

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CRI-2023-070-2076
[2024] NZDC 21145**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

WAYNE RUTLAND
Defendant

Hearing: 18 March 2024
Appearances: HJ Sheridan for the prosecutor
LCR Burkhardt for the defendant
Judgment: 2 September 2024

SENTENCING DECISION OF JUDGE SM TEPANIA

Introduction

[1] Wayne Rutland has pleaded guilty to a charge of unlawfully discharging a contaminant, namely dairy effluent, onto or into land in circumstances where it may enter water, in contravention of ss 15(1)(b) and 338(1)(a) of the Resource Management Act 1991 (**RMA**).¹ The offending relates to a farm property situated at 1212 Old Coach Road, Pongakawa (**the Farm**).

¹ CRN 23070500902.

[2] There has been no suggestion that the defendant should be discharged without conviction, and he is hereby convicted accordingly.

[3] The maximum penalty for the charge is two years imprisonment or a fine not exceeding \$300,000. The prosecutor submits that a fine is the appropriate sentencing response, and I agree.

[4] The differences between counsel were in respect of the starting point that I should adopt, with Ms Sheridan for the prosecution submitting that an appropriate starting point is in the vicinity of \$80,000. For Mr Rutland, Ms Burkhardt proposed a starting point of \$40,000.

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

Regulatory framework

[6] The Farm is within the Bay of Plenty Region. The Bay of Plenty Regional Natural Resources Plan (**RNRP**) is the relevant planning document.

[7] The Farm relies upon resource consent RM20-0069 issued to Scott Farms (Pongakawa) Limited (**Scott Farms**), which allows for the discharge of farm dairy effluent and farm dairy sludge onto land at the Farm in certain circumstances.

[8] Section 15(1) of the RMA controls the discharge of contaminants into water or onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water.

[9] Farm animal effluent is a contaminant pursuant to s 2 of the RMA.

[10] It is also relevant to note that the Bay of Plenty Regional Council (**Council**) has, for many years, made significant efforts to encourage compliance with the relevant legislation, through publication of the rules, education, advice, and regular monitoring.

Background²

[11] The agreed Summary of Facts describes the background to the offending, including information on the environmental effects of the offending. As the Summary of Facts is agreed, I must accept as proven all facts, express or implied (s 24 Sentencing Act 2002).

[12] The Farm, comprising 98ha, is owned by Scott Farms.

[13] Mr Rutland is employed by Scott Farms as the farm's manager. He has worked at the farm in this role for more than 16 years, and in a prior role for two years. He is responsible for the day-to-day operation of the farm including the farm's irrigation system.

[14] The Farm is located approximately 16km southeast of Te Puke and 12km south of Maketu with a herd size of 234 dairy cows.

[15] The Farm's drains flow into a culvert that conveys water from the Farm under Old Coach Road and into a road drain that flows into the Wharere Canal which ultimately flows to Waihi Estuary near Maketu.

Farm's Dairy Effluent System³

[16] Effluent from the Farm's cowshed and yard is washed into an unlined pond (pond 1) which is approximately 100 metres from the cowshed.

[17] Effluent from pond 1 is then gravity fed via a pipe to a second unlined pond (pond 2), from where the effluent is pumped with a tractor-driven PTO pump to a stationary rain gun irrigator and is sprayed into/onto various paddocks.

[18] Until 2020, effluent from pond 2 was irrigated via an outlet pipe that gravity-fed a sprinkler downhill from the pond. However, the gravity-fed sprinkler system ceased being used when a PTO pump and rain gun irrigator were installed at the farm

² Summary of Facts, at [2] – [6].

³ Summary of Facts, at [7] – [9].

in early 2020. The PTO pump and rain gun irrigator allowed a larger area to be irrigated, and included the various paddocks that were previously irrigated using the gravity fed sprinkler system.

Resource Consent⁴

[19] On 13 March 2020, the Council granted resource consent RM20-0069 to Scott Farms for the discharge of farm dairy effluent and farm dairy sludge to land at the farm.

[20] Resource consent RM20-0069 includes the following conditions:

- (a) The maximum herd size at any time shall not exceed 330 cows (Condition 4.1);
- (b) The consent holder shall ensure that no farm dairy effluent (solid or liquid) reaches surface waters by overland flow or direct discharge (Condition 6.3);
- (c) Farm dairy effluent shall not be discharged onto land within any ephemeral flowpath containing water, or 20m from any surface water body (including drains) or 20m from any property boundary (Condition 6.4);
- (d) The consent holder shall keep accurate records of irrigated farm dairy effluent (Condition 8.1); and
- (e) The consent holder shall calibrate the effluent irrigator at the full extent of the irrigation area in July and November of each year to determine the application depth and application rate (Condition 8.3).

Council inspections of farm from 2011 to 2019⁵

[21] From 2011 to 2019 the farm was the subject of seven Council dairy effluent inspections. No major compliance issues were found. Several minor compliance issues were noted relating to milking more cows than permitted in the previous

⁴ Summary of Facts, at [10] – [11].

⁵ Summary of Facts, at [12].

resource consent (i.e., 300) on two occasions (one of which resulted in an abatement notice being issued in 2014), and a failure to calibrate the irrigator as required.

Council inspection of farm on 22 November 2022⁶

[22] On 22 November 2022, a Council enforcement officer carried out a routine compliance inspection at the farm. Mr Rutland and Scott Farm's director (Carol Scott) accompanied the officer during the inspection.

[23] During the inspection, Mr Rutland explained that the farm's effluent system involved pumping effluent from pond 2 to a stationary irrigator using a PTO pump that was run off one of the farm's tractors.

[24] Both ponds were about 75% full at the time.

[25] When the Council officer inspected the rear of pond 2 (on the side furthest from the cowshed) he observed a discoloured liquid discharging from the mid-section of the side of pond 2 and running downslope from the pond. When the officer asked about this discharge of effluent, Mr Rutland advised that the historic outlet pipe from pond 2 must have been knocked, causing the discharge from the pond.

[26] The officer then saw that the outlet pipe coming out of the side of pond 2 had a tap on it and asked Mr Rutland what this tap was used for. Mr Rutland advised that the tap was previously used when effluent from pond 2 was gravity fed to a sprinkler as part of the old effluent system.

[27] The officer followed the flow of liquid from pond 2 to its source and found that the discharge was not occurring from the gravity-fed outlet pipe with the tap because the pipe was dry, and the tap was in the "off" position. Instead, it appeared that the effluent was discharging from a 100mm wide hole in the pond wall at the top of pond 2.

⁶ Summary of Facts, at [13] – [31].

[28] The officer asked Mr Rutland how long this discharge had been occurring and Mr Rutland said that cows had grazed this paddock recently, but he had not noticed any effluent discharging from the side of the pond.

[29] The officer then followed the flowpath of effluent down the slope from the discharge point in pond 2 and into the gully below. The officer found that the effluent flowed approximately 75 metres downhill in the paddock and then for another 25 metres along a gully area in a neighbouring paddock before the effluent dissipated into the soil in a flat area in the adjoining paddock. The effluent flow rate was constant until the point where the effluent dissipated in the flat area in the adjoining paddock.

[30] The officer could find no sign that the effluent had reached a watercourse or had gone beyond the property boundary.

[31] The officer told Mr Rutland and Ms Scott that the discharge must cease immediately. He told them to pump down the level of effluent in pond 2 so that it was below the level of the hole in the side of the pond, and that they should irrigate the effluent they pumped from pond 2 to pasture.

[32] He said that both the hole in the wall of pond 2 and the historic outlet pipe with the tap must be blocked. He recommended that they engage an effluent pond professional to block the hole to ensure the hole in the pond was properly sealed.

[33] The officer then went to inspect the farm's stationary rain gun effluent irrigator. He found that the irrigator had not been used for some time.

[34] The officer then inspected a feed pad area near the farm's cow shed race. The area had three concrete feed troughs for palm kernel and was on an unsealed surface with a build-up of effluent solids mixed with earth (approximately 20cm high). There was no effluent containment measure or infrastructure in place to contain the effluent and direct it to the farm's dairy effluent system.

[35] The officer told Mr Rutland and Ms Scott that the use of the feed pad had to stop immediately because the amount of effluent in this area was at risk of

contaminating groundwater, and the effluent storage and discharge in this area was not authorised by the farm's effluent discharge consent.

[36] At the conclusion of his inspection the officer issued written directions relating to the compliance issues he had found at pond 2 and the feed pad.

[37] Following the Council inspection on 22 November 2022 Ms Scott asked Mr Rutland to seal the pipe in pond 2 and to fix the hole in the pond's wall.

[38] Mr Rutland told Ms Scott a couple of days later that he had sealed the pond 2 pipe by installing a PVC cap on the pipe's inlet point inside the pond.

[39] After Mr Rutland told Ms Scott this, Ms Scott sent the Council an email stating:

The pipe outlet has been sealed to no longer let discharge through it.
We are now in the process of repairing the hole in the wall.

[40] On 14 December 2022, Ms Scott sent the officer a further email stating that the hole in pond 2 had been repaired and enclosed photographs showing the repairs. Ms Scott also advised that the effluent had been removed from the feed pad area and the area had been sown with grass seed.

Offending⁷

[41] On 22 December 2022, two Council compliance officers arrived at the farm to inspect the repairs to pond 2.

[42] When the officers had initially arrived at the farm, Ms Scott and Mr Rutland were talking at the doorway of Ms Scott's house. When she told Mr Rutland that Council officers were coming to check the effluent pond, he abruptly left, saying that the cows had been in that paddock.

[43] When the officers began inspecting pond 2, one of the officers could hear running water. He walked to the eastern side of pond 2 and saw dairy effluent discharging from the outlet pipe that came out of the wall of the pond. This was the

⁷ Summary of Facts, at [32] – [45].

outlet pipe with a tap that had been identified during the previous Council inspection on 22 November. The outlet pipe's tap was in the open position. There was no irrigation equipment in the vicinity. Photographs were also taken and comprised part of the Summary of Facts.⁸

[44] As the officers discovered the discharge from pond 2's pipe, Mr Rutland arrived on a quad bike, ran over to the outlet pipe, and turned the tap to the outlet pipe off before engaging with compliance officers.

[45] Mr Rutland told the Council officers that he had been using the old gravity-fed sprinkler system. He said that earlier that day a bulldozer had driven over an effluent drag hose that was connected to the pond 2 pipe, which had caused the hose and tap to come apart from the pipe. He said that the tap had been left open while it was connected to the effluent drag hose and sprinkler.

[46] The officers followed the effluent flowpath which went down the slope from the pipe/tap outlet in pond 2, between three parked bulldozers, across bulldozer tracks, into a drain which contained flowing water, and through a culvert into an adjoining paddock. The only irrigation equipment that the officers could see was a 50mm drag hose near the bulldozer tracks (at least 55m away from pond 2). Photographs of what the officers observed were taken.⁹

[47] The affected drain then flowed through a culvert under Old Coach Road onto the neighbouring property. Approximately four kilometres beyond the Old Coach Road culvert, the drain flows into the Wharere Canal. Again, photographs of what the officers observed were taken.¹⁰

[48] The officers took samples approximately 40, 80 and 300 metres downstream of the discharge point.

⁸ Summary of Facts, at page 6.

⁹ Summary of Facts, at pages 6 – 7.

¹⁰ Summary of Facts, at pages 7 – 8.

[49] When they had concluded their inspection, the officers told Ms Scott about the effluent discharge from pond 2 and that they would be commencing an investigation into the discharge.

[50] Later on 22 December 2022, after the officers had left the farm, Mr Rutland told Ms Scott that he had used the old gravity sprinkler irrigation system to reduce the level of effluent in the ponds. He said that he had used the old gravity sprinkler system because the farm's tractors, which are used to irrigate via the rain gun irrigator (i.e., a John Deere and a Kubota), were not working. However, it later emerged that the Kubota was functioning, having been repaired on 19 December 2022.

Council investigation¹¹

[51] On 11 January 2023 a Council officer returned to the farm to check the farm's irrigation records in the cowshed.

[52] The defendant had filled in the farm's effluent irrigation records earlier that day, shortly before the Council officer arrived.

[53] The records stated that:

- (a) effluent had been irrigated on 10 dates ranging between May 2022 and January 2023; and
- (b) "Gravity" irrigation occurred for two hours on 21 December and for two hours on 22 December.

[54] On 17 January 2023 a Council officer returned to the farm and spoke with Mr Rutland, who told the officer that:

- (a) in November he had blocked off the pond 2 outlet at the request of Ms Scott following the Council inspection on 22 November;
- (b) however, he had subsequently removed the cap from the outlet pipe and used the old gravity-fed sprinkler on 21 December as he was unable to use

¹¹ Summary of Facts, at [46] – [52].

the PTO pump due to the two farm tractors (i.e., a John Deere and a Kubota) needing repairs;

- (c) he turned on the tap at pond 2 at 9.00am on 21 December 2022;
- (d) he thought he had turned the tap off on the evening of 21 December but obviously had not turned it off enough; and
- (e) he deeply regrets that this has happened, and it will not happen again.

[55] However, when Mr Rutland showed the Council officer the gravity-fed sprinkler on 17 January 2023, the sprinkler was located at the cowshed and showed no signs of recent use. It contained dry dirt and spiders. The grass underneath the drag pipes for the gravity fed system was dead. Photographs of what the officer observed were taken.¹²

[56] Further Council inquiries confirmed that there were three functioning tractors with PTOs at the farm on 21 December 2022 that could have been used for effluent irrigation (instead of the retired gravity fed system from pond 2). These were the Kubota, a Ford 4610 and a New Holland (located and used at the farm's orchard).

[57] Scott Farms initiated an employment investigation relating to the discharge on 22 December and issued Mr Rutland a final written warning. Mr Rutland advised officers that he did not agree with everything raised in that process.

Explanation¹³

[58] On 17 February 2023 the Council formally interviewed Mr Rutland under caution about the 22 December discharge. Mr Rutland stated:

- (a) he is reasonably familiar with the farm's resource consent and farm's obligations;

¹² Summary of Facts, at pages 10 – 11.

¹³ Summary of Facts, at [53].

- (b) he assisted with repairing the hole in pond 2 and he had sealed off the pond 2 outlet pipe with a PVC cap two days after the repairs on the pond were completed;
- (c) the last time he ran the gravity system was for approximately four hours on 21 December 2022;
- (d) his reason for using the gravity system was that the John Deere and Kubota tractors were not working;
- (e) he had not told Ms Scott that there were no tractors available to irrigate with on 21 December;
- (f) he turned the tap on at pond 2 around 9am on 21 December 2022. He believes he had turned it off later that afternoon;
- (g) he did not know why the tap was still on at 2pm on 22 December; and
- (h) his initial explanation to Council officers about the bulldozers separating the drag hose from the pond 2 pipe was untrue. Bulldozers were not working that day. He had told the Council officers and Ms Scott the discharge was caused by the bulldozers because he panicked when he saw effluent coming out of the pipe on 22 December.

Sentencing principles

[59] The purpose and principles of sentencing under the Sentencing Act 2002 are relevant insofar as they are engaged by a particular case. The principles outlined in *Thurston v Manawatu-Wanganui Regional Council (Thurston)*¹⁴ are relevant to sentencing. The factors that are frequently considered in RMA sentencing cases include an assessment of the offender's culpability for the offending, any infrastructural or other precautions taken to prevent the discharges, the vulnerability or ecological importance of the affected environment, the extent of the environmental damage, deterrence, the offender's capacity to pay a fine, disregard for abatement notice or council requirements, remedial steps taken to mitigate the offending or

¹⁴ *Thurston v Manawatu-Wanganui Regional Council (Thurston)* HC Palmerston North CRI-2009-454-24, 27 August 2010.

prevent future offending, and the cooperation with enforcement authorities.¹⁵ The cases evince an increasing concern about the incidence of dairy effluent offending and emphasise the need for deterrence, particularly general deterrence, to be reflected in these sorts of cases.¹⁶

Environmental effects of the offending

Summary of Facts on expert inspection and environmental effects¹⁷

[60] The Council engaged a dairy effluent irrigation expert, Marty Forster, to assess the farm's effluent system and provide expert advice about the discharge on 22 December 2022. Mr Forster concluded that, on a conservative basis, 52.2m³ of effluent was discharged from pond 2 via the outlet pipe/tap on 22 December. He also concluded that if the pipe in pond 2 had had been blocked off as requested by the Council on 22 November, the effluent discharge from the tap would not have occurred on 22 December.

[61] Three samples were collected by a Council officer on 22 December 2022. The laboratory analysis results of the samples were as follows:

Sample #	Sample location	Faecal Coliforms cfu/100mL	E.coli cfu/100mL	Suspended solids g/m3	Ammoniacal-N g/m3	cBOD5 g o2/m3
1	Taken from the effluent flow path downstream from the bulldozer tracks but upstream from the first culvert inlet (approximately 80 metres downstream of the discharge point)	46,000	35,000	47	16	12
2	Taken from the effluent flowpath through the bulldozer tracks (approximately 40 metres downstream of the discharge point)	150,000	20,000	140	78	39
3	Taken from the effluent flowpath in the drain in an adjoining paddock (approximately 300 metres downstream of the discharge point)	43,000	30,000	45	16	14

¹⁵ *Thurston*, at [41] and [42].

¹⁶ See *Watt v Southland Regional Council* [2012] NZHC 3062 and *Yates v Taranaki Regional Council* HC New Plymouth CRI-2010-443-8, 14 May 2010.

¹⁷ Summary of Facts, at [54] – [70].

[62] The discharge entered an ephemeral flowpath located 70m from the discharge point where overland flow occurs during times of rainfall. The ephemeral flowpath supports little to no freshwater ecology.

[63] Approximately 400m from the point of discharge, the ephemeral flowpath flows through a culvert under Old Coach Road into a lower waterway. This waterway meets the definition of an intermittent watercourse and would provide habitat for aquatic fauna.

[64] Just below this section the Water Quality Classification in the RNRP changes to drain water quality, which reflects the modified nature of this section of the water course (i.e., it is artificially straightened and has negligible riparian margins).

[65] The lower waterway then intersects with a road drain at State Highway 2 and enters the Wharere Canal. The Wharere Canal is classified in the RNRP as a ‘modified water course with ecological value.’ Whitebait and eels (amongst other species) inhabit the stream and act as a food source for local iwi and fishers.

[66] The Wharere canal ultimately flows into the Waihi Estuary at Maketū. The Waihi Estuary is a natural taonga, however in recent decades it has degraded as increasing amounts of nutrients (nitrogen and phosphorous), sediment, and faecal bacteria have been washed into the estuary from surrounding land and contributing waterways. The loss of sea grass, and excessive algae growth, has made the estuary less suitable for birds and fish to live, breed and feed in. Declining water quality has resulted in less abundance and variety of shellfish, crabs and worms (benthic macrofauna) living in the estuary bed.

[67] The Waihi Estuary is identified as a ‘focus catchment’ with additional efforts being undertaken to seek improvement in its ecological health.

[68] Dairy effluent can have negative effects on waterways as it contains microbial pathogens that pose a risk to public health. It contains high concentrations of nutrients, particularly phosphorus and nitrogen, which can result in excessive growth of aquatic plants and algae reducing in-stream oxygen levels. Ammonia in effluent can reach

concentrations that are toxic to fish and invertebrates. Effluent contains sediment, which is a major stressor of freshwater ecosystems and has adverse effects on water quality and fish, invertebrates, and algae. It can negatively impact recreational values of receiving environments.

[69] There was rainfall on the morning of 22 December and it had been an unusually wet month. The flow in the waterway was likely to be elevated at the time of the discharge. This would have resulted in greater dilution of contaminants, but also increased the propensity of contaminants to be transported downstream.

[70] Laboratory testing confirmed that there were elevated levels of faecal material in the discharged material. The discharge does not meet the water quality rules in Schedule 9 of the RNRP for discharges into Regional Baseline streams. The concentration of ammonia in all samples is well above the D band (2.2 g/m³) in the National Policy Statement for Freshwater Management.

[71] The discharge likely resulted in a short-lived “pulse disturbance” to the ecology of the downstream catchment. The discharge likely affected animals in the stream through direct toxic impacts (ammonia), and potentially through reductions in dissolved oxygen levels. Any sensitive taxa exposed to the discharge would have either migrated from the immediate reach or suffered mortality; however, the number of sensitive taxa present is likely to have been limited given the modified nature of the receiving environment.

[72] Discharged material would have flowed into the receiving environment of the Waihi Estuary where contaminants would have settled, representing a cumulative adverse impact on the estuary.

[73] When the discharge ceased, water quality within the catchment would have likely returned to baseline levels, approximately five hours post discharge. However, recovery of ecological communities in the affected reach may take several weeks.

Prosecutor's submissions

[74] Ms Sheridan highlighted the environmental effects as set out in the Summary of Facts. She submitted that it is not known how much of the discharged effluent reached the waterway.

Defendant's submissions

[75] Ms Burkhardt also referred to the Summary of Facts as detailing the results of the Council's assessment of effects of the offending discharge.

[76] Ms Burkhardt submitted that it is not known how much of the discharged effluent reached the sensitive receiving environment (i.e., the Waihi Estuary), which is some distance from the farm and connected through a series of drains and modified watercourses, themselves not recognised as being of high ecological value.

[77] She further submitted that, notwithstanding the limited and short-term effects of the discharge in the more immediate environment, the cumulative impact of these types of discharges is well understood and acknowledged.

Conclusion on environmental effects

[78] I find that the adverse effects of the offending are moderately serious. Sampling showed elevated levels of faecal coliforms and *E.coli*. While the receiving environment was modified, and dilution likely elevated due to high rainfall, it is agreed that there was a cumulative adverse impact on the estuary from the discharges. The Court has previously expressed concern about the cumulative effect of effluent discharges of this nature on the integrity of waterbodies. While the actual amount of the discharge cannot be quantified, the fact of the discharge has been admitted.

Culpability

[79] Ms Sheridan for the prosecution submitted that inference can be drawn from the facts of this case that Mr Rutland either deliberately allowed effluent to discharge from the outlet tap unsupervised or was reckless as to the possibility that this was occurring.

[80] Ms Sheridan drew the Court's attention to the tap being open with no irrigation equipment in the vicinity, coupled with the defendant's conduct in running over to the tap and turning it off in front of compliance officers. She noted Mr Rutland's explanation about the bulldozer running over a drag hose connected to the tap, causing it to come apart, and submitted that he later admitted that the bulldozer explanation was a lie. She submitted it is difficult to reconcile Mr Rutland's statement that he thought he had turned the tap off, but just not enough, with the volume of effluent discharging. Also, a tractor was available for irrigation, contrary to the defendant's statement that he used the tap to irrigate due to the unavailability of farm tractors. In addition, Mr Rutland had not been keeping irrigation records.

[81] Ms Burkhardt submitted that there is no basis to find that Mr Rutland deliberately left the tap on to discharge effluent directly to land, and that it is questionable whether any weight should be given to the sprinkler showing no signs of recent use some 26 days after the incident. She referred to Mr Rutland's explanation as to how he pulled the drag hose down the paddock, that he thought he had turned the tap off, but accepts the possibility that he had not turned it off properly. He also accepts that he should have checked. While Mr Rutland accepts that he should not have used the old system, the area he was irrigating was authorised for such discharges and the absence of evidence of a specific instruction to not use it should reduce his culpability for having done so.

[82] Ms Burkhardt reminded the Court that in terms of s 24 of the Sentencing Act 2002, the Court is required to adopt the most favourable inference that is not implausible on any aggravating fact,¹⁸ and submitted that on this basis the Court should not infer that this was a case of deliberate or intentional offending.

[83] As accepted by the Prosecutor this case involved a one-off incident.¹⁹

¹⁸ Adams on Sentencing notes that: "In that event, if the alleged fact which is the subject of submissions is a matter of aggravation, the court should act upon the version of events which is most favourable to the defendant, provided that it is not manifestly false or wholly implausible. This is a principle of some standing: *R v Newton* (1982) 77 Cr App R 13; A-G's References (Nos 3 & 4 of 1996) [1997] 1 Cr App R (S) 29."

¹⁹ Noting that from 2011 to 2019 the farm was inspected seven times and no major compliance issues were found (Summary of Facts, at [12]).

[84] In all the circumstances, Ms Burkhardt submits, it would be appropriate to categorise Mr Rutland's conduct as highly careless or even negligent, but not deliberate or intentional.

Evaluation as to culpability

[85] There is some dispute between the parties as to the culpability of the defendant ranging between a high degree of carelessness to deliberate and intentional. Having regard to the circumstances of this case, I find that the offending was negligent and potentially reckless, demonstrating little regard for the effects of the effluent discharge on the environment.

[86] I acknowledge the defendant's submissions that the Court is required to adopt the most favourable inference that is not implausible on any aggravating fact, and on this basis should not infer that this was a case of deliberate or intentional offending. However, I have some concern about the plausibility of Mr Rutland's explanations, particularly given their inconsistency as to whether, when and to what extent the tap was turned off, his behaviour on the day of inspection, and his own admission that his initial explanation was untrue.

[87] Mr Rutland was present when Council officers directed that the inlet to the historic outlet pipe with the tap must be blocked off. His employer, Ms Scott, specifically directed Mr Rutland to seal the pipe and he confirmed a couple of days later that he had done so. The prosecutor submits that Mr Rutland independently decided to remove the cap and operate the tap, while Ms Burkhardt submits there is no evidence that Mr Rutland knew he wasn't to do so.

[88] The Summary of Facts records that Mr Rutland turned the tap on at pond 2 around 9am on 21 December 2022. He believes he had turned it off later that afternoon. In his affidavit he states that he dragged the sprinkler up the paddock with the drag hose connected, knowing this would pull the hose from the tap.

[89] On 22 December the Council Officers found the outlet pipe's tap was in the open position and there was no irrigation equipment in the vicinity. Mr Rutland

doesn't know why the tap was still on at 2pm on that day when the tap was found discharging effluent with nothing connected to it.

[90] Mr Rutland told the Council officers that he had been using the old gravity-fed sprinkler system. He maintains that he dragged the sprinkler up the paddock with the drag hose connected and knew this would pull the hose from the tap but that he believed he had turned the tap off.

[91] I am not persuaded that:

- (a) as the farm's experienced manager of some 16 years with primary responsibility for the running of the farm, Mr Rutland was unaware that he should not remove the cap and operate the tap;
- (b) on 21 December, instead of checking to see if the tractors on site were working (the Kubota was functioning), he chose to unseal the historic outlet pipe, which he had only sealed up less than one month prior, to use the old gravity system;
- (c) he then forgot to turn the tap off or did not turn it off properly (which is doubtful given the officers noted that on 22 December the discharge from the tap was both visible and audible); and
- (d) he dragged the sprinkler and hose some 55m away (the only irrigation equipment that the officers could see was a 50mm drag hose near the bulldozer tracks (at least 55m away from pond 2)).

[92] I refer to the inconsistency apparent in Mr Rutland's explanations regarding the tap:

- (a) 22 December 2022 – Mr Rutland said that earlier that day a bulldozer had driven over an effluent drag hose that was connected to the pond 2 pipe, which had caused the hose and tap to come apart from the pipe. He said that the tap had been left open while it was connected to the effluent drag hose and sprinkler;

- (b) 11 January 2023 – Mr Rutland recorded in the farm’s effluent irrigation records that “Gravity” irrigation occurred for 2 hours on 21 December and for 2 hours on 22 December;
- (c) 17 January – Mr Rutland told a Council officer that he thought he turned the tap off on the evening of 21 December but obviously hadn’t turned it off enough;
- (d) 17 February – when formally interviewed Mr Rutland stated that the last time he ran the gravity system was on 21 December for approximately 4 hours, that he turned the tap on at pond 2 around 9am on 21 December and that he believes he had turned it off later that afternoon. He stated that his initial explanation to Council officers about the bulldozers separating the drag hose from the pond 2 pipe was untrue;
- (e) 11 March 2024 – in his affidavit Mr Rutland accepts the possibility that the tap was not turned off properly or that there may have been some sort of blockage in the outlet pipe.

[93] I accept the prosecutor’s submissions that:

- (a) the gravity system can only be turned on and off at the tap;
- (b) that the volume of effluent discharging from the tap suggests it was not a trickle but quite a flow that was visible and audible to the officers on arrival at the pond on 22 December; and
- (c) that the potentiality of a blockage occurring on the very occasion that the tap was left on and unchecked is implausible.

[94] Further, Mr Rutland’s explanation on 17 January is difficult to reconcile with the volume of effluent discharging from the outlet pipe. The tap was not ‘almost off’, and it would have been obvious that it was still on. This explanation conflicts with his initial statement to officers that the tap had been left open.

[95] I find that it would be inappropriate to draw some inference as to deliberateness or knowledge from the defendant's conduct in running over to the tap and turning it off in front of compliance officers. In my view, that immediate reaction to turn it off is equally typical for a person who suddenly becomes aware of the discharge – as the officers noted it was both visible and audible on arrival at the pond. I also find that little weight should be given to the sprinkler showing no signs of recent use some 26 days after the incident and accept Ms Burkhardt's submission on this point.

[96] I do not accept that the absence of evidence of a specific instruction not to use the old system again in the future reduces Mr Rutland's culpability for having done so.

[97] The facts support that Mr Rutland deliberately turned the outlet tap on at pond 2 around 9am on 21 December 2022, allowing effluent to discharge to land unsupervised. There is no evidence that he turned the tap off. His explanations at the time and since the incident as to whether he did so are inconsistent, and he admits to a level of dishonesty about that. The tap was on when the officers inspected the site around 2pm on 22 December. Although Mr Rutland maintains it was hooked up to irrigation equipment, there was none within the vicinity.

[98] In all the circumstances I accept that Mr Rutland's actions were not entirely deliberate, but there is an element to the offending that I consider increases his culpability. His actions occurred in circumstances where a Council officer had previously instructed that the historic outlet pipe with the tap must be blocked, and where a tractor was available for irrigation contrary to Mr Rutland's statement that he used the tap to irrigate due to the unavailability of farm tractors.

[99] I find that Mr Rutland's decision to unseal the outlet pipe and open the tap to operate the effluent system other than as directed by his employer, without checking whether the tractors were working on 21 December, was highly careless. I find his failure to supervise the discharge of effluent and to either hook up the irrigation equipment (as the prosecution suggests) or at least ensure it remained hooked up while the tap was on, was negligent and that he was reckless in his subsequent failure to ensure that the tap was off and not continuing to discharge effluent directly to land

while the pipe remained unsealed. While Mr Rutland believes he turned the tap off later that afternoon or evening, he cannot explain why the tap was still on at 2.00pm on 22 December and was therefore reckless as to the possibility that this was occurring. I find that Mr Rutland did not take the requisite level of care to ensure that the effluent discharge complied with the consent and RNRP.

Starting point

[100] Ms Sheridan submitted that an appropriate starting point is in the vicinity of \$80,000. Ms Burkhardt submitted that an appropriate starting point is in the vicinity of \$40,000.

[101] I was referred to *Waikato Regional Council v GA & BG Chick Ltd (Chick)*.²⁰ While the categories of offending identified in that case remain useful for differentiating levels of culpability relating to discharges of dairy farm effluent, Ms Sheridan submitted that the sentencing levels indicated in *Chick* should no longer be applied as they are out of step with current sentencing levels.²¹

[102] Ms Sheridan noted that the present case involved a one-off incident, but with a relatively large volume of dairy effluent discharged across two days and at least a moderate environmental effect. She submitted the nature of the offending fits within the characterisation of ‘offending that is deliberate, or if not deliberate, is occasioned by a real want of care.’

[103] Ms Sheridan submitted that the offending falls around the cusp of Levels 2 and 3 of *Chick*:²²

Level 2 - moderately serious ... This range of offending reflects unintentional but careless discharges usually of a recurring nature over a period of time, or of incidents arising from the malfunction of different parts of the system. The offending is often manifested by a reluctance to address the need for a safe system of effluent disposal, resulting in delays in taking restorative action. It also reflects little or at the most a moderate effect on the environment.

²⁰ *Waikato Regional Council v GA & BG Chick Ltd* (2007) 14 ELRNZ 291 (DC).

²¹ *Waikato Regional Council v Cazjal Farm Ltd* [2023] NZDC 10973, at [18]; *Sowman v Marlborough District Council* [2020] NZHC 1014, at [64] – [68].

²² *Chick*, at [25] – [26].

Level 3 - more than moderately serious ... This range of offending reflects the more serious offending. Offending that is deliberate, or if not deliberate, is occasioned by a real want of care. It is often associated with large plural discharges over time or one large one off event. It often exposes a disregard for the effects on the environment.

[104] Ms Sheridan acknowledged that there are currently no defined sentencing bands and there has been no tariff decision updating *Chick*. Judge Dwyer has described Level 2 of *Chick* as attracting starting points in the range of \$40,000 to \$80,000²³ or \$50,000 to \$100,000.²⁴

[105] In *Waikato Regional Council v Hazlehurst (Hazelhurst)*²⁵ Judge Dickey adopted the observations of Judge Harland in *Waikato Regional Council v Nagra Farms Limited (Nagra Farms)*²⁶ to the effect that the Courts had signalled, over the eighteen months prior to the decision in *Hazlehurst*, that starting points “typically adopted for dairy effluent offending need to be elevated to better relate to the maximum penalty available”. Further, noted Judge Dickey, there is need for the Courts to assess culpability more carefully, to have more regard to the maximum penalty and to be prepared to depart from the *Chick* levels where appropriate.

[106] Counsel referred me to a number of comparative decisions as a reference to assist in setting an appropriate starting point. The cases cited to me by counsel were *Tasman District Council v Langford (Langford)*,²⁷ *Taranaki Regional Council v Vernon (Vernon)*,²⁸ *Hazlehurst, Bay of Plenty Regional Council v Carter (Carter)*,²⁹ *Bay of Plenty Regional Council v Nettleingham (Nettleingham)*,³⁰ *Bay of Plenty Regional Council v Ruki (Ruki)*,³¹ *Otago Regional Council v Jury (Jury)*.³²

²³ *Taranaki Regional Council v Vernon* [2018] NZDC 14037; *Tasman District Council v Langford* [2018] NZDC 10793; *Waikato Regional Council v Torr* [2023] NZDC 28135, at [18].

²⁴ *Waikato Regional Council v Brunt* [2021] NZDC 1714, at [11].

²⁵ *Waikato Regional Council v Hazlehurst* [2020] NZDC 1169.

²⁶ *Waikato Regional Council v Nagra Farms Limited & Singh* [2019] NZDC 2382.

²⁷ *Tasman District Council v Langford* [2018] NZDC 10793.

²⁸ *Taranaki Regional Council v Vernon* [2018] NZDC 14037; *Vernon v Taranaki Regional Council* [2018] NZHC 3287.

²⁹ *Bay of Plenty Regional Council v Carter* [2018] NZDC 22257.

³⁰ *Bay of Plenty Regional Council v Nettleingham* [2023] NZDC 3031.

³¹ *Bay of Plenty Regional Council v Ruki* [2019] NZDC 13701.

³² *Otago Regional Council v Jury* [2017] NZDC 8895.

[107] *Langford* involved a charge of discharging dairy farm effluent onto land in circumstances where it might enter water. The effluent system had been upgraded and Mr Langford, the farm manager, was responsible for capping redundant pipes. Caps were purchased and available, but Mr Langford instead bent the loose ends of the pipes and tied them off. Some four years later effluent was found to be discharging from one of the pipes which had been dislodged (possibly by a cow). Effluent was discharged over a three-day period. Approximately 15,000 litres (15m³) of effluent ponded significantly, and some of it went into a watercourse.

[108] While no down-stream sampling was available and any effect was likely to have been temporary, the cumulative impact was of concern. It was noted that the watercourse flowed to a recognised trout stream. The offending was characterised as 'substantial carelessness' due to the recognised need for end caps and the failure to fit them for a substantial period of time. Judge Dwyer placed the offending in Level 2 of *Chick* and adopted a starting point of \$50,000.

[109] *Vernon* involved a husband and wife who were each charged with intermittently discharging dairy effluent to land in circumstances where it may have entered water. A travelling irrigator was disconnected from its hose and untreated effluent was discharging directly from the hose and onto the paddock. Effluent had ponded over an area about 200m² and was flowing about 35m over land to a tributary of Rum Keg Creek. It was apparent that the irrigator had not been moved for a long time. The effluent pipe had become blocked and after the pump was cleared the irrigator would not work. The defendants used the effluent pipe to discharge directly to land. This was characterised by Judge Dwyer as reckless. The defendants had long been aware of the need for significant upgrades. They were unable to address this due to financial circumstances.

[110] The discharge was intermittent, and the volume was not specified. Judge Dwyer stated that it was difficult to discern the effects on the tributary. There had been high rainfall which likely contributed to the ponding and diluted the ponded effluent. However, the cumulative impact was of concern. A starting point of \$60,000 was adopted, with the end fine being divided between the two defendants.

[111] The sentence was upheld on appeal to the High Court, which held that the fine was ‘well within the available range’ and declined to give a reduction for their financial circumstances.

[112] *Hazlehurst* involved a charge of discharging dairy farm effluent onto land in circumstances where it might enter water. The defendant was a co-owner and sole manager of the farm which had previously had a consent to discharge treated dairy effluent to a tributary from a pipe on the third pond. As the consent expired in 2014, and discharge to the tributary was no longer authorised, the farm operated under permitted activity rules and intended to have an external contractor regularly pump out the ponds. Council instructed the defendant to permanently cap the pipe. The pipe was not capped, and effluent had been discharging from it at a steady flow, through a modified waterway system, to a stream. The offending spanned a three-and-a-half-year period. There was no way of measuring the volume, but it was ‘significant.’ The discharge was intermittent and the effluent that discharged was treated by progressing through three ponds.

[113] Judge Dickey stated that the duration was of serious concern even if the discharge was intermittent. She categorised the offending as deliberate and occasioned by a blind willingness to assume that past practices (under the resource consent) would suffice for ensuring compliance with the Permitted Activity Rule. While the effects on the environment from the samples taken were unlikely to have been significant, the cumulative effect of those discharges over the nearly 43-month period placed the effects of the offending into the more than moderately serious category. Judge Dickey placed the offending in Band 3 of *Chick* and adopted a \$90,000 starting point.

[114] *Carter* related to discharges of dairy effluent onto or into land in circumstances where it may enter water. A pipe from the farm’s effluent pond was found discharging effluent directly into an adjacent farm drain. After that pipe had been capped, effluent was found overflowing from the effluent storage pond to the adjacent farm. The Court described the receiving environment as “sensitive.” The discharges resulted in high levels of contaminants being discharged, well over recommended guideline values. Mr Brian Carter, the owner of the farm and person responsible for the overall

management of it and its effluent system, was found to be highly negligent, bordering on reckless due to the management and systemic failures evident. Mr Bruce Carter's culpability was lower, he was not left with any option to deal with the storage problem, however his failure to identify and remedy the problem without direction from the Council and failure to follow-up was negligent and extremely careless. The offending was found to be moderately serious at the upper end of Level 2 in *Chick*. A starting point of \$60,000 was adopted for Brian Carter and \$25,000 for Bruce Carter.

[115] *Nettleingham* involved discharge of dairy effluent onto or into land where it may enter water. A pipe from the cow shed was set to divert the flow of washdown water into the stormwater diversion pipe leading to a gully, rather than directing it into the farm's effluent storage, and green effluent had been discharged and ponded. The Court observed that there did not appear to have been any fault or problem with elements of the systems, only with the way in which the defendants used it. It was noted that the scale of the milking operation on this farm meant that the consequences were less than regularly seen in cases coming before the Court. The Court considered that the offending was at the lower end of Level 2 of *Chick*. A global starting point of \$40,000 was adopted, to be apportioned between the two defendants.

[116] In *Ruki* dairy effluent was discharged to land. Mr Johnstone gave instructions to Mr Ruki to turn on the pump to send dairy effluent to a travelling irrigator in a paddock and then to turn the irrigator off after a certain time. The irrigator broke down and stopped moving. There was no failsafe device to turn the pump off and effluent discharged to land and flowed to a spring-fed drain in a neighbour's paddock. The environmental effects of the offending, while being difficult to quantify, were accepted as cumulative and serious. The Court considered the conduct was on the upper end of careless. Mr Johnstone's culpability was less than that of Mr Ruki, as Mr Johnstone had given appropriate and adequate instructions which were not followed. The Court adopted starting points of \$17,000 for Mr Ruki and \$9,000 for Mr Johnstone.

[117] *Jury* concerned one charge of discharging dairy effluent from a travelling irrigator to saturated land that resulted in ponding. There was ponding in three of the farm paddocks, covering an area over one hectare across and depths of 10 to 200mm.

The Court observed that this was the sort of offending where the individual effects of any one discharge may be unprovable, but the standard of water in rivers and streams continues to suffer as a consequence. The offending was characterised as careless. A starting point of \$10,000 was adopted.

Prosecutors' submissions

[118] Ms Sheridan submitted that this is not a case of system failure, but rather the defendant had chosen to operate the effluent system other than as directed by his employer and had left the tap in an open position with effluent discharging directly to land.

[119] Ms Sheridan submitted that the offending is more serious than *Langford*. She submitted it is comparable to *Vernon*, which involved an intermittent discharge from an effluent hose to land over a longer period (approximately eight days) but occurred in the context of system-wide problems the defendants were unable to address due to financial circumstances. Ms Sheridan further submitted the offending is less serious than *Hazlehurst*, which involved repeated deliberate discharges over three and a half years but with environmental effects that were unlikely to have been significant.

[120] Ms Sheridan noted that these cases are from four to six years ago and sentencing levels have been gradually increasing.

Defendants' submissions

[121] Ms Burkhardt noted that it is relevant that *Hazlehurst* and *Vernon* involved individuals that were owners/co-owners and resource consent holders and/or had operational or management responsibilities, rather than an employee. Mr Rutland is a non-owner; he is an employee. Ms Burkhardt submitted there tends to be no commercial element to offending by a non-owner, and such defendants lack the financial resources needed to address any systemic failures with a farm's effluent management systems. She also submitted it is the resource consent holder that is generally seen as being responsible, ultimately, for consent compliance.

[122] Ms Burkhardt submitted the offending is within the moderately serious Level 2 *Chick* penalty band.

[123] Ms Burkhardt submitted there is no need to increase the starting point based on any additional deterrent element. Mr Rutland has accepted full responsibility, the entire prosecution process has been traumatic for him, his employment at the farm was to end soon (although not as a direct result of the incident), and he was unlikely to work again in the industry.

Conclusion on starting point

[124] I accept that some caution is required in relation to the sentencing levels indicated in *Chick*, given they are out of step with current sentencing levels and there has been no tariff decision updating *Chick*.

[125] That being said, I accept Ms Sheridan's submission that the offending falls around the cusp of Levels 2 and 3 of *Chick*. This was a one-off event, with a relatively large volume of dairy effluent discharged across two days and at least a moderately serious adverse environmental effect. It is agreed that there was a cumulative adverse impact on the estuary from the discharges, and this Court has previously expressed concern about the cumulative effect of effluent discharges of this nature on the integrity of waterbodies.

[126] Aspects of the offending in this case are similar to *Langford*, *Vernon*, *Carter*, and *Hazlehurst*. However, culpability and the volume of effluent discharged is more serious than *Langford*, and while comparable to *Vernon* the context of system-wide problems the defendants were unable to address in that case is also less serious than the offending here.

[127] I accept Ms Sheridan's submission that the offending is less serious than *Hazlehurst*, where the offending was categorised as deliberate and occasioned by wilful blindness, falling within Band 3 of *Chick* and a \$90,000 starting point. I note that environmental effects were unlikely to have been significant in that case.

[128] I find the characterisation of offending in this case is similar to that in *Carter* where the owner, and person responsible for the overall management of the farm and its effluent system, was found to be highly negligent, bordering on reckless, and at the upper end of Level 2 in *Chick*.

[129] In relation to Ms Burkhardt's submission that some attention needs to be paid to those cases where the defendants are non-owners, the relative culpability of defendants acting in the same capacity and the desire for consistency, I acknowledge that Mr Rutland is a non-owner, an employee and that there is no commercial element to the offending.

[130] However, I do not consider this is a case where we can point to the resource consent holder or employer as being responsible for, or having some part in, the offending that occurred. Mr Rutland is an experienced manager of some 16 years, with primary responsibility for the overall management and running of the farm, who chose to operate the effluent system other than as directed by his employer. The offending discharge did not result from a failure in the farm's effluent system but Mr Rutland's failure to take the requisite care.

[131] I accept Ms Burkhardt's submissions that there are no additional deterrent elements that would give rise to a need to increase the starting point.

[132] Accordingly, having considered the relevant cases cited to me and the circumstances of this case, I find a starting point for this offending of \$75,000 is appropriate. That is because the adverse effects on the environment were moderately serious and the nature of the offending ranges from highly careless to reckless and occasioned by a real want of care. Further, the Courts have emphasised the need for the careful assessment of culpability, to have more regard to the maximum penalty and to be prepared to depart from the *Chick* levels where appropriate.

Aggravating and mitigating factors relating to the defendant

[133] I was not advised of any aggravating factors personal to Mr Rutland that would warrant an uplift.

Previous good character

[134] Ms Sheridan accepted that Mr Rutland, who is almost 65 years old, has no relevant previous convictions. On that basis she submitted that a discount of five percent is warranted for previous good character which Ms Burkhardt agreed with. I will allow the discount.

Guilty plea

[135] Ms Sheridan submitted that Mr Rutland is entitled to a credit for his early guilty plea. It was noted that there were several adjournments prior to a guilty plea being intimated, however it was acknowledged that counsel for Mr Rutland remained in contact with the prosecutor and endeavoured to progress matters.

[136] Ms Burkhardt pointed out that Mr Rutland had not received any legal advice prior to the charge being laid against him and given the nature and extent of possible penalties (including custodial had the availability of statutory liability cover not been resolved) was entitled to be properly advised before deciding to plead guilty. On this basis, she submitted that Mr Rutland intimated a guilty plea at the first available opportunity and should be entitled to receive the full 25 percent discount.

[137] I accept the position as outlined by Ms Burkhardt and will allow a credit of 25 percent reduction for the early guilty plea.³³

Capacity to pay a fine

[138] Section 40 of the Sentencing Act 2002 requires me to take into account the financial capacity of the defendant and this may have an effect of reducing the amount of the fine.

[139] Ms Sheridan was of the understanding that Mr Rutland had the capacity to pay a fine. Ms Burkhardt noted in submissions that his capacity to pay a fine was dependent on the availability of statutory liability cover, otherwise he has an extremely limited ability to pay. However, at the hearing it was confirmed that there will be

³³ *Hessell v R* [2010] NZSC 135.

statutory liability cover because Mr Rutland is an employee, and therefore has the ability to pay a fine. I note for the record that there was no evidence before the Court to support a reduction in that regard in any event.

[140] I have no concerns about the ability of Mr Rutland to pay the fine.

Result

[141] I have applied the two-stage approach to sentencing outlined in *Moses v R*.³⁴

[142] Mr Rutland is convicted on the charge and fined \$52,500. Ninety percent of the fine is to be paid to the Council pursuant to s 342 of the RMA.

[143] The defendant is ordered to pay court costs of \$130 and solicitor's costs of \$113.

Judge S M Tepania

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 02/09/2024

³⁴ *Moses v R* [2020] NZCA 296, at [45]-[47].