IN THE DISTRICT COURT
AT MORRINSVILLE

I TE KŌTI-Ā-ROHE
KI MORENAWHIRA

CRI-2019-039-000401
[2020] NZDC 7135

WAIKATO REGIONAL COUNCIL
Prosecutor

v

MATAMATA-PIAKO DISTRICT COUNCIL
Defendant

Hearing:	26 February 2020 at Hamilton District Court 27 & 28 February 2020 – Supplementary memoranda from Council
Appearances:	JM O'Sullivan for the prosecutor DJ Neutze and Ms Hawthorne for the defendant
Judgment:	13 May 2020

RESERVED SENTENCING DECISION OF JUDGE HARLAND

Introduction

[1] The defendant has pleaded guilty to a representative charge of permitting the discharge of wastewater containing untreated human sewage from a broken wastewater pipe and an overflowing wastewater network access manhole onto land in circumstances where it may have and in fact some of it did enter an unnamed tributary of the Piako River. Such a discharge is contrary to the provisions of s 15(1)(b) and 338(1)(a) of the Resource Management Act 1991 (**RMA**). The maximum penalty for this offence is a fine not exceeding $600,000.

[2] The issue on sentencing was what the starting point for the fine should be, with the prosecutor submitting it ought to be in the region of $90,000 and the defendant submitting that it ought to be $20,000.

Background

[3] The defendant, Matamata-Piako District Council (**the District Council**), is a territorial authority pursuant to the Local Government Act 2002. It has municipal responsibilities for a district-wide population of approximately 35,000 residents within a district boundary comprising about 182,000 hectares.

[4] The Local Government Act 2002 (**LGA**) sets out the responsibilities of territorial authorities. Pursuant to s 10 of the LGA, the District Council is obliged to provide and maintain efficient and effective infrastructure to meet the current and future demands of its community. Part 7 of the LGA is entitled "Specific obligations and restrictions on local authorities and other persons". Sections 125 and 126 are included in Part 7. Under s 125 a local authority is required from time to time to assess the provisions within its district of water and other sanitary services. The purpose of such an assessment is set out in s 126. It is to assess from a public health perspective, the adequacy of the water and sanitary services available to communities within its district in light of (among other things) the actual and potential consequences of stormwater and sewage discharges within the district.[1]

[5] Kaimai Valley Services (**KVS**) is the operational department of the District Council, whose responsibilities incorporate wastewater reticulation services, maintenance and repairs. KVS operates from a depot situated in Waihou, approximately 16 km north east of Morrinsville. A manager is appointed to oversee the functions of KVS, with hierarchal oversight being provided by the District Council's Group Manager of Service Delivery.

[1] Section 126(e).

The Morrinsville wastewater network

[6] Wastewater comprises liquid waste which can include a wide range of potential contaminants of varying concentrations. Sewage is a subset of wastewater that is contaminated with human urine or faeces.

[7] All the wastewater from Morrinsville township, as well as local factory trade-waste that is subject to the wastewater reticulation network, is ultimately pumped to a Wastewater Treatment Plant located on Roach Road, Morrinsville. This treatment plant receives, on average, about 5,000 cubic metres of untreated wastewater each day. A network of pipes and pumping stations in combination with trunk mains facilitates the operation of this network.

[8] The part of the wastewater network I am concerned with is the pipeline located at 6 Seales Road, Morrinsville. This property is a rural block of approximately 26 hectares that operates as a run-off support block. It is leased from the owner and managed by a local farmer. The property is bordered to both the south and west by residential properties.

[9] The Piako River flows along the eastern boundary of the property and there are two tributary streams which flow through it and into the river. The southern-most tributary situated within a tree lined gully system is the area where the wastewater discharge occurred. The Piako River is approximately 250 metres away from the discharge point.

[10] The Morrinsville Wastewater Treatment Plant is located approximately 1.2 kilometres to the south-east of the property.

[11] About 490 metres of a trunk main pipeline for the Morrinsville wastewater network passes through the property. Part of it spans the gully where it is supported by a series of five concrete columns that have a maximum height above the ground of about 6 metres. There are five manhole accesses to the pipeline within the boundaries of the property.

[12] The wastewater catchment upstream of the discharge point comprises 499 property connections within a 92-hectare area, being the northern quarter of the Morrinsville township.

The offending

[13] At approximately 4 pm on 21 December 2018, a tree was observed to have fallen across the suspended Trunk Main wastewater pipeline, fracturing the pipe. This incident was notified to the District Council as a potentially broken stormwater pipeline, which was not observed to be discharging. This information was re-directed to the Works Supervisor of KVS, who was at that stage in an after-hours capacity at his home address.

[14] The Works Manager examined the Council's mapping system and concluded that the fractured pipeline was most likely a wastewater mainline and made arrangements to attend the incident.

[15] The Works Manager gained access to the location of the reported incident via a residential address to the south of the gully. He discovered that a section of the 300mm diameter suspended wastewater pipeline was irreparably damaged and untreated wastewater was discharging into the gully system at a rate of about a third of the pipes internal capacity.

[16] The incident was escalated, and additional District Council staff and contractors were called in to assist with repairs to the damaged section of pipe. An independent contractor retained on a long-standing basis by the District Council with reticulation expertise was one of the people called in to assist. He attended with staff and machinery. The machinery he brought to the property included a vacuum truck with a capacity to hold approximately 10,000 litres of wastewater. Componentry and equipment including a section of temporary replacement piping and a long reach excavator were also delivered to the site. The focus of those present at this point was to try to repair the pipeline.

[17] By 8 pm, the Water & Wastewater Manager for the District Council had joined the KVS Works Manager on the site. After discussing matters between themselves,

the managers decided to postpone repairing the damaged pipe until the next day. They were concerned about the diminishing daylight and the height of the repair site and the implications this would have from a health and safety perspective for staff if they continued working at the site.

[18] The sun set at 8.39 pm on 21 December 2018, some four and a half hours after the District Council had been notified of the breach.

Circumstances of offending from the fractured pipeline

[19] The decision to postpone the repair works and stand all staff down for the night resulted in an unabated discharge of untreated wastewater into the environment overnight.

[20] The reticulation contractor who had been present was not consulted about the practicalities of evacuating the wastewater content of the wastewater mainline upstream of the discharge point by using the vacuum trucks; instead the managers on site concluded that this option was not likely to be successful.

[21] At approximately 6 am on the morning of 22 December 2018, staff arrived back at the site and began the preparation work necessary to begin repairing the pipeline. The discharge from the open pipeline continued until about 8 am, while these preparations were being undertaken.

Circumstances of offending from blocked pipeline at manhole

[22] At about 8 am, just before the physical repair of the discharging wastewater pipeline began, a decision was made by District Council staff to block the pipeline at the manhole access immediately upstream of the fracture so that replacement piping could be installed. This resulted in the wastewater line filling to capacity, which ultimately resulted in another overflow, this time at the manhole. The excess volume of wastewater from the manhole discharged overland down the gully bank and into the same tributary watercourse of the Piako River as the pipeline discharge.

[23] The District Council has estimated that the capacity of the upstream wastewater pipeline above the blocked manhole provided for a time frame of up to two and a half hours during which it is likely that the wastewater was contained before the second discharge occurred.

[24] At approximately 11 am the temporary repairs to the fractured pipeline had been completed and the blockage was removed from the wastewater main line.

Investigation

[25] An investigation into the wastewater discharge was undertaken by Waikato Regional Council. The following information emerged:

- The District Council took responsibility for the decisions relating to the repairs.
- Manhole access to the wastewater main trunk line was accessible on the roadside verge at 6 Seales Road, approximately 450 metres of pipeline up from the point of the fracture.
- The reticulation contractor confirmed that the two vacuum trucks that were available for the entire period of the discharge incident could have evacuated the wastewater mainline at a point upstream of the pipeline discharge and subsequently deposited it into another section of the wastewater network, ostensibly eliminating the discharge of wastewater into the environment.
- One of the key District Council decision-makers involved in the incident said that the known residual contamination levels within the Piako River had a bearing on the matters he considered when deciding what action should be taken to minimise the environmental effects of the pipeline discharge. He was, however, not aware of the existence of the tributary at the time of the incident and believed at that time that, while some wastewater could ultimately enter the Piako River some 250 metres away, he considered it would not have a significant environmental effect on it. In reaching this view he took into account the estimated likely

volume of the wastewater being discharged and the known residual contamination levels in the Piako River.

- One of the managers said he thought that the contour of the land would help contain some of the wastewater. During the first interview he said:

> …some of us, some people on site thought that, that stream didn't actually go to the river it some of the stuff would just sit there and then go into the ground which is not the correct assumption.

- In the second interview he said:

> We weren't sure that we would be able to flow stem the tide, and by the time we decided to call the, call the operation off, we, we abandoned the idea because we thought that this would be contained in here. We didn't know that it was going out to the river.

- When interviewed, the Water & Wastewater Managers & Works Manager, who had respectively been in those positions for a minimum of 15 months, expressed a lack of personal knowledge about any defined protocols for them to follow in relation to this type of incident, and acknowledged a level of uncertainty about who had control of such an event.

[26] As part of the investigation, Waikato Regional Council (**WRC**) was provided with a copy of the District Council's Standard Operating Procedure (**SOP**) entitled "Responding to a Sewer Spill". In respect of an outside spill, the SOP outlined that where there is any ponding, the corrective action to take is to dig a hole in the deepest area and pump the discharge to a manhole or remove it with a sucker truck."[2]

[27] Expert reports were commissioned by the District Council and furnished to WRC. These reports concluded that an average of approximately 13m^3 of wastewater per hour would have been generated by residents upstream of the discharge, however that volume should be adjusted to reflect that less wastewater is discharged by households overnight.

[2] A copy of the SOP was attached to counsel for the defendant's submissions as Tab 2.

[28] Using the District Council's estimated volumes over a total of 12 hours, being from 8.30 pm through to 8 am the following morning and recommencing for 30 minutes from 10.30 am until 11 am, approximately 203,600 litres (203.6m³) of combined untreated wastewater and stormwater/groundwater infiltration was discharged onto land in circumstances where it may have entered water. Of this combined volume, the untreated wastewater component was likely to be about 100,000 litres (100m³).

Environmental effects

[29] The defendant arranged for environmental testing to be undertaken on several dates between 22 December 2018 and 28 January 2019. Samples were taken from the Piako River upstream and downstream of the tributary, as well as within the tributary both upstream and downstream of the discharge point. The *E. coli* results revealed elevated levels downstream throughout the tributary.

[30] The samples of the ponded liquid in the area of the discharge point of the fractured pipe collected by WRC were assessed by Dr Ryan, a senior water quality scientist. These revealed a high degree of sewage contamination. Dr Ryan further noted that *E. coli* bacteria are known to survive for days and even weeks and can settle in stream sediments and then be re-suspended into the water column during periods of heavy rain.

Explanation

[31] The District Council has acknowledged the discharge event and accepted full responsibility for the decisions made by its staff in respect of the incident.

Previous history

[32] The defendant has one previous relevant conviction. In 2003, it was convicted of contravening s 15(1)(b) of the RMA by discharging untreated wastewater to land where it may have entered water. Unfortunately, the sentencing notes relating to this conviction are not publicly available.

Starting point

[33] The purposes and principles of sentencing generally, in this field, are well known. There is a need to hold the defendant accountable for the harm done to the environment (and therefore the community), the need to denounce offending of this type, and a need for the sentence to reflect the purposes of both specific and general deterrence. The relevant principles engaged in this case relate to the need for the Court to take into account the gravity of the offending, the degree of culpability of the defendant for it, the seriousness of it as indicated by the maximum penalty, the general desirability of consistency in sentencing levels and the effect of the offending on the community.

[34] Ms O'Sullivan referred to factors to which the court should have regard that are commonly identified as being relevant to offending against the RMA. These were set out in the High Court decision of *Thurston v Manawatu Whanganui Regional Council*[3] and include assessing the offender's culpability for the offending, any infrastructural or other precautions taken to prevent or otherwise avoid unauthorised discharges, the sensitivity, vulnerability or ecological importance of the receiving environment and the extent of any damage to it, the principle of deterrence and the capacity of the defendant to pay a fine.

The defendant's culpability for the offending

[35] Ms O'Sullivan invited me to characterise the defendant's culpability for the offending as high in respect of both discharges, whereas Mr Neutze submitted that it should be characterised as low.

[36] In support of her argument, Ms O'Sullivan contended that:

- The defendant's decision to suspend the repair of the wastewater pipeline meant that the discharge continued overnight. She submitted that this decision was made primarily for health and safety reasons rather than for environmental reasons, which should equally have formed part of the decision-making process.

[3] HC, Palmerston North, CRI-2009-454-25, 27/8/2010, Miller J at [41].

- The defendant would have been aware of the inevitability of the continued discharge from the wastewater pipeline overnight, but failed to take steps to mitigate it – for example by vacuuming the discharge that occurred.

- The defendant erroneously considered that measures to "over-pump" the sewage from a point upstream of the breach to a point downstream of the breach were unfeasible.

- On 22 December 2018, the steps taken by the defendant to repair the wastewater pipeline involved creating a blockage in the pipeline, leading to the second discharge.

- Although the defendant did consider that further discharges might occur because the wastewater pipeline was blocked to repair it, the defendant did not consider that this would have a detrimental impact on the Piako River, because it was thought to already be degraded.

[37] Ms O'Sullivan's submissions about the defendant's culpability in relation to the first discharge highlighted: the managers' failure to act quickly enough prior to the hours of darkness as:

- there was a four-and-a-half-hour period from the time the Council was notified about the discharge and the time when the decision was made to abandon the repair efforts for the evening;

- the managers failed to ask the reticulation expert about possible solutions, which if this had occurred would have included advice about the sucker/vacuum truck option;

- she invited me to infer from the interview with one manager that a factor in their decision-making was that the Piako River was polluted anyway, more pollution in this area would not make much difference;

- neither manager was aware of the existence of the tributary, despite the topography clearly indicating the existence of the gully, such a formation typically revealing the existence of a waterbody, albeit at times small, at its base.

[38] Ms O'Sullivan submitted that the second discharge (from the blockage of the manhole) was avoidable. She submitted that no other options were considered by the managers, but in fact other manholes could have been used, thereby avoiding the discharge entirely.

[39] Mr Neutze accepted that the managers could have done better to exhaust further lines of enquiry about options to stem the discharge overnight; the reticulation contractor being a primary but possibly not the only source of knowledge about what options might have been available. He however highlighted that the decision to postpone the works and to focus on the pipe repair itself to abate the discharge was made in the heat of the moment, under pressure, and in good faith.

[40] Mr Neutze highlighted the following:

(a) neither of the two managers involved in the decision-making were expressly aware of the existence of the tributary at the base of the gully at the time of making their key decision;

(b) even though each knew that the Piako River was some 250m away:

(i) one assumed that the wastewater would be contained in the gully and that it would be absorbed into the ground;

(ii) the other believed most of the wastewater would be contained in the gully and that any amount that reached the Piako River would be minimal;

(c) the immediately upstream manhole was inaccessible to a vacuum truck. The managers both assumed, incorrectly, that vacuuming from an upstream manhole would not adequately abate the discharge and would not work;

(d) the contractor was a person who had been retained by the District Council over many years, who had specific experience in reticulation and a team of people to assist him, including a vacuum truck operator. While he was not consulted specifically about the options that could be used to abate the discharge overnight, neither did he offer any solutions despite knowing, according to his interview after the incident, that tandem pumping from another upstream manhole overnight could have stopped the discharge.

[41] Mr Neutze submitted that the defendant's culpability for the offending should be characterised as low, because it failed to appreciate a step that was available to it, namely to pump from the north manhole that evening and to use the vacuum trucks. He submitted this was not a case where the defendant was told it could do something and did not do what it had been told to do, rather this was a case where the defendant did not appreciate an option available to it at the time. Mr Neutze submitted that this situation was somewhat novel and amounted to a failure to do enough in the circumstances by asking whether there were alternative options.

[42] He also submitted that the decision to call off works at 8.30 pm was done for a good reason, and even though health and safety reasons were not a complete answer, they were valid considerations, particularly given that the next day a period of six-eight hours was required to get machinery into the gully area through private property and erect scaffolding, given that at the maximum height the pipe was up to 6m from the gully floor.

Finding on culpability

[43] The pipe was fractured because a tree fell on it. For the purposes of this sentencing I accept this risk was not something that was anticipated by the defendant. Counsel agree that the defendant's culpability for the first discharge arises from the decisions made over the four-and-a-half-hour period from the time a representative of the District Council was able to get onto the site and the time when the decision was made to abandon the repair work for the evening. This is the basis upon which I assess the defendant's culpability for the pipeline discharge.

[44] It is always easy to be wise with hindsight. The managers cannot be criticised for taking into account health and safety considerations in their decision to abandon the repair work as it got dark, however it does seem surprising they did not seek the advice of the reticulation expert or include him in the decision-making process. Had that occurred, meaningful discussions could have been had about using the sucker/vacuum trucks to deal with the discharge.

[45] To a lesser degree, but also important in the context of the defendant's management responsibilities, it is surprising that neither manager was aware that the tributary existed at the foot of the gully and flowed into the Piako River, and neither appears to have known of the existence of the SOP.

[46] Although Ms O'Sullivan submitted that the defendant's decision-making did not focus on environmental effects, I do not think this is the same as saying that no consideration at all was given to environmental effects. The reality of the situation was that this was close to Christmas (I was told the last work day before Christmas Day) and the real difficulty was that nobody seems to have known that there was a tributary in the gully that led to the Piako River. Because they did not know this, and even though such a response is not to be encouraged, I can accept that at the time the managers did not consider that there was much risk that the discharge would enter the Piako River. It is, however, unfortunate that one of them mentioned the fact that the Piako River was polluted anyway, because that seems to indicate a lack of understanding that further pollution would not be a desirable thing.

[47] As I explain later, in my view managers of wastewater pipelines ought to be familiar with the parts of the wastewater pipeline they manage that might be subject to risk. Had the managers been aware that this pipeline traversed a treed gully over a tributary of the Piako River, arguably they may have assessed the potential environmental effects of the discharge continuing overnight in a more robust way. However, this is all speculative in the sense that at the time I accept they did not know of the existence of the tributary.

[48] The managers ought to have consulted the reticulation expert present about their proposed plans, as part of responsible management is to seek the best advice

available in the circumstances. In these circumstances the reticulation expert was present with equipment that if used, would have solved the problem. It was not the reticulation expert's responsibility to offer solutions, as he was not in charge of the site, and there appears to have been confusion so far as the managers on site were concerned about who should be in charge of the situation. The failure to consult the reticulation expert earlier or at all about possible solutions is indicative in my view of this confusion.

[49] In my view, given the fact that the managers on the site had only been in their roles for a relatively short time, the fact that they did not know about the SOP and that they were confused about who should be in charge of the site in a situation such as this, reveals a failure of more senior management to ensure that these managers were properly trained and aware of what to do in such an emergency. This arises because of the District Council's overall responsibility under ss 125 and 126 of the Local Government Act 2002 (referred to above) to assess the actual and potential consequences of sewage discharges within the district. Part of such an assessment in my view requires those with management responsibilities on the ground, to be trained to know what to do in such circumstances. At a fundamental level this would include knowing the chain of command i.e. who will take charge of an emergency such as this, who they should consult and what options might be available to resolve it. In this case, the existing SOP included a flow chart which outlined that if a large pond of sewage was discovered, a hole should be dug in the deepest area and the sewage pumped to a manhole or removed with a sucker truck, but as the managers on the ground did not know of its existence, it was worthless on the day.

[50] Mr Neutze submitted that the SOP did not really cover this kind of situation. I do not agree. The SOP provided a broad overview of what should be done to contain a spill where a large pond of sewage was discovered, but even if there was not a large pond given the slope of the gully and given the volume of sewage involved, what the SOP suggested could have been adapted to meet the circumstances the managers faced. I accept that the managers complied with other aspects of the SOP despite not knowing of its existence and that they advised the Council of the spill as soon as practicable.

[51] It will be clear from what I have outlined that, in my view, it is not enough to say this was an emergency that was managed at the time in the best possible way. Had proper training been provided the outcome could well have been very different. I observe that it would not be difficult for an SOP flow chart such as this to be readily accessible from a mobile phone.

[52] Despite Mr Neutze's carefully crafted and persuasive advocacy on behalf of the defendant, because of what I have outlined above, I do not agree that the defendant's culpability for the first discharge was low. There is force, given the statutory responsibilities the defendant has, to counsel for the prosecutor's submission that its culpability for the offending is high. In this case I fall short of making that finding by assessing the defendant's culpability for the first discharge as moderate largely because the focus of many of the cases is on maintenance or upgrade failures and this is not such a case.

[53] In relation to the second discharge, I agree with Ms O'Sullivan that it was avoidable. It is hard to understand why the managers did not consider using the other manholes, as if this had occurred, the discharge would have been avoided. I assess the defendant's culpability for this offending to be moderately high.

[54] Stepping back, and considering all the above matters, I assess the defendant's culpability for the offending as somewhere between moderate and moderately high.

The effects of the offending on the environment

[55] It is agreed that about 203,600l (203.6m^3) of wastewater and groundwater inflows/infiltration, of which the wastewater component was about 100m^3, was discharged onto the sides of the gully during a 12-hour period. Accordingly, about half of the discharge was untreated wastewater.

Pattle Delamore report

[56] A recent report by Pattle Delamore Partners Ltd (**Pattle Delamore**) dated 18 February 2020 was provided to me during sentencing. The report, a technical memorandum, comments on the following:

(a) an explanation of the flows/volumes relating to the discharge of sewage during the pipe break, with reference to the Agreed Summary of Facts; and

(b) assessment of the likely effect of *E. coli* on the Piako River and following the discharge of sewage.

[57] The technical memorandum highlights an important point, which is that almost all the discharge occurred during the evening/night hours. This meant that, fortuitously, the discharge was not as great as it could have been had it occurred during the day.

[58] While the observation can be made that the discharge would have been worse had it occurred during the day, more relevant to this sentencing is the effect a discharge of this volume would have had on the waterbodies concerned (the tributary and the Piako River), and how a discharge of this volume might relate to the facts of other cases cited to me as comparisons to assist me to set the starting point for the fine.

[59] In terms of actual effects on the environment, the Agreed Summary of Facts refers to the environmental sampling undertaken of both the Piako River upstream and downstream of the tributary, as well as within the tributary both upstream and downstream of the discharge point on several dates between 22 December 2018 and 28 January 2019.[4] As the Agreed Summary of Facts records: "… the *E. coli* results revealed elevated levels downstream throughout".

[60] The Agreed Summary of Facts also attached an assessment undertaken by Dr Ryan, the Council's senior water quality scientist. Unsurprisingly, the sampling of the ponded liquid around the discharge point of the fractured pipe revealed a high degree of sewage contamination. Furthermore, the Agreed Summary of Facts records Dr Ryan's observation that: "*E. coli* bacteria are known to survive for a time frame of days to weeks, that *E. coli* can settle in stream sediments and can be re-suspended into a water column during heavy rain."[5] In terms of the effects on the environment, the

[4] Paragraph [48].
[5] Paragraph [49].

main focus of counsels' submissions was on what impact the discharge would have had on the Piako River, which as outlined above is classified as a significant indigenous fisheries and fish habitat.

[61] Ms O'Sullivan's point was that while it is impossible to assess the actual impact, undoubtedly there would have been an impact on the tributary and some impact also on the Piako River.

[62] Mr Neutze's submission was more focussed on the observations in the Pattle Delamore report that the downstream and upstream sampling results[6] reveal other sources of *E. coli* contamination, both in the tributary and the river. Mr Neutze highlighted from the aerial map the existence of dairy farms alongside the part of the river impacted by the discharge. Despite this submission, Mr Neutze highlighted that the defendant accepts that some volume of wastewater reached the Piako River and that this resulted in elevated levels of *E. coli* for a short period of time.

[63] I agree that there is no evidence of long-term damage to the Piako River, and it was common ground that it is fast flowing, however the actual offence to which the defendant has pleaded guilty, reflects that it is not only actual damage to the environment that is covered by the charge, but the potential for such discharges to directly impact water and/or groundwater.

[64] Considering the volume of wastewater discharged from the pipe and the fact that 100m^3 of it would have been untreated and that it discharged for a 12-hour period, in relation to the first discharge I assess the immediate effects on the environment to be moderately serious. This is because there was an actual discharge to the tributary. Although the charge does not specifically outline as a particular the potential for groundwater to be contaminated, such an effect is contemplated by the nature of the charge itself. I do not place any significant weight on this in this case as it was not relied on by the prosecution, however it is regularly referred to in dairy effluent cases where the court has taken a sterner approach to that possibility.

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[6] Page 7, Table B1 and also page 3 "Preliminary assessment of microbial contaminant discharges to Piako River".

[65] In relation to the second discharge, it was more short-lived and lesser in quantity. There is little in the Summary of Facts to assist me to determine the effect on the environment because of this offending.

Sentencing levels in similar cases

[66] To support her submission that a fine in the vicinity of $90,000 was warranted, Ms O'Sullivan referred me to the following cases: *Waikato Regional Council v Waikato District Council*,[7] *Waikato Regional Council v Hamilton City Council*,[8] *Wellington Regional Council v Porirua City Council*,[9] *Wellington Regional Council v Wellington Water Limited*,[10] *Otago Regional Council v Clutha District Council*,[11] *Queenstown Regional Council v Queenstown-Lakes District Council*,[12] *Manawatu-Whanganui Regional Council v Whanganui District Council*,[13] *Otago Regional Council v Queenstown-Lakes District Council*[14] and *Southland Regional Council v Invercargill City Council*.[15]

[67] Because cases that involve territorial authorities as defendants appear to be increasing, it is useful to set the above cases out in tabular form. A summary of the facts, relevant factors and the starting point indicated are included in the table.

Case	Facts	Relevant factors	Starting point
Northland Regional Council v Whangarei District Council DC Whangarei CRN 06088500911, 19 November 2007	A pumping station at Kioreora Rd failed and untreated sewage (about 90 cubic metres) flowed into the stormwater system and into Whangarei Harbour. In attempting to resolve this issue, the defendant shut down the Okara Park pump station, and untreated sewage (about 4,000 cubic metres) was discharged from the Okara pump station into Hatea River and then into Whangarei Harbour.	The charge in relation to the Okara Pump station was withdrawn. The Judge however considered that the matrix of facts included the second larger discharge and the correct exercise was to focus on the actual effects that occurred as a result of the problems that gave rise to the effluent discharge. The Judge considered there was a moderate level of carelessness.	Indicated $18,000 - $20,000
Waikato Regional Council v Taupo District Council DC Tokoroa CRI-2009-077-156, 25 March 2010	The defendant discharged sewage waste on 3 September 2008 to a depression in the ground to try to avoid overflow to an emergency storage area at the Mangakino wastewater treatment plant, where it may have	The problems which lead to the first discharge to land were caused by a combination of heavy rainfall and mechanical failure. It was arguable that the steps taken were preferable to allowing any	$10,000 for the 3 September 2008 offending and $30,000 for the

[7] DC Hamilton, CRI-2013-019-6418, 14 July 2014.
[8] CRN 120-195-000240, 7 August 2012.
[9] DC Wellington, CRI-2014-091-769, 12 June 2014.
[10] [2019] NZDC 18588.
[11] [2018] NZDC 16724.
[12] [2017] NZDC 28767.
[13] [2018] NZDC 26705.
[14] [2019] NZDC 832.
[15] [2019] NZDC 17852.

Case	Facts	Relevant factors	Starting point
	overflowed into Lake Maraetai. The defendant also discharged sewage sludge to drying beds. The sludge was then removed by truck. There was sometimes a delay between these two events. There was a risk of contamination of groundwater.	discharge to Lake Maraetai. The defendant failed to promptly remediate the situation once it was able to do so. The second discharge was negligent, in terms of failure of management to respond.	continuing drying beds offence.
Wellington Regional Council v Porirua City Council DC Wellington CRI-2014-091-769, 12 June 2014	An overflow from Porirua's sewage wastewater treatment plant entered storm water drains, discharging partially treated wastewater into the sea near Tirau Bay. The discharge was very substantial in volume, resulting in "a large brown plume in the bay estimated at 100 metres in length and 100 metres in width".	The effects of the discharge were highly noticeable to the public and they were visible in the water. They affected the use of the bay and combined with the very large volume of the effluent discharge took the offending into a serious category. There was a significant degree of carelessness (in the form of a systemic failure to provide for maintenance).	$70,000
Waikato Regional Council v Waikato District Council DC Hamilton CRI-2013-019-6418, 4 July 2014	The pumps at a wastewater treatment plant failed to activate (as the level in the final holding pond had exceeded the upper limit of pump operation), causing partially treated wastewater to overflow from a storage pond into Raglan (Whaingaroa) Harbour over 3 days. An automated alert system malfunctioned and the plant supervisor did not receive alerts the pond was close to overtopping.	The wastewater was relatively far through the treatment process but it was noted "the aspects of social and cultural well-being" infringed upon. The Judge considered that the pumps not operating was one of a number of systemic errors pointing to poor operational and management practices. The defendant's staff failed to alert the Regional Council and the community.	$70,000
Otago Regional Council v Queenstown Lakes District Council [2017] NZDC 28767	An accumulation of fat blocked a sewer pipe, causing untreated wastewater to be diverted into the Kawarau River via the stormwater system. The discharge took place over a period of two days with a total volume of about 43 cubic metres. The Kawarau River is subject to a Water Conservation Order.	As well as the serious cultural and amenity impacts of the discharge Court noted that faecal coliforms were high enough to pose health risks in a nearby swimming hole. Though these effects were "transitory" and "may be regarded as minor in the longer term, they were measurable". The sentencing Judge noted the particular sensitivity of the Kawarau River and that the sewage and stormwater reticulation systems were deliberately engineered to create a risk of discharge.	$50,000
Otago Regional Council v Clutha District Council [2018] NZDC 16724	A sewer pipe was clogged by an accumulation of fat. An engineered overflow allowed wastewater that could not pass through the blocked pipe to divert into the stormwater system, and discharge into the Clutha River. Over about five hours, up to 90 cubic metres of untreated human wastewater was discharged into the River.	The Court assessed the likely impact on water quality as "very minor" but noted significant amenity and cultural implications. The Court observed that this was a "designed discharge". While accepting that such designs are common the Court noted that discharges of contaminants in these circumstances are not allowed by the Act in the absence of a resource consent.	$35,000
Manawatu-Wanganui Regional Council v Whanganui District Council [2018] NZDC 26705	The case involved sewage overflow from a pump station caused by a failure of the electrical supply. The maximum potential volume was 5.5 cubic metres. The pump station's alarm was dependent on electricity	The Court noted that there was a limited time and volume of discharge and a consequently limited environmental effect.	$30,000

Case	Facts	Relevant factors	Starting point
	and did not alert the defendant to the overflow. Sewage flowed from the pump station into a nearby stream.	The Council's "alarm system" relying on residents calling the power company was haphazard. The discharge was careless, as by determining to spread the upgrade of alarm systems over a four year term, the Council had decided to run the risk of an event like this.	
Otago Regional Council v Queenstown Lakes District Council [2019] NZDC 832	A blockage in a sewer pipeline caused a manhole to overflow, and human sewage discharged into Lake Wakatipu. The discharge of 912 litres was small in volumetric terms. The cause of the blockage was unknown. The clean-up was completed within a few hours.	No particular failure or carelessness on the part of QLDC was identified or suggested. The Judge found that the fact that this particular discharge was into Lake Wakatipu added a significant aggravating element.	$30,000
Waikato Regional Council v Hamilton City Council [2019] NZDC 16254	The defendant discharged 1,782,000 litres of wastewater over a 19-hour period after two separate monitoring systems at a pumping station failed due to human error.	The defendant's actions were careless and the effect on the environment was moderate, given the high volume of the discharge, its untreated nature, its location and the cultural effects of the discharge.	$80,000
Southland Regional Council v Invercargill City Council [2019] NZDC 17852	Approximately 36 cubic metres of human sewage discharged over a five-day period into the Waihopai River. The discharge was caused by a sewer blockage which caused a subsequent overflow into the stormwater system. The discharge was cleaned up within about 3 hours of discovery. There were very high levels of dilution.	The impact of the contaminants would have been noticeable, but would not have had any significant detrimental effect on flora and fauna and certainly no ongoing effect. The discharge of untreated human effluent to our water bodies is offensive to our communities and should be avoided as a matter of principle, in whatever volumes. The discharges came about as a result of operation of a constructed overflow designed to direct sewage overflow into the stormwater system.	$35,000
Wellington Regional Council v Wellington Water Ltd [2019] NZDC 18588	The offending was a discharge of approximately 5,000 cubic metres of wastewater and activated sludge (approximately 1,000 cubic metres of activated sludge discharged) from Porirua's wastewater treatment plant at an outlet at Rukutane Point, creating a visible plume stretching in excess of 200 metres. The volume of the discharge was substantial.	The offending had a moderate effect on the environment, considering the amenity values of the coastal area and the potential harm for people coming into contact with the discharge. There was "a cascade of failures" by staff which amounted to a very high level of carelessness and the situation where alarms were ignored, not working properly, not being received, or only investigated in a cursory manner, bordered on recklessness.	$90,000

[68] While observing that all these cases are District Court decisions, and therefore not binding on me, Ms O'Sullivan submitted that this case was more serious than the offending in *Otago Regional Council v Clutha District Council* (starting point $35,000), *Queenstown (2017)* (starting point $50,000), *Queenstown (2019)* (starting

point $30,000), *Manawatu-Whanganui Regional Council v Whanganui District Council* (starting point $30,000) and *Southland Regional Council v Invercargill City Council* (starting point $35,000) cases. This is because, she submitted, the current case involves a greater volume of wastewater discharged into the environment.

[69] Furthermore, Ms Sullivan submitted that the present case involved a higher level of culpability than that exhibited in those cases both in relation to the reality of the first discharge, and what she submitted was the inevitability of the second discharge because the defendant failed to take available steps to prevent or mitigate those discharges, and there were also shortcomings that contributed to the defendant's failure to respond appropriately to them.[16] While accepting that the present offending involved two separate discharges that were part of the same overall incident, Ms O'Sullivan submitted that the length of the discharge is aggravating, as is the volume.

[70] In relation to the cases of *Waikato Regional Council v Hamilton City Council* (starting point $80,000), *Wellington Regional Council v Porirua City Council* (starting point $70,000) and *Wellington Regional Council v Wellington Water Limited* (starting point $90,000), where the volume discharged was greater than in the current case, Ms O'Sullivan emphasised the culpability of the defendant, which she submitted was arguably more serious because the discharges were not solely the result of system failures and carelessness, but rather the consequence of the defendant making conscious decisions which permitted the first discharge to continue and allowed the second discharge to occur. She also highlighted that the discharge was of untreated, rather than partially treated sewage, as in the cases of *Wellington Regional Council v Porirua City Council, Waikato Regional Council v Waikato District Council*, and *Southland Regional Council v Invercargill City Council*.

[71] Mr Neutze referred me to three cases to justify his suggested starting point of a fine of $20,000. Those cases were *Waikato Regional Council v Taupo District Council* (starting point of $10,000 and $30,000 for separate offences),[17] *Northland Regional Council v Whangarei District Council* (starting point $18-20,000),[18] and

[16] See paragraph [26], prosecution sentencing submissions.
[17] DC Tokoroa, CRI-2009-0777-156, 25 March 2010.
[18] DC Whangarei, CRN 06088500911, 19 November 2007.

Otago Regional Council v Clutha District Council (starting point $35,000)[19] also referred to by Ms O'Sullivan.

[72] I can deal relatively promptly with the first two cases cited to me by Mr Neutze because they were both situations where the maximum penalty for the fine was half that which is now applicable. The Court is required to consider the maximum penalty as one of the factors relevant in sentencing and has observed on many occasions that the uplift in penalties following amendments to the RMA in 2009 signal a change in Parliament's thinking about environmental offending.

[73] As the above table reveals, this case is not dissimilar in terms of the volume of untreated human wastewater that was discharged into the Clutha River in the *Clutha District Council* case, but the time over which that discharge occurred was less, over approximately 5 hours as opposed to 12 hours. In addition, in this case there were two discharges and my assessment of environmental effects differs from that of the sentencing Judge in the *Clutha District Council* case. In my view it is difficult to compare the environmental effects in both cases because, although the sentencing Judge in that case described the likely impact on water quality as "very minor", he noted that there were significant amenity and cultural effects. There is no suggestion of any adverse effect on amenity in this case, nor were any specific submissions made about cultural effects, however in my view all people will find the discharge of untreated wastewater to either land or water unacceptable. Overall in my view, the above table reveals that the *Clutha District Council* case is an outlier in terms of the starting points adopted for other cases involving the unlawful discharge of wastewater from Council facilities.

[74] The volume of discharge in this case was more than that which occurred in *Queenstown (2017)* (starting point $50,000) but the period over which it occurred was less. The volume of the discharge in *Waikato Regional Council v Hamilton City Council* (starting point $80,000) was more, as was the time over which it occurred. The discharge in *Waikato Regional Council v Waikato District Council* (starting point

[19] DC Dunedin, CRI-2018-012-263, 21 February 2019.

$70,000) was for partially treated wastewater but the length over which it occurred was longer.

[75] My analysis of the cases leads me to conclude that there may well be a case for increasing penalties against territorial authorities for discharges from wastewater plant, be that pipeline or facilities, because of the statutory responsibilities territorial authorities have under ss 125 and 126 of the Local Government Act 2002 to assess the actual and potential consequences of sewage discharges within the district. With an increasing focus nationally on water quality, and the approach the Court has taken in dairy effluent cases where the need for proactive management practices that include the effective training of staff have been highlighted, there may well be a case for the penalties against territorial authorities for offending of this nature to increase. It is probable that Ms O'Sullivan's suggested starting point reflects this, however argument on the point was not developed during this hearing.

[76] The starting point nominated by Ms O'Sullivan would pitch this case at the same level as the starting point that was adopted in *Wellington Water Limited*, which in my view was a more serious case. On the other hand, Mr Neutze's nominated starting point is in my view unrealistic, and although it relates back to the *Clutha District Council* case, was pitched at an even lower level than that.

Setting the starting point

[77] Although I am not bound by previous sentencing decisions of the Court, I accept that consistency is an important principle relevant to setting the starting point. In the absence of specific argument inviting an increase of the starting points for offending of this nature, in my view an appropriate range for the starting point to reflect this offending would be between $60,000 and $75,000.[20]

[78] I adopt a starting point of $70,000. This takes into account the relevant purposes and principles of sentencing, the defendant's culpability for the offending,

[20] See *Waslander v Southland Regional Council* [2017] NZHC 2699 at [50] concerning the range for a fine and the relevance of other cases.

the fact that there were two discharges of untreated wastewater amounting to about 100m ^{3} and the environmental effects as outlined above.

Mitigation

[79] Although the defendant has a previous conviction in 2003 for offending against the RMA, and that conviction was for discharging untreated wastewater to land where it may have entered water, as a copy of that decision is not available, I am therefore unable to ascertain the degree to which it is like the offending in this case. I was urged not to take this into account by counsel for the defendant; rather, that I should give the defendant some credit for good character because, apart from this conviction, it has an otherwise unblemished history of compliance under the RMA.

[80] The prosecutor did not seek an uplift from the starting point to reflect the prior offending, largely because the circumstances of it remain unknown. I agree that there should not be an uplift from the starting point, however I am not persuaded that credit should be given for the defendant's prior good character given the existence of this conviction.

[81] The defendant cooperated fully with the Regional Council during the investigation, including providing sampling results and reporting to it. In addition, it has reviewed and updated its procedures. I was provided with a copy of its amended SOPs in relation to responding to a sewer spill, and a document outlining the improvements it has made since the offending. I agree with Ms O'Sullivan that it would have been preferable for the latter document to have been presented to the court as an affidavit, and it was unfortunate that this list was presented at the hearing. This meant that Ms O'Sullivan had insufficient time to consider its contents in more detail. I agree that the steps taken will assist should there be any further incident of this kind. I am encouraged to see that the defendant considers ongoing training of staff (including managers) to be important.

[82] I was concerned to hear that access to the pipe was over private land, and that there were no legally binding arrangements for access to it with the landowner. Mr Neutze reported that such arrangements have since been negotiated, although there is no easement in place. He also advised that the District Council has engaged

arborists to remove some trees around the pipe bridge and it has also engaged Opus to undertake an inspection and report on the pipe bridge for maintenance purposes.

[83] All these matters, Mr Neutze submitted, justified a 10 percent discount from its starting point.

[84] I am not persuaded that a discount of this magnitude ought to be allowed. There is a powerful argument that these initiatives ought to have been considered and implemented earlier, however some discount is appropriate in my view to reflect cooperation and the fact that the defendant has clearly embraced the need for continual training to deal with emergency situations. I consider a discount of 5 percent is justified.

[85] Then there is the discount for an early guilty plea to the charge. In my view a discount of 25 percent (the maximum) is appropriate. The prosecutor agreed that this was appropriate.

Additional matters

[86] After the sentencing hearing, when this decision was reserved, my attention was drawn to an article published on the *Stuff* website that evening after the hearing, a copy of which appeared in hard copy the following day (27 February 2020). Ms O'Sullivan filed a supplementary prosecution memorandum on 27 February 2020 referring to this article, which reported the mayor making statements including:

(a) "…an incident happened yes but in my mind I couldn't have been any happier with how our staff dealt with it at the time";

(b) in relation to the comment by the prosecution that they should have acted more quickly, that it "just shows the lack of understanding" and "that's quite an ignorant statement"; and

(c) that the proceeding was "wasting court time"; and

(d) criticising the Regional Council for bringing a prosecution. [21]

[21] Paragraph 4.

[87] Ms O'Sullivan rightly noted that these reported statements were inconsistent with the defendant's submission acknowledging responsibility and accepting that it "should have done better" and that "further steps should have been taken".

[88] Ms O'Sullivan submitted that this material was relevant to the court's assessment of the attitude of the defendant, the appropriate discounts to be applied for plea and acceptance of responsibility, and the court's assessment of the need for individual deterrence and risk of reoffending.

[89] Mr Neutze equally promptly filed a memorandum in response[22] on behalf of the defendant. Mr Neutze referred to the fact that the statements made by the mayor to the media were hearsay statements made out of court which, if they are accurate (which he submitted cannot be assumed) reflect the mayor's personally held opinions and are political in nature. Mr Neutze rightly submitted that they are not statements of the defendant Council despite the mayor's status as the elected head of Council. I was invited to disregard these statements as they were not recorded in a Council resolution and did not emanate from any decision-making function of the Council. Mr Neutze advised of his instructions that the mayor had made it clear to reporters that these were his personally held views, that he was not the mayor at the time of the offending although he was an elected member of the defendant.

[90] I accept that the reported views of the mayor are opinions which represent the mayor's personal views and not the views of the defendant, however the usual convention is that when matters are before the Court awaiting determination political comment is not only unwise but should not occur.[23]

[91] I disregard the mayor's statements in the media after the sentencing hearing was adjourned for me to issue my reserved decision. They have not influenced my decision in any way, but they should not have been made given that the prosecution was still sub judice; namely before the Court for determination.

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[22] 28 February 2020.

[23] *R v Fugle* (DC Palmerston North CRI-2007-054-4228, 8 Aril 2009), *The Commerce Commission v Taylor Preston Ltd* (HC Auckland CL 38/96, 20 March 1998) at pp7-11, *Maniototo Environmental Society Inc v Central Otago District Council* (Envc C 103/99) from [684], *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council* (EnvC C 100/2001) at [7]-[11].

Result

[92] The defendant, having been convicted, will be fined the sum of $49,875.00. In accordance with s 342 of the RMA, 90 percent of the fine will be paid to the Waikato Regional Council.

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Judge M Harland
District Court Judge and Environment Judge

Date of authentication: 13/05/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.