IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-057-000680
[2020] NZDC 26670

WAIKATO REGIONAL COUNCIL
Prosecutor

v

TUAKAU PROTEINS LIMITED
Defendant

Hearing:	26 November, 8 and 21 December 2020
Appearances:	N Speir and J McGrath for the prosecutor B Watts for the defendant
Judgment:	21 December 2020

SENTENCING DECISION OF JUDGE HARLAND

Introduction

[1] Tuakau Proteins Limited has pleaded guilty to three representative charges of contravening the provisions of the Resource Management Act 1991 (**RMA**) by unlawfully discharging odour and wastewater from its rendering plant at Tuakau and contravening an abatement notice at various times between 12 December 2019 and 27 April 2020. The maximum penalty it faces is a fine of $1.8 million, because each charge carries with it a maximum fine of $600,000.

[2] There were various issues raised at sentencing, the main one being what the starting point for the fine should be, with the prosecutor submitting that, on a global

basis, it ought to be $350,000 and counsel for the defendant submitting that it ought to be $200,000. As well, the deductions I should allow for mitigation matters was in issue, as were the terms and conditions of the enforcement order offered by the defendant.

The charges

[3] The details of the three charges are as follows:

(a) **CRN 20057500147** – a representative charge of discharging odour in breach of condition 8 of the defendant's air discharge consent during the period of 12 December 2019 to 30 April 2020, contrary to ss 15(1)(c) and 338(1)(a) of the RMA (**the odour discharge offending**);

(b) **CRN 20057500148** – a representative charge of contravening an abatement notice that required compliance with condition 8 of the defendant's air discharge consent during the period of 12 December 2019 to 30 April 2020, contrary to ss 338(1)(c) of the RMA (**breach of abatement notice**); and

(c) **CRN 20057500145** – a representative charge of discharging wastewater in breach of conditions 4 and 8 of the defendant's wastewater discharge consent during the period 1 November 2019 and 31 December 20129, contrary to ss 15(1)(a) and 338(1)(a) of the RMA (**the wastewater discharge offending**).

[4] The environment affected by the offending includes the community of Tuakau, and the Waikato River.[1]

[5] The relevant Plan that covers the defendant's activities relevant to this prosecution is the Waikato Regional Plan.

[1] See s 2 RMA definition of "environment"

Background

The defendant company and its directors

[6] The defendant purchases sheep, beef and chicken offal and blood from abattoirs, meat and chicken processors and butchers and renders it to produce blood and bone meal and tallow at its 5.5-hectare site on Lapwood Road, Tuakau. It is an essential industry and can also be fairly described as one which recycles waste product.

[7] The rendering process involves grinding, cooking, pressing and drying offal and blood before it is bagged as a meal product, largely for export. As could be expected, the processing of such material creates significant odour.

[8] Pursuant to its land use consent, the defendant can operate 24 hours a day, 7 days a week.

[9] The plant was constructed in 1972 and sits on the eastern bank of the Waikato River. Farmland is the predominant land use to the north-west of the plant on the opposite side of the river. On the same side of the river and to the north-east a compost manufacturer (Envirofert) is situated and to the south-east there are a number of residential properties and businesses. The plant is located approximately three kilometres from the Tuakau township, however complainants in respect of this matter are located between approximately 200 metres and 1900 metres from the plant.[2]

[10] In 2014, the Lapwood Road plant was owned by Graeme Lowe Proteins Limited, a subsidiary of Lowe Corporation Limited, a Hastings based company specialising in the processing of animal by-products. The business at that time was trading as Waikato By-Products Limited.

[11] On 10 June 2014, the defendant was incorporated as a company, its directors being Glenn Smith and Ian Silver and on 20 October 2014, ownership of the Lapwood Road plant was transferred to the defendant company. At that time its directors (Mr Andrew Lowe, Mr Philip Hocquard and Mr Stephen Murphy) became the Lowe

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[2] Map and Photograph booklet, pages 4, 5 and 8.

Corporation directors. Mr Stephen Dahlenburg was also appointed as a director, but Mr Silver's involvement as a director ceased on this date.

[12] On 15 August 2015, Mr Murphy resigned from his directorship, leaving the company under the control of Messrs Lowe, Hocquard, Smith and Dahlenburg to the present day.

[13] The current directors have had substantial involvement in the animal product and by-product industry for many years, holding directorships and in some cases shareholdings in various companies.

[14] In 2008 and 2010, and whilst under the directorship of Mr Lowe, Waikato By-Products Limited was convicted of discharging objectionable odour from the Lapwood Road site.

[15] Mr Smith has been a director of Hawke's Bay Proteins Ltd, which operates a rendering plant near Napier, since 25 May 1994. Mr Lowe and Mr Hocquard also became directors of Hawke's Bay Proteins on 11 April 2014. Under their control and since 2015, Hawke's Bay Proteins has received four infringement notices relating to the unlawful discharge of objectionable odour, and currently this company faces charges in the Napier District Court in relation to further alleged odour offending.

[16] Mr Smith has been a director of Taranaki By-Products, an animal rendering plant located near Stratford, since 1 January 1995. Since 2005, this company has been prosecuted once and issued with 15 infringement notices for odour offending, eight for unlawfully discharging wastewater from its plant. It has also received abatement notices on four occasions.

[17] Mr Dahlenburg has been a director of Kakariki Proteins Limited, an animal by-product rendering plant located in the Manawatu since 9 January 2007. In 2018 and 2020 the company was issued with abatement notices requiring it to cease unlawfully discharging odour and it was issued with a further abatement notice in respect of wastewater in 2019. Since 2018, this company has received two infringement notices

for unlawful discharges to air, one such notice for an unlawful discharge to water and two for failing to comply with abatement notices.

[18] From January 2015, Mr Dahlenburg took over as the defendant's plant manager, with day-to-day responsibility for the rendering operation.

[19] All the above was included in paragraphs [11] – [22] of the agreed Summary of Facts.

Resource consent[3]

Air discharge consent

[20] The defendant holds resource consent for the discharge of odour and particulate matter to air from the plant subject to conditions, including the following:

> **Condition 5.h:** In accordance with condition 24, the provision of detailed operating, maintenance and risk management procedures, and a programme for the ongoing operation of the anaerobic pond and flare system without operability issues
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> ...
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> **Condition 5.k:** The on-site provision of critical spares that cannot normally be delivered on site within 24 hours, including (but without limiting the nature or range of critical spares) the flame ignition system, flame detection instrumentation, pond pressure monitoring instrumentation, actuator shut off valve and blower/fan including motor.
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> ...
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> **Condition 7:** The Consent Holder shall at all times operate, supervise, monitor and control all processes on site so that the emissions authorised by this consent are kept to a minimum practicable level.
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> ...
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> **Condition 8**: The discharge shall not result in odour that is objectionable to the extent that is causes an adverse effect at or beyond the boundary of the subject property. For the purposes of the consent, whether an odour is objectionable is determined having regard to the frequency, intensity, duration, offensiveness and location of the odour. In considering the location, regard shall be had to the rural location of the subject property where odours from other sources and those typical of a rural environment can be anticipated. For the avoidance of doubt, an offensive odour is not necessarily objectionable for the purposes of this consent when other factors are taken into account.
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> ...

[3] Summary of Facts, paragraph [23], underlining included

> **Condition 9:** On happening of an odour event which in the view of the Council is or may be in breach of Condition 8 and provided the Council shall have advised the consent holder as soon as reasonably practicable of the event, the Consent Holder shall provide a written report to the Council within five working days of being notified of this requirement by the Council. The report shall specify:
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> a) The likely cause of the event and any factors that influenced its severity:
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> b) The nature and timing of any measures implemented by the Consent Holder to avoid, remedy or mitigate any adverse effects: and
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> c) The steps to be taken in the future to prevent recurrence of similar events.
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> ...
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> **Condition 32:** The Consent holder shall notify the Council as soon as practicable and as a minimum requirement within 24 hours of the Consent Holder becoming aware of any accidental discharge, mechanical failure or other circumstances which has resulted in or is likely to result in a discharge of contaminants into air that may have an adverse effect on the environment. The Consent holder shall within seven days of the event occurring provide a written report to the Council identifying any actual exceedance, possible causes, steps undertaken to remedy the effects of the incident and measures that will be undertaken to ensure future compliance.

[21] Throughout the defendant's operation of the site, the Council has maintained a register of odour complaints. After complaints were lodged with the Council, the details of them were made available to the defendant.

[22] The defendant's air discharge consent expired on 1 August 2018. Section 124 of the RMA provides that an application to renew a consent must be lodged 6 months prior to the expiry of the existing consent if an applicant intends to continue to operate pursuant to the expired consent until a new consent is granted and all appeals are determined, or a new consent is declined, and all appeals are determined

[23] Given the history of odour complaints associated with the plant, the Council entered the reconsenting process with a view to obtaining an assurance from the defendant that odour emissions could be properly controlled.

[24] In 2017, the defendant's consultants (Mitchell Daysh Ltd and Golder Associates) filed preliminary documents with the Council in support of the proposed discharge to air consent application.

[25] On 19 January 2018 Council wrote to Mitchell Daysh regarding the application and advised that the Council would be engaging its own experts to review the application. This letter, which formed part of the Summary of Facts[4] was relied on by the Council as important background to the establishment of its submission that the defendant's culpability for the offending displayed a high degree of recklessness

[26] Key points from the letter include:

- identifying that there had not been compliance with the existing consent conditions in relation to the discharge of off-site objectionable odour from the plant and the goal was for this to not occur (to be evidenced by no or very few complaints);

- noting that, as breakdowns are inevitable, odour control systems need to have a comfortable factor of safety and contingency, via design of hardware and if this is not achievable, by procedures.

- noting that the proposed contingency measures outlined in the documents provided by Mitchell Daysh did not include closing the plant, or part of it, if the extraction system broke down and could not be promptly rectified, which in the Council's view was what was required.

- making it clear that continuing instances of objectionable odour affecting residents were unacceptable and that the defendant's application must provide the Council with certainty that its proposed measures would stop such emissions.

[27] The defendant's application to renew the air discharge consent was formally lodged with the Council on 26 January 2018.

[28] The Council engaged Mr Pilgrim, an air quality and pollution control consultant to assist with the technical aspects of the application.

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[4] Summary of Facts, Appendix A.

[29] The application is due to be heard before independent commissioners in February 2021.

[30] Even taking into account the disruptions caused by COVID this year, the application has taken some time to get to this point. A statement by Mr Pilgrim was attached as an appendix to the agreed Summary of Facts,[5] and therefore forms part of it. A timeline in relation to the progression of the application forms part of the statement. It is evident that the substantive technical disagreements between the defendant's air discharge consultant (Golders) and the Council's consultants (including Mr Pilgrim) about how to upgrade the plant so that it will prevent objectionable odour emissions.

[31] As Mr Pilgrim explains in his statements, the experts have recently engaged a peer reviewer to help reconcile their different approaches. A key submission made by the defendant is that the lack of agreement between the experts about what is required for the upgrade has hindered its progress in finding a resolution to the plant's odour problems. Although it is impossible and inappropriate for me to get to the bottom of this in the context of a sentencing hearing, and even bearing in mind that any benefit of the doubt needs to favour the defendant, ultimately it is the defendant's responsibility to ensure that it comply with its consents. It is difficult to understand why a peer reviewer was not engaged earlier to try and find a way through the areas of disagreement between the experts.

Wastewater discharge consent

[32] The defendant uses water throughout its processes, drawing it from both ground sources and the Waikato River. All wastewater generated from the rendering plant is treated on site in a pond-based wastewater treatment system prior to its discharge to the Waikato River.

[33] The system consists of a covered anaerobic pond (pond 2) which removes organic load (measured as 5-day biochemical oxygen demand, or cBOD5) and

[5] Summary of Facts, paragraph 33 and Appendix B.

suspended solids, and mineralises organic nitrogen into readily available ammoniacal nitrogen.

[34] Wastewater from pond 2 is transferred to an activated sludge pond (pond 3) which contains floating electrically powered aerators. Further nitrogen and biochemical oxygen demand (BOD) removal occurs there.

[35] The treated wastewater from pond 3 is then separated from activated sludge solids in a clarifier, treated with UV disinfection and sodium hypochlorite, and then passes over a rock filter before directly discharging to the Waikato River along with stormwater from the plant.

[36] Specifically, the defendant's resource consent enables it to discharge wastewater treated to a specific quality from the plant to the Waikato River, subject to conditions. The conditions include:

> **Condition 4:** requires that the cBOD5 levels must not exceed a Concentration of 150 grams per cubic metre at any time, and a daily load of 40 kilograms per day expressed as a moving average calculated over the last 26 weekly measurements.
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> ...
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> **Condition 8:** requires that the Total Kjeldahl Nitrogen (TKN) must not exceed a daily load of 75 kilograms per day expressed as a moving average calculated over the last 6 monthly measurements.
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> ...
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> **Conditions 35, 36(a) & 39:** requires the defendant to sample the levels of cBOD5 and TKN in the final wastewater discharge on a weekly basis, have them analysed and the results reported to the Council on a monthly basis.

[37] Environmental engineering consultants, Pattle Delamore Partners Limited (**Pattle Delamore**) are engaged by the defendant to undertake wastewater treatment reporting and provide troubleshooting advice when problems arise. While the defendant is responsible for operating the wastewater plant and sampling of the treatment process, Pattle Delamore reviews the wastewater sample results and provides operational expertise and directions to it.

Compliance history

[38] To ascertain the defendant's compliance with its various consents, the Council undertakes yearly audits. Copies of these audits have been provided to the defendant since 2014 and have regularly drawn their attention to odour complaints. , Three tables were appended to the Agreed Summary of Facts showing in particular a graphed history of the defendant-related odour complaints since 2014,[6] a table of the defendant's odour complaints and related compliance history since 2014,[7] and a table of the defendant's compliance history with respect to wastewater discharges since January 2019.[8]

[39] Between February and May 2019, the Council received 43 odour complaints alleging the defendant as the source. The Council issued the defendant with eight odour infringement notices relating to those complaints.

[40] During January, February, and March of 2019, the defendant reported unlawfully discharging wastewater from its plant to the Waikato River, with levels of ammoniacal-N and TKN exceeding the limits permitted by its wastewater discharge consent. On 21 March 2019, the Council issued the defendant with a written formal warning in respect of these discharges.

[41] Despite receiving infringement notices and a formal warning, the defendant continued to unlawfully discharge wastewater to the Waikato River and to discharge objectionable odour from the plant. The Council became concerned by the defendant's level of non-compliance and considered that, if the offending continued into the 2019/2020 summer period, residents and businesses would be severely affected.[9]

[42] On 20 June 2019, the Council wrote to Mr Dahlenburg requesting that he meet with senior Council managers to discuss compliance issues.

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[6] Summary of Facts, Appendix C.

[7] Summary of Facts, Appendix D - A table of the defendant's odour complaints and related compliance history since 2014.

[8] Summary of Facts, Appendix E - A table of the defendant's compliance history with respect to wastewater discharges since January 2019.

[9] Summary of Facts, paragraph [46].

[43] On 12 August 2019, several Council managers met with Mr Dahlenburg and Mr Smith at the defendant's offices. At this meeting, the Council made it clear that the defendant had to address the potential for unlawful discharges of odour to occur from the site and that it should take all necessary steps to ensure that it could manage its rendering operation in a manner that did not contravene the RMA.

[44] To reinforce the seriousness of the situation, the Council set out its expectations in a letter, which it sent to the defendant and each of its four directors on 27 August 2019. Accompanying the letter was an abatement notice prohibiting, and requiring the discharge of objectionable odour to cease.[10]

[45] On 1 November 2019, the Council was advised that the defendant had entered into a contract enabling the plant to receive an additional two hundred tonnes of raw material per day for processing at the plant, starting on 4 November 2019.

[46] The Council sent an email to Mr Dahlenburg on Monday 4 November 2019[11] expressing concern that:

> ... Although there is no limit to the raw material volume that the defendant can accept, this volume increase will put additional stresses on the existing environmental control systems (namely air/odour control system and wastewater treatment). This additional material is also likely to increase the truck numbers and may introduce new drivers/contractors to the site that are unfamiliar with the rules (i.e., speed limits and covered loads) which your neighbours voiced as a significant concern during the last community meeting. We continue to expect the defendant's full compliance with its resource consents and will continue to scrutinize the defendant as a priority site. Proactive odour monitoring will be conducted over the next couple of weeks to continue to assess odour effects in the community. Stephen, I encourage you to continue communicating with PDP on the impact this change will have on the wastewater treatment system so a proactive approach for the prevention of non-compliant water discharges. Daryl, I haven't received a wastewater treatment update in a couple of weeks, please continue to send these through weekly.

[47] Despite the August 2019 abatement notice and letter to the defendant and its directors, one odour complaint was received by the Council in September and five were received by it in October 2019.

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[10] Summary of Facts, Appendix F.
[11] Summary of Facts, Appendix G.

The offending

Wastewater discharges – between 1 November 2019 and 31 December 2019 – CRN ending 00145

[48] Between 1 November 2019 and 30 November 2019, the defendant continuously discharged wastewater from its wastewater treatment plant to the Waikato River. Samples taken and analysed for this period revealed the rolling six-month average was 83 kilograms of Total Kjeldahl Nitrogen (TKN) per day for the six month period up to and including November 2019, exceeding the allowable limit of 75 kilograms per day (11% above the consented limit) in breach of condition 8 of the wastewater resource consent. The Council were first advised of this non-compliance in an email from Pattle Delamore on 28 January 2020.

[49] Between 1 December 2019 and 31 December 2019, the defendant continuously discharged wastewater from its wastewater treatment plant into the Waikato River. Samples collected on 20 December 2019 revealed the rolling six-month average was 79 kilograms of TKN per day for the six month period up to and including month of December 2019, exceeding the allowable limit of 75 kilograms per day (5% above the consented limit) thereby breaching condition 4 of the defendant's wastewater resource consent.

[50] The Council were first made aware of this non-compliance in an email from Pattle Delamore on 14 February 2020.

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[51] During December 2019, elevated organic loads entered the wastewater treatment plant resulting in incomplete BOD removal. The exact cause of the higher loads was unclear, however a subsequent investigation by Pattle Delamore narrowed the potential causes down to either a blood spill or the stickwater tanks within the processing plant overtopping, which had then made its way to the wastewater treatment plant via drains.

[52] Pattle Delamore's analysis also revealed that a single wastewater discharge on 20 December 2019 contained levels of organic matter (measured as cBOD5) measuring 430 grams per cubic metre, exceeding the allowable limit of 150 grams per

cubic metre (186 % above the consented limit), in breach of condition 8 of the wastewater resource consent.

[53] The Council were first made aware of the unlawful cBOD5 discharge on 6 January 2020 during a discussion with Pattle Delamore. On 9 January 2020, the Council received an email from Pattle Delamore setting out the full extent of the non-compliance.

Odour discharges between 12 December 2019 & 27 April 2020: CRN ending 00147

Breach of abatement notice between 12 December 2019 & 27 April 2020: CRN ending 00148

[54] The primary impact of any odour discharges from the plant is felt by a number of residents who live nearby. Odour from the plant is generally carried on westerly and south-westerly winds, affecting those residents and business operators downwind of the defendant's plant. Historically, these odour complaints have tended to occur in the warmer months, typically from November through to February.

[55] Between 1 December 2019 and 30 April 2020, the Council received 139 odour complaints alleging the defendant's plant as the source as follows:[12]

(a) December 2019 - 36 complaints;

(b) January 2020 - 34 complaints;

(c) February 2020 - 25 complaints;

(d) March 2020 - 26 complaints; and

(e) April 2020 - 18 complaints.

[56] The Council engaged Tuakau-based Environmental Management Solutions Ltd to respond and verify complaints when and where possible.

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[12] Photograph & Map Booklet – the defendant plant in relation to Tuakau township, surrounding businesses and complainant locations.

[57] A subsequent Council investigation confirmed that between and including 12 December 2019 to 27 April 2020 (a period of 138 days), there were 135 complaints about odour. On some days there were multiple complaints. Of these 138 days, there were 59 days (namely 42.7% of the time) when the defendant emitted objectionable odour beyond its boundary in breach of condition 8 of its air discharge consent.

[58] Objectionable odour was experienced by some complainants from Christmas Day through into early January, and during the COVID19 lock-down period[13] which extended from 26 March to 27 April 2020.

[59] On 26 March 2020,[14] the Council emailed Mr Dahlenburg and pointed out that the COVID-19 lock-down potentially posed a heightened period of risk. The letter outlined the following:

> While the council cannot authorise non-compliance, we understand that capabilities will be diminished for a range of reasons. If you cannot comply, we will consider all the relevant circumstances – including the impact of COVID-19. We will also consider your contingency planning – for example, has there been planning for effluent treatment management or control of air discharges (odour) should the operators that work together all require isolation.

[60] During the lock-down period, there were 16 days where objectionable odour affected the community.

[61] A brief description of the effects experienced by the complainants on the 59 days referred to above were set out in a table attached to the Summary of Facts.[15] Some of those who experienced these adverse effects prepared victim impact statements for the sentencing hearing. I outline the impact this offending had on them when I assess what is the appropriate starting point for a fine later in this decision.

[62] On each of those days the defendant was in breach of the abatement notice issued on 27 August 2019, which required them to cease the emission of objectionable

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[13] The defendant was considered an essential service and could therefore keep operating during the lock-down.
[14] Summary of Facts, paragraph 33 and Appendix H.
[15] Summary of Facts, Appendix I.

odour beyond the boundary of the plant, and prohibited them from commencing to do so.

Investigation

[63] The Council undertook an investigation into the wastewater and odour discharges to try to establish why they occurred with such severity over the holiday period.

Wastewater treatment plant failure 23 December 2019 to 8 January 2020

[64] On 23 December 2019, a power interruption caused the defendant's wastewater treatment plant aerators in pond 3 to stop. The aerators did not automatically restart, and although the system had been equipped with an aeration outage notification alarm, the alarm consisted of a mobile phone on a pre-paid plan which was out of credit, so it did not work on this occasion. As there was also no physical monitoring of the wastewater treatment plant at that time, the power outage went undetected for up to 24 hours.

[65] During this period with no aeration, the bacteria in pond 3 died and it became anaerobic, resulting in sulphurous odour discharges. Attempts by the defendant to restart the aerators on 24 December 2019 resulted in an odour complaint on 25 December, and a decision was made by the defendant to turn them off. The defendant did not report this odour event to the Council until early January, when it was outlined that the decision to turn off the aerators was made so as not to exacerbate odour issues while the plant's neighbours had Christmas visitors.

[66] To decrease sulphur content, and therefore the odour discharges, hydrogen peroxide (100 litres) and a tonne of sodium nitrate was required. These chemicals were not stored on site and because of the holiday period had to be ordered.

[67] On 2 January 2020, six 25kg bags of sodium nitrate was added to pond 3 with little effect. The defendant still did not have the required quantities of hydrogen peroxide to stem the odour from the pond.

[68] On 4 January 2020 – and to get the wastewater treatment plant operational again – pond 3 required the introduction of new bacteria seed, and for aerobic conditions to be re-established so that the bacteria would survive. This meant that pond 3 had to be aerated to oxidise the sulphides present and lift the redox in the pond. The hydrogen peroxide had still not been delivered to the plant at that stage.

[69] That same day, Pattle Delamore sent an email to Tuakau residents advising them of the plant failure, and that odour would likely result while the defendant worked to fix the issue. As at and including 4 January 2020, there had been 30 complaints made about odour from the plant by 12 different complainants.[16] Later on 4 January 2020, Pattle Delamore also sent an email to the Council, summarising the plant failure and outlining the steps proposed to address it.[17]

[70] On Monday 6 January 2020, a decision was made to restart two aerators to create the necessary aerobic conditions so that bacteria could be added to the pond. This resulted in three odour complaints made both on 5 January and on 6 January 2020. The smell coming from the factory caused one complainant to be physically sick.

[71] By 6 January 2020, all six aerators in pond 3 were operational. The re-seeding of pond 3 commenced on 7 January 2020, and the hydrogen peroxide which had been ordered arrived and was immediately introduced to the pond. Two odour complaints were received.

[72] On 8 January 2020, an odour cannon arrived on site and pond 3 was sprayed with it to reduce odour. There was one complaint on 8 January.

[73] Sampling and physical checks of the wastewater treatment plant between 10 January and 23 January 2020 revealed it had begun to return to normal levels. There were no complaints between 9 and 19 January.

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[16] Summary of Facts, Appendix I.
[17] Summary of Facts, Appendix J.

[74] Several of the odour descriptions received from complainants during the period 23 December 2019 to about 8 January 2020, and as seen in Appendix I, reflect the sulphurous odour being emitted from the defective wastewater treatment pond. The smell was described as being like "death mixed with a septic tank," "burnt meat and drains," "smells like rotten eggs," "smells like raw sewage," and "gut wrenching chemical smell."

[75] Condition 32 of the defendant's air discharge consent requires it to notify the Council as soon as practicable, and as a minimum requirement within 24 hours of it becoming aware of any accidental discharge, mechanical failure or other circumstances which has resulted in, or is likely to result in, a discharge of contaminants into air that may have an adverse effect.

[76] Pattle Delamore did not provide a technical report to Council until 31 January 2020. Further detail regarding the cause of the aerators' failure was not provided to the Council until 31 May 2020.

[77] As part of the subsequent investigation, Council reviewed the defendant's report into the failure of the wastewater treatment plant with the assistance of Dr Matthew Savage of Apex Engineering Ltd.

[78] Dr Savage prepared a report,[18] which was attached to the Summary of Facts. Dr Savage concluded that, although steps were taken to minimise odour discharges and recover the plant to an aerobic state, in his opinion these actions fell short of preventing the discharge from occurring. His opinion was that the delays in aerating pond 3, a lack of monitoring of some pond's parameters, and a lack of pre-planned mitigation procedures being implemented by the defendant increased the overall magnitude and duration of the odour discharges,. I infer from that which might reasonably have resulted from the power interruption.

[79] A later review of the wastewater treatment plants operation by Pattle Delamore resulted in additional information being provided to Dr Savage. He prepared a further

[18] Summary of Facts, Appendix K.

report.[19] In his report, Dr Savage noted that, in his opinion, the anaerobic pond (pond 2) was being operated beyond its design capacity. He reached this conclusion because the recommended operating level for pond 2 was 5,280 kgs per day of BOD, but the defendant was operating it at 6,600 kg per day of BOD.

Plant Manager

[80] On 8 September 2020, the plant production manager temporarily overseeing the plant (pending the appointment of a replacement manager for Mr Dahlenburg) was spoken to and stated that, in his opinion:

(a) the contract to supply and process additional volumes of raw product in November 2019 had an operational impact upon the defendant's wastewater treatment system;

(b) he was concerned about the operation of its biofilter (an integral component of the odour control system) prior to and during the period the complaints were investigated;

(c) maintenance had been deferred because it was too hard to do during the rendering season;

(d) the removal of the Dissolved Air Floatation (DAF) component of the wastewater treatment system by the defendant would have likely increased the loading of both BOD and sediments within the wastewater treatment ponds;

(e) the increased volumes resulting from the new contract, particularly relating to the increased processing of blood product, were adversely affecting the BOD loadings to the wastewater treatments ponds; this having a compounding effect which likely contributed to the issue with the ponds in December 2019 and January 2020;

[19] Summary of Facts, Appendix L.

(f) the ponds were extremely odorous in January 2020, partially attributable to the power outage that affected the operation of the aerators in one of the ponds;

(g) process issues, principally arising from the poor performance of the defendant's boilers not creating sufficient steam to properly operate aspects of the plant, resulted in higher concentrations of blood within the wastewater by-product or 'centrate', which is then directed via the drainage network to the wastewater pond system;

(h) during November and December 2019, the plant was frequently receiving and processing product volumes in excess of its operational capacity, quoting amounts of 700 tonnes of raw material arriving daily when, in his opinion, comfortable production levels are in the vicinity of 550 to 600 tonne. In his opinion the high volumes of raw material left no room for plant breakdowns.

[81] His opinion highlighted that operational areas of the plant were not performing to the level they should have been, and that there was a lack of instructional operating protocols and procedures.

[82] Although these matters were included in the Agreed Summary of Facts, counsel for the defendant submitted that the defendant did not accept the plant manager's opinion, however it did not seek a disputed facts hearing. Rather, it contended that its investigations, including those by Pattle Delamore, pointed to the higher concentrations of blood within the wastewater system being contributed to by a dissatisfied driver dumping a load of it into the system without it being able to be properly processed. Mr Watts described the above as a malicious or negligent act, which was unable to be proved because the defendant's security cameras were not positioned to record the incident occurring.

[83] There was, however, no other documentary evidence produced to this effect apart from the allegation being deposed to by Mr Dahlenburg's affidavit. In the absence of any independent verification of this (which may have included statements from others who may have known about what was contended) I am left in the position

of not being able to conclude that this is in fact what occurred. What has been able to be independently verified is that increased concentrations of blood have, in effect, overloaded the wastewater system. Whether these were caused by a disgruntled truck driver dumping a load in an unauthorised manner, or whether it was caused by taking on increased product, without these issues being tested in the context of some sort of hearing it is impossible to reach a conclusion either way.

[84] The defendant does accept that the alarm failure was unacceptable, but this system, which has now been changed, was not known to management at the time and has now been rectified. Mr Watts also submitted that Dr Savage's recommendations have now been implemented.

[85] I will address what further steps the defendant has taken to ensure that the adverse effects caused in this case are not repeated when I undertake my analysis of the appropriate starting point and/or allowances that should be given for mitigating matters.

Weighbridge records

[86] The defendant has contractual arrangements with suppliers of renderable raw material, and operates a weighbridge to record its receipt. Similarly, the weighbridge is used to measure finished product leaving the plant.

[87] An examination of the weighbridge records for incoming raw product received between November 2019 and April 2020 revealed that there were 59 separate days when in excess of 600 tonnes of product was received at the plant.[20]

[88] Daily product volumes received in excess of the 'comfortable' product levels as described by a current Plant Manager, represented 31% of that six-month period.

[89] Further analysis revealed that for 32% of that period, the renderable daily volumes exceeded 600 tonnes; for 10% of that inclusive period, the renderable daily

[20] Summary of Facts, Appendix M.

volumes exceeded 700 tonnes, equating to 19 individual days; and on two days in December 2019, daily volumes exceeded 800 tonnes.

[90] In relation to the 59 individual dates for which an objectionable odour was corroborated, on 23 of those days (or 39%) the daily volumes of renderable product had exceeded 600 tonnes.

[91] The defendant does not accept that I should draw any inference adverse to it from the weighbridge record, because other businesses nearby use the weighbridge. This means, Mr Watts submits, that I cannot conclude that excess tonnage of product to the plant caused the failure of the wastewater treatment plant to effectively manage it. I agree with this submission.

Financial analysis

[92] The Council engaged the services of Forensic Account's, Indepth Forensic Limited, to examine the defendant's financial records.[21]

[93] The conclusion reached pertaining to the months November 2019 through to March 2020 was that increased product volumes were received and processed, which resulted in an increase in operational profit. Collaterally, there were increased operational and maintenance costs resulting from that production.

[94] In the months of October 2019 to March 2020, the defendant made a profit of $558,935, however I agree with Mr Watts that this fact alone does not mean the defendant has prioritised profit at the expense of its environmental obligations.

Starting point

[95] The purposes and principles of sentencing are well-known. In this case, there is a need to impose a fine that is sufficient to make the defendant accountable for its offending, to denounce its conduct, and to deter it and others from offending in this manner.

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[21] Summary of Facts, Appendix N.

[96] The relevant matters to be addressed are those which were most comprehensively referred to in *Thurston v Manawatu-Wanganui Regional Council*[22] which in this case require me to assess the defendant's culpability for the offending; consider the adverse effects of the offending on the environment (including the bio-physical, social and cultural environments);[23] and to set a starting point that is consistent with other cases where there has been similar offending and there are also similarities between the defendants. In this case, the prosecutor has also submitted that the defendant profited from the offending, and that this, in accordance with the *Thurston* factors, was something that ought to be taken into account in setting the starting point. That contention was not accepted by the defendant.

[97] Both counsel submitted that a global starting point was appropriate, with the lead charge being the odour offending and with uplifts to reflect the wastewater discharges and the contravention of the abatement notice. Although separate starting points could be adopted for each, I agree with counsel that in this case a global starting point is appropriate.

The defendant's culpability for the offending

[98] As signalled above, counsel for the prosecutor submitted that all three sets of offending, if not deliberate, exhibited a particularly high degree of recklessness on the defendant's part. The defendant submitted its culpability for the offending was at the lower end of the scale.

The prosecutor's submissions

[99] In relation to the odour discharge offending and breach of the abatement notice, Mr Speir submitted:

(a) the plant has a lengthy and consistent history of non-compliance with the conditions of its air discharge consent, with a community complaint history dating back to 2014;

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[22] HC Palmerston North, 27/8/2010, CRI-2009-454-24, -25, -27, Miller J at paragraph [41].
[23] See s 3 of the RMA.

(b) the defendant was warned at the meeting in August 2019 that the company needed to address unlawful discharges of odour, and that it was required to take all necessary steps to ensure it could manage its operation in a manner that did not contravene its conditions of consent. This was further clarified by the issuing of the abatement notice on 27 August 2019, even though the defendant was already subject to an active abatement notice issued in 2015;

(c) the defendant proceeded to take on more product despite the Council contacting it to remind it that, if this occurred it should take special care to meet the terms of its consent; and

(d) although the types of odour discharged from the plant during the period can be broadly divided into "pond" odour (resulting from a failure of the wastewater treatment pond in late December 2019) and "rendering" odour (resulting from the day-to-day processing of animal products), both forms of odour discharge are ultimately attributable to the company's decision to run the plant in excess of its capacity while simultaneously failing to properly invest in and manage its odour control and wastewater treatment systems.

[100] To support its argument, reference was made to Mr Pilgrim's statement.

[101] Although the prosecutor accepted that the power outage that led to the wastewater treatment pond failure in December 2019 was an unforeseen event, it submitted that the defendant's inadequate infrastructure and poor management decisions significantly exacerbated the adverse effects that followed for the following reasons:

- Mr Speir referred to the Apex report dated April 2020, which outlined that pond 2 was being operated well beyond its design capacity (it was being operated at around 6,600kg BOD[24]/day on average when the recommended operating level for it was 5,280kg/day of BOD). This overloading of BOD meant that pond 3 could not remove sufficient BOD from the wastewater,

[24] Biochemical Oxygen Demand.

which Apex said was likely to have been a key contributing factor to the odour discharge. As well, the prosecutor contended that the Greenlea contract increased the volumes of raw product;

- The defendant was not continuously monitoring and alarming dissolved oxygen concentrations, which could have enabled it to detect potential issues with the aerobic pond earlier;

- The alarm system designed to respond to any aeration outage at the wastewater treatment plant was on a pre-paid plan that the defendant's management had failed to keep up with payments for. As a result, the power outage went undetected for up to 24 hours, during which time the pond turned anaerobic and began generating odour;

- The aerators were not designed to automatically restart after the power fault. This was identified as a key cause of the odour discharge event.

- The defendant did not have adequate supplies of hydrogen peroxide, sodium nitrate or nitric acid on hand to immediately decrease the pond's sulphur content in the event of a pond becoming anaerobic. Due to the Christmas shutdown period, it took the defendant longer than it should have to source these chemicals in sufficient quantities to mitigate the odour. The prosecutor contended that the defendant should have had a contingency plan in place for a discharge event occurring during the shutdown period which occurs every year, and during the hottest months when any odour discharge would be particularly pronounced;

- The defendant's decision to turn the pond aerators off again on 25 December 2019 is likely to have significantly exacerbated the odour issue long-term, but causing significant acute harm to the treatment process. Likewise, the defendant's decision not to immediately shut down production completely, to allow the wastewater treatment plant to recover from its anaerobic condition, also significantly increased the risks of offensive odour being released when the aerators were restarted. The prosecutor contended that

this poor decision-making stemmed from the defendant's failure to put a proper plan in place to deal with odour events.

[102] The prosecutor's position was largely based on the report from Dr Savage, who reviewed Pattle Delamore's analysis of the reasons for the failure of the defendant's aerobic pond.

The defendant's submissions

[103] The defendant filed an affidavit from Mr Dahlenburg, who has 25 years' experience in the rendering business in senior roles, including managing the defendant's rendering plant between January 2015 and July 2020, i.e. during the offending period.

[104] Mr Dahlenburg's affidavit challenges aspects of Mr Pilgrim's understanding, particularly in relation the defendant's lack of responsiveness to complaints. The defendant's submission was that it was not unresponsive by design or through negligence, but as a result of the way complaints were communicated to it. It contended that the main complainant went directly to the Council rather than to it, so that by the time it learned of them they were generally impossible to verify, impossible to do anything about and difficult to learn from.

[105] Further, Mr Dahlenburg challenged the prosecutor's submission that the amount of raw material that was being processed was the reason for the complaints.

[106] As well, during the period when the odour offending occurred Mr Dahlenburg deposed that the defendant took a number of steps to reduce the load on the wastewater system, both before and after the aerobic pond failure as follows:[25]

(a) from the end of November 2019 it had already diverted 36 tonnes of beef per day to a Taranaki plant to give its system further capacity;

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[25] Affidavit of Mr Dahlenburg, paragraph (8).

(b) from 6 January 2020 it stopped receiving chicken and chicken blood because this is high-water-content product and low-yielding. This product is still being diverted from the plant;

(c) from January 2020 the defendant sought out another renderer to divert its beef blood to, and in March 2020 succeeded in diverting a substantial quantity of beef blood that it had been receiving from Greenleas processing plant. I was advised that the Greenlea contract was for beef product only.

[107] Mr Dahlenburg said that the effect of these diversions was noticeable, and that once chicken product had been diverted the plant had ample capacity to render the beef it was receiving. He said that, between December 2019 and April 2020, a total of 14,615 tonnes of product was diverted (I infer to other processors).

[108] In relation to the weighbridge data,[26] Mr Dahlenburg deposed that the data is "hugely distorted by the local chicken abattoir using the defendant's weighbridge". As well, he contended that the weighbridge reports include trucks using the weighbridge to weigh their loads as they passed through when they were not delivering raw material.

[109] The point of the reference to the diversion of product was to compare it with the volume that the prosecutor contended it had received from the Greenlea plant, which, it submitted, had increased the volume being processed. The defendant's submission was that the extra material the defendant took on in November 2019 had been largely offset by its diversions of product away to other plants.[27] The difference between the two was one of 10,707 tonnes across the year, which Mr Dahlenburg said was approximately 34 tonnes per day, conservatively based on the 6-day rendering week, which represented about one hour's processing per 24 hour cycle, spread across the plant's three production lines. He said: "This is only an incremental increase, and in my opinion insignificant in terms of the plant's capacity".[28]

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[26] Summary of Facts, Appendix M.

[27] The total extra volume of product that had been received from Greenlea plants from November 2019 to 20 October 2020 was outlined by Mr Dahlenburg as 41,297 of beef rendering plus 2,880 tonnes of blood.

[28] Affidavit of Mr Dahlenburg, paragraph 15.

[110] As well, Mr Dahlenburg deposed that the volumes processed had no impact on the numbers of complaints received. He said that complaints had been received when the plant was shut down with no raw material on site, however he did not outline when and how often this had occurred.

[111] The defendant's position, outlined in more detail in Mr Dahlenburg's affidavit, raised the prospect that the failure of the wastewater treatment system was triggered by the actions of a disgruntled delivery truck driver referred to above.[29]

[112] The Pattle Delamore report had concluded that elevated cBOD 5 levels, and the pond failure, resulted from either too much blood entering the wastewater system, or from an overflow of stick water. Mr Dahlenburg, in his affidavit, noted that a stickwater overflow was highly improbable because it is alarmed, and no overflow alarm occurred over this period.[30]

[113] Dr Savage largely supported Pattle Delamore's analysis, and agreed that the influx of blood into the wastewater treatment system is a plausible cause of the failure.[31] However, Dr Savage criticised the monitoring parameters for the pond, which did not forewarn the defendant of the failure. The defendant's submission was that it was simply following the advice of Pattle Delamore.

[114] The defendant accepts responsibility for the pond failure, but submitted that its culpability was low because:

(a) it relied on expert advice to set up and operate its wastewater system, and adhered to that advice;

(b) it monitored it in accordance with its resource consent requirements and the expert advice it received;

(c) it had not been advised to have hydrogen peroxide and/or sodium nitrate on hand in case there was a failure during a holiday period.

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[29] Affidavit of Mr Dahlenburg, paragraphs 24-25.
[30] Affidavit of Mr Dahlenburg, paragraph 26.
[31] Apex report page 14; Summary of Facts, Appendix K.

[115] The defendant accepted its more culpable faults were:

(a) failure to know that the power outage alarm relied on a prepaid phone, but as it was installed by the defendant's predecessor there were no instructions and, as it had worked previously there was no reason to look further into that system, even though Mr Dahlenburg was shocked to learn, after the event, that that was the system being used;

(b) turning off the aerators on Christmas Day 2019 may have extended the odour event, however it was done with the intent to spare the neighbours, who had Christmas visitors.

[116] Once the pond failure occurred, the defendant says it made every effort to rectify it as soon as possible.

Rendering odour from day-to-day operation

[117] As well as the acute odour event caused by the wastewater treatment plant failure, there was a more persistent odour issue caused by the day-to-day operations of the plant. This type of odour discharge cannot be attributed to any single event or failure of the plant. The prosecutor submitted that this offending evidenced a chronic under-investment in the defendant's odour management systems, and that its culpability for it must be considered against the background outlined in the agreed Summary of Facts about the defendant's compliance record.

[118] The prosecutor also relied on the plant production manager, Mr Fussell's statement to it that, in his opinion:

(a) the defendant had deferred maintenance of its biofilter prior to and during the period of the offending in favour of operating the factory rendering lines;

(b) the defendant had removed the DAF component of the wastewater treatment plant, which would have likely increased BOD and sediment loading;

(c) the boilers at the plant were under-performing, resulting in higher concentration of blood within the wastewater by-product;

(d) the plant had insufficient instructional operational protocols and procedures.

[119] The defendant's response to this was that Mr Fussell was not authorised to make a statement on behalf of the defendant, and that his views did not reflect its views. In response, Mr Watts submitted that Mr Fussells' views about the removal of the DAF from the wastewater system do not appear to be shared by either Pattle Delamore or Dr Savage, nor do his views about inadequate boiler heat allowing centrate to enter the wastewater ponds find any support in any of the expert reports.

[120] Despite the above, Mr Fussells' observations about the operating protocols and procedures are not challenged in any significant way. Neither are his comments about deferred maintenance of the biofilter.

Finding in respect of culpability

[121] I do not agree that the defendant's culpability for the offending is low. Although it must be considered within the timeframe included in the charges (a period of four to five months), the agreed Summary of Facts outlined a history of issues to do with contraventions of both the air discharge and wastewater discharge resource consents. The past ought to have put the defendant on notice that practices at the plant needed to be closely managed to avoid them.

[122] In my view, the defendant did not take its obligations seriously enough, and had insufficient instructional operating protocols and procedures in place to deal with potential breaches. Although the initial odour offending was caused by a power outage, the failure of the defendant to understand the systems in place in relation to the alarm, its failure to have available chemicals to deal with an emergency over the Christmas period when it would be obvious that supplies might be difficult to obtain, were significant management failures. Although the offending over the Christmas period cannot be directly attributable to the company's decision to process additional product, in my view the fact of this exacerbated the situation and ought to have been identified by the company as a potential risk if all systems were not operating properly. Given the history of offending complaints, this risk was, in my view, obvious. Not only that, the risk was obvious to the Council, who went to the trouble of highlighting the issue with Mr Dahlenburg.

[123] The defendant's response to all of this was to say that it followed the advice of its experts, Pattle Delamore, and that the real difficulty was the dispute between the experts. In my view, in a situation where it is evident there is a dispute between experts a conservative approach needs to be taken to the risk, which the conditions of a resource consent are designed to mitigate. And at the very least, corporate environmental responsibility requires effective operational practices and procedures to be in place and that these are regularly reviewed and followed by those responsible for implementing them.

[124] But to make matters worse, the period that encompasses the offending also includes unlawful odour discharges that were not occasioned by the failure of the wastewater treatment pond following the power failure, but rather were associated with the ongoing rendering operation. This indicates to me that there were significant failures at a management level to take the warnings that had been given by the Council about this ongoing problem and its impact on the community seriously enough.

[125] The odour offending was also in contravention of an abatement notice.

[126] Taking into account all of these matters, in my view the defendant's culpability for the offending overall can properly be characterised as reckless – in the moderately high category. Given the warnings it had received from the Council, and the history of complaints, upgrades at the plant or at least much tighter management control over protocols and processes, ought to have been implemented.

[127] Even though further steps have been undertaken now, they should have been undertaken a lot sooner. I am left with the impression that, at the time of the offending, the defendant did not take its environmental responsibilities seriously enough and was not proactive enough in trying to prevent the discharges – particularly of objectionable odour – from its premises.

Environmental effects

Odour discharge offending and breach of abatement notice

[128] The prosecutor submitted that the impacts of the odour discharges on nearby local residents were prolonged and severe.

[129] The defendant expressed remorse, and accepted that the effects of the odour associated with the wastewater pond failure were "very unpleasant" for many of the nearby residents. It accepted that this was particularly acute when the aerators were running immediately prior to the decision to turn them off at Christmas 2019, and when the aerators were restarted in order to "nurse" the pond back to functionality in January 2020.

[130] The defendant did not, however, accept that rendering odour was as severe, describing it as an historic problem and observing that community expectations about it have increased steadily "such that what was once considered tolerable is now considered objectionable".[32] Despite this observation, it was submitted that the defendant fully accepts that it must meet today's standards, and that it was committed to making the changes necessary to ensure that it operates compliantly and is a better neighbour.

[131] Mr Watts submitted that the defendant's plant is situated in an area dominated by rural industry, and he referred to Envirofert's composting operation, located to the west, and a chicken processing plant to the north-east, with a chicken hatchery further to the east.

[132] Mr Speir submitted: [33]

> ...between 12 December 2019 and 27 April 2020 (a period of 138 days) the Council fielded a total of 135 verifiable odour complaints on 59 separate days that identified the defendant as the source. The complainants were Tuakau residents living between 200m and 1.8km from the plant.

[32] Counsel for the defendant submissions, paragraph 5.11.
[33] Counsel for the prosecutor submissions, paragraph 8.17.

[133] Mr Watts, however, did not accept that weight should be given to the number of complaints, but rather submitted that most of the complaints (118 out of 130) could be attributed to what were described as "six repeat complainants".[34] While not submitting that this made the complaints unacceptable, it was, Mr Watts submitted, relevant to the comparisons between the *Open Country Dairy* and *Fonterra* sentencing decisions.

[134] Overall, Mr Watts submitted that some of the complainants were much more sensitive to odour than others, and this was evidenced by the intensity ratings by complainants, and the intensity assessments by experts, that some of the complainant were much more sensitive to odour than others.

[135] A map showing the distance of each complainant from the plant was provided as part of the Agreed Summary of Facts.[35]

Victim impact statements

[136] I received 13 victim impact statements. Four of those who had prepared statements delivered their statements in person, and of those two read two other statements with the consent of those two others. The prosecutor read an additional four victim impact statements.

[137] I read all of the statements carefully and I now summarise the effects described by each.

Ms Maguire

[138] Ms Maguire lives on a 20 acre property 1.3km from the plant. She is the chairperson of the community group Environment Action Tuakau Incorporated, which was formed in response to the defendant's application for replacement resource consents. Ms Maguire's family have lived on their property from 1865. Ms Maguire described experiencing odour from the defendant's plant as being most profound in the afternoons with the prevailing westerly wind. She described the odour as "an

[34] Counsel for the defendant submissions, paragraph 5.16.
[35] Map and photograph booklet, page 8.

egregious hideous stink of a putrid nature". Ms Maguire expressed considerable doubt that any fine from these proceedings would change anything.

Ms Clarke (read by Ms Maguire)

[139] Ms Clarke lives at 11 Lapwood Road with her partner, which was purchased by her grandparents. She lives 217m away from the plant. Ms Clarke described the odour emanating from the defendant between 12 December 2019 and 27 April 2020 as consistently bad, and that it would easily occur four to five days out of seven. She said that the smell was often worse at night, and that during the day the smell was so bad that she would often go away shopping or to a café just to get away from it. She also described the smell getting trapped in the house. Ms Clarke rang the defendant on Christmas Day to complain, because she had 30 of her whānau coming, and "it was smelling".

Ms Cleven

[140] Ms Cleven has lived in Tuakau for three years. She lives 498m metres from the defendant's plant. She described the smell as "like sewage or a toilet". She described having to close up her house every summer, but even with that the smell gets inside the house. She described the odour cannon as being "foul, sickly sweet perfume odour… the odour cannon doesn't help, it's just as bad". Ms Cleven also described being unable to enjoy the outdoors because of the smell.

Ms Pryor

[141] Ms Pryor is semi-retired, having left her job as an olfactometry for the defendant in 2019. Prior to that, she had worked at the defendant company for 10 years. She has lived most of her life in Tuakau, and has lived at 12 Lapwood Road for 27 years. Her property is 255m from the plant. Ms Pryor's previous experience and her role at the defendant means that her victim impact statement has been given considerable weight by me.

[142] Ms Pryor's victim impact statement directly addressed the offending period. She described the odour from November 2019 through to April 2020 as being "the

most disgusting and revolting and disgraceful smell I have experienced since living here". In her view, for 90 percent of the time the smell was present; it was intense (she identified it as mostly 10 out of 10) albeit accepting that, as April 2020 approached the smell did improve.

[143] The impacts Ms Pryor described included social effects (not being able to have friends over for barbecues, nor being able to experience Christmas at home), and family members, including her two small granddaughters, not wanting to come to her home. Ms Pryor described talking to Mr Dahlenburg "a lot about the smell" but she said, "it felt like bashing your head against a brick wall; they did not act quickly enough to disperse the smell".

Ms Weke (read by Ms Pryor)

[144] Ms Weke has lived in Tuakau for nearly 50 years. She lives 377m away from the plant. She described the smell being worst over two days in late April 2020 when the smell came through her house, lingered, and then came back again. She described the smell this time as 9 out of 10, "it reeked, like rotten meat or hay. Normally the smell gives me throbbing headaches but this time it made me vomit".

Ms Arnold

[145] Ms Arnold lives with her family at 29 Tyson Lane, Tuakau, approximately 800m away from the defendant's boundary. She and her family have lived there for four years.

[146] Ms Arnold described the smell on Christmas Day 2019 as being "like sewage at our house". She described the difficulties over the summer period with having to shut the family inside the house, contemplating getting air conditioning but worrying that that would just bring the air that smelt from outside into the house. She described the smell as "stale water, rotten carcasses, a baby's soiled nappy or raw sewage".

Ms Futcher

[147] Ms Futcher lives at 2655 River Road, and has lived there for two and a half years. She lives 470m away from the plant. She described the smell over the summer

period last year as on and off, but in April 2020 she considered the smell lasted for hours most days. She described the smell as making her feel sick, and that even with the air conditioning on over summer, if the windows are open the smell comes inside and lingers in the carpet and curtains. She described being unable to have friends and family over, as "you never know when or for how long the stench will be around". Ms Futcher described the smell during COVID 19 as particularly "emotionally stressful".

Mr Tyson

[148] Mr Tyson has lived on River Road for 61 years. He lives 659m away from the plant. Although Mr Tyson did not specifically address the offending period, and was unable to say how frequent the odour was last summer, he described it as being particularly bad throughout the summer. He described the odour as being "vile and makes me physically sick".

Mr Young

[149] Mr Young is a local investor and owner, who owns among other things the motor home park on River Road near to the defendant's plant. The motor home park is 1.2km away from the plant. Mr Young described the smell over New Year 2020 as being "at its worst and almost made me vomit". He described users of the motor home park over last summer, particularly in January 2020, complaining that they had to leave because they couldn't stand the smell from the defendant's plant.

Ms Greathead

[150] Ms Greathead was brought up on River Road, however now lives elsewhere but drives past the defendant's plant three to four times a week for work. She described the smell from the defendant as being worst last summer, saying that "the smell is like death, like dead sheep or cattle".

Summary of odour effects on residents

[151] I have taken some trouble to set out the individual responses of those who made victim impact statements, because it was clear from them and from those who wished to present them personally to me in Court, that these residents are at their wit's end.

Having said that, I must only take into account the impacts on victims over the offending period. Even though on some occasions the victim impact statements strayed beyond this, it was very clear to me that the odour effects on these residents were profound, and impacted them significantly for unacceptably long periods of time over the summer of 2020, when the wastewater treatment pond died.

[152] Residents were also profoundly impacted after that by the ongoing rendering operations undertaken at the defendant's plant. These impacts, in my view, were minimised by Mr Dahlenburg.

Wastewater discharge offending

[153] Wastewater from the plant discharges directly into the Waikato River. Under the Regional Plan, the Waikato River is classified as "contact recreation", a "significant indigenous fishery and fish habitat" and a "significant trout fishery and trout spawning habitat".

[154] The health and wellbeing of the Waikato River is also particularly valued by Waikato Tainui and the local Tuakau iwi, Ngāti Tipa. As well, and as the sample of victim impact statements reveal, the local people feel very strongly about the health of the river as well.

[155] Mr Vant, a senior water quality scientist with the Council, assessed the effects associated with the November and December 2019 wastewater discharges to the river. He concluded that:

- The nitrogen concentrations of meat-works and rendering plant wastewater is particularly high. Although the non-compliances with the nitrogen condition are unlikely to have had serious adverse consequences for the water quality and ecology of the Waikato River, they will have had a cumulative effect when combined with other nitrogen sources in the catchment;

- In respect of the cBOD 5 discharge on 20 December 2019, the flow of the river on that day was about twice that used in NIWA's modelling of the

mixing of the Tuakau wastewater, meaning that the wastewater would have been more diluted than usual. As such the effect of that isolated non-compliant discharge would have been small and localised.

Conclusion re wastewater discharges

[156] Fortunately, the wastewater discharge to the Waikato River is unlikely to have had an adverse effect on it.

Profit by commercial benefit

[157] The prosecutor submitted that an increased starting point was also justified based on the forensic analysis it had arranged to be undertaken, revealing that the defendant had made a net profit of $558,935 between November 2019 and March 2020, despite incurring additional costs associated with repairing and maintaining the plant. Mr Speir submitted that this was a significant improvement on the same six-month period in the previous year, in which the defendant had experienced a net loss of $639,954. The prosecutor sought to draw a correlation between the defendant taking on additional product to the increase in profits. In other words, it was submitted that the defendant had experienced a financial gain which had come at an environmental cost (described as "significant") to the Tuakau community.

[158] Mr Speir also submitted that the defendant had obtained an indirect pecuniary advantage by not investing capital funds to improve the odour and wastewater management systems at the plant in the lead-up to the offending. He submitted that there were no steps taken by the defendant following its meeting with the Council in August 2019 to upgrade the plant infrastructure and/or put in place adequate operational and management systems, which could have prevented and/or minimised the impact of the odour events.

[159] Mr Dahlenburg's affidavit referred to the defendant's efforts to upgrade the plant.[36] He noted that this has unfortunately become protracted, largely due to the disagreement between the defendant's experts and those engaged by the Council about what is needed to upgrade the plant to ensure that it operate without causing adverse

[36] Affidavit of Mr Dahlenburg, paragraphs 42-44.

odour effects. Reference was made to the fact that, six months prior to the expiry of the defendant's air discharge consent, it had applied to renew it.

[160] The company's submission was that it was not unwilling to upgrade the plant, and in fact it had started on some upgrades that the experts agreed would be helpful. It submitted that the delay in implementing more substantial improvements does not reflect an unwillingness to invest, but rather reflects the disagreement between experts about what the defendant should invest in. It was also noted that there is an element of seasonality about the rendering business, in that it is only practical to undertake substantive work during lulls in the rendering season.

Conclusion

[161] In my view, it is difficult to draw a correlation between the profit made by the defendant and the offending, however it also seems very clear to me that the defendant's delay in upgrading its infrastructure has benefitted it financially, because until recently it has not had to incur these expenses. I address what, if any, credit should be given to the defendant for the steps it has taken since the offending to improve its infrastructure when I deal with what deductions should be allowed for mitigating matters.

Similar cases

[162] Counsel agreed that the relevant authorities that might be considered by me to assist in setting the starting point were *Waikato Regional Council v Open Country Dairy Limited* (two decisions – one in 2019 and the other in 2020),[37] *Taranaki Regional Council v Fonterra Limited*[38] in relation to odour and *Manawatu-Wanganui Regional Council v Land Meat New Zealand Limited* [39] in relation to the wastewater discharge offending.

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[37] [2019] NZDC 19755 and [2020] NZDC 18034.
[38] [2015] NZDC 14962.
[39] [2018] NZDC 17652.

Open Country Dairy (2019)

[163] This was a decision of mine and therefore one with which I am very familiar. The wastewater discharge in that case was assigned a starting point of $100,000 and the odour and breach of abatement notice offences attracted a starting point of $250,000.

[164] Mr Watts submitted that the culpability for this defendant was lower in respect of both series of charges, and contended that the systemic mismanagement evident in that case was not replicated in the current case because the defendant had relied on expert direction and advice. As well, it was contended that the odour involved in this case was more objectionable, affected a greater number of people, and provoked a greater number of complainants.

[165] What was not referred to in counsel for the defendant's initial submissions relation to the starting point for this case was the fact that the defendant had offered reparation amounting to $34,000 to compensate those who had been profoundly affected by the odour discharges, and other payments of $40,000 for projects to benefit the community. It was also prepared to attend restorative justice and apologised for the harm it caused to the community on several occasions.

[166] By the end of the hearing after two adjournments, the defendant reconsidered its position and has now offered reparation to the community generally in the form of donations to three community groups (a kindergarten, rugby club and the local College) and Waikato RiverCare, but not to the individual victims impacted by the odour offending, as was the case in *Open Country Dairy (2019).*

[167] In my view, *Open Country Dairy (2019)* is the most comparable case for the odour offending and contravention of the abatement notice charges in this case.

Open Country Dairy (2020)

[168] This case involved a single charge for discharging odour, which was described by the sentencing Judge as reckless bordering on deliberate conduct and failing to remedy systemic errors. Mr Watts submitted that the defendant's culpability in this

case was somewhat lower, and also highlighted that the descriptions of the effects of the odour in that case were more intense than the ones evident in this case. He also highlighted the number of complaints (109) which had been received from 43 separate complainants, and referred to the number of victim impact statements (138) which had been submitted to the Court.

[169] I consider this case to be less relevant to the starting point I adopt in this case for the odour offending and contravention of the abatement notice. I am not persuaded that the number of complainants is a particularly relevant point of comparison.

Fonterra

[170] Fonterra was found guilty of one charge of discharging odour from a wastewater treatment plant between March and May 2014. As in this case, there were instances of odour prior to the charging period which led the judge to conclude that the offending was "simply the culmination of the period of the previous five months of offensive discharges."[40] There were a large number of complaints and evidence of adverse physical effects on the local residents.

[171] Fonterra was found to be highly culpable for the offending as it had little or no contingency plan despite operating close to capacity and the judge found the circumstances leading to the offending meant that it was predictable.

[172] A starting point of $240,000 for a fine was adopted.

[173] This case has also been useful in term of setting the starting point for this case.

Land Meat

[174] In this case wastewater from a meat processing plant was discharged into the Whanganui River. This had been caused by wastewater pumps failing, causing the wastewater to overflow from a sump to a stormwater sump and then down a bank into the river.

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[40] At [11]

[175] The offending was found to be careless – a contribution of mechanical failure, shortcomings in the wastewater system and no plans for overflows or spills from the stormwater system.

[176] A starting point of $70,000 was adopted.

[177] This case has been a useful point of comparison for the wastewater discharge offending in this case.

Setting the starting point

[178] I agree that the lead charge is the odour offending, so that an uplift to reflect that the odour offending contravened an abatement notice (a separate charge) and the wastewater offending is appropriate. It follows that I consider a global starting point rather than cumulative sentences to be more appropriate.

[179] I have characterised the defendant's culpability for the odour offending to be moderately high. I have described it as reckless offending and it had a significant and profound effect on the community nearby, in some cases causing people to be physically sick. The offending occurred continuously over the Christmas period for at least 16 days due to the failure of the pond and the problems with odour generated from rendering continued up until April 2020. The offending contravened an abatement notice. Although the cases are not binding on me, consistency is important. In my view, there is nothing to distinguish this case from the offending in *Open Country Dairy* (2019).

[180] I adopt a starting point of $250,000 for the fine.

[181] There should be an uplift to reflect the wastewater offending. The environmental impacts of this were fortunately low. The offending occurred over almost two months. An uplift of $50,000 is in my view appropriate.

[182] The starting point I adopt for the fine is $300,000. Standing back and considering the totality principle, I remain of the view that this starting point is appropriate.

Mitigation

Extent of attempts to comply/attitude of the offender

[183] The prosecutor accepts that once the wastewater treatment pond failure was identified in December 2019, various steps were taken by the company to attempt to mitigate the adverse effects of odour on the community, and to make the wastewater treatment pond operational again. It was submitted that many of the steps taken immediately, however, were either delayed or ineffective and, overall, the prosecutor submitted that more could have been done if the defendant had had better contingency plans in place to cope with a plant breakdown.

[184] Although accepting that various improvements had been made to the plant's odour management and wastewater treatment system, based on the recommendations of Pattle Delamore and Apex, it was submitted that no additional credit should be received for this given that what was done was simply what was required to be done in order to bring the plant's operations into compliance with the conditions of its discharge consents.

[185] The steps taken by the defendant to improve the management and infrastructure at the plant since the offending were included in a table presented to the Court.[41] The defendant has undertaken, or is about to undertake, infrastructure upgrades amounting to $1,274,850 and has improved its management response significantly.

[186] Although these some of these steps should have been taken sooner to avoid the offending in the first place, the extent of what has been and is to be implemented is worthy of recognition by a deduction from the starting point. This is particularly so because an enforcement order has now been offered that has some "teeth." In addition, due to interactions between myself and counsel during the hearing, (responsibly attended by the directors), I am satisfied that they are under no misapprehension that how the company responds from now on to what it says it will do to avoid any future discharges, will impact not only on the outcome of its future resource consent

[41] Defence exhibit 1.

application, but also on what further steps the Council may take should such an unfortunate event occur again. I am satisfied that, even though the company is an essential industry, it is now very much aware that its obligation is to internalise, rather than externalise, any adverse effects its processes cause.

[187] A deduction of 10% in my view is warranted to reflect this.

[188] Then there is the reparation offered. The law cannot require this,[42] but if an offer is made it must, in my view, be taken into account as an offer to make amends under s 10 of the Sentencing Act. In this case the offer does not benefit those directly impacted by the odour offending. The payments to the kindergarten ($2,000), College ($3,000) and Rugby club ($2,000) are likely to be tax deductible. Unlike *Open Country Dairy (2019)*, there is no evidence that these payments have received approval by the community adversely affected by the offending. I am not satisfied these payments should be taken into account.

[189] The payment of $30,000 to Waikato RiverCare is more related to environmental betterment and is appropriately the subject of a deduction. I note that this was offered to Environment Action Tuakau for the purposes of a riverfront enhancement project but the offer was rejected. I allow 5%.

Guilty plea

[190] The defendant has pleaded guilty at an early opportunity, and is entitled to a deduction of 25 percent.

Result

[191] After deduction of 40% as outlined above, the end result is a fine of $180,000 and the making of an enforcement order. The specifics of the fine are as follows:

(a) in relation to the odour offending (CRN ending -147), the defendant will be convicted and fined the sum of $140,000;

[42] Given the wording of s 32 of the Sentencing Act.

(b) in relation to wastewater offending (CRN ending -145), the defendant will be convicted and fined the sum of $30,000;

(c) in relation to the contravention of the abatement notice (CRN ending -148), the defendant will be convicted and fined the sum of $10,000.

[192] Ninety percent of the fine is to be paid to the Council in accordance with s 342 of the RMA. For the benefit of the victims of the odour offending, I note that the law requires me to do this.

[193] I make an enforcement order in the terms attached to this decision.

M Harland
District Court and Environment Court Judge