

**IN THE DISTRICT COURT  
AT DUNEDIN**

**I TE KŌTI-Ā-ROHE  
KI ŌTEPOTI**

**CRI-2020-012-000956  
[2020] NZDC 26125**

**OTAGO REGIONAL COUNCIL**  
Prosecutor

v

**CLUTHA DISTRICT COUNCIL**  
Defendant

Hearing: 9 December 2020  
Appearances: N Laws for the Prosecutor  
M Parker for the Defendant  
Judgment: 9 December 2020

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**NOTES OF JUDGE B P DWYER ON SENTENCING**

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[1] Clutha District Council (the Defendant or CDC) appears for sentence on six charges brought by Otago Regional Council (the Regional Council) for breaches of the Resource Management Act 1991 arising from the operation of five wastewater treatment plants which it operates at:

- Tapanui, where there is one charge of discharge of wastewater into water (charging document ending 0233);
- Kaka Point where there is one charge of discharge of wastewater to land (charging document ending 0237);

- Lawrence, where there is one charge of discharge of wastewater into water (charging document ending 0245) and a further charge of discharge of odour to air (charging document ending 0246);
- Owaka where there is one charge of discharge of wastewater into water (charging document ending 0258); and
- Stirling, where there is one charge of discharge of wastewater into water (charging document ending 0255).

[2] I am advised that these charges relate to five out of a total of 11 wastewater treatment plants which CDC has in its district.

[3] The Defendant pleads guilty to each of the charges which I have described. No suggestion has been made that it should be discharged without conviction and it is accordingly convicted on each charge. I understand that s 24A of the Sentencing Act 2002 is not applicable.

[4] The treatment of wastewater from community schemes is a core function of local authorities. The wastewater plants I have identified above were all established by CDC as part of undertaking that function. The five plants initially treated human wastewater in oxidation pond systems. Upon renewal of resource consents for the plants between 2005 and 2009 additional treatment processes were required.

[5] The first process is a Biofiltro plant where wastewater from oxidation ponds goes through a bed containing layers of worms, wood shavings, geofabric and drainage pellets. Following this the partially treated wastewater enters the second process, a UV chamber before being either recycled to the oxidation pond or discharged. These systems were established in all of the plants by 2011.

[6] The summary of facts records that:

Maintenance and monitoring of the WWTPs is critical to their performance. Consent conditions were included to ensure ongoing monitoring and maintenance.

[7] Since 1 July 2019 the five wastewater plants have been managed and operated on behalf of CDC by Citycare Limited (Citycare) which specialises in providing wastewater maintenance and management services throughout New Zealand. It goes without saying that notwithstanding Citycare's involvement, CDC remains responsible for operation of the wastewater plants and compliance with the terms of its various resource consents specifically and the Resource Management Act generally.

[8] It is apparent from the summary of facts that no maintenance on the plants had been carried out since March 2019. Further, the summary states at para 110 that the contractor's staff only drove past the plants without going in to check them since it took over operations in July. So there was no oversight by the contractor.

[9] Compounding that failure, neither did CDC undertake any oversight of Citycare's management of the plants, which should have involved checking the plants itself from time to time and requiring strict compliance with a reporting regime. I will return to those issues in due course.

[10] The charges arise out of a series of inspections of the plants conducted by Regional Council officers in late November and early December 2019. I understand that at least some of the inspections were the result of complaints being received by the Regional Council about operation of and discharges from the plants.

[11] Because of the complexities of dealing with charges involving five separate plants, and for the sake of efficiency, rather than trying to accurately summarise facts applying to each plant, I will incorporate in full into these sentencing notes the relevant provisions of the summary of facts pertaining to each plant, including the description of each plant, the state of affairs at each discovered by Regional Council officers on inspection, the nature of offending in each case and the environment affected by the offending in each case. I will exclude from that references to photographs which are in the summary of facts.

[12] I will then consider the effects of the offending by reference to the environmental impact assessment forming part of the summary of facts which is a general report pertaining to all of the offending.

## TAPANUI WWTP

23. The Tapanui WWTP is located at the corner of Station Road and Duncan Road, approximately 1.34km northwest of Tapanui near the Pomahaka River at Tapanui.
24. It is operated pursuant to Discharge Permit 2005.246 for the discharge of treated domestic wastewater into the Pomahaka River. The conditions of consent include the following requirements:
- 24.1 Measure and record the daily volume of effluent discharging from the WWTP; and
- 24.2 The daily volume records are to be provided to the Consent Authority by 31 March each year; and
- 24.3 An Operations and Maintenance Manual must be prepared; and
- 24.4 The WWTP shall be operated in accordance with the Operations and Maintenance Manual, and it shall be reviewed every five years and updated as appropriate; and
- 24.5 Records of maintenance, complaints, malfunctions and breakdowns shall be kept in a log and submitted to the Consent Authority each year; and

- 24.6 Effluent discharged to the Pomahaka River shall comply with the following limits:

| Parameter                                      | Remainder of consent term         |
|--|-----------------------------------|
| pH, range                                      | 6.5-9.0                           |
| BOD <sub>5</sub> (g/m <sup>3</sup> )           | 12 (90 <sup>th</sup> percentile)  |
| Total suspended solids (g/m <sup>3</sup> )     | 30 (90 <sup>th</sup> percentile)  |
| <i>Escherichia coli</i> ("E Coli") (cfu/100mL) | 260 (90 <sup>th</sup> percentile) |
| Total Phosphorus (g/m <sup>3</sup> )           | 10 (90 <sup>th</sup> percentile)  |
| Total Nitrogen (g/m <sup>3</sup> )             | 30 (90 <sup>th</sup> percentile)  |
| Ammoniacal Nitrogen (g/m <sup>3</sup> )        | 20 (90 <sup>th</sup> percentile)  |

- 24.7 Representative samples were to be taken in the first week of each month of the final effluent prior to discharge.

### Tapanui WWTP - Facts

25. ORC enforcement officers inspected the Tapanui WWTP on 28 November 2019. During this inspection, they observed that the

plant had not been operated in accordance with the Operations and Management Manual:

- 25.1 The oxidation ponds were overgrown with weeds and grass; and
  - 25.2 There were multiple deep cracks in the oxidation pond wall; and
  - 25.3 The sprinklers on the BioFiltro bed were not operating and had not been working for some time; and
  - 25.4 The BioFiltro bed was dry, and could be stood on; and
  - 25.5 There was evidence that the pond had overflowed at times; and
  - 25.6 Wastewater was completely bypassing the treatment system and discharging through the emergency overflow into the Pomahaka River.
26. Test samples were taken at the emergency overflow (refer to photograph 10), which discharges to the discharge pipe and the Pomahaka River. The test results showed *E. coli* levels at 6,100, being an exceedance of 2,246%.
27. There was no record of:
- 27.1 the daily volume of effluent having been measured; or
  - 27.2 samples of effluent having been collected in the first week of each month prior to discharge.
28. The ORC enforcement officers observed that cuts had been made in the emergency overflow weir to lower the level at which wastewater would enter it.
29. A log of maintenance, complaints, malfunctions and breakdowns was not submitted to the ORC by 31 March 2020.

#### **Tapanui WWTP - Nature of the offending**

- 30. The failure to inspect, operate and maintain the WWTP had caused the wastewater to bypass treatment in the BioFiltro and UV chamber. Cuts made to the overflow weir caused the discharge of contaminants through the emergency overflow to the Pomahaka River.
- 31. The BioFiltro had not been maintained since March 2019. The WWTP had not been inspected properly from 1 July 2019, nor had any maintenance been performed. It is likely that wastewater had been escaping through the emergency overflow for some time.

#### **Tapanui WWTP - Nature of the environment affected – Pomahaka River**

- 32. The headwaters of the Pomahaka River are located near the top of the Umbrella Mountains, which are approximately 1,300m above sea

level. The Pomahaka River flows into the Clutha River / Mata-Au at Waitahua Island, approximately 18km north of Balclutha.

- 33. The Pomahaka River is identified as having ecological values.
- 34. The Pomahaka River provides domestic water supply to surrounding areas.
- 35. The Pomahaka River is identified as having cultural values.
- 36. The Pomahaka River also has significant recreational values, most notably regionally significant recreational trout fisheries and fish habitats. The surrounding land use is predominantly pastoral farming.

#### **KAKA POINT WWTP**

- 38. The Kaka Point WWTP is located approximately 450m northwest of Kaka Point township, and 400m west of the Pacific Ocean. It is operated pursuant to two resource consents, being:
  - 38.1 Coastal Permit 2008.691 which permits the occupation of a coastal marine area (in particular the concrete pipeline structure disposing of wastewater); and
  - 38.2 Coastal Permit 2008.690 to discharge treated domestic wastewater into the Pacific Ocean.
- 39. The conditions of Coastal Permit 2008.690 include the following requirements:
  - 39.1 Measure and record the daily volume of effluent discharging from the WWTP; and
  - 39.2 The daily volume records are to be provided to the Consent Authority by 31 March each year; and
  - 39.3 An Operations and Maintenance Manual must be prepared; and
  - 39.4 The WWTP shall be operated in accordance with the Operations and Maintenance Manual, and it shall be reviewed every five years and updated as appropriate; and
  - 39.5 Records of maintenance, complaints, malfunctions and breakdowns shall be kept in a log and submitted to the Consent Authority each year; and
  - 39.6 Effluent discharged to the Pomahaka River shall comply with the following limits:

| <b>Parameter</b>                     | <b>Remainder of consent term</b> |
|--------------------------------------|----------------------------------|
| pH, range                            | 6.5-9.0                          |
| BOD <sub>5</sub> (g/m <sup>3</sup> ) | 12 (90 <sup>th</sup> percentile) |

| Parameter                                  | Remainder of consent term         |
|--|-----------------------------------|
| Total suspended solids (g/m <sup>3</sup> ) | 30 (90 <sup>th</sup> percentile)  |
| <i>E Coli</i> (cfu/100mL)                  | 260 (90 <sup>th</sup> percentile) |
| Total Phosphorus (g/m <sup>3</sup> )       | 10 (90 <sup>th</sup> percentile)  |
| Total Nitrogen (g/m <sup>3</sup> )         | 30 (90 <sup>th</sup> percentile)  |
| Ammoniacal Nitrogen (g/m <sup>3</sup> )    | 20 (90 <sup>th</sup> percentile)  |

39.7 Representative samples were to be taken in the first week of each month of the final effluent prior to discharge.

#### Kaka Point WWTP - Facts

40. ORC enforcement officers inspected the Kaka Point WWTP on 2 December 2019. Upon attending the plant, they observed that the plant had not been operated in accordance with the Operations and Management Manual:
  - 40.1 The facility was unkept, with very long grass; and
  - 40.2 There was significant ponding on the BioFiltro surface; and
  - 40.3 The UV chamber was full of sludge and suspended solids, and was ineffective; and
  - 40.4 There was only one inch of freeboard around the pond, and the level was quite high; and
  - 40.5 The BioFiltro unit was leaking wastewater at the northwest corner; and
  - 40.6 The leaking wastewater was discharging to the neighbouring property, and in turn entering an unnamed stream; and
  - 40.7 The unnamed stream travelled through a culvert under the road to Kaka Point beach and the Pacific Ocean.
41. The culvert and beach were accessible to the public.
42. The smell of the discharge was strong and had a distinct sewage odour. There was evidence that the flow path had been wider because ponded areas of wastewater were visible outside the current flow path.
43. Samples of the discharge to the unnamed stream were taken by the ORC 10m upstream and 30m downstream of where the wastewater entered it, and at the beach. The test results showed:

|  | <b>Upstream</b> | <b>Discharge</b> | <b>Downstream</b> | <b>Beach</b> |
|--|-----------------|------------------|-------------------|--------------|
| Total suspended solids (g/m <sup>3</sup> ) | 9               | 1,680            | 30                | 8            |
| Total Nitrogen (g/m <sup>3</sup> )         | 0.71            | 18.3             | 1.05              | 1.36         |
| Enterococci (cfu/100mL)                    | 10              | 200              | 20                | 20           |

#### **Kaka Point WWTP - Nature of the offending**

44. The failure to inspect, operate and maintain the WWTP had caused wastewater to escape from the BioFiltro, and flow over land to water on a neighbouring property.
45. The BioFiltro had not been maintained since March 2019. The WWTP had not been inspected properly from 1 July 2019, nor had any maintenance been performed. It is likely that wastewater had been discharging to land for some time.

#### **Kaka Point WWTP - Nature of the environment affected – Unnamed Creek and Pacific Ocean**

46. The unnamed tributary runs through farmland.
47. The wastewater travelled across Kaka Point beach and into the Pacific Ocean. Such a discharge has potential impacts on both the marine ecosystem and public health. The area is a popular contact recreation area, and also used for the gathering and consumption of seafood/kai moana.

#### **LAWRENCE WWTP**

49. The Lawrence WWTP is located approximately 700m west of the township of Lawrence. It is operated pursuant to two resource consents.
50. The first is Discharge Permit 2008.428 which permits CDC to discharge contaminants, namely odour, to air (for the purpose of treatment and disposal of wastewater from the Lawrence township). It is subject to one specific condition, being that:

*“The consent holder shall ensure that there are no discharges of odour to air as a result of the exercise of this permit that are noxious, dangerous, offensive or objectionable, in the opinion of an authorised enforcement officer of the Consent Authority, at or beyond the legal boundary of the properties from which the consent holder operates.”*
51. The second consent, being Discharge Permit 2008.308, permits the discharge of treated domestic wastewater into Tuapeka Creek. The conditions of consent include the following requirements:

- 51.1 Measure and record the daily volume of effluent discharging from the WWTP; and
- 51.2 The daily volume records are to be provided to the Consent Authority by 31 March each year; and
- 51.3 An Operations and Maintenance Manual must be prepared; and
- 51.4 The WWTP shall be operated in accordance with the Operations and Maintenance Manual, and it shall be reviewed every five years and updated as appropriate; and
- 51.5 Records of maintenance, complaints, malfunctions and breakdowns shall be kept in a log and submitted to the Consent Authority each year; and
- 51.6 Effluent discharged to the Tuapeka Creek shall comply with the following limits:

| <b>Parameter</b>                           | <b>Remainder of consent term</b>  |
|--|-----------------------------------|
| pH, range                                  | 6.5-9.0                           |
| BOD <sub>5</sub> (g/m <sup>3</sup> )       | 12 (90 <sup>th</sup> percentile)  |
| Total suspended solids (g/m <sup>3</sup> ) | 30 (90 <sup>th</sup> percentile)  |
| <i>E Coli</i> (cfu/100mL)                  | 260 (90 <sup>th</sup> percentile) |
| Total Phosphorus (g/m <sup>3</sup> )       | 10 (90 <sup>th</sup> percentile)  |
| Total Nitrogen (g/m <sup>3</sup> )         | 30 (90 <sup>th</sup> percentile)  |
| Ammoniacal Nitrogen (g/m <sup>3</sup> )    | 20 (90 <sup>th</sup> percentile)  |

- 51.7 Representative samples were to be taken in the first week of each month of the final effluent prior to discharge.

**Lawrence WWTP - Facts**

- 52. ORC enforcement officers inspected the Lawrence WWTP on 3 December 2019, after complaints of odour had been received.
- 53. Upon arrival, the enforcement officers parked outside the site boundary. Immediately upon exiting their vehicles outside the boundary, they noticed a strong sulphurous and ammonia-like odour. The odour was further described as pungent, incredible and really overpowering. It was also described as smelling like rotten eggs combined with decayed chicken when left in the sun.
- 54. The enforcement officers entered the WWTP, and they observed that the plant had not been operated in accordance with the Operations and Management Manual:

- 54.1 The facility was unkept, with very long grass; and
  - 54.2 The oxidation pond was very murky, with algal growth, scum and sanitary debris floating thereon; and
  - 54.3 The BioFiltro plant was dry (so dry that the enforcement officers could walk upon it); and
  - 54.4 The aerator in the oxidation ponds had not been operated for some time, and had rags and weeds around the pipe and propeller; and
  - 54.5 There was no flow of wastewater through the UV chamber; and
  - 54.6 There was no flow of treated wastewater over the final weir; and
  - 54.7 There were several extensive cracks in the waveband of the oxidation pond; the ground adjacent to that crack was soft; and
  - 54.8 The main electricity switch had been set to “*off*”; and
  - 54.9 The emergency overflow weir plate had been cut to reduce its height and enable wastewater to discharge to Tuapeka Creek.
55. The enforcement officers went to the discharge point at Tuapeka Creek. They could smell the discharge before they found it. Black sewage fungus and sanitary towel plastics were across the bed of Tuapeka Creek. There was a visible change in colour from upstream of the discharge to downstream. Clarity tube readings were obtained showing an 84% visual change in colour from upstream water to downstream water.
56. The WWTP appeared to have been shut down and abandoned for some time. There was no record of any recent maintenance.
57. There was no record of:
- 57.1 the daily volume of effluent having been measured; or
  - 57.2 samples of effluent having been collected in the first week of each month prior to discharge.
58. Wastewater was simply being collected in the oxidation pond and only partially treated before being discharged through the altered emergency overflow into Tuapeka Creek. Water samples were taken by the ORC, including from upstream of and at the discharge point to Tuapeka Creek. The test results showed:

|                                      | <b>Discharge Point</b> | <b>Upstream</b> |
|--------------------------------------|------------------------|-----------------|
| BOD <sub>5</sub> (g/m <sup>3</sup> ) | 61                     | < 2             |

|  |         |         |
|--|---------|---------|
| Total suspended solids (g/m <sup>3</sup> ) | 40      | < 3     |
| <i>E Coli</i> (cfu/100mL)                  | 360,000 | < 1,000 |
| Total Nitrogen (g/m <sup>3</sup> )         | 33      | < 6     |

59. A log of maintenance, complaints, malfunctions and breakdowns was not submitted to the ORC by 31 March 2020.

**Lawrence WWTP - Nature of the offending**

60. The failure to inspect, operate and maintain the WWTP had caused the cessation of treatment to the wastewater and its discharge through the emergency overflow to Tuapeka Creek.
61. The BioFiltro had not been maintained since March 2019. The WWTP had not been inspected properly from 1 July 2019, nor had any maintenance been performed. It is likely that wastewater had been escaping through the emergency overflow for some time.

**Lawrence WWTP - Nature of the environment affected – Tuapeka Creek**

62. Tuapeka Creek's flow rate is estimated as averaging 500l/s, with summer flows of 200l/s. In the vicinity of Lawrence, Tuapeka Creek is a stable channel with a gravel and cobble bed. Bank vegetation is comprised largely of native and exotic grasses and bushes; it is not identified as holding any particular natural or heritage values.
63. Tuapeka Creek is not used for drinking water extraction, agricultural irrigation, fishing or aquaculture. It is not generally used for contact recreation activities, apart from occasional use in a small area approximately 5kms downstream of the discharge (after the confluence of two other creeks). Water is sometimes extracted from the creek for stock water. It is accepted that Tuapeka Creek is likely degraded, but still holds some intrinsic values, and recreational values in some stretches.
64. The WWTP is approximately 180m from the Lawrence campground. The owner of the campground had repeatedly complained of odour emanating from the plant to CDC.
65. The discharge point is adjacent to the Bellview Wetlands Reserve, which offers scenic walking tracks surrounded by natural bush and birds.
66. The Clutha Gold cycle trail runs adjacent to Tuapeka Creek and crosses a ford approximately 10m downstream of the discharge point.

**OWAKA WWTP**

68. The Owaka WWTP is located approximately 800m northwest of the township of Owaka. It is operated pursuant to Discharge Permit 2003.680. The conditions of consent include the following requirements:

- 68.1 Measure and record the daily volume of effluent discharging from the WWTP; and
- 68.2 The daily volume records are to be provided to the Consent Authority by 31 March each year; and
- 68.3 An Operations and Maintenance Manual must be prepared; and
- 68.4 The WWTP shall be operated in accordance with the Operations and Maintenance Manual, and it shall be reviewed every five years and updated as appropriate; and
- 68.5 Records of maintenance, complaints, malfunctions and breakdowns shall be kept in a log and submitted to the Consent Authority each year; and
- 68.6 The consent holder shall maintain a sign at the discharge point and keep it clear of vegetation and be readable from the land and river; and
- 68.7 Effluent discharged to the Owaka River shall comply with the following limits:

| Parameter                                  | Remainder of consent term         |
|--|-----------------------------------|
| pH, range                                  | 6.5-9.0                           |
| BOD <sub>5</sub> (g/m <sup>3</sup> )       | 12 (90 <sup>th</sup> percentile)  |
| Total suspended solids (g/m <sup>3</sup> ) | 30 (90 <sup>th</sup> percentile)  |
| <i>E Coli</i> (cfu/100mL)                  | 260 (90 <sup>th</sup> percentile) |
| Total Phosphorus (g/m <sup>3</sup> )       | 10 (90 <sup>th</sup> percentile)  |
| Total Nitrogen (g/m <sup>3</sup> )         | 30 (90 <sup>th</sup> percentile)  |
| Ammoniacal Nitrogen (g/m <sup>3</sup> )    | 20 (90 <sup>th</sup> percentile)  |

- 68.8 Representative samples were to be taken in the first week of each month of the final effluent prior to discharge.

**Owaka WWTP - Facts**

- 69. A complaint was received by the ORC about the Owaka WWTP, and ORC enforcement officers inspected it on 5 December 2019.
- 70. Upon attending the plant, they observed that the plant had not been operated in accordance with the Operations and Management Manual:
  - 70.1 The facility was unkept with very long grass; and
  - 70.2 There was ponding on the BioFiltro media; and
  - 70.3 The ponds had cracks in them; and

- 70.4 The UV chamber was full of sludge and suspended solids, rendering it ineffective; and
  - 70.5 The BioFiltro plant was leaking from the northeast corner; and
  - 70.6 Wastewater was discharging through the emergency overflow.
71. Samples were taken by the ORC at the “V-notch” after the UV chamber, and the discharge pipe at the Owaka River. The test results showed:

|  | <b>Discharge Pipe</b> |
|--|-----------------------|
| BOD <sub>5</sub> (g/m <sup>3</sup> )       | 17                    |
| Total suspended solids (g/m <sup>3</sup> ) | 99                    |
| <i>E Coli</i> (cfu/100mL)                  | 1,900                 |
| Total Nitrogen (g/m <sup>3</sup> )         | 17                    |

72. There was no record of:
- 72.1 the daily volume of effluent having been measured; or
  - 72.2 samples of effluent having been collected in the first week of each month prior to discharge.
73. A log of maintenance, complaints, malfunctions and breakdowns was not submitted to the ORC by 31 March 2020.

**Owaka WWTP - Nature of the offending**

- 74. The failure to inspect, operate and maintain the WWTP had prevented effective treatment of the wastewater and the discharge of wastewater through the emergency overflow to the Owaka River.
- 75. The BioFiltro had not been maintained since March 2019. The WWTP had not been inspected properly from 1 July 2019, nor had any maintenance been performed. It is likely that partially treated wastewater had been discharging to Owaka River for some time.
- 76. There was no sign maintained at the discharge point warning of the presence of the discharge.

**Owaka WWTP - Nature of the environment affected – Owaka Creek**

- 77. The Owaka River flows through a highly modified farming catchment. The discharge was at its lower reaches. The water is stained by humic material (eg tannins) derived from the upper catchment. Flows are considered to be sluggish in the lower catchment. It is nevertheless considered to have natural values such as:
  - 77.1 High numbers of particular species or habitat variety; and
  - 77.2 Freedom from biological nuisances, ie it is weed-free; and

- 77.3 Presence of riparian vegetation of significance to aquatic habitat; and
  - 77.4 Presence of significant trout and significant areas for development of juvenile trout; and
  - 77.5 Presence of a significant range of indigenous fish species; and
  - 77.6 Significant presence of eels.
78. There are acknowledged cultural values, such as Kaitiakitanga and Mauri.
79. The Pomahaka River also has significant recreational values, most notably regionally significant recreational trout fisheries and fish habitats. The surrounding land use is predominantly pastoral farming.

**STIRLING WWTP**

81. The Stirling WWTP is located approximately 1km southeast of the township of Stirling. It is operated pursuant to Discharge Permit 2005.193. The conditions of consent include the following requirements:
- 81.1 Measure and record the daily volume of effluent discharging from the WWTP; and
  - 81.2 The daily volume records are to be provided to the Consent Authority by 31 March each year; and
  - 81.3 An Operations and Maintenance Manual must be prepared; and
  - 81.4 The WWTP shall be operated in accordance with the Operations and Maintenance Manual, and it shall be reviewed every five years and updated as appropriate; and
  - 81.5 Records of maintenance, complaints, malfunctions and breakdowns shall be kept in a log and submitted to the Consent Authority each year; and
  - 81.6 Effluent discharged to the Clutha River / Mata-Au shall comply with the following limits:

| <b>Parameter</b>                           | <b>Remainder of consent term</b>  |
|--|-----------------------------------|
| pH, range                                  | 6.5-9.0                           |
| BOD <sub>5</sub> (g/m <sup>3</sup> )       | 12 (90 <sup>th</sup> percentile)  |
| Total suspended solids (g/m <sup>3</sup> ) | 30 (90 <sup>th</sup> percentile)  |
| <i>E Coli</i> (cfu/100mL)                  | 260 (90 <sup>th</sup> percentile) |

|   |                                  |
|---|----------------------------------|
| Total Phosphorus (g/m <sup>3</sup> )    | 10 (90 <sup>th</sup> percentile) |
| Total Nitrogen (g/m <sup>3</sup> )      | 30 (90 <sup>th</sup> percentile) |
| Ammoniacal Nitrogen (g/m <sup>3</sup> ) | 20 (90 <sup>th</sup> percentile) |

81.7 Representative samples were to be taken in the first week of each month of the final effluent prior to discharge.

#### **Stirling WWTP - Facts**

82. A complaint was received by the ORC about the Stirling WWTP.
83. ORC enforcement officers inspected the Stirling WWTP on 5 December 2019.
84. Upon attending the plant, they observed that the plant had not been operated in accordance with the Operations and Management Manual:
- 84.1 The site was unkept with overgrown grass and weeds obscuring the pond waveband; and
  - 84.2 The BioFiltro media was inundated (ie ponding) and included fungus growth, which prevented treatment of the wastewater; and
  - 84.3 A sprinkler had been turned off at the northern end, resulting in that media drying out; and
  - 84.4 The UV chamber was heavily laden with sludge, rendering it ineffective; and
  - 84.5 There were two leaks in the corner of the BioFiltro, producing continuous drips and discharge to the surrounding environment.
85. There was no record of any maintenance since 30 June 2018.
86. There was no record of:
- 86.1 the daily volume of effluent having been measured; or
  - 86.2 samples of effluent having been collected in the first week of each month prior to discharge.
87. The enforcement officers were unable to access the discharge pipe into the Mata-Au branch of the Clutha River / Mata-Au because it was inaccessible. They sampled the discharge leaving the treatment plant (which travels through a pipe to the Mata-Au branch of the Clutha River / Mata-Au) and the discharge point. The test results showed:

|   |       |
|---|-------|
| pH  | 7.5   |
| Total suspended solids (g/m <sup>3</sup> )    | 26    |
| <i>E Coli</i> (cfu/100mL)                     | 1,600 |
| Total Nitrogen (g/m <sup>3</sup> )            | 34    |
| Total Ammoniacal Nitrogen (g/m <sup>3</sup> ) | 23    |

88. A log of maintenance, complaints, malfunctions and breakdowns was not submitted to the ORC by 31 March 2020.

#### **Stirling WWTP - Nature of the offending**

89. The failure to inspect, operate and maintain the WWTP had prevented effective treatment of the wastewater and the discharge of partially treated wastewater to the Mata-Au branch of the Clutha River / Mata-Au.
90. The BioFiltro had not been maintained since March 2019. The WWTP had not been inspected properly from 1 July 2019, nor had any maintenance been performed. It is likely that partially treated wastewater had been discharging to the river for some time.

#### **Stirling WWTP - Nature of the environment affected – Clutha River / Mata-Au**

91. The Clutha River / Mata-Au splits into two branches, the Mata-Au and the Koau. The discharge to which this incident relates occurs in the Mata-Au branch, approximately 300 metres downstream of the Stirling bridge. The width of the river at this location is about 100 metres. The Clutha River / Mata-Au experiences significant flow rates, having an annual flow rate of 297 cumecs.
92. The Clutha River / Mata-Au provides a suitable habitat for a range of estuarine and tidal fish fauna, including eel (long-finned and short-finned), lamprey, common smelt, giant kokopu, black flounder, inunga, brown trout and chinook salmon.
93. The flood path and delta of the Clutha River / Mata-Au are used by a variety of bird species, including waterfowl, wading species and terns. The flood plains are also seasonally valuable for black-backed gulls that nest in the mid-Channel Islands. Sandbars downstream of Balclutha are used as roosting sites, particularly for black-billed gulls.
94. There are no community water supply takes in the vicinity of the discharge.
95. The Clutha River / Mata-Au has significant cultural values. The Clutha River / Mata-Au is a statutory acknowledgement area under the Ngāi Tahu Claims Settlement Act 1998.
96. The lower Clutha River / Mata-Au support significant recreational values that include trout, salmon, eel and whitebait fisheries; boating;

game bird hunting; and passive forms of recreation such as picnicking and sightseeing.

97. The Clutha River / Mata-Au is not considered a major contact recreational river because of cold water temperatures and its high flow rate.

[13] The summary of facts describes the offending overall in these terms and I am going to quote it because I am aware that there are members of the public present who may not have seen this document and are entitled to know what was going on. The summary contained in the summary of facts reads:

99. All offences constitute the discharge of contaminants, namely wastewater and odour, to the environment from municipal wastewater facilities operated by a District Council and maintained by a contractor.
100. The offending was foreseeable. If sufficient care by CCL and oversight by CDC was taken to adequately operate the municipal wastewater facilities, the offending would not have occurred.

[14] I will record in the decision that the summary of facts can be released to the media.

[15] Those findings which are contained in the summary and are accordingly common ground between the parties, bring me to the matter of the effects of the various discharges. These were described in the environmental impact statement, also forming part of the summary of facts. The environmental impact statement details the effects of the discharges on the receiving waters of the various rivers involved in this case. It does not deal with the odour discharge from the Lawrence plant and I address that matter first.

[16] The potential for wastewater treatment plants to generate adverse odours is well recognised. When such plants are being consented it is common for assurances to be given to local communities that the plants will not generate objectionable odours beyond their boundaries. Those assurances are commonly reflected in conditions requiring this standard to be attained and there is such a condition in this case. I will return to the matter of breach of conditions further in this decision, but note that the odour offence at Lawrence arose as a matter of complaint from the public.

[17] Council officers who inspected the site described the odour outside the site boundaries using these terms - strong, sulphurous, and ammonia like, pungent, incredible and really overpowering. Smelling like rotten eggs combined with decayed chicken.

[18] The summary of facts records that the plant is approximately 180 metres from the Lawrence camping ground whose owner had repeatedly complained of odour in the past. The odour charge before the court relates to the specific discharge detected on 3 December 2019. The odour discharge was clearly adverse in the extreme and represents significant offending in its own right.

[19] Turning to the water discharge offences, I commence by noting that the contaminated discharge in each case was barely treated or, at best, undertreated wastewater containing human effluent.

[20] I note that four of the receiving water bodies are recognised for their significant natural values in the Regional Plan. The Clutha estuary where receiving waters ultimately flow, is recognised as a coastal protection area and for recreation in the Regional Plan. Kaka Point is scheduled as a coastal recreation area in the Regional Plan and is used as a patrolled swimming beach, for scuba diving and snorkelling and is popular for walking.

[21] The environmental impact report notes that water quality in the Owaka, Pomahaka and Tuapeka Rivers is already degraded from nutrient and bacteria enrichment. As the Court notes on a regular basis, that in no way justifies or minimises the addition of further contaminants to these water bodies. The effects of further discharges are cumulative on the existing effects, usually to an indefinable extent. The Clutha of course has good water quality primarily because of the vast volume of its flow.

[22] The environmental impact report assesses the quality of the discharges and their effects on receiving waters against a number of criteria. The report identifies exceedance of standards required by resource consents which in some cases can be

described as massive. The worst instance being at Tapanui where E.coli levels were 2,246 per cent above the 90 percentile specified in the relevant resource consent.

[23] The statement goes on to detail the generic outcomes which potentially arise from wastewater discharges and I refer there to para 6. I am not going to recite them here but I quote from the summary contained in the environmental impact assessment at paras 6.1 and 6.2 which summarises the environmental effects of the discharges to the water bodies in these terms:

- 6.1 The background water quality in the Tuapeka, Owaka and Pomahaka Rivers is degraded when compared to ORC S15 limits in the NOF. This discharge of contaminants from untreated waste water into these receiving environments (or the coastal environment) will further compromise values associated with drinking water; cultural; mahinga kai consumption; primary contact recreation; public health; recreational; aesthetic; cultural and eco system
- 6.2 If a WWTP is not functioning as it should or functioning outside consented limits it is likely that the adverse effects of the discharge will have a profound effect on the receiving environment.

The fact of the matter is that we do not need an environmental impact report to know that it is appalling practice to discharge inadequately treated wastewater containing human effluent into our rivers.

[24] There is also the matter of adverse cultural effect which needs to be taken into account in my considerations. A cultural impact report has been received from Kāi Tahu identifying the importance to them of the Mata-Au or Clutha and Owaka Rivers in particular which have cultural and food gathering functions and traditions associated with them.

[25] The abhorrence to Māori of discharge to wastewater to our rivers is well known and something to which local authorities should pay particular attention and should be familiar. I would add that discharges such as those before the Court today are commonly offensive not only to Māori but also the wider community on amenity, health and environmental grounds. I note that the Defendant has failed to pass on to the Regional Council complaints received from the public in the past regarding operation of the plants as it was supposed to do.

[26] Those observations bring me to the matter of starting points for this offending. I intend to do so in the same manner as counsel have done in their submissions, namely, by identifying individual starting points for each charge. This is not a case where it is appropriate to take a global starting point for the overall offending. Each of the charges involves serious offending in its own right at separate locations, with the exception of the two charges at Lawrence.

[27] In undertaking this exercise I am going to consider the following issues:

- Maximum penalties.
- Culpability.
- The need for denunciation and deterrence.
- The seriousness of effects.
- Breach of conditions.
- The status of the Defendant.
- Comparable cases.

Having considered those matters I will identify starting points and then consider if there should be any uplift from starting point for previous convictions and if there should be reductions from the point I end at in light of any mitigating factors and guilty pleas. Finally, I will consider application of what is known as the totality principle in fixing penalty.

[28] The maximum penalty for each offence in this case is \$600,000 or \$3.6 million all up. There is no suggestion that fines of that amount are appropriate here.

[29] Turning to the matter of culpability, in my view this has to be looked at in the round, in other words, in the context of the overall situation we have before the Court. In its sentencing submissions the Prosecutor notes that there were lower levels of

culpability at the Owaka and Stirling plants than the others. That may be so, however there was a systemic failure on the part of CDC to properly manage its sewerage systems overall and that must also be taken into account.

[30] I accept Mr Parker's submission for the Defendant that the offending was not deliberate in the sense that it set out with the intention of offending but frankly that is not much of a concession.

[31] The Regional Council submits that the offending was careless if not reckless because CDC failed to respond to complaints from the public about the plants. I consider that understates reality.

[32] What is clear is that there was a systemic failure on CDC's part to properly operate and/or monitor the operation of these five wastewater plants whose output flows into the various water bodies I have described. These failures led inevitably to discharges which exceeded a range of quality criteria which they were obliged to meet. The Defendant's submissions acknowledge that there was a lack of oversight on its part. It claims that it was under the apprehension that Citycare was regularly inspecting and maintaining the plants but evidently took no steps to ensure that was the case. This failure persisted over a period of months from the time Citycare took over management until the offending was discovered later in the year.

[33] The Court has commented on any number of occasions that when a consent holder or land owner delegates management of its facilities to a third party it remains liable for compliance with Resource Management Act requirements and has an obligation to monitor its delegate's performance. CDC failed miserably and totally in that regard. Put simply it hoped that Citycare was doing the right thing but did not check to see that that was the case.

[34] CDC was reckless in the extreme. So much so as to make the distinction between deliberate and reckless almost meaningless in this case. For that reason alone culpability on CDC's part is at the very high end of the scale. That fact, and the fact that CDC has 11 wastewater plants under its control, put denunciation and deterrence at the forefront of considerations in this case.

[35] In considering the seriousness of effects, I return to my findings as to the nature of the odour discharge and find that that requires imposition of a significant penalty in and of itself. The owners of the camping ground at Lawrence were subjected to discharge of vile odours.

[36] The effects identified on receiving waters fall into the generic category, being the well-recognised consequences of discharging untreated, partially treated or inadequately treated wastewater into our rivers and coastal waters. The best that can possibly be said in that regard is contained in Mr Parker's submission that there is no evidence of direct harm to persons who came into contact with the water nor any evidence of ongoing effects. However, that statement ignores the cultural and amenity effects which I have described and the potential for there to have been direct harm to people.

[37] Section 6(a) RMA requires that in exercising functions under the Act (and this sentencing is such a function) I am obliged as a matter of national importance to recognise and provide for the preservation of the natural character of rivers and their margins and their protection from inappropriate use. That obligation adds a degree of gravity to the offending and also adds another element to the need to deter offending which adds to the degradation of the quality of our river waters.

[38] The fact that this offending involved the breach of numerous conditions of the Defendant's resource consents is a particularly aggravating factor in the offending. Resource consents are routinely granted by consent authorities subject to conditions which seek to avoid remedy or mitigate adverse effects. There is a presumption that such conditions will be complied with. Failure to do so strikes at the heart of the resource consent system and destroys confidence which the public should have in the integrity of that system. If, by way of example, when applying for its resource consents CDC had advised the Regional Council that it was not going to keep accurate records, was not going to comply with the requirements of its operation and maintenance manual and was not going to ensure that its discharges met certain quality criteria, it would not have got resource consents for the plants.

[39] Having accepted the benefit of the consents, CDC accepted a corresponding obligation to comply with the conditions of those consents. When regard is had to the fact that CDC is itself a consent authority, its failure to comply with conditions is something which I have weighted highly in my consideration.

[40] That comment brings me to the status of the Defendant as a local authority. The Court frequently makes the comment when dealing with commercial enterprises that they can be expected to know the rules and practices under which they have to operate. The same is applicable and even more so to local authorities who themselves have to enforce the provisions of the Resource Management Act, District and Regional Plans and other rules.

[41] I have considered the range of comparable cases to which I have been referred by counsel. The cases involve widely varying factual situations as to the causes and consequences of discharges. I make the general observation that the management of sewerage and wastewater systems can impose difficult obligations on territorial authorities. The various cases cited demonstrate multiple ways in which unlawful discharges can occur from sewerage systems and wastewater plants. They range from pipe breakages or blockages, the accumulation of grease/fat and other material, equipment break down, system overload, operator error by mistake or carelessness, design failings and so on. Many of these factors were present in the cases which were cited to me.

[42] However, none of the other cases referred to have involved the prolonged failure to adequately monitor the performance of five wastewater plants and the contractor responsible for operating them as this offending does. I repeat that the summary of facts records that without adequate maintenance and care of the plants unconsented discharges were “inevitable”. The failures of CDC in that regard can only be described as egregious and the purposes of denunciation and deterrence alone lead to the adoption of penalty starting points at a substantially higher level than that adopted in the various cases which were cited to me.

[43] Having considered all of those matters I have determined to identify separate starting points for penalty considerations on a three-tier basis.

[44] Firstly, I determine that the offending involving wastewater discharges at Tapanui and Lawrence has an additional element of seriousness to it in that both of these plants were being operated in a manner that meant effluent bypassed the secondary BioFiltro and UV processes altogether. I am going to adopt similar starting points for the offending in respect of those plants.

[45] Secondly, I will take an identical starting point for the wastewater discharges at Kaka Point, Owaka and Stirling. Although there are differences between them as to the nature and extent of management failures and the effects of those failures, the ultimate outcome in each case was that the BioFiltro and UV systems of those plants were not operating properly and were not effectively treating the wastewater passing through them.

[46] Thirdly, I will identify a stand alone starting point for the discharge to air at Lawrence. I refer again to the descriptions as to the vile nature of that discharge given by Council officers, to the fact that that plant appeared to have been shut down or abandoned and that the owner of the camping ground had complained about odour emanating from the plant on a number of occasions.

[47] In light of the lack of assistance from comparable cases I shall resort to first principles in determining starting point. It will be apparent from my previous comments that any one of these offences considered in isolation involved serious offending. In each case the failures on the part of the Defendant fall into the reckless category and the consequent discharges into the inevitable category.

[48] The offending was by a territorial authority which can be expected to be aware of its obligations. Its management failures giving rise to the offences detected on the charging dates, were ongoing over a period of months. There was a serious adverse amenity effect on the owner of the camping ground at Lawrence. There was potential for the discharges of wastewater to have a profound effect on the waters into which they entered. There were significantly adverse cultural effects and community effects from the discharges. The fact that these failures extended over the operation of five plants is a serious aggravating factor.

[49] All of these things which I have discussed at some length previously, combine to make the matters of denunciation and deterrence important factors in my considerations.

[50] Accordingly, I determine that the appropriate starting point for penalty for these offences are:

- For the two wastewater discharges at Tapanui and Lawrence in each case the sum of \$120,000;
- For the three wastewater discharges at Kaka Point, Owaka and Stirling, the sum of \$100,000 each;
- For the discharge to air at Lawrence the sum of \$80,000.

[51] I can say that in the case of each of the wastewater discharges, the starting point recognises the limited volumes being treated in the plants. An addendum to the summary of facts will be provided setting out the throughput volumes. If these offences had involved larger plants, starting points at a considerably higher level would have been adopted.

[52] CDC has one previous conviction for a discharge offence in 2018. It was fined \$21,000. It was also subject to an infringement fee in 2016. Clearly it receives no discount for past good character. There is no rule of thumb as to what uplift it should attach for previous offending, although the *Yates* case suggests one third as being a maximum uplift.<sup>1</sup> Factors such as lapse of time between offences, the nature and relative seriousness of the respective offences will all come into play.

[53] The 2018 conviction was for a discharge offence that was much less serious than this offending by many degrees of magnitude. However, the 2018 conviction should have put CDC on notice as to the need to manage its sewerage network properly. I will increase starting points by five per cent on account of the previous offending giving figures of \$126,000 for each of the Tapanui and Lawrence discharge

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<sup>1</sup> *Yates v Taranaki Regional Council* HC New Plymouth CRI-2010-443-8, 14 May 2010.

offences, \$105,000 for Kaka Point, Owaka, and Stirling and \$84,000 for the discharge to air at Lawrence.

[54] Looking to mitigating factors I record that it appears from the information before the Court and the appearance of the Mayor, some Councillors and other representatives of CDC at Court today, that the Council is generally remorseful about what has happened. It has previously tendered formal apologies and did so again in Court. There have apparently been repercussions for staff and affidavits provided by the Council suggest that matters are being put right. That of course is how things should be and I give no additional credit for that.

[55] Counsel agree that there should be a reduction from starting point of 25 per cent in each case to reflect CDC's prompt guilty pleas. That gives end penalties of \$94,500 each for the Tapanui and Lawrence discharges to water; \$78,750 each for the Kaka Point, Owaka and Stirling discharges and \$63,000 for the Lawrence discharge to air. A total of \$488,250.

[56] Those findings bring me to the issue of totality and s 85 of the Sentencing Act which relevantly provides:

**85 Court to consider totality of offending**

- (1) Subject to this section, if a court is considering imposing sentences of imprisonment for 2 or more offences, the individual sentences must reflect the seriousness of each offence.
- (2) If cumulative sentences of imprisonment are imposed, whether individually or in combination with concurrent sentences, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.

Although s 85 refers directly to sentences of imprisonment, it is agreed by counsel that similar considerations apply in the case of monetary penalties. I have identified what I consider to be appropriate individual sentences in each case.

[57] I consider that s 85(2) sets a high bar when applied to fines. It requires that the total fines imposed are *wholly*, (and I emphasise the word wholly) out of proportion to the gravity of the overall offending. Use of the word wholly suggests that there must

be a very significant or large disproportionality between the penalties imposed and the gravity of the overall offending.

[58] The overall offending (I apologise if I repeat myself) involved reckless systemic mismanagement of CDC's wastewater plant infrastructure giving rise to six serious offences at five plants. Total penalty maxima are \$3.6 million so the penalties I have identified total approximately 13.5 per cent of total maxima. Determining penalty involved consideration of all of the various factors I have noted. Taking all of those matters into account, I do not consider that the total fines are wholly out of proportion to the gravity of the overall offending and I make no further adjustment to penalty.

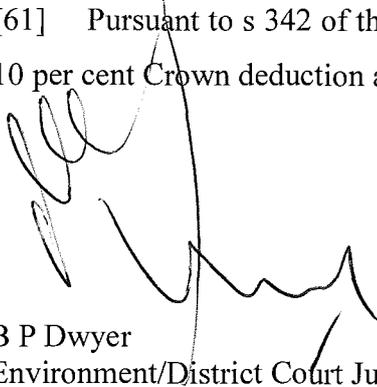
[59] Accordingly, I determine as follows:

- On charging document ending 0233 pertaining to discharge into water at Tapanui, Clutha District Council is fined \$94,500.
- On charging document ending 0237 pertaining to discharge to land at Kaka Point, Clutha District Council is fined \$78,750.
- On charging document ending 0245 pertaining to discharge into water at Lawrence, Clutha District Council is fined \$94,500.
- On charging document ending 0246 pertaining to discharge to air at Lawrence, Clutha District Council is fined \$63,000.
- On charging document ending 0258 pertaining to discharge into water at Owaka, Clutha District Council is fined \$78,750.
- On charging document ending 0255 pertaining to discharge into water at Stirling, Clutha District Council is fined \$78,750

As I have said, by my calculations those come to a total amount of \$488,250.

[60] I note that legal costs are not sought by the Prosecutor. On each charge the Defendant will pay court costs of \$130.

[61] Pursuant to s 342 of the Resource Management Act I direct that the fines less 10 per cent Crown deduction are to be paid to Otago Regional Council.

A handwritten signature in black ink, appearing to read 'B P Dwyer', is written over the text of paragraph [61]. The signature is fluid and cursive, with a prominent vertical stroke on the right side.

B P Dwyer  
Environment/District Court Judge