IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2019-067-000273
[2020] NZDC 12891

MANAWATU-WANGANUI REGIONAL COUNCIL

v

RANGITIKEI DISTRICT COUNCIL

Hearing: 6 July 2020

Appearances: B Vanderkolk for the Prosecutor
J Maassen for the Defendant

Judgment: 6 July 2020

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] Rangitikei District Council (the District Council) appears for sentence on one charge laid by Manawatu-Wanganui Regional Council (the Regional Council) of breach of s 15(1)(a) Resource Management Act 1991 by discharging a contaminant (human effluent) into water. The charge is contained in charging document ending 0026.

[2] The District Council has pleaded guilty to the charge. No suggestion has been made that it should be discharged without conviction. Section 24A Sentencing Act 2002 is not applicable in this case so there has been no formal restorative justice process. I hereby convict the District Council of the charge against it.

[3] According to the charging document, the offending discharge occurred for a period between 15 April 2019 and 18 December 2019. There is some suggestion there may have been a small ongoing discharge subsequently but I am told that has been remediated. In any event, the dates in the charging document are 15 April 2019 to 18 December 2019.

[4] The source of the discharge was an overflow pipe from a pump station in the District Council sewerage network at Papakai Road in Taihape. The pump station is situated on the bank of the Hautapu River. Its function is to pump effluent in the system to an oxidation pond east of the river. The pump station has an overflow pipe running underground through the Papakai domain for approximately 100 metres to a point where it emerges on the west bank of the river.

[5] On 15 April 2019 a member of the public discovered the pipe sticking out of the bank just above the water level of the river. It was partially blocked, so the member of the public unblocked it and raw sewage came out. This incident was reported to the District Council some weeks later. Discharges from the pipe to the river were subsequently observed (either directly or through a manhole) on about eight occasions up to 16 July. These included observations by members of the public and Regional Council monitoring officers.

[6] On 31 July 2019 the Regional Council served an abatement notice on the District Council, requiring it to cease discharge of human effluent into the Hautapu River by 6 August 2019. Inspections on 5 November and 18 December 2019 detected further discharges occurring, although I understand it to be common ground between both Councils that the offending discharges have now been remedied and ceased.

[7] The environment affected by the offending discharges was the Hautapu River. A Regional Council water scientist's report identified that the reach of the river in the vicinity of the discharge point has the following values;

- Amenity;
- Water supply;
- Trout fishing, trout spawning;
- Hill soft sedimentary.

[8] The report states that the Hautapu River at Papakai is a well-used recreational site in which the local community has invested to encourage people to use. Swim spot water monitoring is undertaken upstream from the discharge point and there is a swim spot zone sign in the vicinity to provide guidance that it is likely suitable for swimming.

[9] In summary, the vicinity of the discharge is an area with recognised values and a high degree of vulnerability because it is used for swimming which the community has encouraged. I was also told that there is a water supply intake somewhere in the river but I am unsure of its position relative to the discharge.

[10] The Regional Council is unable to draw any conclusions as to the actual physical effects of the discharges in this case due to an absence of data on the volume of the discharges or their frequency. As I have observed, somewhere about eight or 10 discharges are identified in the summary of facts which I have read.

[11] The discharges were raw sewage containing a range of pathogens and viruses which present a real risk of severe illness to humans. It is apparent that many of the discharges took place over winter months when it was unlikely that the river would be used for swimming. I was given no evidence of other recreational use such as

kayaking. That does not mitigate the offending in any way but rather constitutes the absence of an aggravating factor.

[12] Putting that aside, the discharge of raw sewage into our waterways is a practice which is repugnant to many (if not all) New Zealanders and was obvious to persons in the vicinity - it could be seen by the public. It is prohibited under the Regional Plan. The discharge will have contributed in some indefinable way to the contaminant load in the river on the occasions it occurred. There was potential harm to persons who came into contact with it for any reason.

[13] Additionally there was specific cultural offence to Māori. I have had regard to the cultural impact report filed by Mōkai Pātea in respect of the two discharge offences which are coming before the Court today. The views of Māori in that regard are to be weighed by me as a matter of national importance pursuant to s 6(e) Resource Management Act.

[14] Accordingly, in terms of effects on the environment, we have:

- The common indefinable, cumulative and generic effect of discharges of an unknown volume of contaminant to the river;

- The contaminant discharged had potential to cause severe illness to people who came into contact with it. There is no evidence that happened in this case but that might have happened. It was a potential effect and the Act seeks to avoid such potential effects;

- Adverse cultural effects;

- What might be regarded as adverse amenity effects on those who observed the discharges and complained about them.

[15] In discussing the question of culpability it is necessary to consider in more detail the actual source of the offending discharge in this case. Before doing that I

make some general observations regarding the matter of discharges of waste from municipal sewerage systems.

[16] Discharges from such systems have been the subject of a number of prosecutions before the Court over recent years. They are not infrequently the source of political acrimony between territorial authorities and the regional authorities which bring prosecutions against them. In this case, the District Council, through an affidavit from its infrastructure advisor (Mr A Benadie), quite properly recognises the function of the Regional Council to ensure compliance with the law.

[17] A frequent feature of prosecutions of this nature is that they arise through engineered discharges from municipal sewerage systems which are intended to convey sewage overflow from those systems and are necessary to avoid blowout in times of heavy flow.

[18] Notwithstanding the sometimes unavoidable aspect of such discharges, they are illegal unless territorial authorities hold necessary resource consents. Frequently, they do not. In many cases they cannot obtain such permits as discharges of untreated effluent are not uncommonly prohibited by regional plans (and I understand that is the case here).

[19] The bottom line is that in the absence of holding necessary resource consents, territorial authorities have no more right to discharge contaminants into our waterways than anyone else and may be prosecuted when that occurs.

[20] Turning to the offending discharge in this case, it came from an overflow pipe serving the Papakai Road pump station. When the discharge was first discovered both Councils assumed that the source of effluent in the overflow pipe was the pump station itself. However, during the course of investigation and remedial work by the District Council, it was discovered that a feeder pipe into the pump station had a maintenance manhole in it and that this manhole also had an overflow pipe in it. Overflow effluent from the feeder pipe manhole was directed to the overflow pipe from the pumping station and that overflow pipe then discharged the manhole effluent to the river.

Mr Benadie described this as an unusual configuration, not shown on as-build plans and not known to District Council staff.

[21] I understand that the District Council first became aware of this configuration on undertaking further investigation when discharges to the river continued after issue of the abatement notice and District Council staff had concluded that these could not be coming from the pump station itself where everyone thought it originated. It was only then that the overflow pipe from the manhole was discovered.

[22] In his submissions for the District Council Mr Maassen described the previously unknown pipe as a "rogue" connection. I accept that the presence of this pipe was unknown but have to observe that territorial authorities ought reasonably be required to know how their systems work.

[23] I am aware that in the *Otago Regional Council v Clutha District Council (Clutha)* case after the discharge that occurred, the council in that case took a review of its entire system to find out just where things were going and what other problems there might be in its sewerage systems.[1] In this case there was obviously a manhole in the feeder pipe and there was clearly a discharge pipe from that manhole which had to go somewhere.

[24] The unknown overflow pipe is significant in my considerations because an aggravating factor identified in the Regional Council's submissions was the failure of the District Council to comply with the abatement notice requiring cessation of the discharge to the river[2]. Such a failure must be a matter of weight in my culpability considerations.

[25] That failure must now be looked at in the context that both Councils initially believed that the source of the discharge was the pump station. The District Council undertook a comprehensive assessment of its operation and had commenced remedial works but discharges continued. It was only on further investigation of the continuing discharges that the District Council discovered the manhole connection which, as I

[1] *Otago Regional Council v Clutha District Council* [2018] NZDC 16724.

[2] No separate charge for breach of the abatement notice was laid, so it might potentially be regarded as an aggravating factor in the discharge offending.

have said, it should have known about but I accept it did not. The belief of both Councils as to the source of the discharge was wrong. As soon as the true cause of the discharge was found, it was repaired.

[26] Those considerations have some impact on assessment of the District Council's culpability, even accepting it should have known how its own system worked. I accept that the District Council worked diligently to fix any possible problems with the pump station which it believed was the source of the discharge. Failure to comply with the abatement notice arose due to mistaken belief rather than failure of effort or disregard as initially submitted by the Regional Council and that does have some effect in pulling back the penalty starting point which I had initially considered.

[27] In fixing a starting point for this offence, I note that the maximum penalty is $600,000. In his submissions for the Regional Council, Mr Vanderkolk submits that an appropriate starting point is in the range $90,000 to $110,000. Mr Maassen submits a figure in the order of $60,000 is appropriate. There are a number of factors I have taken into account in resolving the difference between them.

[28] The first arises from the interrelated issues of compliance with the abatement notice, delay in fixing the problem and culpability which I have just discussed. Mr Vanderkolk contended that failure to comply with the notice and remedy the discharge was… "Grossly reckless if not deliberate". He had not had the advantage of seeing Mr Benadie's affidavit as to the cause of discharge when he prepared that submission and cannot be criticised on that basis. Without Mr Benadie's information, I would have agreed with the submission and used the same terms. However, in light of the information contained in the affidavit, the District Council's culpability must be viewed at a lower level than initially pitched by the Regional Council.

[29] The District Council was caught by the presence of the overflow pipe not shown on the as-build plans. Arguably, if there had been regular checking of the sewerage system from time to time someone might have asked the question, "Where does the overflow pipe in the manhole go?". As I have observed, ultimately, the

District Council has to accept responsibility. However, for the reasons I have discussed, I reject the proposition that it acted recklessly or that the discharge was deliberate. I put culpability at what I might describe as the moderate level.

[30] The next issue relates to the scale and significance of the offending. It is common ground that we have no information as to the magnitude and frequency of the discharge. Mr Maassen pointed to the limited size of the discharge pipe (which I am told was about 150 millimetres in diameter) and the fact that photographs suggest it was never discharging more than 25 percent of capacity. Of course, we do not know all the times that discharges might have taken place which were not observed and so we really do not know one way or the other. Mr Vanderkolk places emphasis on the values of the river and the fact that this is a recognised swimming area. I concur with elements of all of those propositions advanced by both counsel. The significant issue for me is to recognise that discharges of untreated effluent into our waterways in any volumes, at any time are unacceptable.

[31] The best that can be said in this instance is that there is no evidence of direct harm to persons who might have come into contact with river waters nor any evidence of ongoing adverse effects on the river. Had either of these factors been present, that would have elevated the gravity of the offending and substantially elevated the amount of the fine that I am about to impose.

[32] The third matter of discussion arises from the status of the District Council as a local authority, something on which the Regional Council has placed some weight. I agree that local authorities generally should display a commitment to compliance and protection of the environment. They must follow best practice at all times. However, I do not accept that penalties should necessarily be increased automatically when a territorial authority is involved as might be implied from the Prosecutor's submission. Although there may be instances when that is appropriate, I do not consider this as such an instance.

[33] Ultimately, the factors which I have determined are relevant in fixing starting point in this case are:

- This was a discharge of raw sewage;
- The discharge persisted for a period of some months;
- A total of about 10 or so instances were observed but their magnitude is unknown;
- No longer-term adverse effects have been identified but the discharges were potentially dangerous for persons who came into contact with the discharged effluent;
- The discharge was into a river with recognised values and near a sign posted swimming hole;
- The discharge was offensive to the wider community as marked by complaints to the Councils;
- The discharge was culturally offensive to Māori;
- Continuation of the discharge after issue of an abatement notice arose due to genuine mistake as to its source rather than to lack of compliance effort by the District Council. I have pitched culpability at a moderate level for that reason;
- Finally, penalties need to be set at a level which drives home to territorial authorities the need to ensure that their sewerage systems are operated in accordance with best practice. They should check their systems regularly so that they understand where weaknesses or likely problems are. Had such a checking system been in place here, the District Council would or should have known that there was a discharge pipe in the feeder pipe manhole. There should be warning systems in place so that territorial authorities know when discharges are occurring or have occurred from engineered discharge pipes.

[34] I have endeavoured to set a starting point which reflects these things and signals the need for territorial authorities to (in common parlance) get their acts together.

[35] I have had regard to the various cases cited by counsel for the purposes of s 8(e) Sentencing Act. Starting points range from $30,000 in the *Manawatu-Wanganui Regional Council v Whanganui District Council* case where a very small volume was discharged over a short period of time (admittedly to a small water body with limited dilutive capacity), to $90,000 in the *Wellington Regional Council v Wellington Water Ltd* case where there was a substantial volume of sewage and sludge and recklessness but limited adverse effect because the discharge took place into Cook Strait where there was an enormous diluting effect.[3]

[36] There are similarities and significant differences between this and all of the cases cited. Mr Vanderkolk contends that the ongoing aspect of this offending is a matter of significance and I concur with that. It is something of a point of difference with the cases cited which all involved short term discharges.

[37] Taking all of those matters into account, I have determined that the appropriate starting point for penalty considerations is the sum of $80,000. Had there been any more evidence available as to the magnitude of the discharges or actual adverse effects on either the river environment or persons using it, that figure would have been considerably increased.

[38] I will give no discount for past good character on the part of the Defendant as it has been subject to previous enforcement action. I am going to reduce starting point by 25 percent on account of a prompt guilty plea, giving an end penalty of $60,000 and I fine the District Council that amount accordingly.

[39] I make no direction as to any use to which the fine (less prosecution expenses) may be put, but I record that the Councils are considering that matter and will ensure

[3] *Manawatu-Wanganui Regional Council v Whanganui District Council* [2018] NZDC 26705, *Wellington Regional Council v Wellington Water Ltd* [2019] NZDC 18588.

that Mōkai Pātea participates in any discussion regarding the application of fine monies towards betterment projects on or in the vicinity of the river.

[40] I direct that the Defendant will pay solicitor costs as per the Costs in Criminal Cases Regulations (to be fixed by the Registrar if need be) and Court costs $130. Finally, pursuant to s 342 Resource Management Act, I direct that the fine less 10 percent Crown deduction is to be paid to Manawatu-Wanganui Regional Council.

B P Dwyer
Environment/District Court Judge