IN THE DISTRICT COURT
AT HAMILTON (EX TOKOROA)

CRN-170775007254-256
[2018] NZDC 20594

WAIKATO REGIONAL COUNCIL
Prosecutor

v

H & S CHISHOLM FARMS LIMITED
Defendant

Hearing:	4 April 2018
Appearances:	EM Light for the prosecutor N Beadle and C Halliday for the defendant
Judgment:	7 November 2018

RESERVED SENTENCING DECISION OF JUDGE HARLAND

Introduction

[1] H & S Chisholm Farms Limited has pleaded guilty to three charges of contravening the Resource Management Act 1991 (**the RMA**) by permitting a contaminant (farm animal effluent) to be unlawfully discharged onto land into water[1] on 23 June and 7 July 2017, and by permitting the contravention of an Abatement Notice[2] issued against it on 27 June 2017. The discharges on 23 June and 7 July were unlawful because they did not comply with the permitted activity rules in the Waikato Regional Plan.

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1 Contrary to ss 15(1)(b), 338(1)(a) and 339(1)(b) of the RMA.
2 Contrary to s 338(1)(c) of the RMA

[2] It was common ground that the appropriate sentencing response was a fine, but counsel disagreed about the starting point I should adopt for the fine, with counsel for the prosecutor submitting it should be $85,000 and counsel for the defendant submitting it should be $50,000. The maximum penalty available to me on each charge is a fine not exceeding $600,000, so the total fines that could be imposed amount to $1.8 million.

[3] Although the hearing for this sentencing occurred some time ago, due to issues associated with the relevance of insurance cover for any fine the Court could impose in this case it has been unable to be resolved until now.[3]

[4] As well as sentencing submissions, the company director, Mr Hugh Chisholm, filed an affidavit to explain what happened, and the steps taken by the company after the offending was revealed.

Background

[5] The defendant company operates a dairy farm from 397 Old Taupo Road, Puketurua. The Waipa Stream is located approximately 3km downstream of the farm, but an unnamed tributary of the Waipa Stream flows through it. The natural course of that tributary runs adjacent to the farm's effluent ponds, and the distance between it and the side wall of the effluent ponds is approximately 7 metres.

[6] At the time of incorporation on 25 August 1994, the defendant's farming operation was a small one, milking approximately 300 cows. Since then the farming operation has grown and intensified to the extent that, at the time of the offending, it was winter milking 700 cows, and with the additional spring calving herd it was expected to peak milk approximately 920 cows in the 2017/18 dairy season. Of the total farm area of 409ha, approximately 330ha comprised the milking platform.

[7] To facilitate the level of increased intensification, numerous improvements to the main farm infrastructure were made, including upgrading the milking shed to a 64-bale rotary cowshed, installing feed silos and an in-shed feed system that enables the

[3] See *H & S Chisholm Farms Ltd v Waikato Regional Council* [2018] NZHC 1885 and the determination in this case following the appeal (dated 30 October 2018)

cows to be fed during the milking process, installing a stand-alone feed pad to enable the feeding of supplement feed to the cows, installing concrete feed bunkers to store bought-in feed and constructing four herd homes. The infrastructure as it was at the time of the offending was capable of housing 1,100 dairy cows.

[8] Although there were the improvements made to the farm's infrastructure referred to above, the component of the milking infrastructure that was not improved as at the date of the offending was the farm's effluent holding capacity. Ostensibly the two storage ponds, which originally functioned together as oxidation ponds prior to the purchase of the farm by the defendant, remained unchanged.

[9] The development of the dairy farming operation outlined above enabled it to function in previous seasons as a System 5 farm, a classification indicating that a farm operates at the highest level of intensification. With regards to animal feed purchased off a farm, a System 5 farm classification as defined by Dairy NZ is one which imports between 25-40 percent (but can import up to a 55 percent) of its total animal feed from outside of the farm milking platform. If feed is purchased off a farm, it can enable a farm to carry a higher stocking rate.

[10] For the 2017/2018 season, however, the farm was operating at a reduced level as a System 3.5 farm, because of the cost of purchasing feed. This meant that approximately 15-25 percent of the total feed was purchased off the farm.

The effluent system

[11] The storage facilities for dairy farm effluent on the farm at the time of the offending were the two adjacent and connected ponds referred to above which had a combined area of 989m^2 and were situated approximately 72m below the dairy shed, with a capacity of about 4.2 million litres. The full stormwater catchment area including the cowshed and yards, feed pad, herd homes and associated amenities were connected to those ponds.

[12] The effluent was applied over the farm in two ways:

(a) by a travelling irrigator within the effluent block; and

(b) by a slurry tanker outside the effluent block.

The travelling irrigator

[13] The effluent block on the farm is an area comprising approximately 140ha connected via underground piping to a network of hydrants, to which a travelling irrigator can be coupled. The travelling irrigator is a self-contained unit that is driven by a diesel motor attached to a large spool of irrigation dragline. The unit is connected to a hydrant, which is fed liquid farm animal effluent under pressure from an electric pump mounted within the effluent storage ponds. A rain-gun irrigator mounted upon a travelling platform is then towed across land, being reeled in by the motor-driven spool.

[14] A senior farm hand at the farm described that:

(a) the travelling irrigator has the facility to alter the effluent spreading rate by adjusting its travel speed;

(b) the flow rate of the effluent can be adjusted via an adjustable bypass valve; and

(c) a range of between 5 and 25mm of depth could be achieved through basic data input at the control panel on the irrigator spool.

The slurry tanker

[15] As well, the defendant owned a tractor-towed slurry tanker, with a 12,000 litre storage capacity. The slurry tanker was used to transport effluent from the storage ponds and apply it onto paddocks outside of the effluent block.

The relevant legislation and rules

[16] Farm animal effluent is a contaminant pursuant to s 2 of the RMA. It is unlawful to discharge a contaminant into water (s 15(1)(a) of the RMA) or onto land in circumstances where it may enter water (s 15(1)(b) of the RMA) unless the

discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional or proposed regional plan or a resource consent.

[17] Since 2003 this farm has operated under the permitted activity rules in the Waikato Regional Plan. The relevant rules[4] do not permit effluent to enter surface water by way of overland flow or pond on the land surface following application.

[18] The agreed Summary of Facts includes a section entitled "Efforts to achieve compliance with dairy effluent management". It includes reference to the fact that, unlike many regions that require resource consent to irrigate dairy effluent, the Waikato Regional Plan allows dairy effluent management by way of permitted activity. Even though the Waikato Regional Plan became operative on 28 September 2007, the rules have been in effect since 28 September 1998, at which time they were publicly notified. This is the time from which dairy farms in the Waikato Region began to transition to the permitted activity rules. The rules have been well publicised and are easily accessible, for example through the Waikato Regional Council (**the Council**) website.

[19] Under this part of the agreed Summary of Facts the following matters are also noted:

- It is well known that dairy effluent management has been a topical issue for a number of years, and is recognised nationally as one of the major contributors to water quality concerns.
- Considerable resources have been dedicated to addressing and eliminating poor effluent management practices, both within the industry itself and by external partner agencies.
- Literature specifically dedicated to effluent management practices have been actively published by industry partners since 2006, culminating in the Farm Dairy Effluent Design Standards and Code of Practice document, the most recent version (Version 3) being published by Dairy NZ in

[4] Rules 3.5.5.1 and 3.5.5.2

September 2015. These Codes of Practice have had input from several lead agencies, including Federated Farmers, Fonterra and AgResearch.

- The Council has had a team dedicated to proactively monitor dairy farm effluent for more than a decade. There has been an emphasis on education, and in more recent years farmers have been encouraged to link with accredited dairy effluent infrastructure providers.

- Over the last few years, the Council has also orchestrated and widely marketed an annual Effluent Expo, which has involved all sectors of the industry including DairyNZ, effluent consultants and specialists, Primary ITO, who are one of the lead agricultural training organisations nationally, and regional authorities.

- NZ Agriculture lead agencies have made substantial efforts to assess and provide advice of what is best practice in relation to the management of farm dairy effluent.

[20] The point of all of this is to highlight that dairy farmers in the Waikato Region have had ample time to understand what is required to lawfully manage dairy effluent and to become educated about best practice, both in terms of the design, operation and management of effluent systems.

The offending

Overflow from effluent pond – CRN ending -255

[21] At about 2.00pm on 23 June 2017, in response to a complaint, Council staff inspected the defendant's property at 397 Old Taupo Road. Mr Hugh Chisholm was present and escorted the Council staff around the property. Although it was not raining at the time, there had been torrential rain earlier in the day.[5]

[22] An examination of the effluent storage ponds revealed that they had reached full capacity and were overflowing.[6] Effluent was flowing across the grassed area

[5] Mr Chisholm said in his affidavit he believed 51mm of rain fell in a two-hour period
[6] Photograph booklet, photo 5.

beside the pond and down the bank of the into the tributary.[7] The electrical irrigation pump within the storage pond was operating at the time.

[23] Mr Chisholm was instructed to rectify the overflowing ponds immediately. He directed staff to use the slurry tanker to lower the pond levels, however when the Council staff left the premises at approximately 3.15pm, the effluent pond was still overflowing into the tributary. Mr Chisholm's affidavit outlined that the required level was reached at about 10pm that night.

[24] The Council staff took samples of the overflowing liquid from the pond as well as further samples from the tributary, approximately 80m downstream from the point of discharge into the tributary and approximately 30m upstream from the point of discharge.

Abatement Notice

[25] On 28 June 2017, an Abatement Notice was served on the defendant. The notice prohibited the defendant from unlawfully discharging farm animal effluent and it also attached a copy of the relevant permitted activity rules as prescribed in the Waikato Regional Plan.

Discharge on 7 July 2017 – CRN ending -254 and 256

[26] At approximately 12.30pm on 7 July 2017, Council officers undertook a further inspection of the defendant's property to check whether there was compliance with the Abatement Notice. Mr Chisholm was present. The effluent ponds were observed to be at an acceptable level, and there was no overflow.

[27] Mr Chisholm, along with his senior farmhand, escorted the Council officers to the ridgeline of a paddock where the travelling irrigator had been operating since about 9 15 am and had almost finished its run. The paddock area to the north of the irrigator was flat, however the area to the south of the irrigator comprised a steep hill at the foot of which was a small wetland area. This area was drained via an in-ground culvert

[7] Photographs 6 and 7.

pipe, which ultimately directed surface wastewater via a natural drainage path towards the tributary. [8]

[28] The Council staff observed that the irrigator had been set to "throw" the effluent to the southern side of the irrigator in an oscillating arc covering between half to three-quarters of that side. A path of effluent had formed and was flowing from where the effluent was landing across the ground downhill, where it was ponding near to the wetland area.[9] At that point, the effluent in combination with the surface water that was present gravitated naturally through the culvert pipe via the drainage channel to the tributary. The distance between the irrigator and the point of discharge into the tributary was approximately 460m.

[29] The soil conditions at that time were at saturation point and the Council staff observed that the ground generally was wet underfoot. The travelling irrigator was operating at an application rate of 15mm depth.[10] This was able to be observed on the screen attached to the irrigator spool.

[30] The senior farmhand immediately changed the direction of the rain-gun so that it "threw" to the northern side of the irrigator, and adjusted the settings of the irrigator to a new application rate of 3mm.

[31] Samples of the overland flows were taken and upstream and downstream samples from the point of discharge into the tributary were also taken.

Explanation

[32] Mr Chisholm was spoken to in relation to the offending. He expressed remorse and acknowledged that both incidents were unlawful and from his point of view, indefensible. He explained the difficulties that had been encountered during that season because of the excessive amount of wet weather. There had been a downpour on 23 June and he considered that this had contributed to the pond overflowing. Mr Chisholm expressed gratitude to the Council for ostensibly forcing the need to

[8] Photograph booklet, photograph 8.
[9] Photographs 9-11.
[10] Photograph 13.

complete the necessary upgrades to his effluent systems. Mr Chisholm's response to the offending was refreshingly frank and responsible. He did not seek to minimise it or blame others for it.

[33] Since the offending, the defendant has extensively upgraded its effluent management system. The defendant's aim, by undertaking these improvements, has been to ensure that the system has a wide margin of safety, particularly during periods of heavy rainfall. The upgrade has included the following:

- A third effluent pond has been commissioned to provide an additional 4 million litres of capacity as a safeguard against heavy rainfall events. This effluent pond had previously been part of the effluent management system on the farm, but had been decommissioned.

- A network of underground effluent pipes has been installed, which has increased the effluent block from 140ha to 332ha. The cost of the piping amounted to $64,686.58;[11]

- A Nevada Rainwave irrigation system has been installed at a cost of $106,950.[12] This replaces the travelling irrigator. The Rainwave is pulled by a tractor, therefore the irrigation process is constantly monitored by the driver. The continuous movement of the system also means that pooling of effluent is avoided;

- A Trac Mac System is used to show where effluent has been spread on the farm. This is essentially a GPS system attached to the tractor. Mr Chisholm estimated the cost to install this system was about $7,000.[13]

[34] In addition, procedures have been put in place to ensure that the level of the effluent ponds is monitored at least every two days, and the ponds are lowered if they exceed 60 percent of capacity.

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11 Affidavit of Mr Chisholm, paragraph [12.2] and Annexure C.
12 Affidavit of Mr Chisholm, paragraph [12.3] and Annexure D.
13 Affidavit of Mr Chisholm, paragraph [12.4].

[35] Counsel for the prosecutor submitted that no proof has been provided that the third pond has been sealed as required under Rule 3.5.5.1 c. It would have been preferable for this information to be before the Court, however for the purposes of sentencing I am prepared to give the defendant the benefit of the doubt that the pond does comply. This does not mean however that the Council cannot take this issue further. The Council is entitled to be satisfied that the pond has been sealed to the degree required by the rule.

[36] I deal with what discount should be allowed to reflect Mr Chisholm's explanation for the offending, his cooperation with the Council and the upgrade after I assess what the starting point for the fine should be.

Purposes and principles of sentencing

[37] The purposes and principles of sentencing are well-known and need not be repeated. In terms of the process to be undertaken to set the starting point for the fine, I address the nature of the environment affected by the offending and the effect of the offending on it, the defendant's culpability for the offending, and the relevant or comparable cases referred to me by counsel.

The nature of the environment affected and the effect of the offending on it

[38] The discharges of effluent on both 23 June and 7 July were to the same tributary but to different parts of it. The Waipa Stream, which flows into the Waikato River, is approximately 3km downstream from the tributary.

[39] I accept that the tributary itself is not of any special note, however the water bodies into which it ultimately flows have significant value. The Waipa Stream is listed in the Waikato Regional Plan maps as significant because it is a trout fishery and spawning habitat and it is used for contact recreation. No samples were taken from the Waipa Stream on either 23 June or 7 July, so counsel for the defendant submitted that there is no evidence to suggest that it was contaminated by the discharge. He submitted that the absence of this feature reduces the seriousness of the offending. I address this submission with reference to the analysis of the samples that were undertaken.

[40] Dr Eloise Ryan reviewed the laboratory analysis reports of the samples taken on the two occasions. Her report was an appendix to the Agreed Summary of Facts.[14]

Ecological effects – 23 June

[41] Six samples were collected on 23 June. Two were taken from the point of discharge over the top of the pond, two were taken approximately 30m upstream from the point of discharge, and two were taken approximately 80m downstream from the point of discharge.[15]

[42] In relation to the 23 June samples, Dr Ryan noted that they "were all were consistent with a high degree of contamination with effluent."

[43] While noting that the upstream sample appeared to have been contaminated by another source of effluent, Dr Ryan was still able to effectively compare the upstream and downstream samples against the relevant environmental guidelines. She noted that:[16]

- Concentrations of suspended solids were extremely high (920-950g/m^3), significantly elevated above the Waikato Regional Plan Rule 3.2.4.6 standard of 25g/m^3. With reference to sections 70 and 107 of the RMA, which state there shall be no "conspicuous change in colour or visual clarity" following the discharge of contaminant, she observed that "this load of suspended solids would very likely cause conspicuous change in colour and visual clarity of the water course, and the discolouration of the water was noted by the officer conducting the water sampling."[17]

- *E. coli* levels in the samples were elevated (800,000 to 1.4 million cfu/100mL), above the current Ministry for the Environment Guideline (95th percentile less than 550 E.coli/100mL).[18] She observed that "people and stock coming into contact with this water are exposed to a high risk of

[14] Agreed Summary of Facts, Appendix 3.
[15] See Map 4 Photograph and Map booklet for sample locations
[16] At page 2.
[17] At page 2.
[18] MFE/Ministry of Health 2003.

infection."

- The Ammoniacal-N concentrations were high (2.3-2.5g/m^3), in exceedence of the Waikato Regional Plan Standard of 0.88g/m^3 (Rule 3.2.4.5B.viii) and the 2014 National Policy Statement for Freshwater Management Standard of 0.4g/m^3. Dr Ryan noted the comparison with these guidelines and standards "indicates a likely potential for significant ecological effects."

- The Total Nitrogen concentrations (25-26g/m^3) were well above the Waikato Regional Council Guidelines and Standards for Ecological Health (TN < 0.5g/m^3).

- Total Phosphorous concentrations (4.3-4.8g/m^3) were above the Waikato Regional Council Guidelines and Standards for Ecological Health (TP < 0.04g/m^3).

- Dr Ryan observed there can be adverse ecological effects where concentrations of BOD are greater than 4g/m^3, with the resulting low levels of oxygen; $cBOD_5$ results were 25-30g/m^3, and at these concentrations Dr Ryan's opinion was that "there would have been very low dissolved oxygen concentrations in the water. "

Ecological effects – 7 July

[44] In relation to the samples collected on 7 July,[19] Dr Ryan noted that, while those collected from areas where ponding was on land were consistent with a high degree of contamination with effluent, because they had not been collected from a waterway a suitably qualified soil/land scientist would need to assess them, as her expertise did not extend to this.

[45] In relation to the two samples taken 50m downstream from the point of discharge which she was qualified to address, she noted that all were "consistent with contamination of effluent." She noted:[20]

[19] See Map 5 Photograph and Map booklet for sample locations
[20] Agreed Summary of Facts, Appendix 3, p. 3.

- The Total Nitrogen and Total Phosphorous (5.4 and 0.174g/m^3 respectively) concentrations were above guideline values;

- The Ammoniacal-N concentration was high (0.26g/m^3), however below guideline values but still elevated eleven times above the upstream concentration of 0.023g/m^3;

- The $cBOD_5$ concentration at 20g O_2/m^3 was extremely high, and at this concentration she noted there would be very little oxygen in the water;

- *E. coli* bacteria levels were also very high (50,000cfu/100mL), well above the Ministry Guidelines of no greater than 550 e-coli/100mL.

Summary of potential effects

[46] In relation to the potential impacts on the unnamed tributary and the Waipa Stream, Dr Ryan summarised them in general terms as follows:

> The potential for significant adverse ecological effects on the receiving environment water quality is high, as the dilution factor required to achieve receiving water guideline standards would be significant. In addition to localised adverse ecological effects in regards to toxicity (especially from the extremely high ammonia concentrations), there could be further reaching effects from the increased nutrient enrichment from the effluent source. The effects from high loading from Nitrogen and Phosphorous on water-ways are well published, and can cause a variety of issues including increased algal biomass and nuisance slimes. The high concentrations of bacteria (*E. coli* and Faecal Coliforms) in these samples are also concerning, and there would be an unacceptable risk of people and stock becoming sick after being in contact with the water. *E. coli* can persist for many days and months in water-ways under the right conditions, and thus the effects of high bacteria loads can be persistent in the environment.
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> If this discharge continues to be on-going for a period of time, I would be concerned about the bacteria levels accumulating in the stream, and also the effect of the low levels of dissolved oxygen (as indicated by the BOD results) on any sensitive aquatic organisms living in the stream. The slug of effluent flowing downstream would rapidly use up any available oxygen, making it unavailable for invertebrates and fish. Even a small change in dissolved oxygen concentration can affect the composition of aquatic communities, and it is noted the Waipa Stream is classified as a Significant Trout Fisheries and Trout Habitat -Fishery Class. It may take a considerable period of time for the bacteria levels to return to safe levels, dependent of course on the amount of rainfall and thus flushing. Also, as mentioned above, the increased nutrient loading into the stream and then ultimately the Waipa Stream could cause

> stimulation of algal growth, with a resultant lack of water clarity depending on the time duration of this discharge.[21]

[47] On 23 June, the Council investigation was triggered by a complaint. The length of time the discharge continued from the time the Council arrived and left the property (approximately an hour and a quarter) and the photographs, as well as the sample results, speak for themselves. In relation to the discharge to the tributary on 7 July, this was less profound than the discharge from the storage pond on 23 June, but the $cBOD_5$ concentrations were still extremely high. I conclude that the offending on both 23 June and 7 July adversely affected the tributary, but it is not possible to say for how long these effects would have lasted or the extent to which they would have impacted on the biodiversity and water quality values present in the tributary. Dr Ryan's report, however, makes it clear the discharges to the tributary raise very real concerns.

[48] Even though the Waipa Stream is some 3km away and no samples were taken from it, I have no difficulty in finding based on Dr Ryan's report that there was the potential for it, too, to be contaminated to some degree as a result of this offending. As the High Court noted in *Waslander v Southland Regional Council*:[22]

> [20] The extent of the environmental harm caused by the discharge of the contaminant is an obvious relevant consideration when assessing the seriousness of this type of offending. Whether lasting or irreversible damage has been caused, and whether the harm caused by the offending was of a continuing nature, or occurred over an extended period, are all relevant factors. However, it does not follow that where no actual damage is identified as having occurred to the wider environment harm has not been caused by allowing the contaminant to enter water.
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> [21] Regard must be had to the nature of the statutory prohibition which creates the offence in order to properly assess the nature of the harm or adverse environmental effect the Resource Management Act 1991 seeks to avoid. Mr Waslander was charged under s 15(1)(b) of the Act, which prohibits a person from discharging any:
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> > (b) contaminant 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;
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> [22] Mr van der Wal's argument was premised on the submission that unless there was proof of the contaminant having entered the wider receiving environment no harm was caused. He described in his submissions the drain or waterway into which the silage leachate made its way as being "devoid of

[21] Appendix 3, pages 3-4.
[22] [2017] NZHC 2699, at paragraph [20]

> ecological value". However, the focus simply on the waterway being a drain ignores the fact that it eventually discharges into Duck Creek, which flows into the New River (Invercargill) Estuary. As with other discharges, it is the entry of the contaminant into water and the potential hazard for the wider environment from such an occurrence that constitutes the harm.
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> [23] Importantly, the offence is directed at the prohibition of discharging contaminants onto land which *may* result in it entering water. The deleterious prohibited act which attracts a maximum fine of $300,000 is not the discharge of a contaminant which enters water, but rather the discharge of the contaminant onto land which *may*, as a result of natural processes, enter water…
>
> [24] … The harm relates not just to any injury to the immediate environment, but the risk created of wider damage to it.

[49] Again, it needs to be stated that the Court's wider concern is the cumulative effect of discharges of this nature on water bodies. In this case, there were two discharges on different days to the same tributary.

[50] It follows that I do not agree with counsel for the defendant that the lack of evidence about the actual effects on the Waipa Stream reduces the seriousness of the offending. The relevant charges encapsulate the *potential* for discharges of this nature to occur rather than the *actuality* of them. I agree, however, that it is impossible to quantify how much of an effect the offending would have had on the Waipa Stream.

[51] In respect of immediate adverse effects in relation to the tributary I consider these to be serious discharges, however, in relation to the long term effects on it and the Waipa Stream, these effects are unquantifiable, but, based on Dr Ryan's report, are unlikely to be non-existent.

Culpability for the offending

23 June

[52] I take into account that the overflow from the storage pond on 23 June was contributed to by the heavy rainfall event, however I was not provided with any evidence to support the severity of the rainfall in relation to other rainfall events and in any event during the winter months heavy or continuous rainfall is possible and often predicted. As well it seems to me that the storage pond contents could have been

pumped to a lower level using the slurry tanker prior to the heavy rainfall event, as this was what was done after the Council discovered the overflow.

[53] I do not, however, agree with counsel for the prosecutor that the two storage ponds were wholly unfit for purpose. There is no suggestion of non-compliance prior to this date, nor any evidence of any previous complaints to the Council. While the increase in the herd size without increased storage capacity might lead one to conclude that further effluent storage capacity should have been provided for before or at the same time as the herd was increased, because other infrastructure improvements were made to accommodate the increased herd and different farming methods employed, it is equally possible to infer that the effluent system was being effectively managed until the offending on 23 June.

[54] In my view, the failure on 23 June was more a failure by the defendant to properly manage the storage ponds in conjunction with the system it had chosen to employ for effluent disposal. Because of the lack of attention to the level in the pond, and the failure to take a proactive and predictive approach to the management of the level of it in these circumstances, I assess the defendant's culpability for the offending on 23 June to have been extremely careless.

[55] Counsel for the defendant advised that immediately after the incident on 23 June, Mr Chisholm organised a meeting with the company's employees to emphasise the importance of effluent management. This was a prompt and responsible approach to take. The Minutes from this meeting were annexed to Mr Chisholm's affidavit. The company put in place a management structure that required the most senior of the employees to be responsible for the management of the effluent pond levels daily, and to report daily on that employee's worksheet information about the level of the effluent ponds. In the absence of the most senior employee, another employee was assigned to that task. The need to manage the pond as a matter of priority, given the unusual weather events that had been experienced, was also discussed, and Mr Chisholm indicated he would be sending photos to the Council showing the reduction of the pond that had been achieved following the use of the slurry tanker the night before. Mr Chisholm also discussed with the staff that he was looking at purchasing more equipment to manage effluent disposal, as well as

considering purchasing 4 million litres' worth of storage. There was a general discussion held and the notes record that all were made aware how important recording the effluent level in the ponds was to the defendant company.

[56] I consider that the defendant's response to the offending on 23 June was exemplary. It indicates the seriousness with which the defendant viewed what had happened, and it showed the desire of the company to fix the problem immediately, if necessary by spending further money on infrastructure.

7 July

[57] The offending on 7 July was revealed during the inspection by the Council officer to see if the defendant had complied with the Abatement Notice. On this occasion, the irrigator had been incorrectly set, not to the flat contoured part of the irrigation paddock but downhill, where it ponded and flowed into the tributary. I have no hesitation in finding that this was a mistake made by the senior farm worker who had placed the irrigator in that position without checking it regularly.

[58] The prosecutor submitted that the farm worker's conduct was plainly negligent and indicative of poor management, because the defendant had been put "on notice" about its conduct,[23] however counsel for the defendant disagreed with this assessment. The suggestion from the prosecutor seemed to be that a further meeting should have been held after the Abatement Notice had been served, and that the meeting that occurred after the 23 June incident was too limited because it focussed more on the management of the storage pond rather than the overall management of the effluent system.

[59] I have carefully considered this aspect of the case. The Abatement Notice, whilst generically stating that the defendant was required to cease and was prohibited from commencing the unlawful discharge of farm animal (dairy) effluent, the circumstances set out in the Abatement Notice relate more to the problems associated with the discharge from the effluent storage pond on 23 June.[24] As well, even though

[23] Prosecutor submissions, paragraph [24]

[24] I note that in paragraph 12 of the abatement notice reference is made to the site visit occurring on 23 July 2017. This must be an error, however, as the Summary of Facts records the event occurring on

the meeting on 24 June focussed on the level of the effluent ponds, in my view the defendant was entitled to rely on its staff to properly set the irrigator and monitor it. With the benefit of hindsight, the meeting could have discussed effluent management more generally, but the fact that it may not have does not, in my view, display a direct want of care or a negligent or reckless approach by the defendant to its other effluent management responsibilities.

[60] It is clear to me that the defendant was let down by its employee's behaviour on 7 July. This employee was a senior farm hand who ought to have known that setting the travelling irrigator to throw down a slope into a wetland area with a culvert into the tributary was risky and unwise, particularly given the length of time over which it was likely to run i.e. a 3-4-hour period, and the rate at which it was set.[25] Even though the prosecutor submitted that the farm workers behaviour was plainly negligent, it could easily be characterised as reckless. For the purposes of this sentencing, I characterise the offending on 7 July as plainly negligent. The company is vicariously liable for the actions of its employee.

Comparable cases

[61] I was referred to the following cases counsel submitted were comparable *Southland Regional Council v Talisker Farms Limited & Loveridge*,[26] *Bay of Plenty Regional Council v Dibley*,[27] *Waikato Regional Council v Brownsville Farms Limited*,[28] *Southland Regional Council v Carpenter*,[29] *Waikato Regional Council v Rymanda Farms Limited,*[30] *Waikato Regional Council v GT & AB Limited & Troughton*,[31] and *Waslander v Southland Regional Council*.[32]

[62] Counsel for the defendant submitted that the offending was at the lower end of Level 2 (low to moderately serious offending) as described in *Waikato Regional*

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23 June and the note signed and dated 27 June 2017.

[25] The Agreed Summary of Facts refers to the irrigator being set up to run at 9 15am and it being near the end of its run at the time the Council officers saw it at around 12 30.

[26] DC Invercargill, CRI-2010-025-2498, 17 December 2010, Borthwick DCJ and EJ

[27] CRI-2012-063-000772, 10 September 2012, Smith DCJ and EJ

[28] CRN 15039500059-61, DC Hamilton, 4 September 2014, Harland DCJ and EJ

[29] [2016] NZDC 10013, Dwyer DCJ and EJ

[30] [2016[NZDC 5056 Harland DCJ and EJ

[31] [2017] NZDC 3353

[32] [2017] NZHC 2699

Council v Chick,[33] justifying a starting point of $50,000 for both incidents, but counsel for the prosecutor submitted that a total starting point of $85,000 ($65,000 for the 23 June offending and $20,000 for the 7 July 2017 discharge and breach of an Abatement Notice) was appropriate.

[63] I address each of the cases referred to above in the order that each was decided.

Southland Regional Council v Talisker Farms Limited & Loveridge (2010)

[64] The defendant was convicted of five charges of discharging effluent over a period of two months onto land in circumstances where the discharges may have, but did not, enter water. There was a risk of groundwater contamination, as there were shallow aquifers in the vicinity that eventually discharged groundwater into the Mataura River, but no evidence that effluent actually entered the surface waterbodies. There is no mention of expert reports having been prepared and annexed to the agreed Summary of Facts, unlike the report prepared by Dr Ryan in this case.

[65] The five charges occurred between 13 January and 22 April 2010, and related to the over-application of effluent from a travelling irrigator (two charges), the ponding and dumping of sludge onto a paddock from a wintering pad and storage pond (two charges) and one charge relating to the overflow from a storage pond.

[66] A starting point for all offences of $150,000 was adopted to reflect the totality of the offending, reduced to $110,000 following the deduction of allowances for mitigation. The end fine for the defendant company in relation to the travelling irrigator was $20,000 and for the charge concerning the overflowing effluent pond, $40,000. The non-corporate defendant was fined $13,000 in relation to each of the travelling irrigator offences, which occurred on separate dates. The gravity of the offending was regarded as moderate and there were multiple sources of discharge over what the Judge characterised to be a long period of time. The company's culpability was described as "if not deliberate … due to a real want of care"[34] and the individual defendant's culpability was characterised as moderate.

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[33] [2007] 14 ELRNZ 201
[34] At paragraph [27]

[67] This case involved (in the round) more serious offending, but more particularly, was decided some time ago now.

Bay of Plenty Regional Council v Dibley (2012)

[68] The defendant pleaded guilty to three charges of discharging dairy effluent: one an overflow from an effluent contingency pond; another from a sump discharging effluent over land that reached a roadside drain; and a charge relating to a travelling irrigator that ponded effluent which entered an ephemeral stream, which in very high water-flow conditions (particularly in heavy rainfall events) meant such a discharge would eventually reach Lake Rotorua. The case does not identify when the offending occurred, although the sentence was delivered in September 2012.

[69] The defendant had delayed providing a second pond to cope with capacity, and there was a deliberate use of a rainwater diverter to flush effluent out of the dairy shed. The Court identified systemic issues with the farm, and categorised the deliberateness of the offending in relation to the contingency pond as "wilfully blind".

[70] A starting point of $50,000 was adopted, but it was noted that had the defendant been a company the starting point would have been $10-15,000 higher.

Waikato Regional Council v Brownsville Farms Limited (2014)

[71] In this case, a decision of mine, the defendant had pleaded guilty to three charges; two of unlawfully discharging dairy effluent to land in circumstances where it may have entered water and one of breaching an Abatement Notice. The offending occurred between 9 September and 8 November 2013. One charge concerned a discharge of effluent from one of the effluent storage ponds directly into an unnamed tributary of the Waitoa River, and the second discharge occurred after the Abatement Notice had been issued, when it was discovered that a hole in the wall of the second, unused pond, was discharging effluent that then entered the same tributary. The first discharge followed a period of heavy rainfall, but the discharge from the second pond had not been anticipated by the defendant because it was not aware of the hole in the pond wall. The defendant had been unwell for several weeks prior to the offending, and there was also a new farm worker who had only recently been employed.

[72] As a result of the offending, the defendant planned to completely replace the effluent management system, including decommissioning both of the ponds.

[73] The suggested starting points were $90,000 by counsel for the prosecutor and $60,000 by counsel for the defendant. I determined that the offending was moderately serious and that the management and maintenance of the effluent system had caused problems. I adopted a starting point of $65,000 for a fine but signalled that:[35]

> …higher starting points can be expected for similar cases in the future, given that the need to properly manage effluent systems (and the employees who manage them), and to ensure that effluent systems contain sufficient capacity for unseasonable rain, are topics that have been traversed by the Court regularly over the last five years at least. The main purposes of sentencing in this field are denunciation and deterrence. The fact that similar types of cases continue to come before the Courts seems to indicate that a more stern response might be required in the future.

Southland Regional Council v Carpenter (2016)

[74] The defendant appeared for sentence on five charges, with the offending taking place on two neighbouring farms owned by a family trust on 20 August and 23 October 2015. The discharges related to ponding on the land and overflow from an old two-pond effluent system that made its way into a watercourse. Following the issue of an Abatement Notice, there was further ponding in breach of the discharge permit. One of the discharges directly entered surface water, but the others concerned the possibility of the overapplication of effluent to land leaching into groundwater.

[75] Judge Dwyer adopted a starting point for one farm at $75,000, categorising the offending to be at the top end of *Chick* category 2 (this was the farm from which the overflow of effluent from the disused storage ponds entered a surface waterbody) and the judge adopted $50,000 of that starting point to the discharge to the water body. The charges on the other farm, involving ponding of effluent on land, attracted a starting point of $45,000, and the breach of the Abatement Notice a starting point of $20,000.

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[35] At [37].

[76] There was no deduction for the remedial works under way at the time of sentencing to "put things right" because, as Judge Dwyer said, "that is simply putting the systems into the condition they should have been".[36]

[77] This case is similar to the current one, even though there were more charges and it involved an individual as opposed to a corporate defendant.

Waikato Regional Council v Rymanda Farms Limited (2016)

[78] The offending in this case occurred between August 2013 and September 2015, and related to the ponding of effluent on land from a travelling irrigator and from an underpass pipe, even though the offending did not occur over the entire two-year period. There was no suggestion of any direct discharge to waterbodies, but there was a possibility that the effluent could have entered groundwater. The defendant had been alerted to concerns from the Council about ponding prior to the offending, and the offending was over a lengthy period. The defendant pleaded guilty to five charges, but by sentencing a system upgrade had finally taken place.

[79] I accepted that management failures appeared to be at the heart of the offending, but noted that the system itself was obviously inadequate for the number of cows that were being milked. The director of the defendant in that case had health difficulties that made it harder for him to make decisions to replace the effluent management system in a timely way. As well, the defendant had a very limited understanding of the permitted activity rules.

[80] The offending was described as moderately serious of its type, and I determined that the failure to immediately remediate the difficulties between the Council's inspections displayed a real want of care.

[81] I adopted a starting point of $55,000 and noted as follows:

> [49] I take into account that the inadequacy of the effluent management system (albeit obvious, did not (fortunately for the defendant)) impact to a significant degree on the offending. I accept that it was the management of the system in this case that was the problem. Had the offending revealed a

[36] At [22]

> more direct link to the inadequacies of the system, I would have had no hesitation in adopting a starting point of $80,000.

[82] The offending in *Rymanda Farms* is similar to this case to the extent that the offending was, in the main, attributable to failures to manage the effluent system properly. It is, however, distinguishable because there were no discharges directly to waterbodies, and the director's health issues were a key contributor to his ability to keep on top of managing the farm.

Waikato Regional Council v GT & AB Limited and Troughton (2017)

[83] The corporate defendant in this case pleaded guilty to one charge of discharging effluent onto land between 14 and 29 December 2015. The defendant's farm had an inadequate effluent system in which there were no contingency measures to manage effluent in the event of any failure of the pump or irrigator. The Council officers had previously warned the sharemilker about the small capacity of the effluent sump and the high risk this presented. Three years later effluent had overflowed from the sump and ran 130m into a farm drain. There was no evidence that the effluent reached the Piako River, some 746m away from the drain.

[84] The Court noted a number of systemic problems, and observed that the defendant ought to have increased the capacity for effluent storage. A starting point of $55,000 was adopted for the corporate defendant, with the Court holding that the offending by the defendant company was less serious than in *Dibley*.

[85] This case is distinguishable from the case before me because it involves only one charge, and the effluent entered a farm drain rather than a tributary of the Piako River.

Waslander v Southland Regional Council (High Court) (2017)

[86] The appellant was sentenced on three charges of unlawfully discharging contaminants, two of which involved effluent, on 4 August 2016. Effluent had ponded on the ground within 20m of a tributary of Duck Creek, and had it remained unchecked compliance officers considered it would have eventually entered the waterway although this had not happened. One charge related to the unlawful discharge of silage

leachate, a second discharge was from a split pipe linking the silage facility to the effluent pond on the property, and the third discharge was effluent derived from the cleaning out of a calf shed and stormwater from a pipe connected to a sump on the dairy shed tanker pad.

[87] Judge Dwyer had adopted a global starting point of $80,000 for a fine.

[88] The High Court upheld Judge Dwyer's categorisation of the offending as being in the upper level of Level 2 in *Chick*, namely being of a moderately serious nature. Mander J accepted that the offending involved a degree of carelessness, marked by a continuation of an entrenched pattern of breaches. Whilst observing that the apparent immediate environmental effect was minimal, he noted: "… discharges that have entered either a watercourse or have the potential to enter groundwater must be viewed seriously."[37] I note that this comment is then followed by reference to the toxicity of the silage leachate discharge, which is not a feature of this offending.

[89] The overall starting point adopted of $80,000 was considered to be within the appropriate range. The High Court noted "…minimal benefit is gained by comparison with other cases which inevitably will have their own particular facts and points of difference", however the High Court reduced the starting point for the fine to $72,000 to reflect the defendant's personal difficulties at the time of the offending, the extent of which had not been before Judge Dwyer.[38]

[90] This case is distinguishable as it did not involve a corporate defendant or discharges to a waterbody.

Analysis of comparable cases

[91] Counsel for the defendant submitted that the offending in this case was less culpable than that in *Rymanda Farms*, for which a starting point of $55,000 was adopted. Counsel's submission was that a $50,000 starting point was appropriate. Contrasting this case with *Rymanda*, counsel submitted that *Rymanda* concerned offending over a two-year period rather than an isolated incident in this case, with no

[37] At [45]
[38] At [50]

history of prior non-compliance. Further, counsel highlighted that, in *Rymanda*, the farmer was managing effluent from 800 cows via a sump of 8.1m^3 irrigated over 40ha, which he contrasted with the defendant's storage in this case of 4,200m^3 irrigated over 140ha, plus the use of a 12,000 litre slurry tanker to apply effluent to paddocks outside the effluent block while winter milking 700 cows.

[92] Counsel for the prosecutor, rather than relying on specific comparable cases, submitted that a starting point in the vicinity of $65,000 for the 22 June 2017 offending was appropriate, accepting that the offending was negligent as opposed to a deliberate discharge of effluent. Counsel submitted that this part of the offending shares clear similarities with that in *Dibley*, but should be higher to reflect the fact that this is a corporate defendant. The subsequent offending, recognising that it occurred after the issue of the Abatement Notice and recognising the charge for that, should attract, counsel submitted, an uplift of $20,000.

[93] I agree with counsel for the defendant that there are aspects of *Rymanda* that apply in this case, however *Rymanda* did not involve any direct discharge to a waterbody, neither did it involve the breach of an Abatement Notice. I also agree that *Dibley* is similar, but again there is no breach of an Abatement Notice in that case and evidence of some effluent reaching a roadside drain. *Dibley* is also a case involving an individual not a corporate defendant and was decided some years ago now. *Carpenter* is also helpful, because one of the charges reflected the fact that effluent had entered surface water and there was a charge of breaching an Abatement Notice, however it involved an individual rather than a corporate defendant. *Waslander* is helpful because it is the most recent High Court authority on sentencing levels (albeit for an individual) and the case involved a charge of breaching an Abatement Notice, but the comparable charges (I have excluded the silage leachate discharge from this) did not involve the effluent discharge entering any waterbody.

[94] Based on the cases, but bearing in mind Mander J's observation that if a sentence is within range little benefit is gained by comparison with other cases, I consider the starting point suggested by counsel for the defendant to be too low and counsel for the prosecutor's suggested starting point to be within range.

Other factors

[95] There is nothing to suggest that the defendant profited from the discharges or that specific deterrence is required in this case.

Setting the starting point

[96] Taking into account all of the above matters, I consider the offending is moderately serious and is most properly addressed as falling within the upper part of Level 2 of *Chick*. In relation to the 23 June offending, I do not agree that there were deferred maintenance issues in relation to the pond; rather, the gravity of this offending rests more on the management of the effluent storage system given the large herd that was being milked, the proximity of the storage ponds to the tributary, and the position of the tributary in relation to the farm in general. It is hard to understand why staff had not been told to regularly check the effluent pond level, given that the defendant had access to the slurry wagon to use as an additional storage facility. More particularly, it is hard to understand why such a direction was not given after the heavy rainfall event. In relation to the offending on 7 July, this occurred after the Abatement Notice had been issued (even if it was of a different type), and it involved the negligent behaviour of an employee.

[97] There is a need for this sentence to reflect the sentencing purposes of denunciation and general deterrence, particularly bearing in mind the efforts the Council and dairy industry have gone to to alert farmers to effluent management issues over the years. I refer to my observation in *Brownsville Farms* outlined above in [73].

[98] The approach taken by Judge Dwyer in *Carpenter* is, in my view, the most transparent way to deal with charges that involve the breach of an Abatement Notice. I agree that a starting point of $65,000 for the 23 June offending is appropriate. I adopt an uplift of $20,000 to the overall starting point to recognise the 7 July discharge and the breach of the Abatement Notice. In my view, the uplift could well have been higher.

[99] I adopt an overall starting point for the fine of $85,000.

Mitigation

[100] The defendant has no previous convictions and is entitled to a five percent discount to reflect this.

[101] Then there is the question of whether there should be an additional discount to reflect the defendant's cooperation with the Council, its remorse for what has happened, and the extensive improvements it has undertaken in relation to what counsel for the defendant submitted was a compliant system. An overall discount of 10 percent from the starting point (including the discount for previous good character) was suggested as appropriate. It was submitted that this is in line with *Waikato Regional Council v GT & AB Limited*.

[102] I agree that the defendant's response to the Council's involvement was exemplary, and I accept that the work it has done to prevent problems with storage capacity occurring in the future and/or with the management of the irrigators have been impressive. This is not, in my view, a case where the effluent storage was completely inadequate, although there is force to the prosecutor's submission that the intensification of the farm meant that it was likely additional storage capacity would be needed. Even if it was not absolutely necessary for the storage capacity to have been increased at the time of the increase in the herd, this would have been a wise thing to do, given that otherwise very close management of the system was required because of the proximity of the effluent storage ponds to the tributary.

[103] In my view, the fair response is to allow some discount for these matters, given that the defendant's response is not typical, and because, in my view, even though the defendant is vicariously liable for the negligent actions of its employee in relation to the travelling irrigator, there is only so far an employer can go to prevent an employee's thoughtless actions. On the facts of this case, I allow an additional discount of five percent.

[104] The guilty plea was one that was entered at the earliest opportunity. A 25 percent discount is appropriate.

Result

[105] After the deductions for mitigating matters, the end result is a fine of $57,375.00. This will be divided as follows:

(a) CRN ending -255, the defendant will be convicted and fined the sum of $25,000;

(b) CRN ending -254, the defendant will be convicted and fined the sum of $20,000;

(c) CRN ending -256, the defendant will be convicted and fined the sum of $12,375.00.

[106] Ninety percent of the fines will be paid to the Council in accordance with s 342 of the RMA.

M Harland
District Court Judge and Environment Judge