The Contract is Harder

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ABSTRACT

Land treatment systems require the application of good science and good design to develop a sustainable system. Part of this process is identifying the land that is most suitable, helped by a wide to narrowing focus on design, site and operational issues. Professionals in the industry are very capable of identifying site limitations and developing design solutions, which enables the resource consent base to be reached with relative ease.

No matter how good a system is on paper, there is still the need to convince the land owner and the people who will actually operate the system that it will work, and that their outstanding issues can be dealt with. If the land is being purchased for the specific purpose of land treatment, then on-going contractual issues are only a formality. However, in many cases industry and local authorities cannot afford to purchase the land, with a better option on paper being to enter into an agreement with a willing land owner.

Applying wastewater to someone else's land has the ability to generate headaches, especially in the establishment phase. It is essential that buy-in is secured at an early stage, with failure to do so causing delays, additional costs and potentially putting in jeopardy effort put into option assessments, initial site investigations and in some cases the project.

This paper focuses on the land access requirements for successful land application systems. It considers the issues that typically come up in finalising contractual agreements, and develops a series of steps that should be covered off at an early stage to get multiparty buy in.

KEYWORDS

Land treatment, land application of wastewater, land use agreements, contracts.

INTRODUCTION

Land treatment involves the application to land of domestic, industrial or municipal wastewater. Growing public concern at the effects of wastewater discharges to rivers and the sea, and the corresponding tightening of environmental regulatory provisions for such discharges, brings the need for land treatment into sharp focus.

Land treatment systems need a sufficient area of land available to receive applied wastewater, and while productive use of that land may be an economic necessity, it will be essential that the land remains available to receive the wastewater on an on-going basis. While purchase and ownership of the land provide good security for the wastewater generator, there can be economic advantages in securing the use of land in separate ownership by way of suitable land use agreements or contracts to use land. This paper addresses some of the issues to be considered in relation to land use agreements to enable the land application of wastewater.

This paper is prepared in the light of direct experience with a number of land application projects around the country, including consideration of land treatment schemes for Te Kuiti, Waipukurau, Waipawa, Riversdale, Waipatiki Beach, Mahia Beach, Himatangi Beach, Richmond Oringi and AFFCO Feilding, to name a few.

IDENTIFICATION OF THE PARTIES

There are two primary parties in establishing a contract to use land for land treatment. These are the generator of the wastewater (Generator) and the land owner (Owner). They should ultimately agree and form a contract between them. However, in order to establish that contract other parties may be involved, such as the Regional Council (resource consents), District Council (land use consents), neighbours, the community, Iwi and community groups. These other groups play a critical role, and in some cases need to be involved due to consenting requirements, but they can side track and derail the discussion and agreements that need to be established between the Generator and the Owner. Care is needed to ensure the objectives of the primary parties are satisfied.

LAND ACCESS REQUIREMENTS

There are two key requirements for establishing land access. First, the Owner needs to provide an acceptable degree of certainty that the land will be available for the application of wastewater; and on terms that are acceptable to the Generator.

Second, the Generator needs to address and resolve issues that may detract from the value of, or the ability to enjoy the use of, the land by the Owner.

For the Generator, whether it be a district council with a municipal system, a body corporate with one or a number of residential landholdings, or an industrial operation, the highest degree of certainty of land availability is undoubtedly provided by the purchase and/or ownership of the land concerned. However, the purchase or continued ownership of that land also has problems. Can the purchase and/or ongoing tie-up of capital be afforded or commercially justified by the Generator?

In reality, the use of land for a land treatment system will require the land's initial land use (often pastoral farming and sometimes cropping) to be continued. This requires the wastewater application system to coexist and blend in with the land use. The management of the irrigated land is not a primary function of the Generator and so alternative management arrangements may need to be considered (sub-contractor, leasee, alternative land ownership). What do the Generator's stakeholders think about owning and operating a farm, or a forest? There is a need to form a relationship between the Generator and Owner to provide for a mutual understanding of requirements and benefits and provide for land access.

For the Owner, there will be consideration of issues that may **improve** the property (betterment) and issues that may **detract from** the property (injurious affection).

Betterment may be considered to arise from the provision of irrigation water, and from the provision of nutrients, both potentially increasing productivity, whether the land use be pasture, crop, or forestry. Betterment may also be considered to arise from such peripherals as improved vehicular access and improved electric power supply. Both aspects can contribute to an increase in value of the property.

Injurious affection conjures up a Pandora's box of everything that might be considered could possibly go wrong, including loss of production, loss of access, contamination of land, the need to provide third party access and liability.

RECENT REGIONAL COUNCIL PERCEPTION AND EXPERIENCE

In our experience, some territorial local authorities (TLA) consider the cost of land purchase for wastewater application to be too high, and their involvement in operating a farm as politically risky. Horizons Regional Council's recent announcement that they were considering re-investing the proceeds of the sale of port company shares in a dairy farming operation received a hostile response from local news media and some members of the public.

On the other hand, Hawke's Bay Regional Council has gone onto the front foot with the purchase of blocks of land for the commercial purpose of investing in carbon credits through afforestation, and has made that land available to two of their TLAs for the application of treated municipal wastewater, free of charge. In the context of this paper, HBRC's land for afforestation provides a geographically handy land application opportunity to the TLAs, without the need for the TLAs either to have to fund the purchase of the land, or to have to justify the land acquisition to their ratepayers.

One large industrial operation originally discharged its minimally treated organic waste stream directly to the river alongside. As the community's environmental expectations, and the regional council's rules, have progressively hardened, this Generator has over the last 20 years moved to provide for the land application of more than half its annual total treated waste stream. The land is owned and farmed by a neighbour to this Generator, and the agreement by which wastewater is applied to the land is best described as informal. While the lack of formality is not an arrangement that we could advise, it has nevertheless been regarded by both the Generator and the farmer as a satisfactory arrangement to meet both their needs.

In summary, certainty of availability for the Generator is best provided by ownership of the application site, but an acceptable degree of certainty can also be provided by some form of agreement with the Owner. This form, need and complexity of any agreement is based on the respective requirements of the parties and the level of risk they are prepared to accept with respect to a long term relationship.

WHEN THE OWNER ISN'T THE ONE CALLING THE SHOTS

Dealing with an Owner who is unencumbered with commitments to other parties makes for a straight-forward, two party negotiation. However, other parties may be involved and negotiations can become much more complex. For example, a tenant of the land may have contractual entitlements with regard to the use of the land, involving the ownership of a right to farm the land, or the ownership of a Forestry Right, or potentially the ownership of mineral rights, an access easement, or potentially all of the above.

Just as an Owner will not necessarily be an agreeable, individual person (i.e. may be a company or Trust), so also may a tenant be a diverse and complex group of people. The entity owning a Forestry Right, for example, can comprise a group of investors, with decisions made by consensus rather than by their manager or even by majority.

In these situations there will need to be negotiations between the Generator and the tenant, but formal agreement still needs to be between the Generator and the Owner. Arrangements with

tenants need to be made through the Owner, especially if agreements outlast the lease term of the tenant. Management of these relationships can add significant complexity, delay, and cost; but it is not insurmountable.

ISSUES THAT MAY OCCUR

Regardless of the ownership structure, the negotiation of access to an application area potentially raises a number of questions, many of which are based around perceived problems. Some of these include:

- Will the wastewater application system leave residual effects after the design life of the project, leaving what amounts to a contaminated site?
- Will residual effects reduce the potential value of the land for possible future subdivision and re-sale as residential or life-style blocks?
- Will the use of the land for human wastewater application compromise actual or potential value of farm production? Fonterra and the Meat Industry Association take a cautious approach to the acceptance of product sourced from such land.
- Who will operate the wastewater application (irrigation) system? If it is the Generator, will they irrigate to meet the Owner's requirement? If it is the Owner, will he be liable for potential discharge consent non-compliances?

There are other issues that arise in the context of negotiating between the Generator and the Owner, some of which are as follows:

- How is reserve capacity to be addressed? Will the wastewater supply grow into the future, and will more land be required to receive this? If environmental performance proves in practice to be different to what was designed and consented, will more land be required? Should access to this extra land be secured now, or can it wait?
- Who or what is the Owner? Is it an individual, or a trust, or a company, or a public authority? How about a deceased estate with aspects of estate settlement still to be resolved? The land ownership structure can be complex, making for slow progress in reaching a decision.
- Is the Owner the only affected party? Do any other parties have a legitimate interest in the land, such as the owners of forestry or mineral rights? And irrespective of land title, the presence of waahi tapu or archaeological assets would influence land treatment decisions.
- The Owner may not be the person calling the shots. A tenant may have contractual rights to the use of the land, and if so a relationship of the Generator with the tenant needs to be managed in parallel with that with the Owner.
- What price is paid, and by whom? Should the Owner pay for the benefit of the applied wastewater, or should the Generator pay for the privilege of using the land? There isn't a rule of thumb for this yet, and there are strong cases to be made by both parties in their own economic interest. If a Generator has other land options available, his negotiating position will be that much stronger.

In our experience, most issues raised, such as above, have readily identifiable answers. If no answers are available then a plan to resolve the issue can be established. In many cases the issues are resolved by education, and in particular the Generator explaining to the Owner the nature of the material, the method of application and the resulting production and environmental effects. Tied into that discussion and explanation is a need to have a frank and

realistic discussion about risks, including public health, worker safety and the potential for industry embargos on any material produced.

THE SOLUTION

There is no one solution that fits all. Every Generator will have specific requirements. Every Owner will have specific requirements. But there is a generic process that can be followed and moulded to suit individual situations. The steps in this solution are suggested below.

1. Preliminary Steps

a. It is presumed that the land that is required has been identified, in both size and location. It could be prudent to identify several possible land areas, in order to increase the likelihood of a favourable result (this is often undertaken as part of a separate option assessment exercise). It also helps to ensure negotiations are undertaken in good faith.

b. The Owners and tenants of the land should be identified, along with any other directly interested parties. A title search will provide this. At this early stage it would be worthwhile identifying who is calling the shots on any decisions that need to be made to save the need for repeated discussions.

c. The planning provisions that apply to the land should be identified and assessed. Are there zoning, designation, or other plan provisions that may have a bearing on the consentability of the land application proposal?

2. Initial Contact with Owner

d. In principle, is the Owner agreeable to the land application proposal? The Owner should be met and the proposal discussed in broad outline.

e. The current and expected future uses of the land by the Owner should be identified.

f. The Owner's issues, both of betterment and injurious affection, should be canvassed in general terms. The Owner may need some time to think about this, and should be expected to call in his own professional advice. Be prepared for the Owner's list of issues to expand as all the implications sink in. The establishment of a Heads of Agreement may assist in clarifying the positions and requirements of the respective parties.

3. Detailed Assessment

g. A Valuer should be engaged to assess the betterment and injurious affection involved, to provide a basis for negotiations with the Owner.

h. The owners of other interests in the land (farm tenant, forestry or mineral rights, etc) should be approached to establish whether there is a reasonable prospect of agreement on the land application proposal. At this stage it is critical to ensure that the stumbling blocks that may be presented by other parties are identified.

i. A proposal should be prepared and put to the Owner, and where relevant to the owners of other interests, addressing the terms and conditions on which agreement might be reached for the land application proposal.

j. On the strength of a favourable response from the Owner in d above, resource consenting (both district and regional) should proceed, if it has not already done so.

k. The Owner's issues, initially canvassed in f above, need detailed appraisal. It would be a distinct advantage for the Generator not to be either in a hurry, or committed to this area of land without viable alternatives.

l. Do it formally and properly; no shortcuts or assumptions. Do not underestimate values or be ridiculous with offers or commitments as this will only stall progress. The

wastewater project will probably cost millions, so it is important not to put it in jeopardy by not doing the basics thoroughly.

4. Negotiation

m. It will be useful for the Generator to try to work in collaboration with the Owner to develop the land use agreement, if possible. An alternative approach, with the Owner's lawyer telling the Generator to "go away and come back with a proposal, we will tell you whether we like it or not" takes longer to get to the agreement stage.
n. Be generous. If you need to reach agreement soon, and/or have no other land options available, the Generator may need to focus on compensating for injurious affection only, leaving the value of betterment as a free expression of goodwill.
o. Be prepared to address the issue of ongoing management of the application system. While an agreement with a farmer/forester by which they do the irrigation would be attractive if it can be achieved, a Generator's responsibilities for consent compliance may well be better secured if the Generator itself operates the irrigation system.

SUMMARY

Professionals in the land treatment field are well versed in the science of land application of wastewater. This paper addresses the art and politics of achieving the agreement with involved parties that is essential if the technical possibilities of land treatment are to be realised.

The key to the successful conclusion of a land use agreement for a land treatment system is the early identification of, and engagement with, the Owner and his tenants, and good faith negotiation to reach settlement of their issues on mutually acceptable terms. Where a land treatment project depends on a land use agreement with an Owner, the whole project will sink or swim on satisfying outstanding issues to the Owner's satisfaction. Having other land options, plenty of time and a generous budget would be helpful too.