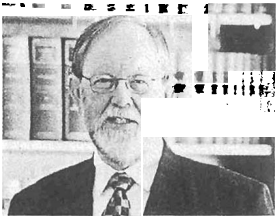


HOW AN "HISTORIC AND PROBABLY UNIQUE ACCORD" WORKS

BY MARK VON DADELSEN, LAWYER AND ASSOCIATE MEMBER. NZPI



For most people, there is little exciting or remarkable about planning for sewage (wastewater) treatment and disposal. However, please read on, as this story has a remarkable ending.

Brief Background – pre-1999

The Hastings District Council ("HDC") lodged, in 1998, an application to renew its restricted coastal activity consent to discharge fine-screened wastewater to Hawke Bay via a 2.75 km long ocean outfall pipeline. Despite an in-depth programme of pre-application consultation, Maori considered that they had not been listened to, and also considered that consultation with HDC staff and consultants was inadequate without involvement of the decision-making HDC politicians. The Hearing Commissioners in 1999 concluded that "on the scientific evidence thus far heard the proposed discharge would cause no adverse effects that cannot be appropriately remedied or mitigated under RMA as per the proposed conditions," but that HDC had not met tangata whenua and community concerns about the discharge of relatively untreated human waste to the sea. At the HDC's request the hearing was adjourned.

4 Journey of Discovery – 1999-2000

HDC and tangata whenua representatives then embarked on a journey of discovery – physically and mentally. HDC Councillors, key staff, and senior representatives of tangata whenua workshopped options on a hiko of discovery around New Zealand wastewater treatment plants, and agreed on a technical solution. This solution was the basis

of HDC's amended proposal:

- Separating out most of the industrial waste stream (trade waste) for fine-screening and discharge through the ocean outfall, and
- For non-separable industrial and all human wastes, fine-screening the waste stream, using natural settlement to remove settleable material, and discharging the remaining wastes via a Papatuanuku (Mother Earth) rock passage to the ocean outfall.

This proposal would meet, in part, Maori cultural and spiritual concerns over the discharge of human wastes to the sea.

Maori Cultural and Spiritual Perspectives

Simply put, Maori are deeply offended and disturbed by the discharge of human wastes, particularly to natural waters (sea or rivers) and also land (although Hawke's Bay Maori originally expressed a preference for disposal to land rather than the sea). Historically, in Maori settlements, human wastes were disposed of to land and kaumatua decided how many years needed to pass before Papatuanuku had transformed the wastes into non-human form. For wastewater engineers, that presents significant challenges:

- HDC's amended 2000 natural settlement proposal would produce sludge wastes that would require disposal to land.

- Fine-screening, even if followed by natural settlement (HDC's amended 2000 proposal), allows fine solids and bodily fluids from human wastes to discharge to natural water. Before disposal to a landfill (HDC's original 1998 and amended 2000 proposals), screenings or sewage sludge needs to be transported past Maori houses, marae, wahi tapu sites, and cemeteries.

As the Hearing Commissioners observed in the HDC case, many of those Maori concerns are shared by many others in the community.

Maori Perspectives and the RMA

Relevant to the disposal of human wastes (domestic sewage):

- The principles of the Treaty of Waitangi under section 8 assume considerable importance, especially the principles of consultation and partnership,²
- The relationship of Maori and their culture and traditions with their cultural lands and water is a matter of national importance under section 6(e),
- The role of tangata whenua in Kaitiakitanga is a matter of to have particular regard to under section (7)(a), and
- For Maori and the rest of the community providing for "social, economic, and cultural well-being³ and for ... health and safety"

under section 5(2), "avoiding remedying, or mitigating any adverse effects of activities on the environment" under section 5(2)(c), preserving the natural character of the coastal environment under section 6(a), the ethic of stewardship under section 7(aa), and the maintenance and enhancement of amenity values under section 7(c) and of the quality of the environment under section 7(f) are all relevant, to say nothing of sections 5(2)(a) and (b), 6(d) and (g), and 7(b), (d) and (g).

As is clear, then:⁴

Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By section 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By section 7 particular regard is to be had to a list of environmental factors, beginning with "(a) kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By section 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to

retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. ...

While this explanation of the law appeared in a Privy Council judgment relating to roading designation issues? it did not seem to me to represent any new understanding of the legal position, but it was and is certainly authoritative, and relevant to the present subject.

From Engineering to Governance

Once it was accepted that, after reasonable mixing,⁶ there were no scientifically adverse effects on the marine environment, the key issue was to satisfy tangata whenua cultural and spiritual concerns. To satisfy those concerns, by mid-1999 tangata whenua and HDC had agreed on the engineering solutions that would achieve "significant removal of kuparu" (human wastes). These solutions were affordable for the community and would go some way to addressing Maori cultural and spiritual concerns. While that was satisfactory, it postponed identifying solutions that would permanently resolve Maori concerns, namely the "complete removal of kuparu". The immediate problem was solved, future problems were deferred.

Before returning to the hearing, HDC and Maori had to agree on detailed proposed conditions of consent, and inherent in that was not just what HDC was required to do but also how the necessary decisions were to be made (and, perhaps, how HDC was to be kept "honest") It was during this negotiation process that a radical proposal⁷ was accepted. A joint committee of HDC was to be constituted under the Local Government Act; the Joint Council - Tangata Whenua Wastewater Committee, with:

- Equal representation from tangata whenua (5) and HDC (5) (echoing Treaty of Waitangi partnership principles),

- Chairmanship rotating annually between tangata whenua and HDC, and
The chairman having no casting vote.

This structure was inherently risky as, if unanimity was not achieved, the division would be very public, and if the voting was deadlocked 5:5 both sets of representatives would have to report failure back to their constituencies, leaving the Council with the unenviable task of making decisions tangata whenua would be highly likely to object to.

The Joint Committee's task was defined as driving the wastewater project forward – to supervise monitoring, to implement "significant removal of kuparu" by December 2007, and to investigate how to achieve "complete removal of kuparu" by 2009 (in anticipation of the expiry of the consent in 2014).

As characterised by senior tangata whenua representative, Ngahiwi Tomoana, to the Hastings District Council when the amended proposal was adopted by HDC, from standing "toe-to-toe" with HDC, tangata whenua now stood "shoulder-to-shoulder" with the Council.

The Joint Committee model was devised as a specific response to address a specific set of circumstances. An essential precondition to its establishment was an existing relationship of trust and goodwill between representatives of both tangata whenua and HDC. All were committed to a mutual search for solutions acceptable to both, and HDC was at a political level open to change and to concerns expressed by tangata whenua. Thus, the Joint Committee concept is not a universal device that could be adopted in the hope of finding mutual understanding where that does not already exist.

Driving the Wastewater Project Forward

Natural settlement as consented in 2000 would only remove a proportion of settleable solids from human wastes (primarily faecal matter) but not dissolved human wastes and little treatment would occur. This was recognised in the consent as being only a first step, so tangata whenua

“The project is being driven by a joint committee established under local government and resource management legislation, proving that cultural values can unite and not divide.”

members of the Joint Committee convinced it to investigate whether there were better ways of achieving "significant removal of kupara" than the consented natural settling process. HDC Effluent Disposal Officer, Bob McWilliams, raised the possibility of a system using fine-screens and biological trickling filters, followed by discharge through the Papatuanuku passage to the ocean outfall. Abiological trickling filter (BTF) uses biological processes to convert solid and fluid (dissolved) human (and other organic) wastes into carbon dioxide, water and excess cell (plant) biomass. However, traditional wastewater systems using BTFs include primary treatment before the BTF and secondary clarifiers after the BTF, but what was proposed did not include primary or clarifying treatment.

With the backing of the Joint Committee, a detailed BTF proposal was developed by an MWH consultancy team led by senior engineer Jim Bradley and wastewater treatment specialist Pete Loughran. The focus was on designing a "natural" rather than "technical" or "engineered" treatment system. Uniquely, the resulting Hastings system does not include either primary treatment or secondary clarifiers, but will involve fine-screening (with the screenings washed to remove human waste), BTF treatment, and then discharge via a Papatuanuku passage to the ocean.

Thus the BTF system will treat both solid and fluid (dissolved) human wastes, and while the low loaded BTF system will cost much the same as the natural settlement system to build, it will cost the community around \$1 million less per annum to operate (with the savings rising as energy costs increase). Furthermore, no primary sludge is produced, largely avoiding the offence to Maori associated with sludge transportation and disposal. Replacing natural settlement with the BTF treatment better meets the cultural and spiritual imperatives,⁸ while also delivering a treatment

system that is less costly for the community to operate. The now amended restricted coastal activity consent amendment was approved in March 2006

Tangata whenua members of the Joint Committee explain that a Biological Trickling Filter asks Papatuanuku's sons to share in the cleansing process; Tanemahuta providing biomass to transform kupara by removing the mauri of human wastes, Tangaroa receives the transformed waste after passage through Papatuanuku and heals himself through movement of the ocean, and Tawhirimatea agitates the surface of Tangaroa and through a synthesis of air and water completes the cleansing process.

Is the Partnership Working?

In 2000 the Hearing Commissioners described the Joint Committee proposal as a "remarkable and probably historic accord between tangata whenua and local government. "Some years on, there can be no doubt that the accord is working:

- Consultation has been taken to new levels – building capacity through the sharing of information, not only listening to other points of view but achieving some understanding of different paradigms, and being prepared to alter proposals to accommodate deeply held concerns,
- New relationships have been established based on mutual trust, respect, understanding and goodwill,
- The partnership approach has created a harmonious atmosphere where searching questions are asked (and answered) and robust debate occurs, "win-win" solutions are found, neither "side" dominates, and decisions made unanimously,
- The usual technical "engineered" solutions have yielded to more "natural" treatment processes, while delivering solutions that are more in tune

with tangata whenua's cultural and spiritual aspirations and more environmentally friendly, with significant cost savings, and

- The project is being driven by a joint committee established under local government and resource management legislation, proving that cultural values can unite and not divide.

Footnotes

1. Not just faecal matter and urine, but also blood and other bodily discharges.
2. Even if partnership is only regarded as an obligation of central rather than local government.
3. Compare with the purpose of local government under section 10(b) Local Government Act 2002, ". . . to promote the social, economic, environmental and cultural well-being of communities in the present and for the future."
4. McGuire v Hastings District Council [2002] NZLR 577; [2001] NZRMA 557.
5. Where the HDC happened to be the successful respondent.
6. Section 107(1), Resource Management Act 1991.
7. For those interested in history, the author advanced this proposal.
8. Including those referred to in the 2000 restricted coastal activity consent as removal of kupara by December 2007 and ultimately transforming kupara, as well as addressing sludge transportation and disposal issues.

Acknowledgement

Proper acknowledgement is due to Hastings District Council politicians and staff (past and present), Ngati Kahungunu elders, and MWH Planner Paula Hunter and MWH Engineers Jim Bradley and Pete Loughran, without all of whom the "historic and probably unique accord would never have been forged, and this article could never have been written.