IN THE DISTRICT COURT
AT WHAKATANE

I TE KŌTI-Ā-ROHE
KI WHAKATĀNE

CRI-2021-087-001185
[2022] NZDC 9929

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

KYLE SEAN MAITAI
Defendant(s)

Hearing:	By AVL on 23 May 2022
Appearances:	A Hopkinson for Prosecutor S Franklin for Defendant
Judgment:	6 July 2022

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

Introduction

[1] The defendant Kyle Sean Maitai is charged that on 17 May 2021 at or near Wano Road, Whakatāne he contravened s 15(1)(b) of the Resource Management Act 1991 by discharging a contaminant, namely septic tank waste, onto land in circumstances which may have resulted in that contaminant entering water, namely the Orini Canal, when that discharge was not expressly allowed by a national environmental standard or other regulation, a rule in a regional plan as well as a rule in a proposed regional plan for the same region, or a resource consent.

[2] The contravention of s 15(1)(b) of the RMA is an offence under s 338(1)(a) of that Act for which the maximum sentence under s 339(1)(a) for a natural person is imprisonment for a term not exceeding two years or a fine not exceeding $300,000.

[3] The defendant pleads guilty to the charge. He makes no application for a discharge without conviction under ss 106 and 107 of the Sentencing Act 2002. In terms of the sentencing principle in s 8(g) of the Sentencing Act, which directs me to impose the least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences and orders set out in s 10A of that Act, I see no basis in this case on which a discharge would be warranted. I accordingly convict the defendant Kyle Sean Maitai of the charge and I will proceed to consider what an appropriate sentence would be.

The offending

[4] The agreed summary of facts records that between December 2020 and May 2021 Mr Maitai was employed by a septic tank waste removal business known as Brownfreight. He was driving one of his employer's vacuum/tipper trucks to collect septic tank contents for disposal at the wastewater treatment plant of the Kawerau District Council.

[5] On 17 May 2021 Mr Maitai had collected the contents of two septic tanks in Ruatoki at around 8:30 am. Each septic tank had a capacity of approximately 2,000 litres of wastewater, resulting in at least 4,000 litres of septage being in the tank of the truck.

[6] It was raining heavily that day. Mr Maitai was soaked and sent a text message to his manager saying that he was going home to change his clothes. Mr Maitai's home is located near Wano Road, to the west of Whakatāne. The road crosses the Orini Canal near its intersection with Huna and Ferguson Roads.

[7] Between approximately 11:15 and 11:30 am that day, two local residents were driving south on Wano Road. As they approached the bridge over the Orini Canal, they saw a truck backed towards the south-western corner of the bridge with the rear of the

truck near the bank of the canal. The defendant was at the side of the truck putting on a rain jacket as the residents drove past. It was raining at the time. There was no other traffic. On the truck the residents could see the name "Brownfreight" and the words "0800 POO TANK". The residents could also see brown material and liquid flowing from the outlet at the back of the truck, with no hose attached. This material and liquid was pouring from the outlet down the bank into the Orini Canal. As they drove past the residents could smell a terrible smell like septic tank waste which caused them to dry-retch.

[8] Shortly after passing the truck, the residents phoned both Brownfreight and the Whakatane District Council to advise them that they had just seen a Brownfreight truck discharging waste into the canal. Later that day, the residents phoned the pollution hotline of the Bay of Plenty Regional Council to report what they had seen.

[9] On 18 May 2021 officers of the Regional Council went to the location beside the bridge. On arrival they detected a strong smell of human sewage and observed brown sludge on the ground at the foot of the bridge barrier. The sludge ran down the bank into the canal. The waste material on the bank and in the canal also contained such things as wet wipes, pegs, sanitary items and razors. The officers took samples from both the solid material on the bank and liquid from the canal, including samples upstream and downstream of the bridge as well as at the discharge point. Subsequent analysis showed the samples to have very high levels of faecal coliforms and *E.coli*.

[10] While inspecting the area, the Regional Council officers called Brownfreight and told the company's owner/manager what they had found. The owner/manager arrived at the site at about 12:30 pm. On seeing the sludge, he immediately arranged for Mr Maitai and another employee to bring the company's truck to the site to clean it up by removing the sludge and waste material as well as contaminated soil and plants. Brown Freight subsequently added fresh soil and plants at the site to replace what they had removed.

[11] The Council's investigation revealed:

(a) When Brownfreight was first notified of the incident on 17 May 2021, a staff member had gone to the wrong location on Ferguson Road to look for it but did not find anything;

(b) When Mr Maitai was first contacted by his employer, he denied he had discharged septic waste into the canal;

(c) When Brownfreight was contacted by Council officers on 18 May, its owner/manager went to the correct location at the bridge where it was apparent straightaway from the smell that waste had been disposed there;

(d) Brownfreight's records show that some 6,000 litres of septic tank waste had been collected from the two Ruatoki addresses but there was no record of that waste having been disposed of at the disposal site in Kawerau;

(e) On checking the truck, no issues were found with its outlet valve;

(f) The amount of waste on the bank and in the canal was greater than could have resulted from a leak in the tank;

(g) Brownfreight concluded that the waste had been manually discharged and initially suspended the defendant and subsequently dismissed him; and

(h) When Council officers formally interviewed Mr Maitai, he claimed he had no involvement in the offending.

Effects of the offending

[12] The Orini Canal is identified in the Bay of Plenty Regional Natural Resources Plan as a land drainage canal that is part of the Rangitaiki Plains Land Drainage Scheme and as a modified watercourse with ecological values. While modified, the

canal has ecological value such as providing an aquatic habitat and migratory pathway for indigenous fish species.

[13] The canal flows approximately 3.5 km from the bridge on Wano Road into areas identified in the Regional Coastal Environment Plan as indigenous biodiversity areas, namely the Orini Estuary and Orini Open Water. The plan states that those areas provide a migratory pathway for indigenous freshwater fish and other habitat of a number of indigenous bird species. The plan also records that the estuary is an originally rare ecosystem type that includes high quality examples of salt marsh. The areas are also part of the broader Whakatāne estuary which is identified in the plan as being an area of major spiritual significance to the people of Ngāti Awa for its wairua and mauri and as being a habitat for a number of indigenous bird species.

[14] An ecological assessment was prepared by an environmental scientist employed by the Regional Council who found:

(a) Such a discharge is likely to have had several environmental and cultural effects;

(b) The discharge contained high levels of faecal indicator bacteria and nutrients, was likely to have contained emerging contaminants and possibly contained harmful microbial pathogens. These pathogens pose a risk to human health and adversely effect recreational values of waterways and the coastal environment;

(c) Nutrients from the discharge would contribute to high organic loading in the canal and degradation of downstream receiving environments which can alter ecosystem dynamics by encouraging the growth of nuisance species;

(d) Sediments or solids contained in the discharge can affect amenity values, limit the ability of water to transmit light and clog spaces used as refuges by benthic invertebrates and by fish;

(e) Sewage is one of the main sources of emerging contaminants and the risk that emerging contaminants pose to human health and the environment is not yet fully understood. While the risk of emerging contaminants is largely unknown, the accumulation of these compounds in the environment is of increasing concern in New Zealand and overseas.

(f) Discharges of sewage to water are particularly culturally offensive to Māori and can degrade and mauri of the receiving environment and this discharge had a significant cultural impact on the local community;

(g) While the Orini Canal is highly modified, the Bay of Plenty Regional Natural Resources Plan identifies its ecological values and aims to minimise further degradation. Rainfall and tidal flushing in the system likely dispersed contaminants from the discharge site to downstream receiving environments of high ecological value.

(h) Pollution events play a part in further degradation of receiving environments due to the accumulation and ongoing mobilisation of pollutants.

Personal circumstances

[15] Mr Maitai is 34 years old. He has no previous convictions for offending under the RMA but does have a number of convictions between 2011 and 2017 for other offences including failing to answer bail and breaching conditions of community detention and community work and intensive supervision.

[16] Mr Maitai's whakapapa is to Ngāi Taiwhakaea of Ngāti Awa, who hold mana whenua in the area where the offending occurred. He has found a new and apparently steady job as a bus driver. His financial circumstances limit his capacity to pay a fine but his counsel submitted that he is in a position to pay a weekly amount of $30.

[17] While Mr Maitai had denied involvement to his employer and the Regional Council investigators, he pleaded guilty to the charge at an early stage. Arrangements were made for a restorative justice process with members of Ngāi Taiwhakaea, but this was not carried through by Mr Maitai.

[18] Advice was given by Department of Corrections which reported that Mr Maitai has a new job as a bus driver but has limited resources. The report recommends a sentence of community work and a fine. As electronic monitoring is not supported by this whanau, a sentence of community detention is not recommended. The author of the report did not consider that Mr Maitai had rehabilitative needs or more complex needs and accordingly did not recommend supervision or intensive supervision.

Prosecutor's submissions

[19] Counsel for the prosecutor submitted that deliberate offending of this kind, however unusual or inexplicable it may be, would result in a fine of the order of $80,000, having regard to other cases of comparable discharges. Counsel acknowledged that a fine at that level would be unrealistic in Mr Maitai's case given his limited financial resources.

[20] Counsel for the prosecutor also submitted that Mr Maitai's history of non-compliance with community-based sentences makes any of those inappropriate. He noted the advice of the Department of Corrections that electronic monitoring was not recommended, so a sentence of home detention would not be appropriate. As a consequence, the prosecutor submits, the sentencing option that remains is a short term of imprisonment.

[21] Recognising that sentences of imprisonment for offending under the RMA are relatively rare, counsel produced a schedule of cases where custodial sentences had been imposed. Several of those cases, such as *Conway v R* (1) [2005] NZRMA 274, *Conway v R* (2) [2013] NZCA 438 and *Auckland Regional Council v Lau* [2018] NZDC 1133 are examples of cases where defendants have been sentenced to between two and half to six and a half months imprisonment for discharges of contaminants and other forms of environmental offending.

[22] In response to my questions, counsel properly, in my view, acknowledged that the circumstances of those three cases were not truly comparable to the present case. Instead, counsel pointed to the sentences in *Bay of Plenty Regional Council v Singh* [2018] NZDC 13866 and *Bay of Plenty Regional Council v Faulkner* [2022] NZDC 2754 as providing comparable guidance.

[23] In *Singh*, the defendant faced five charges of discharging sediment and contravening an abatement notice relating to earthworks in a residential property development. It had been large scale offending and there had been ongoing failure to comply with abatement notices. A starting point of $190,000 was identified, but the defendant had no means and the opportunity to charge the trustees of the entity that had employed him had been lost. A sentence was imposed of 400 hours of community work, being the maximum possible, and a fine of $40,000.

[24] In *Faulkner* the defendant faced five charges relating to coastal reclamation and discharges from a piggery being operated adjacent to the coastal marine area. The offending was deliberate and had serious effects on an area of high ecological and cultural values. The defendant was sentenced to imprisonment for three and a half months after unsuccessfully defending the charges.

[25] The schedule also included a recent sentencing decision in *R v McIntyre* [2022] NZDC 5840 where I was the presiding judge. The defendant in that case pleaded not guilty to 13 charges relating to discharges on a farm of dairy factory effluent which might enter water. The defendant was found guilty following a trial by jury. The Crown sought a penalty of imprisonment in light of previous offending by Mr McIntyre. The starting point identified was home detention for four months and a fine of $100,000. The sentence was home detention for five months and a fine of $100,000, there being an uplift to reflect the previous convictions.

Defendant's submissions

[26] Mr Franklin, counsel for the defendant, readily acknowledged that the offending warranted a stern community-based sentence and argued that this, combined with supervision and a fine or an emotional harm reparation payment within the

defendant's financial means would be both appropriate and the least restrictive outcome, in keeping with the principles set out in s 8(g) of the Sentencing Act. He argued that a sentence of imprisonment would not be appropriate.

[27] Counsel also submitted that the starting point suggested by counsel for the prosecutor seemed disproportionately high. In any event, counsel advised that the financial circumstances of Mr Maitai meant that he could offer to pay $30 a week. Counsel noted that over a period of five years this would total $7,800.

[28] In terms of the character of the offending, counsel advised that the defendant acknowledged that the discharge was detrimental to the environment, causing clear and obvious harm.

[29] Counsel also submitted that while Mr Maitai has previous convictions in relation to non-compliance with community based sentences, his last conviction was five years ago and that since then he had not been brought before the court. The assessment of the Department of Corrections is that he presents a low risk of further offending and would be suitable for a community based sentence.

Evaluation

[30] In sentencing an offender the Court must follow the two-stage approach as set out in *Moses v R* [2020] NZCA 296 at [45] – [47], first calculating the adjusted starting point incorporating any aggravating and mitigating features of the offence, and then incorporating all aggravating and mitigating factors personal to the offender together with any discount for a guilty plea (calculated as a percentage of the adjusted starting point).

[31] All of the purposes and principles in ss 7 and 8 of the Sentencing Act 2002 must be borne in mind, as well as the purpose of the RMA to promote the sustainable management of natural and physical resources. Of particular relevance for offending against the RMA under s 7 of the Sentencing Act 2002 are the purposes of (a) accountability, (b) promoting a sense of responsibility, (e) denunciation and (f) deterrence, and under s 8 the principles relating to (a) gravity of the offending and the

degree of culpability of the offender, (b) the seriousness of the type of offence, (e) the general desirability of consistency with appropriate sentencing levels and (f) the effect of the offending on the community.

[32] As to the overall sentencing approach for offending against the RMA, see generally *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 503 (HC) and *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-25, 27 August 2010, Miller J at [39]-[66] and [70]. There is no tariff case.

[33] The prosecutor seeks that Mr Maitai be sentenced to a period of imprisonment. I must therefore have regard to the provisions of s 16 of the Sentencing Act 2002, which provides:

> **16 Sentence of imprisonment**
>
> (1) When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.
>
> (2) The court must not impose a sentence of imprisonment unless it is satisfied that,—
>
> (a) a sentence is being imposed for all or any of the purposes in section 7(1)(a) to (c), (e), (f), or (g); and
>
> (b) those purposes cannot be achieved by a sentence other than imprisonment; and
>
> (c) no other sentence would be consistent with the application of the principles in section 8 to the particular case.
>
> (3) This section is subject to any provision in this or any other enactment that—
>
> (a) provides a presumption in favour of or against imposing a sentence of imprisonment in relation to a particular offence; or
>
> (b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

[34] In my sentencing notes in *R v McIntyre* [2022] NZDC 5840, I referred to the following comments by Whata J in *R v Lau* [2018] NZHC 2935, where his Honour said:

> [11] Sentences of imprisonment for environmental offences are relatively unusual. In general, a non-custodial sentence is regarded as a real and effective alternative to imprisonment. But this should not be elevated to a presumption. The proper application of the Sentencing Act framework may justify a custodial sentence in appropriate cases. Importantly, the purpose, principles and scheme of the RMA assist a sentencing Judge to identify the aggravating and mitigating factors of the offending and the offender. In this regard, aggravating factors include:
>
> (a) Deliberate or reckless conduct, including flagrant and repetitive disregard for planning rules and enforcement;
>
> (b) The vulnerability or importance of the affected environment, with reference to the matters listed at ss 6 and 7 of the RMA and/or environments subject to the protection of national environmental standards or national or regional policy statements;
>
> (c) Significant environmental effects, including any lasting or irreversible harm and/or effects with high potential impacts, including on the public;
>
> (d) Deliberate breach for commercial profit;
>
> (e) Refusal or failure to correct non-compliance or remediate environmental harm; and
>
> (f) Significant remediation cost to the public.
>
> [12] Conversely, mitigating factors include:
>
> (a) Previous good history of compliance;
>
> (b) Inadvertent conduct;
>
> (c) Efforts to immediately remediate any environmental harm done;
>
> (d) Any infrastructural or other precautions taken to prevent the effects;
>
> (e) Co-operation with enforcement authorities;
>
> (f) Offers of reparation; and
>
> (g) Remorse.

[35] Considering the most relevant purposes and principles of the Sentencing Act together with the purpose of the RMA, there is an emphasis on a forward looking approach. In the case of an individual who has committed an offence under the RMA, options for reparation and education should form part of the assessment of an appropriate sentence. I consider that environmental offending should be met with sentences that require a defendant to take responsibility for their acts or omissions, such as by making reparations or doing community work. That is one reason why the scope of a sentence under s 339 of the RMA can include an enforcement order under s 314 of the RMA, as that sentencing method offers scope for positive action to maintain or enhance the quality of the environment, although I acknowledge that option is not applicable in this case.

[36] Assessing those various matters in the circumstances of Mr Maitai's case, I do not accept the submission of counsel for the prosecutor that all of the sentencing options other than imprisonment are closed off. I find that while a sentence of imprisonment would respond to certain policies and principles of the Sentencing Act including denunciation and deterrence, it would not provide for the education or rehabilitation of Mr Maitai or maintain or enhance the quality of the environment. I am concerned not to sentence Mr Maitai on the basis that no options are available. I consider that points made by his counsel are worth pursuing and I accept his submissions as to the elements of an appropriate sentence for the following reasons.

[37] As his counsel pointed out, a prison term of two months would likely result in one month of incarceration without any constructive element for the benefit of the community. Instead, Mr Maitai would likely lose his present job, find it difficult to obtain a new job and have limited contact with his whanau. A sentence including community work of, say, 200 hours would, his counsel submits, keep Mr Maitai with his whanau, in contact with the community and in gainful employment. Considering these submissions in the context of ss 55 – 69A of the Sentencing Act, I am satisfied that a sentence including community work of 200 hours is appropriate in Mr Maitai's case. It may also be appropriate for his community work to be with his hapū Ngāi Taiwhakaea as tāngata whenua of the area where the offending occurred and I express the expectation that the Department of Corrections will consider that.

[38] Addressing the issue of Mr Maitai's record in relation to community based sentences, his counsel submitted that the sentence could include intensive supervision, given the risk of further breaches of a sentence of community work. Reviewing the provisions of ss 54B - 54I of the Sentencing Act relating to intensive supervision, I consider that it would be appropriate in the case of Mr Maitai.

[39] I also impose a fine within the means of Mr Maitai, which means identifying a significantly reduced starting point of $7,800. Allowing a discount of 25% for his early guilty plea, that results in the imposition of a fine of $5,850.

[40] For those reasons, I sentence Kyle Sean Maitai to:

(a) 200 hours of community work;

(b) Intensive supervision for a period of 10 months;

(c) Consideration by the Department of Corrections that community work be or include environmental work undertaken in conjunction with Ngāi Taiwhakaea; and

(d) A fine of $5,850.

[41] Under s 342 of the Resource Management Act 1991 I order that the fine, less 10% to be credited to a Crown bank account, shall be paid to the Bay of Plenty Regional Council as the local authority which commenced proceedings against Mr Maitai.

Judge D A Kirkpatrick
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 06/07/2022
Paragraph [40](b) amended: 22/07/2022