020] NZDC 697 – two charges arising from earthworks associated with the conversion of a rural property to a kiwifruit orchard. The offending involved discharging sediment laden stormwater to land where it may enter water. The environmental effects of the offending were moderately serious given the site's proximity to the Otamarakau Wetland and the cumulative impact of sedimentation on that wetland. Baygold was found to be highly careless; it did not approach with sufficient urgency problems that had been identified regarding the non-construction of the retention ponds and was caught short when problems began to manifest themselves. Starting point of $70,000.

[19] *Otago Regional Council v Maruia Mining Ltd and Anor* [2019] NZDC 20752 – two charges against each defendant relating to the discharge of sediment laden water from a mine on two separate instances. The effects were described as generic in character. The defendants' failings were characterised as systemic and involving a high degree of carelessness. The defendants had been on notice from its previous offending as to the need for proper management of the site. The Court noted that the starting point could have been higher however, there were uncertainties as to the volume of sediment that was in fact discharged and the adverse effects which were brought about by the discharge, the defendants were given the benefit of the doubt in relation to both these matters. Starting point of $60,000.

[20] *Bay of Plenty Regional Council v CRS Tauranga Ltd* [2021] NZDC 4071.

and lower levels of contamination), culpability is higher given the discharges occurred while the first prosecution was still before the Court.

[60] Ms Brewer submitted that there are similarities between the offending in the *Waiotahi Contractors* case and the offending in the present case, given that both cases involve discharges of sediment-laden water from industrial sites. Each case involves a history of previous compliance inspections identifying non-compliant discharges. While *Waiotahi Contractors* involved higher levels of suspended solids, the receiving environment in the present case is more sensitive. The Court's starting point was $55,000.

[61] Ms Brewer submitted that, although Baygold Holdings' offending also involved discharges on only two dates, the *Baygold Holdings* case involved an area of exposed earth approximately three times larger than the CRS site and breaches of the defendant's consent.

[62] Ms Brewer submitted that there are similarities between the offending in the *Maruia Mining* case and the offending in the present case given both cases involved discharges on two offence dates and the defendants being on notice of issues at each site. The Court adopted a starting point of $60,000. However, in the present case there is certainty about the origin of the source of the discharges.

[63] Ms Brewer submitted that a starting point in the range of $80,000 - $90,000 would be appropriate in this case. She argued that the starting point range is modest when considered against the maximum available penalties in this case, being approximately 6.5 per cent to 7.5 per cent of the total available maximum penalties of $1,200,000.

[64] Ms Brewer submitted a starting point at this level recognises that the scale of the offending is less serious than the previous prosecution, but is aggravated by the repeat nature of the offending as well as the environmental harm caused by repeat discharges of sediment to the marine environment.

[65] Ms Brewer submitted that, given the ongoing offending in the Bay of Plenty region involving discharges of sediment into watercourses and Tauranga Harbour, it is important that the starting point in the present case is set at a level that will have a general deterrent effect on those with control over sediment-loss from worksites within the Tauranga Harbour catchment. In light of the defendant's poor previous compliance at the CRS site, she submitted that convictions and fines are necessary to provide a strong message of individual deterrence.

[66] Mr Ryan submitted that the prevalence of cases concerning offending in the Bay of Plenty Region involving discharges of sediment into water courses and the Tauranga Harbour predominantly concern large-scale conversion of land, whether through residential development or conversion to more intensive horticultural uses. The present case was submitted to be atypical.

[67] In support of his proposed starting point of $60,000, Mr Ryan noted four cases in particular: W*aiotahi Contractors*, *Otago Regional Council v Northlake Investments Ltd* (***Northlake***),[21] *Nelson City Council v KB Contracting and Quarries Ltd* (***KB Contracting***),[22] and *Maruia Mining*.

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[21] *Otago Regional Council v Northlake Investments Ltd* [2019] NZDC 17582 – one charge of unlawfully discharging silt and sediment from a large residential subdivision to land in circumstances in which contaminants might enter water. The Court noted that adverse effects of sediment discharges from earthworks on fresh and coastal water bodies were well recognised. The Court accepted there was no evidence that such environmental adverse effects actually occurred or persisted in this case because of the Clutha River flow. However, cumulative effects were to be considered, although these were not measurable. The offending had demonstrable amenity effects and a significant cultural effect. The underlying cause for the offending was the failure by Northlake to ensure that the proper level of sediment protection was in place on the development site, and that up to 20ha of the site was open contrary to consent conditions and the Site Management Plan. The Court concluded Northlake had a higher level of culpability for the offending than its contractor. Starting point of $50,000. The High Court declined the appeal and affirmed the District Court's approach to sentencing.

[22] *Nelson City Council v KB Contracting and Quarries Ltd* [2018] NZDC 11153 – five charges relating to discharge of sediment-laden run-off from sediment treatment ponds utilised as part of the earthworks undertaken for a residential development. The extent of damage to Maire Stream could be adequately identified, that to the estuary less so. The offending involved gross pollution of an important habitat of the banded kokopu leading to a sharp decline in its numbers from which the population had not recovered and may not do so. Sediment would ultimately make its way to the estuary which is vulnerable to the effects of sedimentation and is an important habitat for various fauna and plant species. The Court noted its concern is with the cumulative effect which such individually minor discharges have on water bodies. The Court found the offending was the culmination of an ongoing situation of appalling management of sediment discharges by the defendants which commenced within only weeks of resource consent being granted and persisted for a period of up to a year until the offending. The degree of carelessness in management of sediment discharge was so high as to make the distinction between accidental discharge and deliberate discharge almost meaningless. Starting point of $120,000.

[68] Mr Ryan submitted that the gravity of the offending is more akin to the starting point penalty imposed in *Waitohai Contractors* and *Maruia Mining*. He also referred to *Northlake*, and observed that the fine imposed was in line with other cases where the effects, although significant in some cases, were largely transitory or short term. The Court adopted a starting point of $50,000. Mr Ryan pointed out that in *KB Contracting* the offending was the culmination of an ongoing situation of appalling management of sediment discharges. The starting point on five charges was $120,000.

Conclusion on starting point

[69] I have considered the cases to which I was referred. I have had particular regard to *Maruia Mining* because it involved systemic failings and the defendants having been on notice about the need for proper management of the site. I have also considered my earlier decision involving CRS.

[70] This offending provides another example of the problems at the site. CRS was on notice about the need for proper management of the site from concerns raised by the Council and from the charges laid in the first prosecution. Concerns were first raised towards the end of 2018, and while some attempts were made to address the issues they were not successful. Permanent steps to address the issues are only now underway. The environment is adversely affected by the discharges as is the local marae, even though the discharges are smaller than those involved in the previous offending. In all the circumstances, I determine that the starting point for this offending should be $70,000. I have taken into account the fact that these charges relate to discharges that occurred before the previous sentencing hearing and which were laid after that hearing.

Aggravating and mitigating factors

[71] The Summary of Facts recorded previous compliance issues, namely two abatement notices, an infringement notice being issued as well as the recent prosecution. Ms Brewer submitted that CRS's history of non-compliance has been factored into her proposed starting point. Accordingly, no additional uplift was sought to reflect this aggravating factor.

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

[73] In considering discounts for mitigating factors, Ms Brewer submitted that the Court should be mindful of the High Court's concerns in *Stumpmaster v Worksafe New Zealand*[23] that the discounts of 25 to 30 per cent being routinely allowed for mitigating factors (e.g. reparation, cooperation and previous good character) in the District Court can distort the sentencing process and result in outcomes that are too low.

[74] Mr Ryan submitted there should be a discount of up to five per cent for personal mitigating factors including remorse. I will consider this matter under the Restorative Justice heading.

[75] It was accepted by both parties that credit is available for a guilty plea. I consider the full 25 per cent discount is appropriate.

Restorative justice

[76] A restorative justice conference was held on 31 August 2021. I was provided with a restorative justice conference report. The summary records:

> Greg Wilson, speaking on behalf of CRS, apologised for the harm caused and over the course of the restorative justice meeting CRS representatives listened carefully to the explanation of the effects of the presence of general industry and specifically the discharges that CRS was responsible for, on the Ngāti Kuku hapu and Ngāi Te Rangi Iwi as kaitiaki for the moana and whenua of Tauranga Moana. Greg Wilson explained that NPDL took control of CRS in March 2020 but would not have done so had it known that there had been previous environmental harm caused from the site and had it known that the previous owners had not invested in the remedial work required.
>
> Ngāti Kuku and Ngāi Te Rangi explained at the outset that the best possible outcome for them would be for all industry to be removed from the area, and actively asked CRS to pursue that course of action. CRS explained that they were obliged to invest in the remedial work which they had done, and that the dealing of the CRS lot and improvements to the stormwater reticulation were expected to be completed in October 2021. They explained that because of this level of investment required from the company, leaving the site was not an easy option.

[23] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 at [64] to [67].

> The conversations that followed explored the way the situation could be addressed in more detail, and the outcomes between the parties about how this could be achieved [were] recorded.

[77] CRS offered some support by way of reparation. Representatives of Whareroa and Ngāti Kuku read the offer made by CRS and responded. The proposed outcomes for the Court to consider included:

> 1. Reparation that can be vested in Ngāti Kuku and Ngāi Te Rangi as a Taiao (natural world/ecological) Fund and applied to sea habitat planting, other environment initiatives and a cultural impact assessment that would give all parties the opportunity to understand and recognise the mana whenua perspective, provision of other ecological measures.
>
> 2. In addition to this, CRS offer to plant trees as a protective screen along, or in the most effective place near to the eastern boundary of the Whareroa Marae atea.
>
> 3. Support for an ongoing liaison and engagement process between Ngāti Kuku, Ngāi Te Rangi and CRS based on respect and communication.
>
> CRS offer to fund the facilitation of this process at the outset as it develops an ongoing action plan, processes and protocols. It is anticipated that the group can consider action planning and priorities around:
>
> a) Riparian buffer tree planting;
>
> b) An "event and communications" protocol between Whareroa and CRS;
>
> c) Initiatives that utilise the Ngāti Kuku Taiao Fund (for environmental wellbeing); and
>
> d) Consideration of options regarding relocation of CRS.
>
> 4. The potential for the issues to be resolved on a longer term basis by way of better engagement and communication between Ngāti Kuku, Ngāi Te Rangi and CRS.

[78] Ms Brewer acknowledged that CRS has shown a willingness to participate in restorative justice. She accepted that a discount of up to five per cent would be appropriate to reflect remorse.

[79] At the hearing I advised counsel that I found the outcomes of the restorative justice process to be vague. The sentencing of this matter was adjourned for the details of the potential outcomes of the restorative justice process to be defined and clarified.

[80] An addendum regarding reparation terms was provided to the Court on 4 October 2021. Despite the further facilitation no agreed outcome was able to be reached; however the following proposed outcomes were recorded:

Summary of proposed outcomes from Ngāti Kuku and Ngāi Te Rangi

1. Provision of resourcing for 2x FTE's to assist Ngāti Kuku and Ngāi Te Rangi to exercise kaitiakitanga over the taiao. $100,000 per annum. If the Court is limited to ordering a single payment by virtue of the sentencing process we invite consideration of an enforcement order that would require further payment if future breaches were to occur.

2. Establishment of a Kaitiaki Taiao Enhancement Fund [environmental care enhancement fund – appropriate name to be decided]. $70,000 per annum. If the Court is limited to ordering a single payment by virtue of the sentencing process we invite consideration of an enforcement order that would require further payment if future breaches were to occur.

3. Provide reimbursement to individuals of the Ngāti Kuku Board and the Ngāi Te Rangi Manager for Environment & Natural Resources Unit time. $15,000.

4. Commission the development of a Landscape Planting & Maintenance Plan $8,500 and further implementation costs of estimated at $40,000 for labour and overheads. Total $48,500.

5. Provision of a contribution towards to Kuku ki Tai Ātea Vision Strategy document of $25,000.

6. Development of a Memorandum of Understanding estimated cost $20,000 over the course of one year. The MOU will cover (but not be limited to) the following items:

   a) relationship protocols;

   b) communication protocols;

   c) a process of engagement and planning including resourcing, that enable and commits the parties to exploring options in relation to:

      (i) the parties supporting each other to achieve mutually beneficial outcomes;

      (ii) present lease conditions & provisions;

      (iii) future possibilities such as purchasing the site or part of the site;

      (iv) term of consented activities in the context of reviews, renewals or reconsenting;

      (v) actively pursuing options for relocation;

   d) a process that the parties develop together with a view to reaching agreement on ways to facilitate the realising of Kuku ki Tai Ātea visions;

e) a process that the parties can agree to in relation the managed retreat of industry in the Totara Street South vicinity.

Summary of proposed outcomes from CRS Limited

CRS agree and would appreciate the opportunity to contribute to:

A) Kaitiaki Taiao Enhancement Fund [environmental care enhancement Fund – appropriate name to be decided].

B) Landscape Planting & Maintenance Plan; and

C) Development of a Memorandum of Understanding to establish communication and relationship protocols and if appropriate a process of engagement between Ngāti Kuku and Ngāi Te Rangi. The agenda of this engagement process to be developed by agreement between the parties.

CRS will commit up to $50,000 to these agreed reparation opportunities.

In addition to CRS's contribution above, CRS are also aware that BOPRC have requested that 90% of any fine be paid to the Council. CRS would have no objection to the payment of additional fine or financial penalty being also made to Ngāti Kuku and Ngāi Te Rangi as the kaitiaki of the affected whenua and moana.

[81] While there was not full agreement either in terms of the range of options or the quantum, it was hoped that the alignment between the requests outlined by Ngāti Kuku and Ngāi Te Rangi and the proposals made by CRS Limited is sufficient to provide the Court with specific guidance for sentencing outcomes.

[82] By memorandum dated 5 October 2021 Mr Ryan advised that CRS remains ready and willing to perform its proposal, should this be accepted by the victims.

[83] While there was some alignment between Ngāti Kuku, Ngāi Te Rangi and CRS there was no acceptance of the CRS offer. In the circumstances, and to assist me in finalising sentencing, I invited CRS to clarify, in the absence of that agreement, if it will provide up to $50,000 (being the amount offered in the further meeting) towards a Kaitiaki Taiao Enhancement Fund (environmental care enhancement fund); Landscape Planting & Maintenance Plan; and development of a Memorandum of Understanding to establish communication and relationship protocols.

[84] By memorandum dated 17 December 2021 it was proposed that CRS's proposal be secured in the form of a written undertaking by the company. An undertaking was provided – the commitments were in large part those made at the

further facilitation meeting but were conditional on Ngāti Kuku and Ngāi Te Rangi accepting the company's proposal. Mr Ryan submitted the Court is entitled to take into account the defendant's undertaking in accordance with s 10 of the Sentencing Act 2002.

[85] On occasion, the Court has encountered restorative justice outcomes that leave matters incomplete or are not clearly stated. This makes it difficult to assess their impact on any discount that may be applied to the starting point. While the restorative justice process did not result in an agreed outcome, it resulted in a commitment, albeit conditional on Ngāti Kuku and Ngai Te Rangi's acceptance, to provide funds and to contribute to the development of a memorandum of understanding, implementation of a landscape planting and maintenance plan and contribution towards a Kaitiaki Taiao Enhancement Fund. In light of that, I allow a five per cent discount for CRS's participation in restorative justice and its commitment to certain actions. If the process had resulted in agreement I would likely have allowed a greater discount to recognise the commitments.

[86] The prosecution does not agree to the proposal that 90 per cent of any fine be directed towards the victims rather than the Regional Council.

[87] The wording of section 342 of the RMA makes it clear that, where a person is convicted of an offence under section 338 and the Court imposes a fine, the Court shall order that 90 per cent of the fine be paid to the local authority that commenced the proceedings. The Court is not able to direct the use to which any fine will be put.

[88] In its victim impact statement, Ngāti Te Rangi asked the Court to consider imposing an enforcement order for site improvements. I have been advised that sealing of the site was due to be completed on 17 December, which I understand should resolve the issues. Further, I note that the Council has not sought an enforcement order against the company. I do not consider there is presently any basis to make enforcement orders.

Outcome

[89] I have adopted the two-step methodology outlined by the Court in *Moses v R*.[24] I convict CRS and impose a fine of $49,000.

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

Judge MJL Dickey
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 04/02/2022

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