

**IN THE DISTRICT COURT  
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE  
KI TE WHANGANUI-A-TARA**

**CRI-2019-096-001621  
[2019] NZDC 25761**

**GREATER WELLINGTON REGIONAL COUNCIL**  
Prosecutor

v

**NZ FOUR WHEEL DRIVE ASSOCIATION INCORPORATED**  
Defendant

Date of Ruling: 12 December 2019  
Appearances: A Britten for the Prosecutor  
I Gordon for the Defendant  
Judgment: 12 December 2019

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**SENTENCING NOTES AND RULING OF JUDGE B P DWYER  
ON S 106 APPLICATION**

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[1] New Zealand Four Wheel Drive Association Incorporated (the Association) appears for sentence on two charges brought against it by Wellington Regional Council (the Council) of permitting the contravention of ss 13(1)(b) and 15(1)(a) Resource Management Act 1991. The charges are that:

- On or about 10 November 2018, at Upper Hutt, the New Zealand Four Wheel Drive Association Incorporated did permit a contravention of section 13(1)(b) of the Resource Management Act 1991, namely the disturbance of the bed of an un-named tributary of the Mangaroa River otherwise than as expressly

allowed by a national environmental standard, a rule in the regional plan as well as a rule in the proposed regional plan for the same region, or a resource consent (charging document ending 5955);

- Between 9 and 13 November 2018, at Upper Hutt, the New Zealand Four Wheel Drive Association Incorporated did permit a contravention of section 15(1)(a) of the Resource Management Act 1991, namely the discharge of sediment into an un-named tributary of the Mangaroa River otherwise than as expressly allowed by a national environmental standard or other regulations, a rule in the regional plan as well as a rule in the proposed regional plan for the same region, or a resource consent (charging document ending 5957).

[2] The Association has pleaded guilty to both charges. Counsel advise that s 24A Sentencing Act 2002 is not applicable in this case. The Association seeks a discharge without conviction pursuant to s 106 Sentencing Act and I will return to that matter in due course.

[3] I propose to address the background facts and relevant sentencing matters in somewhat truncated terms. The Association is one of two defendants charged with offences arising out of a four-wheel drive event known as the Deadwood Safari held on a farm property at Whitemans Valley, Upper Hutt in November 2018. The other defendant, (Valley 4WD Club Incorporated – the Club) having obtained a sentence indication from the Court on 13 September 2019, entered a guilty plea to the charge and was subsequently sentenced. The Association had previously maintained a not guilty plea on both charges but formally withdrew that plea on 30 October last and entered a guilty plea today having signalled the possibility that it might seek a discharge without conviction, as it now does.

[4] The background facts and details of the environment affected by the offending were set out in full in paragraphs [2] to [6] of my sentence indication decision on the charges against The Club:

[2] The Club is an organisation for enthusiasts of four-wheel driving. It is based in the Wellington region. As part of its activities, it hosts events at both a local and

sometimes wider level. One of those events known as "The Deadwood Safari" was undertaken by the Club on or about 10 November 2018. The summary of facts describes the background:

13. Valley 4WD has successfully applied for permission to host a regional competition as part of the NZFWD national competition eight times since 2002. When held, the regional event has been named "Deadwood Safari".
14. Since 2011 (that is, in 2011, 2014, 2017 and 2018), the Deadwood Safari event has been held at 528 Whitemans Valley Road, Upper Hutt. That property is run as a low-intensity farm. Its owners are not affiliated with either NZFWD or Valley 4WD.
15. The property at Whitemans Valley Road comprises hilly terrain and contains both some native bush fragments and wetlands. A lowland stream on the property, of approximately two kilometres in length, feeds into the Mangaroa River, a tributary of the Hutt River. This lowland stream on the property has two major branches and there are a number of smaller branches.
16. The most recent Deadwood Safari event took place from 9.00 am to 5.30 pm on 10 November 2018.
17. All competitors were required to be affiliated members of NZFWD, at a cost of \$30 per annum. This fee is collected by local clubs and passed on to NZFWD.
18. The event involved 43 vehicles making one run each on 32 short obstacles.
19. Some of these obstacles involved vehicles passing through the branches of the lowland stream on the property. The course was marked with coloured pegs so as to direct the vehicles to drive through the stream branches.
20. Two National Stewards appointed by NZFWD inspected the course for its compliance with the NZFWD regulations. They did not consider compliance with the Resource Management Act (assuming that this had been attended to by Valley 4WD). However, they did note straw bales that [that] had been placed in the stream in order to catch anticipated sediment discharge.
21. During the Deadwood Safari event, vehicles drove across and along the stream, causing disturbance to the river bed and the adjacent river banks. This resulted in discharges of sediment from the river bed, banks, and adjacent land.
22. Photographs of the Deadwood Safari event are **annexed in Part 1 of the Appendix**.
23. Disturbing the stream bed and discharging sediment are activities that, when carried out on this scale, require resource consent. Neither NZFWD nor Valley

4WD held resource consents authorising the disturbance of the stream bed or the discharge of sediment into the stream.

24. Valley 4WD was aware that the beds and banks of the stream would be disturbed. Arrangements had been made with the owner of the property to cover the costs of any associated remedial work.
25. The owner of the property raised the possibility of cancelling Deadwood Safari due to heavy rainfall over the preceding days. However, Valley 4WD decided to continue with the event due to the fact that the weather was forecast to clear and some competitors had travelled from out of town.

[3] As a result of observations of the activities described above from persons in the vicinity, the Council received a complaint about disturbance of a stream and discharges of sediment to the streams on the Whitemans Valley property and on the Mangaroa River. A number of photographs were produced to the Court by the Council. One of the photographs showed visible sedimentation in the Mangaroa River approximately 5.5 kilometres downstream of the event.

[4] Following receipt of the complaint Council officers went to 528 Whitemans Valley Road on 12 November 2018. They found:

- Bank and bed disturbance visible in the streams and their branches;
- Sediment on the stream benthos;
- Tyre tracks visible on banks and in streams;
- Discharges of sediment ongoing into a stream from mud slips caused by vehicles repeatedly entering and exiting the stream;
- Large areas of unstable soft mud visible on slopes adjacent to channels and in the channels themselves with no apparent sediment control measures.

[5] The environment affected by this offending was at a number of levels:

- Firstly, there were the streams or tributaries of the Mangaroa River in which the activity took place;
- Secondly, there was the Mangaroa River itself which was shown to have been subject to sediment discharge from its tributaries;
- Finally, there was (potentially) the Hutt River into which the Mangaroa River flows.

I will comment further on these matters in due course.

[6] What were the adverse effects on this environment? The adverse effects are described in the agreed summary of facts in these terms:

**Adverse environmental effects**

33. The unnamed tributaries of the Mangaroa River on the property were directly impacted by the disturbance and the sediment discharges. These tributaries are likely to have supported a diverse macroinvertebrate community and corresponding fish populations. Kākahi shells (freshwater mussels) were found by officers during their inspection.
34. The Mangaroa River is a major tributary of the Hutt River, and has accordingly been identified as a significant contributor to the overall water quality downstream. A number of restoration efforts are undergoing in an attempt to improve the health of the river ecosystem. The Mangaroa River is also listed in Schedule H2 (Priorities for improvement of fresh and coastal water quality for contact recreation and Maori customary use) and Schedule I (Important trout fishery rivers and spawning waters) of the Proposed Natural Resources Plan (**PNRP**) for the Wellington Region.
35. Further, the Mangaroa River has cultural significance due to its links to the Hutt River (Te Awakairangi). Te Awakairangi/Hutt River has specific mana whenua values to Taranaki Whanui ki Te Upoko o Te Ika and Ngāti Toa Rangatira, as recognised in Schedule B of the PNRP. The River is referred to in the Port Nicholson Block Settlement Trust settlement and the Ngāti Toa Rangatira settlement due to its historical and cultural importance.
36. The inclusion of sites in Schedules within the PNRP is a recognition of specific values and a need to give regard to these values when considering effects.
37. The short-term effects of the Deadwood Safari event can be described as follows:
  - (a) Bed disturbance from vehicle crossings caused fundamental changes to the structure of the river bed over hundreds of metres.
  - (b) The event caused significant immediate erosion of the banks of the stream, due to vehicles losing traction (thus disturbing sediment) and bow waves undercutting the banks. This led to ongoing discharge to the stream for at least a further 48 hours, including through the creation of several slips and pools adjacent to the stream.
  - (c) It is estimated that in excess of 1.35 tonnes of sediment was discharged into the stream during the Deadwood Safari event. This led to suspended sediment concentrations of over 1000 mg/L in the water, causing it to become extremely turbid (over 1000 NTU).
38. No pre-event samples were able to be taken to establish the baseline macroinvertebrate and fish populations of the stream. However, there is likely to

have been a significant short-term reduction in macroinvertebrate and fish diversity in the stream from the bed disturbance and (especially) the discharge of sediment.

39. Many of the populations are likely to be able to recolonise the stream in the medium-term. A possible exception is the kākahi (freshwater mussel) population, which will take longer to regenerate.
40. The most significant effects are likely to have been caused by sediment deposition resulting from the discharge, as increased fine sediment cover on the bed will likely lead to long-term decreases in macroinvertebrate abundance and diversity, native fish abundance, and the availability of trout spawning habitat.

[5] In general terms I do not understand that counsel are in dispute regarding those matters. Nor are the facts or process in dispute whereby I determined that the appropriate penalty starting point for the Club was the sum of \$80,000 after which due credit for prompt guilty plea had been taken into account leading to an end outcome fine of \$60,000, which is the fine I imposed on the Club. Accordingly, I will simply adopt the reasoning which led to those conclusions in this case, however, I do note that counsel are some distance apart in their proposed starting points with Mr Britten suggesting a figure of \$50,000 for the Association and Mr Gordon \$12,000 to \$15,000.

[6] I ultimately concur with the Council's acknowledgment that there is a difference in culpability between the two defendants, with a lesser degree of culpability attaching to the Association, but I must say not to the extent suggested by Mr Gordon. I will return to that matter in due course.

[7] In determining the issue as to whether or not the Association should be given a discharge without conviction I can say that I have read and given considerable thought to matters raised in counsels' submissions and affidavits filed on behalf of the Association by Mr N Dunton (its current President) and Mr S G Purdie (a member of the Association's executive management committee). This afternoon I received and considered further information by way of a letter from Mr I Hutchings, (President of the Cross Country Vehicle Club) addressing matters raised in the affidavits to which I have referred.

[8] Turning now to the Association's situation, it is the national organisation for four-wheel drive enthusiasts. It represents about 70 affiliated clubs with somewhere

in the order of 2200 members across the country. As might be expected, local clubs organise local events and the Deadwood Safari has been organised and hosted by various Wellington clubs over a period of years. In 2018 the Association's co-defendant, the Club, was the organising body. The Club made a request for the rally to be included as an event in the Association's annual national competition series. That request was accepted by the Association so the Safari became an Association sanctioned event bound by Association rules and competition regulations. I think that as a result of that process the Association must also accept a degree of responsibility for the manner in which the Safari and similar sanctioned events are undertaken and run.

[9] The Association sent an information pack to the Club which set out the rules for competitors and included guidelines as to how the event should be undertaken. The guidelines included instructions to consider the need for local authority consents (including resource consents) and to have dialogue with local authorities about that. The Association took no further steps regarding that issue which it evidently left in the hands of the Club which obviously has local knowledge. Nevertheless, Mr Dunton acknowledged in his affidavit that the Association... "Accepts a role of responsibility in environmental issues where that is relevant, as here, and that it ought to have been more vigilant on risk management in respect of the area and landscapes where events are held." I think that states the situation truthfully and succinctly.

[10] In my sentence indication in the case of the Club I made the comment that it was not clear to me the extent to which the Club turned its mind to the need for a resource consent to hold the Safari but that it should have been on inquiry because it had previously been subject to an infringement notice for disturbance and damage to streams caused by an earlier event.

[11] In the case of the 2018 Safari I found the nature of the course and the weather conditions at the time it was held made disturbance and damage giving rise to the charges inevitable. I was not aware at that time that the Association's guidelines directly raised this issue with the Club. The Association provided scrutineers and stewards to the Safari who undertook checks of drivers, vehicles and course obstacles. It was not the designated responsibility of any of those officials (I mean designated by

the Association) to check and see if resource consents had been obtained as the guidelines signal. I note that overall control of the event lay with the Club which appointed a Clerk of the Course whose powers included calling off the event if need be.

[12] What is apparent to me is that the matter of environmental damage and the suitability of the course to hold the event on the day in question in terms of potential environmental offending slipped through the cracks. The Club, which was Johnny-on-the-spot, failed to turn its mind to this issue and the Association whose guidelines directly raised this subject did not check to see if the Club had sorted this out. In my view it had a responsibility to do so.

[13] The Prosecutor has assessed the culpability of the Club as being to a “high degree” with the offending considered deliberate. I make no comment on that. The Prosecutor puts the Association’s culpability in the “moderate” category being considered inadvertent but without appropriate effort made to ensure compliance. With some reservations, I have accepted that the Association and the Club had different functions in the process of the management of this event with the Club having the ultimate right to cancel the event through its Clerk of the Course. However the potential resource consent issue was something within the Association’s knowledge, it was included in the guidelines and even if it was unable to cancel the event it was within the Association’s oversight through its scrutineers and stewards to draw the matter to the attention of the Clerk of the Course.

[14] I had initially thought that liability should lie equally between the Club and the Association, but having heard Mr Gordon on the topic I have altered my view somewhat. I now accept that the Association ultimately had a lesser degree of responsibility as it pertained to this event on that particular day. I understand that situation may have changed as a result of new procedures. Accordingly, I am going to adopt a lesser starting point for the Association although nowhere near as low as that suggested by Mr Gordon. I am going to adopt a starting point of \$50,000 being the figure suggested by the Council. I will return to consider the gravity of the offending for the purpose of determining the Association’s application for discharge without conviction but I can say that I consider that this was reasonably serious offending.



[15] Unlike the Club, the Association has a good past record and should receive a deduction from a starting point of five percent on account of that. It should receive a further reduction of 20 percent from the reduced point on account of its guilty plea which was somewhat more belated than the Club which would give an end penalty of \$38,000 should the Association be convicted and I now turn to that matter.

[16] I may only grant a discharge without conviction if I am satisfied that the direct and indirect consequences of conviction are out of all proportion to the gravity of the offending. Dealing with the gravity of the offending, I find that this was an offence of some considerable adverse environmental consequence as described in my initial sentence indication and as will appear in the material from the summary of facts which I have previously referred to in this decision.<sup>1</sup> Some 400 metres of stream length were directly and seriously impacted by the defendants' activities. In excess of 1.35 tonnes of sediment were discharged and visible sedimentation was observed up to 5.5 kilometres downstream in the wider catchment. In my view these were offences of a moderate degree of seriousness or gravity at least.

[17] Are the consequences of conviction out of all proportion to that degree of gravity? I make the observation that use of the term "out of all proportion" suggests that there must be a serious imbalance between gravity and consequences. In my view that is a relatively high bar. In making my assessment of whether or not that test is satisfied I should take a wide approach and consider all factors relevant to the offender and the offending. I observe that s 106 is not a provision that requires that there shall be no consequences of conviction on an offender. It is intended that there will be consequences. The issue is whether they are out of all proportion to the gravity of the offending.

[18] Two consequences of conviction for the Association have been identified in the submissions of its counsel and in the affidavits provided on its behalf. Mr Dunton described the consequences in these terms in paragraphs 47 and 48 of his affidavit. I will read those out in view of the number of people having an interest in these proceedings who are present today. I quote first his paragraph 47:

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<sup>1</sup> Paras [5] and [6] (above).

47. The first is of the disproportional impact a conviction is likely to have on the large majority of NZFWDA members who are not involved in the Valley 4WD competition event or any other competitive activity. In the normal pursuit of their four-wheel drive recreational and sporting activities these members assess potential environmental risk thereby managing impact on the “Tread Lightly” principles espoused and promulgated by NZFWDA. These members have had and continue to have a considerable history of contributing to environmental enhancement through regular programmes of track maintenance, beach clean-ups, native tree planting as well as the community and social support and civil defence.

[19] Then in paragraph 48 Mr Dunton says:

- 48 The second, in my opinion, is that there is a real and appreciable risk of significant consequences of long-term prejudice flowing from the convictions. The 70-odd clubs whose members are affiliated to the NZFWDA may seek to disassociate themselves from the national umbrella by withdrawing from the NZFWDA in order to distance themselves and their activities from the stigma of criminality arising from a conviction. If the NZFWDA is seen to lack credibility the member clubs may not take it seriously and break their ties with it. This will impact on the NZFWDA’s viability, and its usefulness to lead its members as an overarching positive influence on the operators of four-wheel drive vehicles and a future champion for the environment in which those off-road vehicles operate.

I record that Mr Purdie also addressed that second matter in his affidavit as did Mr Hutchings in the letter with which I was provided today.

[20] Regrettably, I must say that having had regard to all those matters I concur with the views of the Prosecutor who opposes the discharge. It is difficult to see how a conviction of the Association has a disproportional impact on its members in the manner suggested in the affidavit. Driving vehicles in the situations where these offences occurred is one of the activities which the Association routinely seeks to undertake. It has an obligation to undertake such activities lawfully and indeed is aware of the need to comply with that obligation. It failed to meet it. I appreciate that some members of the Association may feel a degree of disappointment or shame for their Association being involved in offending such as this but I do not consider that that is an indirect consequence of such weight as to justify a discharge without conviction in this particular case. In my view the adverse effects on the environment

which have been occasioned give a degree of severity or seriousness to the offending which considerably outweigh that consideration.

[21] Insofar as the contended potential withdrawal of members is concerned, I concur with the Council's submission that this is speculative. I mean no disrespect to the persons who provided the affidavits and letter to the Court in that regard. The fact is that disruptions and irregularities occur in any number of clubs and associations from time to time. These are commonly remedied to the extent that they need remedy by internal procedures such as replacement of office holders, amendments to rules and new systems.

[22] The Association is undertaking those processes to try and avoid this situation occurring again and that is how it should be. I accept it is acting responsibly in that regard, however, nothing in the evidence before the Court convinces me that there might be a mass or substantial withdrawal of members from the Association as a result. What seems much more likely is that members will take steps to make sure that what has happened in this instance will not happen again, as the Association is doing in this case. That is how it should be and again, in my view, the seriousness of the offending does not make this a consequence of such weight that it is out of all proportion to the seriousness of the offending.

[23] The outcome is therefore that the application for discharge without conviction is declined. The Association is convicted. It is fined the sum of \$38,000 which I will divide as to the sum of \$19,000 against each charge. It will pay solicitor costs in accordance with the Costs in Criminal Cases Regulations (to be fixed by the Registrar if need be) and Court costs \$130.

[24] Finally, pursuant to s 342 Resource Management Act, I direct that the fines, less 10 percent Crown deduction, are to be paid to Wellington Regional Council.



B P Dwyer  
Environment/District Court Judge