

**IN THE DISTRICT COURT
AT NEW PLYMOUTH**

**I TE KŌTI-Ā-ROHE
KI NGĀMOTU**

**CRI-2020-043-001362
via AVL
[2022] NZDC 1265**

TARANAKI REGIONAL COUNCIL
Prosecutor

v

HERD PROPERTIES LIMITED
Defendant

Hearing: 12 October 2021
Appearances: K de Silva for the prosecutor
S Hughes QC for the defendant
Judgment: 4 February 2022

SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] The defendant has pleaded guilty to two charges. The first relates to permitting a contravention of ss 15(2A) and 338(1)(a) of the RMA on 17 March 2020 by discharging a contaminant, namely dust, into the air in a manner that contravenes a regional rule, namely Rules 43 and Rule 44 of the Regional Air Quality Plan for Taranaki.¹ The second relates to permitting a contravention of an abatement notice dated 24 December 2019 contrary to s 338(1)(c) of the RMA on 17 March 2020.²

¹ CRN 20043500423.

² CRN 20043500422. The charging document was amended to delete the words “contravened or”.

[2] The maximum penalty applicable for each charge is a fine not exceeding \$600,000.

[3] Ms de Silva, for the Taranaki Regional Council, proposed a starting point of \$40,000 to \$50,000 and \$20,000 to \$25,000 for the discharge and abatement notice offences respectively. For the defendant, Ms Hughes proposed a starting point of \$35,000 to \$45,000 and \$20,000 to \$25,000 for the offences.

The site³

[4] The discharge of dust occurred from a property being developed for an industrial/commercial subdivision (**the site**) at 812 Devon Road (State Highway 3), Bell Block, New Plymouth.⁴ The site is approximately 6.5 hectares and was purchased by Herd Properties in August 2016. At the time of purchase the site was grass covered and used primarily for pastoral grazing.

[5] To the west of the site are industrial properties that have been largely established within the last 5 – 10 years and land that is currently being developed and which contains bare unstabilised ground. To the north-west of the site is a residential subdivision known as The Links. The township of Bell Block is located to the north east of the site.

[6] The area within which the site is located is zoned industrial by the District Plan 2002.

Statutory Framework⁵

[7] Permitted Activity Rule 26 of the Regional Freshwater Plan for Taranaki (**RFWP**) permits the discharge of stormwater and sediment deriving from soil disturbance activities of between one and eight hectares subject to specified standards/terms/conditions. Controlled Activity Rule 27 of the RFWP requires a

³ Agreed Summary of Facts at [4]-[9].

⁴ Christopher Herd holds the Subdivision Consent granted by the New Plymouth District Council.

⁵ Agreed Summary of Facts at [16]-[20].

resource consent to be held for the discharge of stormwater from soil disturbance activities if Rule 26 cannot be complied with.

[8] Permitted Activity Rule 43 of the Regional Air Quality Plan for Taranaki (RAQP) permits “*Discharges of contaminants to air from earthworks that exposes a contiguous area of soil of 4 hectares or less, at any one time*” subject to specified standards/terms/conditions. Controlled Activity Rule 44 of the RAQP requires a resource consent for “*Discharges of contaminants to air from earthworks that exposes a contiguous area of soil of more than 4 hectares, at any one time.*”

Chronology of events⁶

2018

[9] Earthworks commenced in approximately 2018. These works involved the creation of a flat building platform of approximately 17,925 m². The surface was exposed clay and was not stabilised.

2019

[10] Earthworks recommenced at the site in 2019. These works involved the continued development of a flat building platform and the establishment of an earth surfaced access road into the site. After these earthworks, the flat part of the site closest to Devon Road and which is approximately 14,400m² was stabilized by a layer of metal being spread evenly across this part of the site.

October

[11] On 25 October 2019, following a complaint, an inspection of the site was undertaken by a Council Enforcement Officer. He found that significant volumes of dust were discharging beyond the boundary of the site, and silt was observed discharging into the road side curb and into the stormwater system. Approximately 5.1 hectares of soil was exposed as a result of the earthwork activities at the site. No resource consents authorised the earthworks.

⁶ Agreed Summary of Facts at [10]-[15], [22]-[32], [34], [36]-[58].

November

[12] On 4 November 2019 abatement notice EAC-22989 was issued to Christopher Herd. The notice required Mr Herd to undertake works to comply with Rule 26 of the RFWP by 4 November 2019 and comply with Rule 44 of the RAQP by 30 November 2019.

[13] The Council issued infringement notices to Herd Properties for non-compliances found on 8, 12, and 20 November 2019.

December

[14] By approximately December 2019 earthworks had resulted in 27,800 m² of exposed area.

[15] In December 2019 aggregate was applied to the surface of approximately 15,000m² of the site immediately adjacent to Devon Road. The aggregate was stabilised; there was no visible dust leaving the area covered in aggregate.

[16] However, the Council issued infringement notices to Herd Properties for non-compliances found on 3, 21, 23, 24, and 29 December 2019.

[17] On 3 December 2019 a reinspection of the site found contravention of abatement notice EAC-22989: earthworks were continuing; sediment controls were insufficient; and no action had been taken to comply with Rule 44 of the RAQP.

[18] On 4 December 2019 a further abatement notice (EAC-23044) was issued to Christopher Herd and an abatement notice (EAC-23045) was issued to Burgess Crowley Civil Ltd, the earthworks contractor at the site. The notices required: "*cease earthworks and do not recommence until Rule 26 of the Regional Freshwater Plan for Taranaki and Rule 44 of the Regional Air Quality Plan for Taranaki can be complied with.*" Burgess Crowley Civil Limited did not do further work at the site from December 2019.

[19] On 23 December 2019, in response to multiple complaints, an inspection of the site was undertaken by a Council Enforcement Officer. She found that inadequate dust suppression measures were being used and objectionable dust was found to have discharged beyond the site boundary.

[20] On 24 December 2019 a Council Enforcement Officer inspected the site at 5.40pm in response to multiple complaints about discharge of dust and found application of a dust suppressant polymer to the exposed earth and metalled area had just begun.

[21] On 24 December 2019 a Council Officer recommended that Herd Properties get expert advice on dust control. The same day it engaged an expert, Mr Robert Coulson of RST Environmental Solutions. Mr Coulson recommended *Envirobinder* and provided advice about the volume of product required and the application method. Herd Properties purchased 1,000 litres of *Envirobinder* from RST Environmental Solutions on the afternoon of 24 December 2019.

[22] On 24 and 25 December 2019 1,080 litres of *Envirobinder* was applied in 28,000 litres of water to 22,000 m² of bare clay.

[23] Mr Coulson provided a statement. He set out the advice he provided and noted that his advice was not followed: approximately 2,150 litres of product should have been applied in 40,850 litres of water as a minimum, the site should have been monitored after five weeks, and if the product started to break down further product should be applied. Mr Coulson had not inspected the site. Mr Coulson's opinion was based on photographs of the site and other information provided by a Council Officer.

[24] Also on 24 December 2019, Herd Properties contacted Mr Hunte, the Operations Manager of Appchem Groundspray (a company that provides solutions to prevent dust on development sites), and asked for advice and a solution for the discharge of dust. Herd Properties instructed Mr Hunte to undertake regular inspections of the site.

[25] On 24 December 2019 abatement notices were issued to Herd Properties (EAC-23085), Christopher Herd (EAC-23086), and to Simon Herd (EAC-23087). All three notices required the recipients to “*Ensure that no objectionable or offensive dust discharges beyond the boundary of the site*”. The second charge relates to permitting a contravention of this abatement notice.

2020

January

[26] The Council issued an infringement notice to Herd Properties for a non-compliance found on 3 January 2020.

[27] On 19 January 2020 a resource consent application from Herd Properties was received by Council seeking a discharge consent pursuant to Rule 44 of the RAQP. Christopher Herd is named as the contact for Herd Properties. The application states that the polymer GRT: Envirobinder is to be used.

February

[28] On 18 February 2020 Resource Consent 10815-1.0 was issued to Herd Properties. The consent authorised, subject to conditions, the “*discharge of contaminants (dust) to air from earthworks associated with the development of an industrial/commercial subdivision*”.

March

[29] On 14 and 15 March 2020 people entered the site without permission and drove a buggy and dirt bikes on the site and damaged the polymer that had been applied by Herd Properties for dust control. The gate at the main entrance at this time had been vandalized and was unusable.

[30] The site could be accessed by the buggy and dirt bikes because parts of the site had inadequate fencing to keep the public out. To access the site the riders had cut the silt control fencing and bridged a silt control drain at the bottom of a dirt bund. There

were no signs stating that the site was private property and that members of the public were not allowed to access the site.

[31] Mr Hunte found that the polymer membrane had been compromised on 14 and 15 March 2020 by the buggy and bikes.⁷ Mr Hunte decided to re-treat the site as soon as possible when the next batch of polymer arrived. The polymer arrived on 19 March 2020, two days after it was supposed to be delivered, but was only half of the quantity ordered.⁸

[32] On 17 March 2020 the Council received 19 complaints from members of the public about discharge of dust from the site. New Zealand Police were also notified of the dust discharges due to the reduced visibility that motorists were experiencing when commuting past the site.

[33] In response to the complaints, a Council Enforcement Officer undertook an inspection of the site. A series of photographs and videos were taken by Council Enforcement Officers and complainants. At the time of the inspection the weather was clear, with no rainfall and a medium to strong south-easterly wind.

[34] The Officer found that large plumes of dust were discharging from the site in a north-westerly direction. The dust was discharging across Devon Road (State Highway 3) and dispersing throughout large areas of The Links residential subdivision. Objectionable levels of dust were found to be discharging on a near constant basis from 8.20am through to approximately 4.00pm.

[35] Christopher Herd was notified at approximately 9.00am that further dust controls were required at the site. At approximately 1.18pm the first water truck arrived, however the rate of application was insufficient to reduce the dust discharge from the site. A second water truck arrived at 3.30pm. Dust discharge from the site began reducing upon the application of water to the exposed surfaces from both water trucks. 1,500 litres of *Stabil-X* was added to the water trucks. The application of

⁷ Affidavit of Daniel Charles Hunte affirmed 6 October 2021 at [27] and [28].

⁸ Affidavit of Daniel Charles Hunte affirmed 6 October 2021 at [29].

Stabil-X was very unsuccessful and the large water trucks driving around the site were not helpful.

[36] On 18 March 2020 the Council sent a letter to Herd Properties asking for an explanation of the circumstances surrounding the incident.

[37] On 19 and 20 March 2020 910 litres of Gravel Locks CSC polymer was applied in 30,000 litres of water to 24,000 m² of bare clay.

May

[38] On 29 May 2020, an email from Simon Herd explained as follows (*sic*):

Our reply to this is simple. We tried a batch of polymer at considerable cost, but it was ineffective. The wind on this day was especially fierce, and from a different direction to the previous wind we finally were able to manage. As soon as we got this complaint, we handed the dust management control of the whole site to a professional spraying company who has kept it fully in control since. We will continue to engage them so the issue does not occur again.

October

[39] On 6 and 7 October 2020 720 litres of Gravel Locks CSC polymer was applied in 28,000 litres of water to 24,000 m². There was a verified complaint about dust from the site on 7 October 2020. The Council issued an infringement notice for breach of the abatement notice EAC-23085 for this date.

December

[40] There was a verified complaint about dust from the site on 1 December 2020. On 1 December 2020 720 litres of Gravel Locks CSC polymer was applied in 18,800 litres of water to 18,000 m². The Council issued an infringement notice for breach of the abatement notice EAC-23085 for this date.

Sentencing principles

[41] The purposes and principles of the Sentencing Act 2002 are relevant. The High Court in *Thurston v Manawatu Wanganui Regional Council*,⁹ provides a useful summary of the approach to be taken to sentencing, which includes consideration of culpability; precautions taken to prevent discharges; the vulnerability or importance of the affected environment; extent of damage; deterrence; capacity to pay a fine; disregard for abatement notices; co-operation and guilty pleas.

Environmental effects

[42] Mr Gary Bedford,¹⁰ Director of Environment Quality, provided a report¹¹ on the effects of the discharge of dust on the environment. Mr Bedford found that the discharge exceeded the consent limit by much more than 300 times within the neighbouring properties. He also is of the view that the discharge breached the consent requirement that discharges to or from the site not give rise to any offensive, objectionable and noxious levels of dust at or beyond the property. He states:

... It is apparent on viewing a number of the photographs, that a dense cloud of dust was visible well beyond the boundary of the development, and therefore the photographs capture a clear breach of the quantitative standard imposed within the Consent. ...

... while over a short period of time, the cumulative amount of dust depositing even at above the consented rate might be inconsequential, deposition at the same rate over an extended period would result in unacceptable total deposition.

... I have reviewed the photographs of households in the evidence folder and it is my considered opinion that the discharge from the Herd development exceeded the Consent limit of 0.13g/m²/day by much more than 300 times within the neighbouring residential properties, with my best estimate being that the deposition approximated to between 300 and 900 times greater than allowed. (This is based on the assumption that the deposition visible in the site photographs occurred in the course of a single day).

The dust cloud as recorded also gives rise to a breach of the more general Consent requirement that any discharge to air from the site not give rise to any

⁹ *Thurston v Manawatu Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, -25, -27, 27 August 2010.

¹⁰ Mr Bedford holds a Bachelor of Science degree from the University of Auckland, a Master of Applied Science degree from the University of New South Wales, and a postgraduate Diploma in Science in environmental science.

¹¹ Report on environmental effects of dust discharges arising from Herd Properties Ltd – 17 March 2020.

offensive, objectionable, noxious, ... levels of dust at or beyond the boundary of the property. ... The effects need not be associated only with a direct physical impact upon a recipient, either bodily or upon their property and possessions, as long as the nature of the event would be considered unacceptable or intolerable to a reasonable and average person.

While the exposure on the day is being regarded by the Council as a single episode (one day) observed during ‘business hours’ involving a contaminant that is relatively inert (soil-derived dust), these three factors do not preclude it being found to be offensive and objectionable. Key factors to be considered are that the dust exposure was of high intensity, and it lasted for longer than a brief moment or two (the factor of duration). ... the event continued for more than 7.5 hours at least. While the dust originated from an area that was at least in part industrial, and hence might be relatively more acceptable in that locality, it blew immediately into a residential area, where inhabitants could reasonably be expected to be able to enjoy outdoor activities such as hanging out washing, children playing outside under parental supervision, gardening, or simple relaxation and enjoyment of an external environment, free from hindrance or impairment (the factor of location).

... It is my opinion, based on my experience professionally and personally, that a dust cloud of the density evidenced in the photographs is likely to cause irritation in the nose, throats and breathing and swallowing passages of people exposed to such a cloud even if exposure was to be of short duration. Persons with existing chronic conditions such as asthma or impaired lung function would potentially experience more significant adverse effects, depending on whether they were able to take evasive action (which would mean their normal expectation around freedom of movement and activity would have been compromised).

[43] The Court was provided with 10 victim impact statements.¹² The statements describe the events of the discharge on 17 March 2020 and earlier dates. The victims’ descriptions and reported effects of the 17 March 2020 discharge include:

From Statement 2

On the morning of the 17th of March, I went outside in the dark to get the morning paper and once I got back inside I had to wash my eyes out with water because of the dust all through them. ... we had left the toilet window on the latch (open about a cm at most) and when I walked in to the toilet the entire room was absolutely filthy with brown dust. ... We have had other developments, ... the old folks village next door (Summerset), but we have had no other dust issues ... My wife has so far spent over 12 hours just cleaning dust up from around the house, and we’ve probably spent around 2 hours just washing dust off the cars.¹³

From Statement 4

On the 17th of March 2020, my husband and I looked out of the window first thing in the morning and could see the dust from the site. It was blowing dark brown, and it’s what I imagined a tornado would like but not quite as fierce

¹² Counsel agreed that the identity of the victims need not be disclosed.

¹³ Statement 2 dated 27 March 2020.

and more blowing than twirling. ... at times we couldn't even see the road, so we shut all the windows, ... It still seeped into the house, ... On the 17th I had to spend 3 hours cleaning, and have probably spent another 4 or 5 hours since then cleaning the dust.¹⁴

From Statement 5

On the 17th of March 2020, I first noticed a haze of dust coming from the site and going across the road around quarter to 7 when I was driving to work. When I drove home for lunch ... I looked down and couldn't even see the road or the Bell Block overbridge. ... The first few houses on Links Drive would have been covered. At my home, there was a slight dusting in the front of the garage, you could tell dust was around but we were on the outskirts as the dust had gone down Link Drive not so much Kotere Drive. After the 17th we had to hose our house down, which took an hour and a half. It badly dusted the house, around the garage and on the roof.¹⁵

From Statement 8

When I went to the section of farmland I look after next door, I was breathing in dust. ... it was like being in a dust storm with almost constant great clouds of dust coming off the site.¹⁶

From Statement 10

On the 17th of March 2020, I was driving north past the development at 11.45a.m ... You couldn't see 15 metres in front of you. ... You couldn't see through the dust. ... Visibility was really poor. I chose to turn up the Golf Course using the slip lane, ... I know you're not supposed to do that. I was worried about my safety and I wanted to get to a slower speed.¹⁷

[44] Ms de Silva submitted the adverse effects were significant. She noted that the discharge continued for 7.5 hours, the dust clouds were dense, the dust deposited inside and outside houses, the dust reduced visibility for motorists travelling past the site, and there were a significant number of complaints (19 in total).

[45] Herd Properties accepted that dust escaped from the site despite its best endeavours. Ms Hughes submitted the cause of the dust was, however, the unlawful entry onto the site of a dune buggy rider and, thereafter, persons on motorbikes. She submitted had these unlawful entries not occurred, then there is no reason to believe that the polymer would not have been maintained. She noted that an order for extra polymer had already been placed and was anticipated to be delivered on 16 March, the day before the events giving rise to these charges.

¹⁴ Statement 4 dated 1 April 2020.

¹⁵ Statement 5 dated 1 April 2020.

¹⁶ Statement 8 dated 30 March 2020.

¹⁷ Statement 10 dated 31 March 2020.

[46] Mr Coulson's opinion that inadequate polymer was applied was rejected. Ms Hughes submitted that, given the absence of complaints between December 2020 and March 2021, it is clear that the polymer was successful.

[47] Ms Hughes highlighted that the victim impact statements merge complaints regarding the discharge on 17 March with the earlier incidents occurring in December, and the defendant is only charged in relation to the March incident.

Conclusion on effects

[48] There is no doubt that the large amount of dust swept up by wind from the site on that day in March was confronting for nearby residents and motorists. The photographs graphically demonstrate its density and magnitude. It continued from early morning to late afternoon. Sizable amounts of dust were deposited on houses, courtyards and driveways and affected nearby residents. Some residents had to spend a considerable amount of time cleaning their properties.

[49] I find that the discharge of dust on the day of the offending was offensive, noxious and objectionable. It had a significant impact on the amenity of those occupying neighbouring houses.

Culpability

[50] Ms de Silva submitted there is a high degree of culpability for the following reasons:

- (a) the history of non-compliance and complaints between 25 October 2019 and 6 February 2020. The victim impact statements also describe the adverse effects prior to 17 March 2020;
- (b) Herd Properties was on notice from the Council through discussions with Council staff, the detailed inspection notices, the abatement notices issued on 4 November, 4 December and 24 December 2019, and the nine infringement notices for discharges;

- (c) the site is flat, exposed, and at times there is wind, and therefore discharge of dust is foreseeable;
- (d) Herd Properties could, and should, have taken steps when it commenced earthworks at the site to get expert advice on all necessary steps to reduce the discharge of dust. Instead, it delayed getting expert advice until 24 December 2019. Despite the steps taken from 24 December 2019, in addition to the discharge of dust on 17 March 2020 there were discharges on 29 December 2019, 3 January 2020, and further discharges on 7 October and 1 December 2020, resulting in issue of infringement notices;
- (e) the method of dust suppression was entirely up to Herd Properties. The Council could only make suggestions, and should not and could not dictate to the defendant what steps it should take.¹⁸ The responsibility was on the company to engage an expert to find and implement a solution.

[51] Ms de Silva submitted the development of the subdivision is a commercial operation to make money and the company had a duty to take all necessary steps to protect the environment and comply with the resource consent.

[52] Ms Hughes submitted that:

- (a) the company made significant efforts in the time leading up to the offending to address the issues at the site. The defendant had expended a sum in excess of \$150,000 in applying metal to the site to try and contain the dust. It had also endeavoured to use water as a dust suppressant, but unsuccessfully so;
- (b) it was accepted the company was on notice given the receipt of the abatement notices, and took steps to avoid further incidents;
- (c) the topography of the site, and its wind issues, were not apparent to the defendant; and

¹⁸ *Taranaki Regional Council v Fonterra Ltd* [2015] NZDC 14962 at [31], the Court pointed out (in response to Fonterra attributing a degree of blame for what happened to the Regional Council) that it was not the Regional Council's job to act as technical advisor to Fonterra and to do so, might have compromised its regulatory responsibility.

- (d) Herd Properties could not foresee the trespass onto the site and the consequences of that.

[53] Ms Hughes submitted the site at this stage is a bare site that has had considerable capital investment. Eventually it will be developed for profit, however it cannot logically be said that the dust issues arose from an effort to maximise profit and minimise expense.

[54] The Court was provided with an affidavit of Mr Daniel Hunte.¹⁹ The affidavit describes the steps Mr Hunte and the company took to contain dust on the site from 24 December 2019, including trying to water the site with large water trucks (which he determined would not be a practical solution to the problem), purchasing polymer and engaging Mr Hunte to monitor the site and remediate as required. Mr Hunte was of the view that at no point did the Herd's hold back or hesitate in its attempts to have the dust issues properly resolved. He hoped the Court would see the commitment made by the company and Appchem to immediately remediate the problems, as and when they could, to the very best of their ability and knowledge as soon as possible.

Conclusion on culpability

[55] The company has clearly had a chequered enforcement history with regard to its management of dust on the site. It had belatedly taken advice and implemented measures to address the issues from late December 2019 to March of 2020, and from 4 January 2020 dust issues appeared to have been largely resolved. However, further issues arose when the dirt bikes and buggy broke into the site on 14 and 15 March and disrupted the polymer. While Herd Properties responded relatively promptly to the issue, it could not obtain a new delivery of polymer in time to remedy the problem. That is regrettable. In that intervening period it could, however, have put in place some measures to ensure there was no discharge of dust; for example, a regular programme of watering the exposed surfaces until the polymer arrived and it could have had water trucks on standby, among others. I am concerned that it took over four hours for the first water truck to arrive on site on the day of the offending, and that

¹⁹ Affirmed 6 October 2021.

only one truck was called. The site is large and the amount of dust generated on that day was significant.

[56] It must also be observed that Herd Properties could have taken better care to ensure the security of its site; signage warning against entry and secure fencing could have prevented entry to the site. Maintaining site security is also important from a health and safety perspective.

[57] In all the circumstances I determine that Herd Properties did not take sufficient care of the site or pay adequate regard to its environmental responsibilities. However, I do take notice of the unlawful trespass onto its site, and the damage done, in determining culpability. I place its culpability as moderate.

Starting point

[58] In support of the proposed starting point Ms de Silva referred me to *Bay of Plenty Regional Council v Waimea Consultancy Ltd & HEB Contractors Ltd (Waimea & HEB Contractors)*²⁰ and *Northland Regional Council v Hick Bros Civil Construction Ltd (Hick Bros)*.²¹

[59] *Waimea & HEB Contractors* involved one charge relating to dust nuisance incidental to earthworks. HEB was tasked with providing water to ensure prevention of a dust nuisance. The Court found HEB to have been neglectful and convicted and fined HEB \$20,000. In *Hick Bros*, the charge was discharging sand and organic material into the air on four occasions. The offending was described as reckless – there were insufficient dust suppression measures, insufficient use of water trucks and protective fencing. The Court found there was a loss of amenity to residents, who had to clean up dust and other material. The Court set a starting point of \$30,000. Having referred to these cases, Ms de Silva submitted a significantly higher fine is required here because of the higher culpability and the significant adverse effects.

²⁰ *Bay of Plenty Regional Council v Waimea Consultancy Ltd & HEB Contractors Ltd* DC Tauranga CRN 8070022442, 27 September 1999.

²¹ *Northland Regional Council v Hick Bros Civil Construction Ltd* DC Whangarei CRI-2006-088-909, 20 November 2006.

[60] Further, Ms de Silva submitted there should be a separate starting point for the abatement notice offence. While the two offences arose out of the same incident, Ms de Silva submitted that the High Court's approach in *Thurston* should be applied and there should be a separate starting point for the abatement notice offence. Counsel referred to *Southland Regional Council v Dodds*²² in which the District Court said:

Turning to the charge of breach of abatement notice, I record the Court's common observations that such breaches are inherently serious matters in and of themselves and warrant the imposition of penalties which deter non-compliance with legally issued Council notices. Abatement notice penalty considerations without any particularly aggravating factors commonly range in the \$20,000-\$30,000 range.

[61] Ms de Silva noted that in a number of cases the Courts have held that the increase in maximum penalties in October 2009 is a clear signal for an increase in fines.²³

[62] Ms de Silva submitted there is a need for general deterrence to encourage developers and contractors to ensure that all necessary steps are taken to avoid discharge of dust in breach of conditions in resource consents.

[63] The Council issued nine infringement notices prior to the date of the offences and two notices after the date of the offences. Ms de Silva submitted that this should be taken into consideration in setting the starting point or there should be an uplift for these infringement notices.

[64] Ms de Silva submitted that the starting point for the discharge offence should be in the range of \$40,000-\$50,000, and the starting point for the contravention of abatement notice should be in the range of \$20,000-\$25,000.

[65] Ms Hughes did not accept that the offences should attract a significantly higher fine because of higher culpability and the significant adverse effects (as characterised by the prosecution). Ms Hughes submitted that, factored against all of these matters has to be the fact that the mitigation measures taken by the company in December had

²² *Southland Regional Council v Dodds* [2021] NZDC 16836 at [16].

²³ *Taranaki Regional Council v Remediation (NZ) Ltd* DC New Plymouth CRI-2010-043-2334, 17 November 2010 at [33]; *Sowman v Marlborough District Council* [2020] NZHC 1014 at [65].

been perfectly effective until the polymer was breached by the illegal actions of third parties, namely those operating the dune buggy and dirt bikes. In this regard, the pleas of guilty were entered in the context that the company could have foreseen the possibility of third parties gaining access to the site and potentially damaging the polymer. The company, had it anticipated the unlawful actions of third parties, could have done more to have secured the site and prevent such access.

[66] Ms Hughes submitted the starting point for the discharge offence should be in the range of \$35,000-\$45,000, and the starting point for the abatement notice breach should be in the range of \$20,000-\$25,000. The Court was reminded of the need to apply the totality principle to sentencing, particularly in circumstances such as these when both charges relate to the same event.

[67] I have considered the cases to which I was referred. There are similarities and differences but none are on all fours with this case. I have, however, been assisted by the *Dodds* case in its approach to breaches of abatement notices. I have found that the offending did give rise to an offensive, objectionable and noxious discharge, and that Herd Properties' lack of contingency planning to ensure dust suppression following the damage to the polymer directly contributed to the size and duration of the dust discharges. In setting the starting point I have taken into account the many infringement notices issued, as that was relevant to my determination of culpability.

[68] I adopt a starting point of \$45,000 for the discharge offence and \$20,000 for the abatement notice offence.

Aggravating and mitigating factors

Criminal record / evidence of good character

[69] The company has no previous convictions.

[70] The company acknowledged that abatement notices had been issued prior to the events of this prosecution. I again note Ms de Silva's submission that there should be an uplift for the infringement notices if not taken into consideration in setting the starting point. The infringement notices were taken into account in setting the starting

point, I will not therefore impose an uplift. However, recognising these infringement notices, I will not allow a discount for good character.

Guilty plea

[71] The charging documents were filed on 24 August 2020. The joint memorandum recording the position on guilty pleas was filed on 17 March 2021. Ms de Silva acknowledged that Herd Properties should be given a discount for the guilty pleas. Ms Hughes submitted the full credit for prompt guilty pleas should be allowed on the basis that, once she was instructed, there were steps taken to speak to the prosecutor ultimately resulting in certain charges being withdrawn and guilty pleas entered on those which remained. In the circumstances I allow a discount of 25 per cent for the guilty plea.

Remorse

[72] Ms de Silva submitted the efforts made by Herd Properties to address the issue fall into the category where no credit should be given, as described by the High Court in *Thurston*.²⁴

[73] Ms Hughes disagreed and submitted as follows:

- (a) Mr Hunte was regularly inspecting the site and found no breaches of the polymer up until the dune buggy and subsequent dirt bike incidents;
- (b) there is no evidence that the polymer was other than successfully containing the dust until these two incidents occurred;
- (c) in any event, the company had ordered extra quantities of polymer in the event that the original polymer was breached;
- (d) Mr Hunte records that his instructions were to take all steps to ensure that there be no further issue with dust;

²⁴ *Thurston* at [67]-[69].

- (e) such was the commitment of Herd Properties to mitigate the harm done that staff worked throughout the night of Christmas Eve and into the early morning hours of Christmas Day to ensure that a coating was applied;
- (f) a combination of the dune buggy, the dirt bikes, unexpectedly high winds, and a delayed shipment of polymer set the scene for the 17 March breach;
- (g) undoubtedly the company should have factored dust mitigation measures into its development plan.

[74] Ms Hughes made the point that the breach on 17 March was one which arose in circumstances where the company was unable to react quickly enough to the unlawful actions of third parties. She submitted the company was not cavalier or dismissive of the concerns of neighbours. Ms Hughes submitted that some credit should be given for the steps taken to mitigate the dust nuisance arising.

[75] Ms de Silva submitted the company has not taken steps to help affected people. She referred to victim impact statement 6, which refers to discussions with Mr Herd about the adverse effects, including laundry covered with dust and a swimming pool filled with dust, and an offer by Mr Herd to help with the cost of laundromat and pool expenses but disappointment that no help was given and “*so far it has all been words.*”²⁵

[76] The company regretted that the author of statement 6 considers that no steps were taken to assist those affected. Ms Hughes noted that it is only the author of this statement who makes such an allegation, and on reading the statement suggested it is plain that the complaints relate primarily to the 2019 incidents, although it was acknowledged that the complaints included the events of 17 March 2020 as well.

[77] I acknowledge the steps taken by Herd Properties in December 2019 to address the dust issues, however they are no more than what was required to ensure that dust was not discharged from the site. They or similar steps should have been implemented when earthworks first began. Further, steps taken after it was discovered the site had

²⁵ Statement 6 dated 27 March 2020.

been entered and the polymer compromised were inadequate. I am disinclined to allow any discount for remorse because I have not seen any concrete expression of it.

Outcome

[78] I have adopted the two-step sentencing methodology outlined by the Court in *Moses v R*.²⁶

[79] Accordingly, Herd Properties Limited is convicted and ordered to pay a fine of \$48,750. In terms of s342(2) of the RMA, I order that 90 per cent of the fine be paid to the Taranaki Regional Council.

Judge MJL Dickey

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 04/02/2022

²⁶ *Moses v R* [2020] NZCA 296 at [45] to [47].